FEDESARROLLO
Centro de Investigación Económica y Social

Desafíos de la Tributación Global: Hacia una tributación global incluyente, sostenible y equitativa para América Latina y el Caribe

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Hacia una tributación global incluyente, sostenible y equitativa para América Latina y el Caribe
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Repensando la Tributación Global: Hacia una tributación global incluyente, sostenible y equitativa

La iniciativa académica *"Repensando la Tributación Global: Hacia una Tributación Global Incluyente, Sostenible y Equitativa",* resultado de la colaboración entre Fedesarrollo y el Ministerio de Hacienda y Crédito Público de Colombia, tiene como objetivo abordar los principales desafíos que enfrenta el panorama fiscal en América Latina y el Caribe. Esta iniciativa busca contribuir a la creación de un sistema de tributación global más inclusivo, sostenible y equitativo. Este objetivo es de especial relevancia en un contexto global caracterizado por desafíos compartidos en la tributación internacional y la creciente digitalización de la economía. En Fedesarrollo, consideramos que esta es una oportunidad única para armonizar posiciones regionales y aprovechar nuestra experiencia técnica colectiva en la búsqueda de soluciones efectivas.

El evento académico tuvo lugar los días 2 y 3 de mayo de 2023 en Bogotá, Colombia, y sirvió como plataforma para una amplia gama de actores, incluyendo académicos, la sociedad civil y el sector privado, con el propósito de compartir ideas e identificar cuestiones críticas en nuestro sistema tributario actual.

Los panelistas del evento académico fueron seleccionados a través de una convocatoria competitiva de contribuciones académicas, con un comité académico externo[1] que evaluó rigurosamente los más de 80 resúmenes recibidos para garantizar la calidad de las contribuciones y seleccionar a los autores más destacados en sus aportes. A partir de los resúmenes recibidos, se identificaron las siguientes problemáticas que se discutieron durante el evento académico:

I. Inclusión, gobernanza y proceso

II. ODS y tributación / Cambio climático / Derechos humanos colectivos e individuales / Equidad

III. Impuestos a las empresas

IV. Impuestos digitales

V. Impuestos a las personas físicas y al trabajo remoto

VI. Incentivos fiscales e igualdad entre países

VII. Transparencia, elusión y evasión tributaria

VIII. Nexo y distribución equitativa de los poderes impositivos

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1 El comité académico estuvo conformado por: Ricardo Guerrero (Centro Contribuyente, Chile); Liselott Kana (Universidad Católica de Chile, Chile); Martin Hearson (International Centre for Tax and Development, Reino Unido); Ana Luiza Matos (CEPAL, México); César Pabón (Fedesarrollo, Colombia) y; Pasquale Pistone (International Bureau of Fiscal Documentation, Holanda).

Posteriormente, estas preocupaciones se discutieron con mayor detalle durante una cumbre ministerial celebrada los días 27 y 28 de julio de 2023 en Cartagena, Colombia. Fedesarrollo ha asumido la importante tarea de compilar los diversos documentos ganadores de estos eventos en un libro completo centrado en la Cooperación Fiscal en América Latina y el Caribe. Este libro se presenta como un compendio de investigaciones y reflexiones valiosas que representan un paso significativo hacia el objetivo de abordar los desafíos fiscales en nuestra región. Esperamos que este libro contribuya al enriquecimiento de nuestro conocimiento colectivo y fomente el diálogo y la acción en el campo de la cooperación fiscal. Los artículos se publican en su idioma original, y Fedesarrollo se encargó de realizar una traducción de los resúmenes ejecutivos de los artículos que estaban escritos en otro idioma al español.

Finalmente, deseamos expresar nuestro más sincero agradecimiento a *Open Society* Foundations por su colaboración y apoyo en la ejecución de esta iniciativa. También queremos extender nuestros agradecimientos a las organizaciones aliadas que hicieron posible este proyecto, incluyendo la Oficina Internacional de Documentación Fiscal (IBFD por sus siglas en inglés), la Comisión Independiente para la Reforma de la Fiscalidad Corporativa Internacional (ICRIT por sus siglas en inglés), el Centro Internacional para los Impuestos y el Desarrollo (ICTD), OXFAM, la Iniciativa por los Principios de Derechos Humanos en la Política Fiscal, la Red de Justicia Fiscal de América Latina y el Caribe, el Centro Contribuye, la Iniciativa Global por los Derechos Económicos, Sociales y Culturales, la Red de Trabajo Fiscal, Latindadd, Dejusticia y la Tax Justice Network. Su valiosa participación y colaboración fueron esenciales para llevar a cabo esta iniciativa.

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ÍNDICE

Retos de la tributación en América Latina y el Caribe

Luis Fernando Mejía *

** Director Ejecutivo de Fedesarrollo. Previamente fue director del Departamento Nacional de Planeación, director de política macroeconómica en el Ministerio de Hacienda, así como investigador en el Banco de la República de Colombia y el Banco Interamericano de Desarrollo en Washington, entre otros cargos.*

En las últimas tres décadas, América Latina ha experimentado profundos cambios en su sistema tributario. Uno de los cambios más destacados ha sido el creciente papel del Impuesto al Valor Agregado (IVA), que ha desplazado a los impuestos al consumo y al comercio exterior. Esta transformación se atribuye en gran medida a la apertura económica y la modernización de las economías de la región. En 1990, los impuestos al consumo y al comercio representaban el 40,2% del recaudo tributario, mientras que en 2021, esta cifra se redujo al 20,1%. En contraste, el IVA duplicó su contribución, alcanzando el 29,9% del recaudo en 2021 (OCDE, 2023)[1]. Además, los impuestos sobre la renta y las contribuciones a la seguridad social experimentaron un ligero aumento, en línea con la dinámica de crecimiento económico[2].

No obstante, es importante destacar que, lejos de presentar una estructura impositiva uniforme, la región se caracteriza por una marcada heterogeneidad en sus fuentes de ingresos tributarios. Por ejemplo, en Brasil y Argentina, el recaudo tributario se concentra especialmente en las contribuciones a la seguridad social, representando un 23,9% en Brasil y un 17,8% en Argentina, además de los impuestos al comercio exterior, que alcanzan un 22,0% en Brasil y 29,5% en Argentina. En contraste, países como Chile y Perú concentran su recaudo principalmente en el IVA, con una participación del 42,7% y el 39,9% del recaudo total, respectivamente. Esta diversidad en la estructura tributaria refleja los distintos enfoques adoptados por los países de la región para financiar sus gastos públicos y abordar sus necesidades económicas y sociales.

Desde Fedesarrollo, hemos identificado una serie de desafíos que enfrenta América Latina y el Caribe en el ámbito tributario. En primer lugar, el nivel de recaudo es insuficiente dadas las necesidades y el nivel de ingreso de la región. En 2019, la región presentó, en promedio, ingresos fiscales equivalentes al 24,8% del producto interno bruto (PIB), una cifra por debajo del promedio de recaudación observado en países con niveles similares de ingreso por habitante, que alcanzan el 31,0% del PIB. Además, existe una evidente variación en los niveles de recaudo a lo largo de la región, con Brasil y Argentina obteniendo niveles cercanos al 30% del PIB en 2020, mientras que otros países se mantienen por debajo del 20%.

Otro desafío crucial es la alta dependencia de impuestos indirectos en la región. Aunque estos impuestos facilitan el recaudo, tienden a reducir la progresividad del sistema, ya que no toman en consideración las diferencias en los ingresos de los contribuyentes. En 2021, por ejemplo, los impuestos indirectos pesaban cerca del 50,0% del recaudo de América Latina y el Caribe, donde el 20,1% del recaudo provenía de los impuestos sobre el consumo y comercio exterior, mientras que el 29,9% correspondía al IVA.

Además, las empresas enfrentan una importante carga tributaria, con tasas estatutarias de impuesto a la renta relativamente altas. En promedio, la tasa estatutaria de impuesto a la renta de las empresas en la región es del 31,8%, en comparación con el 21,6% de otros países de ingresos medio-alto. Colombia y Argentina tienen las tasas más altas, alcanzando un 35%. A pesar de las medidas tomadas para ampliar las bases gravables y acercar las tasas a los niveles estatutarios, es necesario seguir reduciendo estas tasas y, al mismo tiempo, mejorar la equidad en la tributación.

En cuanto a los impuestos a las personas, se observa que el recaudo efectivo está por debajo del promedio en comparación con países de ingreso medio-alto. En el conjunto de países LAC6[3], el recaudo por impuestos a personas representa el 2,4% del PIB, 0,9 puntos porcentuales por debajo del promedio de otros países de ingresos

medio-alto. Colombia es el país de LAC6 con el menor recaudo por impuestos a personas, alcanzando solo un 1,3% del PIB. Además, las bajas bases gravables de tributación a las personas reducen la progresividad del sistema en la región.

La evasión fiscal sigue siendo un desafío en los sistemas tributarios de América Latina. En 2018, se estimó que la economía subterránea representaba entre el 20% y el 50% del PIB en América Latina y en países de ingresos medio-alto, lo que contribuye significativamente a la evasión fiscal. En promedio, se estima que la región pierde ingresos tributarios equivalentes al 6,1% del PIB debido a la evasión.

Finalmente, se observan niveles elevados de rigidez en el gasto público, que asciende al 56,2% para LAC6. Además, se identifican ineficiencias en el gasto, ya que los impuestos y transferencias tienen un impacto limitado en la reducción de la desigualdad, generando una disminución promedio de solo 0,02 en el coeficiente de Gini. Por lo tanto, el desafío no se limita únicamente a aumentar los ingresos fiscales y cerrar la brecha con países de ingresos similares, sino que también implica mejorar la eficiencia del gasto público en términos de focalización, con el objetivo de mejorar la equidad en la distribución de los ingresos

En resumen, la región de América Latina y el Caribe se enfrenta a una serie de desafíos tributarios que van desde la diversidad en la estructura impositiva hasta la necesidad de aumentar los ingresos fiscales, reducir la dependencia de impuestos indirectos, aliviar la carga tributaria a las empresas y abordar la evasión fiscal. Estos desafíos representan una oportunidad para impulsar reformas significativas en los sistemas tributarios y la gestión fiscal en la región, con el objetivo de lograr un desarrollo sostenible y equitativo en el futuro. La creación de sistemas tributarios más justos y eficientes es esencial para el futuro de América Latina y el Caribe, y promoverá el crecimiento económico y la equidad social en la región.

Cooperación tributaria regional de América Latina y el Caribe: un hito histórico y un camino hacia un sistema tributario más justo y equitativo.

José Antonio Ocampo [*]

** Profesor de la Universidad de Columbia. Anteriormente secretario ejecutivo de la Cepal, secretario general adjunto de las Naciones Unidas sobre Asuntos Económicos y Sociales, ministro de Hacienda de Colombia en dos ocasiones y director de Fedesarrollo, entre otros cargos.* *Agradezco el apoyo de Natalia Quiñones y Camilo Umaña para la elaboración de este documento.*

Introducción

La Cumbre de Cartagena, celebrada el 27 y 28 de julio de 2023, constituyó un hito histórico para América Latina y el Caribe, al reunir por primera vez a ministros y expertos para discutir la política tributaria internacional, que desempeña un papel crucial en la financiación del desarrollo de nuestros países.

Durante el siglo XX y en lo que ha transcurrido del XXI, los países en vías de desarrollo se han enfocado en la adopción de reformas tributarias con enfoque estrictamente nacional. Lamentablemente, ha sido poca la atención que se ha puesto en la distribución de los ingresos de los Estados a nivel global y en los desafíos que la globalización plantea frente a un poder tributario confinado a las fronteras políticas de cada territorio.

No es una coincidencia que el sistema tributario internacional responda a las necesidades y expectativas de los países más ricos del mundo, pues son ellos quienes han decidido priorizar desde lo político la obtención de mayores ingresos tributarios propios. Por ende, las reglas y los estándares que hoy determinan dónde y cuánto impuesto paga cada actividad económica, han privilegiado la imposición en el país de la residencia. En términos prácticos, se ha otorgado un mayor derecho a los países exportadores de capital en desmedro del recaudo en países importadores de capital, como ha sido el caso de América Latina y el Caribe. Este hecho quedó reiterado en las negociaciones que tuvieron lugar en el contexto del Marco Inclusivo de la OCDE, que culminaron hace dos años. Hasta la Cumbre de Cartagena, la posición de nuestros países se ha caracterizado por ser pasiva frente a la inmensa desigualdad condensada en estas reglas.

Esta situación de desigualdad global solo puede ser remediada consolidando posiciones de bloque de los países que hacen parte del Sur global. Naturalmente, un primer paso radica en la consolidación de posiciones a nivel regional. Este artículo analizará la importancia de la cooperación tributaria regional en el contexto de los desafíos globales y la creación de la Plataforma de Tributación de Latinoamérica y el Caribe (PTLAC) como un hito histórico que busca cambiar la dinámica actual y promover un sistema tributario global más equitativo y sostenible.

Desafíos en el Marco de la Política Tributaria Internacional.

En los últimos años, y particularmente en la última década, se ha vuelto evidente que la política tributaria internacional es una prioridad política para el G20 y la OCDE. Estos organismos han liderado los esfuerzos para diseñar un sistema tributario global, pero se ha observado una deficiencia significativa en la inclusión de los países del Sur global en la toma de decisiones. El sistema tributario internacional se ha diseñado en gran medida para satisfacer las necesidades de los países más ricos, quienes buscan aumentar sus ingresos tributarios para financiar gastos a nivel nacional y, en el caso europeo, también regional.

En efecto, la combinación de las reformas tributarias de los países desarrollados con los estándares *soft-law* de la OCDE ha tenido como resultado un mundo en el que las empresas multinacionales, que operan a escala global, aprovechan los beneficios tributarios y regímenes pre-

ferenciales para disminuir el impuesto total que pagan como unidad económica a nivel mundial. Esta situación se hizo evidente con la crisis de 2008, que impulsó a los países del G-20 a comisionar a la OCDE para estudiar las causas y posibles soluciones a los bajos niveles de tributación en este tipo de contribuyentes globales.

Fue así que el proyecto sobre Erosión de las Bases Tributarias y Traslado de Beneficios (BEPS, por sus siglas en inglés) dio inicio a la creación de los estándares que hoy conforman el sistema tributario global, con base apenas en los acuerdos alcanzados por los (entonces) 37 miembros más cinco países asociados, incluyendo China, India, Argentina, Brasil y Colombia. A pesar de la limitada representación de los países de ingresos medios, los estándares aprobados se convirtieron en los *estándares mínimos* de la convención multilateral acordada en el Marco Inclusivo de la OCDE. La firma de esta convención en 2017 se convirtió en un requisito para los países que quisieran participar en las siguientes negociaciones (pilares I y II), pero no fue suscrita por Estados Unidos.

Muchos de los países de nuestra región firmaron esta convención buscando influir en la configuración de las reglas tributarias internacionales. Sin embargo, los resultados del proceso más reciente, cuyas negociaciones terminaron en 2021 y están sujetas todavía a una convención que estará disponible para firmar a fines del presente año, han sido limitados y frustrantes. El llamado Pilar I ha relocalizado las obligaciones tributarias de las multinacionales, pero de manera limitada y solo para empresas muy grandes. El Pilar II ha establecido una tasa mínima de tributación del 15%, por debajo del 24% promedio de los países de América Latina y el Caribe, lo que ha generado preocupación.

Propuesta africana y controversia ONU–OCDE.

Como resultado de las limitaciones en el alcance de las soluciones propuestas en esta convención, se prevé que los mayores beneficios de estas reformas tributarias internacionales recaigan en los países de altos ingresos, donde se encuentran las sedes de las principales multinacionales. Los países en desarrollo, incluidos los de América Latina y el Caribe, recibirán beneficios limitados. Además, las restricciones impuestas por la OCDE en la tributación de actividades digitales a nivel nacional se consideran indeseables debido a los beneficios limitados que aportarán a nuestra región. En respuesta a los beneficios marginales para el Sur global y la excesiva complejidad de las soluciones ofrecidas por el Marco Inclusivo de la OCDE, los países africanos propusieron una convención tributaria de la ONU en 2022, que fue aprobada por la Asamblea General de la organización[1] , convirtiéndose en un tema central en los debates tributarios internacionales de 2023. Sin embargo, persiste una controversia sobre el papel que deben desempeñar la ONU y la OCDE en la cooperación tributaria internacional. Se ha propuesto en dos ocasiones transformar el Comité de Expertos sobre Cooperación Internacional en Cuestiones de Tributación de las Naciones Unidas en un organismo intergubernamental: en 2004, por propuesta mía como secretario general adjunto de la ONU para Asuntos Económicos y Sociales; y en 2015, por propuesta del Grupo de los 77 en la Cumbre de Financiación para el Desarrollo que tuvo lugar en Adís Abeba. En ninguno de los dos casos se aprobó dicha propuesta.

La Creación de la PTLAC.

Ante este panorama, la creación de la Plataforma de Tributación de Latinoamérica y el Caribe (PTLAC) se presenta como un hito histórico que busca cambiar la dinámica y consolidar la voz de nuestra región en las discusiones tributarias globales. La PTLAC tiene como objetivo principal priorizar los asuntos de la tributación internacional en las agendas ministeriales y hacer valer las necesidades y expectativas de América Latina y el Caribe en la configuración del sistema tributario global. La PTLAC ofrece la oportunidad de atraer mayores recaudos tributarios para nuestra región, los cuales son recursos esenciales para abordar desafíos como la pobreza, la desigualdad y la violencia. Además, permite a los países de América Latina y el Caribe unirse para reflexionar sobre los desafíos y las oportunidades que plantean las nuevas tecnologías y formas de hacer negocios. Esto facilita la utilización de recursos humanos, técnicos y logísticos para res-

ponder de manera más efectiva a las propuestas discutidas en organismos internacionales y promover cambios necesarios en el sistema tributario global de manera coordinada y oportuna.

Coordinación regional y desafíos comunes

La coordinación de aspectos internacionales de la política tributaria a nivel regional es un aspecto valioso de la PTLAC. Los desafíos que enfrentan los países de América Latina y el Caribe, como la pobreza, la desigualdad y la adaptación al cambio climático, son similares y requieren soluciones financieras comunes. Un reto importante es evitar la competencia tributaria, tanto a nivel global como regional, lo que implica acordar el tratamiento tributario que tendrían las empresas aun cuando se desempeñen en actividades o sectores que han sido tradicionalmente objeto de beneficios tributarios en las legislaciones nacionales. Además, es esencial establecer reglas para el pago justo de impuestos por parte de las multinacionales en los países donde operan, así como abordar los desafíos planteados por la economía digital.

Justamente, en la Cumbre de Cartagena, los países de la PTLAC tomaron la primera decisión de rango ministerial a través de la priorización de cuatro temas sustanciales que se llevarán a discusión en los distintos foros de política tributaria internacional. Por primera vez, estaremos proponiendo y no solo reaccionando a las agendas propuestas por el Norte global. En particular, los países presentes en la Cumbre de Cartagena dieron el mandato de enfocarse en los siguientes cuatro temas: beneficios tributarios, impuestos progresivos, medidas tributarias para financiar la acción climática y economía digital y nuevas formas de trabajo. Estos cuatro temas representan las prioridades de América Latina y el Caribe que hasta el momento no han sido atendidas en las discusiones sobre tributación internacional.

Adicionalmente, cada vez que un país de nuestra región aprueba una reforma tributaria o intenta formular su política fiscal, se obtienen valiosos aprendizajes. Compartir estos conocimientos y reunirse para identificar mejores prácticas fortalecerá la posición competitiva de los países de América Latina y el Caribe. Sin duda, el aumento de la cooperación a nivel regional, en especial en materia de evasión y elusión, permitirá captar ingresos tributarios necesarios para acercarnos más al cumplimiento de los Objetivos de Desarrollo Sostenible (ODS). Así mismo, defender una medida que se ha adoptado como bloque será mucho más fácil y eficiente que la defensa de medidas dispares que buscan fines comunes.

La gobernanza propuesta para la PTLAC aporta un ejemplo indiscutible de inclusión, transparencia y democracia, principios que siempre tendrían que estar presentes en las decisiones de política tributaria que afectan a todos los ciudadanos. Este enfoque permite llegar a decisiones comunes en procesos incluyentes, que involucren a todos los países sin requisitos distintos a la voluntad de participar y a la ciudadanía a través de la sociedad civil, la academia y el sector privado. Finalmente, el proceso de toma de decisiones por consenso dota además de una fuerza excepcional a nuestras decisiones, pues estas reflejarán los puntos que en verdad compartimos y que nos unen como región latinoamericana y caribeña.

Conclusiones y llamado a la acción

La creación de la PTLAC representa un hito histórico para América Latina y el Caribe al consolidar la voz regional en la cooperación tributaria internacional. Nuestra región debe unirse para influir en un sistema tributario global más justo y equitativo, así como coordinar políticas fiscales para abordar desafíos comunes. La gobernanza incluyente de la PTLAC demuestra la importancia de la transparencia y la participación ciudadana en la toma de decisiones tributarias. Se espera que esta plataforma fortalezca los lazos regionales y promueva un sistema tributario internacional que contribuya al desarrollo sostenible y equitativo de los países.

Discurso pronunciado en la Primera Cumbre de Latinoamérica y el Caribe para una Tributación Global Incluyente, Sostenible y Equitativa*

Joseph Stiglitz **

** Traducción realizada por Fedesarrollo del texto original titulado: Remarks delivered at tax summit of Latin America, Cartagena July 25, 2023 (Stiglitz, 2023).*

*** Joseph Stiglitz recibió el Premio Nobel de Economía en 2001, es economista y profesor en la Universidad de Columbia. Su trabajo se ha centrado principalmente en economía asimétrica, teoría de la información y economía del sector público.*

Agradezco sinceramente la invitación que me han extendido para compartir mis reflexiones acerca de cómo pueden moldear esta iniciativa tan importante. Hasta el momento, América Latina ha reaccionado mayormente a las propuestas provenientes de los países más avanzados, abordando los asuntos país por país. No obstante, el resultado, incluso cuando hemos tenido la oportunidad de sentarnos en la mesa, ha sido que la voz de América Latina no ha sido debidamente escuchada. Así mismo, nuestra región no ha logrado ejercer el liderazgo que podría haber desempeñado al unificar su voz. Estas acciones, junto con otras iniciativas similares que están en desarrollo en diversas regiones, incluyendo algunas en curso en África, transformarán la arquitectura global, especialmente en lo que respecta a la tributación internacional. No puedo subrayar lo suficiente la vital importancia de este cambio, no solo para la región, sino para el mundo entero.

Hace tres décadas, durante mi presidencia en el Consejo de Asesores Económicos de la administración Clinton, planteé la problemática del sistema tributario basado en la fijación de precios de transferencia. Allí sostenía que este enfoque tenía serias deficiencias y abogaba por la necesidad de adoptar una perspectiva distinta: el enfoque basado en fórmulas promovido por la Comisión Independiente que presido y que en el pasado estuvo liderada por José Antonio Ocampo. El sistema de fijación de precios de transferencia, que se suponía funcionaba de manera global, resultaba inadecuado en el contexto de los Estados Unidos, especialmente para determinar las obligaciones fiscales entre los estados de la nación, además de ser inaplicable en el creciente mundo de la globalización. Esta problemática ya era evidente incluso antes de que la globalización alcanzara su plenitud y antes de que se produjeran los cambios significativos en la estructura de las economías a nivel mundial. Estos cambios marcaron la transición de una economía centrada en la manufactura hacia una economía digital basada en el conocimiento y los servicios.

De esta manera, la necesidad de reforma es inminente debido a que el sistema actual adolece de inequidades y falta de eficiencia, otorga amplias oportunidades para la evasión y elusión de impuestos y no logra generar los ingresos necesarios para las economías del siglo XXI.

Ahora bien, la carencia de un sistema tributario justo y equitativo, tanto a nivel nacional como internacional, tiene consecuencias adicionales. El terreno de juego desigual discrimina a las pequeñas y medianas empresas en contraste con las multinacionales, ya que las primeras no pueden aprovechar las oportunidades de evasión fiscal que la globalización proporciona.

A nivel nacional, esto socava la cohesión social y la democracia. A nivel internacional, debilita la capacidad más amplia de cooperación, la cual es fundamental en diversas áreas, incluyendo la gestión de pandemias y el cambio climático. Tanto a nivel nacional como internacional, alimenta el populismo, cuyo auge representa una amenaza fundamental para toda nuestra civilización tal y como la conocemos.

La razón por la que esta plataforma es especialmente necesaria en la actualidad para América Latina

América Latina y el Caribe constituyen la región más desigual del mundo. El 10% más rico de la región posee 630 veces más riqueza que el 50% más pobre. Esta extrema concentración de la riqueza es considerablemente mayor que en otras

regiones. Por ejemplo, en África subsahariana, el 10% más rico posee 351 veces más riqueza que el 50% más pobre. En Europa, esta proporción se sitúa en 66 veces. Estos números nos ayudan a comprender la magnitud de la brecha en la concentración de la riqueza que la región debe esforzarse por reducir a través de una tributación más progresiva y efectiva.

Para que América Latina y el Caribe tengan éxito en la reducción de la desigualdad y cierren la brecha de ingresos más amplia con los países avanzados (donde el ingreso per cápita promedio es menos de una séptima parte del de Estados Unidos), la región deberá tomar decisiones que impliquen un gasto público sustancial en áreas como la educación, que representa el 4,2% del PIB en comparación con un promedio de gasto gubernamental en educación en la OCDE del 5,3%; la salud, que equivale al 8,6% del PIB en contraste con el promedio de la OCDE del 13,9%; la infraestructura y, en este momento crucial, la tecnología. Las políticas industriales están en auge, ya que el gasto masivo en Estados Unidos probablemente aumentará la brecha en conocimiento y tecnología.

El cambio climático plantea otra imperiosa necesidad. Si bien es cierto que los países avanzados son responsables del nivel actual de concentración atmosférica de gases de efecto invernadero, el mundo en desarrollo soportará una parte desproporcionada de los costos, por lo que es de su interés que se haga todo lo posible para frenarlo.

Pero ¿quién financiará todos estos gastos tan necesarios? La deuda no puede ser la única respuesta, menos en un contexto de tasas de interés altas y restricciones cuantitativas que encarecen la financiación internacional. En América Latina y el Caribe, una década o más de un reducido recaudo tributario, junto con un marcado incremento de la deuda, agravado por tasas de interés elevadas, ha resultado en que en muchos países los pagos por servicio de deuda superen considerablemente las inversiones en el ámbito social. Para evitar la imposición de medidas de austeridad en la región, se requiere un incremento en los ingresos fiscales, con especial énfasis en una tributación de naturaleza progresiva.

Los ingresos fiscales en América Latina como porcentaje del PIB han estado alrededor del 20%. Las cifras más recientes de 2022 muestran un promedio del 21,7% del PIB para la región, mientras que el promedio de la OCDE es del 34,1%, lo que representa una brecha de casi 13 puntos porcentuales. Esto equivale al 64% del recaudo fiscal de la OCDE. Para lograr un aumento equitativo de estos ingresos fiscales en apoyo a la cohesión social, es esencial que las corporaciones y las personas de mayor riqueza contribuyan de manera justa. Con demasiada frecuencia, esto no ha sido así.

La tributación de la economía digital ejemplifica lo que tengo en mente. Las grandes empresas tecnológicas han sobresalido no solo en la creación de servicios demandados por la población, sino también en la evasión fiscal corporativa. ¿Cómo es posible que estas gigantes tecnológicas y otras grandes corporaciones que funcionan prácticamente como monopolios sean tan rentables, pero paguen casi nada en impuestos?

Comprender las negociaciones fiscales internacionales en curso

Pasemos ahora al segundo tema de la charla: comprender las negociaciones fiscales internacionales en curso. Un aspecto negativo de la globalización fue que abrió nuevas oportunidades para la evasión fiscal, que las multinacionales y los súper ricos aprovecharon con rapidez, exacerbando los problemas del sistema de precios de transferencia. La comunidad internacional finalmente reconoció esto, y así comenzó la iniciativa de la OCDE, como lo mandó el G20.

Sin embargo, una iniciativa que inicialmente prometía mucho ha producido resultados insatisfactorios, lo que corre el riesgo de empeorar las cosas para los países en desarrollo y los mercados emergentes, en especial para América Latina y el Caribe. Permítanme explicar por qué estoy tan decepcionado con el resultado.

El principio del Pilar II de un impuesto mínimo es bueno, pero la tasa de 15% es demasiado baja, y tiene muchas excepciones. Este impuesto mínimo es más bajo que el aplicado por muchos países de América Latina, que tienen una tasa promedio nominal del 23,4%. La preocupación radica en que este mínimo podría convertirse en el estándar, lo que podría llevar a una disminu-

ción real de la tributación corporativa en muchos países. A medida que el 15% se consolida como un mínimo aceptable, ya han comenzado a surgir llamados de grupos empresariales en mi país y en otros lugares para que este se convierta en el máximo. Aquí cabe señalar que es importante ser precavido al interpretar los datos que muestran los bajos ingresos adicionales esperados, expresados como porcentaje del PIB; es necesario tener en cuenta el alto grado de informalidad. No obstante, dado que la informalidad es tan extendida en América Latina y su gravamen es complejo, es aún más crucial que las multinacionales paguen su justa parte de impuestos.

Por otro lado, el Pilar I es, en el mejor de los casos, insuficiente. Se aplica solo a un número reducido de empresas y asigna una parte mínima de las ganancias. Su metodología carece de justificación económica, ya que considera que todas las ganancias corporativas son simplemente ganancias, sin tener en cuenta el costo de capital, la mano de obra y otros insumos deducibles. La tributación corporativa no reduce la inversión ni el empleo, excepto en la medida en que un país intente atraer negocios de otros. El alcance se ha diluido tanto que los ingresos generados serán mínimos. De esta pequeña suma, los países de América Latina obtendrán una fracción, a menudo igual o incluso menor que la que podrían obtener mediante medidas alternativas, como impuestos de retención e impuestos sobre servicios digitales, que son mucho más fáciles de administrar. Colombia, en su reciente reforma fiscal, ha optado por estas alternativas.

Para complicar aún más las cosas, al firmar el convenio multilateral para la Cantidad A del Pilar I, se espera que los países renuncien a varios otros impuestos, incluidos los impuestos digitales, que probablemente serán cada vez más relevantes en el futuro. Dado que los detalles aún no se han publicado, no podemos determinar con precisión qué impuestos se están abandonando, lo que ejemplifica la falta de transparencia en el proceso de la OCDE, que ha sido justamente criticada.

Además, los países que se adhieran al convenio estarán sujetos a un sistema independiente de resolución de disputas obligatorio. Si este sistema no se diseña de manera adecuada, corre el riesgo de sesgarse en exceso a favor de los intereses empresariales. Una vez más, dada la ausencia de detalles y la falta de transparencia, es complicado evaluar con precisión qué tan perjudicial podría ser un sistema de resolución de disputas de este tipo. En resumen, lo que hoy parece ser un acuerdo desequilibrado podría agravarse aún más en diez años.

Algunos podrían argumentar: “Esperemos a ver qué sucede. Si resulta ser tan problemático como afirman los críticos, podremos corregirlo”. Sin embargo, esta posición demuestra una verdadera ingenuidad política, ya que cambiar la arquitectura global es una tarea ardua, como hemos visto. Las deficiencias del sistema de impuestos basado en la fijación de precios de transferencia, conocido como “a brazo largo”, se han reconocido durante décadas, pero eliminarlo resulta complicado.

Al analizar el resultado, es evidente que las voces de los países avanzados y las corporaciones en ellos fueron las más influyentes. Aunque los países en desarrollo y los mercados emergentes estuvieron presentes en la mesa de negociaciones, sus preocupaciones recibieron poca atención. Esto se refleja en numerosas disposiciones detalladas y en los resultados generales. El Grupo de los 24 (G-24) presentó un conjunto de propuestas que habrían servido como base para un acuerdo mucho más equitativo, pero en su mayoría fueron pasadas por alto, a pesar de su fundamento sólido. El resultado se basó en gran medida en propuestas de Estados Unidos.

Esto no debería sorprendernos, ya que se le llamó un marco inclusivo porque se enviaron invitaciones de manera inclusiva, con la esperanza de que los países en desarrollo y los mercados emergentes se sintieran más dispuestos a participar. Sin embargo, estar en o cerca de la mesa de negociaciones no garantiza que se escuchen las preocupaciones de estos países. La OCDE es una organización que reúne a los países avanzados del mundo y no incorpora los intereses y las perspectivas de los países en desarrollo y los mercados emergentes en su enfoque.

Es importante destacar que el reciente acuerdo de la OCDE, conocido como BEPS, no prohíbe a ningún país imponer impuestos digitales durante el periodo interino antes de que se firme

y ratifique la Convención del Pilar I. La incertidumbre sobre si alguna vez se concretará es alta. La probabilidad de que el Congreso de Estados Unidos lo apruebe es baja, ya que enfrenta oposición de ambos lados del espectro político.

Por tanto, los países de la región deben plantearse si este acuerdo realmente beneficia sus intereses o si debieran considerar alternativas, especialmente en lo que respecta al Pilar I. Independientemente de si consideran que el acuerdo es beneficioso o no, deben cuestionarse si tiene sentido unirse, dada la baja probabilidad de que este se implemente. En caso de que no se concrete, es casi seguro que el punto de partida para futuras negociaciones (que seguramente habrá) será aún menos favorable para los países en desarrollo y los mercados emergentes.

El camino a seguir

Ahora, permítanme comenzar la discusión crítica sobre hacia dónde debemos avanzar. Esta discusión consta de cuatro partes. La primera se centra en cómo América Latina debería reaccionar ante la iniciativa de la OCDE. La segunda se refiere a qué procesos alternativos pueden ser activados. La tercera aboca a qué iniciativas fiscales específicas deben estar sobre la mesa. Y la cuarta, posiblemente la más importante, versa sobre cuáles deben ser las prioridades para la nueva Plataforma.

En cuanto a la respuesta a la iniciativa: por supuesto, los países deberían imponer impuestos al menos al nivel mínimo. El Pilar II, sin excepciones, debería ser el estándar. Los países no deberían firmar el Pilar I y, si consideran que la presión política es demasiado fuerte y que deben hacerlo, deberían esperar para ratificar hasta que lo haga Estados Unidos. Como mencioné antes, la probabilidad de que el Congreso de Estados Unidos lo haga es baja, con oposición en ambos lados del espectro político. Y si Estados Unidos no está dentro, ¿por qué debería algún país atarse las manos? Sin embargo, aún es posible que los países exijan cambios positivos. Y ciertamente sería beneficioso que los países piensen en cómo podría ser un mejor acuerdo.

Es probable que exista presión sobre los países para firmar con rapidez, posiblemente a partir de septiembre, con el fin de socavar las posibilidades de un proceso de la ONU hacia una convención fiscal de la ONU, que se discutirá en la AGNU en septiembre. La Unión Africana es enérgica en su respaldo a este proceso, y hay margen para que los países de América Latina colaboren en su promoción, lo que permitiría establecer una estructura fiscal global más democrática que beneficie a todos los países. El éxito en este enfoque en verdad más inclusivo se verá facilitado si los países pueden resistir la presión para suscribir el convenio de la OCDE. Mientras tanto, en este periodo de incertidumbre, sin saber si el Convenio entrará en vigor, y en particular si Estados Unidos lo ratificará, los países de la región deben avanzar en la imposición de impuestos digitales y en otras reformas del sistema de tributación multilateral.

Permítanme resumir y reiterar mis opiniones sobre los temas clave que deberían estar en el centro de la discusión para crear un orden fiscal internacional justo, a los que me referí al comienzo de esta charla.

1. Debemos aumentar la tasa mínima de impuestos global y eliminar las excepciones.

2. El Pilar I debe ser abandonado y se debe introducir un sistema más justo para asignar los derechos fiscales, comenzando con un enfoque basado en fórmulas que tenga en cuenta las diferencias en las partes de la economía. En el caso de los recursos naturales, la mayoría de las rentas (ganancias puras) deberían asignarse al país de origen. En el caso de la manufactura, se debe dar peso al empleo y al capital.

3. Discutí anteriormente cómo la globalización y la transición a una economía de servicios han socavado el antiguo sistema de precios de transferencia y sus reglas. Los cambios continuos y futuros en la estructura de la economía, incluida la digitalización, tendrán importantes implicaciones para el diseño de un buen sistema fiscal multilateral.

4. Debe haber un firme compromiso para reducir la evasión fiscal, incluyendo la eliminación de paraísos fiscales, ya sea en tierra o en el extranjero, con reformas en los sistemas de intercambio de información fiscal, entre otros.

5. Es necesario establecer la tributación digital y marcos más efectivos para gravar los servicios.

6. Existen una serie de reformas técnicas: la presencia física, un requisito estándar para la imposición de impuestos, carece de sentido en un mundo de servicios y especialmente en un mundo digital. Un buen acuerdo debería anular el papel de los acuerdos bilaterales y otros acuerdos de inversión y doble imposición en la limitación del diseño de las estructuras fiscales.

7. Debe haber una mejor manera de resolver las disputas: por esto aludí a las objeciones al actual sistema de arbitraje.

Mirando hacia el futuro, tiene mucho sentido ubicar un nuevo proceso en las Naciones Unidas. Esta es la institución global inclusiva con legitimidad. No es perfecta, ninguna organización lo es. Pero debemos fortalecer nuestro compromiso con el multilateralismo inclusivo. El impulso para hacerlo ya ha comenzado, motivado por la frustración de los países africanos que también están decepcionados por la falta de resultados hasta la fecha y la incapacidad de la comunidad internacional para encontrar soluciones justas que generen ingresos sostenibles a largo plazo.

Los países de América Latina y el Caribe aprobaron una resolución el año pasado para iniciar estas negociaciones, y hay una oportunidad para que los países de la región colaboren en la promoción de esta iniciativa. Esto permitiría establecer una estructura fiscal global verdaderamente más democrática que beneficie a todos los países. Es del interés de todos los países respaldar este proceso.

Principios y reformas adicionales

Ahora, permítanme abordar la tercera cuestión sobre el camino a seguir: cuáles son algunas de las medidas adicionales, más allá de las reformas técnicas de los pilares I y II, que deberían ser objeto de discusión y los principios que deben guiarnos.

Esta discusión debe comenzar considerando qué tipo de sociedades queremos construir y cómo hacerlo. América Latina no debería depender de la competencia fiscal para construir la recuperación o la sostenibilidad. El desarrollo de un país no debe basarse en una carrera a la baja entre países, atrayendo falsamente inversiones a través de incentivos fiscales que solo benefician a las grandes empresas. Si se implementa un incentivo fiscal, debería ser para fomentar el verdadero desarrollo social.

Más que involucrarse en una competencia a la baja en materia tributaria, se debería aspirar a competir al alza en materia de infraestructura y capital humano. Un ejemplo concreto de cómo la reforma fiscal corporativa podría marcar la diferencia se relaciona con la tributación de las ganancias extraordinarias y excesivas. Desde el inicio de la pandemia, hemos observado un aumento significativo en este tipo de ganancias. La disparidad entre las ganancias de las corporaciones más ricas y las dificultades económicas de las personas más desfavorecidas, quienes han visto cómo muchas empresas aprovechaban la coyuntura para aumentar desproporcionadamente sus márgenes de beneficio, no solo socava la cohesión social, sino que también contribuye a la inflación. La implementación de impuestos sobre estas ganancias adquiere un sentido económico innegable, especialmente en un momento en el que tantos países están urgidos de recursos financieros. Entiendo que Colombia ya está considerando la implementación de un impuesto sobre las ganancias extraordinarias en la industria extractiva, pero sería beneficioso ampliar esta medida. Esto es algo que debe ser considerado con cuidado, ampliado y diseñado a nivel regional.

Quiero enfatizar que en la mesa de discusión no se debe incluir solo la tributación corporativa, sino también otras formas de tributación, como la riqueza y las ganancias de capital. Esta Plataforma, que se estableció para discutir y promover la reforma fiscal, brinda la oportunidad para que los países de la región acuerden de manera colectiva aumentar los impuestos a las personas más ricas. Esto se lograría a través de una colaboración internacional verdaderamente inclusiva y ambiciosa con el objetivo de gravar la riqueza y poner fin a la competencia fiscal y la evasión de impuestos por parte de los individuos más afortunados.

Reitero: nuestra ambición compartida debe ser hacer que nuestros sistemas internacionales y nacionales funcionen para todos, no solo para aque-

llos que tienen dinero y poder. Y esto significa eliminar la capacidad de los ultra ricos para evadir lo que deben pagar. Una mejor coordinación en la tributación de la riqueza, incluido el intercambio automático de información, reduciría las oportunidades para evadir impuestos y permitiría a los países recaudar fondos vitales para abordar los múltiples desafíos que enfrenta nuestro mundo.

Algunos países han demostrado que incluso gravando la riqueza con tasas muy bajas se pueden obtener ingresos sustanciales. De manera más amplia, esta iniciativa también debería ayudar a promover mejores prácticas compartiendo experiencias y coordinando enfoques y soluciones comunes a problemas compartidos en la región.

Pero esta Plataforma no debe ser solo técnica, sino también política. América Latina, al hablar con una sola voz, puede, como sugerí al principio, ir más allá de reaccionar con discusiones que tendrán repercusiones a nivel nacional, regional y global. Las soluciones identificadas en la Plataforma pueden ayudar a los países a avanzar en reformas fiscales nacionales en áreas como la tributación de las multinacionales, la competencia fiscal, la tributación de la riqueza y la evasión fiscal.

Prioridades

Para finalizar, permítanme decir algunas palabras sobre mis puntos de vista respecto a las prioridades entre los elementos de la lista que ya se han identificado. Todos son importantes. Ya he mencionado muchos de ellos. Uno en el que quizás no he hecho suficiente hincapié es la tributación ambiental y de recursos. Esto es especialmente importante porque muchas de las economías de la región dependen de los recursos naturales. Debemos dejar claro que los recursos pertenecen a las personas, y el objetivo de la tributación de los recursos debe ser recaudar la mayor cantidad posible de rentas de los recursos, en consonancia con su desarrollo sostenible. América Latina, en su mayoría, se ha quedado corta en este aspecto. Evaluar hasta qué punto esto es cierto y cómo se puede corregir debería ser uno de los objetivos de la Plataforma.

El cambio climático es real, y Europa está considerando imponer impuestos transfronterizos a los países que no han establecido cargos adecuados por emisiones de carbono. Tanto para que América Latina haga su contribución global en esta lucha por salvar el planeta como para evitar estos impuestos transfronterizos, toda América Latina debe diseñar e imponer rápidamente impuestos equitativos y sostenibles sobre el carbono, o medidas equivalentes. La Plataforma debe dar alta prioridad a avanzar en esta agenda.

De manera simultánea, muchos países de la región han realizado enormes contribuciones para preservar la biodiversidad. Es una gran decepción que algunos países, incluido Estados Unidos, se hayan negado a ratificar el convenio sobre la biodiversidad, precisamente porque esto compensaría a los países por sus servicios ecológicos. Esta es una injusticia que la región podría trabajar para corregir.

Ya mencioné que Estados Unidos está respondiendo al cambio climático con fuerza, gastando enormes cantidades de dinero, no solo para proteger a las personas de este calor sin precedentes, sino también para la política industrial. Los países del sur no pueden responder de la misma manera porque no tienen los mismos ingresos. Por tanto, estos últimos deben aumentar los ingresos, incluida la reforma de la tributación de las multinacionales de manera equitativa, para contar con los recursos necesarios para responder al cambio climático y afrontar tanto los costos de mitigación como de adaptación.

Incluso con las mejores reformas, el campo de juego no está nivelado. Si los países avanzados hubieran tenido un poco de sentido de humanidad, habrían dicho: “si tenemos alguna disputa sobre dónde deben asignarse los ingresos globales, permitamos que ese dinero se destine a un propósito global común. ¿Y cuál es nuestro propósito común? Combatir el cambio climático. Esta es una amenaza existencial para el planeta”. Ahora bien, los países avanzados se han comprometido a brindar a los países en desarrollo cien mil millones de dólares cada año para responder al cambio climático. A medida que el cambio climático ha avanzado, está claro que esa cantidad es insuficiente. Pero los países avanzados no han cumplido con esa obligación.

En este contexto, ¿no tendría sentido asignar los ingresos en disputa para ayudar a los países en desarrollo y los mercados emergentes a responder al cambio climático? Pero no hubo ese tipo de generosidad, humanidad, empatía, porque la reforma fiscal no fue realizada por aquellos que están tratando de crear una arquitectura global justa, sino que la agenda fue establecida por las corporaciones, cuyo objetivo era minimizar sus impuestos, dadas las fuerzas que exigían reformas. Así que querían minimizar la reforma, y lo lograron... o lo habrían logrado si no fuera por Estados Unidos: casi con seguridad, no vamos a obtener un acuerdo ratificado.

Conclusiones

Quiero concluir con algunas reflexiones generales sobre el proceso de reforma. El primer conjunto de puntos se relaciona con mi reacción como economista ante las propuestas de reforma. Ya he hecho énfasis en mi decepción por cómo las personas que estructuraron este acuerdo no tuvieron en cuenta lo que hemos aprendido sobre los impuestos a las empresas y sus efectos en la última mitad de siglo. Simplemente no hay justificación económica para la estructura básica que subyace en el Pilar I y para las excepciones en el Pilar II.

Así mismo, hay algunas ideas de la economía, la teoría económica y la teoría política que pueden ser relevantes para pensar en el proceso de reforma. El teorema de la imposibilidad de Arrow señala que el proceso importa. Cómo se organiza el proceso afectará el resultado. Importa quién está a cargo del proceso, quién establece la agenda. Cómo se organiza un proceso afecta el resultado, e incluso determina si hay un resultado.

Lo que hemos visto, las desigualdades que he señalado no son una sorpresa, dada la forma en que se llevó a cabo el proceso. Ninguno de nosotros puede garantizar lo que generaría un proceso alternativo, como el convocado bajo los auspicios de la ONU, pero es probable que, si genera un resultado, este sea más equitativo. Cualquier proceso de esta complejidad debe involucrar un cierto nivel de confianza. Hay un intercambio: yo cedo en esto, tú cedes en aquello. Lamentablemente, la historia de las negociaciones, como las de comercio, lideradas por Estados Unidos y Europa, no ha sido buena.

La historia de estas negociaciones no ha resultado en mayor confianza. Y esa es la realidad con la que tenemos que vivir. Cuando los países en desarrollo ingresaron en las negociaciones de la Ronda de Uruguay, tenían varios puntos que querían incluir en la agenda. Cuando se completó la Ronda de Uruguay, los países avanzados obtuvieron la mayor parte de lo que querían y los países en desarrollo, muy poco. Los países desarrollados decían: “confíen en nosotros, abordaremos sus problemas, como los subsidios agrícolas y los aranceles escalonados, más adelante, en la próxima ronda de negociaciones comerciales”.

Luego, unos años después, se inició la Ronda de Desarrollo de negociaciones para completar la tarea. ¿Cuál fue el resultado de la Ronda de Desarrollo? Nada. Después de doce años, fue abandonada. Se suponía que la Ronda de Desarrollo rectificaría los desequilibrios. Pero cuando llegó el momento de hacer las concesiones necesarias, Europa y Estados Unidos se mostraron obstinados. Incluso dejando de lado la larga historia de colonialismo, los países avanzados se han ganado cierto grado de desconfianza. Y, como ilustré antes, lo que hemos visto en estas negociaciones fiscales es consistente con esta herencia histórica. Entonces, debe haber otro foro que no esté centrado en Estados Unidos y Europa.

Esto me lleva al siguiente punto: estamos experimentando lo que siento un poco como un teatro Kabuki, donde hay mucho drama, pero estamos bastante seguros de cuál será el resultado. Como dije antes, el resultado es que no habrá resultado. Estados Unidos no ratificará.

Y entonces, uno tiene que preguntarse: ¿por qué los brazos de tantos países se dan a torcer sabiendo que el resultado será cero? ¿Por qué se está gastando tanto capital político? ¿Por qué se les pide que hagan tanto por algo que no marcará ninguna diferencia? Una hipótesis es que lo que está sucediendo es una lucha sobre dónde comienzan las próximas negociaciones. Una vez que los países en desarrollo y los mercados emergentes hagan una concesión en estas negociaciones, esto se interpretará como una concesión para el próximo proceso. Por tanto, es necesario

ser fuerte en el proceso actual, pensando todo el tiempo en los resultados deseables como parte del proceso de la ONU.

El último conjunto de temas se refiere al escenario alternativo, a lo que sucede si no hay un convenio ratificado. Eso implica menos juicios sobre economía y más sobre política. Los países de América Latina y el Caribe tendrán la libertad de establecer impuestos digitales. Tendrán la libertad de rediseñar sus normas. Su libertad se verá limitada por los acuerdos bilaterales, los acuerdos de inversión que hayan firmado y por los acuerdos de doble imposición que hayan suscrito. Pueden y deben considerar la renegociación de esos acuerdos. Hace años, Sudáfrica decidió retirarse de sus acuerdos bilaterales de inversión. Retirarse, renegociar o reinterpretar algunos de los acuerdos de doble imposición también les dará más margen de maniobra. Está claro que los países de la región necesitan más espacio.

Hay quienes han argumentado que, si este acuerdo no se firma y se establece un impuesto digital, Estados Unidos tomará represalias con todo tipo de impuestos a sus productos. Eso es especulativo. Incluso si pudo haberlo hecho en el pasado, tenemos que hacernos la pregunta, ¿estamos en un mundo nuevo? Un mundo diferente al de hace cinco años. La dinámica política es diferente en dos aspectos importantes.

El primero es la nueva Guerra Fría. Es real. América Latina está muy bien posicionada para esta nueva Guerra Fría. Comercian más con China que con Estados Unidos. ¿Hará Estados Unidos algo para acercarlos más a la órbita de China? No lo creo, pero estas son especulaciones políticas y tendrán que tomar una decisión sobre el riesgo. Pero en mi opinión esto es poco probable.

Además, el futuro político de Estados Unidos y Europa está en el aire. Si gana Trump, los acuerdos no significan nada de todos modos. Son, como mucho, una ligera molestia. Incluso para Biden, cuando las normas de la OMC resultaron incómodas, dijo, en efecto, “aunque escribimos las normas en primer lugar, ahora que esas normas nos están atando las manos, las reescribiremos para que se adapten a nuestros propósitos”. No está claro cuánto significan los acuerdos para Estados Unidos. Entonces, la pregunta es, ¿por qué deberían otros países atarse las manos si Estados Unidos no está atando las suyas?

Al mirar hacia el futuro, las opciones para un mejor acuerdo son bastante razonables. Desde la izquierda, si un buen gobierno democrático es elegido en Estados Unidos, habrá más preocupación por los países en desarrollo, habrá más preocupación por la cooperación global, y se reconocerá nuestra misión de trabajar juntos y reducir la pobreza a nivel mundial. Si la derecha prevalece, no hace mucha diferencia, porque pasarán por alto cualquier acuerdo que no les guste o que no sirva a los intereses empresariales a los que sirven. Está claro que los países de la región deben pensarlo dos veces antes de firmar. Y la toma de decisiones estándar bajo incertidumbre sugiere que uno podría no querer firmar.

Permítanme concluir: la cumbre en Cartagena es el primer paso en un largo camino para construir un consenso que permita enfrentar las múltiples crisis que afectan a la región con políticas fiscales inclusivas, sostenibles y equitativas. Hay mucho que la región puede lograr aquí que puede inspirar al resto del planeta. Y estoy muy feliz de ver que la voz de la sociedad civil se escucha y contribuye.

Esta cumbre no sucedió por casualidad. Sucedió gracias al liderazgo de Colombia, con mi amigo José Antonio Ocampo primero, y el Ministro de Hacienda Ricardo Bonilla ahora, junto con Fernando Haddad, de Brasil, y Marcelo Marcel, de Chile, y la cooperación de todos los países aquí en la sala y las personas particulares que ya han sido reconocidas por ayudar a organizar este seminario. Les agradezco por su liderazgo en la creación de esta Plataforma y por habernos traído aquí a Cartagena.

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The BEPS proposals: challenges and smart policy options for developing countries

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Resumen[1]

Este documento resume los posibles resultados de la última etapa de las negociaciones sobre la reforma de las normas para gravar a las empresas multinacionales (EMN) y esboza las opciones de medidas que deben considerarse en respuesta, especialmente por parte de los países en desarrollo.

El mandato del proyecto de la OCDE/G20 sobre erosión de la base imponible y traslado de beneficios (BEPS) era asegurar la tributación de las EMN d*onde se llevan a cabo sus actividades*. La forma más sencilla y eficaz de lograr este objetivo consiste en gravarlas de acuerdo con su verdadera situación económica, considerando que funcionan como empresas individuales bajo una propiedad y control compartidos. De igual manera, se deberían asignar sus beneficios totales en función de sus actividades reales para su tributación en cada país, tal como lo sugirió el grupo G-24 de naciones en desarrollo en el año 2018. El paquete de dos pilares de propuestas acordado en 2021 implicó la aceptación en principio de este enfoque, y el trabajo técnico desde entonces ha establecido estándares detallados para su implementación. Sin embargo, las cuatro medidas específicas ahora propuestas son mucho más limitadas y serían ineficaces e injustas, especialmente para los países en desarrollo. Es esencial que estos países adopten alternativas más adecuadas para defender la fuente de la base impostiva que también pueden ser compatibles con el paquete BEPS.

Un elemento clave que ya se está implementando gradualmente es el impuesto mínimo global (GloBE), que tiene como objetivo garantizar que los beneficios de las EMN se graven con una tasa mínima efectiva del 15% en cada país al que se atribuyan esos beneficios, asignando los derechos para aplicar un impuesto complementario a otros países donde Las EMN tengan presencia tributable. Esto podría beneficiar a todos los países, poniendo un freno parcial a la competencia para reducir los impuestos a las EMN para atraer inversiones, aunque existe el peligro de que el 15% mínimo se convierta en el máximo. Sin embargo, en las reglas de GloBE, el derecho a aplicar un impuesto complementario se otorga prioritariamente al país o países de residencia de las EMN mediante la aplicación de una regla de inclusión de ingresos (IIR), mientras que el derecho del país anfitrión a un impuesto complementario sobre los beneficios en origen (regla de pagos insuficientemente gravados, UTPR) es solo una opción. Se ha incluido un derecho adicional para un impuesto mínimo adicional doméstico (DMTT), pero este beneficiaría a los países donde las EMN ya atribuyen niveles elevados de beneficios según las normas actuales: jurisdicciones que actúan como centros de inversión o conductos para el traslado de beneficios. Las estimaciones muestran que la mayoría de los países en desarrollo obtendrían poco o ningún ingreso fiscal adicional directamente del GloBE, y dado que sus reglas son muy complejas, unirse al esquema no sería rentable para la mayoría de estos países.

Ante el diseño injusto e ineficaz de GloBE, los países en desarrollo deben tomar medidas por sí mismos. Deben 1. Revisar todos sus incentivos fiscales existentes y eliminarlos a menos que exista evidencia clara de beneficios para la economía del país y 2. Introducir medidas apropiadas para proteger su derecho a gravar los beneficios en origen, lo que sería más efectivo que el DMTT, ya que no permite gravar beneficios que se han trasladado fuera de su jurisdicción. Estas medidas pueden diseñarse cuidadosamente para ser compatibles con GloBE y con las obligaciones internacionales, incluidos los tratados fiscales, aunque esto puede implicar negociaciones con los socios de los tratados debido a las diferencias de interpretación. Si bien los Estados deben diseñar medidas adecuadas a sus propias circunstancias, pueden aprender unos de otros para lograr la convergencia y desarrollar un enfoque común a través de organizaciones regionales y sectoriales adecuadas.

El objetivo debe ser evitar la continuación y el agravamiento del enfoque actual injusto e ineficaz y mantener el impulso hacia una reforma más completa. Esto debería basarse, como ya ha señalado el grupo G-24, en la tributación unitaria de las EMN con asignación de beneficios según una fórmula. Esto finalmente beneficiaría a todos los países y a las EMN al establecer un sistema simple, efectivo y justo para la tributación de las EMN.

Summary

This paper summarises the likely outcomes of the latest stage of negotiations on reform of rules for taxing multinational enterprises (MNEs), and outlines options for measures that should be considered in response, especially by developing countries.

The mandate for the G20/OECD project on base erosion and profit shifting (BEPS) was to ensure taxation of MNEs *where their activities take place*. The only simple and effective way to ensure this is to tax them in accordance with the economic reality that they operate as unitary enterprises under common ownership and control, and to apportion their total global profits in proportion to their real activities for taxation in each country, as proposed in 2018 by the G-24 group of developing countries. The Two-Pillar package of proposals agreed in 2021 entailed acceptance in principle of this approach, and the technical work since then has established detailed standards for its implementation. However, the four specific measures now proposed are much more limited, and would be ineffective and unfair, especially for developing countries. It is essential that these countries adopt alternatives more appropriate for defending their source tax base, which can also be compatible with the BEPS package.

A key element already being gradually implemented is the global minimum tax (the GloBE), which aims to ensure that MNE profits are taxed at an effective minimum rate of 15% in each country to which those profits are attributed, by allocating rights to apply a top-up tax to other countries where they have a taxable presence. This could benefit all countries, putting a partial brake on the competition to reduce tax on MNEs to attract investment, although there is a danger that the 15% minimum could become the maximum. However, in the GloBE rules this right to apply a top-up tax is given in priority to the home country or countries of residence of the MNE by applying an income inclusion rule (IIR), while the host country's right to top-up tax on profits at source (undertaxed payments rule, UTPR) is only a fall-back. An additional right for a domestic minimum top-up tax (DMTT) has now been included but would benefit countries where MNEs already attribute high levels of profit under current rules –jurisdictions which act as investment hubs or conduits for profit-shifting. Estimates show that most developing countries would gain little or no additional tax revenue directly from the GloBE, and since its rules are highly complex, joining the scheme would not be cost-effective for most of these countries.

In view of the unfair and ineffective design of the GloBE, developing countries must act themselves. They should 1. Review all their existing tax incentives and remove them unless there is clear evidence of benefits to the country's economy, and 2. Introduce appropriate measures to protect their right to tax profits at source, which would be more effective than the DMTT, since it does not enable taxation of profits that have been shifted out of their jurisdiction. Such measures can be carefully designed to be compatible with the GloBE, and with international obligations, including tax treaties, although this may entail negotiations with treaty partners due to differences of interpretation. While states should individually design measures suited to their own circumstances, they can learn from each other to achieve convergence, and develop a common approach, through appropriate regional and sectional organisations.

The aim should be to prevent the continuation and exacerbation of the present unfair and ineffective approach, and to maintain the momentum towards a more comprehensive reform. This should be based, as already signposted by the G-24, on unitary taxation of MNEs with formulary apportionment. This could finally benefit all countries and MNEs alike by establishing a simple, effective, and fair system for MNE taxation.

Introduction

As the second phase of the G20/OECD project on base erosion and profit shifting (BEPS) draws to a close, this paper outlines the current proposals, and identifies the choices and options for countries to reform taxation of multinational enterprises (MNEs). The first part outlines the outcomes to date and discusses their limitations, while the second puts forward some additional or alternative measures that could be more effective for developing countries to protect their tax base.

The BEPS process during this phase has taken significant steps towards the broader aim stated by the G20 in 2013 to ensure that MNEs could be taxed *where economic activities occur and value is created*[2]. Under the Two-Pillar approach outlined in 2021, Pillar I aimed to directly curb profit-shifting by introducing a unitary approach to allocating MNE profits to market countries for taxation; while Pillar II sought to limit the incentives for misalignment, by introducing a minimum effective tax rate for MNEs' profits regardless of where they are declared. The work on the Two Pillars has laid the basis for a move towards unitary taxation of MNEs with formulary apportionment, by formulating detailed technical standards for all its components: 1. A taxable nexus based on a minimum threshold of sales revenue, 2. A definition of global consolidated profits for tax purposes for MNE corporate groups, and 3. Definitions and methods for quantification of sales revenue by destination, physical assets, and employees, the three tangible and measurable factors relevant for formulary apportionment.

It should be recalled that, at the start of the BEPS project's second phase in 2018, the G24 (Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development) took the initiative to propose that MNEs should be taxable in every country where they have a Significant Economic Presence (SEP), by apportioning their global profits[3]. As regards the formula for apportionment, the G-24 argued that:

> Both production and sales are essential for generation of profits, and neither can be ignored for the purpose of determining the profits that would be taxable in a jurisdiction. The jurisdiction that contributes towards demand by facilitating the economy, or by maintenance of markets, and the ability of its residents to pay that enable sales, as well as the jurisdiction that contributes to the production or supply of goods, contribute towards the business profits of an enterprise. In some cases, the market jurisdiction also contributes infrastructure networks that are used by the enterprise to perform its services or to deliver its products. This gives rise to a valid justification of taxation by them of the profits to which their economies have contributed.

The G-24 therefore proposed the adoption of *fractional apportionment*, pointing out that this method has long been regarded as acceptable, and has been included in tax treaties, until its omission from the OECD model in 2010. Their submission continued:

> For this purpose, (a) the definition of the tax base to be divided; (b) the determination of the factors based on which that tax base is to be divided; and (c) the weight of these factors, need to be determined.

This proposal was one of three summarised in a consultation document issued by the OECD Secretariat in February 2019 (OECD, 2019). While the other two also entailed acceptance of a new taxable nexus, they were much more limited in scope, focussing on specific modifications of profit allocation rules related only to sales: one on the value created by *user participation* in the digitalised economy, and the second on *marketing intangibles*. The outcome was a proposal for a *new taxing right*, based widely on sales revenue, that is intended to be created by a multilateral convention (MLC) to introduce what is called amount A of Pillar I. Work also focused on designing a global minimum tax, which resulted in proposals under Pillar II. In 2021 the OECD proclaimed the Two Pillars as the solution to the reform of the international tax system, together with an Implementation Plan (OECD, 2021).

The challenge now facing countries is 1. To assess which, if any, of the current BEPS outcome elements to implement; 2. To respond to their likely implementation by some other countries; and 3. To pursue possible options for further progress.

The current proposals

The OECD/Inclusive Framework on BEPS aims this year to complete the work on the four components of the Two Pillars outlined in October 2021. Here we explain and analyse these, as far as they are known at the time of writing this paper.

Pillar I, amount A

This aims to provide a *new taxing right* over an allocated part of the *residual* profits of the largest and most profitable MNEs (around 100), based on sales regardless of physical presence, applying a new tax nexus rule (a simple quantitative threshold of sales revenues). It would be implemented through a Multilateral Convention (MLC), a full version of which the OECD is expected to release shortly.

Due to its design the MLC would require *ratification* by a significant number of countries *before* it could come into effect[4]. These should include the main MNE home countries, particularly the US (whose MNEs account for around one-third of the profits that would be reallocated), as well as at least some of the main *investment hubs,* which would be required to surrender profits (e.g., Bermuda, Ireland, Isle of Man, Liechtenstein, Singapore, South Africa, Switzerland, Thailand) (Barake and Le Pouhaer, 2023). US ratification is key, but it requires approval by two-thirds of the US Senate, so it would need bipartisan political support, which is highly problematic in the present state of US politics. Hence, the MLC is very unlikely to come into force, certainly not in the immediate future.

Even if the scheme could be implemented, available estimates suggest that the net benefits to lower-income countries would be very small[5]. In exchange, participating countries would be required to give up digital services taxes (as defined in the MLC) for all MNEs, not just those in scope of amount A[6]. Amount A itself applies formulary apportionment, starting from the consolidated profits of the MNEs (adjusted for tax purposes), and allocating a share of profits based on the location of sales (applying detailed sourcing rules, including for services). However, it would leave in place the existing *transfer pricing* rules based on the radically different independent entity principle, for allocating the remaining profits of in-scope MNEs, and for all the profits of those not in scope.

Participation in the scheme has wider implications beyond the revenue involved. The rules for administration of amount A are highly complex[7], largely due to its design (e.g., scope of application, interactions with existing transfer pricing rules, allocation of the obligation to *relieve double taxation*)[8]. There will be a t*ax certainty framework* to administer the process, which will give the MNE's home country the main role, subject to panels and arbitration to prevent and resolve disputes. This will apply not only in relation to amount A itself, but also to *related* issues, which could extend to *any* questions regarding transfer pricing for in-scope MNEs[9]. Thus, participation would entail significant obligations, as well as administrative time and other costs, which would be onerous, making it hard to provide an effective check on the home countries of the MNEs affected which will primarily run the scheme. Low-income countries should consider whether this would be the most appropriate way to deploy their scarce tax administration capacity.

Pillar One, amount B

This aims at a simplified application of the arm's length principle to *baseline* marketing and distribution activities. The last published draft proposed a version of the transactional net margin method (TNMM) widely used in transfer pricing, by applying benchmarks based on statistical analysis, applying to wholesale marketing and distribution[10]. This applies a *one-sided* methodology, allocating only a *routine* level of profit to affiliates performing the covered functions, which allows high shares of profit to be attributed to affiliates in other countries, including investment hubs and conduits used for profit-shifting. Hence, amount B would continue to allocate low levels of profit to countries where sales are made. Any simplification that it might achieve would be at the cost of locking source countries into acceptance of relatively low levels of tax revenue. Work is continuing the guidance, and much remains to be done.

Implementation is independent of amount A and could be done by amending the OECD

Transfer Pricing Guidelines, and perhaps the UN Manual. These are not binding on states, but many lower-income countries have enacted legislation which incorporates one, or both, into domestic law, which may automatically cover updates to them. It would be undesirable for amount B to become a standard de facto binding even on non-OECD members, so it should not be included in the OECD Guidelines, and certainly not in the UN Manual.

Pillar II: the Global Anti-Base Erosion tax (GloBE)

The GloBE will implement a minimum effective tax rate on MNE groups with over €750m turnover, by allowing countries to apply a top-up tax to ensure that the group pays in relation to its affiliates the minimum of 15% on the GloBE income in each jurisdiction. This is the net income or loss declared in each jurisdiction under financial accounting standards, and applying existing transfer pricing rules, with specified adjustments to arrive at the GloBE tax base. This will place a floor on the competition to reduce corporate tax rates, although it risks becoming a ceiling, and is significantly lower than the current average nominal weighted rate of 25%[11].

Adherence to the scheme is voluntary, but to ensure coordination a participating country would be expected to join the implementation framework. This will entail a rigorous review of the rules it adopts, to verify if they can be treated as *qualified* under the GloBE standards. These are extremely detailed and complex: in addition to the Model Rules (72 pages) there is a Commentary (200 pages), as well as Guidance on the GloBE Information Return (76 pages), and so far, two sets of Administrative Guidance in 2023 (February, 110 pages; July, 90 pages). No doubt the easiest way would be simply to enact legislation incorporating the Model Rules, as well as the related commentary and guidance and perhaps any future changes or additions, directly into domestic law by reference, as New Zealand intends to do[12]. This essentially entails outsourcing a country's tax legislation to the OECD. The administrative burden of checking compliance would remain, but it has also been suggested that this also could be facilitated by providing a single point of filing for each MNE of the GloBE Information Return, which would then be supplied to other relevant participating countries through information exchange[13]. This would make countries joining the GloBE passive participants in a scheme designed and administered by others. This seems almost inevitable, given the complexity and rigidity of the GloBE.

Adoption of some or all elements of the GloBE has begun in many states, particularly through its uniform and coordinated application under a Directive among the 27 EU member states, which will give it momentum[14]. Instead of the GloBE, the US Congress in 2022 enacted a corporate alternative minimum tax (CAMT), which applies a 15% minimum tax on profits based on financial accounts, in tax years beginning from 2023, to corporations with revenues over USD 1 billion p.a. (around 150). This is not aligned to the GloBE rules, but (like the GILTI) is likely to be treated as covered tax in calculating the GloBE's ETR, as with other taxes on income, such as those on controlled foreign corporations (CFCs), including the GILTI[15]. The Biden administration's proposals to amend the GILTI to align with the GloBE seem unlikely to be adopted soon, as Republicans are very hostile to the GloBE, and some are threatening retaliatory measures. The US would benefit most by increasing its minimum ETR (even without aligning the GILTI with the GloBE), which would also greatly enhance the effects of the GloBE, creating an incentive for convergence on a higher rate closer to the average headline cor-

11 See https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/

12 See the Taxation Bill tabled in May 2023, available at https://legislation.govt.nz/bill/government/2023/0255/latest/versions.aspx

13 OECD (2022), Pillar Two–GloBE Information Return, Public Consultation Document 20 December 2022–February 3rd, 2023, para. 15.

14 The 27 EU member states must implement it by the end of 2023, with both the IIR and the UTPR, and most are likely to include a DMTT also; plans of other countries include: Korea (enacted IIR & UTPR, and a power for a DMTT); Japan (IIR, wef April 2024); Malaysia (plans by 2024, including DMTT); Indonesia (considering for 2024); Singapore (plans by 2025, including DMTT); Hong Kong (the same); Australia (consultation); UK (enacting IIR and DMTT in 2023); Canada (plans for IIR and DMTT by 2024, UTPR 2025); Colombia (enacted its own minimum tax, which has a broader scope than the DMTT); New Zealand (Bill published May 2023 to incorporate all GloBE rules into NZ law). There have been no announcements yet from other G20 countries, e.g., Brazil, China, India. Working groups are dealing with continuing aspects of implementation, which has already produced additional administrative guidance published in February and July 2023. These deal with some key issues such as the allocation of blended taxes on CFCs, including notably the US GILTI tax, though only for a limited period, in the hope that the US will bring it into line with the GloBE rules.

15 For a discussion, see Gravelle (2023).

porate tax rate[16].

The GloBE creates complex interacting rules, giving the primary right to tax undertaxed profits to the (ultimate, or failing that intermediary) home countries of MNEs, to apply the income inclusion rule (IIR), while the right of host countries to apply the undertaxed profits rule (UTPR) is only a backstop[17]. However, countries can also apply a domestic minimum top-up tax (DMTT), on the profits that MNE affiliates declare in that country. A Qualified DMTT (one which is accepted under the implementation framework to be in accordance with the GloBE rules) would be deducted from the top-up tax otherwise payable under the IIR (or the UTPR). Hence it would have priority over both.

Some have suggested that lower-income countries could benefit from introducing a DMTT. However, the DMTT applies to the GloBE income declared in the country *under existing transfer pricing rules*. For source countries the problem is that MNEs can easily shift profits out under these rules, for example by avoiding having a PE, deductions of interest, fees and royalties, and attribution of only *routine* profits to any resident affiliate. The DMTT has no impact on any of this. The DMTT would benefit countries that have adopted tax incentives to encourage MNEs to declare high profits there (e.g., Ireland, Netherlands, Bermuda, Luxembourg, Cayman Islands, Singapore, Mauritius). These jurisdictions offer zero-tax regimes or low-tax regimes to attract profits shifted from other countries where MNEs have real activities. The adoption of a DMTT by such investment hubs and conduit countries would ensure that MNEs in-scope of the GloBE pay at least 15% there, pre-empting the application of an IIR by home countries (or the backstop UTPR).

It should be noted that, unlike either the IIR or the UTPR, the DMTT does not apply to profits that have been shifted to jurisdictions where they are undertaxed, but only to profits which are declared in and could in any case be taxed by the country concerned. By giving the DMTT priority over both the IIR and the UTPR, the GloBE continues to encourage profit-shifting, due to the still significant difference between the 15% minimum ETR and the average headline rate on corporate profits of 25%. Inclusion of the DMTT in the GloBE makes it easier for conduit countries to continue offering preferential tax regimes[18]. A recent estimate suggests that by doing so these countries would obtain 89% of the additional tax revenues from the GloBE, high income countries would gain 9%, while low-income and middle-income countries would gain almost nothing (Reitz, 2023).

The likelihood that the DMTT will be adopted by conduit jurisdictions strengthens the need for source countries to introduce more appropriate measures to protect their own tax base, rather than adopting a DMTT or relying on the UTPR, which has the lowest priority under the GloBE. Of course, all states have the sovereign right to tax income sourced from their territory, unless such right is ceded by a tax treaty. The logic of the GloBE is that if a country fails to exercise its right to tax income at least at the minimum 15% rate, top-up tax can be applied by others. Hence, countries should ensure that income is taxed appropriately at source, where it derives, by applying suitable measures to prevent profit-shifting.

In our view, participation in the GloBE is not appropriate for most developing countries, due to its design and scope, and the complexities and constraints that the implementation framework would impose. The worst option of all would be to join the GloBE scheme and rely on the QDMTT, without also adopting measures to ensure that MNEs pay a fair level of tax at source. However, the GloBE's adoption could benefit all, by creating an incentive for all countries to raise their effective tax rate to at least the 15% minimum, since any undertaxed profits would likely be taxed at that rate by another country. Hence, countries should review and phase out their tax incentives. Revenue authorities should work with civil society to help politicians to resist the lobbying pressures from MNEs for new

16 *Picciotto (2023), Fixing or Nixing GloBE, Tax Notes International 111(11): 1325-35.*

17 *See BEPS Monitoring Rules (2022) Comments on the Model Rules for the GloBE, 25 January.*

18 *Devereux, Vella and Wardell-Burrus (2022) There is already evidence that such conduit countries have managed to benefit from the failure of the first phase of BEPS reforms to prevent treaty shopping, see Hohmann, Merlo and Riedel (2022) Limits of BEPS's Multilateral Instrument available in: https://drive.google.com/file/d/18nwqszywqbeIDFqLY4lnIQXFDWq34x14/view*

subsidies, which have already begun[19]. It should be noted that the substance-based income exclusion already allows countries to grant rates as low as zero for profits resulting from investments in real activities.

All countries should consider other measures, as alternatives or in addition to the GloBE, that may be more suited to protecting their tax base (discussed in section B below). Such measures should be considered compatible with the GloBE, and hence treated as covered taxes, provided they fall within its definition of a tax on income rather than on gross receipts. This would both assert the prior right to tax profits at source and forestall complaints by MNEs of double taxation.

The subject to tax rule

The Subject to Tax Rule (STTR) was introduced into Pillar II at the initiative of lower-income countries, which were dissatisfied with the GloBE rules' bias towards MNE home jurisdictions. It will require amendments to existing tax treaties. And Inclusive Framework members accepted a political obligation to agree to the STTR's inclusion in treaties with lower-income countries *when requested to do so*[20]. To facilitate the implementation, the Inclusive Framework on BEPS adopted a multilateral instrument (STTR MLI) published on October 3rd, 2023. Countries that ratify the STTR MLI would be able to list the specific treaties that they wish to amend by including them as *covered agreements*. Each such specific treaty would be amended if the relevant treaty partner also listed that treaty as a *covered agreement*. A range of additional notifications must also be made in relation to each notified treaty.

The rule will apply to both interest and royalties (as defined in the tax treaty), as well as payments for distribution rights, insurance and reinsurance premiums, guarantees and financing fees, the use of equipment, and revenues for provision of services. However, it has a range of exclusions. It does not apply to payments made by or to an individual, or payments that are not between *connected persons* in the two tax treaty partner states[21]. Hence, although all fees for services are in scope, the vast bulk of payments for digitalised services by individuals and businesses are excluded. The definition of *connected persons* is a direct or indirect control of over 50% of shares or voting rights, which is a markedly higher threshold than that for *associated enterprises* used for transfer pricing purposes in most countries[22]. Payments for international maritime transport or benefiting from a tonnage tax regime are also excluded[23]. There is also a *materiality threshold*, so the STTR would not apply unless aggregate covered payments in a year exceed EUR 1 million, or EUR 250,000 if either party has a GDP below EUR 40 billion.

The STTR applies to covered payments (between *connected* affiliates of MNE groups in two tax treaty partners) that are taxed below the minimum rate of 9% by the country of the recipient and allows the country of the payer to apply a withholding tax which is capped at 9%. However, it only applies if the gross amount of the covered income exceeds the costs *directly or indirectly incurred by the person deriving the income*, plus a mark-up of 8.5%. Hence, in effect the 9% minimum is the effective rate on the net income, although the withholding tax applies to the gross payment.

The STTR will have priority over all the GloBE top-up taxes, because taxes collected under the STTR will be *covered taxes* under the GloBE and included in the computation of the ETR. However, the minimum rate of 15% under the GloBE is higher than that of the STTR, so the IIR and QDMTT could still also apply. The rationale suggested for the lower rate is that the STTR

19 See e.g., Guarascio (2023). A subsequent report indicated that such a direct subsidy could disqualify the DMTT, because it would nullify the effects.

20 See OECD/BEPS IF (2021), Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 8 October 2021 (available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf) and OECD/BEPS IF (2023), Frequently asked questions on the Pillar Two STTR, 3 October 2023, questions 3 and 5, available at: https://www.oecd.org/tax/beps/sttr-mli-faqs.pdf. Lower income countries are defined as those with a GNI per capita, calculated using the World Bank Atlas method, of $12,535 or less in 2019, to be regularly updated.

21 See STTR MLI, Annex 1, Article 1(1), and Article 1(8).

22 For example, in its recent proposal for an EU Directive on Transfer Pricing, the EU Commission proposes an EU wide harmonization of the associate enterprise threshold at 25% of shares or votes. See: European Commission (2023), Proposal for a Council Directive on Transfer Pricing, 12 September 2023, COM(2023)529.

23 See STTR MLI, Annex 1, Article 1(4). The exclusion of payments under tonnage tax regimes which are not strictly related to international maritime transport (like payments for offshore dredging or cable laying) is surprising, given that these payments do not fall under the international shipping income carve-out of the GloBE rules.

applies to the gross payment rather than net profits, but the mark-up threshold takes account of tax paid in the receiving country. Hence, capping the withholding tax under the STTR at a lower minimum rate than for the GloBE means that the STTR will have only limited priority, home and conduit countries could apply a DMTT or an IIR at 6% to ensure the minimum of 15% under the GloBE is reached. This again shows the bias of Pillar II against source countries.

Based on the earlier announcements on the STTR, the IMF reported that it would cover only 101 existing treaties for 32 lower-income countries with 13 other countries[24]. If implemented in all these treaties the IMF estimates the additional revenue as varying from near zero to 0.14% of current CIT revenue[25]. These increased revenues, however, would go to the recipient country if it raises its rate to at least 9%, or implements a QDMTT.

An alternative provision has been agreed in the United Nations Tax Committee for an STTR for inclusion in the UN Model Tax Convention. This would have a much broader scope, covering all payments that are undertaxed in the recipient country. In the meantime, lower-income countries should ensure that their domestic tax rules properly tax payments to non-residents of fees, royalties, and interest, which reduce the domestic tax base, and review any treaties that allow such payments to be made to entities in countries where such income is taxed at low or zero rates. They should deny deductions for such payments under domestic anti-abuse rules, in conjunction with the general anti-abuse principle (the principal purpose test, PPT), that should now be included in all treaties following the recommendations of Action 6 in the first phase of the BEPS process[26]. Specific anti-abuse provisions could also be introduced: for example, Australia's measures tabled in June 2023 to deny deductions for payments attributable to an intangible asset made by *significant global entities* to an associated entity if the income is subject to a low tax rate[27].

Other measures for consideration

The implementation of Pillar II will do little or nothing to stop base erosion at source, and hence will not benefit lower-income countries, which are mainly host countries for MNEs. Those countries could nevertheless indirectly benefit from the adoption of the GloBE by others since it would reduce the pressure on them to offer tax advantages to foreign MNEs. They should therefore review their tax incentives, to ensure that they do not result in an effective tax rate on MNE affiliates in the country below 15%. They may wish to consider the exclusion under the GloBE rules of income based on economic substance (assets and payroll). However, it should be borne in mind that such expenses are already considered in determining the net taxable profits, and adding this income exclusion increases complexity and greatly reduces the revenue potential. For the global minimum tax to create an effective floor and stop the race to the bottom on tax rates, the minimum of 15% is essential.

The GloBE is also an opportunity for countries to strengthen taxation at source. This is in line with the principle of the GloBE, that countries can apply top-up tax to profits which have been shifted to jurisdictions where they are undertaxed. Countries should adopt policies, and where necessary introduce specific measures, for example to deny deductions for payments made to associated enterprises that are subject to low tax rates in the receiving country, as aforementioned. It should be noted that some OECD countries are already protecting their source tax base. Notably, the UK is retaining its Diverted Profits Tax (DPT)[28], aimed at arrangements avoiding tax on income earned in the UK by foreign MNEs. This is in addition to implementing the GloBE, which will also benefit the UK as the home or conduit country of many MNEs. The US has opted for its CAMT as an alternative to the GloBE.

24 See IMF (2023) p. 42, which assumes it will include royalties, and charges for financing and insurance, and for professional and technical services, but not digitalized services or capital gains. Note also that the OECD interpretation of royalties excludes income from the licensing of software.

25 IMF (2023) International Corporate Tax Reform, p. 14.

26 The PPT can be used to deny deductions of payments to a conduit which is not genuinely carrying out the relevant activities: see example G in Paragraph 182 of the Commentary to article 29 in both the OECD and UN models.

27 Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions.

28 An announcement on 19th June 2023 stated that consideration is being given to integrating the DPT into transfer pricing rules, while maintaining its key advantages, which are estimated to have resulted in £8b of tax revenue between 2015-2022.

Hence, measures to protect taxation at source may be additional to the GloBE for participating countries, or an alternative to it for countries that do not participate. In the next section we discuss two key general considerations of design, and then we outline and evaluate some measures that countries have adopted or that have been proposed.

Design considerations

Compatibility with the GloBE, trade rules and tax treaties

Any suitable tax on income at source that falls within the definition of a *covered tax* under the GloBE rules would take precedence over GloBE taxes (the IIR and QDMTT) when calculating the ETR under GloBE rules. Covered taxes are defined in article 4.2 of the GloBE Model Rules as taxes on income, or in *lieu of* a *generally applicable income tax*. The Commentary explains that taxes on income are generally applied to net profits; although that can include a *simplified estimate of net profit*, but not if done by reference to a gross amount *without any deductions* (i.e., a tax on turnover) (para. 27). The *in lieu of* test also allows *taxes that are not described in the generally applicable income tax definition*, *but which operate as substitutes for such taxes*. Explaining this criterion, the Commentary states that it "would generally include withholding taxes on interest, rents and royalties, and other taxes on other categories of gross payments such as insurance premiums, provided such taxes are imposed in substitution for a generally applicable income tax" (para. 31).

This does not specifically refer to withholding taxes on fees for services, so their treatment remains uncertain.

However, the Commentary does specifically state that digital services taxes (DSTs) will generally not fall within the definition of covered taxes. This is because 1. They apply to gross and not net income, and 2. They are "generally designed to apply in addition to, and not as substitutes for, a generally applicable income tax under the laws of a jurisdiction" (para. 36). This is likely to apply to all taxes on digitalised transactions, not just the DSTs that would need to be withdrawn under the MLC[29]. However, it is possible to design a tax on income from digitalised services which is more clearly part of a generally applicable income tax (see below).

DSTs would also be required to be withdrawn by countries participating in the MLC for amount A. For countries that decide not to do so, there may also be retaliatory action against DSTs under trade rules, particularly by the US[30]. Kenya recently announced that it will modify its DST to align it with both the Pillar II and Pillar II rules, in the light of its negotiations for a trade and investment agreement with the US[31]. To align with those rules, such taxes should be designed as far as possible 1. As direct taxes on income, rather than indirect transactions taxes, and 2. To be broadly applicable rather than targeted in a way that could be considered discriminatory.

It may also be important that such taxes can be considered compatible with tax treaties or international tax rules more generally. There would only be a direct conflict if such a tax is applied in relation to an entity that is resident in a country with which a tax treaty is in force. The provisions in tax treaties can vary considerably, and there are significant divergences between those based on the OECD and the UN models, particularly in relation to tax on income from services[32] (see further below).

More widely, however, compatibility with international tax rules would mean that such taxes could be considered for foreign tax credits. This may depend not only on international tax or treaty rules, but on the domestic tax rules of the country granting the credits. The US has refused

29 Many countries have introduced such taxes: see the surveys by KPMG, most recently Taxation of the Digitalized Economy: Developments Summary 9 March 2023; this reports measures which it categorizes as direct taxes have been enacted in 31 countries, while 9 more have made announcements or proposals; in addition, 100 have extended indirect taxes, mostly VAT, to digitalized transactions, some at subnational level. This listing does not include taxes such as Ghana's levy on electronic transactions introduced in 2022, or similar taxes on mobile money transactions in Kenya, Tanzania, and Uganda. However, a tax designed to apply to income or profits, even if derived from digitalized transactions, should be treated as a covered tax under the GloBE.

30 Sanctions under the US Trade Act s.301 are determined by the US Trade Representative, and directed by the executive, and have often been used as a weapon in international negotiations; adjudication under WTO rules, which could counteract them, is currently not possible due to US blocking of its procedures.

31 A more broadly based tax is likely to produce greater revenues, as well as aligning with Amount A: see. Akure (2023).

32 For further detail see Picciotto (2021).

credits for some alternative minimum taxes (discussed below) (Aslam and Coelho, 2021, p. 13), and has amended its rules to disallow credit for any *extraterritorial* taxation. These require the source rules for income from services to be *reasonably similar* to those of the US, and to attribute income from services based on the place of performance and not the location of the customer[33]. However, the MLC for amount A will now include detailed source rules for sales income, including from services, which now establish an internationally agreed standard[34]. If countries adopt this as the basis for defining the source of sales income, it would be hard to justify denial of tax credits on these grounds. It should also be noted that these rules resolve problems such as determining the source of income from digital platforms for the sale of offline services (e.g., for accommodation), by splitting it between the country of residence of the purchaser and the place of performance of the service.

Data availability and access

Data availability is also set to improve substantially. The system for country-by-country reporting has been established, but now clearly needs significant improvement. First, the design introduced needless flaws including in the measure of profit, which allows divergences in the accounting methods, and does not require reporting of, or reconciliation with, a group's consolidated profits. Second, it provides for home country filing only, with a complex and costly system for exchange of information. Most non-OECD members are still not participating, and countries face tight limitations on their use of the data, with the threat of being excluded again[35].

Growing momentum for public country-by-country reporting is now bringing change, supported by evidence that it can result in more effective taxation (Overesch and Wolff, 2021). The leading international sustainability standards setter, the Global Reporting Initiative (GRI), developed an improved standard, based on technical work and consultation involving representatives of major reporting companies, the big four accounting firms, academics, investors, labour, and civil society. This has been receiving increasing support, including from investors with trillions of dollars of assets under management. The OECD has still not released any report of its public consultation on CbCR conducted in 2020, when many called for it to align with the GRI, including requiring publication.

The European Union has agreed to require publication of OECD standard data from 2024, although with one important limitation: country-level data will only be required for EU member states and the small number of jurisdictions on the EU's *non-cooperative* list (which are mainly irrelevant to international profit shifting). The Australian government continues to consider legislation which is expected to go significantly further and to require publication of GRI standard data for all MNEs operating in the country (likely to cover more than a quarter of those currently reporting under the OECD standard). This would provide many tax authorities, as well as academics, civil society, and independent researchers, with direct access, and further normalise proposals for all countries to require publication of this data by all MNEs with a significant economic presence in their jurisdiction.

Alternative Minimum Taxes (AMTs)

Many countries have in place AMTs, designed in various ways, depending on their aim. They can apply only to local affiliates of foreign MNEs, to reinforce territorial taxation, or also to foreign affiliates of locally resident parents (like CFC rules). For most lower-income countries the former are more relevant.

These can be designed either as a substitute for a regular income tax or, more commonly as creditable against any liability for income or profits tax. Carry-forward rules may also be needed, to deal with variations in profitability. However, since they are designed to restrict profit-shifting,

33 See T.D. 9959, Internal Revenue Service, Guidance Related to the Foreign Tax Credit; Clarification of Foreign-Derived Intangible Income, 26 CFR Part 1, Federal Register, Vol. 87, No. 2, Tuesday, January 4, 2022. See also Notice 2023-55, July 21, which provides certain temporary relief through 2023 from the new regulations implemented by T.D. 9959. Some countries, e.g., India, apply a withholding tax on payments made by customers resident in the country for services, regardless of where the services are performed, and this is allowed under articles 12A and 12B of the UN model convention.

34 OECD (2022) Progress Report on Amount A of Pillar One; Schedule E Revenue Sourcing rules.

35 Fewer than half of UN members have any access, and progress is negligible even compared to other OECD-led instruments: see Table III.A.2 of IATF, 2023, Financing Sustainable Development Report 2023, New York: Inter-Agency Task Force on Financing for Development. In addition, the exchange protocol prohibits use of the data for tax assessment.

companies should eventually pay the higher of AMT or regular CIT taxes due.

Based on financial accounts (book income)

These aim to limit the benefits for taxable entities from tax incentives, such as generous investment allowances or nonrefundable tax credits, by ensuring that they pay at least a minimum rate on profits calculated by reference to financial accounting rules, in the country concerned. This is the approach adopted by the US for its CAMT as an alternative to the GloBE rules.

This type of tax is far more suitable for developing countries than the DMTT, for several reasons. The top-up tax applicable under the DMTT is limited to tax calculated on the local profits that a group has declared in that country and would require complex calculations in compliance with the GloBE rules, which would be a heavy burden for small jurisdictions. For an AMT, the country can specify adjustments to the financial accounting measure of profit to suit its own circumstances. It can also determine the scope of application, particularly the size threshold. Overall, such a tailored minimum tax would be far easier to administer, and less restrictive, than adopting a DMTT and joining the GloBE implementation framework. Colombia has introduced such a minimum tax, at the rate of 15%, based on modified book income, as an alternative to a DMTT[36].

Based on modified income

Here the tax base is the same as the income tax, but the deductions are limited, hence the term modified income. India is one country that follows this approach applying a minimum rate of 18.5% to a tax base which is the normal tax base but with a limited number of allowable deductions[37]. Like the minimum tax on book income, this aims to limit the benefits that a company can obtain from the (often) large variety of tax incentives enacted by legislatures over time.

Based on turnover and/or assets

AMTs can also be designed using an alternative way of attributing profits to MNE affiliates, to restrict base erosion and profit shifting. These are also much easier to apply than the complex transfer pricing rules, as well as the proposed amount B that would be applicable only to distributors.

Many low-income and middle-income countries have adopted minimum taxes based on gross revenues. According to IMF data, in 2018, 31 countries applied such taxes, at rates between 0.2% and 3.0%, with an average of 1.2%[38]. These have the advantage of being easy to administer, particularly compared to the complex rules on transfer pricing. However, they take no account of differences in profit margins between different sectors or firms and may hit hard on small and medium firms.

Indeed, in 2021 the Kenya High Court suspended the introduction of an AMT that would have obliged all businesses to pay a minimum of 1% on gross turnover as against the normal rate of 30% of net income or profits. It found that the petitioners, an association of bar owners, had made an arguable case that this would violate the constitutional requirement of equality in the application of law, and that businesses such as theirs in the consumer sector would be annihilated, since they could not achieve the implied net profit rate of 3.33%, particularly in the post-pandemic economic conditions[39].

In Nigeria, the Companies Income Tax Act (section 30) allows the Federal Inland Revenue Services (FIRS) to assess profits tax on a *fair and reasonable percentage* of turnover. This is done by charging the standard corporate income tax rate of 30% on a *deemed profit* of 20% of the turnover, an effective tax rate of 6% of the turnover. The method applies essentially as an anti-abuse rule and is triggered by some prescribed conditions including *where the true amount of the assessable profits of the company cannot be ascertained*. Probably for this reason, it does not appear to have been challenged in the courts. This has now been applied also to income from digital services. However, it falls outside the de-

36 Law 2277 of 2022, article 10, para. 6.

37 Chapter VI-A heading C, Section 35AD and Section 10AA of the Indian Income Tax Act (https://cleartax.in/s/amt-alternative-minimum-tax).

38 Aslam and Coelho (2021), and see also Best, Brockmeyer, Kleven et al. (2015).

39 Waweru Chairman and 3 others (Suing as Officials of Kitengela Bar Owners Association) versus National Assembly and 2 others [2021] KEHC 455 (KLR).

finition of a DST under the proposed MLC for amount A. It would also be hard to treat as a violation of trade rules, since it is a tax on income under domestic law, and not a transaction tax.

Others, particularly in Latin America, have used an assets basis. Such taxes were in effect in 10 countries in 2018, at rates between 0.4 and 2.0%. These can be effective particularly in a context of high inflation, since companies can declare tax losses (e.g., due to interest deductions) which can be carried forward (often indexed to inflation) avoiding tax for many years (Aslam and Coelho, 2021, p. 10). Generally, only fixed, or tangible assets are used, which increases incentives for their efficient use. This disadvantages capital-intensive firms but can encourage employment.

It is likely to be contentious whether taxes of this type would be treated as *covered* under the GloBE rules, or eligible for tax credit under treaties. Such treatment would be more likely if they are formulated as a method of calculating the net income or profit. It should be noted that even the supposedly *transactional* methods in the OECD Transfer Pricing Guidelines include the *cost-plus* and *retail-minus* methods, which apply a profit margin to the gross revenues, although this is determined by reference to supposedly similar transactions between independent parties. An alternative method could be justified as needed because it's not otherwise possible to ascertain the true profits, as under Nigeria's law. Another possibility is to treat the tax as an option in lieu of the regular tax, or an advance payment against it.

Fractional apportionment

The fundamental issue remains that digitalisation has exacerbated the longer-term shift to the intangible and services-based economy, revealing the fundamental flaws of the tax rules devised by the OECD, which prioritised the country of residence and entrenched the independent entity or arm's length principle. As made clear in the 2018 report under Action 1 of the BEPS project, this requires a rethinking of the basic principles of international tax: the definition of taxable presence, and the attribution of profits. The solution, as pointed out by the G-24 in 2018, is to base the tax nexus on significant economic presence, and to attribute profits by fractional apportionment.

Among the many advantages of this approach is that it taxes the net income or profits of the MNE concerned. Hence, it is superior to the AMTs discussed in the previous section, which are mainly a fall-back, simplified mechanism to ensure a minimal level of taxation. Taxation of an appropriate share of each MNE's actual global profit reflects the ability to pay of that MNE, so is much more justifiable in economic terms than a tax on revenues such as a DST.

Apportionment based on factors reflecting the MNE's real presence in each jurisdiction (physical assets, employees, and sales) would also be relatively easy to administer, and hard to avoid. MNEs could of course respond by moving production to lower-tax jurisdictions, but this would be deterred by the inclusion of sales in the formula. Such strategies would also depend greatly on the suitability of a country for the location of such real investments: availability of a workforce with relevant skills, adequate infrastructure, etc. Thus, countries would no longer be able to compete by offering tax breaks to attract paper profits but would also need to offer an attractive location for real activities. This approach would finally achieve the objective set for the BEPS project of aligning rights to tax MNE profits with their substantive presence in each country.

A comprehensive shift towards unitary taxation with formulary apportionment would require broader international agreement. However, significant shifts in this direction can be made by willing states, learning from each other to enable convergence and collaboration.

Taxable presence

A taxable presence may be found to exist even under current rules. For example:

1. A services PE under treaties based on article 5.3.b of the UN model.

2. An agency PE, where the MNE has a local subsidiary which may be also a PE of a related non-resident subsidiary (e.g., a local affiliate dealing with marketing or customer support may be treated as a PE of a non-resident affiliate to which sales revenue has been attributed)[40].

40 Treaties that include the new language resulting from BEPS

3. by requiring a non-resident wishing to do business to do so through a locally incorporated company (e.g., in Nigeria, under the Companies and Allied Matters Act: s.54).

Several countries have also gone further and introduced a new taxable nexus based on Significant Economic Presence (SEP), as proposed by the G-24, notably India, Nigeria, and Colombia. These have various definitions, usually aimed at digitalised services. Notably, Nigeria defined a SEP by a combination of user-based criteria and a sales threshold, requiring affected MNEs to register and comply with their tax obligations in Nigeria[41].

However, the proposals for a new taxing right, amount A, provide for a taxable nexus based on a simple quantitative threshold of sales revenues[42]. This seems to be both practical and effective. It reflects a wide consensus that now accepts that a significant level of sales demonstrates a close interaction with customers and the benefits of access to a market and the country's infrastructure, which are essential to profitability. There seems to be little reason for limiting this to only a few large and particularly profitable MNEs.

There is a strong economic rationale for taxing non-residents when they derive significant levels of income from accessing a country's market without any significant physical presence. The failure to do so gives non-residents tax advantages over local entrepreneurs and hinders the growth of jobs and the local economy. This runs counter to the justification usually argued for tax treaties, that they stimulate inward investment. Furthermore, payments to non-residents, particularly for business-to-business services, are deductible from the customer's business income, hence undermining the source country's tax base.

Attribution of Profit

If the MNE has little or no physical presence in a jurisdiction, it will also have few direct expenditures there. Mismatches between the location of revenues and expenditures are inherent in the modern type of highly integrated MNEs and mean that a tax on net income or profits in each country must be based on apportionment. This was recognised from the earliest beginnings of negotiations on international tax standards, resulting in a provision in the model treaty which continues to this day in the UN model treaty's article 7.4. Even the OECD's Transfer Pricing Guidelines include a profit-split method.[43] Various methods of applying apportionment are possible.

India in 2019 published a discussion draft for public comment, proposing a formulary method to define profits derived from India when an MNE has a taxable presence, and explaining how this could be valid under tax treaties. The proposal would multiply the revenues from sales in India by the MNE's global operational profit margin and then attribute the taxable profits using an apportionment method applying a 3-factor formula of sales, employees, and assets. The use of local revenues as a base was mainly to make the method easy to apply, in the absence of a suitable standard for global consolidated profits. Such a standard has now been agreed, for the proposed MLC to introduce amount A.

The OECD Transfer Pricing Guidelines reject global formulary apportionment, defined as the

Action 7 extending the PE definition to an entity habitually playing the principal role leading to the conclusion of contracts, could make it easier to treat a subsidiary as also constituting an agency PE.

41 Finance Act 2019 s.4 extended taxation of income derived by a non-Nigerian company from a trade or business in Nigeria to 1. Various kinds of digital activities, including e-commerce, online advertising, and a participative network platform, and 2. Furnishing technical, management, consultancy, or professional services outside Nigeria, in each case to the extent that the company has significant economic presence in Nigeria. The Companies Income Tax (Significant Economic Presence) Order 2020 defined the term SEP in relation to 1. As a minimum of 25 million Naira (equivalent to USD 40,000, the de minimis threshold for corporate income tax) derived from a range of digitalized activities, and for 2. Where any payment or income for services is derived from a Nigerian resident or a fixed base or agent in Nigeria of a non-Nigerian company. The Companies Income Tax Act s.30 allows income to be attributed based on a fair and reasonable percentage of turnover if the true amount of the assessable profits of the company cannot be readily ascertained, and this was fixed at 6% for income from digitalized activities. Nigeria does not regard this as a DST; but under the 2020 Order it would cease to apply to any company that becomes subject to tax under a multilateral agreement or consensus arrangement addressing the tax challenges arising from digitalisation of the economy to which Nigeria is a party.

42 EUR 1 million revenues from sales in a country, EUR 250,000 for countries with a GDP below EUR 40 billion. At time of writing, the latest published draft of the MLC is in OECD, 2022, Progress Report on Amount A of Pillar One; the Nexus rule is article 3; article 4 and Schedule E deal with the Revenue Sourcing rules, and article 5 is the Determination of the Adjusted Profit Before Tax of a Group.

43 It is noteworthy that MNEs and their home countries more readily support the apportionment of expenses, particularly for central services, as seen in the first phase of the BEPS project; indeed, the work done by the OECD on limitation of deductions showed that the only effective way to prevent excessive deduction of interest is apportionment of the costs of servicing the MNE's total debts to third parties, and this method was accepted, although only as a backstop in conjunction with a fixed cap.

allocation of an MNE's global consolidated profits based on *a predetermined and mechanistic formula*. Many of the reasons given for this rejection are based on administrative concerns, most of which have now been resolved in the rules for the Two pillars. Pillar II establishes agreed rules for defining the MNE's total consolidated profits for tax purposes, as well as for determining the source of sales revenue (including for digital services), for allocating a share of profits based on sales. Rules have also been agreed under the GloBE's substance-based carve-out for defining and quantifying physical assets and employees. Hence, we now have detailed technical standards agreed internationally that could be used to define total global profits for tax purposes, and for all three factors put forward by the G24 for formulary apportionment.

The principled defence of the arm's-length principle in the Guidelines, as based on *the normal operation of the market*, now looks even more shaky, given that the BEPS proposals have accepted the unitary principle, as well as establishing technical standards that would greatly facilitate coordinated implementation. The OECD guidelines are not binding international law, but at most aids to interpretation of the treaty articles. Tax treaty rules provide considerable leeway in determining the appropriate approach for allocating MNE income, as can be seen by the acceptance of the profit-split method, and the provision for fractional apportionment in article 7(4). The provisions in articles 7 and 9 for attributing profits for taxable purposes to affiliates of MNEs, which have been used to justify the arm's length principle and the OECD Guidelines, are essentially anti-abuse rules. Tax treaties can be reinterpreted or revised, the main obstacles to adopting formulary apportionment are now political.

Conclusion: towards a practical consensus

The central question remaining after the second BEPS phase is this: how will countries, individually or in groupings, take steps now to protect their tax bases by reducing the misalignment between where MNEs carry out their real economic activity and where they declare profits?

The discussion above points to a clear direction of travel. By careful design, it should be possible to elaborate measures for a new approach to allocating MNE income, based on the SEP and formulary apportionment, which are both compatible with other instruments and feasible given the constraints, including data access, that face tax authorities around the world.

We note that there are now multiple fora and processes where such approaches can be taken forward. The time now seems right for a coalition of countries to develop more detailed proposals for the adoption of a new approach to allocating MNE income, based on SEP and formulary apportionment.

References

Akure D. (2023). New digital tax mechanism promises Kenya windfall. Business Daily.

Aslam A. & Coelho MD. (2021). A Firm Lower Bound: Characteristics and Impact of Corporate Minimum Taxation. Working Paper No. 2021/161 IMF.

Australian Government (2023). Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions. https://treasury.gov.au/consultation/c2023-382169

Barake & Le Pouhaer. (2023). Tax Revenue from Pillar One Amount A: Country-by-Country Estimates. EU Tax Observatory.

BEPS Monitoring Group. (2022a). BEPS Monitoring Rules Comments on the Model Rules for the GloBE.

BEPS Monitoring Group. (2022b). Tax Certainty Issues Related to Amount A.

BEPS Monitoring Group. (2022c). Progress Re-

port on Amount A of Pillar One.

BEPS Monitoring Group. (2023). Withdrawal of Digital Services Taxes and Relevant Similar Measures.

BEPS Monitoring Group. (2023). Pillar One Amount B.

Best, M. C., Brockmeyer, A., Kleven, H. J. et al. (2015). Production versus Revenue Efficiency with Limited Tax Capacity: Theory and Evidence from Pakistan. Journal of Political Economy 123(6), 1311-1355.

Devereux M., Vella J. & Wardell-Burrus H. (2022). Pillar 2's Impact on Tax Competition. WP 22/11: Oxford University Centre for Business Taxation.

Enache C. (2022). Corporate Tax Rates around the World. https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/

European Commission. (2023). Proposal for a Council Directive on Transfer Pricing.

Gravelle J. A. (2023). The 15% Corporate Alternative Minimum Tax, Congressional Research Service.

Guarascio, F. & Vu, K. (2023). Exclusive: Vietnam eyes multi-million-dollar handouts to Samsung, others to offset global tax. Reuters. https://www.reuters.com/world/asia-pacific/vietnam-eyes-multi-million-dollar-handouts-samsung-others-offset-global-tax-2023-05-30/

Guarascio, F. (2023). No handouts to big firms to offset global tax, OECD tells Vietnam. Reuters. https://www.reuters.com/markets/asia/no-handouts-big-firms-offset-global-tax-oecd-tells-vietnam-2023-06-07/ .

Hohmann, A., Merlo, V. & Riedel, N. (2022). Multilateral Tax Treaty Revision to Combat Tax Avoidance: On the Merits and Limits of BEPS's Multilateral Instrument. https://drive.google.com/file/d/18nwqszywqbeIDFqLY4lnIQXFDWq34x14/view

IMF. (2023). International Corporate Tax Reform.

OECD. (2019). Addressing the Tax Challenges of the Digitalisation of the Economy. Public Consultation Document.

OECD. (2021). Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the digitalisation of the Economy.

OECD. (2022). Pillar Two–GloBE Information Return, Public Consultation Document.

OECD. (2022). Progress Report on Amount A of Pillar One. Schedule E Revenue Sourcing Rules.

Overesch, M. & Wolff, H. (2021). Financial transparency to the rescue: Effects of public country-by-country reporting in the European Union banking sector on tax avoidance. Contemporary Accounting Research, 38(3), 1616-1642.

Picciotto, S. (2021). The Contested Shaping of International Tax Rules: The Growth of Services and the Revival of Fractional Apportionment. ICTD Working Paper 124.

Picciotto, S. (2023). Fixing or Nixing GloBE. Tax Notes International, 111(11).

Reitz, F. (2023). Revenue Effects of the OECD Corporate Tax Reform–An Updated Impact Assessment of Pillar Two. IFF-HSG Working Papers. Working Paper No. 2023-17.

Tax Annex to G20 Leaders' St. Petersburg Declaration. (2013). https://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf

Source taxation of international shipping income: charting a new course for the LAC region countries

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Resumen

La crisis del costo de vida en todo el mundo, en parte desencadenada debido a la guerra en Ucrania, tiene otro culpable: la industria internacional del transporte marítimo, que ha obtenido beneficios récord al aprovechar las interrupciones en el suministro causadas por la guerra. Sin embargo, es probable que estos beneficios, al igual que los anteriores de esta industria, no estén sujetos a impuestos. Esto se debe al régimen fiscal internacional existente para las aerolíneas y el transporte marítimo, que efectivamente asigna el derecho de gravar los beneficios del transporte marítimo al país de residencia, al tiempo que impide que que los Estados fuente recauden impuestos, es decir, los Estados donde tiene lugar el transporte marítimo. Además, muchos estados de residencia no utilizan eficazmente los derechos de imposición exclusivamente asignados: la mayoría de las empresas de aerolíneas y transporte marítimo son residentes de paraísos fiscales o se benefician de regímenes fiscales preferenciales para el transporte marítimo, evitando así por completo la tributación.

Este trabajo examina la arquitectura fiscal internacional de la industria de aerolíneas y transporte marítimo, codificada en el artículo 8 de los Modelos de Convenios Fiscales de las Naciones Unidas y la OCDE. Se exploran las muchas implicaciones perjudiciales de este régimen, como la privación de importantes ingresos fiscales para los países en desarrollo costeros, la sobrecapacidad en el sector que provoca un aumento de las emisiones de gases de efecto invernadero, la degradación del medioambiente a través de actividades como la sobrepesca y, por último, un campo de juego desequilibrado que dificulta a los países del Sur global desarrollar sus propias flotas mercantes y aerolíneas domésticas.

Dado que muchos países de América Latina y el Caribe son naciones costeras, les interesa impulsar una reforma del régimen fiscal internacional que incluya la tributación de las fuentes de ingresos de aerolíneas y transporte marítimo. El trabajo explora las opciones de reforma disponibles, incluidos los cambios necesarios en el artículo 8, el fin de la exención de transporte marítimo bajo el impuesto mínimo global del Pilar II, el uso de las reglas de asignación de ingresos del Pilar I, posibles medidas unilaterales que pueden ser tomadas por los países y la práctica estatal existente en este sentido que puede facilitar la Cooperación Sur-Sur.

El trabajo concluye con posibles estrategias y opciones para que América Latina y el Caribe impulsen conjuntamente una reforma integral del sistema fiscal internacional para permitir una tributación efectiva de este sector.

Abstract

The cost-of-living crisis around the world, partly triggered due to the Ukraine war, has another culprit –the international shipping industry, which has seen record profits by capitalizing on the supply disruptions caused by the war. However, these profits, like past profits of this industry, are likely to remain untaxed. This is due to the existing international tax regime for airlines and international shipping, which effectively allocates the taxing right on shipping profits to the country of residence while preventing the

source states, i.e., the states where the shipping take place, from levying any tax. Many residence states furthermore do not effectively use the exclusively allocated taxing rights: most airline and shipping companies are residents of tax havens or benefit from lavish preferential shipping tax regimes, thereby escaping taxation entirely.

This paper thus examines the international tax architecture of the airline and shipping industry, codified in article 8 of the UN and OECD Model Tax Conventions. The many harmful implications of this regime are explored, namely deprivation of significant tax revenues for coastal developing countries, overcapacity in the sector which causes increased greenhouse gas emissions, environmental degradation through activities such as overfishing, and lastly an imbalanced playing field which makes it difficult for countries in the Global South to develop their own mercantile fleets and domestic airline industries.

Given that many Latin American and Caribbean countries are coastal nations, it is in their interest to push for a reform of the international tax regime to include source taxation of income from airlines and shipping. The paper explores the reform options available, including changes needed to article 8, the end of the shipping exemption under the global minimum tax of Pillar II, the use of the Pillar I revenue sourcing rules, possible unilateral actions that can be taken by countries, and existing state practice in this regard which can facilitate South-South Cooperation.

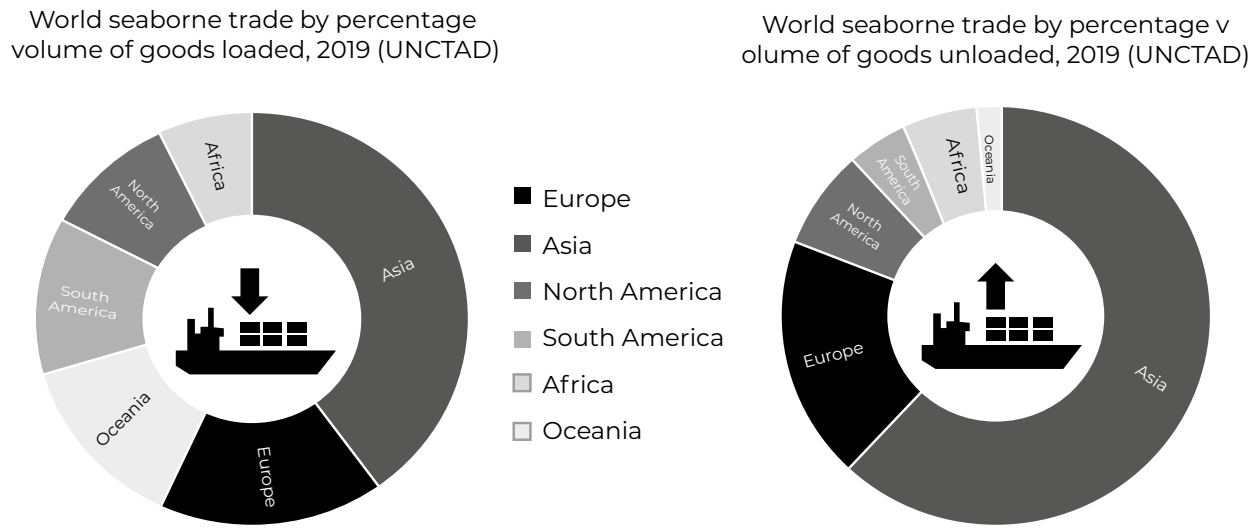
The paper concludes with possible strategies and options for Latin America and the Caribbean to jointly push for a comprehensive reform of the international tax system to enable effective taxation of this sector.

Introduction

Latin America and the Caribbean (LAC) is a region of the world where most countries are coastal countries. There is abundant shipping activity here. Like other regions in the Global South, the LAC region accounts for a significant share of global maritime shipping flows. The prominent role of the LAC region reflects its ever-growing role in the global economy as an exporter of raw materials and semi-finished products, as well as an importer of finished products.

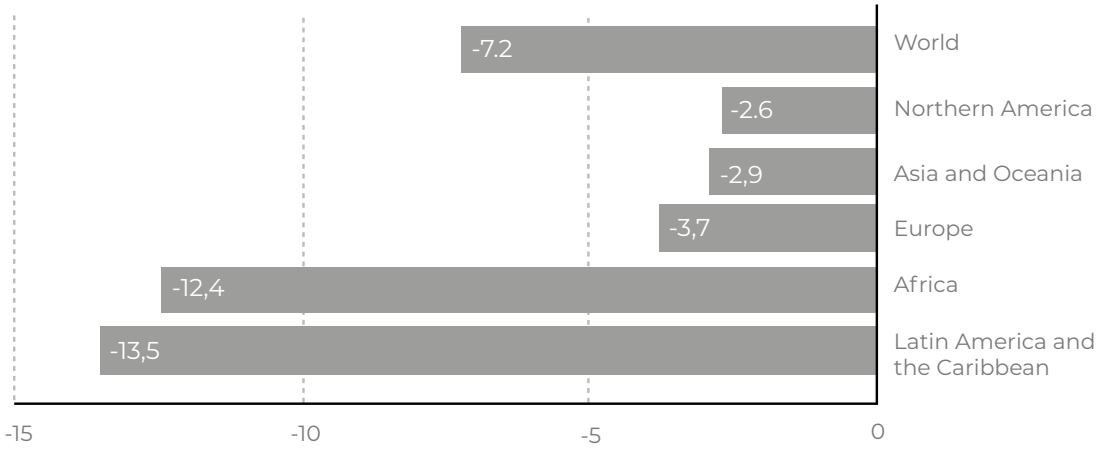
The heavy reliance on shipping could be seen during the COVID-19 pandemic of 2020-2022, when the LAC region was the worst affected in the world in terms of the reduction in port calls.

Figure 1
World seaborne trade by volume loaded and unloaded.



Note. UNCTAD, 2019.

Figure 2
Number of direct calls by region 2020Q3 to 2022Q2 (% change).



Note. UNCTAD, 2022

The importance of international shipping for LAC can also be seen in the fact that it is the world's fourth largest region for world container port throughput after Asia, Europe and not far behind North America.

Figure 3
World container port throughput by region 2020-2021.

(millions of 20-foot equivalent units and annual percentage change)

	20-foot equivalent units		Annual percentage change 2020-2021
	2020	2021	
Asia	506	535	6%
Europe	136	143	5%
North America	67	77	14%
Latin America and the Caribbean	49	55	11%
Africa	30	33	10%
Oceania	13	14	8%
World total	802	857	7%

Note. UNCTAD, 2022

Regarding the ownership of the mercantile fleet carrying out global maritime transport, the situation is markedly different. Fleet ownership is concentrated in a handful of countries, mostly OECD member states and countries in Asia like China and Singapore. The top-10 of *fleet ownership* countries accounts for about 70% of global fleet ownership[1]. The LAC region's ownership share of the global fleet is less than 1%[2].

In other words, while the LAC region generates a significant share of global maritime trade activity, the ownership and the exploitation of the transport is situated elsewhere. This incongruence has important consequences for the region's potential to tax profits from international transport. For nearly a century, countries have adhered to the general rule that international shipping profits are taxable only in the residence state, i.e., the state where the ownership and enterprise exploiting the vessel is located, and that the source state, i.e., the state where the goods are loaded or unloaded, must yield its tax claim. This rule is embedded in article 8 of the OECD Model Tax Convention and figures in nearly all bilateral tax treaties. Fleet owner states furthermore grant lavish subsidies to their shipping companies in the form of tonnage tax regime. These regimes drastically reduce the effective rates on the global shipping industry as compared to most other industries[3].

There is a solution to this conundrum of the source state not being allowed to tax while the residence state refuses to tax at a decent level, and it figures in article 8 (alternative B) of the UN Model Tax Convention. This model rule gives partial taxing rights on shipping profits to the source state. The rule is however underexplored in the doctrine and underused in treaty practice, especially in the treaties signed by the LAC region countries. In this chapter, first an analysis is made of the history and policy behind article 8 (alternative B). In the next section, the global tax treaty practice on source taxation of shipping profits is explored. Unlike the LAC region, there are regions on the global South that have successfully embraced the source taxation alternative. Recommendations are made as to how LAC countries can adopt a similar policy.

LAC countries, like all developing countries, are in extreme need of tax revenues to finance the SDGs. The very high debt levels in the region add another imperative for enhancing tax collection. Reclaiming source state tax sovereignty and ending the *de facto* nearly tax-exempt status of the international shipping industry is a low hanging fruit in this regard, but only if LAC countries act in a concerted way.

History

The source state–residence state conundrum

The main objective of bilateral tax treaties is to avoid double taxation. To achieve this objective, the treaties provide for a set of rules that determine which country must yield in case of competing tax claims on the same income. Competing claims exist if both countries use their tax sovereignty to determine that the same income has a nexus to its respective jurisdiction. Typically, under the domestic tax law of a country acting as a *residence state*, all (worldwide) income derived by a resident taxpayer –individual or company– is subject to income tax. Under the domestic law of a state acting as a *source state*, certain items of income derived by non-residents is taxable if the has a certain nexus to the territory of that state. Such a nexus can be the physical location of the income generating activity or the location of the payor of the income.

With regard to international shipping income, competing claims exist if a state subjects its resident shipping and airline companies to tax on global profits and, at the same time, the source country –the country where the loading/unloading of the goods or passengers took place or where the payor of the fees for the transport is located– taxes the same income because of its nexus to that state's territory. Given that under the most domestic income tax systems both worldwide income derived from resident shipping and airline companies as well as locally sourced shipping income by non-resident shipping companies is subject to tax, competing tax claims are the rule rather than the exception.

Historically, there have been two venues to deal with competing tax claims on shipping income. First, countries have been incorporating exemptions of source taxation on non-resident ship-

ping income in their domestic tax law on the condition of reciprocity. Reciprocal exemption implies that if a country obtains assurances from the other state that its own shipping companies are exempt from source tax in said state, it will do the same for profits derived from its territory by shipping companies' resident in said other state. Some countries have been formalizing these reciprocal exemptions in single-issue bilateral tax treaties or *exchange of diplomatic* notes that confirm the reciprocal exemption of airline and/or maritime shipping profits derived by residents of the other state[4].

Reciprocal exemptions and single-issue treaties make sense if the shipping income flows across the border between the countries are symmetrical. If the flows are asymmetrical, and one country acts on aggregate more as a *source country* than a *residence country*, such country has little (revenue) incentive to unilaterally exempt non-resident shipping companies. In such case, it might make more sense for the countries to try and bundle the issue in a comprehensive tax treaty that deals with competing tax claims on all types of income and not just international shipping income. A comprehensive tax treaty is the result of a negotiation process and reflects a balance of benefits for the treaty countries that is agreed to when the treaty is negotiated. A country might be willing to sacrifice its source state tax sovereignty on non-resident shipping income if this concession is balanced with concessions by the other country on other issues dealt with in the treaty.

A crucial tool in these negotiations are the model tax treaties. Models have been developed by international organizations like the OECD and the UN to serve as a *baseline* for tax treaty negotiations. The *taxing right allocation rules* contained in the model provide solutions to deal with conflicting tax claims. However, any solution proposed has revenue redistribution consequences because the proposed rule essentially requires one state –the source state or the residence state– to restrain its national sovereignty to subject certain income to tax. Countries are free to deviate from the model solutions in their bilateral negotiations, but the models (and especially the OECD Model) do provide important *baseline* rules for these negotiations. A country requesting to deviate from the baseline will most likely be pressed to provide concessions. As such, those countries whose national interests are closely aligned with the baseline solutions in the model have a natural advantage in tax treaty negotiations. For the OECD Model, these countries are the OECD member states which tend to be high-income countries and on the receiving end of aggregate income streams.

A country, like most developing countries, whose national interests are not reflected in the OECD Model baseline has a few options. First, it can step away from the negotiation table and refuse to sign a tax treaty[5]. Alternatively, it can adopt the baseline solution of the model at expense of its national revenue interests, assuming this sacrifice will provide other benefits inside or outside the tax treaty (like increased investment or economic activity). The country can also request a deviation from the baseline solution, which will come with the granting other concessions in return. Finally, the country can join similarly situated countries and try to reshape the negotiation baseline in the model. This last strategy is, broadly speaking, what happened with the base line rule for international shipping profits under OECD Model and the subsequent development of an alternative rule in the UN Model.

The OECD Model: the baseline of exclusive residence state taxation

The OECD Model Tax Convention provides that profits from international shipping are exclusively taxable in the residence state of the shipping enterprise. Source states must yield their sovereign claim to tax shipping income that satisfies the domestic tax law nexus to their territories.

This rule, enshrined in article 8(1) of the OECD Model, is often said to be one of the most stable rules in tax treaty practice because it figures in nearly all the 3,000 tax treaties currently in force today. article 8 of the OECD Model provides that: "Profits of an enterprise of a Contracting state from the operation of ships or aircraft in international traffic shall be taxable only in that state" (OECD, 2017). *International traffic* is defined in article 3(1) of the OECD Model as "any transport by a ship or aircraft except when the ship or aircraft is operated solely between places in a Contracting state and the enterprise that operates the ship or aircraft is not an enterprise of that

state" (OECD, 2017).

Like many rules in the OECD Model in its current version, the apparent global consensus that underlies it is a century old and based on an agreement struck by policymakers at the level of the League of Nations in the 1920's. In the discussions leading up to the release of the first *draft bilateral convention for the prevention of double taxation*, the Technical Experts of the League of Nations determined that exclusive residence state taxation of international shipping profits was the preferred rule for two reasons, namely reciprocity and enforceability.

The Experts noted, first, that contemporary state practice showed that several countries were granting domestic law exemptions of source taxation on non-resident shipping profits subject to reciprocity. Especially for states with a sizeable domestic shipping industry at the time –like the United States, United Kingdom, or France– this seemed to be common practice. The League of Nations models, and later the OECD Model, institutionalized this practice.

Secondly, and more importantly, the Technical Experts of the League of Nations noted that the alternative solution of applying the so-called permanent establishment (PE) threshold on business profits was unpractical in case these profits were derived from international shipping. Under the PE rule, business profits are only taxable in the source state if the economic activity in said state meets a certain threshold, for instance if the taxpayer maintains a fixed place of business in the source state. Theoretically, in case the activities of a shipping company in the source state went beyond the mere calling of its vessels in the local ports, the PE threshold is met if the company disposes of facilities to load and unload ships. It was however concluded that: "in view of the very particular nature of their activities and of the difficulty of apportioning their profits, particularly in the case of companies operating in a number of countries, the experts admit an exception to this [PE] principle" (League of Nations, 1925).

The resolution in 1925 by the Technical Experts –all practical thinkers, appointed national government officials– contrasted sharply with the preceding findings in the League of Nations first report on the matter, namely the report by the so-called *Four Economists*, published in 1923 (League of Nations, 1923). In their seminal theoretical study of the phenomenon of international double taxation, the Four Economists analyzed the nexus of different type of cross-border income to countries based on four criteria, namely *origin, situs, enforceability*, and *domicile* (*i.e.* residence) of the taxpayer.

Regarding the nexus of international shipping income, the Four Economists observed that:

> If the vessels ply the high seas, there is no particular country to which the origin of the yield can be ascribed. If, however, they ply navigable waters which traverse different countries, we have, as in several of the preceding categories, not one, but several, places of origin, [...]. Moreover, in the case of ocean liners there are apt to be in several countries large and extensive docks and appurtenant property which materially contribute to the profitable operation of the vessels.

They continued by noting that:

> In as much as the economic yield of vessels depends partly on the seamanship of the captain and to a larger degree upon the business sagacity of the owner, the element of personal management becomes of importance, and that this management may be carried on in the one or the other country. But, as in the case of immovables, the controlling consideration is the existence of the traffic: origin therefore re-enforces domicile (the home of the owner) only to a partial extent. (League of Nations, 1923, p. 33)

They added that the *domicile* of the shipowner had a subsidiary importance compared to the other factors, i.e., it may only reinforce the other factors. In contrast, *enforceability* was closely related to the country in which the ship was registered (League of Nations, 1923, p. 33). The Four Economists concluded that when a ship crosses different countries' territories, the *origin* of the income becomes more important than the other elements, however *registry* is the chief consideration because of enforceability reasons. Nevertheless, "for purposes of income tax [...]

the other country, where expensive docks and shipping offices are found, might reasonably prefer a claim to a part of the earnings" (League of Nations, p. 33).

Similar opinions were raised at the time during the International Shipping Conference of 1926. The Conference attendants took the view that double taxation of international shipping profits had to be dealt with in a comprehensive tax treaty so that the one-sided exclusive allocation of taxing rights to the residence state could be balanced by other benefits in favor of the source state[6].

The rest is history. The baseline rule of exclusive residence taxation and implied abdication of taxing rights on shipping profits by the source state was endorsed in the first League of Nations Draft Model (1927) and subsequent Mexico Model (1943) and London Model (1946). The OECD Draft (1963) and OECD Model (1977 and subsequent updates) adopted the criterion of exclusive taxation in the state where the place of effective management (PoEM) of the international transport enterprise was established. In the 2014 update of the OECD Model, the PoEM criterion was replaced with the residence criterion, allegedly to better reflect current treaty practice of most OECD Member countries and non-OECD countries (OECD, 2013).

The baseline of exclusive residence state taxation has however been a permanent fixture of the OECD Model since its inception. Reference is often made to the fact that this rule is the result of a century old consensus. As shown, at the inception of the consensus, the rule came with a double *caveat*: first, exclusive residence state taxation of shipping profits is preferable because and only to the extent source taxation is not enforceable. A century of technological developments has altered this reality (Ahmed, 2020). Second, exclusive residence state taxation of shipping profits is fundamentally at odds with an equitable allocation of taxing rights on said income between source and residence states and the upholding the rule necessitates residence states to compensate source states elsewhere. This aspect of exclusive residence state taxation of shipping profits has completely faded in the OECD Model and in current tax treaty practice.

The UN Model: faring an alternative course of source taxation

History of the UN Model (1980) article 8 alternative B.

After the disintegration of the League of Nations in 1946, many of its components were relocated into the new United Nations. This included the establishment of a United Nations Fiscal Commission. Geopolitical tensions on both the North-South (developed v. developing countries) and East-West (culminating in the Cold War) fronts meant that the UN Fiscal Commission was wound up in 1954 without having achieved any progress beyond the work of the League of Nations. Shortly after, the Organization for European Economic Co-operation (OEEC) (followed by its successor body the OECD when the US and Canada joined) stepped in.

The UN Fiscal Commission did discuss the treatment of air transport under the League of Nations double tax convention models. An expert report commissioned in 1950 concluded that there was a lack of evidence that justified special tax regime (i.e., exclusive residence state taxation) for airline transport profits. The United States and other developed countries heavily favored the exemption of air transport at source and objected to the report. The developing countries, who had no airlines but supplied traffic of persons and goods to other countries' airlines, supported the findings of the report. The resulting deadlock prevented the adoption of a resolution at ECOSOC level (Avery Jones, 2023, p. 631).

A decade would pass before the international tax agenda would return to the United Nations' scrutiny. In its resolution of 4 August 1967, the UN ECOSOC expressed its belief that:

> Tax treaties between developed and developing countries can serve to promote the flow of investment useful to the economic development in the latter, especially if the treaties provide for favourable tax treatment to such investments on the part of the countries of origin. (United Nations, 1969, par. 1-3)

Pursuant to the Resolution the Ad Hoc Group of Experts on Tax Treaties between Developed and

Developing Countries (*the group of experts)* was set up, composed of experts and administrators nominated by governments from developed and developing countries, but acting in a personal capacity.

In their First Report (1969), the group of experts highlighted that several members from developed countries supported the position taken in article 8 of the OECD Model. Several members from developing countries were not in favor of exclusive residence state taxation, which would de facto imply that they would not derive any tax revenue from international shipping. They asserted that their countries were not in a position to forgo even limited revenue from taxing foreign shipping enterprises while their own shipping industries were not more fully developed. It was recognized that there were considerable difficulties in determining a taxable profit in this situation. Various methods were proposed, one proposal being the source country to agree to a 50% reduction of tax levied on foreign shipping profits. Issues like the impact of accelerated depreciation, tax deductions and government subsidies in the residence state on tax levied in the source state were discussed (United Nations, 1969, par. 65-68).

In the Third Report (1972), the positions of the developed and developing countries were once more laid out, with the former restating the OECD point of view, and the latter reiterated that, from the standpoint of a developing country, the mutual exemption of shipping profits in the source state appeared to represent a somewhat outdated approach. The problem should not be looked at from the point of a special interest group or of traditional methods but should be resolved in a manner that would give due consideration to the needs of developing countries (United Nations, 1972, par. 13-15). The Members from a number of those countries added that article 8 of the OECD Model was in fact a deterrent for developing countries to sign tax treaties, as it worked exclusively in favor of developed countries. As the four economists had warned in 1923, it was mentioned once again that consideration had to be given to the very substantial expenditure that developing countries incurred in the construction of airports and harbor facilities. The Experts representing developing country experts therefore conclude that:

> It would appear more reasonable to place the geographical source of profits from international transportation at the place where passengers or freight were booked. Considering those problems, an apportionment of shipping profits on the basis of turnover would appear to provide a fair solution. (United Nations, 1972, par. 16)

Two different problem areas were identified –determination of shipping profits and allocation of these profits to the various countries concerned. With respect to allocation of profits, suggestions were made both for a formula-based approach and for a unilateral attribution of profits like the attribution of profits to a PE. Several experts from both developed and developing countries were in favor of a formula-based approach, because it would prevent double (or multiple) taxation of profits (United Nations, 1972, par. 21). Most members agreed that the adoption of a formula under which net profit, as determined by the residence country, would be multiplied by the ratio of gross receipts from outgoing freight originating in the country to gross receipts on a global basis (United Nations, 1972, par. 23). One expert from a developed country observed that the question remained regarding the portion of income that should be allocated to the home country of the enterprise: “a shipping enterprise domiciled in a particular country might well conduct all its activities outside that country, with the result that nothing would be left for the latter to tax, although it contributed capital and management to the enterprise” (United Nations, 1972, par. 27). Developing country members pointed out that an overall net profit figure computed under the rule of the home country might not always be acceptable in source countries, especially where the home country provided special depreciation, investment allowances or other benefits.

The technical experts also discussed the source rule used for income to be allocated to a source country. It was believed that source countries should be able to tax shipping income if two conditions were fulfilled: 1. There was a permanent activity of some kind, such as a PE or a permanent representative, as distinguished from merely occasional contacts in the source country; and 2. There was a sufficient intensity of connection between the enterprise and the source country. “A ship might visit a country

repeatedly or it might call only once. But if the single call was a planned operation, the profits from the voyage should be taxable" (United Nations, 1972, par. 32).

The attribution of profits to the source state would occur as follows. The source state would be entitled to tax profits from outbound transport income –income from freight leaving its territory. The experts noted that a shipping enterprise that considered itself too heavily taxed under this method would be free to invoke competent authority procedures under the tax treaties. Special rules were to be devised to prevent shipping enterprise being taxed more excessively in source countries than ordinary business enterprises were under the PE rule (United Nations, 1972, par. 29).

Regarding tax levied in the source state, it was observed that certain developing countries had reduced their tax on shipping profits to one-half under tax treaties. It was believed that "through such a concession, the cost of capital and management services provided by the home country was recognized" (United Nations, 1972, par. 33). Albeit not reflected in the text of the Model provision, it was generally agreed that if source country tax was allowed, the focus should be on taxing outgoing freight, not inbound freight. If both were taxed in the source state, it might be advisable to have a different rate of reduction of domestic tax in that state –a lower deduction for outbound transport and a higher deduction for inbound transport. These nuances are not taken on board in the text of the Model provision (and the Commentary), which simply provides that the tax in the source state is to be reduced by a percentage to be established through bilateral negotiations.

The technical experts discussed a report from a special advisor who suggested that two approaches should be considered. One approach would be exclusive residence state taxation, endorsed in the OECD Model. If that rule were to be abandoned, the question arose whether the taxation of shipping income should be governed by the PE rule, or whether specific rules for the shipping industry were necessary (United Nations, 1972, par. 39).

The work of the Ad Hoc Group of Experts would eventually culminate in the adoption of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries in 1979 (United Nations, 1979). The Manual presents a set of guidelines based on the technical experts' discussions on issues arising in connection with the negotiation of tax treaties between developed and developing countries (United Nations, 1979, p. 5). Guideline 8A duplicated the text of article 8 of the OECD Model (1977). Guideline 8B provides for the text of the provision which would come to be known as article 8 (alternative B) of the UN Model (1980). The observations expressed by the experts in the Manual were incorporated in the Commentary on article 8 (alternative B) of the UN Model (1980). Both model provision and Commentary have remained unaltered since.

Article 8 (alternative B) of the UN Model and Commentary: schematic analysis

Paragraphs 1 and 2 of article 8 alternative B of the UN Model (2017) read as follows:

> 1. Profits of an enterprise of a Contracting state from the operation of aircraft in international traffic shall be taxable only in that state.
>
> 2. Profits of an enterprise of a Contracting state from the operation of ships in international traffic shall be taxable only in that state unless the shipping activities arising from such operation in the other Contracting state are more than casual. If such activities are more than casual, such profits may be taxed in that other state. The profits to be taxed in that other state shall be determined on the basis of an appropriate allocation of the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by ___ per cent. (The percentage is to be established through bilateral negotiations.)

The most relevant observations in the Commentary on article 8 of the UN Model are the following (United Nations, 2017):

- Article 8 (alternative A)/article 8 of the OECD Model is predicated, inter alia, on the premise

that exemption in the source states ensures that enterprises will not be taxed in foreign countries if their overall operations turn out to be unprofitable.

· Article 8 (alternative B) was inspired by certain countries asserting that they were not able to forgo even the limited revenue to be derived from taxing foreign shipping as long as their own shipping industries were not more fully developed.

· Article 8 (alternative B) grants source state taxing rights on income from both regular or frequent shipping visits and irregular or isolated visits, provided the latter were planned and not merely fortuitous. 'More than casual' means a scheduled or planned visit of a ship to a particular country to pick up freight or passengers.

· Some countries did not agree on the inclusion of the 'more than casual' threshold in article 8 (alternative B), and other countries wished to extend alternative B to cover profits from international air transport, considering the limited size of their domestic airline industry.

· The determination of the profits taxable in the source state should be based on determination of the overall profits in the state of residence (or PoEM state) of the shipping enterprise, with or without considering deductions of special allowances, incentives or subsidies granted in the latter state, and losses. The residence state issues source state taxable profit certificates in this regard.

· The apportionment of profits should preferably be based on the factor of outgoing freight receipts.

· The source state accepts a reduction in tax due by application of its domestic tax law on the share of profits allocated to it. The reduction reflects the managerial and capital inputs originating in the country of residence.

Schematically, article 8 (alternative B) of the UN Model has the following components:

1. Income covered

- Profits from the operation of ship in international traffic by a resident enterprise
- Alternatively, also profits from operation of aircraft in international traffic by a resident enterprise.
- International traffic defined as any transport, except if operated solely between places in other state.

2. Residence state taxing rights

- Residual taxing rights for resident enterprise/enterprise with PoEM in the state.
- Provides relief for double taxation (credit or exemption)

3. Source state taxing rights

- Shared taxing rights for income covered from activities that are *more than casual*.
- Alternatively, shared taxing rights for any covered income.
- Sourcing rule: i*ncome from the operation of international traffic in the source state*.

4. Method of taxation (in source state)

- Taxation on gross or on net basis.
- Reduction of domestic tax due by an agreed percentage, (possibly distinguishing inbound and outbound transport).

In section 5, there is an analysis of the current global tax treaty practice of article 8 (alternative B) of the UN Model with emphasis of the country practice regarding the separate components of the provision. In the final section, the authors prove recommendations for a possible rewrite of the model article based on treaty practice with an eye on wider global adoption, especially in the LAC region.

Intersection with the OECD/BEPS IF Two-Pillar Solution

Intersection with Pillar I

Pillar I was developed by the OECD/Inclusive Framework (IF) as part of the Two-Pillar Solution for addressing the tax challenges arising from the digitalization of the economy. Pillar I applies to the biggest and most profitable MNEs and re-allocates part of their profit (amount A) to the countries where they sell their products and provide their services. Through this re-allocation, the OECD aims to solve the problem that MNE can earn significant profits in a market without paying much tax there (OECD, 2022). This is the case for digital services companies, but also for international shipping companies, as explained in the first section.

Pillar I is designed as having a comprehensive scope, meaning that it rules apply profits derived by MNEs from all types of goods and services provided to third parties. As such, amount A of Pillar I includes international shipping in scope. The implication of this is an in-principle acknowledgement that market jurisdictions, which are defined as the jurisdictions of final consumption of goods or services, have source taxing rights on income derived from the provision of international shipping services. This is a major step forward for developing countries. As explained in the second section, until the development of Pillar I, the OECD has consistently upheld the view in the OECD Model Tax Convention that there was no reasonable nexus between shipping income and the source states from which this income was derived.

The amount A draft model rules for nexus and revenue sourcing for determining how market jurisdictions can source international shipping income are reproduced below:

> Revenues derived from the provision of Passenger Non-air Transport Services are treated as arising in the Jurisdiction of the Place of Destination using the Passenger Non-air Transport Allocation Key.
>
> Half of the Revenues derived from the provision of Cargo Non-air Transport Services are treated as arising in the Jurisdiction of the Place of Origin and half in the Jurisdiction of the Place of Destination, using the Cargo Non-air Transport Allocation Key. (OECD, 2022, p. 19)

Thus, under amount A revenue from transporting passengers is to be entirely sourced to the place of destination while for cargo transport this is to be split between the origin and destination. This 50/50 split has been criticized by the shipping industry as being overly complicated. Instead, they argued amount A should be allocated fully to the destination country. Given that LAC countries and other countries in the global South account for more outbound freight than inbound freight (figure 1), this is a controversial suggestion. For countries in the global South, it would be more beneficial to allocate amount A in function of origin only, given that this would avoid making the import of goods more expensive. This would also be in line with the tax policy of those countries that do tax international shipping income at source, which is to levy tax only on outbound transport (Michel and Falcao, 2022, p. 655). Arguably, the 50/50 rule is an acceptable compromise.

Pillar I also comes with a few downsides and concerns. First, it is as yet unclear how many shipping companies will be covered under the amount A thresholds. For example, amount A applies to MNEs with revenues exceeding EUR 20 billion. This threshold is designed to catch the few major providers of digital services. The international shipping industry is far less concentrated with the bulk of the industry operating under the EUR 20 billion threshold.

Secondly, it is also not very clear at this stage whether a country's commitment to Pillar I would prevent it from adopting in the future a policy to tax non-resident shipping income at source[7], or how it will impact tax treaty negotiations on the matter[8].

Finally, it is also not clear at this point whether Pillar I will see the light of day. The adoption of Pillar I requires signing and ratification of jurisdictions accounting for at least 60% of the ultimate parent entities of in-scope MNEs. This means that Pillar I stands or falls by the ratification of the underlying multilateral agreement by the United States, which remains an uncertainty (OECD, 2023).

Nevertheless, as a matter of principle it is a great step forward and can boost reforms to article 8

of the UN Model Tax Convention. This, in turn, can revitalize the model baseline and potentially bolster bilateral tax treaty negotiations in favor of source taxation of shipping income.

Intersection with Pillar II

Under Pillar II, a much larger group of MNEs (any company with over EUR 750 million of annual revenue) would now be subject to a global minimum corporate tax. Under the Pillar II GloBE regime, MNEs profits in a given jurisdiction subject to an effective tax rate lower than the minimum rate, will still be taxed at a minimum rate of 15%. The top-up is ensured either by an optional qualified domestic minimum top-up tax (QDMTT) in the jurisdiction where the profits are realized or by extra-territorial top-up tax rules on the undertaxed income in the parent jurisdiction (the so-called Income Inclusion Rules, IRR) or (in last resort) other jurisdictions where the MNE has taxable presence (via the so-called Undertaxed Payments Rules, UTPR) (OECD, 2023).

Given that many international shipping companies own subsidiaries in source states (for example to own and exploit port facilities), the application of the GloBE would in theory mean that these states would be able to levy a top-up tax if profits from international shipping are undertaxed in the ship owner state (for instance, because these profits are subject to a tonnage tax regime). However, the shipowner states and the international shipping industry have managed to carve out *international shipping income* from the scope of the global minimum tax (OECD, 2021). Except for the reference to article 8 of the OECD Model and the widespread use of tonnage tax systems, there is no true rationale given for the carve-out, and there probably is none from a fairness or neutrality perspective (OECD, 2022).

Additional policy perspectives on source taxation of international transport income

Both developed and developing countries have simple and diametrically opposite drivers to pursue their respective policies as both aspire to maximize their tax revenues from international shipping business. However, it would be advisable to appraise the aspiration for maximum revenue from shipping on the touchstone of some normative principles. It is a universally accepted principle that “any income derived from the activities carried on within a country is sourced in that country” (Rohatgi, 2005, p. 222). The public international law’s canonical position is that “every country has the primary right to tax the income arising or derived from an economic attachment or territorial link with that country (i.e., domestic source income)”, and therefore “a non-resident person is liable to pay a tax for the privilege of earning the income from a source in the host country” (Rohatgi, 2005, p. 222).

The source state’s taxing right being so unequivocal the United Nations’ abdication on this account can be judged based on five principles that determine allocation of taxing rights between states (UN, 2011). One, taxation in the source state “should not be so high as to discourage investment” (UN, 2011). Two, the “taxation of income from foreign capital should take into account expenses allocable to the earnings of the income so that such income is taxed on a net basis”. Three, the source state while asserting its territorial taxation ought to “take into account the appropriateness of the sharing of revenue with the country providing the capital” (UN, 2011). Four, that there exists “an economic connection between a particular item of income and the country as a taxing jurisdiction” (Rohatgi, 2005, p. 222). Five, that the source state must be in a position “to identify the income and its recipient, to quantify it and to enforce its taxing rights” (Rohatgi, 2005, p. 222).

It has also been averred that source rules provide connecting factors in that they help identify as to where a certain chunk of income arises, and which jurisdiction has a predominant taxing right over it (Rohatgi, 2005, p. 222). Now, one can easily reach the conclusion that on all five counts, income from international traffic cannot be shifted out of the source state. In fact, first three principles being normative in nature it is in developing countries’ own interest to implement them to continue deriving benefits of economic integration with developed countries. The League of Nations, which originally surrendered the source rule had defended its decision as it would “facilitate the operation of international transport enterprises”, and that it would avoid “numerous difficulties which experience

has shown to be involved in the taxation of profits from international navigation outside the home-country of the operating enterprise" (League of Nations, 1946). Interestingly, this is exactly the OECD position on the matter. It has been remarked that the

> OECD tax treaty approach for international transport income is premised on the view that the income will be equally balanced between the two countries, so that it is simpler from an administrative point of view to confine taxation to the country of residence of the company carrying out the international transport. (Vann, 1988, p. 21)

Developing countries having tied themselves into an extensive bilateral tax treaty network through which they have bargained away source taxation rights, are now feeling the heat, at least, on five counts. First, the definition of *profits* under article 8 is constantly expanding whereby taxing rights on more and more genuine economic activities taking place on developing countries' soil are getting shifted to the capital-owning residence states (Ahmed, 2020). Although primarily it covered "the profits directly obtained by an enterprise from the transportation of passengers or cargo by ships or aircraft that it operates in international traffic," yet, over time, it has expanded into "shipping and air transport enterprises invariably carry(ing) on a large variety of activities to permit, facilitate or support their international operations" (Ahmed, 2020,). The definition of the word *ship* itself has widened in due course to cover "any vessel used for water navigation" (Ahmed, 2020).

Over time, the scope of article 8 has broadened to envelop "profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ships or aircraft in international traffic as long as they are *ancillary* to such operation"[9] –including but not limited to profits derived by an enterprise from 1. Leasing of ships or aircrafts on charter; 2. Sale of tickets or booking of load on behalf of other enterprises (Khan, 2000, p. 175); 3. Operation of a link passenger transport service; 4. Marketing, advertising, or commercial publicity; 5, Transportation of goods by trucks to and from a port or airport to a depot (p. 175); 6. Containerization as well as "from detention charges for the late return of containers"[10] 7. Operation of boats and vessels "engaged in fishing, dredging or hauling activities on the high seas"; (OECD); 8. Debt that is earned as a by-product of the main or ancillary business operations; 9. Provision of technical expertise (engineers) and goods (spare-parts) to other enterprises; and 10. Maintenance services extended to other enterprises under a "pool agreement" (Ahmed, 2020). In the same vein, the UN Model vests taxing rights on capital gains arising out of "the alienation of ships or aircraft operation in international traffic, boats engaged in inland waterways transport or moveable property pertaining to the operation of such ships, aircrafts or boats," in the state of effective management rendering costs of the source rule surrender further expensive for the source state (Ahmed, 2020).

The allocation of taxing rights to developed countries on international traffic on incomes earned in developing countries, adversely affects the latter's balance of payments and foreign exchange reserves rather severely. The developing countries which continually face balance of payments crisis hardly afford to let go of even a few millions of dollars in soft outflow; this causes serious haemorrhage in their hard-earned meagre foreign exchange reserves. The source rule surrender may have stunted maritime and aviation industries of the developing countries by providing tax-free opportunities to financially stronger and technologically advanced and equipped foreign lines. Giving away of the source taxation rights may have had implications for the defence of many developing countries as their own maritime and aviation sectors –so very important to the integrity and security of a state– could not develop into stable and reliable means of communications. Stunted shipping and airline industries hurt developing nations in terms of their lost pride that is generally associated with national flag carriers.

Treaty practice across the Global South

9 Commentary on the Model Tax Convention on Income & on Capital, 175.

10 OECD, Commentary on the Model Tax Convention on Income & on Capital, 176.

General observations

A few preliminary observations are due before delving into the tax treaty practice of article 8 (alternative B) of the UN Model.

First, unlike other income allocation rules, source taxation of international maritime shipping is only for certain countries, namely those countries that have sea access. For land-locked countries, there is no point in obtaining source state taxing rights on maritime shipping profits.

Secondly, also from a residence state perspective, certain tax treaties are more relevant than others. Mercantile fleet ownership is concentrated in a handful of shipowner states, which makes the tax treaties signed with those countries more relevant than with countries without significant shipowner presence. Unlike other types of income, fleet ownership is not mobile. Shipping companies benefit from lavish tax benefits in shipowner states, mostly in the form of tonnage tax systems. The purpose of tonnage tax systems is to fixate the ownership and exploitation of vessels in the shipowner states. Unlike in the case of other types of income like royalties or fees for technical services, shipping companies cannot escape source taxation if provided in a treaty with the shipowner state by shifting ownership or exploitation to other group companies. Shifting these activities would mean losing the benefit of tonnage tax and other exemptions. So much more than for other types of income, certain tax treaties –those signed with shipowner countries– matter more than other tax treaties.

Thirdly, one could argue that a source country without a tax treaty is better off than having its sovereignty limited by a tax treaty that includes article 8 of the OECD Model or article 8 (alternative A) of the UN Model. In reality, this is not necessarily the case. The purpose of a tax treaty is not only to restrict the sovereignty of the source state. It also serves to compel the residence state to provide for relief for double taxation for those types of income that can be taxed under the tax treaty in the source state. Without a treaty in place, relief for source country tax depends on the unilateral relief for double taxation in the residence state and these are not always beneficial. Without proper relief for double taxation, enterprises face double burdens, which is not optimal and which risks distorting economic activity. Ideally, source countries safeguard the benefit to levy tax on non-resident shipping profits in their tax treaties, while at the same time obligate residence countries to provide relief for double taxation. For this to happen, countries need to insert a clause similar to article 8 (alternative B) in their tax treaties.

Below an overview is provided of treaty practice on source taxation of shipping profits across the countries in the Global South.

Latin America and the Caribbean

Source taxation of international shipping profits currently figures in only a handful of tax treaties signed by countries in Latin America and the Caribbean, equaling a total inclusion rate of about 3%[11]. Brazil, Chile, Mexico, and Uruguay have signed one or two tax treaties with source taxation of maritime shipping profits, but these treaties are anomalies in relation to the countries' tax policy. Rather, these treaties reflect the standard policy of the treaty partner countries, all countries located in Southeast Asia (see below)[12].

One interesting exception is the Dominican Republic. This island state in the Caribbean has only two tax treaties in force currently, the first one signed with Canada in 1976 and the second one signed with Spain in 2011. Interestingly, both tax treaties profit for source state taxing rights not just on maritime shipping profits but also on profits from air transport. The tax charged in the source country cannot exceed 2.5% (in the treaty with Spain) or 4% (in the treaty with Canada) of the gross income derived from sources in that state and can in any case not be more than "the lowest rate on such profits under an agreement or convention with a third state"[13]. Under do-

11 This percentage is based on the Tax Treaty Explorer's analysis of a total of 211 tax treaties signed by countries in the region and currently in force (Hearson et al. 2023).

12 See, for example, Brazil-Philippines Tax Treaty (1983), Chile-Thailand Tax Treaty (2006) and Uruguay-Vietnam Tax Treaty (2003).

13 See article 8(2) of the Dominican Republic-Canada Tax Treaty (1976) and the Dominican Republic-Spain Tax Treaty (1976). The most-favoured-nation (MFN) clause is fulfilled in relation to Canada, given that in the treaty with Spain, the Dominican Republic accepted a more favorable rate than 4%. It is uncertain whether the clause is fulfilled if the Dominican Republic would sign a tax treaty in the future that would altogether omit source taxation of shipping profits in line

mestic tax law, foreign transportation companies operating from the Dominican Republic to other countries are presumed to earn a net profit equivalent to 10% of their gross receipts from passenger and cargo charges. The corporate income tax is assessed at a flat rate of 27% (Corral, 2023).

Currently, no country in Latin America and the Caribbean has a tax treaty in force with one of the major shipowner states that provide for source taxation of maritime shipping profits.

Africa and the Middle East

General overview

Source state tax rights on maritime shipping income are currently included in about 7% of the tax treaties signed by countries in Sub-Saharan Africa, North Africa, and the Middle East. This percentage goes up to about 9% if the treaties by the landlocked countries in the region are excluded. None of the treaties provide for source taxation rights on profits from international air transport profits[14].

On aggregate level, source taxation of maritime shipping is not standard treaty practice in the region. This does not mean that there are no individual countries in Africa that have been able to successfully embrace source taxation of shipping income in their tax treaties, or better: have been able to negotiate this rule into their tax treaties. These countries are Tanzania, Kenya, and Nigeria.

These three African countries with a vested tax treaty policy to allow source taxation of shipping

with article 8 of the OECD Model. Strictly speaking, an omission is not equal to the granting of a lower rate.

14 These percentages are based on the Tax Treaty Explorer's analysis of a total of 756 tax treaties signed by countries in the region and currently in force (Hearson et al., 2023).

Figure 4

South American and Caribbean Bilateral tax treaties (pink line indicates no source state taxing rights on international maritime shipping profits, green line indicates source state taxing rights).

Note. Based in ICTD's Tax Treaty Explorer

profits have been reasonably successful in including this policy in at least a few tax treaties with important shipowner countries.

Tanzania

Tanzania has a limited tax treaty network that consists of only nine tax treaties currently in force, mostly with OECD member countries but also with South Africa and with India, which was signed in 2011 and is the most recent Tanzanian tax treaty. All Tanzanian tax treaties include source taxation on international maritime shipping income. In most of these treaties, an de minimis activity threshold is not included and source taxation is allowed on profits "derived from the operation of ships in international traffic in the state". Such profits are "deemed to be an amount not exceeding five per cent of the full amount received by the enterprise on account of the carriage of passengers or freight embarked in the state" and the tax levied "shall not exceed fifty per cent of these profits"[15].

Under Tanzanian domestic tax law, payments received by non-resident operator of land, sea or air transport is deemed to be income with source in Tanzania provided embarkation takes place in Tanzania. Tanzanian source income derived by a non-resident is taxed through a representative assessee (Mkaro, 2023).

Kenya

Kenya has a slightly more expansive treaty network than Tanzania. About 60% of the Kenyan tax treaties currently in force provide for source taxation of maritime shipping profits. Source taxation is included in tax treaties with OECD countries like Norway, Denmark, and France and in the most recent Kenyan tax treaty signed with India in 2016. Source taxation is absent in important treaties with OECD countries like Germany, the United Kingdom, and South Korea. In most Kenyan tax treaties, the source state allocation rule is formulated similarly as in the Tanzanian tax treaties[16]. In the recent treaty with India, a simpler clause is used which provides that:

> profits derived from the operation of ships in international traffic may be taxed in the Contracting state in which such operation is carried on; but the tax so charged shall not exceed 50 per cent of the tax otherwise imposed by the internal law of that state[17].

Under Kenyan domestic tax law, income by a maritime or air transport business from the carriage of passengers who embark, or cargo that is embarked, in Kenya is deemed to be derived from Kenya and subject to withholding tax of 2.5% on the gross amount received on account of the transport[18].

Nigeria

Nigeria has fifteen tax treaties currently in place, eight of which provide for source taxation. This includes the most recent Nigerian tax treaty signed with Singapore in 2017. Source taxation in shipping profits is omitted in treaties with countries like China and OECD countries like the Netherlands, Sweden, and the United Kingdom. Most Nigerian tax treaties that do provide for source taxation simply stipulate that "the tax charged shall not exceed 1 per cent of the earnings of the enterprise derived from the other Contracting state"[19].

Under Nigerian domestic tax law, the full profits (or loss) derived by a non-resident maritime or air transport company that arises from the carriage of passengers, mail, livestock, or goods shipped from or loaded into an aircraft in Nigeria is subject to tax. The tax payable by a foreign company shall not be less than 2% of the gross income[20].

South and Southeast Asia

General overview

32% of tax treaties currently in force and signed by countries in South and Southeast Asia provide for source taxation rights on maritime shipping profits. This high inclusion rate in the region is

15 See, for example, article 8(3) of the Tanzania-Denmark Tax Treaty (1976), Tanzania-Sweden Tax Treaty (1976) and Tanzania-Norway Tax Treaty (1976).

16 See, for example, Kenya-United Arab Emirates Income Tax Treaty (2011) and Kenya-Sweden Income and Capital Tax Treaty (1973).

17 See article 8(2) of the Kenya-India Tax Treaty (2016) and Kenya-South Africa (2010).

18 See Section 9(1) and Schedule 3 at A(3)(k) of the Kenya Income Tax Act (2021), available at: https://kra.go.ke/images/publications/Income-Tax-Act-Cap-470-Revised-2021-3-1.pdf (last accessed 18 Aug. 2023).

19 See article 8(2)

20 See J.N. Isaac, Nigeria - Corporate Taxation sec. 12.5.1., Country Tax Guides IBFD (accessed 18 Aug. 2023).

caused by the fact that in a number of countries in the region with extensive bilateral tax treaty networks have been able to include source taxation of shipping profits in nearly all treaties. Countries with the highest adoption rate are the Philippines (43 out of 43 tax treaties or 100%), Sri Lanka (46 of 47 tax treaties or 98%), Thailand (58 out of 61 tax treaties or 95%), and Bangladesh (31 out of 34 tax treaties or 86%).

The Philippines

All Philippine tax treaties currently in force provide for source state taxing rights on international transport profits. This includes tax treaties with all important maritime ship owning states. Unlike other countries in the region, the Philippine tax treaties extend the scope of the source state taxing rights to also cover profits from international airline transport. Philippine

Figure 5
African and Middle Eastern bilateral tax treaties (pink line indicates no source state taxing rights on international maritime shipping profits, green line indicates source state taxing rights).

Note. Based in ICTD's Tax Treaty Explorer

tax treaties allocate source state taxing rights on transport income that is derived "from sources within the other state" or that is "arising in the other state". Nearly all Philippine treaties provide that the tax charged in the source state shall not exceed 1.5% of the gross revenue derived from sources in said country[21]. In a small number of treaties, the absolute cap is replaced by a relative deduction of 40% of tax ordinarily charged in the source state[22].

21 See, for example, article 8(2) of the Philippines-Germany Tax Treaty (2013) and article 8(3) of the Philippines-China Tax Treaty (1999).

22 See article 8(2) of the Philippines-Japan Tax Treaty (1980, as amended in 2006).

The Philippines' tax treaty policy is concomitant to the country's strong tradition in its domestic law of taxing non-resident profits from international transport sourced in the Philippines, both from air and maritime transport. Under Section 28(A)(3) of the Philippine National Internal Revenue Code of 1997 (NIRC, 1997), foreign international air and ship carriers are subject to a tax of 2.5% on their *gross Philippine billings* (GPB). For international shipping carriers, GPB is defined as gross revenue, whether for passengers, cargo, or mail originating from the Philippines up to the destination, regardless of the place of issue or payment of the passage ticket of freight document. The 2.5% rate applied on gross billings is said to be determined by assuming a 90% ratio of deductions to a carrier's Philippine gross income and the application of the (old) 25% rate of corporate income tax on the assumed 10% of net income (Michel and Falcao, 2021).

Unlike source taxation of maritime shipping income, the Philippines has been flying solo when it comes to its policy to effectively tax non-resident income from the international air transport of persons. Since 2000, the forces of competition and the (alleged) thin profit margins in the airline industry resulted in a pattern of foreign airlines slashing their direct flights to the Philippines with detrimental effects on the country's tourism industry. In April 2012, Air France-KLM pulled out of the last direct service to Europe from the Philippines (Berlie, 2012, p. 7). The airlines and Board of Airline Representatives (BAR) and the American Chamber of Commerce (AmCham) were quick to blame these developments on the Philippines' failure to r*ationalize the airline tax regime*, i.e., to relinquish its position to tax airline profits derived from its territory (Board of Airline Representatives, 2012). It should be noted in this regard that exclusive residence state taxation of airline profits by means of reciprocal exemption in the source state has since long been the best practice advocated by the International Air Transport Association (IATA, 2015) and the International Civil Aviation Organization (ICAO), with the latter going as far as expressing the ICAO Council's view that:

> Non-observance of the principle of reciprocal exemption envisaged in these policies was also seen as risking retaliatory action with adverse repercussions on international air transport which plays a major role in the development and expansion of international trade and travel. (ICAO, 1994, pp. 1-9)

Eventually, the Philippine government surrendered. In 2013, the income tax code was amended, and a reciprocity clause was inserted. The clause only applies to gross revenue derived from the carriage of persons by sea or by air, but not goods. It provides that international carriers might obtain a preferential rate of tax or an exemption on the basis of a tax treaty or on the basis of reciprocity "such that an international carrier, whose home country grants income tax exemption to Philippine carriers, shall likewise be exempt from the tax imposed under this provision"[23]. Given that most, if not all, major airline owner states employ an exemption for non-resident income from air transport, the addition of the clause makes the Philippine tax treaty provision on source taxation on airline profits without object.

Sri Lanka

Except for the treaty with Bangladesh (1986) and Japan (1967), Sri Lankan treaties only provide source state taxing rights to maritime shipping profits, including in treaties with the biggest ship owning nations. Most Sri Lankan tax treaties provide source state taxing rights in relation to income f*rom the state where the operation is carried on*. In recent treaties, a broader sourcing rule is applied that refers to income *derived in the state*. None of the Sri Lankan treaties contains an activity threshold (like the *more than casual* threshold in article 8B of the UN Model), meaning that the source country can tax any income that meets the (domestic law interpretation of) the source rule. All relevant treaties provide for a 50% reduction of the tax levied in the source state in the shipping profits[24]. No indication is provided whether this tax is to be levied on a gross or on a net basis. In a number of older treaties, it is provided that, in any case, the tax cannot exceed between 2% and 6% of the gross receipts. This seems to imply that the envisioned

23 See Section (A)(3) of the Philippine Income Tax Code (1997).

24 See, for example, article 8(1) of the Sri Lanka-Singapore Tax Treaty (2014) and article 8(2) of the Sri Lanka-China Tax Treaty (2003).

method of taxation is on a gross receipt basis.

Under Sri Lankan domestic tax law, payments received by a person who conducts a relevant transport business in respect of the carriage of passengers who embark or cargo, mail or other moveable tangible assets that are embarked in Sri Lanka, other than as a result of transshipment, or the rental of containers and related equipment which are supplementary or incidental to the carriage are deemed to have their source in Sri Lanka[25]. If these payments are made by companies and persons carrying out a business to non-resident persons, they are subject to a withholding tax. The tax is levied at a rate of 2% on the gross receipts. The withholding tax is final, unless the non-resident maintains a PE in Sri Lanka for the purpose of Sri Lankan domestic tax law[26] If a PE exists, profits and losses are to be attributed as if the PE was a separate entity from its head office and taxation of the net profit would occur at the standard rate of 14% (Sri Lanka: Manual of Inland Revenue, 2017).

Thailand

Nearly all Thai tax treaties allocate source state taxing rights only on maritime shipping profits. Most older treaties do not contain a sourcing rule. As such, whether or not income is covered by the source state taxing right depends solely on the domestic tax law of the source state and can, for instance, cover income from transport in the state but also income from local ticket sales of transport taking place solely in third countries. Newer treaties define source state income as *income from the operation of international traffic in the other state*. None of the Thai treaties contains an activity threshold. A few older tax treaties provide that the source state is entitled to tax the income, if the transport enterprise meets the PE threshold in the source state[27]. Except for the treaty with the Philippines, which also includes the Philippine 1.5% limit on gross shipping income, all Thai treaties stipulate that the tax levied in the source state under domestic law is to be reduced by 50%[28].

Thai domestic tax law provides that foreign companies are subject to tax in Thailand on the net profits from the business carried on in Thailand. Foreign companies carrying on an international transportation business are subject to a 3% tax levied on fares, freight charges, fees, and other benefits chargeable in Thailand, deducting any expense from such carriage of passengers or passengers. Under Thai domestic law, different source rules are employed for transport of passengers and transport of goods. Transport of goods is taxable at a rate of 3% of gross freight charges for transport to/from Thailand, regardless of where the freight charges are collected. Transport of persons to/from Thailand is taxable at the same rate, but only on the gross ticketing revenues physically connected in Thailand[29].

Bangladesh

Most Bangladeshi tax treaties generally preserve source state taxing rights on maritime shipping profits, including in tax treaties with the biggest ship owning nations. The relevant income is usually defined as shipping income *derived from the other state*. Only a few tax treaties refer to profits from w*here the operation is carried on*. None of the Bangladesh tax treaties contains an activity threshold, meaning that the source country can tax any income that meets the (domestic law interpretation of) the source rule criteria. In two treaties, maritime transport is not covered in the international transport article and is expressly excluded from the business profits article. Under these treaties, the source state has unlimited taxing rights on these transport profits deemed derived from the source state[30]. All Bangladesh tax treaties provide that the tax charged under domestic law in the source state shall be reduced with 50%. In a small number of treaties, this tax, after the reduction of 50%, shall in any not exceed 4% of the gross receipts[31].

25 See Section 73 of the Inland Revenue Act (2017) of Sri Lanka.

26 See Section 85 of the Inland Revenue Act (2017) of Sri Lanka.

27 See, for example, article 8(2) of the Thailand-Germany Tax Treaty (1967).

28 See, for example, article 8(2) of the Thailand-Singapore Tax Treaty (2015) and the Thailand-Norway Tax Treaty (2003).

29 See Section 66 and 67 of the Revenue Code of Thailand, available at the website of the Thai tax authorities at https://www.rd.go.th/5939.html#mata67 (last accessed: 15 August 2023) and also at https://www.thailandlawonline.com/revenue-code/corporate-income-tax-law-in-the-revenue-code (last accessed: 15 August 2023).

30 See Bangladesh-Canada Tax Treaty (1982) and Bangladesh-United Kingdom Tax Treaty (1979).

31 See article 8(2) of the Bangladesh-Denmark Tax Treaty (1996)

Under Bangladeshi domestic tax law, profits from international transport derived by a non-resident enterprise are taxed on the gross amount. Any person responsible for making a payment for air transport or water transport to a non-resident shall, unless such person is himself liable to tax on the amount as an agent in Bangladesh, at the time of making such payment, deduct a tax on the amount payable at a rate of 7.5%[32].

Conclusions based on treaty practice

Four conclusions can be made based on the treaty practice on source taxation of international shipping profits across countries in the global South.

It is clear that the average incidence of source state taxing rights on shipping profits in tax treaties signed by countries in the global South is rather low. Contrary to common opinion though, this does not make article 8 (alternative B) of the UN Model a rule without practice. Looking at the inclusion rates of source taxation on shipping profits at regional level and at country level, a different picture unfolds. Whereas there is little relevant treaty practice in Latin America and the Caribbean, a significant cluster of countries in Southeast Asia has been able to successfully embrace source taxation of maritime shipping profits in their tax treaties. Certain countries like the Philippines, Sri Lanka, Thailand, and Bangladesh have large bilateral tax treaty networks but this did not prevent them from securing source state taxing rights on maritime shipping profits in nearly all their tax treaties.

Two further observations can be made on this

and Bangladesh-Netherlands Tax Treaty (1993).

32 See Section 56 of the Bangladeshi Income Tax Ordinance (1986, as amended in 2015), available at: http://nbr.gov.bd/uploads/acts/25.pdf (last accessed: 15 August 2023).

Figure 6

Southeast Asian bilateral tax treaties (pink line indicates no source state taxing rights on international maritime shipping profits, green line indicates source state taxing rights).

Note. Based in ICTD's Tax Treaty Explorer

point. First of all, country practice shows that for an individual country in the global South, and especially for smaller countries, to succeed in adopting a policy of source taxation, much depends on concerted action by similarly situated countries in the region. Concerted action by individual countries in Southeast Asia most likely explain the individual countries' success in taxing non-resident maritime shipping companies' profits derived from their territory. In the same vein, the lack of concerted action also played a significant role in the Philippines' failure to uphold its policy to do the same for profits from international air transport. Even if agreed by tax treaty that the sharing of taxing rights on shipping profits between source and residence country is fair and equitable, with the latter country being obligated to provide relief for double taxation, the negative spillovers and beggar-thy-neighbor effects make it very difficult, if not impossible, for an isolated source country to uphold this policy.

Secondly, the fact that certain countries in the Global South have been able to include source taxation of maritime shipping profits in nearly all their tax treaties comes with an important corollary: all important shipowner countries (see the first section) have accepted source taxation of maritime shipping profits in one tax treaty or another[33]. For most of these shipowner countries, this concession was made in tax treaties signed in the last two decades, which in tax treaty terms is the recent past. This topples the common opinion that source taxation of maritime shipping profits has and will never be accepted in tax treaty negotiations by shipowner countries, and that if it has been accepted, it is nothing more than a historical anomaly.

As to the relevance of article 8 (alternative B) of the UN Model, it is clear that the exact phrasing of the model article is not used in practice. Neither the *more than casual* activity threshold in the first sentence of article 8 (alternative B) nor the net taxation alternative in the second sentence has found its way into tax treaty practice. To gain relevance and to support the further unfolding of source taxation of shipping profits in regions with little practice at the moment, the model provision should be revised. This could be in line with the UN Model's approach of incorporating widespread existing tax treaty practice, as was the case with article 12A on *fees for technical services*, for example.

The situation is different regarding the source taxation of airline profits. There is little country practice in this regard. This does not mean source taxation of airline profits is a bad policy. Successful implementation will however require both concerted country action on regional level and support from the relevant international bodies. This starts with the expansion of the scope of article 8 (alternative B) of the UN Model to also cover airline profits. It also requires a restatement of the policy positions in the field of direct taxation as currently held by industry bodies like ICAO. Since long, ICAO has been a strong defender of exclusive residence taxation of airline profits because this policy is most beneficial to a steady growth of the airline industry. ICAO is a Specialized Agency of the UN with a *unique mandate* to support the SDGs in the airline industry (United Nations, 2017). One can argue that sustainable growth in the international civil aviation sector should respect SDG Target 17.1 on domestic resource mobilization. Exclusive residence state taxation of airline profits is contrary to Target 17.1's call to "strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection".

Towards a revitalization of article 8 (alternative B) of the UN Model

In recent times, the UN Committee of Experts on International Tax Matters (UN Tax Committee) is once again and for the first time since the inception more than four decades ago of the first UN Model Tax Convention, debating a revision of the model rules on the taxation of international shi-

33 The most recent tax treaties by the major shipowner states with source state taxing rights on maritime shipping profits are the following: Hong Kong: Hong Kong-Bangladesh Tax Treaty (signed on 30 August 2023, not yet in force); Japan: Japan-India Tax Treaty (2017); Singapore: Singapore-Sri Lanka Tax Treaty (2014); South Korea: South Korea-Thailand Tax Treaty (2006); Norway: Norway-Bangladesh (2004; China: China-Sri Lanka Tax Treaty (2003); Germany: Germany-Philippines Tax Treaty (2003); Denmark: Denmark-Thailand (1998); United States: United States-Thailand Tax Treaty (1996); United Kingdom: United Kingdom-Thailand Tax Treaty (1981); and Greece: Greece-India Tax Treaty (1964). Compared to other shipowner countries, Greece has a relatively small bilateral tax treaty network, which includes few treaties with countries in the global South. Without a treaty in place, source countries preserve their right to tax shipping profits derived from their territory.

pping income.

The decision to put article 8 of the UN Model back on the UN Tax Committee's agenda was taken at the 24th Session of the Committee in April 2022. The move is understandable from the perspective of developing countries. If developing countries aspire to retrieve their lost tax base on shipping (and even airlines) profits, the *baseline* in article 8 of the UN Model needs to change. Since the 24th, extensive deliberations have taken place with both developed and developing countries taking diametrically opposite positions on various issues involved. Members from developing countries have been demanding elimination of both article 8 alternative A and alternative B of the UN Model and replacing both provision with a single provision with source state taxing rights for both shipping and airlines profits.

Developed countries have been advancing the traditional arguments to defend the status quo, that is, administrative difficulties, and potential over-taxation of the industry.

Given that the issue has been deliberated extensively at Subcommittee level[34] the topic of article 8 of the UN Model is likely to come before the UN Tax Committee during its upcoming sessions to take position on the following half a dozen questions, namely:

1. Whether article 8 of the UN Model should continue to have an option providing for exclusive residence –based taxation as in alternative A.

2. If the answer is yes whether the order of the alternatives in article 8 should be reversed, presenting the option that allows source-state taxation first.

3. Whether the redrafted present alternative B is fine.

4. Whether alternative B, paragraph 2 should cover only shipping or both shipping and international air transport.

5. To what extent ancillary income should be covered under article 8, and some examples of what members think is covered and what is not.

6. Whether there are general suggestions on language of the proposed Commentary.

At this stage, it is difficult to predict the outcome of these deliberations at the UN Tax Committee not only because of a strong resistance by developed countries but also because of the split responses by several developing countries' members which may primarily be due to lack of awareness and understanding of the importance of the issue in totality, and cognition of reality in its essence.

Final conclusions

Source taxation of international shipping income is a policy that is currently underexplored in the LAC region countries. The purpose of this contribution is to put the topic on the map and chart a new course, away from the OECD Model Convention *baseline* of exclusive residence state taxation of shipping companies with rising debt levels and the need to refocus efforts to achieve the Sustainable Development Goals (SDG), the LAC region countries should consider the taxation at source of international maritime shipping income, and even potentially international aircraft income at source. After all, the region is responsible for a significant part of the international transport business. With ownership mostly situated abroad and the current rules privileging exclusive residence taxation, shipping activities in the region do not yield sufficient tax revenue for the LAC countries.

Other regions, like a cluster of countries in South-Southeast Asia, show that source taxation of maritime shipping profits is a valid policy alternative to the OECD propagated *baseline* of exclusive residence state taxation and a policy that is very much alive: on August 30th, Bangladesh signed a bilateral tax treaty with Hong Kong that allows Bangladesh –a source country– to levy source taxation on maritime shipping profits by shipping companies established in Hong Kong –a major shipowner country. By means of South-South policy cooperation, LAC countries should take inspiration from countries like Ban-

34 For an overview of the current state of the discussions, see United Nations (2023).

gladesh and others in the region that have been successful at taxing shipping profits at source.

Countries with a small tax treaty network that lacks tax treaties especially with OECD countries and major shipowner countries, can in principle adopt domestic tax laws that submit non-resident shipping profits to tax, as is done by the various South and Southeast Asian countries mentioned previously. LAC countries that do have tax treaties with major ship-owning countries will need to renegotiate these treaties. For these countries it is essential to understand the historic background of the *baseline* in article 8 of the OECD Model. If applied to unbalanced flows of shipping income between states –like is the case between a LAC region country and a major ship owner country– exclusive residence state taxation of shipping income is nothing more than a one-sided concession granted to the ship owner state. For this reason, LAC countries should be aware and support the efforts by developing country members of the UN Tax Committee's to reshape article 8 of the UN Model. The newly formed Platform for Taxation in Latin America and the Caribbean (PTLAC) provides a new forum through which LAC countries can come to a common position in this regard and speak in one voice on reforming article 8.

In the meantime, the PTLAC can also mobilize the region to consider a common position on source taxation of shipping and aircraft in domestic law. Such a common regional position can end beggar thy neighbor policies and create a win-win situation for all LAC countries.

References

Ahmed, M. A. (2020). U.N.M.T.C. article 8: Was the source rule surrender a blunder? Intertax, 48(1), 103-121.

AmCham. (2012). statement on House Bill 4444–Rationalizing taxes imposed on international carriers'. https://www.arangkadaphilippines.com/amcham-statement-on-house-bill-4444-%e2%80%93-rationalizing-taxes-imposed-on-international-carriers/

Avery Jones, J. (2023). The United Nations in global tax coordination. Intertax, 51(8-9), 631.

BEPS Monitoring Group. (2023). Withdrawal of digital services taxes and relevant similar measures. https://www.bepsmonitoringgroup.org/news/2023/1/25/proposed-multilateral-convention-provisions-on-digital-services-taxes-and-relevant-similar-measures.

Berlie, L. (2012). International carriers' taxation in the Philippines. NTRC Tax Research Journal, XXIV(2), 7.

Board of Airline Representatives. (2012). Rationalization of airline tax regime–position paper. https://www.investphilippines.info/arangkada/wp-content/uploads/2012/02/Attachment-1-BAR-Position-Paper-Rationalization-of-Airline-Tax-Regime.pdf

Corral, M. (2023). Dominican Republic-Corporate Taxation sec. 1.3.1.1., Country Tax Guides IBFD.

Forbes. (2023). Manal Corwin Takes the helm: updates on the OECD tax reform plan. https://www.forbes.com/sites/taxnotes/2023/08/01/manal-corwin-takes-the-helm-updates-on-the-oecd-tax-reform-plan/?sh=26204b5e6bf6.

Hearson, M. et al. (2023). Tax Treaties Explorer. International Centre for Tax and Development. https://www.treaties.tax

IATA. (2015). Guidelines for taxation of international air transport profits. https://www.iata.org/contentassets/a72d8d3cfaf84529bcdef6b2dc59f224/taxation_intl_air_transport20profits_final.pdf.

ICAO. (1994). Policies on taxation in the field of international air transport, Doc 8632-C/968. https://www.icao.int/publications/Documents/8632_2ed_en.pdf

ITF-OECD. (2019). Maritime subsidies–do they provide value for money? Internatio-

nal Transport Forum Policy Papers, 70. https://www.itf-oecd.org/sites/default/files/docs/maritime-subsidies-value-for-money.pdf

Khan, A. (2000). Corss border transactions and tax treaties theory and practice. Petrosin.

League of Nations. (1923). Report on double taxation submitted to the Financial Committee by professors Bruins, Einaudi, Seligman and Sir Josiah Stamp (doc. E.F.S. 73 and F19).

League of Nations. (1925). Double taxation and tax evasion. Report and resolutions submitted by the technical experts to the Financial Committee of the League of Nations (doc. F 212) (7 Feb. 1925), at I(2) (a).

League of Nations. (1946). Commentaries on Mexico and London Draft. League of Nations.

Maisto, G. (2003). The history of article 8 of the OECD Model treaty on taxation of shipping and air transport. Intertax, 31(6-7), 237.

Michel, B. & Falcao, T. (2021). Taxing profits from international maritime shipping in Africa: Past, present, and future of UN Model article 8 (alternative B). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193094

Michel, B. & Falcao, T. (2022). Pillar 1 as a ticket to a fairer taxation for low- and middle-income countries. Tax Notes International, 655, https://ssrn.com/abstract=4193093

OECD. (2013). Proposed changes to the OECD Model Tax Convention dealing with the operation of ships and aircraft in international traffic. https://www.oecd.org/ctp/treaties/Discussion-draft-international-taffic.pdf

OECD. (2021). Tax challenges arising from the digitalization of the economy–global anti-base erosion model rules (pillar two): inclusive framework on BEPS. https://doi.org/10.1787/782bac33-en

OECD. (2022a). Fact sheet amount a–progress report on amount A of Pillar One. https://www.oecd.org/tax/beps/pillar-one-amount-a-fact-sheet.pdf

OECD. (2022b). Public consultation document: Pillar One—Amount A: Draft model rules for nexus and revenue sourcing. https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf

OECD. (2022c). Tax challenges arising from the digitalization of the economy – commentary to the global anti-base erosion model rules (Pillar Two): inclusive framework on BEPS. https://doi.org/10.1787/1e0e9cd8-en

OECD. (2023a). Outcome statement on the Two-Pillar solution to address the tax challenges arising from the digitalization of the economy. https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf

OECD. (2023b). The Pillar Two rules in a nutshell. https://www.oecd.org/tax/beps/pillar-two-model-rules-in-a-nutshell.pdf

Pickering. A (2013). Rohatgi, R. (2005). Basic International Taxation, vol. I: Principles of Taxation. Richmond.

Sri Lanka: Manual of Inland Revenue. (2017). Act, N.° 24 of 2017. http://www.ird.gov.lk/en/publications/Acts_Income%20Tax_2017/Guide%20to%20Inland%20Revenue%20Act.pdf

UNCTAD. (2019). United Nations Conference on Trade and Development–Review of Maritime Transport 2019. https://unctad.org/system/files/official-document/rmt2019_en.pdf

UNCTAD. (2022). United Nations Conference on Trade and Development–Review of Maritime Transport 2022. https://unctad.org/system/files/official-document/rmt2022_en.pdf

UNCTAD. (2023). Review of Maritime Transport.

United Nations. (1969). Tax Treaties Between Developed and Developing Countries–First Report. United Nations.

United Nations. (1972). Tax Treaties Between Developed and Developing Countries–Third Report. United Nations.

United Nations. (1979). Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries. https://www.un.org/esa/ffd/wp-content/uploads/2014/10/Manual_TaxTreaties1979.pdf

United Nations. (2019). International Civil Aviation Organization (ICAO) - Specialized Agency's Strategic Plan/Business Plan is contributing to the 2030 Agenda and SDGs. https://sdgs.un.org/un-system-sdg-implementation/international-civil-aviation-organization-icao-34579

United Nations. (2021). Commentary on the United Nations Model Double Taxation Convention between Developed and Developing Countries. UN-DESA.

United Nations. (2023). Committee of Experts on International Cooperation in Tax Matters – Twenty-sixth session, 27-30 March 2023, Co-Coordinators' Report: Proposal for a revision to article 8 (alternative B) of the UN Model, E/C.18/2023/CRP.14. https://financing.desa.un.org/document/crp14-united-nations-model-double-taxation-convention-article-8-0

Vann, R. (1998). International Aspects of Income Tax. In: Tax Law Design and Drafting, ed. Victor Thuronyi, 21 p. IMF.

Host jurisdictions and Pillar II: A proposal for an actual QDMTT simplification measure

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Resumen

El Impuesto Mínimo Adicional Doméstico Calificado (QDMTT, por sus siglas en inglés) se incorporó de manera tardía al proyecto Pilar II. Sorprendentemente, no se hace ni una mención de este en la Declaración del Marco Inclusivo de 2021, la cual solo hace referencia a la Regla de Inclusión de Ingresos (IIR), la Regla de Pagos con Impuestos Insuficientes (UTPR). Su primera aparición se registra con la promulgación de las reglas modelo, que incluyen detalles adicionales en el comentario correspondiente. A pesar de no recibir una clasificación sistemática como regla de recaudo, el QDMTT desempeña un papel esencial en la cadena de incentivos diseñada para establecer un umbral global en la competencia fiscal. Las jurisdicciones de Entidades Constituyentes con Impuestos Bajos tienen la capacidad de evitar la aplicación de un Impuesto Adicional bajo un IIR o un UTPR, al promulgar un QDMTT que disminuye la cantidad del Impuesto Adicional para la jurisdicción. Por tanto, el QDMTT posee una relevancia fundamental para los países en desarrollo.

Las Reglas Modelo GloBE ofrecen escasa información acerca de las características de diseño del QDMTT, y el Comentario GloBE hace hincapié en la necesidad de una Guía Administrativa (GA) sobre el tema. A pesar de su entrada algo lacónica, el QDMTT se ha percibido como un cambio significativo en el tema políticamente delicado de la asignación de derechos de imposición, y se ha convertido en una parte esencial de la solución del Pilar II. Este nuevo impuesto ha sido objeto de amplias discusiones con gran anticipación en el ámbito académico y ha captado con rapidez la atención de los países en desarrollo. El Foro de Administración Tributaria Africana emitió un enfoque sugerido integral, incluso antes de que se promulgara una Guía Administrativa Acordada.

En febrero de 2023, el Marco Inclusivo finalmente publicó Guía Administrativa sobre el diseño de un QDMTT. La Guía Administrativa de 2023 aclara que su contenido no es exhaustivo y que se emitirá orientación adicional sobre el diseño y funcionamiento en el futuro, incluyendo una Zona de Seguridad para el QDMTT. También sostiene que se desarrollará un *proceso de revisión multilateral* en 2023 y establece los Principios Rectores para Evaluar los QDMTT. A la luz de estos principios generales, se añadieron 53 párrafos, abordando el diseño de los QDMTT.

Sin embargo, la Guía Administrativa de 2023 presenta notables deficiencias en cuanto a lo que las jurisdicciones anfitrionas deben esperar del QDMTT. Esto ha frustrado las expectativas de que el QDMTT se diseñaría como un *impuesto de absorción*, ya que exige que las jurisdicciones anfitrionas apliquen un Impuesto Adicional que en muchos casos es más elevado que el que se cobraría bajo el IIR. Como resultado, esencialmente se desalienta la adopción de los QDMTT, presentando un dilema entre la competencia fiscal y la recaudación de impuestos. Este tema requiere un debate adicional, con un enfoque constructivo que esboce vías para su solución.

Abstract

The Qualified Domestic Minimum Top-up Tax (QDMTT) is a latecomer of the Pillar II project. It is not even mentioned in the 2021 Inclusive Framework Statement, which only refers to the Income Inclusion Rule (IIR), the Undertaxed Pay-

ment Rule (UTPR). It first appeared upon the enactment of the model rules, with further specification in the corresponding commentary. Despite not being systematically qualified as a charging rule under, the QDMTT plays an important role in the chain of incentives that is intended to set a global floor to tax competition. The jurisdiction of the Low-Taxed Constituent Entity can prevent a Top-up Tax from being charged under an IIR or an UTPR by enacting a QDMTT, which reduces the amount of Top-up Tax for the jurisdiction. Therefore, the QDMTT is of fundamental importance for developing countries.

The GloBE Model Rules do not say much about the design features of the QDMTT, and the GloBE Commentary stressed the need for Administrative Guidance (AG) on the topic. Despite its somewhat laconic debut, the QDMTT has been perceived as an important change in the politically sensitive issue of allocation of taxing rights and has become an essential part of the Pillar II solution. The new tax has been discussed with great anticipation in academia, and quickly caught the attention of developing countries. The African Tax Administration Forum issued a comprehensive suggested approach, even before any Agreed Administrative Guidance was enacted.

In February 2023, the IF finally AG on the design of a QDMTT. The 2023 AG clarifies that its content is not exhaustive and further guidance on the design and operation will be issued in the future, including on a QDMTT Safe Harbor. It also asserts that a *multilateral review process* will be developed in 2023 and sets out the guiding Principles for Evaluating the QDMTTs. Considering these general principles, 53 paragraphs were added, addressing the design of QDMTTs.

The 2023 AG presents significant shortcomings in relation to what host jurisdictions should expect from the QDMTT. It has frustrated the expectations that the QDMTT would be designed as a *soak-up tax*, as it demands that host jurisdictions charge a Top-up Tax that is in many cases higher than the Top-up Tax that would be charged under the IIR. Therefore, it essentially discourages the adoption of QDMTTs, presenting a trade-off between tax competition and tax collection. The topic requires further discussion, with a constructive approach that outlines avenues for their solution.

Introduction

Pillar II is "the first serious multilateral step in a paradigm shift relating to the global income allocation system" (Dagan, 2023 p. 638). It modifies a principle that has been upheld by the OECD for decades, namely that setting tax rates was a matter for sovereign states to decide, and not an issue that the OECD should deal with (OECD, 2019). It represents a departure from the policy consensus agreed only a decade ago in the BEPS project[1] , according to which "no or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it" (OECD, 2013, p.10).

The OECD Secretariat makes the case that the reduction of Effective Tax Rates (ETR) differential across jurisdictions (i.e., reduction of the allowed level of tax competition) will improve the efficiency of the international allocation of capital (OECD, 2020). Accordingly, firms would make investment decisions following post-tax returns. Decreasing the ETR differentials would reduce tax-induced behavior and global output would increase because of more efficient capital allocation across jurisdictions. Essentially, it is expected that "[i]f enough large economies agree to implement Pillar II, there will be no incentive for companies to put their businesses through low-tax jurisdictions" (Avi-Yonah et al., 2022).

However, there is more to taxation than the efficiency of capital allocation. Tax competition affects both residence and source taxation (Kane, 2015). While harmonization allows some states to maintain their levels of social welfare, it also prevents other (developing) states from establishing levels of taxation that are congruent with the level of development of their public sector. Besides, such form of harmonization also assumes that all tax systems share the tax burden in a similar way[2], and ignores the structure of the tax systems of developing countries, which, for several reasons, tend to rely more heavily on consumption taxation (Tanzi and Zee, 2000). Furthermore, States also compete to define the distributive rules in a way that maximizes national tax revenue (Ault, 2019). In a nutshell, the transition from tax competition to a multilaterally negotiated harmonization does nothing more than

transferring powers to states with privileged positions in such negotiations, since the terms of the cooperation will not necessarily be in line with the interests and needs of the states with less bargaining power (Dagan 2013 and 2018).

Such features are very clear in the case of the GloBE Model Rules. There is little evidence that the GloBE Model Rules will benefit developing countries[3]. Consequently, Pillar II initially got very little attention from developing countries –at least from a technical perspective. While they saw themselves being affected by such rules, they hardly saw the possibility of applying them. After all, in the initial proposal[4], under the Public Consultation Document and the Pillar II Blueprint, the Top-up Tax would be predominantly collected by capital exporting jurisdictions, under the Income Inclusion Rule (IIR), and the Undertaxed Payment Rule (UTPR) would work as a backstop. Therefore, the complexity of Pillar II was seen as a problem for capital exporting countries only, which would be the ones in charge of enforcing the floor to tax competition, centered in the functioning of the IIR.

Everything changed[5], however, when a Qualified Domestic Minimum Top-up Tax (QDMTT)[6] was included in the GloBE Model Rules, with further specification in the corresponding commentary[7]. The QDMTT completely modified the chain of incentives designed to set a global floor to tax competition. While it allows host countries to derive tax revenues from the application of the GloBE Model Rules[8], it also demands that, in order to do so, they get acquainted with the extremely complex set of rules designed for the reality capital exporting countries.

The late addition of the QDMTT was therefore responsible for a curious development. Initially, host countries were concerned with the impact of the Pillar II proposal, but not really with its technical specificities. After all, they would not be the ones enforcing the floor to tax competition, even if they would undoubtedly be impacted by it. The lack of technical interest allowed for the design and endorsement of rules which are completely disconnected from the reality of host jurisdictions. The addition of the QDMTT, however, shifted the incentives related to the charging of the Top-up Tax, and now host countries are the ones incentivized to charge the Top-up Tax under GLOBE's *diabolical machinery*.[9]

The existing Agreed Administrative Guidance (AG) further pushed the enforcement obligations towards host countries[10]. The February 2023 AG only acknowledges as a QDMTT a fully-fledged Domestic Minimum Top-up Tax (DMTT), with all the details and complications related to the Top-up Tax calculation[11]. The July 2023 AG conceives a QDMTT Safe Harbour that is a *seal of quality* for QDMTTs, which operates to the exclusive benefit of home jurisdictions, while putting all the enforcement pressure on host jurisdictions.

Against this background, the present contribution presents a simplification alternative for host jurisdictions, which is compatible with the GloBE Model Rules and relevant AG. The proposed clause operates as an actual simplification measure for host jurisdiction, without harming the integrity of the QDMTT or of the GloBE Model Rules as a whole. The clause is simple to administer and promotes the uniform adoption and application of the GloBE Model Rules.

The contribution is structured as follows. Section 2 discusses the dual function of the QDMTT and Section 3 evidences why the qualification as a QDMTT is important for host jurisdictions. Section 4 evidences how the requirements related to the qualification as a QDMTT and as a QDMTT Safe Harbour completely shift the enforcement of the floor to tax competition to host jurisdictions. Finally, Section 5, which is the center of the contribution, draws on the proposal for an actual QDMTT simplification measure.

The dual function of the QDMTT

To design a simplification measure for the QDMTT, it is necessary to understand the role it plays within the GloBE Model Rules, which are built to provide for a strong model of minimum taxation[12]. With the assistance of a significant amount of autonomous concepts[13], they set forth the rules for the calculation of a Top-up Tax, which *tops up* the insufficient taxation by the host country, ensuring that the agreed global Minimum Rate is reached. A Top-up Tax is calculated for jurisdictions in which the MNE Group is subject to an ETR below the 15% Minimum Rate.

In short, the rules provide for the calculation of a Jurisdictional Top-up Tax[14], which is further allocated to the Low-Taxed Constituent Entities (LTCEs) in the jurisdiction.

After calculating the Top-up Tax in relation to a LTCE, liability for Top-up Tax is further allocated either to a parent Entity (IIR) or to another CE (UTPR). A charge under the IIR or the UTPR may be prevented if the host country enacts a QDMTT. The charging rules operate *as an interconnected series of on/off switches*[15], or *fiscal fail-safes*[16] which support each other in enforcing the agreed ETR. Following the design of the GloBE Model Rules, the main switch[17] is the IIR, which can be *switched off* by a QDMTT. The UTPR is only *switched on* if neither a QDMTT nor an IIR applies. Without this logic, tax competition would prevent states from establishing the floor to tax competition. Under Pillar II, a low-tax jurisdiction is incentivized to adopt a QDMTT, because, otherwise, the income of the LTCE will be taxed by means of an IIR or an UTPR. Home countries, on the other hand, are incentivized to adopt an IIR, because, otherwise, the income of the LTCE will be taxed by means of the UTPR, which, on its turn, protects states adopting the IIR against tax inversions[18]. The adoption of an IIR by a state would simply lead to the shifting of residence to a state that does not apply an IIR (*the so-called tax inversion*) (Plunket, 2022). Within this context, the QDMTT plays a primary allocative function and a secondary simplification function.

The primary function of the QDMTT is to give preferential taxing rights to the host jurisdiction, thus fixing a *major flaw*[19] of the Pillar II Blueprint. The GloBE Model Rules' mechanism sets forth a Top-up Tax, which can be charged under a QDMTT, an IIR and an UTPR, *in that order*. The addition of the QDMTT to the GloBE Model Rules significantly changes the allocation of taxing rights under Pillar II and contributes to addressing concerns over the fairness on the allocation of taxing rights embedded in the preliminary discussions on its design[20]. The QDMTT mitigates the concerns according to which Pillar II would operate to generate revenue gains for the countries where MNEs are headquartered. Its priority over the IIR and the UTPR is therefore *not surprising*[21], as the same outcome could be produced by the jurisdiction of the CE by means of reform of its tax legislation. The mechanism allows a jurisdiction to collect the revenue that would otherwise have been collected by a foreign jurisdiction over income derived by an LTCE in the host jurisdiction[22].

A secondary function of the QDMTT is simplification, as it eliminates the need for the host jurisdiction to implement a major tax reform to meet the Pillar II standards. The outcome of introducing a QDMTT cannot be easily replicated by simply raising tax rates[23]. The QDMTT allows states to specifically design a tax increase to the minimum necessary to comply with the GloBE Model Rules[24]. If a country presents a CIT rate below 15% and simply raises the rate, Top-up Taxes may still be due, considering the differences in the tax base. The natural difficulties of a general reform of a domestic system, which would have to deal with existing tax incentives and the politics surrounding them, make the adoption of a QDMTT a much more viable solution, which is justified as a practical mechanism[25].

A functional understanding of the QDMTT requires not only the description of its two functions, but also the acknowledgment of the lack of a third function. From the host jurisdiction perspective, the QDMTT is merely a mechanism intended to neutralize the application of IIRs and UTPRs by other jurisdictions in the simplest possible way, without creating additional tax burden above the agreed floor to tax competition[26]. No further tax collection functions should be attributed to the QDMTT, which is in essence a bad tax, considering that it is excessively complex, and its economic incidence is unclear.

QDMTT or DMTT: Why and for whom the difference matters

20 See Devereux et al. (2022) and Arnold (2022)

21 See Arnold (2022)

22 See Arnold (2022)

23 See Devereux, Vella, and Wardell-Burrus, "Pillar 2: Rule Order, Incentives, and Tax Competition," 8; Arnold, "The Ordering of Residence and Source," 225; Arnold, "An Investigation into the Interaction," 282

24 See Arnold, "The Ordering of Residence and Source," 224.

25 See Arnold, 225.

26 See, addressing the risk that QDMTT could also become a "ceiling for all states and could make tax competition more acute", Oguttu (2022)

Besides understanding the functional role of the QDMTT, it is also essential to consider why the qualification matters for host jurisdictions. After all, why is it relevant to have a DMTT acknowledged as QDMTT? What difference does it make? Are there host jurisdictions to which the qualification is more important?

The present Section answers those questions, with the assistance of a simplified example. In the GloBE Model Rules, the QDMTT is subtracted from the Jurisdictional Top-up Tax, while DMTTs which do not qualify as a QDMTT will likely be treated as Covered Taxes. After describing both qualifications under the GloBE Model Rules, the section discusses a simplified numerical example, considering three scenarios. The example evidences that the qualification as a QDMTT is more important in cases where the carve-out applies, being essential to host jurisdictions engaging in competition for actual investments, whereas the importance of the qualification for the so-called tax havens is less evident.

The QDMTT as a subtraction from the Jurisdictional Top-up Tax

Under Art. 5.2.3 of the GLOBE MODEL RULES, the QDMTT is subtracted from the Jurisdictional Top-up Tax, as follows (Formula 1).

The Jurisdictional Top-up Tax is further apportioned to the Constituent Entities ("**CEs**") in the jurisdiction in proportion to their GLOBE Income[27]. The Top-up Tax of the CE is the amount finally considered under the IIR or the UTPR[28]. This means that, to charge an IIR or an UTPR, a home jurisdiction will have to go through essentially the same calculations as a jurisdiction applying the QDMTT.

The DMTT as a Covered Tax

In case the DMTT cannot be qualified as a QDMTT, it will probably be treated as a Covered Tax. The definition of Covered Tax is broad enough to accommodate most DMTTs. In such case, the DMTT will increase the ETR numerator, and, as consequence, also contribute to increase the ETR for the jurisdiction.

The starting point to calculate the ETR numerator is the amount of Covered Taxes that is included in the financial net income calculation in the financial statements as an expense. The Globe Model Rules take the current tax expense accrued in the CE's Financial Accounting Net Income or Loss with respect to Covered Taxes and submits it to a series of adjustments.

The definition of Covered Taxes[29] embraces 1. Taxes recorded in the financial accounts of a CE with respect to its income or profits or its share of the income or profits of a CE in which it owns an Ownership Interest; 2. Taxes on distributed profits, deemed profit distributions, and non-business expenses imposed under an Eligible Distribution Tax System; 3. Taxes imposed in lieu of a generally applicable CIT; and 4. Taxes levied by reference to retained earnings and corporate equity, including a Tax on multiple components based on income and equity.

A Tax is defined as a compulsory unrequited payment to General Government[30], following the definition of taxes used for statistical purposes[31]. They are *unrequited* in the sense that benefits eventually provided by the General Government to the taxpayer are not proportional to the amount paid – thus excluding fees and payments for privileges, services, property, and other benefits from the definition of tax. Fines, penalties, and interests are also excluded from the definition of tax[32].

27 GLOBE MODEL RULES, Art. 5.2.4.

28 The provision of Article 2 of the GloBE Model Rules is applicable for this purpose.

29 GLOBE MODEL RULES, Art. 4.2.1.

30 GLOBE MODEL RULES, Art. 10.1.

31 See OECD, Revenue Statistics 1965-2017 Interpretative Guide, Annex A, Paris, OECD Publishing, 2018.

32 GLOBE COMMENTARY, p. 91, para. 24.

Formula 1

Jurisdictional Top- up Tax = (Top-up Tax Percentage x Excess Profit) + Additional Current Top Tax - QDMTT

For identifying a Covered Tax, "the focus is on the underlying character of the tax"[33] . Neither the name of the tax, nor the mechanism used to collect it are determinative of its character. It is also immaterial whether the tax charge is levied under corporate income tax rules or under a separate regime or statute. The timing is equally unimportant: in the case of a tax on income distribution, it is irrelevant whether the distribution is attributable to current or previously accumulated earnings[34].

Some exclusions are designed to maintain the integrity of the GloBE Model Rules. Top-up Taxes are expressly excluded[35], as the inclusion would result in a circular computation in the Fiscal Year that the Top-up Tax arise, undermining the agreed Minimum Rate[36]. A Disqualified Refundable Imputation Tax is also excluded. A Disqualified Refundable Imputation Tax is defined as an amount of tax, other than a Qualified Imputation Tax, accrued or paid by a CE that is: 1. Refundable to the beneficial owner of a dividend distributed by such CE in respect of that dividend or creditable by the beneficial owner against a tax liability other than a tax liability in respect of such dividend; or 2. Refundable to the distributing corporation upon distribution of a dividend[37]. It is excluded because it would be *similar to a deposit* and could not be properly considered upon the ETR computation[38]. Taxes paid by an insurance company in respect of returns to policyholders are also excluded[39], because amounts charged to policy holders for tax expense incurred by an insurance company in respect of returns to a policy holder are excluded from the computation of GloBE Income or Loss[40].

As one may see, the GloBE Model Rules' definition of Covered Taxes has no direct interaction with the definition of Art. 2 of the OECD-MC[41], being tailored in broader terms. From the above, it seems likely that any tax minimally designed to look like a QDMTT will be qualified as a Covered Tax if the qualification of QDMTT is denied.

Taxes that do not qualify as Covered Taxes, such as excise taxes and payroll taxes, are deductible in the computation of GloBE Income or Loss[42], thus reducing the denominator for the ETR calculation. The GloBE Commentary provides a negative list, with taxes that will generally not fall within the definition of Covered Taxes[43].

Practical implications of the distinction

The difference between qualifying the DMTT as a QDMTT or simply as a Covered Tax can be evidenced by means of a simple example. In the following sections, a scenario without a QDMTT or DMTT is compared to a scenario with a QDMTT, and a scenario with a DMTT which is a Covered Tax, but not a QDMTT.

First scenario: Low-Tax Jurisdiction without a QDMTT or a DMTT

Consider an example in which an LTCE in the host jurisdiction is wholly-owned by the UPE, which is a resident in the UPE Jurisdiction, which has an IIR in force. In Fiscal Year 202 1, LTCE has GloBE Income of 100 and Adjusted Covered Taxes of 5. The Substance-Based Income Exclusion (SBIE) was calculated for the host jurisdiction, considering LTCE payroll and tangible assets, leading to a total of 50. Schematically:

In this simplified example, in order to calculate the Jurisdictional Top-up Tax, one would start from the calculation of the ETR, which is the ratio between the Adjusted Covered Taxes with respect to a jurisdiction (numerator) and the GloBE Income or Loss in such jurisdiction (denominator)[44], as follows (Formula 2).

The Top-up Tax percentage for the jurisdiction is further obtained by subtracting the ETR from the Minimum Rate[45], under the following formula (Formula 3).

The Excess Profit for the jurisdiction for the Fiscal Year is defined as the Net GLOBE Income less the SBIE[46], which would be calculated in this scenario, as follows (Formula 4).

33 GLOBE COMMENTARY, p. 91, para. 23.
34 GLOBE COMMENTARY, p. 91, para. 23.
35 GLOBE MODEL RULES, Art. 4.2.2(a) to Art. 4.2.2(c)..
36 GLOBE COMMENTARY, p. 94, para. 38.
37 GLOBE MODEL RULES, Art. 10.1.
38 GLOBE COMMENTARY, p. 95, para. 40.
39 GLOBE MODEL RULES, Art. 4.2.2(e).
40 GLOBE MODEL RULES, Art. 3.2.9. See GLOBE COMMENTARY, p. 95, para. 40.
41 GLOBE COMMENTARY, p. 91, para. 22.
42 GLOBE COMMENTARY, p. 91, para. 22.
43 GLOBE COMMENTARY, p. 94, para. 36.
44 GLOBE MODEL RULES, Art. 5.1.
45 GLOBE MODEL RULES, Art. 5.2.1.
46 GLOBE MODEL RULES, Art. 5.3.

For the example, no QDMTT is being charged and there is no Additional Current Top-up Tax to consider. The Jurisdictional Top-up Tax would then be calculated as follows[47] (Formula 5).

The Jurisdictional Top-up Tax, in this case would be 5. Considering that the UPE Jurisdiction has an IIR in force, it is entitled to charge a Top-up Tax in the amount of 5.

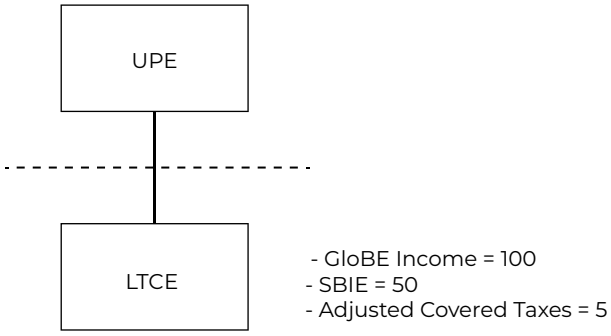
Second scenario: Adoption of a QDMTT

Assume that the host jurisdiction has enacted a QDMTT, and there is no doubt that the tax in question is qualified as a QDMTT. In the design of the new tax, the host jurisdiction has strictly followed the GloBE Model Rules and the applicable Administrative Guidance. In this case, the calculation of the QDMTT leads to an amount of 5, which is precisely the Jurisdictional Top-up Tax that has been calculated for the host jurisdiction. With the new tax, the Jurisdictional Top-up Tax would be calculated as follows (Formula 6).

In this case, the QDMTT has fulfilled its purpose. It neutralizes the IIR that would be otherwise applicable, thus bringing additional revenue to the host jurisdiction, without harming its competitive position. The QDMTT works, in this case, as a soak-up tax. The Top-up Tax that would be collected in the UPE Jurisdiction under its IIR will now be collected by the host jurisdiction under its QDMTT. This outcome is in line with traditional nexus rules, as the income of the LTCE is taxed in its residence jurisdiction, as opposed to the taxation in the residence jurisdiction of its parent.

47 GLOBE MODEL RULES, Art. 5.2.3.

Figure 1



Note. Own elaboration.

Third scenario: Adoption of a DMTT that is a Covered Tax

Consider an alternative scenario, where the host jurisdiction has enacted a DMTT, which is not, however, a QDMTT. As it will be further discussed

Formula 2

$$\text{ETR} = \frac{\text{Ajusted Covered Taxes}}{\text{GloBE Income or Loss}} = \frac{5}{100} = 5\%$$

Formula 3

Top-up Tax Percentage = Minimum Rate - ETR = 15% - 5% = **10%**

Formula 4

Excess Profit = Net GloBE Income - Substance - Based Income Exclusion = 100 - 50 = **50**

Formula 5

Jurisdictional Top- up Tax =
(Top-up Tax Percentage x Excess Profit) + Additional Current Top Tax - QDMTT= 10% x 50 = **5**

, there are many reasons why the qualification as a QDMTT could be denied, as the conditions are very strict. For the example, the only deviation of the DMTT in relation to the Administrative Guidance is that it does provide for the pushdown of CFC Taxes and PE Taxes upon the calculation of the Top-up Tax. According to the February 2023 AG, such feature is sufficient to reject the qualification of the DMTT as a QDMTT[48].

In the example, there are, however, no CFC or PE Taxes into play. As a consequence, the calculation of the DMTT leads to the very same amount of 5, as in the case of the QDMTT from the second scenario. The only difference in this case is that, due to design choices mentioned above, the DMTT cannot be qualified as a QDMTT. In this scenario there is also no doubt that the DMTT can be considered as a Covered Tax, as it is a tax on the income of the LTCE. In this third scenario, the ETR for the jurisdiction would have to be recalculated, as the DMTT will be treated as a Covered Tax (Formula 7).

The DMTT would increase the ETR for the host jurisdiction and, as a consequence, the Top-up Tax percentage for the jurisdiction would also have to be recalculated (Formula 8).

48 February 2023 AG, pp. 105-106, para. 118.30.

The Top-up Tax Percentage would therefore be reduced by the enactment of the DMTT. The new tax would not modify the calculation of the Excess Profit, which would remain as 50, as in the other two scenarios. However, as a result of the lower Top-up Tax Percentage, the Jurisdictional Top-up Tax would be lower. As the DMTT is not a QDMTT, the amount of QDMTT deducted from the Jurisdictional Top-up Tax will be zero. Accordingly (Formula 9).

Therefore, in the example, as the DMTT does not qualify as a QDMTT, there will still remain 2.5 of Top-up Tax, which can be charged by the UPE Jurisdiction under its IIR. In the example, the enactment of a DMTT is not sufficient to neutralize the application of the IIR by the UPE Jurisdiction, even if the DMTT charges the same amount as a QDMTT.

As a consequence, in the third scenario, the LTCE will be subject to an amount of 5 under the DMTT plus the 2.5 of Top-up Tax charged under the UPE's Jurisdiction IIR, leading to a total of 7.5 of tax. The LTCE will be charged a different Top-up Tax only due to design features of the DMTT. In the example, the DMTT cannot be qualified as a QDMTT, even though the amount it charges is the same as the one that would be otherwise charge by a tax that qualifies as a QDMTT. Due to the limitation to the qualification, LTCE will be

Formula 6

Jurisdictional Top-up Tax =
(Top-up Tax Percentage x Excess Profit) + Additional Current Top-up Tax - QDMTT =
(10% x 50) - 5 = 0

Formula 7

$$ETR = \frac{\text{Ajusted Covered Taxes}}{\text{GloBE Income or Loss}} = \frac{5 + 5}{100} = 10\%$$

Formula 8

Top up Tax Percentage = Minimum Rate ETR = 15% - 10% = ***5%***

subject to a higher taxation.

The importance of the QDMTT for host jurisdictions

The example makes clear that it is within the host jurisdiction's interest to have its DMTT acknowledged as a QDMTT. If the DMTT is not qualified as a QDMTT, since the amount that has to be charged in order to neutralize the application of potential IIR and UTPRs will be higher. As a consequence, the non-qualification as a QDMTT will harm the competitive position of the host jurisdiction, incentivizing it to follow the relevant AG and enacting a tax that will be treated as a QDMTT.

However, this incentive is not uniform across jurisdictions. As discussed in the Introduction, the GloBE Model Rules create a floor to tax competition, including legitimate tax competition. The non-qualification as a QDMTT presents different impacts according to the kind of tax competition in which the host jurisdiction engages. The difference between the second and the third scenarios is due to the SBIE. If there was no carve-out, the outcome of qualifying as a QDMTT or not would be the same in both scenarios. If the three scenarios are reproduced, but with a SBIE of zero, there is no difference between the second and the third scenarios. Both the QDMTT and the DMTT (Covered Tax) are able to neutralize the application of the IIR by the UPE Jurisdiction. In cases where the calculation of the SBIE leads to an amount of zero, there will be no difference if the DMTT is qualified as a QDMTT or not[49].

This perception leads to an important conclusion. For the so-called tax havens, which are not engaged in attracting actual investments, it will be essentially irrelevant whether the DMTT is a QDMTT or not. Assuming that CEs in such jurisdictions do not have significant tangible assets and payroll, there will be no SBIE to deduct. The qualification as a QDMTT is, however, essential for jurisdictions engaging in legitimate tax competition, aimed at attracting actual investments, with tangible assets and people.

Therefore, the qualification as a QDMTT is much more important to jurisdictions that use tax incentives as means to attract actual investments, than it is to jurisdictions engaging in harmful tax competition. Enacting restrictive criteria for the qualification as a QDMTT is therefore a policy choice with low impact against tax havens, but very detrimental to jurisdictions which use tax incentives as means to attract actual investments. Curiously, a restrictive definition of QDMTT is a measure against legitimate tax competition, with very low (if any) impact on harmful tax competition.

QDMTT or QDMTT Safe Harbour: The policy choices of the AGs

In a nutshell, the practical difference between a QDMTT and a DMTT is essentially whether it is computed after (QDMTT) or before (DMTT) the carve-out and the Additional Current Top-up Tax. As seen, this difference is more relevant to host jurisdictions engaging in legitimate tax competition. This conclusion is important to critically evaluate the requirements for a QDMTT and a QDMTT Safe Harbour, as found in the relevant AG.

The GloBE Model Rules do not say much about the design features of the QDMTT. Despite its somewhat laconic debut, the QDMTT has been perceived as an important change in the politically sensitive issue of allocation of taxing rights,

49 It is also possible that differences arise due to the existence of an Additional Current Top-up Tax, which is treated as an addition in the formula. An Additional Current Top-up Tax arises in cases where there is a recalculation related to a previous year, because of correcting information previously provided. Its impact can be disregarded for the purposes of the present contribution.

Formula 9

Jurisdictional Top-up Tax =
(Top-up Tax Percentage x Excess Profit) + Additional Current Top-up Tax - QDMTT = 5% x 50 =2,5

and has become an essential part of the Pillar II solution[50]. The new tax has been discussed with great anticipation in academia, and quickly caught the attention of developing countries. The African Tax Administration Forum (ATAF) issued a comprehensive suggested approach of DMTT[51], even before any Agreed Administrative Guidance was enacted.

In the GloBE Model Rules, QDMTT means a tax that applies to Excess Profits of the domestic CEs and operates to increase domestic tax liability with respect to those profits to the Minimum Rate[52]. As a defined term, QDMTT is a minimum tax that is included in the domestic law of a jurisdiction and that[53]: 1. Determines the domestic Excess Profits in a manner that is equivalent to the GloBE Model Rules; 2. Operates to increase domestic tax liability with respect to domestic Excess Profits to the Minimum Rate for the jurisdiction and CEs; and 3. Is implemented and administered in a way that is *consistent with the outcomes* provided for under the GloBE Model Rules and the GloBE Commentary.

Hence, there is a high level of vagueness in the GLOBE MODEL RULES with regard to the qualification as a QDMTT. The expressions "equivalent" and "consistent with the outcomes" are textbook examples of quantitative (or soritical) vagueness[54]. "Equivalent" is more than "different", but less than "identical". How much similarity does "equivalent" require? The same can be said about "consistent with the outcomes", which allows for different degrees of tolerance regarding deviations.

For this reason, the GloBE Commentary stressed the need for Agreed Administrative Guidance on the topic[55]. The February 2023 AG and the July 2023 AG brought further clarification (*rectius* policy choices) with regard to the possible design features of a QDMTT and a QDMTT Safe Harbour.

The QDMTT and the asymmetrical approach in the February 2023 AG

In the February 2023 AG, the QDMTT definition is rephrased as *functional equivalence*, meaning that the QDMTT must 1. Be consistent with the design of the GloBE Model Rules and 2. Provide for outcomes that are consistent with the GloBE Model Rules[56]. More specifically, it adopts an asymmetrical approach on the exam of whether a DMTT is QDMTT. As a general rule, the choice for less restrictive features than that of the GloBE Model Rules harms the qualification as a QDMTT, while the adoption of features that are more restrictive do not prevent the qualification as a QDMTT.

On the one hand, the February 2023 AG is very restrictive with regard to design features that do not meet the minimum level of taxation that is expected from a Top-up Tax. The QDMTT is required to account for most of the specificities envisioned by the GloBE Model Rules, including the definitions of UPE, MNE Group, and CE[57]. The computation of the tax liability for the jurisdiction must take into account the GloBE Income and the Covered Taxes of CEs that are located in the jurisdiction, as determined under the GloBE Model Rules[58]. The QDMTT is required to take into consideration the separate treatment applicable to investment entities[59], joint ventures[60], and minority -owned CEs[61]. The QDMTT shall strictly follow the rules on computation of income of Permanent Establishments[62] and Tax Transparent Entities[63]. Income and tax computations *generally need to mirror* the GloBE Model Rules[64]. The use of a broader carve-out than the SBIE is not admitted[65].

On the other hand, the February 2023 AG is very permissive with regard to design features that go beyond what is expected from a Top-up Tax. The host jurisdiction is allowed to extend the QDMTT to groups that do not trigger the EUR 750 mi-

50 See Herzfeld (2022) ; Devereux et al. (2022).
51 (ATAF, 2022), hereinafter, ATAF Suggested Approach
52 GLOBE COMMENTARY, p. 212, para. 116.
53 GLOBE MODEL RULES, Art. 10.1.
54 Discussing the forms of vagueness and meaning of soritical vagueness, see Keil and Poscher (2016, pp. 2-4).
55 GLOBE COMMENTARY, p. 212, para. 118
56 February 2023 AG, p. 99, para. 5
57 February 2023 AG, p. 100, para. 118.4(a).
58 February 2023 AG, p. 100, para. 118.4(b).
59 February 2023 AG, p. 106, para. 118.33. See GLOBE MODEL RULES, Art. 7.4.
60 February 2023 AG, p. 101, para. 118.7-118.8. See GLOBE MODEL RULES, Art. 6.4.
61 February 2023 AG, p. 101, para. 118.6. See GLOBE MODEL RULES, Art. 5.6.
62 February 2023 AG, p. 104, para. 118.22. See GLOBE MODEL RULES, Art. 3.4.
63 February 2023 AG, pp. 104-105, para. 118.23-118.25. See GLOBE MODEL RULES, Art. 3.5.
64 February 2023 AG, p. 104, para. 118.20.
65 February 2023 AG, p. 107, para. 118.36-118.37

llion threshold, or to purely domestic groups[66]. The QDMTT does not need to allow for the carry-forward of losses or contemplate the GloBE Loss Election[67]. For QDMTT purposes, stricter limitations on blending of income and taxes across the CEs are also tolerated[68]. The adoption of a carve-out is not a requirement, and the adoption of a *less generous* carve-out for QDMTT purposes is also admitted[69]. The choice for a tax rate that exceeds the Minimum Rate is also treated as a possibility[70]. The *de minimis* exclusion[71] does not need to be adopted for QDMTT purposes[72].

The choice for the asymmetrical approach is very clear, but the February 2023 AG is inconsistent with regard to the need for justification for deviating from the GloBE Model Rules. While the adoption of most of the more restrictive features do not refer to any sort of requisite to allow for a deviation, a different wording is adopted with regard to income and tax computations, in relation to which *customization* is only *permissible* in two situations[73]. The QDMTT can be made *more restrictive* than the GloBE Model Rules, where the restriction is consistent with local rules[74], or where the adjustments are not relevant in the context of its domestic tax system[75]. In all other cases (subjective scope, jurisdictional blending, carve-out...), no reference to a requirement for deviations is found. Following the wording of the February 2023 AG, it can be concluded that only in the case of customization in relation to permanent differences a justification is needed. The February 2023 AG does not discuss the reasons for such differentiation.

In fact, the asymmetrical approach as a whole cannot be justified neither on purposive nor on literal considerations. The approach is not necessary to achieve the goal of establishing a floor to tax competition – and cannot be justified on a purposive reasoning. A more permissive approach in relation to features that fall short of the Top-up Tax definition would not harm the goals of the GloBE Model Rules, since Excess Profits not captured by the QDMTT would still be captured by an IIR or an UTPR[76]. The IF acknowledges that the fact that the QDMTT falls short of the floor to tax competition does not present an integrity risk for the GloBE Model Rules[77]. The approach cannot be justified on a more literal interpretation of the QDMTT definition either. If the intent was, for whatever reason, to interpret the relevant provision strictly, the interpretation should cut both ways. Following the actual wording of the relevant provision, the only allowed deviation should be with regard to the applicable GAAP – which is the only feature whose deviation is expressly mentioned in the definition of Art. 10.1 of the GloBE Model Rules.

The policy choice made by the February 2023 AG was therefore to set a high bar for the qualification as a QDMTT, as if the host jurisdiction was the sole responsible for ensuring the floor to tax competition. However, the application of the QDMTT is also backed by the IIR and the UTPR. The QDMTT is intended to give the host jurisdiction the first bite, but the February 2023 AG went for an *all-or-nothing* approach. In other words, if host jurisdictions wish to have some of the GloBE revenue, they will have to be the ones adopting the complex rules and enforcing them.

Such restrictive requirements are a measure against the interest of host countries that engage in legitimate tax competition, whereas they are mostly irrelevant for tax havens. A restrictive definition of QDMTT cannot be justified on the goal to set a floor to tax competition, being much more clearly a matter of distribution of the necessary tax enforcement measures. A permissive definition of QDMTT would leave some enforcement work to be performed by home jurisdictions, as they would still have to apply IIRs and UTPRs, in case the Top-up Tax of charged by the host jurisdiction was below the floor. Whereas a permissive definition would mean sharing the

66 February 2023 AG, p. 100, para. 118.2.
67 February 2023 AG, p. 105, para. 118.27. See GLOBE MODEL RULES, Art. 4.4 and Art. 4.5.
68 February 2023 AG, p. 106, para. 118.33
69. February 2023 AG, p. 107, para. 118.36-118.37.
70 February 2023 AG, p. 107, para. 118.38.
71 GLOBE MODEL RULES, Art. 5.5.
72 February 2023 AG, p. 107, para. 118.39
73 February 2023 AG, p. 104, para. 118.20-118.21.
74 February 2023 AG, p. 104, para. 118.20.
75 February 2023 AG, p. 104, para. 118.21.

76 This issue has different implications in the case of a safe harbour, as it has been discussed.
77 This feature of the GloBE Model Rules is acknowledged in the July 2023 AG, p. 77, para. 2.: "This possibility of an MNE Group paying less Top-up Tax under a QDMTT than it would have incurred under the GloBE Rules, does not, however, give rise to any integrity risks because the credit mechanism in Article 5.2 ensures that any shortfall in domestic Top-up Tax payable under the QDMTT will simply result in additional tax being payable under the GloBE Rules".

enforcement burden with home jurisdictions (demanding the application of IIRs and UTPRs as backstops), a restrictive definition of QDMTT is a measure aimed at allocating the total enforcement burden of the floor to tax competition on home jurisdictions.

The QDMTT Safe Harbour in the July 2023 AG as a seal of quality

A very sensible and much awaited topic was the development of a QDMTT Safe Harbour[78]. The terms of such QDMTT Safe Harbour would determine which jurisdictions would ultimately be tasked with enforcing the floor to tax competition envisaged by the IF. Depending on how the QDMTT Safe Harbour was drafted, host jurisdictions could either be partially relieved from the burden of enforcing the floor to tax competition or become the sole responsible for ensuring that the Minimum Rate is observed. The February 2023 AG already gave a hint on where the IF was headed, and the July 2023 AG confirmed the trend initially presented.

In essence, the QDMTT Safe Harbour is a mere *seal of quality*, granted to jurisdictions that implement and enforce a fully-fledged QDMTT. If the QDMTT enacted meets certain conditions, the application of other charging rules (IIRs and UTPRs) is excluded, by deeming the Top-up Tax to be zero for the jurisdiction. In other words, if the host jurisdiction adopts a robust QDMTT, the other jurisdictions will not try and charge any additional amount of Top-up Tax.

As put by the July 2023 AG, the coexistence between IIRs, UTPRs, and QDMTTs requires at least two separate Top-up Tax calculations in respect of the same jurisdiction: the first, based on the QDMTT legislation in the host jurisdiction, and the second, under the other applicable charging rules[79]. It is a concern for the IF members that the requirement for multiple Top-up Tax calculations under parallel rules may result in increased compliance costs for MNE Groups and tax administrations[80]. The issue is, then, which jurisdictions should be relieved from the administrative burden of enforcing the floor to tax competition.

One possible policy choice would be to make the QDMTT Safe Harbour work to relieve the MNE Group from IIR and UTPR obligations. One possible simplification would be to establish that an IIR calculation is not required in relation to a jurisdiction in which there is an applicable QDMTT[81]. This logic could also be extended to relieve the MNE Group from obligations related to the UTPR. This was the path initially advanced by the February AG 2023 and further implemented by the July 2023 AG.

In a single paragraph discussing the prospects of a QDMTT Safe Harbour, the February 2023 AG speaks of *simplifications for MNE Groups*[82], without taking into account that the simplification is also relevant for the tax authorities involved – and that conflicting positions may arise therefrom. The February 2023 AG tentatively described a QDMTT Safe Harbour that would work "for example by exempting the MNE Group from the requirements to perform additional GloBE calculations in respect of Constituent Entities located in a jurisdiction that qualifies for the Safe Harbour"[83]. In other words, if the QDMTT being applied in the host jurisdiction is robust enough, the MNE Group would be exempted, in relation to such CEs, from the obligations related to the IIR and the UTPR, which would otherwise arise in other jurisdictions.

This political choice was indeed confirmed by the July 2023 AG. The QDMTT Safe Harbour operates under Art. 8.2 of the GloBE Model Rules and excludes the application of other charging rules by deeming the Jurisdictional Top-up Tax to be zero in a jurisdiction whose QDMTT meets an additional set of standards[84]. In order to qualify for the QDMTT Safe Harbour, the QDMTT implemented by the jurisdiction must meet an additional set of standards, including a QDMTT Accounting Standard, a Consistency Standard, and an Administration Standard[85]. The IF will examine the QDMTT legislation of the host jurisdiction and supervise how they are applicable, by means of a peer-review process[86].

78 February 2023 AG, p. 98, para. 3; p. 109, para. 118.46.
79 July 2023 AG, p. 77, para. 2.
80 July 2023 AG, p. 77, para. 2
81 See Wardell-Burrus (2023)
82 February 2023 AG, p. 109, para. 118.46.
83 February 2023 AG, p. 109, para. 118.46.
84 July 2023 AG, p. 77, para. 4.
85 July 2023 AG, pp. 77-78, para. 5.
86 July 2023 AG, p. 78, para. 6.

Drafted in such a way, the QDMTT Safe Harbour is of no benefit for host jurisdictions: they need to enact a complicated tax, which will provide them with a *seal of quality*, which comes at a high administrative cost. This *safe harbour* allocates the totality of the administrative burden to the host jurisdiction. It operates to the exclusive benefit of the tax authorities of the IIR and UTPR jurisdictions, while transferring all the complications of calculating the Top-up Tax to the host jurisdiction. The obvious impact of such a measure is to completely shift the burden of monitoring the floor to tax competition to the tax authorities of the host jurisdiction, in a way that would be unimaginable when the Pillar II project was launched. The central role played by the GAAP of the UPE in the GloBE Model Rules is enough evidence that the enforcement efforts were always intended to be concentrated in the UPE Jurisdiction.

A proposal for an Actual QDMTT simplification measure

Even considering the policy choices made by the AGs, it is still possible for host jurisdictions to enact an actual QDMTT simplification measure, which actually works to (partially) relieve the tax authorities of the host jurisdiction from administration burdens related to the QDMTT.

The simplification measure would be drafted in a simple way and relieve the MNE Group from incremental QDMTT liabilities in case certain conditions were met. Accordingly, host jurisdictions could enact a QDMTT with the precise features outlined in the GloBE Model Rules, as interpreted by the GloBE COMMENTARY and the AGs. The simplification measure consists of a simple clause, added to the legislation adopted in such terms. The clause would state that the taxpayer shall not be subject to any form of adjustment or incremental liability under the QDMTT rules if the amount of QDMTT calculated is sufficient to neutralize the application of IIRs and UTPRs by other jurisdictions.

The suggested clause benefits from the incentives created by the GloBE Model Rules ' structure. When applying IIRs and UTPRs, home jurisdictions already must check whether the floor to tax competition is being respected in all the relevant jurisdictions. The QDMTT appears as a simple deduction for the purpose of calculating the Top-up Tax under IIRs and UTPRs. Even if they do not expect to collect revenue, if they have enacted IIRs and UTPRs, they are expected to enforce it. As the QDMTT is a deduction from the Jurisdictional Top-up Tax, they need to take the QDMTT into consideration, in order to ensure the proper application of IIRs and UTPRs. Besides that, only by ensuring the enforcement of their IIRs and UTPRs they will ensure the authority of the floor to tax competition, which is within their interests.

As seen, the calculation of the QDMTT is a necessary step for the calculation of the IIR and the UTPR. If no IIR or UTPR is being applied, it means that other jurisdictions have concluded that the floor to tax competition is being respected, including due to the neutralization of the other charging rules by an applicable QDMTT. Such a simplification measure would be in line with the February 2023 AG guiding principles. The minimum tax would be consistent with the design of the GloBE Model Rules and would provide for outcomes that are consistent with the GloBE Model Rules. The measure would, by no means, be a *benefit* in relation to the application of the GloBE Model Rules, as it would precisely take the GloBE Model Rules as a reference point to conclude whether the taxpayer is compliant with the minimum tax.

Host jurisdictions could therefore use the GLOBE Information Return to check whether the MNE Group is being subject to IIRs and UTPRs in other jurisdictions, in relation to CEs within the host jurisdiction. Enforcement efforts would correspondingly be focused on CEs that are still being subject IIRs and UTPRs in other jurisdictions, which could be indicative of a misapplication of the QDMTT. In case where no IIR or UTPR arise, it would be assumed that home jurisdictions have audited the relevant GloBE Information Return and concluded that no additional Top-up Tax should be due. It would be important that jurisdictions would also share information in cases where an auditing has been performed and an IIR or an UTPR has been charged, with information that deviates from the GloBE Information Return.

The simplification measure is intended to mi-

nimize interpretative conflicts and compliance costs. In practice, its adoption will mean that the host jurisdiction abides to the home jurisdiction interpretation of the relevant charging rules. By giving away this interpretative power, host jurisdictions will be able to benefit from the monitoring of home jurisdictions over the IIRs and the UTPRs, while still capturing the relevant tax revenue under their QDMTTs.

A similar provision may be found in the ATAF Suggested Approach. The model sets forth that the determination of the Top-up Tax under the QDMTT "will be deemed to be in accordance with the GloBE Information Return provided that such calculations were made by a Member of the Group in accordance with a Qualified Income Inclusion Rule or Qualified UTPR"[87]. The deeming provision acknowledges the calculation of the Top-up Tax performed by another jurisdiction and takes into consideration that "it would be burdensome to require a Group to recalculate based on these relatively narrow range of differences"[88] that may arise between IIRs, UTPRs and QDMTTs. The difference between the ATAF Suggested Approach and the approach advanced hereby is essentially that the latter leaves more leeway for host jurisdictions and creates an incentive for MNE Groups to pay all Top-up Tax in the form of QDMTT.

Conclusions

Initially centered in the functioning of the IIR, Pillar II took an unexpected turn with the inclusion of the QDMTT. Its addition by the GloBE Model Rules offered host countries the possibility of raising revenue with Pillar II. With the development of the AGs, it became clear that the new revenue would only come with the adoption of very complex rules. Despite the relevant compliance efforts that a QDMTT requires, host jurisdictions are not likely to waive additional tax revenue.

The developments within the IF show a trend towards shifting the enforcement burden of the floor to tax competition to host countries. The specific provisions on the QDMTT and the QDMTT Safe Harbour allocates the monitoring and enforcement obligations on host countries. As argued, the asymmetrical approach of the February 2023 AG can only be explained by the intent of shifting all the enforcement liabilities to host jurisdictions. The design of the QDMTT Safe Harbour as a *seal of quality* makes this trend even clearer. This is a curious outcome, as the Pillar II rules were initially designed to be applied by home jurisdictions, and the QDMTT was included at the last minute.

Against this background, the contribution presents an actual QDMTT simplification measure for host countries, which draws on the incentive embedded in the GloBE Model Rules and considers the function a QDMTT is expected to perform. The proposal is compatible with the applicable AG, fosters the uniformity of the application of the rules, and maintains the integrity of the floor to tax competition.

References

Arnold, B. J. (2022). An Investigation into the Interaction of CFC Rules and the OECD Pillar Two Global Minimum Tax. Bulletin for International Taxation, 76(6), 275.

Arnold, B. J. (2022). The Ordering of Residence and Source Country Taxes and the OECD Pillar Two Global Minimum Tax. Bulletin for International Taxation, 76(5), 224.

Ault, H. J. (2019). Tax Competition and Tax Cooperation: A Survey and Reassessment . In K. L. International, International Taxation in a Changing Landscape: Liber Amicorum in Honour of Bertil Wimen (pp. 10-11). Netherlands: Jérome Monsengo and Jan Biuvberg.

Avi-Yonah, R., Ran, Y., & Sam, K. (2022). A New Framework for Digital Taxation. Harvard International Law Journal, 63(2), 297.

Christians, A., & Magalhães, T. D. (2022). Undertaxed Profits and the Use-It-or-Lose-It Principle. Tax Notes International.

Dagan, T. (2018). International Tax Policy: Between Cooperation and Harmonization.

87 ATAF SUGGESTED APPROACH
88 ATAF SUGGESTED APPROACH, p. 46.

Cambridge University Press, 137.

Dagan, T. (2023). GloBE: The Potential Costs of Cooperation. Intertax, 51(10), 638.

Devereux. (2020). THE OECD GLobal Anti-Base Erosion ("GloBE") Proposal. Oxford University Centre for Business Taxation, 2-3.

Devereux, M., Vella, J., & Wardell-Burrus, H. (2022). Pillar 2: Rule Order, Incentives, and Tax Competition. Oxford University Center for Business Taxation, Policy Brief.

Englisch, J., & Becker, J. (2019). International Effective Minimum Taxation - The GLoBE Proposal. World Tax Journal, 11(4), 483-529.

Galendi, R. A. (2023). The Single Top-up Tax Principle: justification, content and functions upon the design of the QDMTTs. World Tax Journal, 15(4).

Herzfeld, M. (2022). Do GILTI + BEAT + BMT = GloBE? Intertax, 50(12), 895.

Kane, M. (2015). A Defense of Source Rules in International Taxation. Yale Journal on Regulation, 32, 321.

Keil, G., & Poscher, R. (2016). Vagueness and Law: Philosophical and Legal Perspectives . In G. K. Poscher, Vagueness and Law: Philosophical and Legal Perspectives. Oxford University Press.

Manson, R. (2020). The Transformation of International Tax. American Journal of International Law, 114(3), 376-380.

Manson, R. (2022). A Wrench in GLOBE´s Diabolical Machinery. Tax Notes International.

OECD. (2013). Action Plan on Base Erosion and Profit Shifting. Paris.

OECD. (2019). Public Consultation Document, Global Anti-Base Erosion Proposal ('GloBE') - Pillar Two" (8 November 2019- 2 December, 2019).

OECD. (2019). Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy. (90), 24.

OECD. (2020). Tax Challenges Arising from Digitalisation - Economic Impact Assesment: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project. Paris.

OECD. (2023). Tax Challenges Arising from the Digitalisation of the Economy - Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar II). Paris .

Oguttu, A. W. (2022). Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy – A Developing Country Perspective. Bulletin for International Taxation, 76(11), 551.

Pascucci, F. (2022). The (Re)Allocation of Taxing Rights Following the 2021 Consensus on Pillar Two Blueprint: An Examination of Its Causes and Effects. In IBFD, Tax Nexus and Jurisdiction in International and EU Law. Amsterdam: Edoardo Traversa.

Perry, V. (2023). Pillar 2, Tax Competition, and Low Income Sub-Saharan African Countries. Intertax, 51(2), 116.

Picciotto, S. (2021). For a Better GLOBE: A Minimum Effective Tax Rate for Multinationals. Tax Notes International, 101, 864.

Plunket, C. (2022). What's in a Name? The Undertaxed Profits Rule. Tax Notes International, 105, 1507.

Talley, E. (2015). Corporate Inversions and the Unbundling of Regulatory Competition. Virginia Law Review, 101, 1649-1751.

Tanzi, V., & Zee, H. H. (2000). Tax Policy for Emerging Markets: Developing Countries. IMF Working Papers.

Wardell-Burrus, H. (2023). GloBE Administrative Guidance – The QDMTT and GILTI Allocation. Policy Brief, Oxford University

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Bolivia: La experiencia de la tributación de servicios digitales en Bolivia

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Resumen

La pandemia COVID-19 trajo consigo muchos cambios en la sociedad, con lo cual la tecnología ha invadido casi todas las actividades rutinarias y, por supuesto, las formas habituales de comercio. Este aspecto, por lo menos en el ámbito tributario, ha generado bastante debate por sus implicaciones, principalmente en lo referido a las potestades tributarias de las jurisdicciones, donde corresponde la tributación de la economía digital, sobre todo los servicios digitales y otras actividades que se realizan en espacios virtuales (metaverso).

En el presente trabajo, de manera analítica descriptiva, se identifican las distintas formas jurídicas por las que han optado los países en desarrollo para la tributación de los servicios digitales, se presenta una evaluación de las opciones que ha escogido Bolivia para cobrar tributos y los inconvenientes presentados en ambos casos.

Respecto a las formas de tributar, se identifican principalmente los casos en los que se ha optado por gravar la renta de empresas no constituidas en territorio nacional (sin establecimiento permanente) y aquellos que han optado por gravar el consumo, entendido como importación de servicios (impuesto al valor añadido).

Para ponernos en contexto, respecto a las alternativas planteadas por Bolivia, se encuentran los proyectos de norma remitidos por el Órgano Ejecutivo, con los cuales se establecieron mecanismos para que las empresas que prestaban servicios desde el exterior tributaran en este país. El primero consistía en aplicar el Impuesto sobre las Utilidades de la Empresas–Beneficiarios del Exterior (IUE-BE) a las prestaciones de servicios realizados desde el exterior, cuyo mecanismo de cobro se basaba en una retención a ser ejecutada por una Entidad de Intermediación Financiera; y el segundo se trataba de aplicar el Impuesto al Valor Agregado (IVA) a los consumidores en territorio nacional, para lo cual la empresa del exterior debía inscribirse previamente en el Servicio de Impuestos Nacionales (SIN).

Ninguna de estas propuestas resultó exitosa porque no han nacido a la vida jurídica a través de la promulgación de una norma, por lo cual resulta importante analizar las alternativas que tienen las economías pequeñas como Bolivia, para lograr que la economía digital pague tributos, así como la conveniencia de las alternativas planteadas por organismos internacionales como Naciones Unidas (ONU) o la Organización para la Cooperación y el Desarrollo Económico (OCDE).

Introducción

Muchos países han visto la necesidad de realizar reformas a sus legislaciones a fin de que quienes utilizan las nuevas formas de operar en el comercio, sin la necesidad de presencia física, cumplan con sus obligaciones tributarias en el país donde se consumen los servicios por medios digitales. Este aspecto generó un debate en cuanto a la potestad tributaria en jurisdicciones extraterritoriales, como es el caso del establecimiento permanente y la posible doble imposición resultante de gravar a los servicios en el país de donde proviene la renta pagadora.

El presente artículo se enfoca en la discusión sobre el estado actual de la tributación del comercio electrónico en su modalidad B2C y busca brindar detalles sobre las estrategias y desa-

fíos que giran en torno a la implementación de normas dedicadas a su regulación.

Comercio electrónico nacional

En Bolivia, la venta de bienes y servicios por medios digitales y la intermediación (plataformas) realizada en su territorio está sujeta al pago del Impuesto al Valor Agregado (IVA), Impuesto a las Transacciones (IT) e Impuesto sobre las Utilidades de las Empresas (IUE) al igual que el resto de las operaciones, por lo que, en cuanto al marco normativo para gravar estas actividades, no se ha tenido la necesidad de ajustar la normativa vigente, sino más bien mejorar los mecanismos de control.

El comercio B2B posiblemente sea el que menos problemas presenta porque, al tratarse de operaciones entre personas jurídicas que llevan una contabilidad y desarrollan sus actividades en condiciones formales, estas también reportan sus operaciones por medios digitales.

En cuanto al comercio B2C, el principal problema que se presenta es la sanción por la no emisión de factura, toda vez que actualmente esta figura se sanciona con la clausura del establecimiento, aspecto que ya no es aplicable en operaciones realizadas digitalmente. Este mismo problema se presenta en el comercio C2C, debido a que en la mayoría de los casos las ventas de bienes o servicios se realizan en la calle, en una plaza o desde un domicilio particular, a través de una aplicación gratuita como Marketplace, y otras en las que no se puede identificar al titular de la cuenta de Google o Facebook, con las que operan desde distintas plataformas.

Al respecto, el Servicio de Impuestos Nacionales (SIN) ha realizado la adecuación de los sistemas de facturación, al incorporar actividades en el padrón de contribuyentes e implementando la factura electrónica, medidas que coadyuvan al cumplimiento de las obligaciones y principalmente el control de contribuyentes en territorio nacional (tabla 1).

Tabla 1.
Normativa referida al control del comercio electrónico en mercado interno

Norma	Alcance
Resolución Normativa de Directorio RND 10-0044-13, de 20 de diciembre de 2013	Establece que, en las operaciones de venta por comercio electrónico sin intermediarios, el vendedor deberá entregar al comprador la factura emitida bajo la modalidad de Facturación Computarizada o Electrónica al momento de la entrega del bien. Y en las operaciones de venta por comercio electrónico con intermediarios, éstos realizarán Facturación por Terceros, a través de la modalidad de Facturación Computarizada o Electrónica, debiendo entregar la factura a momento de la entrega del bien.
Resolución Normativa de Directorio N° 102100000020, de 04 de noviembre de 2021.	Incorpora como Actividades Económicas al Padrón Nacional de Contribuyentes los siguientes: • Servicios de intermediación en la venta de bienes y servicios a través de medios digitales. • Suministro de contenido digital por descarga o streaming. • Suministro de plataformas y servicios de contenido digital para educación en línea. • Suministro de tecnología en la nube. • Suministro de servicios de gestión de publicidad en línea. • Servicios digitales vinculados a las actividades de apuestas y juegos de azar en línea.
Resolución Normativa de Directorio (RND) 1021000001 1	Dispone la implementación del sistema de facturación electrónica desde diciembre 2021.
Decreto Supremo N° 4541, 14 de julio de 2021	Otorga la misma validez a la factura emitida por medios digitales que una física en original.

Nota. Elaboración propia

Otro tipo de actividades de difícil control está relacionado con aquellos servicios que se ofrecen a través de plataformas internacionales como es el caso de hospedaje (Airbnb, Booking, etc.), y servicios de taxi (Uber, InDrive), con la particularidad de que en estos casos quien ofrece el servicio y el cliente son personas naturales y ambos están ubicados en territorio nacional por lo que, aunque la aplicación es extranjera, no se trata de una operación transfronteriza. En cuanto a servicios de hospedaje, en Bolivia se realizan operativos de control por parte de autoridades turísticas, gobiernos municipales y el SIN. Respecto a los servicios de taxi, en Bolivia estos tributan en un régimen especial denominado Sistema Tributario Integrado (STI), por lo que no están obligados a facturar, pero sí realizan un pago trimestral, inclusive si el servicio es prestado a través de una plataforma.

Comercio electrónico de bienes transfronterizo B2C

Respecto al comercio electrónico de bienes procedentes del exterior –adquiridos a través de una plataforma internacional como Amazon, eBay, AliExpress, entre otras–, si bien Bolivia no cuenta con regulaciones especiales sobre estas, se debe considerar que, al momento del ingreso de bienes al país, estos se encuentran sujetos al pago de tributos de importación. En estos casos, existen dos modalidades de importación para operaciones no habituales sin presencia física:

1. Envíos urgentes vía servicio expreso Courier y 2. Encomiendas postales y envíos urgentes, las cuales se detallan en la tabla 2.

Tabla 2.
Normativa aduanera de importadores no habituales (no presencial)

Modalidad	Alcance	Exentos de tributos
Envíos urgentes vía servicio expreso (Courier):	Cuando el valor de las mercancías (valor FOB) por envío no supere USD 1.000.-, un peso total bruto no superior a 40 Kg, hasta un valor acumulado anual de USD 4.000.- (de enero a diciembre de la misma gestión).	Ninguno
Encomiendas postales y envíos urgentes:	A través de la Empresa de Correos de Bolivia (ECOBOL), cuando el valor de las mercancías (valor FOB) sea mayor a USD 100.-, un peso total bruto no superior a 40 Kg, un valor de las mercancías no superior a USD 1.000.-, hasta un valor acumulado anual de USD 4.000.- (de enero a diciembre de la misma gestión). En el caso de compras por internet (envíos postales y/o envíos urgentes EMS) remitidos por empresas comerciales, indistintamente de su valor y peso estarán sujetos al pago de tributos aduaneros.	Los paquetes y encomiendas postales que no sean enviados por empresas comerciales, estarán libres de tributos aduaneros cuando cumplan los siguientes requisitos: a) Que su valor no exceda de $us. 100.- (cien 00/100 dólares estadounidenses) y b) Que su peso no exceda de dos (2) kilogramos en el caso de paquetes postales y 20 kilogramos para envíos urgentes (EMS). c) Que sus medidas no superen un metro con cincuenta centímetros (1.50 Mt.) en cualquiera de sus dimensiones, ni de tres metros (3 Mt.) el contorno, cuando se trate de paquetes postales. Los productos farmacéuticos y/o medicamentos bajo prescripción médica expresa, importados para uso personal del destinatario en una cantidad no superior a tres (3) unidades de cajas y/o frascos envasados de origen, están libres del pago de tributos aduaneros.

Nota. Elaboración propia

Prestación de servicios digitales transfronterizo B2C

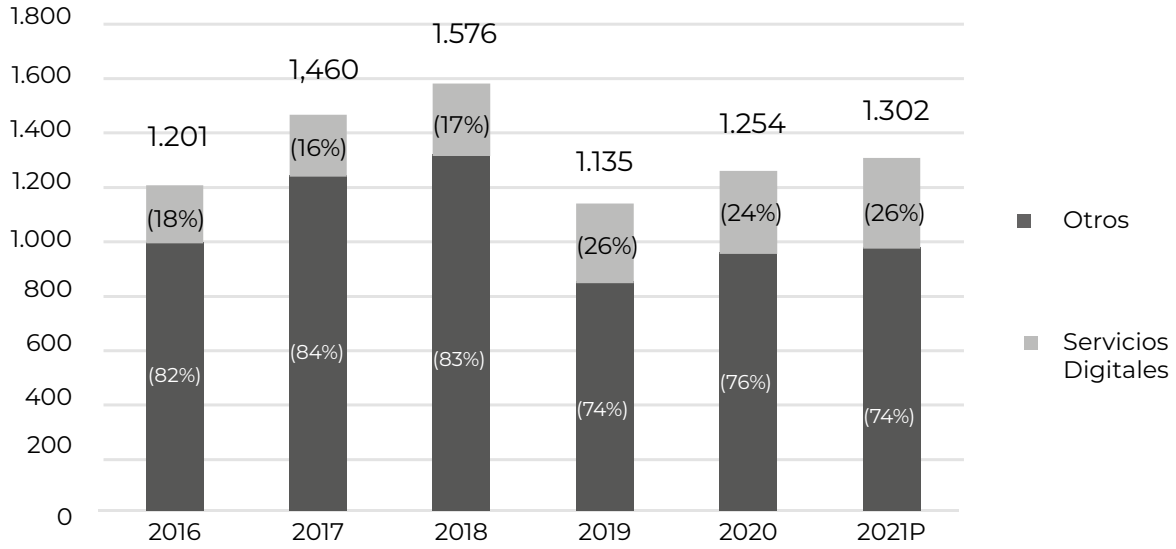
De acuerdo con información de la Autoridad del Sistema Financiero (ASFI), a partir de 2016, con proyecciones a 2021, la compra de servicios digitales como Netflix, Google y YouTube, entre otros, se incrementó en 56%, lo que representa un crecimiento anual promedio de 9%.

Del total de transacciones digitales efectuadas en 2016, 213 millones Bs (18%) corresponden a ventas por *servicios digitales*; para 2021 se estima que este monto se elevó a 332 millones Bs (26%), como se aprecia en la figura 1.

Los servicios digitales transfronterizos representan una parte importante de las transacciones; sin embargo, debido a la naturaleza de sus operaciones actualmente no reportan el pago de impuestos en Bolivia por sus actividades.

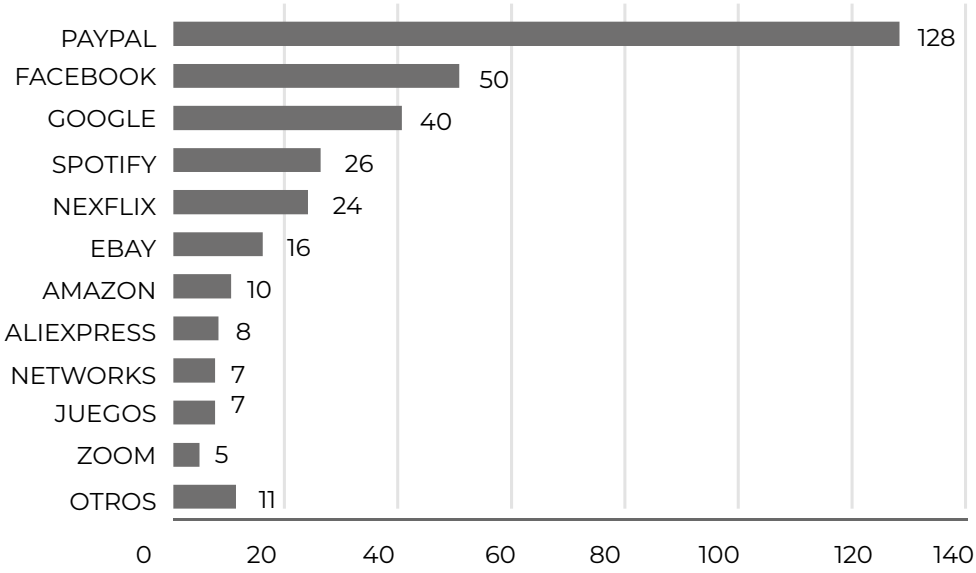
La figura 2 muestra el valor de las operaciones realizadas por tarjetas de débito y crédito con origen en una cuenta bancaria habilitada en una entidad financiera nacional, identificando a las empresas beneficiarias en el exterior durante la gestión 2021. En dicha información se observa que 128 millones Bs corresponden a transferencias con destino a la plataforma de pago PayPal y las demás corresponden a pagos de servicios de publicidad (PayPal, Facebook), servicios de *streaming* (Spotify, Netflix) y otras plataformas que intermedian la compra de bienes o servicios (Ebay, Amazon, AliExpress). En porcentajes, PayPal representa el 38% del total de transacciones; Facebook, el 15%; Google, el 12%; y el 35% restante corresponde a transferencias por valores menores a empresas como Spotify, Netflix, Ebay, Amazon, AliExpress, entre otros.

Figura 1.
Composición de las transacciones por tipo de actividad 2016-2021P
(expresado en porcentajes y millones de bolivianos).



Nota. P: Son valores proyectados. Fuente: ASFI. Elaboración: Viceministerio de Política Tributaria.

Figura 2.
Operaciones realizadas por servicios digitales 2021*
(en millones de bolivianos)



Nota. Fuente: Autoridad del Sistema Financiero. Elaboración: Viceministerio de Política Tributaria.
**Datos estimados a diciembre de 2021.*

Desafíos que se presenta la tributación transfronteriza de bienes y servicios en línea

Con base en esta información, se identificó como principal falencia la ausencia de normativa que permita el pago de tributos por los servicios que son prestados desde el exterior mediante aplicaciones digitales en línea, intentando en dos oportunidades gestionar la aprobación de normas tributarias, la primera enfocada en gravar la renta y la segunda, en el consumo.

Alternativa 1. Gravar los servicios digitales con el Impuesto sobre las Utilidades de las Empresas Beneficiarios del Exterior (IUE-BE)

El Impuesto sobre las Utilidades de las Empresas (IUE) se rige por el principio de fuente o territorialidad; pero también alcanza a las rentas obtenidas por beneficiarios en el exterior (*fuente ampliada*), por las prestaciones de servicios realizados desde el exterior. Este impuesto no está supeditado a la definición del establecimiento permanente, por lo que los ingresos por concepto de honorarios, retribuciones o remuneraciones de servicio de cualquier naturaleza, prestaciones desde o en el exterior, para personas naturales y jurídicas, también están alcanzados por este impuesto, en el que se presume que la utilidad del beneficiario del exterior es el 50% del monto total pagado o remesado, sobre el cual se aplica la alícuota del 25%, y su mecanismo de pago es a través de la retención por parte de quien realiza el pago del servicio en territorio nacional.

A través de este mecanismo, las personas jurídicas que contratan servicios prestados desde el exterior realizan la retención de la tasa efectiva del 12,5%. Este tratamiento les permite que este gasto sea deducible del IUE, mecanismo que también ha estado funcionando para los servicios digitales. Sin embargo, no se tiene un esquema similar cuando quien recibe el servicio en territorio nacional es una persona natural; por tanto, la primera normativa planteada por el Órgano Ejecutivo en la gestión 2017 se trataba de un Decreto Supremo que ampliaba el alcance a personas naturales como agentes de retención. Entre las principales características de esta alternativa estaban las siguientes:

- La alícuota que se paga es el 25% del 50% del monto total pagado o remesado (tasa efectiva del 12,5%).

- El mecanismo de pago es a través de la retención por parte de quien pague o remese al beneficiario del exterior.

- Las entidades financieras establecidas en territorio nacional retendrán el impuesto por cuenta de las personas naturales que contraten servicios del exterior al momento que realicen el pago con su tarjeta de crédito o débito.

Entre los principales problemas para su implementación se identifican los siguientes:

- Las entidades financieras manifestaron inconvenientes operativos para efectuar la retención porque al momento del pago se desconoce el destinatario y el motivo del pago.

- Las entidades financieras no podían ser responsables por las retenciones cuando los contribuyentes no tengan saldo suficiente en las cuentas bancarias.

- El banco no contaba con mecanismos para incorporar en el precio el importe que corresponde al impuesto.

- Al tratarse de un impuesto empresarial, quien asume la carga sería el consumidor.

- En caso de realizar la retención por el código de actividad que usan las operadoras internacionales de tarjetas de débito y crédito (Visa y MasterCard), el banco hubiese efectuado la retención al momento de conocer el motivo del pago, es decir, posterior al pago.

Alternativa 2. Gravar los servicios digitales con el Impuesto al Valor Agregado (IVA)

Esta alternativa consistía en un Proyecto de Ley que permitía aplicar el impuesto al consumo (IVA) a los servicios digitales provistos desde el exterior y consumidos en Bolivia, similar a un impuesto a la importación de servicios que fue planteada en la gestión 2021. En Bolivia, el IVA tiene una alícuota del 13%; sin embargo, a diferencia de otros países, este impuesto está incluido en el precio de venta, es decir, no se expone por separado en la factura. Entre las principales características de la propuesta estaban las siguientes:

· Se pretendía gravar los siguientes servicios:

- Intermediación entre terceros en compras de bienes o servicios de cualquier naturaleza realizadas en el territorio nacional o en el extranjero.

- Suministro de videos, música, juegos, textos, revistas, libros y otros análogos.

- Transferencia, instalación o puesta a disposición de software, almacenamiento, plataformas o cualquier otra infraestructura informática.

- Publicidad difundida por cualquier soporte o medio digital.

- Cualquier otro servicio digital.

· Las empresas que proveen servicios digitales desde el exterior tenían que empadronarse en el Servicio de Impuestos Nacionales (SIN) para liquidar y pagar el impuesto de forma bimestral.

· En caso de que estos sujetos incumplieran con su inscripción, las entidades financieras debían retener el impuesto de los usuarios al momento de realizar el pago mediante los instrumentos electrónicos de pago.

· Se presumía que el servicio digital era consumido, utilizado o explotado en Bolivia cuando la transferencia, descarga, retransmisión mediante internet u otra tecnología se hubiera realizado desde un dispositivo cuyo IP, tarjeta SIM u otro mecanismo de geolocalización situado en territorio boliviano o cuando el instrumento electrónico de pago utilizado para el pago haya sido proporcionado por una entidad regulada por la Autoridad de Supervisión del Sistema Financiero (ASFI).

Entre los obstáculos para su implementación se pueden citar los siguientes:

· La desinformación mediática originada por partidos políticos opositores al Gobierno actual generó el rechazo de la población, al pensar que se encarecería el acceso a plataformas educativas o que se pagaría inclusive por plataformas gratuitas como WhatsApp y Facebook.

· Las empresas extranjeras que se hubieran inscrito en Bolivia tendrían que haber incluido en su precio el IVA, por lo que posiblemente iban a subir sus tarifas.

· La carga tributaria recaía directamente sobre el consumidor en territorio nacional, encareciendo el costo de estos servicios en Bolivia.

· La efectividad para el cobro del impuesto dependía de la información con la que cuentan las entidades financieras, las Administradoras de Tarjetas (ATM) y los operadores de pagos internacionales como Visa y MasterCard, referidos al destinatario y concepto de pago en el exterior.

· Las presunciones previstas para identificar aquellos servicios digitales que son consumidos en territorio nacional podrían haber ocasionado que algunos de estos servicios no sean realmente consumidos en Bolivia.

· El mercado boliviano es muy pequeño en cuanto a cantidad de usuarios de servicios digitales y puede resultar poco atractivo para que las empresas se registren en el SIN, por lo que existen pocos mecanismos de cobro coactivo y/o control a estos proveedores.

Conclusiones

El comercio electrónico, a través de sus distintas modalidades, ha tomado mayor relevancia a partir de la pandemia COVID-19, dando lugar a que los distintos países hayan adecuado sus legislaciones para cobrar tributos por las prestaciones de servicios desde el exterior. Bolivia no es ajena a ello. Ha visto la necesidad de plantear ajustes normativos al realizar el cobro de tributos por las prestaciones de servicios provenientes del exterior, otorgando igualdad de condiciones con empresas locales que brindan servicios similares. Sin embargo, ninguna ha prosperado y actualmente únicamente se está cobrando el IUE-BE en servicios B2B.

Si bien los primeros intentos de gravar los servicios digitales provistos desde el exterior no tuvieron éxito, Bolivia no puede renunciar al derecho de gravar los ingresos generados en territorio nacional, por lo que estas alternativas no deben ser desestimadas, al igual que las propuestas por organismos internacionales como la OCDE y el G-20, que en el marco del convenio multilateral como parte del marco inclusivo sobre BEPS proponen la aplicación de un impuesto mínimo global del 15%, con base en volúmenes de ventas y otros, o la alternativa planteada por las Naciones Unidas (ONU), consistente en negociar la inclusión del artículo 12b en un Modelo de Tratado Tributario para la tributación de los servicios digitales automatizados.

Principios de Derechos Humanos y justicia tributaria global

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Resumen

Los Estados deben crear un entorno de gobernanza global adecuado para lograr la plena realización de los derechos humanos. Bajo esta premisa, en este artículo defendemos la tesis de que la incorporación de una perspectiva de derechos humanos es necesaria para discutir en mejor forma la reforma a la tributación global que actualmente se adelanta a nivel internacional.

Los artículos 55 y 56 de la Carta de la ONU establecen que los Estados deben cooperar internacionalmente para asegurar el respeto universal de los Derechos Humanos, y por ello no solo deben respetar y garantizar los derechos humanos en su territorio, sino que tienen obligaciones fuera de este. Así, la política fiscal no solo está regida por normatividad doméstica, sino también por los principios generales del derecho internacional y estándares de política pública de organismos internacionales. En este contexto, los Derechos Humanos pueden hacer un aporte valioso para repensar una tributación incluyente, sostenible y equitativa a nivel nacional e internacional.

Introducción

En este artículo defendemos la tesis de que la incorporación de una perspectiva de derechos humanos es no solo relevante, sino incluso necesaria para discutir en mejor forma la reforma a la tributación global que actualmente se adelanta a nivel internacional y que busca combatir la competencia tributaria a la baja, la cual ha erosionado la capacidad de muchos Estados para movilizar recursos suficientes para cumplir sus funciones y satisfacer los derechos de sus poblaciones. Sin embargo, la adopción de este enfoque de derechos humanos en el campo fiscal no es nada fácil, por cuanto hasta hace muy pocos años existió una desafortunada ignorancia recíproca entre las discusiones de derechos humanos y las de política fiscal, tanto a nivel nacional como internacional.

En concordancia con estas premisas, el presente documento se estructura en cuatro secciones. La primera resalta la importancia de superar esa brecha entre discusiones fiscales y de derechos humanos a fin de adoptar un enfoque de derechos humanos en las políticas fiscales en general, y en materia tributaria en particular. La segunda parte identifica los principios y obligaciones de derechos humanos que son más relevantes para la discusión de la reforma a la tributación global, lo cual nos llevará, en particular, a introducir la tesis de que los Estados tienen también obligaciones extraterritoriales en este campo. La tercera aborda el debate actual en torno a la tributación global y muestra la relevancia de un enfoque de derechos humanos en estas discusiones. Finalmente, presentamos algunas conclusiones de todo este examen.

Un puente necesario pero desatendido: derechos humanos y políticas fiscales

La ignorancia recíproca, al menos hasta hace pocos años, entre los debates de derechos humanos y aquellos de política fiscal ha sido desafortunada, pues es incomprensible y debilita ambos campos de reflexión y de acción política y social.

Resulta problemático que en el ámbito de los derechos humanos se tienda a ignorar las discu-

siones fiscales, pues, como lo mostró el ya clásico trabajo de Holmes y Sunstein (2000), la realización de todos los derechos humanos, incluso de los derechos civiles y políticos, implica costos. No existen derechos gratuitos, por lo cual, si uno quiere tomar en serio la garantía de los derechos y las libertades, debe igualmente tomar en serio el análisis de las restricciones fiscales para realizarlos. La razón es obvia: la realización de los derechos humanos requiere que los Estados cuenten con instituciones robustas que movilicen, asignen y utilicen recursos públicos de manera transparente, participativa y responsable.

Este enfoque es respaldado por el Pacto Internacional de Derechos Económicos, Sociales y Culturales (PIDESC), que reconoce la importancia de la movilización máxima de los recursos disponibles como un elemento fundamental para la realización progresiva de los derechos económicos, sociales y culturales. En el artículo 2, párrafo 1 de este tratado se establece el compromiso de los Estados Parte de tomar medidas, tanto a nivel nacional como mediante la cooperación internacional, para lograr progresivamente la plena efectividad de los derechos reconocidos en el pacto. La movilización máxima de recursos destaca específicamente la responsabilidad de los Estados de fortalecer sus ingresos mediante la recaudación tributaria y de utilizar de manera eficaz los recursos disponibles para avanzar decididamente hacia la plena realización de los derechos humanos.

A su vez, la política fiscal, al ser una política pública, debe regirse por los principios de derechos humanos, ya que estos enmarcan todas las actividades del Estado. El derecho internacional de los derechos humanos establece la obligación ineludible de los Estados de respetar, proteger y garantizar la efectividad de los derechos humanos en todas las facetas de sus funciones. En este contexto, los derechos humanos desempeñan un papel fundamental para reconsiderar la tributación de una manera inclusiva, sostenible y equitativa. La política fiscal, entendida como el conjunto de medidas para administrar el gasto público y sus diversas fuentes de financiamiento, debe entonces concebirse como una herramienta esencial para salvaguardar todos los derechos humanos, sean estos civiles, políticos, económicos, sociales, culturales o ambientales. Además de cumplir con esta función protectora, la política fiscal posee un potencial transformador significativo al poder ser un instrumento para enfrentar la pobreza, la desigualdad y otros obstáculos estructurales que obstaculizan la plena realización de los derechos humanos. En este contexto, la política fiscal se sitúa intrínsecamente en el ámbito de los derechos humanos y, por ende, las reglas y estándares que la regulan deben interpretarse a la luz de las normas de derechos humanos y de las constituciones nacionales, que incorporan esos derechos.

Afortunadamente, en los últimos años se ha empezado a superar esa ignorancia recíproca entre los temas fiscales y los análisis de las obligaciones de derechos humanos, gracias a la labor académica y a los desarrollos doctrinarios de instancias internacionales de derechos humanos. Así, en el plano académico, hay quienes hemos estimulado ese mayor diálogo entre estos campos, por ejemplo, a través de una interpretación interdisciplinaria del alcance del artículo 2 del PIDESC, que establece, como ya lo señalamos, el deber de los Estados de usar el máximo de sus recursos disponibles para lograr la plena realización de los derechos sociales (Uprimny, Chaparro y Castro, 2019). En los últimos quince años, otros académicos han desarrollado esfuerzos semejantes por lograr este puente entre la economía política, la política fiscal y los derechos humanos, tanto en el plano nacional como internacional (Nolan, O'Connell y Harvey, 2013).

A nivel de las instancias de derechos humanos, en el sistema interamericano, la Comisión Interamericana de Derechos Humanos (CIDH, 2017, doc. 147, párrafo 501) ha resaltado que "los principios de derechos humanos constituyen un marco que apuntala las funciones clave de la política fiscal y la tributación" y señaló que los Estados de la región "deben tomar medidas pertinentes para un análisis integral de las políticas fiscales" (párrafo 496). Entonces, es imperativo reconocer la trascendencia de cómo un Estado estructura sus políticas de ingresos y gastos, ya que esto incide de manera directa en su capacidad para cumplir con las obligaciones internacionales en materia de derechos humanos, especialmente aquellas vinculadas a los derechos económicos, sociales y culturales de las personas.

En el ámbito universal, el informe de 2014 de la Relatora Especial de Naciones Unidas sobre la

extrema pobreza y los derechos humanos, Magdalena Sepúlveda Carmona (Sepúlveda, 2014), resaltó que las políticas tributarias son un factor determinante del disfrute de los derechos humanos. La relatora subraya la importancia de la movilización "máxima de recursos disponibles" para asegurar la realización progresiva de los niveles mínimos y esenciales de todos los derechos económicos, sociales y culturales. Estos niveles mínimos esenciales son cruciales para asegurar un nivel de vida adecuado a través de la subsistencia básica, atención primaria de la salud esencial, vivienda y formas básicas de educación para todos los miembros de la sociedad. El principio de movilización, incluso en épocas de limitaciones graves de recursos, impone a los Estados la obligación de hacer todo lo posible para utilizar eficazmente los recursos disponibles, ya sea a través de la recaudación de impuestos, la lucha contra la evasión fiscal y otras corrientes financieras ilícitas, con el firme propósito de satisfacer los niveles mínimos esenciales.

Por su parte, el Comité de Derechos del Niño de Naciones Unidas adoptó en 2016 la Observación General n.º 19 sobre la elaboración de presupuestos públicos para garantizar los derechos del niño, la cual proporciona una guía detallada para la efectiva realización de todos los derechos consagrados en la Convención sobre los Derechos del Niño. Este enfoque se orienta especialmente hacia los niños en situaciones de vulnerabilidad, estableciendo principios rectores de eficacia, eficiencia, equidad, transparencia y sostenibilidad en las decisiones relacionadas con los presupuestos públicos. La "efectividad de los derechos del niño" impone de nuevo a los Estados la responsabilidad de movilizar, en la medida máxima posible, sus recursos disponibles de manera coherente, con el propósito de promover la realización efectiva de los derechos económicos, sociales y culturales.

Además, en esta observación general se destaca que los Estados carentes de los recursos necesarios para implementar los derechos establecidos en la Convención tienen la obligación de buscar cooperación internacional, ya sea de manera bilateral, regional, interregional, global o multilateral, con el fin de facilitar el ejercicio de los derechos del niño. Esto reconoce la importancia de la coordinación de los Estados a nivel global para generar recursos suficientes destinados a la realización de los derechos del niño, lo cual tendría un impacto simultáneo en los derechos de las personas en general.

En particular, esta observación general señala cuatro principios presupuestales que se pueden extrapolar a las políticas fiscales para la realización de los derechos sociales de todas las personas, y no solo de niños y niñas: 1. Eficacia: los estados deben llevar a cabo la planificación, aprobación, ejecución y seguimiento de los presupuestos con el objetivo de promover los derechos humanos. Deben tomar decisiones presupuestarias que conduzcan a los mejores resultados posibles, especialmente para la población más vulnerable. 2. Eficiencia: los estados deben garantizar la optimización de los recursos, teniendo en cuenta la obligación de respetar, proteger y hacer efectivos los derechos económicos, sociales y culturales. Además, no deben malgastarse los fondos asignados a la realización de los derechos humanos. Es esencial la supervisión, la evaluación y la auditoría de los fondos públicos para favorecer la solidez de la gestión financiera. 3. Equidad: los Estados deben evitar la discriminación al movilizar, asignar o ejecutar recursos y fondos públicos. La equidad en el gasto no se limita a distribuir la misma cantidad de dinero a cada individuo, sino a tomar decisiones de gasto que fomenten una igualdad sustantiva entre todos los miembros de la sociedad. Y, finalmente, 4. Transparencia: los Estados deben establecer y mantener sistemas y prácticas de gestión de las finanzas públicas que sean transparentes y sujetos a evaluación. La transparencia no solo mejora la eficiencia, sino que también actúa como un freno contra la corrupción y la mala administración de los presupuestos públicos, incrementando así los recursos disponibles para promover los derechos económicos, sociales y culturales (DESC). Además, la transparencia se presenta como un requisito esencial para facilitar una participación significativa en el proceso presupuestario por parte de los poderes ejecutivo y legislativo, así como de la sociedad civil.

Finalmente, una contribución importante para fortalecer este diálogo entre política fiscal y derechos humanos ha sido "la iniciativa de los principios de los derechos humanos en política fiscal", una coalición de un grupo de diez organizaciones de la sociedad civil de diferentes países de América latina y el Caribe la cual, junto con

diez expertos en temas fiscales y de derechos humanos, propuso un conjunto de principios generales y directrices de derechos humanos aplicables a la política fiscal. Estos fueron elaborados tomando en cuenta las normas internacionales de derechos humanos relevantes, los avances doctrinarios de las instancias internacionales de derechos humanos, como la CIDH o los órganos de tratados y los relatores especializados de Naciones Unidas, y los desarrollos constitucionales en América Latina en este campo[1]. Consideramos que estos quince *Principios de derechos humanos de la política fiscal*, junto con las bases jurídicas en las que se basó su formulación (disponibles en la página web de la iniciativa), son una guía muy útil y relevante para que los Estados puedan implementar políticas fiscales más legítimas y eficaces y resolver mejor los dilemas de justicia involucrados en la asignación de recursos públicos escasos.

Estos principios abordan la aplicación tanto de estándares sustantivos (como los deberes de adoptar medidas, de satisfacer obligaciones mínimas esenciales, de movilizar el máximo de recursos disponibles, de lograr la igualdad sustantiva y de no discriminar) como procedimentales (tales como la transparencia, la participación y la rendición de cuentas) a todas las fases de la política fiscal. Así, los principios y directrices de los derechos humanos en política fiscal buscan facilitar que los Estados, las instituciones financieras internacionales y actores económicos, públicos y privados, cumplan con sus obligaciones y que otros actores estatales, al igual que la sociedad civil y los movimientos sociales, tengan un referente claro para la rendición de cuentas y la exigibilidad de los derechos a través de la política fiscal.

Por ejemplo, entre estos principios podemos destacar tres para mostrar su relevancia. Primero, el principio sustantivo número 10, que establece que los "Estados deben movilizar el máximo de los recursos disponibles para lograr progresivamente la plena efectividad de los derechos económicos, sociales, culturales y ambientales" (Iniciativa, 2021, p. 44). Este principio subraya nuevamente la importancia de que los Estados implementen medidas para generar ingresos y gestionar los gastos de manera que sean suficientes para garantizar la efectividad de los derechos.

Este enfoque requiere, principalmente, ampliar el espacio fiscal, aprovechando recursos que en la actualidad no están siendo movilizados, y resalta la importancia de la cooperación internacional en la promoción de políticas tributarias. Segundo, un principio de justicia (que es el tercer principio), según el cual los Estados deben asegurar que su política fiscal sea justa a nivel social, lo cual implica que el sistema tributario sea progresivo. Este principio enfatiza entonces que los Estados no pueden recolectar los recursos tributarios de cualquier manera, sino repartiendo con equidad las cargas entre las distintas personas y grupos sociales. Y, finalmente, un principio procedimental, que ya habíamos mencionado (el séptimo), el cual señala que la "política fiscal debe ser transparente, participativa y sujeta a rendición de cuentas. Las personas tienen derecho a la información fiscal". Este principio resalta entonces la importancia de las formas y los procedimientos para que una política pública sea compatible con las obligaciones de derechos humanos y que, por ello, la transparencia es esencial a fin de que pueda haber redición de cuentas de las autoridades sobre esas políticas.

Los párrafos anteriores han mostrado la relevancia de que exista un puente entre las discusiones de derechos humanos y la política fiscal, y así adoptar un enfoque de derechos humanos para discutir la política fiscal. Sin embargo, hasta ahora no hemos salido de la esfera nacional. Una pregunta obvia surge; ¿cuál es la relevancia de ese análisis para una discusión de la reforma a la fiscalidad global, que desborda el marco nacional? El siguiente punto busca responder a ese interrogante.

Las obligaciones extraterritoriales de los Estados y la lucha internacional contra la competencia tributaria a la baja

El punto fundamental para entender la relevancia de los derechos humanos para la discusión de la tributación global es la tesis de que un Estado no tiene obligaciones solo frente a la población en el territorio que controla o en el que ejerce su jurisdicción, que es la tesis clásica, sino que tiene igualmente ciertas obligaciones más allá de su territorio. Se trata de las llamadas obligaciones extraterritoriales de derechos humanos de los Estados, una categoría que se ha

ido consolidando tanto a nivel de la doctrina jurídica como de los desarrollos jurisprudenciales por parte de las instancias internacionales de derechos humanos, en especial por los órganos de tratados de Naciones Unidas, como el Comité de Derechos Económicos, Sociales y Culturales.

La idea esencial es que los Estados, conforme a los artículos 55 y 56 de la Carta de las Naciones Unidas, deben contribuir al logro de los propósitos de las Naciones Unidas, uno de los cuales es la vigencia en el mundo de los derechos humanos. Por consiguiente, los Estados tienen la responsabilidad no solo de respetar y contribuir a la garantía de los derechos humanos en su territorio, sino también fuera de él.

Otro fundamento normativo de esas obligaciones extraterritoriales es el ya mencionado artículo 2 del PIDESC, el cual establece que, para lograr progresivamente el pleno goce de los derechos sociales, los Estados se comprometen a la adopción de medidas "tanto a nivel individual como mediante la asistencia y la cooperación internacionales, especialmente económicas y técnicas, hasta el máximo de los recursos de que disponga". Esto significa no solo que cada Estado puede recurrir a esa cooperación internacional cuando sus recursos sean insuficientes, sino que los otros Estados más poderosos tienen un cierto deber de cooperación para que los Estados menos desarrollados puedan lograr la plena realización de los derechos de su población.

Aunque es una categoría aún controvertida, consideramos que la existencia de las obligaciones extraterritoriales de los Estados en materia de derechos humanos tiene un fundamento normativo claro, tanto en la Carta de las Naciones Unidas como en el PIDESC, e implica no solo un cierto deber de cooperación internacional para la plena vigencia de los derechos humanos en el mundo, sino también obligaciones específicas de cada Estado de respetar, proteger y garantizar los derechos humanos en otros territorios. Sin embargo, el contenido y alcance concreto de dichas obligaciones extraterritoriales todavía está en desarrollo y suscita algunas perplejidades, pues es obvio que sería excesivo exigir jurídicamente a un Estado desarrollado del Norte global, con un altísimo PIB *per cápita*, que consagre todos sus recursos disponibles para garantizar el acceso a la educación básica de otro Estado del Sur global con un muy bajo nivel de desarrollo.

En ese contexto, algunas elaboraciones académicas, como los llamados Principios Maastricht[2], y algunos desarrollos jurisprudenciales de los órganos de tratado de Naciones Unidas, han buscado entonces precisar el alcance de esas obligaciones extraterritoriales. En particular, el Comité de Derechos Económicos Sociales y Culturales adoptó la Observación General n.º 24 (2017) sobre las obligaciones de los Estados en el contexto de las actividades empresariales, la cual dedica apartes importantes a clarificar el alcance de las obligaciones extraterritoriales, dado el marcado aumento en las actividades de las empresas transnacionales, así como un crecimiento constante en los flujos de inversión y comercio entre los países, acompañado por el surgimiento de extensas cadenas globales de suministro. En particular, el Comité analizó las obligaciones de respetar, proteger y dar efectividad a los derechos sociales a nivel extraterritorial.

La obligación extraterritorial de *respetar* subraya la importancia de que los Estados eviten cualquier acción que pueda afectar negativamente el disfrute de los derechos humanos por personas fuera de su jurisdicción y que no tomen decisiones que impidan a otros Estados cumplir con sus propias obligaciones de derechos humanos. Esta obligación cobra especial relevancia en situaciones relacionadas con la negociación y celebración de acuerdos comerciales y de inversión, así como tratados fiscales y financieros.

La obligación extraterritorial de *proteger* implica que los Estados deben tomar medidas para que las empresas con sede en su territorio actúen con diligencia para prevenir violaciones de derechos por parte de sus filiales y socios comerciales, independientemente de su ubicación geográfica.

Finalmente, la obligación extraterritorial de *dar efectividad* requiere que los Estados contribuyan a establecer un entorno internacional propicio para la plena realización de los derechos del PIDESC. Para lograr esto, los Estados deben implementar medidas necesarias en su legislación y políticas, incluyendo estrategias diplomáticas y relaciones exteriores, para promover y colaborar en la creación de dicho entorno. En particular, el Comité indicó que los Estados deben implementar medidas que prevengan prácticas

como la elusión o evasión de impuestos. Y muy específicamente, en esa Observación General, el Comité señaló que la reducción del impuesto de sociedades con el único propósito de atraer inversores promueve una competencia a la baja que al final debilita la capacidad de todos los Estados para movilizar recursos a nivel nacional y hacer efectivos los derechos del PIDESC, lo cual es incompatible con las obligaciones extraterritoriales de los Estados.

El anterior recuento muestra la relevancia del concepto de obligaciones extraterritoriales para discutir la reforma de la tributación global, por cuanto implica reformular el énfasis en la soberanía fiscal en favor de una concepción más moderna de la cooperación internacional en tributación en una economía mundial globalizada e interdependiente[3]. Esto implica, en particular, que los Estados deben abstenerse de desarrollar de manera individual una competencia tributaria a la baja que afecte la capacidad de otros Estados de recaudar los tributos requeridos para cumplir con sus obligaciones de derechos humanos. Así mismo, los Estados deben cooperar a nivel internacional para abordar asuntos fiscales de manera conjunta, en especial en relación con la lucha contra la evasión fiscal y los flujos financieros ilícitos. Finalmente, cuando un Estado participa como miembro en una organización internacional, persiste la responsabilidad inherente a su propia conducta con respecto a las obligaciones de derechos humanos tanto dentro como fuera de su territorio. Esto implica la necesidad de evaluar el posible impacto en los derechos humanos derivado de las decisiones acordadas a nivel internacional, considerando en particular el impacto en las personas que viven en condiciones de pobreza.

El debate actual sobre tributación global y las obligaciones de derechos humanos

En el complejo panorama de la tributación global, donde las fronteras económicas se difuminan y las transacciones trascienden límites nacionales, surge un debate crucial sobre cómo los derechos humanos se entrelazan con los sistemas fiscales a nivel mundial. Más allá de las cifras y las políticas, se encuentra una dimensión ética que plantea preguntas fundamentales sobre la equidad, la justicia y la responsabilidad de los Estados. En este contexto, es importante explorar cómo los principios y las obligaciones extraterritoriales señaladas en el apartado anterior arrojan luz sobre el debate actual de tributación global.

Contexto general: la iniciativa BEPS (Erosión de la Base Imponible y Traslado de Beneficios)

Distintos investigadores (Gräbner et al., 2021) han reconocido durante mucho tiempo que, a medida que la integración económica se ha profundizado a lo largo del proceso de globalización desde la década de 1980, los gobiernos han creado medidas que establecen una competencia en materia de impuestos. De hecho, las tasas impositivas corporativas estatutarias han disminuido sustancialmente en los países de la Unión Europea (UE) en las últimas décadas (Heimberger, 2021).

Para abordar esta situación, la Organización para la Cooperación y el Desarrollo Económicos (OCDE) lanzó en 2013 la iniciativa Erosión de la Base Imponible y Traslado de Beneficios (BEPS, por sus siglas en inglés). Esta iniciativa tiene como objetivo principal frenar las estrategias agresivas de planificación fiscal utilizadas por algunas empresas multinacionales para evadir impuestos y trasladar beneficios a jurisdicciones de baja tributación.

La iniciativa se compone de dos pilares: el primero se centra en la reasignación de utilidades y derechos de imposición, buscando redefinir las reglas para atribuir beneficios y derechos fiscales a las jurisdicciones donde se encuentran los clientes o usuarios finales. El segundo pilar busca abordar la competencia fiscal perjudicial y asegurar que las empresas multinacionales paguen una tasa mínima global del 15%, evitando que eludan impuestos mediante la búsqueda de jurisdicciones con tasas impositivas extremadamente bajas (OCDE, 2023).

La iniciativa BEPS a la luz de los principios y obligaciones extraterritoriales

La iniciativa BEPS destaca su compromiso con la *cooperación internacional* para abordar prácticas fiscales perjudiciales de empresas multinacionales, alineándose en cierta proporción con las obligaciones extraterritoriales de

los Estados en materia de derechos humanos. Sin embargo, presenta desafíos y críticas en las siguientes tres dimensiones:

Primero, no es clara la consistencia de las regulaciones fiscales a nivel internacional. La inclusión de cláusulas antiabuso en los convenios fiscales se alinea con *las obligaciones extraterritoriales de respetar y dar efectividad* a las estrategias diplomáticas y de relaciones exteriores, con el fin de establecer un entorno internacional propicio para la plena realización de los DESC. Sin embargo, las acciones BEPS presentan un alto grado de complejidad y ambigüedad, lo que genera desafíos en la interpretación y aplicación. Adicionalmente, análisis como el realizado por Tax Justice Network (TJN, 2019) han señalado que los países de bajos ingresos tienen una capacidad limitada para implementar las acciones BEPS y participar plenamente en el proceso, ya que las propuestas resultan beneficiosas solo para los miembros de la OCDE. Por tanto, se pone en entredicho incluso la *obligación extraterritorial de proteger,* ya que, según TJN, es necesario fortalecer la colaboración entre Estados de ingresos altos y bajos, para asegurar que las multinacionales respeten los derechos humanos en todas sus operaciones globales.

Segundo, existen problemas importantes de transparencia en el intercambio de información. Las acciones BEPS se fundamentan en el principio de transparencia (OCDE, 2015), promoviendo un intercambio de información más amplio entre las administraciones tributarias, de la mano de plataformas internacionales para la cooperación y la asistencia mutua entre administraciones tributarias como el Centro de Colaboración e Información Conjunta sobre Refugios Tributarios Internacionales (JITSIC, por sus siglas en inglés) y del Foro sobre Administración Tributaria de la OCDE. No obstante, es crucial desarrollar estrategias de diálogo y participación con aquellos países que no forman parte de la OCDE ni participan en el Proyecto BEPS, con el fin de mitigar el riesgo de que los esfuerzos destinados a abordar prácticas tributarias perniciosas puedan desplazar geográficamente los regímenes tributarios en cuestión hacia terceros países.

Tercero, aunque los dos pilares de la propuesta fiscal parecen bien orientados a nivel de los principios, su concreción práctica es problemática. En efecto, los dos pilares de BEPS buscan, en términos generales, asegurar que las empresas realicen actividades económicas genuinas en las ubicaciones donde generan beneficios para evitar la elusión fiscal (Pilar I) y que exista un mínimo de tributación corporativa para evitar los paraísos fiscales (Pilar II). Sin embargo, ambos pilares han sido criticados desde una perspectiva de los Estados del Sur global.

Las críticas al primer pilar se centran en la incertidumbre en la clasificación de las utilidades para la aplicación de tratados, ya sea como regalías, tasas por servicios técnicos o beneficios empresariales. De no ser correctamente clasificados, se socavaría el *principio de eficacia,* ya que se asignarían beneficios según la ubicación de las ventas de las multinacionales, pero sin tener en cuenta los estándares y las regulaciones laborales de sus operaciones en otros países (TJN, 2019). En este mismo sentido, la sociedad civil (Danzi et al., 2023) ha señalado que el acuerdo no aborda de manera adecuada las necesidades de los países de ingresos bajos y medios, lo que evidencia una falta de equidad global.

Las críticas al segundo pilar señalan que el impuesto mínimo global del 15% es bajo y no aborda adecuadamente las necesidades de países de bajos y medianos ingresos (Danzi et al., 2023), contradiciendo el *principio de progresividad,* pues no evita del todo que las ganancias se desplacen hacia jurisdicciones con tasas impositivas más bajas, erosionando así la base imponible en los países de menor desarrollo. Además de no considerar las diferencias económicas y sociales entre naciones (Bloomberg, 2022).

Esto muestra que, desde una perspectiva de derechos humanos, la iniciativa BEPS está bien orientada pero es insuficiente, por lo cual es necesario explorar oportunidades para reformar la gobernanza fiscal a nivel global, con el fin de lograr un acuerdo más equitativo, especialmente en beneficio de las naciones de ingresos bajos y medios.

Acuerdo de tributación global en Latinoamérica y el Caribe

En este contexto, los países de América Latina y el Caribe deben fortalecer su capacidad de ne-

gociación en las discusiones tributarias internacionales, promoviendo no solo la justicia fiscal, sino también contribuyendo a la construcción de un entorno más equitativo y respetuoso de los derechos humanos a nivel internacional.

En julio de 2023, se llevó a cabo en Colombia la primera cumbre regional de América Latina y el Caribe para abordar la tributación global, inclusiva, sostenible y equitativa. Participaron representantes de la academia, sociedad civil y funcionarios de diversos países, dando lugar a la creación de la Plataforma Tributaria para América Latina y el Caribe (PTLAC), con la secretaría técnica a cargo de la Comisión Económica para América Latina y el Caribe (Cepal).

La PTLAC tiene como objetivo establecer mecanismos que armonicen la agenda tributaria con otras prioridades de cooperación global (como la iniciativa BEPS). Las discusiones incluirán esencialmente cuatro aspectos: la progresividad de los sistemas tributarios, los beneficios fiscales, la tributación ambiental y la adaptación a la tributación digital y nuevas formas de trabajo. Resulta destacable que la PTLAC no solo promueva la colaboración regional, sino que también priorice la progresividad y la equidad global, aspectos que la iniciativa BEPS parece pasar por alto. En este marco, emergen oportunidades significativas para fomentar la equidad, sostenibilidad y cooperación internacional, contribuyendo así a la realización de los derechos sociales a nivel global.

El reto para este acuerdo en América Latina y el Caribe está vinculado con la globalización de las empresas y la búsqueda de una distribución más equitativa de la carga fiscal entre las naciones. Un desafío aún mayor se presenta al intentar incorporar los fundamentos de los derechos humanos en las propuestas, especialmente en un contexto en que los países enfrentan problemas significativos de pobreza, desigualdad y concentración de la riqueza.

Conclusiones

El examen precedente nos permite llegar a tres conclusiones básicas:

Primero, creemos haber mostrado la importancia de un enfoque de derechos humanos para la política fiscal. En efecto, la incorporación de los derechos humanos como base en la política fiscal debe ser un pilar fundamental en la formulación de cualquier tratado tributario a nivel internacional. Esto implica asegurar que las medidas fiscales contribuyan de manera significativa a la eliminación de la pobreza y a la reducción de las disparidades socioeconómicas entre diferentes jurisdicciones. Así mismo, fortalece el compromiso de garantizar la realización de los DESC, promoviendo un desarrollo sostenible que no solo sea eficiente a nivel económico, sino también social y ambientalmente sostenible.

Segundo, en el ámbito de los compromisos extraterritoriales, destaca la obligación de garantizar la efectividad de los derechos sociales. Un objetivo crucial de está obligación es hacer frente a las prácticas fiscales abusivas llevadas a cabo por empresas transnacionales, las cuales buscan minimizar su carga tributaria trasladando deliberadamente sus beneficios o ingresos a países o regiones con regímenes fiscales más favorables. En este contexto, la cooperación internacional se convierte en un elemento esencial para abordar los impactos negativos que estas prácticas tienen en la plena realización de los derechos humanos a nivel global.

Tercero, a pesar de que las medidas propuestas en BEPS buscan garantizar la coherencia entre las normativas fiscales nacionales e internacionales, existe el riesgo de un impacto desigual en los países en desarrollo. La capacidad limitada de estos países para implementar las medidas y participar plenamente en el proceso podría afectar su habilidad para abordar la elusión fiscal de manera efectiva. Por esta razón, la PTLAC se ha convertido en una oportunidad de suma importancia para coordinar acuerdos con países del Norte global, con base en los principios y las obligaciones extraterritoriales que buscan la plena realización de los DESC.

Referencias

Bloomberg Industry Group (Bloomberg). (2022). BEPS 2.0: generalidades e implicaciones para América Latina. Tax Management International Journal,

51(1), 1-19. https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2022/02/beps-2-0-generalidades-e-implicaciones-para-america-Latina-final.pdf

Comisión Interamericana de Derechos Humanos (CIDH). (2017). Informe sobre pobreza y derechos humanos en las Américas. OEA/Ser.L/V/II.164. Doc. 147. Pár. 501.

Comité de Derechos del Niño. (2016). Observación general núm. 19 (2016) sobre la elaboración de presupuestos públicos para hacer efectivos los derechos del niño (art. 4). https://www.ohchr.org/es/documents/general-comments-and-recommendations/general-comment-no-19-2016-public-budgeting

Comité de Derechos Económicos, Sociales y Culturales (2017). Observación general núm. 24 (2017) sobre las obligaciones de los Estados en virtud del Pacto Internacional de Derechos Económicos, Sociales y Culturales en el contexto de las actividades empresariales. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/237/20/PDF/G1723720.pdf?OpenElement

Danzi, E., Chaparro, S., Holland, L., Silva V. y Sepúlveda, M. (2023). Unidos por un nuevo pacto fiscal. Construyendo una hoja de ruta para América Latina y el Caribe. https://derechosypoliticafiscal.org/images/2023/Unidos_por_un_nuevo_pacto_fiscal.pdf

De Schutter, O. et al. (2012). Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. Human Rights Quarterly, 34, 1084-1169.

De Schutter, O, Lusiani, N. J. y Chaparro, S. (2020). Re-righting the international tax rules: operationalising human rights in the struggle to tax multinational companies. The International Journal of Human Rights, 24(9), 1370-1399. https://doi.org/10.1080/13642987.2020.1816971

Gräbner, C., Heimberger, P., Kapeller, J. y Springholz, F. (2021). Understanding economic openness: a review of existing measures. Review of World Economics, 157, 87-120.

Heimberger P. (2021). Corporate tax competition: a meta-analysis. European Journal of Political Economy, 16. https://www.sciencedirect.com/science/article/pii/S0176268021000033

Holmes, S. y Sunstein, C. (2000). The cost of rights: why liberty depends on taxes. Norton.

Iniciativa de los Principios de Derechos Humanos en Política Fiscal (Iniciativa). (2021). Principios y directrices de derechos humanos en la política fiscal. https://derechosypoliticafiscal.org/images/ASSETS/Principios_de_Derechos_Humanos_en_la_Politica_Fiscal-ES-VF-1.pdf

Nolan, A., O'Connell, R. y Harvey, C. (2013). Human rights and public finance: budgets and the promotion of economic and social rights. Hart Publishing.

Organización para la Cooperación y el Desarrollo Económicos (OCDE) (2015). Proyecto OCDE/G20 sobre la Erosión de la Base Imponible y el Traslado de Beneficios-Informes finales 2015. https://www.oecd.org/ctp/beps-resumenes-informes-finales-2015.pdf

Organización para la Cooperación y el Desarrollo Económicos (OCDE). (2023). OCDE/G20 Inclusive Framework on BEPS Progress report. https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-september-2022-september-2023.pdf

Sepúlveda, C. M. (2014). Report of the Special Rapporteur on extreme poverty and human rights. United Nations.

Tax Justice Network (TJN). (2019). OECD reform weak on corporate tax havens, harsh on

poorer countries. https://taxjustice.net/press/oecd-reform-weak-on-corporate-tax-havens-harsh-on-poorer-countries/

Tax Management International Journal de Bloomberg. (2022). 51 TMIJ Núm. 1, 07/01/2022. Traducido y reproducido con autorización. Copyright 2022 de la Oficina de Asuntos Nacionales, Inc. (800-372-1033) http://bna.com

Uprimny, R., Chaparro, S. y Castro, A. (2019). Bridging the gap. The evolving doctrine on ESCR and "maximum available resources". En Young, K., The future of economic, social and cultural rights (pp. 624-653). Cambridge University Press.

Taxation and gender and class inequality: a look from the IRPF and POF*

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Resumen

El objetivo de este trabajo es analizar si el modelo fiscal brasileño refuerza las desigualdades de género y clase en el país. Para hacerlo, además de la revisión teórica, analizamos datos de la Encuesta de Presupuestos Familiares (POF) (2017-2018) y la declaración de impuesto sobre la renta de Brasil en 2020. Concluimos que la estructura fiscal brasileña refuerza las desigualdades de género y clase en el país. Las contribuyentes mujeres pagan tasas de impuesto sobre la renta más altas, y los hogares encabezados por mujeres pagan tasas más altas de impuestos indirectos, mientras que en la totalidad de los impuestos directos hay una mayor incidencia fiscal en los hogares encabezados por hombres. En cuanto a la distribución de impuestos por clase, el análisis por deciles de ingresos indica que las familias en el decil más bajo perciben la carga tributaria indirecta y total más elevada en comparación con los demás deciles. La carga fiscal directa total recae más en las familias en la parte superior de la distribución, pero sigue siendo inferior al 10%, lo que indica una fuerte regresividad fiscal en Brasil.

Palabras clave: tributación, desigualdad, género, ingreso.

Abstract

The objective of this paper is to analyze whether the Brazilian tax model reinforces gender and class inequalities in the country. To do so, in addition to the theoretical review, we analyze data from the Household Budget Survey (POF) (2017-2018) and the 2020 Brazilian income tax return. We conclude that the Brazilian tax structure reinforces gender and class inequalities in the country. Women taxpayers pay higher rates of income taxes, and female-headed households pay higher rates of indirect taxes, while in the totality of direct taxes there is a higher tax incidence in male-headed households. As for the distribution of taxes by class, the analysis carried out by income decile indicates that families in the lowest decile pay the highest indirect and total tax burden, compared to all the other deciles. The total direct tax burden falls more on families at the top, but remains less than 10%, indicating Brazil's strong tax regressiveness.

Keywords: taxation, inequality, gender, income.

Introduction

Social inequality is one of the hallmarks of mercantile societies, permeated by gender, race, and class relations, as well as the way different societies organize themselves productively. Gender inequality is related to the productive context, defining the spaces that women and men occupy in society.

One of the ways to mitigate social inequalities and redistribute income is through fiscal policies, including taxation. Several studies correlate how society taxes with the maintenance or reduction of income inequalities. However, there is little research that incorporates gender as an important marker for the definition of the relative positions between men and women, and how the tax structure can affect these relations.

The importance of building fiscal policies with a gender bias is gaining space in the agendas of international organizations, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), and the 2015 Sustainable Development Goals (SDG, 2015). These instruments recognize that gender-sensitive public budgets bring benefits to society. The Beijing Platform for Action in 1995, at the Fourth Conference on Women, also included gender as an agenda to be adopted by governments, indicating the need for policies that contemplate women in public budgets. In Latin America, the topic of fiscal policy at ECLAC's international conferences is highlighted in the Montevideo Agenda, signed in 2016. Among the recommended measures are 5c, 5d, 5g, and 5h, in which States committed to mobilize efforts to implement a fiscal agenda with a gender bias, accompanied by impact studies. They also indicate the need to strengthen cooperation among Latin American economies to combat tax evasion and improve tax collection (ECLAC, 2017; ECLAC, 2022).

Several Non-Governmental Organizations (NGOs) and research groups have been strengthening the agenda on tax policy and the impacts on gender inequalities, both at the international and local level. Among the initiatives that address the issue at the international level, we highlight the Women Budget Group[1], formed in 1989 by a group of independent women researchers. The group launches periodic analyses about the different impacts of macroeconomic policies, including tax changes, on gender and other clippings, such as family arrangements. In relation specifically to taxation, the group Tax Justice Network[2] carries out several studies and analyses on the question of the impacts of tax regression and tax evasion on gender. In Latin America, the Red Latinoamericana por Justicia Económica y Social (Latindadd), has been promoting conferences and research on the subject. In Brazil, the Instituto de Justiça Fiscal, and the group Tributos a Elas stand out in this debate.

In other words, it is an agenda that has been acquiring growing importance in economic debates, which emphasize the aspect of fiscal justice and the role of tax policy on social and gender inequalities. In the case of Brazil, besides having a markedly regressive tax burden, the country maintains deep gender inequalities, which are related to class and race structures, stemming from our slave-owning and landowning past. This characteristic is evidenced by the way women are inserted in the labor market, which is illustrated by low participation, wage inequalities, high unemployment rates, and underutilization of the labor force.

In addition to monetary restrictions, the burden of unpaid domestic work falls mainly on the female labor force, which is related to the way society organizes itself to offer them, marked by the scarcity of public policies and services. The unequal situation of women is also illustrated in the low participation in positions of leadership and political power.

Demographic changes and changes in family formats have increased the role of women as heads of households. However, their condition in the labor market has changed little, which has reinforced their condition and their families' vulnerability to poverty.

The objective of this work, meanwhile, is to analyze whether the Brazilian tax policy reinforces gender and class inequalities. To this end, it has a theoretical part, in which we discuss feminist theory, and an empirical part.

The empirical analysis is divided into two parts, in the first part we analyze the data from the Individual Income Tax (IRPF), made available by the Receita Federal do Brasil (RFB), for the year 2020. It is known that surveys are less accurate for the top of the income distribution, for this reason, income declarations will be analyzed, since in 2020, when 14.88% of the population declared and 12.6% of the population paid such a tax. Whenever possible, marital declarations were disregarded to better ascertain individual income by sex. The breakdown by income was in minimum wages, as published by the RFB.

In the second section, we analyze microdata from the 2017/2018 Household Budget Survey (POF), prepared by the Brazilian Institute of Geography and Statistics (IBGE, for its initials in Portuguese). The data pertain to the average expenditures of male-headed and female-headed households by income deciles, and the average income by income deciles. The POF uses households as the sampling unit, classified as "(...) structurally separate and independent housing, consisting of one or more rooms, and the conditions of separation and independence of access must be met" (IBGE, 2019, p. 12). In this research, we use the terms household and domicile as synonyms to facilitate reading and writing.

The term head of household used in this research, refers to the reference person, used by the POF to classify the people living in the household. The reference person is classified by the interviewers themselves during the survey; as a criterion, the person responsible for paying one of the following expenses is used: rent, mortgage, or other housing expenses. If no criterion is met, the person is classified by the residents themselves, and if there is more than one, the one with the highest age is defined among those indicated (IBGE, 2021, pp. 13-14). It should be noted that the rental expenditure in the POF also considers non-monetary rent, which is quite representative. Such value refers to the expenditure that would be incurred on rent when the family's property is owned.

To estimate the tax rates, we used data from the Brazilian Institute of Planning and Taxation (IBPT), with data for 2022. The municipal and state taxes were estimated based on the state and municipality of São Paulo. This criterion was taken considering the high relative weight of the region for the whole country and the difficulty of establishing a weighted average of the taxes with each state and municipal federate entity. The subnational entities tax goods with rates that vary from 7% to 37%, according to the place and the item. The state of São Paulo represents around 21.6% of the national population, according to IBGE estimates (2021). As the "food" item is very representative in family budgets, it was decided to make a weighted average for this case. There is great national heterogeneity, since some states tax with the basic rates, which are 17% or 18%, and other states tax with rates of 7%. To this extent, the eight most populous states in Brazil were selected, which make up more than 60% of the population, and a rate was stipulated by the weighted average of taxation and population of these states[3].

In this cut, we sought first to analyze the consumption profile among households headed by men and women. Afterwards, we calculated the amount of taxes, both direct and indirect, per income deciles among all the households, and those headed by men and women. Next, we analyze the differences in consumption between 40% of the population in the lower-income strata and 10% of the population in the upper strata.

To facilitate the presentation of data and theory, the paper is divided into three sections, in addition to this introduction and the conclusion. In the second, we analyze gender inequalities within the scope of feminist theory and present the dynamics of these relations in Brazil. We also address the theoretical aspects of income inequality. Taxation in the country is centered on indirect taxes, with low progressivity on income, profits and capital gains, and assets. The disputes between classes and social groups prove to be important, going beyond the theoretical aspect, in understanding the distribution of the tax burden among taxpayers.

In the third section, we analyze the empirical data referring to the Individual Income Tax. In the fourth, we analyze the POF data according to household heads and income deciles, based on the study carried out by Silveira et al. (2006), which was based on the POF 2002-03. This sec-

tion discusses gender inequalities by income deciles and income inequalities. In the fifth section, a simulation of the impact of a tax reform by class and gender cut is carried out.

Finally, we conclude that the Brazilian tax structure reinforces gender and class inequalities in the country, by its regressive character, and by the lower incidence and exemption of taxes on wealth, profits, and dividends. Women taxpayers pay higher tax rates on income taxes but pay lower rates on all direct taxes. In the case of indirect taxes, the tax incidence per family head is similar, with a higher incidence among women, reinforcing the importance of maintaining and strengthening tax exemption policies for the basic food basket. The analysis also indicates the importance of a non-neutral tax reform to gender, that is, considering the inequalities of insertion of men and women in society.

Gender as a marker of inequality in Brazil

Gender relations are influenced by historical and geographical contexts, and by the way society organizes itself productively. The way countries have inserted themselves into mercantile society will define the characteristics of the labor market and influence social structures, as well as the way society organizes itself to offer reproductive work.

In general, the economies of Latin American countries remain marked by structural heterogeneities, where large, unproductive companies coexist with small and medium-sized ones, dependent on the former. Wages are dammed up by the low productivity of large companies, leading to the formation of a labor market marked by high levels of informality and poverty and an economy that concentrates capital, a scenario that is worsened by the abundance of labor force and concentration of land (Vasconez, 2012).

One of the priority issues when analyzing female poverty is linked to reproductive work and the scarcity, not only of monetary resources but also of time. This trend has led to the overrepresentation of women as unemployed or underemployed, deepening the circle of social vulnerability and poverty. According to Vasconez (2012, p. 87):

> (...) la condición de pobreza es un factor que incide en la oferta laboral, dado que las mujeres pobres tienden a tener peores condiciones de calificación, enfrentan mayores costos de búsqueda, mayor número de hijos e hijas pequeños sin acceso a servicios de cuidado que se constituyen en barreras para la entrada al mercado; y por otro lado, la no participación en el mercado de trabajo incide en la pobreza de las mujeres y sus familias, dado que implica una imposibilidad de generar recursos.

The female unemployment rate is historically higher than the male rate, in 2020, 11.7% of men were unemployed, while among women the rate was 16.5%. Another important indicator when analyzing the greater precariousness of women's work is the compound rate of underutilization, which represents people employed in occupations with insufficient hours, plus unemployed people, divided by the total number of people in the labor force. The female composite underutilization rate was 34.3% in 2020, while the male rate remained at 23.4%. The effects of the pandemic once again had repercussions on this year's indicators, however, the differences between men and women in relation to underemployment are structural, in 2019, the female indicator was 29.9%, approximately 10 p.p. higher than the male, which remained at 19.8%.

Among the factors that define the spaces and the unequal situation of men and women in the labor market and society, is the female overload in the exercise of domestic work and unpaid care. According to IBGE, in 2019 the rate of performing household chores was 92.4% among women, and 79% for men, concerning caring for people, the female participation rate remained at 36.8% while among men it stood at 25.9%. The biggest discrepancies are in the weekly workload by sex; women spent an average of 21.4 hours on caregiving and housework, while men spent 11 hours, that is, women's hours exceeded men's by 10.4 hours a week. The overload of unpaid housework among women impacts their entry into the labor market and their access to time and monetary resources.

Transforming this scenario would require policies, in the public and corporate spheres, that are not gender-neutral, and seek the inclusion of women, the equitable distribution of mar-

ket-oriented and socially reproductive work, and equal pay. However, these policies are only put into practice when the people penalized are in positions of power, whether in the public or private sphere.

In the case of Brazil, the indicators regarding decision-making by gender are quite unequal, only 35.7% of management positions were occupied by women in 2020, this percentage even worsened in relation to 2015, when 36.8% of management positions were occupied by women (IBGE, 2021). This scenario is also reflected in the public sphere, considering that Brazil occupies position 129 out of 187 countries analyzed in the ranking organized by the Inter-Parliamentary Union, which measures the participation of women in the Chambers and Senate[4]. According to the survey, only 17.7% of the seats in the House of Representatives are occupied by women, and 16.1% in the Brazilian Senate in 2022. As for the executive branch at the national level, of the total of 23 ministers and female ministers in the Bolsonaro government at the end of 2022, only one was a woman[5]. In addition, it is worth remembering that the only female president in the history of the Brazilian republic suffered an impeachment process led by her vice president.

The indicators related to the labor market, to access to resources such as time and money, and to decision-making regarding reproductive rights reveal the deep gender inequalities existing in Brazil. This structure is associated with class inequalities and can be reinforced by the way the country taxes. In this sense, in the next section we will analyze the indicators of inequality and taxation.

Taxation and gender inequality in Brazil: a look at income tax returns

The National Household Sample Survey and the Family Budget Survey have always been the main sources of information for calculating average income and inequality. However, among the richest 10%, such surveys are not accurate, either because in the interviews these segments tend to omit information, or because they usually do not account for wealth income, such as financial income and rents. To that extent, for the bottom 90%, sample surveys are excellent sources of information, but for the richest 10%, they are not. Piketty's (2014) research with income tax data has shed light on this issue, which has spurred greater disclosure of tax data.

As of late 2014, the Brazilian IRS began to release more raw data from Individual Income Tax (IRPF) returns. The information presented in this text considers the declarations made by taxpayers to the Federal Revenue of Brazil as of 2020 income. An individual who received more than BRL 2,379.98 a month in 2020 declared income tax, as well as those who have assets above BRL 300,000.00. In that same year, 31.63 million people declared Income Tax in Brazil. This represented 15% of the total Brazilian population and 16.85% of the population over 18. However, only 12.6% of Brazilians paid IRPF in 2020, which means that this universe is more reliable to the income phenomena of the top of the distribution.

Taxable income is mainly made up of income from work, although it also includes income from property, such as rent. The income taxed exclusively at source includes income from financial investments and 13th salary. Most of the exempt income is from profits and dividends, but there are also withdrawals from the FGTS, savings accounts, and scholarships.

In 2020, 31,632,157 declarations were registered, of this total, 216,133 were joint declarations. These therefore represent less than 1% of the total declarations in Brazil. Due to the low representativeness and to capture the differences between declarations by gender, in the following analyses, the joint declarations of married individuals were excluded, and therefore individual declarations were considered.

Regarding joint statements, it is important to point out that they are considered by the feminist economics literature as explicit and implicit forms of gender bias. This occurs, firstly, because there is a disincentive for individuals with lower incomes that make up the couple to enter into higher paid and formal activities, which would lead to an increase in the couple's tax burden. In addition, joint taxation discriminates against single-parent families, which mostly consist of women, to the extent that they pay higher tax burdens (Sanches, 2021; De

Villota, Ferrari and Blanco, 2008).

In Brazil, the joint declaration for the couple is optional, even so, De Villota, Ferrari and Blanco (2008) indicate that there is gender bias in all joint declaration formats, for the reasons mentioned above. The author believes that individual declarations should be mandatory, and also suggests the creation of deductions in favor of single-parent families, due to the burden of unpaid work. In Brazil, in 2020, of the total number of joint declarations, 91% were male, totaling 196,570, against 19,563 joint declarations made by women.

The data regarding income declarations by sex indicate the inequalities between men and women, in terms of the proportion of declarants, regarding income and ownership of goods and services. For example, in 2020, 56.25% of individual declarants were men and 43.74% were women. Regarding the total income mass, men remained at 57.72% and women at 42.28%. When we analyze the assets and rights declared, there is an even greater disproportion: 69.87% are reported by men and 30.13% by women[6]. Men are also the biggest inheritance receivers, with 51.07% of the total inheritances received, compared to 48.92% of those received by women.

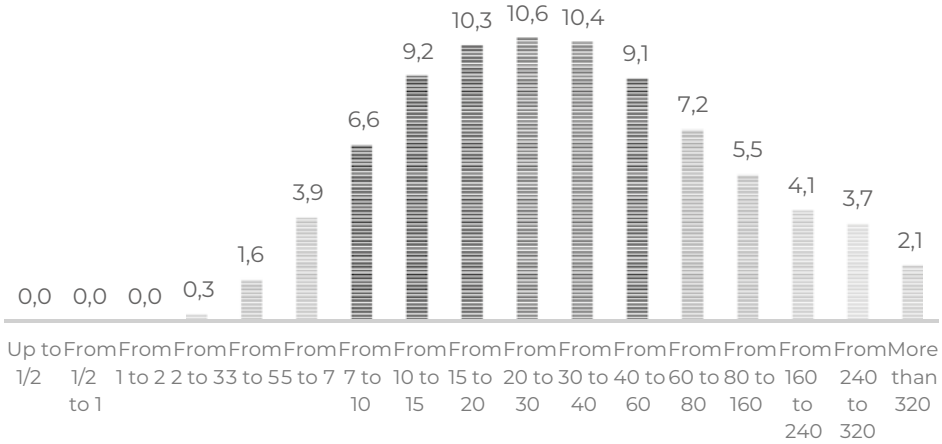
The Brazilian tax structure penalizes the poorest individuals, in which women are found, both because of the higher relative taxation on consumption and because of the exemption of taxes on the richest, especially on profits and dividends. To this extent, starting at 40 minimum wage per month, there is an increasing exempt portion. Therefore, the effective tax rate paid is reduced for individuals in the highest income brackets (figure 1).

Figure 1[7] explains this tax regressiveness present in the Brazilian IRPF. As an example of the discrepancy in the IRPF, individuals receiving more than 320 minimum wages, equivalent to BRL 332,480.00 in 2020, paid average effective tax rates of 2.1%, less than individuals receiving incomes of 5 to 7 minimum wages and (BRL 5,195.00 and BRL 7,273.00) who pay average effective tax rates of 3.9%.

In the case of the gender-differentiated data, there is no ordering by total income, only by taxable income, which encompasses mainly wages. This problem in the origin of the data does not allow a more accurate visualization of the differences in the higher levels of income

Figure 1

Average effective tax rate by range of minimum wage, Brazil, 2020 (%).



Note. Receita Federal do Brasil (Brazil, 2020). Own elaboration.

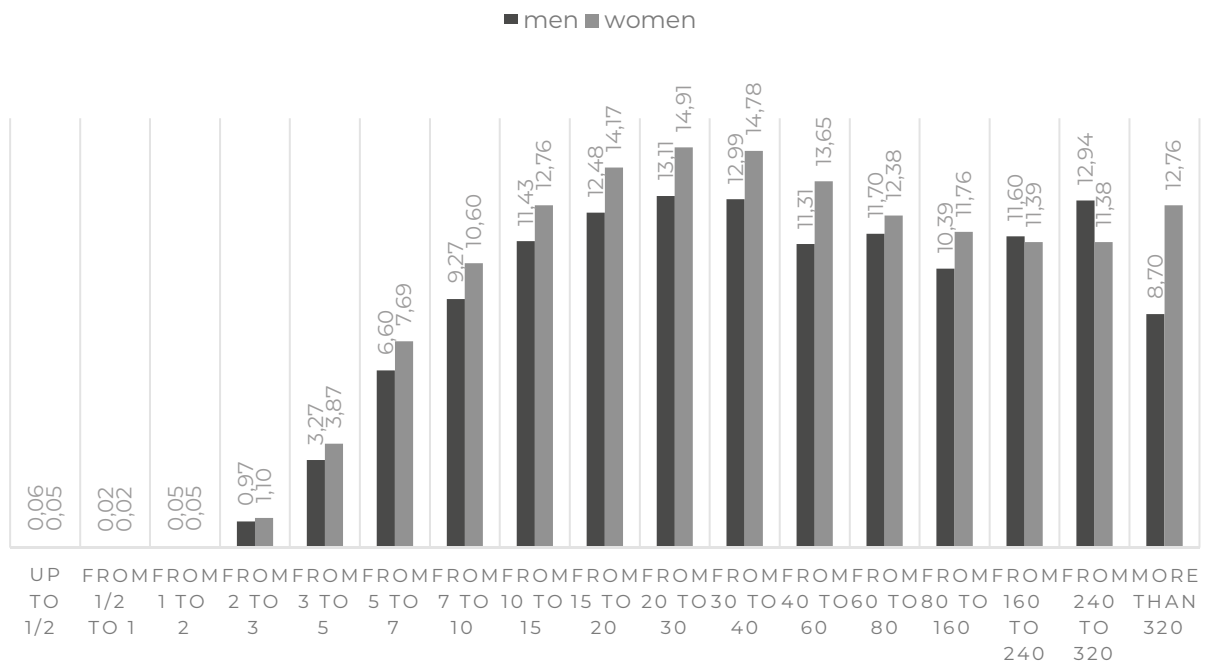
stratification. From the information available, it is interesting to see that women pay a higher rate of income tax in almost all ranges, except the two ranges from 160 to 240 minimum wages and 240 to 320, in which men's rates are higher than women's (figure 2).

Even though the average effective rates for both men and women have regressive characteristics, the profile of women is less regressive than that the profile of men. The greatest difference between rates by gender is noticed in the higher bracket, with more than 320 minimum wages, where women pay 12.76% of the rate, a difference of 4.06 percentage points (p.p.) in relation to men.

The strong gender bias in the collection of the Brazilian income tax is also seen in the differences in income between men and women per minimum wage bracket. Women, despite being the ones who pay the highest tax rates in almost all the minimum wage ranges, are also the ones who receive the lowest remuneration per range (figure 3). This difference is even greater in the higher ranges, in which men receive 64.8% of the total income measured among individuals who earn more than 320 minimum wages.

Figure 2

Effective tax rate by range of minimum wage and sex, Brazil, 2020



Note. Receita Federal do Brasil (Brazil, 2020). Elaborated by the author.-

Gender and class inequalities in consumption and taxation profile according to POF data

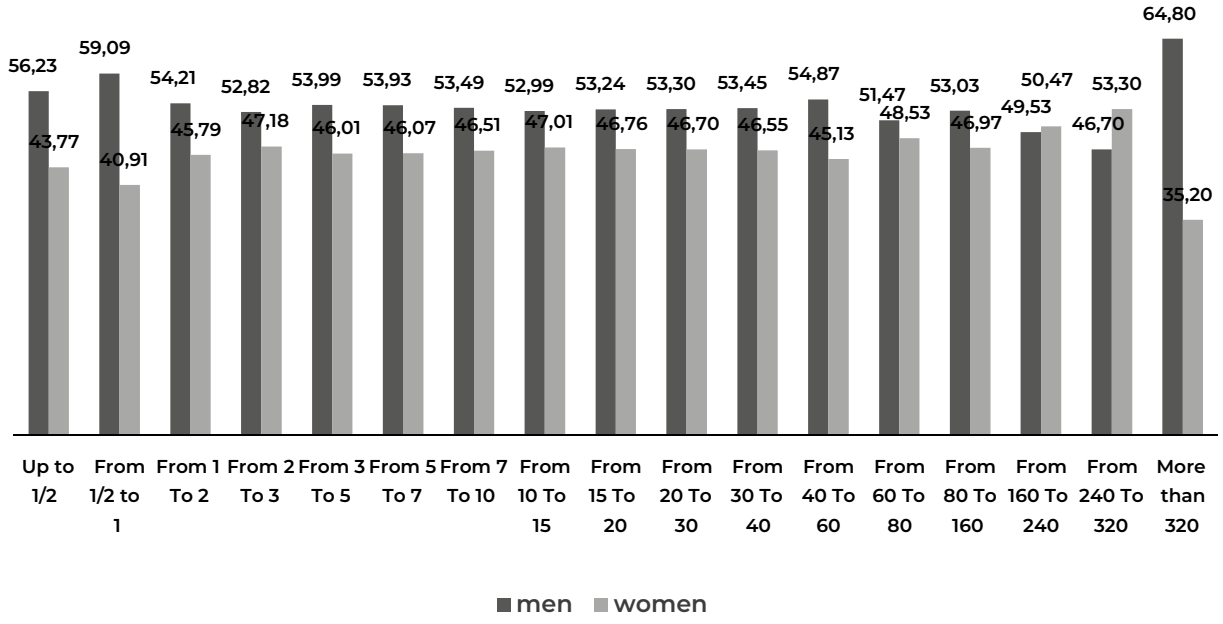
Changes in demographics, the labor market and family structures tend to reinforce women's role as breadwinners for their families. For example, in 1995, according to data from the National Household Sample Survey (PNAD-IBGE), only 22.9% of families were headed by women[1]. That is, the participation more than doubled in the period, approaching the percentage of men, which corresponds to 53.6%. Among the heads of household, 56% are black and mixed-race women, and 43% are white (figure 5).

Women and men, when they are responsible for the households, have different consumption profiles, resulting both from the maintenance of wage inequalities and also related to gender constructions. This tendency has been verified in the feminist literature on the subject, indicating that women, when they are responsible for household maintenance, spend a larger part of their income on basic consumption items, such as food, clothing, and housing. Men, on the other hand, spend a greater portion of their income on goods linked to transportation, beverages, smoking, and increasing assets (Arauco and Castro, 2018; Pineda, 2018; Sanches, 2018; Casale, 2012).

Regarding Brazil, data from the 2017-18 Household Budget Survey (POF) indicate that women, when they are household references, spend a higher percentage of their monthly income, compared to men, on expenses focused on food, housing, clothing, hygiene and personal care,

Figure 3

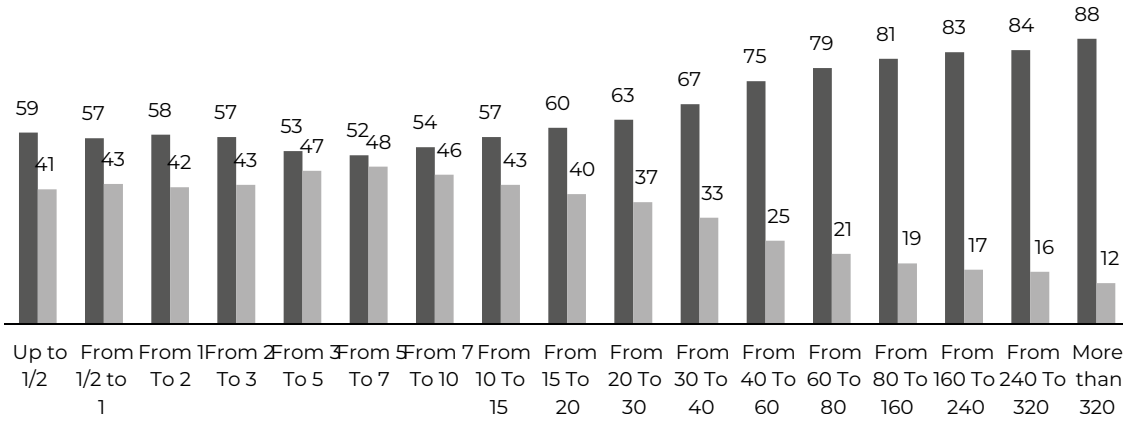
Proportion of average individual income by minimum wage bracket and gender, Brazil, 2020



Note. Receita Federal do Brasil (Brazil, 2020). Elaboration by the author.

Figure 4

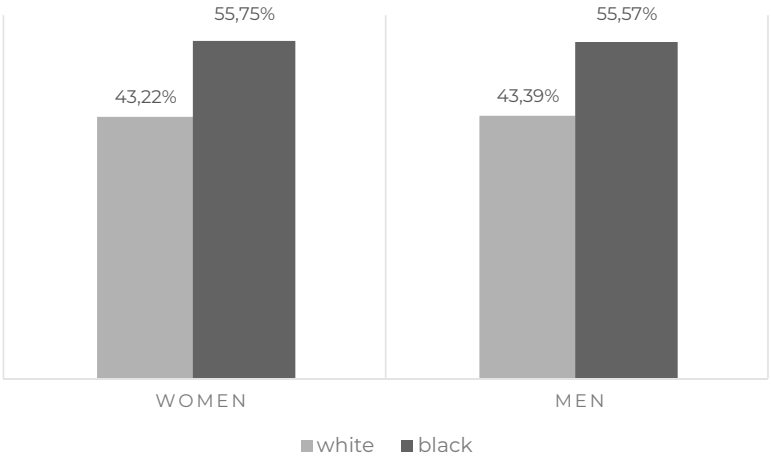
Proportion (%) of declarants by minimum wage bracket and gender, Brazil, 2020.



Note. Receita Federal do Brasil (Brazil, 2020). Own elaboration.

Figure 5

Distribution of heads of household by sex and color, Brazil, 2020.



Note. Prepared by the authors based on IBGE, Síntese de Indicadores Sociais, 2021.

health care –including medicines. Men, on the other hand, spend more on expenses related to transportation, taxes and increasing assets, such as the purchase of real estate, and investments, as shown in figure 6.

Inequalities in the expenditure profile tend to reinforce the gender income gap. This occurs because, compared to male heads, women spend a greater share of income on consumer goods aimed at maintaining the family and a lower percentage on investments and increasing assets, for example, in the acquisition of real estate. Even when it comes to expenses aimed at reducing liabilities, women spend a larger part of their income on paying off loans, while they spend more than women on real estate.

One of the ways to reduce social inequalities is through taxation. Even though the incidence of indirect and regressive taxation is high in Brazil, tax exemption on the basic food basket tends to penalize less the households headed by women. On the other hand, men pay a higher total tax burden due mainly to expenses related to direct taxes, labor contributions and transportation. According to table 1, the total tax burden for female-headed households is 21.32%, compared

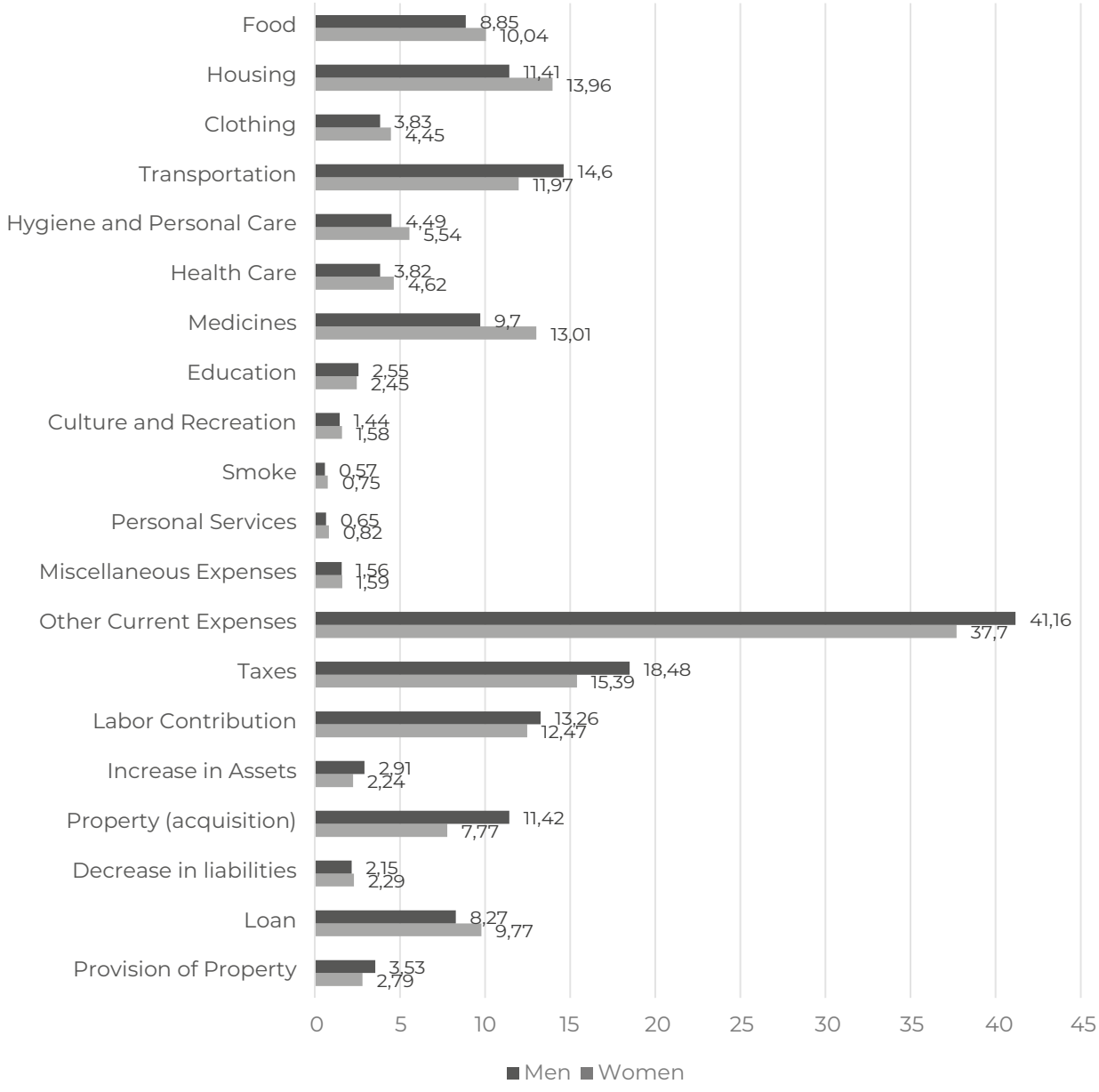
with 22.07% for male-headed households.

Considering only indirect taxes, the tax burden of female-headed households remains 15.05% higher than that of male-headed households, whose burden is 14.55%. Direct taxes represent 7.08% of the tax burden, there is a greater incidence in the male population, 7.52% compared to the female population, 6.27%.

It draws attention that as of 2017 tax data, men paid more indirect taxes than women and in 2022 this reversed, due to the reduction of taxes on vehicles and fuels made in the meantime. The total indirect taxes paid by male-headed households exceed those paid by female-headed households in all deciles, except for the highest incomes, where the rate for female-headed hou-

Figure 6

Distribution of monthly expenses of households headed by men and women, according to the type of **expense, Brazil (2017-2018) (%).**



Note. Source of raw microdata: Household Budget Survey-POF (2017-2018). Own elaboration.

seholds is 0.22 percentage points (p.p.) higher than for male-headed households.

The differences between the rates paid by families headed by men and women are greater among families with lower incomes, varying from 3.32 p.p. for the poorest 10% to 1.09 p.p. in the 30% to 40% decile in favor of families headed by men. In the other deciles, the difference in rates is less than 1 p.p., except in the 50% to 60% decile, in which the households headed by men have higher rates of 1.09 p.p.

The largest share of indirect taxes according to income and family head is paid by male-headed households in the lowest deciles (poorest 10%). In this group, families spend 32.36% of their income on indirect taxes. In the case of families headed by women, the poorest are also the ones that pay the highest percentage of taxes, spending on average 29.04% of income on indirect taxes, this group is the second that pays the highest indirect tax burden, considering all income deciles by family heads.

The upper strata spend a smaller portion of their income on indirect taxes, which will be better analyzed below. It is worth noting that the same occurs between families headed by men and women. The families headed by women in the upper-income deciles, which comprise the richest 10%, spend 11.12% of their income on indirect taxes, while families headed by men in the same income decile spend 10.90% of their income on these taxes. Comparing the two extremes of the income distribution, the poorest families spend almost 20 p.p. more than the richest on indirect taxes.

The data on indirect taxes, therefore, show that the way the country taxes reinforces gender and class inequalities. There is a greater participation of families headed by women in the lower classes, which, even though they pay proportionally lower rates in almost all income deciles, make them, in the aggregate, pay higher rates.

Table 1

Tax burden by type of expenses of households headed by men and women, Brazil, 2017-2018, (% of income)

Expense Categories	Tax burden by sex		
	Total	Women	Men
Food	3.30%	3.46%	3.20%
Housing	3.03%	3.33%	2.87%
Clothing	1.08%	1.15%	1.04%
Transport	2.55%	2.17%	2.76%
Hygiene and Personal Care	1.17%	1.29%	1.10%
Health care	0.94%	1.02%	0.89%
Education	0.62%	0.59%	0.63%
Recreation and Culture	0.43%	0.45%	0.42%
Smoke	0.15%	0.17%	0.13%
Personal Services	0.16%	0.18%	0.15%
Miscellaneous expenses	0.36%	0.35%	0.36%
Other current expenses	7.36%	6.51%	7.84%
Taxes	4.00%	3.43%	4.32%
Labor contribution	2.98%	2.78%	3.10%
Asset Increase	0.15%	0.12%	0.16%
Real State Acquisition	0.09%	0.07%	0.11%
Decrease in liabilities	0.51%	0.51%	0.50%
Total	21.80%	21.32%	22.07%
Total without direct taxes	14.72%	15.05%	14.55%
Direct taxes	7.08%	6.27%	7.52%

Note. Source of raw data: Pesquisa de Orçamentos Familiares-POF (2017-2018). Taxation data: Brazilian Institute of Planning and Taxation. Own elaboration.

The biggest difference, however, is related to class, due to the disparity between the rates paid by the bottom 10% and the top 10%.

About low-income households (bottom 10% decile), which pay the highest share of taxes, the expenses of both male and female households are concentrated in the food and housing groups.

The greatest differences in the expenditure profile between low-income families by head of household are found in housing, in which the families headed by women spend 4.81 p.p. more than those headed by men. On the other hand, male-headed households spend 4.41 p.p. more than female-headed households on the transportation item. Among the items that make up the housing group, the biggest expense is on rent, which is not taxed. It should be noted that non-monetary rent, which is an imputation of rent to families with their properties, is accounted for. On the other hand, in the case of transportation, gasoline, and the purchase and maintenance of vehicles are the biggest expenses for families headed by men. These items have tax rates that vary between 13.45% and 18%. Differently, among the households headed by women, the expense of transportation occurs mainly in urban transportation, whose tax rates vary between 2.45% and 13.45%.

In other words, the data indicate that there are differences between the expenditure profiles of households headed by men and women. These inequalities are related to gender norms. Indirect taxes fall more heavily on families headed by men when compared with the same income decile, this occurs mainly because expenses with fuel and the purchase and maintenance of vehicles are higher when compared with those headed by women.

The higher expenses with individual transportation among households headed by men, when compared to those headed by women, may be related to professional activities, such as motorcycle couriers and applicative drivers, which are mostly male. This indication is a hypothesis that should be better researched in future surveys.

Another issue that should be pointed out is that, even though households headed by men pay a higher indirect tax burden when compared with those headed by women in the same income deciles, there is a higher incidence of women heads of household in poor households, as seen previously. In addition, female-headed households in the lower deciles have the second highest proportion of indirect taxes on income when compared to the other deciles, regardless of the gender of the household head. In this sense, the tax regressiveness incident on indirect taxes strongly impacts women, especially those most vulnerable to poverty, such as single mothers and black women.

Regarding direct taxes, on the other hand, there is evidence of progressivity with income and greater incidence in male-headed households. Households headed by women of all income deciles pay less direct taxes when compared to those headed by men. The difference, however, is smaller concerning indirect taxes, not reaching 2 p.p. in any income decile, varying from a maximum of 1.41 p.p. for the lowest incomes (poorest 10%), and a minimum of 0.11 p.p. among the richest income brackets (richest 10%), in favor of men.

Again, gender differences are related to social norms, since there is a higher incidence of men owning vehicles, real estate, and land. On the other hand, as seen in section three, the effective income tax rates paid by women are higher than those paid by men, which should explain the greater equality of the rates paid by families headed by men and women among the total of direct taxes when compared to indirect taxes.

It is also worth noting that despite the greater incidence of direct taxes on families with higher incomes, the percentage of income spent by the richest 10% on these taxes does not reach 10%. If we add up the total of direct and indirect taxes compared to the total income of the population, we see that families in the lower deciles pay more proportional taxes than the other deciles. The proportion of taxes paid by families of the poorest decile headed by men is the highest among the groups analyzed (36.14%), followed by families headed by low-income women, who spend 31.42% of their average income on direct and indirect taxes.

Following Palma's (2019) recommendation of paying attention to inequalities between the poorest 40% and the richest 10%, the income commitment of these strata with different consumption groups is observed below.

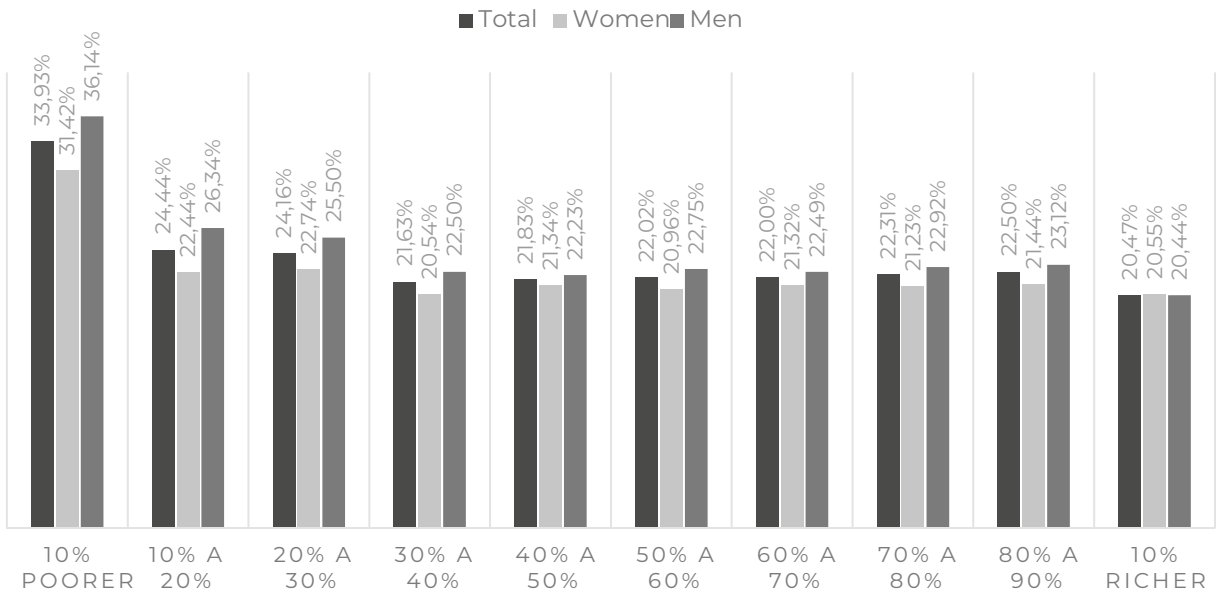
There is a greater commitment of the budget in low-income families, compared to high-income families, mainly in the following items: food (22.42% and 7.02%), housing (40.92% and 18.23%), rent (21.65% and 8.79%), electricity (4.41% and 0.98%), domestic gas (2.07% and 0.21%), water and sewage (1.91% and 0.33%), clothing (4.39% and 1.95%) and hygiene (5.07% and 1.12%). The relative expenditure of the poorest is lower than that of the richest, especially the following items: vehicle purchase (0.20% and 5.16%), travel (0.81% and 1.56%), increase in assets (1.68% and 5.40%), direct taxes (1.64% and 6.20%), and labor contributions (1.71% and 3.13%). To this extent, when thinking about reducing social inequalities through taxes, we suggest reducing taxes on basic items such as food, energy, hygiene and cooking gas, and increasing direct taxes.

Even though the poorest 40% spend only 3.37% of their income on direct taxes, indirect taxation represents 21.12% and the total reaches 24.49%. The richest 10% spend 9.51% of their income on direct taxes and 10.96% on indirect taxes, reaching 20.47% in total. The poorest 40%, therefore, spend more of their income on taxes than the richest 10%. It is worth noting that the lowest-income segments are mostly black.

The data shows the need for progressive tax reforms, as well as other fiscal policies that consider the different profiles of consump-

Figure 7

Share of total taxes in the income of male-headed, female-headed and total families, Brazil, 2017/2018.



Note. Microdata from the Household Budget Survey (POF, 2017/2018) and Brazilian Institute of Planning and Taxation. Own elaboration.

tion and social insertion by gender, class, and race. In the next section, we present the main proposals for a non-gender-neutral tax reform based on progressivity.

Simulation of tax reform

In this exercise, instead of the existing actual tax rate calculated by IBPT, a basic rate of 7% was calculated for the sum of the three federative levels for items considered of primary necessity: food, electricity, domestic gas, water and sewage, urban transportation, and medicine. Such a change would require compensation among the levels of government since the rates are heterogeneous in the different subnational entities. Table 2 shows the results for the total of male and female-headed households.

The reduction in indirect taxes for the aforementioned groups results in a decrease in the total tax burden by 3.49 p.p. The effects are greater for families headed by women, which reduces taxation by 3.74 p.p., in the case of those headed by men, there is a reduction in the tax burden of 3.34 p.p.. As a result, the total tax burden for women is 17.58% and for men 18.73%. About indirect taxes only, the result points to the approximation of tax burdens by gender: families headed by women would have an indirect tax burden of 11.31% and those headed by men 11.21%.

Therefore, the effects of such a reform would have an indirect gender bias, considering the greater reduction in the tax burden among women. However, the reform must be carried out broadly, also contemplating direct taxes. In this sense, besides the reduction of the tax rates

Table 2

Tax burden by type of expenditure of male-headed and female-headed households after reduction of indirect taxes, Brazil, 2017-2018 (% of income)

Expense Categories	Tax burden by sex		
	Total	Women	Men
Food	0.85%	0.89%	0.83%
Housing	2.49%	2.72%	2.37%
Clothing	1.08%	1.15%	1.04%
Transport	2.45%	2.04%	2.68%
Hygiene and Personal Care	1.17%	1.29%	1.10%
Health care	0.54%	0.59%	0.51%
Education	0.62%	0.59%	0.63%
Recreation and Culture	0.43%	0.45%	0.42%
Smoke	0.15%	0.17%	0.13%
Personal Services	0.16%	0.18%	0.15%
Miscellaneous expenses	0.36%	0.35%	0.36%
Other current expenses	7.36%	6.51%	7.84%
Taxes	4.00%	3.43%	4.32%
Labor contribution	2.98%	2.78%	3.10%
Asset Increase	0.15%	0.12%	0.16%
Real State Acquisition	0.09%	0.07%	0.11%
Decrease in liabilities	0.51%	0.51%	0.50%
Total	18.31%	17.58%	18.73%
Total without direct taxes	11.24%	11.31%	11.21%
Direct taxes	7.08%	6.27%	7.52%

Note. Source of raw data: Pesquisa de Orçamentos Familiares-POF (2017-2018). Taxation data: Brazilian Institute of Planning and Taxation. Own elaboration. Own elaboration.

mentioned above, a 20% increase in direct taxes for the richest 10% was simulated.

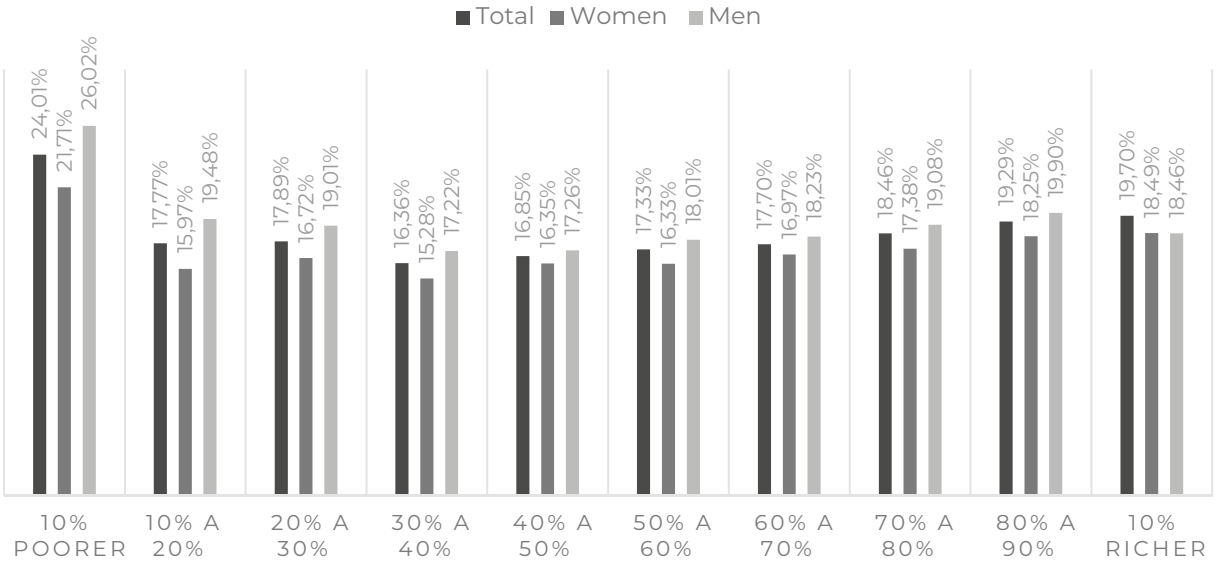
A criticism in the specialized literature about the reduction of taxes on basic items is that it impacts all social strata, and not only the richest. In the simulation above, we observe a reduction in taxation for the top segment, which goes from 20.47% to 19.39% even with an increase in direct taxes, even though there is a reduction of more than 6 percentage points for the poorest 40%. The suggested alternative is a tax refund for the poorest 40%, but this solution increases the tax complexity since it requires bureaucratic registration and refund procedures, which also means more operational costs. It must be considered that a large part of the purchases are made informally, without an invoice, which makes the return unfeasible. Another situation that can be implemented is the increase of indirect taxes on luxury goods, such as high-powered automobiles.

When stratifying the analysis further, it can be observed that for the poorest 10%, the tax burden falls by 10 percentage points, but is still higher than for all other segments. This simulation generates a reduction for all levels, but greater for the lowest. This conjecture indicates that in order for there not to be a revenue loss, it would be necessary to increase direct taxes by more than 20%. To make progressivity more effective, it might be necessary to tax luxury items more heavily, while tax rates on basic items would be reduced to less than 7%. Regarding the gender cut, this tax variation would not present major changes concerning the real tax base (figure 8).

Concerning IRPF, for the year 2020, there was a declaration of BRL 695.5 billion of exempt income by recipients of profits and dividends. In that same year, the total collection of IRPF was BRL 204.8 billion. A linear taxation on capital income of 15% would represent BRL 104.3 billion (+50.9%), while if the tax rate were 20%, collection would increase by BRL 139.1 billion (+67.9%). It is not possible to carry out this simulation with segmentation by income deciles and gender, however, it is known that the group of dividend recipients is formed mostly by wealthy men, which would have an important impact on women.

Figure 8

Share of total taxes in the income of male-headed, female-headed and total households, with simulation of tax reform.



Note. Source of raw data: Pesquisa de Orçamentos Familiares-POF (2017-2018). Taxation data: Brazilian Institute of Planning and Taxation. Own elaboration.

Concluding remarks

The objective of this paper was to analyze whether the Brazilian tax model reinforces gender and class inequalities in the country. To do so, we carried out a theoretical review of feminist theory, and in the empirical part, we analyzed the differences in the incidence of direct and indirect taxes concerning gender and income deciles.

The paper is divided into three parts, besides the introduction and the conclusion. In the second section, we deal with feminist theory and the approach to gender relations and class taxation. The gender category is an important contribution to the feminist movement because it identifies the different social constructions attributed to the sexes and how these reflect the worsening social conditions of women. Concerning Brazil, gender-related inequalities are reflected in several indicators, regarding labor market participation, unemployment, underutilization, overload of unpaid housework, and low participation in leadership positions.

Due to unequal patterns, according to feminist literature, different tax systems can reinforce or diminish gender inequalities. This characteristic is not only associated with tax progressivity and regressivity, but also with other particular aspects, such as how the country carries out tax relief policies, or how different family arrangements are taxed. The discrimination of gender taxation, meanwhile, may be explicit or implicit.

In the third section, we present data regarding the incidence of Individual Income Tax (IRPF) from the Internal Revenue Service for the year 2020 by gender. The results show that the tax rate paid by women is higher than that paid by men in almost all minimum wage ranges, even though women receive lower average salaries in all ranges. This fact is related to the tax policy in the country, which largely exempts individuals who receive profits and dividends, mostly men, for example, in all salary ranges, men have higher net worth when compared to women. Male taxpayers also have a greater share of tax deductions, totaling 57.96% of deducted expenses, while women participate with 42.04%. Moreover, 56.26% of the taxes refunded are from male declarations, against 43.73% from female declarations.

In the fourth section, we analyze the incidence of direct and indirect taxes from the POF data. We conclude that there is a strong regressivity in the Brazilian tax burden, reinforcing gender and class inequalities. This evidence is in line with the literature on the subject. Finally, in the fifth section, a simulation of the impact of tax reform by gender and class was carried out.

Regarding gender inequalities, female-headed households pay higher indirect tax rates and are more prone to poverty, especially those whose arrangements are formed by black mothers and children. It is noteworthy that the reduction of taxes on fuel and vehicles that occurred between 2017 and 2022 caused men to pay less indirect taxes than women. The results also show that the different consumption profiles define the highest incidence of direct and total taxes on male-headed households. This fact is related to the low cost of the products in the basic consumer basket and the greater incidence of the direct tax burden on the male population, who are greater owners of goods such as real estate.

On the other hand, as we have seen, families headed by women are more concentrated in the income brackets with the highest incidence of poverty and are the second group in proportion to total taxes on income. This fact indicates that the Brazilian tax burden reinforces gender inequalities for the total population and impacts mainly women in the poorest income strata.

For future research, it is necessary to analyze the incidence of the tax burden on race and household arrangements, since the black population is historically at the bottom of the wage structure, especially women. There is evidence, therefore, that Brazil's tax burden reinforces intersectional inequalities of gender, class, and race. The data reinforce the arguments in favor of the need for a tax reform that is not gender and class neutral.

References

Arauco, V. y Castro, C. (2018). Brechas de género y política tributária en Bolívia: apuntes para un debate. Friedrich Ebert Sti-

fund–FES. https://library.fes.de/pdf-files/bueros/kolumbien/14612.pdf

Brasil. Ministério da Fazenda. (2017a). Receita Federal do Brasil. História do imposto de renda. 2017. http://idg.receita.fazenda.gov.br/sobre/institucional/memoria/imposto-de-renda/historia/trajetoria

Brasil. Ministério da Fazenda. (2017b). Receita Federal. Centro de estudos tributários e aduaneiros. http://idg.receita.fazenda.gov.br/dados/receitadata/estudos-e-tributarios-e-aduaneiros/estudos-e-estatisticas

Casale, D. (2012). Indirect taxation and Gender Equity: evidence from South Africa. Feminist Economics Review, 18(3), 25-54.

Castro, F. (2014). Imposto de renda da pessoa física: comparações internacionais, medidas de progressividade e redistribuição. Masters' Thesis, Universidade de Brasília (UnB).

Comissão Econômica para América Latina e Caribe (Cepal). (2022). 45 años de Agenda regional de género. Santiago, 2022. https://repositorio.cepal.org/bitstream/handle/11362/47950/4/S2200522_es.pdf

CEPAL (2017). Estrategia de Montevideo para la Implementación de la Agenda Regional de Género en el Marco del Desarrollo Sostenible hacia 2030. Santiago, 2017.

CEPAL (2021). Panorama Fiscal de América Latina y el Caribe. Los desafios de la política fiscal en la recuperación transformadora pos-COVID-19, Santiago, 2021.

ONU Mujeres (1979). Convenção Sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher (Cedaw), ONU-Mulheres (1979). https://www.onumulheres.org.br/wp-content/uploads/2013/03/convencao_cedaw.pdf. Acesso em: 05 mar. 2022.

Credit Suisse Wealth Report (CSWR). (2016). Global Wealth Databook. https://www.credit-suisse.com/corporate/en/research/research-institute/publications.html

De Villota, P., Ferrari, I., Blanco, C., Sahagún, E. (2008). El impuesto sobre la renta de las personas físicas en Castilla y León desde la perspectiva de género: una propuesta a favor de las mujeres asalariadas. Consejo Económico y Social de Castilla y León.

Grown, C. (2010). Taxation and Gender Equity. Routledge. https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/43684/IDL-43684.pdf?sequence=1&isAllowed=y. Acesso em 05 Mar. 2022

Instituto Brasileiro de Geografia e Estatística (IBGE). (2021). Estatísticas de Gênero. Indicadores sociais das mulheres no Brasil. Estudos e Pesquisas, informações Demográficas e Socioeconômica, 38. https://www.ibge.gov.br/estatisticas/multidominio/genero/20163-estatisticas-de-genero-indicadores-sociais-das-mulheres-no-brasil.html?=&t=resultados

Pesquisa Nacional por Amostra de Domicílios Contínua. Módulo: Outras formas de trabalho. (2019). https://www.ibge.gov.br/estatisticas/sociais/trabalho/17270-pnad-continua.html?edicao=27762&t=resultados

Estatísticas do século XX. (2019). Econômicas. https://seculoxx.ibge.gov.br/Pesquisa de Orçamento Familiar. (2017-2018). Análise do Consumo Alimentar Pessoal no Brasil. https://biblioteca.ibge.gov.br/visualizacao/livros/liv101742.pdf

Instituto Brasileiro de Planejamento e Tributação (IBPT) (2017). https://regys.com.br/ibpt-nova-tabela-ibpt-17-2-b-disponivel/#.YiOnKJZv-5c

Inter-Parlamentary Union (IPU). (2019). Women in national parliaments. http://archive.ipu.org/wmn-e/arc/classif010219.htmONU. (2015). Objetivos para o Desenvolvimento Sustentável (ODS). https://

brasil.un.org/pt-br/sdgsOrganization for Economic Co-Operation and Development (OECD). (2018a). OECD Tax Database. 2018. http://www.oecd.org/tax/

Organization for Economic Co-Operation and Development (OECD). (2018b). Social and welfare issues. A broken social elevator? How to promote social mobility. http://www.oecd.org/social

Oxfam Brasil. (2017). Publicações. A distância que nos une: um retrato das desigualdades brasileiras. https://www.oxfam.org.br/publicacoes

Palma, J. G. (2019). Why is inequality so unequal across the world? Part 2 The diversity of inequality in market income and the increasing asymmetry between the distribution of income before and after taxes and transferences. CWPE19100.

Piketty, T. (2014). O capital no século XXI. 1. Ed. Intrínseca.

Pineda, E. (s. f.). Perspectiva de género y justicia tributaria: una aproximación al caso venezolano. Friedrich Ebert Stifund (FES). http://library.fes.de/pdf-files/bueros/kolumbien/14360.pdf.

Receita Federal do Brasil. (2108). Ministério da Economia. Dados abertos. http://idg.receita.economia.gov.br/dados

Receita Federal do Brasil. (2019). Ministério da Economia. História do imposto de renda. http://idg.receita.economia.gov.br/sobre/institucional/memoria/imposto-de-renda

Sanches, M. A. (s. f.). Estado de la tributación para la equidad de género en Ecuador. Friedrich Ebert Stifund (FES). https://library.fes.de/pdf-files/bueros/kolumbien/14359.pdf

Sánches. M. D. (2021). La política fiscal con enfoque de género en países de América Latina. Serie Macroeconomía del Desarrollo, 217. Comisión Económica para América Latina y el Caribe (Cepal).

Silveira, F. G., Menezes, T., Diniz, B. C., Servo, L. M., Piola, S. F. (s. f.). Family health expenditure and demand: an analisis based on the Consumer Expenditure Survey-POF 2002/2003. Well-Being and Social.

Souza, P. (2016). A desigualdade vista do topo: a concentração de renda entre os ricos no Brasil, 1926-2013. UnB.

World Inequality Database (WID). Data. https://wid.world/data/

Vásconez, A. (2012). Mujeres, hombres y economías latinoamericanas: un análisis de dimensiones y políticas. En: V. Esquivel (ed.), La economía feminista desde América Latina: una hoja de ruta sobre los debates actuales en la región. Santo Domingo.

Opacidad y secreto financiero: entender sus impactos sobre la estabilidad fiscal y social en Colombia

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Resumen

El objetivo del presente documento es brindarle al lector una introducción a la naturaleza de los Flujos Financieros Ilícitos (FFI) y dar claridad sobre la forma en que países como Colombia se ven afectados por las operaciones de opacidad y secretismo financiero en centros bancarios internacionales como Panamá. Lo innovador de este trabajo es que busca enmarcar el problema combinando dos perspectivas a través de las que se han abordado los FFI. La primera perspectiva es la de la denominada literatura gris, los informes de agencias multilaterales que intentan evaluar la dinámica de los FFI para hacer recomendaciones de política. La segunda perspectiva es la de la literatura académica sobre el papel de Panamá en las dinámicas del secretismo financiero global y su impacto sobre el bienestar y la sostenibilidad fiscal de otros países como Colombia. Se identifica que tanto Colombia como Panamá poseen falencias en su legislación, sus sistemas de control sobre FFI y sobre las operaciones comerciales relacionadas con la facturación fraudulenta. En ese sentido, se halló que las filtraciones como los Papeles de Pandora, aunque brindan información incompleta y heterogénea, constituyen insumos para el inicio de investigaciones judiciales, académicas y periodísticas que permiten identificar esquemas de evasión fiscal y lavado de activos. Finalmente, se halló que la literatura académica apoya la adopción de mecanismos de divulgación voluntaria de riqueza oculta. Estos esquemas tienden a aumentar el recaudo, le ahorran recursos al Estado en términos de persecución a los evasores y desincentivan la posterior evasión o elusión fiscal.

Palabras clave: Flujos Financieros Ilícitos, Papeles de Pandora, paraíso fiscal, facturación fraudulenta, evasión fiscal, empresas fantasmas.

Códigos JEL

F13, F38, F42, F51, F53, F55, G28, G32.

Abstract

This document aims to provide the reader with an introduction to the nature of Illicit Financial Flows (IFF) and clarify how countries like Colombia are affected by operations of opacity and financial secrecy in international banking centers such as Panama. What is innovative about this work is that it seeks to frame the problem by combining two perspectives through which IFFs have been addressed. The first perspective is the so-called *gray literature*, the reports of multilateral agencies that attempt to assess the dynamics of IFFs to make policy recommendations. The second perspective is that of the academic literature on the role of Panama in the dynamics of global financial secrecy and its impact on the welfare and fiscal sustainability of other countries such as Colombia. It is identified that both Colombia and Panama have flaws in their legislation, their control systems over IFF, and commercial operations related to fraudulent billing. In this sense, it was found that leaks such as the Pandora Papers, although they provide incomplete and heterogeneous information, constitute inputs for initiating judicial, academic and journalist investigations that allow identifying tax evasion and money laundering schemes. Finally, it was found that the academic literature supports adopting mechanisms for the voluntary disclosure of hidden wealth. These schemes tend to increase tax collection, save State resources in prosecuting evaders, and discourage subsequent tax evasion or avoidance.

Keywords: Illicit Financial Flows, Pandora's Papers, tax haven, trade misinvoicing, tax evasion, shell companies.

JEL codes

F13, F38, F42, F51, F53, F55, G28, G32.

Introducción

La lucha para controlar el flujo ilícito de dinero alrededor del mundo ha resultado infructuosa. Si bien en la última década se han fortalecido iniciativas independientes y gubernamentales para luchar en contra de los delitos financieros internacionales y el secretismo que los origina, el esfuerzo no ha sido suficiente para que disminuyan los estimativos de los Flujos Financieros Ilícitos (FFI) (Global Financial Integrity, 2021a). La globalización de la economía, junto con el aumento de la competencia en el mercado financiero, han llevado a la creación de nuevos productos y tecnologías que pueden utilizarse para cometer delitos económicos internacionales, como el lavado de activos (LA) y el financiamiento al terrorismo (Dirección de Estudios Financieros, 2021).

La investigación asociada a la reciente filtración conocida como los Papeles de Pandora, ocurrida en octubre de 2021, ha reavivado el debate público en torno a los FFI. Esta investigación reveló doce millones de documentos con información de catorce empresas internacionales involucradas en la creación de cuentas secretas y *empresas de papel* en jurisdicciones con normativas fiscales laxas, las cuales imponen menos impuestos a las cuentas bancarias de extranjeros y brindan mayor privacidad y secretismo a sus clientes (ICIJ, 2021a).

El Consorcio Internacional de Periodistas de Investigación (ICIJ) –organización que publicó los resultados de la investigación de los Papeles de Pandora– ha proporcionado información acerca de las operaciones financieras y cuentas en el extranjero de más de 330 políticos procedentes de aproximadamente noventa naciones. Entre los documentos se identifican alrededor de 29 mil propietarios de empresas ficticias o fantasma, incluyendo tanto celebridades como individuos con antecedentes criminales (ICIJ, 2021b).

Los Papeles de Pandora han sido ampliamente vinculados a una filtración muy similar ocurrida en 2016, a la cual se le denominó los Papeles de Panamá, debido a que la mayoría de los documentos filtrados provenían de la firma Mossack–Fonseca, creada y administrada en Panamá. Investigaciones tanto periodísticas como judiciales confirmaron que las actividades de Mossack–Fonseca habían posibilitado la creación de empresas en el extranjero y la formación de instrumentos financieros que facilitaban la evasión fiscal, ocultar ingresos generados a través de actividades ilícitas y llevar a cabo transacciones relacionadas con el LA (Medina et al., 2021).

Por su parte, los Papeles de Pandora han sacado a la luz información concerniente a Alcogal y Overseas Management Company (OSM), dos empresas panameñas especializadas en proveer servicios financieros a clientes de alto perfil político y económico, bajo un velo de secreto que comparte notables similitudes con las actividades desempeñadas por Mossack–Fonseca, previo a su bancarrota y cierre (Medina et al., 2021). Más de 2,3 millones de documentos de los 11,9 millones filtrados en los Papeles de Pandora provienen de Alcogal y OMS, evidenciando que, pese al desmantelamiento de Mossack–Fonseca, aún hay empresas que ofrecen servicios de secreto financiero en Panamá (Medina et al., 2021).

Aunque, en principio, no es ilegal tener cuentas bancarias o empresas radicadas en el extranjero, hay evidencia de que personas adineradas o, en muchos casos, criminales, han usado estos vehículos sistemáticamente para esconder dinero, lavar activos, ocultar transacciones y evitar pagar impuestos. En consecuencia, este tipo de servicios financieros pueden facilitar crímenes como el fraude fiscal, pagos por las operaciones de minería ilegal, transferencias relacionadas con la trata de personas o hechos relacionados con corrupción (Global Financial Integrity, 2021a).

Panamá se encuentra especialmente expuesto a estas problemáticas porque es uno de los centros financieros y bancarios más importantes en toda América. El país ostenta un sector financiero considerablemente líquido y un sistema bancario robusto que aloja a más de 60 bancos con licencia internacional y 45 bancos con licencia general (Superintendencia de Bancos de Panamá, 2021b). A corte de junio de 2023, los depósitos externos representan más del 79% de los activos líquidos del Centro Bancario Internacional (CBI) panameño (Superintendencia de Bancos de Panamá, 2023a) y, en particular, Colombia lidera los fondos en la cartera de de-

pósitos externos con una participación del 21,8 %, seguida por Estados Unidos, con el 5,9%, y Costa Rica y Venezuela (ambos con el 5,7 %) (Superintendencia de Bancos de Panamá, 2023b). El monto de estos fondos, en su mayoría originados en América Latina, subrayan el potencial riesgo de que los bancos panameños reciban fondos cuya procedencia carece de claridad y transparencia si no se implementa un control adecuado (ONU, 2018).

Organizaciones tan diversas como el Fondo Monetario Internacional (FMI) y Tax Justice Network han estimado que la escala de la pérdida en ingresos fiscales a nivel global, debido solamente al traslado de ganancias corporativas[1] hacia paraísos fiscales, asciende aproximadamente a 600 mil millones USD al año (Nelson et al., 2020). Por otro lado, autores como Cobham y Janský (2020) han estimado que las naciones con ingresos más bajos, o en desarrollo, enfrentan pérdidas fiscales que alcanzan los 200 mil millones USD al año. En otra investigación, Alstadsæter et al. (2019) estimaron que cerca del 8% del PIB mundial se encuentra escondido en paraísos fiscales que operan con una reglamentación tributaria parecida a la de Panamá.

Dado este contexto, el objetivo del presente documento es brindarle al lector una introducción a la naturaleza los FFI y dar claridad sobre la forma en que países como Colombia se ven afectados por las operaciones de opacidad y secretismo financiero en centros bancarios internacionales como Panamá. Se desea resaltar los efectos nocivos de los FFI, entendidos como un problema mundial complejizado por la globalización. Adicionalmente, se expone el potencial positivo de abordar la problemática a partir de mecanismos de divulgación de riqueza oculta y el aprovechamiento de filtraciones de información secreta, como la contenida en los Papeles de Pandora o los Papeles de Panamá.

Nelson et al. (2020) sostienen que prácticamente todos los países del mundo se ven afectados por los vehículos que permiten trasladar capitales de manera irregular a otras jurisdicciones. Esta práctica ejerce efectos directos e indirectos sobre la estabilidad fiscal de las naciones y el bienestar de sus ciudadanos. La erosión de la base gravable conlleva que el Estado disponga de menos recursos para atender a las poblaciones más vulnerables, lo que con el tiempo agrava la desigualdad (Cobham y Janský, 2020) y dificulta la provisión de servicios esenciales como el acceso a educación, salud y salubridad (Barake et al., 2018).

Los FFI han sido, en gran medida, fomentados por la deficiente supervisión y el escaso control que algunos centros financieros internacionales ejercen sobre la transferencia de capitales, como es el caso de Panamá, Irlanda, Suiza y Hong Kong. Estas naciones han encontrado una fuente de liquidez y rentabilidad en los depósitos de entidades o individuos extranjeros. Como resultado, en jurisdicciones como Panamá, las regulaciones en torno a los flujos financieros internacionales suelen ser permisivas y ofrecen atractivos beneficios y descuentos tributarios. Además, suelen evitar que estos activos estén sujetos a la revisión de otras autoridades tributarias, debido al alto nivel de confidencialidad que rodea las transacciones y la identidad de sus beneficiarios finales[2] (Bowers, 2020).

La situación descrita anteriormente resulta alarmante para los países emergentes de ingresos bajos y medios, que son los que más recursos necesitan para atender las necesidades de sus poblaciones más vulnerables. Estudios como el de Cobham y Janský (2020) encuentran que la cantidad relativa de riqueza de los países en desarrollo que se mantiene en el extranjero es mucho mayor que la de los países desarrollados, alcanzando niveles entre el 20% y el 30% en varios países africanos y latinoamericanos.

Lamentablemente, estudiar los FFI y medir su impacto real sobre las finanzas y el bienestar de los países es una tarea compleja y de mucho cuidado. Los datos son escasos y las fuentes de información son muy heterogéneas, ya que muchas veces dependen de filtraciones cuya veracidad es difícil de comprobar.

La literatura existente respecto a la dinámica y el impacto de los FFI entre Panamá y Colombia ha abordado su estudio desde dos perspectivas. En primer lugar, se encuentra la perspectiva proporcionada por informes de agencias multilaterales, intergubernamentales y ONG, que reúnen sus descubrimientos y recomendaciones en lo que

se conoce como reportes de *literatura gris*. En segundo lugar, se encuentra la visión derivada de la literatura académica, que explora el papel de Panamá en las dinámicas globales del secreto financiero y cómo esto afecta el bienestar y la sostenibilidad fiscal de otras naciones como Colombia. La originalidad de este informe radica en su intento de integrar los hallazgos de la literatura gris con los de la literatura académica, dado que abordar ambos aspectos de manera conjunta enriquece y fortalece la comprensión rigurosa del problema en cuestión.

Este documento está organizado en seis secciones de las cuales la primera corresponde a esta introducción. La segunda sección se dedica a la exposición de los hallazgos derivados de la revisión de la literatura académica. En la tercera sección, se analiza cómo el papel de Panamá en los FFI afecta la estabilidad fiscal y social de Colombia. En la cuarta sección, se evalúan los compromisos y los avances de Panamá en cuanto a la regulación necesaria para controlar los FFI, destacando la relevancia de la cooperación internacional para encontrar soluciones al problema. La quinta sección ofrece recomendaciones de política, respaldadas por los hallazgos de la literatura gris y académica, y examina en detalle las implicaciones de implementar mecanismos de divulgación voluntaria de riqueza oculta, como la normalización de 2021 regulada en Colombia a través de la Ley de Inversión Social. Finalmente, en la sexta sección, se presentan las conclusiones del estudio.

Revisión de literatura académica

La literatura académica relacionada con los FFI, los paraísos fiscales y las filtraciones como los Papeles de Pandora es muy limitada (Schmal et al., 2023), en gran parte por la dificultad de encontrar datos para evaluar el problema. Barake et al. (2018) hallaron que, para el periodo 1980-2017, los artículos sobre paraísos fiscales han representado tan solo el 0,4% de las publicaciones académicas sobre fiscalidad en bases como Elsevier, Jstor y Wiley. Si se consideran otras bases como Econlit o Ideas, el porcentaje cae al 0,2%. Esta escasez resulta inquietante, ya que la falta de información desincentiva la investigación y la comprensión del fenómeno global del secretismo financiero, los paraísos fiscales y los FFI.

Hasta donde llega el alcance de esta investigación y el conocimiento de su autor, en las principales bases de datos de artículos académicos en economía, tales como Econlit, Jstor y Wiley, solamente hay un documento que examina de manera explícita el tema de la evasión fiscal a través de FFI entre Colombia y Panamá. Londoño–Vélez y Ávila–Mahecha (2021) estudiaron datos relativos al patrimonio personal, deslocalización y evasión fiscal de las declaraciones de impuestos presentadas por ciudadanos colombianos para analizar un programa de divulgación de riqueza oculta, y vincular esa información con los documentos filtrados en los Papeles de Panamá. A través de esta metodología, identificaron posibles modificaciones en las declaraciones de impuestos de las personas salpicadas por el escándalo. Los autores señalan que la población 0,01% más rica de Colombia es mucho más propensa a evadir impuestos, y estimaron que los evasores de ese 0,01% más rico tienen alrededor de un tercio de su riqueza oculta en el exterior.

Diversos investigadores han empleado los Papeles de Panamá para llevar a cabo estimaciones de la evasión fiscal en países distintos a Colombia. Alstadsæter et al. (2019) utilizaron la información proveniente de la filtración de Mossack–Fonseca y de los Swiss Leaks para calcular la magnitud y distribución de la evasión fiscal en las naciones escandinavas. Sus resultados revelaron que el 0,01% más rico de la población evade una porción mucho mayor de sus impuestos personales (alrededor del 30%) que los ciudadanos promedio (aproximadamente el 3%). Además, observaron que, en el marco de algunas amnistías tributarias, aquellos evasores que optaron por revelar sus activos no intentaron eludir impuestos de manera legal posteriormente. Como lo indican los autores, estos resultados son llamativos considerando que los países escandinavos son conocidos por tener altos niveles de confianza social, lo que sugiere que la magnitud de la evasión podría ser aún mayor en lugares como Colombia. Esta intuición es respaldada por los estudios de Fuest y Riedel (2012) y Janský y Prats (2015), quienes, empleando Orbis Data (Bureau Van Dijk, s. f.) –una base que abarca información de más de 400 millones de compañías–, evidenciaron que en los países en desarrollo se presentan transferencias financieras de beneficios corporativos hacia paraísos fiscales, los cuales

son relativamente grandes cuando se comparan con las de países más desarrollados.

Nerudova et al. (2020) discuten lo que se conoce como planeación tributaria internacional agresiva y el papel del centro financiero de Panamá en la creación de empresas fantasmas para facilitar la transferencia de ganancias hacia paraísos fiscales. En su análisis, los autores identificaron que el canal más usado para este tipo de operaciones es el de la deuda. Es decir, las compañías tienden a crear falsos pasivos con empresas de papel en paraísos fiscales para reportar menos ganancias gravables. Por su parte, García–Alvarado y Mandel (2022) hallaron, usando los Papeles de Panamá, que la red global de evasión fiscal, lejos de ser una colección aleatoria de vínculos bilaterales, tiene una organización jerárquica caracterizada por una estructura de centro–periferia.

Bayer et al. (2020) realizaron un estudio a partir de los documentos de los Papeles de Panamá en el que encontraron una relación fuerte entre el aumento de noticias sobre expropiaciones dentro de un país y un incremento en el mismo mes de la creación de empresas en el extranjero por parte de sus nacionales. Los autores hallaron que el efecto es más fuerte en países relativamente menos corruptos, lo que parece indicar que las entidades extranjeras se usan con frecuencia para esconder riqueza a medida que gobiernos se vuelven más efectivos en la aplicación de sus leyes de recaudo y apropiación. Por ejemplo, González et al. (2020) identificaron que los Papeles de Panamá revelan que transferencias a paraísos fiscales o la creación de empresas en el extranjero fueron usadas en Chile para evadir las consecuencias económicas del cambio político y del fortalecimiento institucional del país al término de la dictadura de Pinochet.

Finalmente, Schmal et al. (2023) hallaron –al usar los datos de cuatro filtraciones diferentes– que en Estados Unidos los estados financieros de las empresas salpicadas por estas filtraciones se volvieron más difíciles de leer y sus reportes de gastos por impuestos aumentaron, lo que podría ser un indicio de que las empresas tomaron medidas para contrarrestar las posibles consecuencias negativas sobre su reputación, tratando de ocultar conductas que podrían considerarse no éticas.

En síntesis, los hallazgos de la literatura académica sobre los FFI relacionados con Panamá sugieren que los mecanismos para transferir activos de manera irregular hacia paraísos fiscales se han usado ampliamente para evadir impuestos, ocultar recursos de origen ilícito o proteger la riqueza de individuos de alto perfil económico ante cambios políticos o el fortalecimiento institucional de los sistemas de recaudo y fiscalización.

Los efectos nocivos de los FFI sobre Colombia, debilidad regulatoria deliberada

Los mecanismos por los cuales se realizan las operaciones relacionadas con los FFI en Colombia son diversos. Estos incluyen la facturación fraudulenta de importaciones y exportaciones, la creación de deudas falsas con empresas de papel en el extranjero o la compra irregular de mercancía extranjera con dinero ilícito para venderla dentro del país (Global Financial Integrity, 2019).

Para Colombia, las prácticas relacionadas con los FFI tienen una serie de impactos desfavorables que incluyen la reducción de ingresos fiscales, el débil control sobre las transacciones internacionales, el fomento a la criminalidad y la fuga de capitales del país (Global Financial Integrity, 2019). Autores como Zander (2021) y Alstadsæter et al. (2019) indican que los FFI pueden erosionar los recursos públicos, hacer los impuestos regresivos en la parte superior de la distribución y socavar la estabilidad macroeconómica. También se afecta la eficiencia de la producción porque las inversiones pueden terminar en sectores poco competitivos que permitan establecer proyectos complejos e intensivos en capital, que faciliten disfrazar los actos de corrupción o evasión con menos esfuerzo (Zander, 2021).

Por ejemplo, se han detectado FFI relacionados con la subfacturación o sobrefacturación de importaciones y exportaciones de bienes como la madera, el oro, los combustibles minerales y las piedras y metales preciosos o con la compra y venta de bienes ilícitos como la cocaína y la marihuana (Global Financial Integrity, 2019, 2021b y 2021c). Según Global Financial Integrity (en adelante GFI) (s. f.), la facturación fraudulenta de importaciones y exportaciones es la forma más común de los FFI a nivel global y suele utilizarse

para evitar los controles en los flujos de capitales, evadir aranceles, lavar dinero o reclamar incentivos gubernamentales relacionados con el comercio internacional.

De acuerdo con un análisis del GFI (2021c), entre 2008 y 2019 más del 40% de las exportaciones de madera tropical de Colombia fueron fraudulentas. Durante este periodo, Colombia reportó 65,6 millones de dólares menos por concepto de exportaciones de madera que la cifra declarada por sus socios comerciales. La mayor discrepancia en el valor de la madera exportada fue encontrada en el comercio con Panamá, alcanzando los 37,3 millones de dólares.

Otro mercado sensible a los FFI es el del oro. Un método utilizado por los contrabandistas consiste en sacar oro de Colombia en pequeños aviones con destino a Panamá o las Antillas Holandesas en ruta a su destino final en Europa o Estados Unidos, adonde llega como oro totalmente legal porque empresas en los países intermediarios se dedican a comprar la mercancía sin preocuparse por su origen (InSight Crime, 2019). Por ejemplo, para el periodo 2010-2018, Cedetrabajo, en alianza con GFI, encontró que el valor declarado en exportaciones de oro hacia Panamá fue de 4,3 millones de dólares FOB, mientras que las importaciones declaradas por Panamá en el mismo periodo fueron de 60,8 millones de dólares FOB, es decir, una brecha de 56,5 millones (Global Financial Integrity y Cedetrabajo, 2021). De hecho, en el contexto de las filtraciones de los Pandora Papers, uno de los salpicados fue capturado por el lavado de 5,8 billones de pesos originados en la exportación de oro extraído de manera ilegal en diferentes partes de Colombia. El empresario constituyó empresas extraterritoriales justamente en los años en los que más activos reportaron sus empresas en Colombia. La red criminal a la que pertenecía habría utilizado la identidad de personas fallecidas o que simplemente no tenían relación con el negocio para hacerlas pasar por mineros certificados por la Agencia Nacional de Minería (El Espectador y Connectas, 2021b).

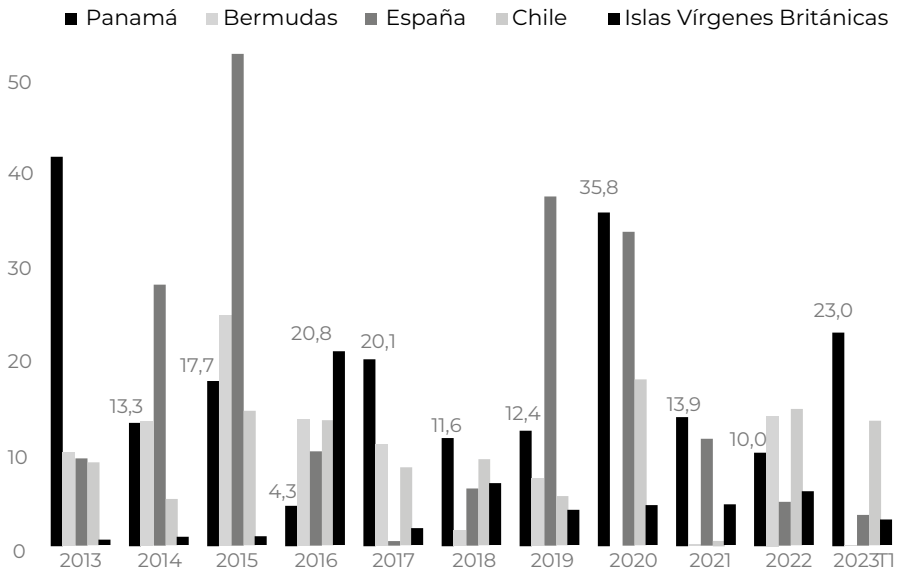
Al igual que en el caso de la madera, mucho de este oro ilegal es cambiado por joyas u otros artículos en Panamá, los cuales vuelven a Colombia para ser revendidos como bienes legales de importación. Para el comercio de oro con Estados Unidos, Suiza e India, se han calculado brechas de 2.668, 1.818 y 1.157 millones de dólares FOB respectivamente (Global Financial Integrity y Cedetrabajo, 2021). Estos montos resultan realmente preocupantes si se considera que combinados representan más del 2% del PIB de Colombia en 2020. Según Tax Justice Network (TJN) (2021), el gobierno colombiano pierde aproximadamente 2,8 miles de millones de dólares en ingresos fiscales al año por facturación fraudulenta, aproximadamente el 6,8% de los ingresos fiscales del país en 2020 (Tax Justice Network, 2021).

Por otro lado, según el portal de rastreo de vulnerabilidad ante FFI de TJN (2021), Panamá es el tercer país que más riesgo genera ante los FFI para Colombia por el canal de las exportaciones, el segundo por el canal de las posiciones bancarias en el extranjero y el primero por medio del canal de la Inversión Extranjera Directa (IED). Como se refleja en la *figura 1*, Panamá es uno de los principales destinos de IED desde Colombia. De hecho, desde 2013 ha recibido en promedio el 18,5% del total de la IED colombiana al extranjero. En particular, llama la atención que en 2013 la participación de Panamá en estos flujos alcanzó el 41,8% del total y que en 2016, año del escándalo de los Papeles de Panamá, la participación cayó a 4,3% –el mínimo de la última década–, pero se recuperó rápidamente a partir de 2017 (Banco de la República, 2023). Adicionalmente, en 2016 se presentó un inusual aumento de la proporción de la IED colombiana dirigida a las Islas Vírgenes Británicas, un reconocido paraíso fiscal que también es frecuentemente mencionado en los Papeles de Pandora (BBC Mundo).

En marzo de 2023, la Superintendencia de Bancos de Panamá destacó que el crecimiento de los depósitos particulares provenientes de Colombia ha mantenido un dinamismo estable desde finales de 2021 y que Colombia ostenta el primer puesto entre los países con mayor peso en los depósitos externos del CBI de Panamá con el 21,8% (Superintendencia de Bancos de Panamá, 2023b).

Las autoridades colombianas son conscientes de los efectos nocivos que tiene la normativa de países como Panamá respecto a los FFI. Sin embargo, hasta el momento, las acciones tomadas para abordar esta problemática han sido muy limitadas. Ante la evidencia de los riesgos

Figura 1
Inversión directa de Colombia en el exterior–principales países de destino.



Nota. Construcción propia con datos de Banco de la República (2023). Los datos para 2023 corresponden a los disponibles con corte al primer trimestre del año.

en que se incurre en las relaciones comerciales y financieras con el país centroamericano, Colombia declaró a Panamá como paraíso fiscal en 2014, buscando implementar regulaciones y controles más rigurosos sobre las transacciones financieras y comerciales realizadas por ciudadanos colombianos en dicho territorio. Sin embargo, las represalias diplomáticas y económicas por parte de Panamá sobre la inversión colombiana fueron inmediatas y contundentes, lo que llevó a revertir rápidamente esta decisión (Portafolio, 2016). Aunque la realidad es que el sistema comercial y financiero de Panamá crea riesgos relacionados con los FFI a Colombia, este último no tiene declarado al primero como paraíso fiscal porque esa medida le acarrearía fuertes problemas comerciales.

Panamá figura en la posición 28 en el Índice de Paraísos Fiscales para las Corporaciones elaborado por TJN, el cual indica que las regulaciones del país centroamericano perjudican a otras naciones en la forma de pérdidas de ingresos fiscales en por lo menos dos billones USD anuales. En este contexto, Colombia se posiciona como la segunda nación más expuesta a estas vulnerabilidades, justo detrás de Estados Unidos (Tax Justice Network, 2020b).

Ahora, Colombia también presenta deficiencias en la regulación tanto del comercio interno como del externo. Un estudio de la Economist Intelligence Unit (s. f.) sobre los FFI en Colombia identificó que la escala de la economía informal en el país proporciona un ambiente propicio para actividades como la facturación fraudulenta, la corrupción a gran escala, la evasión fiscal, el contrabando y los crímenes transnacionales (Economist Intelligence Unit, s. f.). Adicionalmente, se debe tener en cuenta que la normativa tributaria en Colombia hace muy complicado el control y la supervisión de la Dian, ya que se trata de un código muy complejo y con múltiples excepciones, lo que deja demasiados espacios en la normativa para que haya elusión recurrentemente (Londoño–Vélez y Ávila–Mahecha, 2021).

Colombia se queda corta en sus acciones en contra de los FFI. No contener las finanzas ilícitas expone al Estado a un riesgo significativo que puede socavar los esfuerzos para establecer sistemas que promuevan el bienestar

de la población, la resiliencia social y el logro de la reducción de la pobreza y la desigualdad, el cuidado del medioambiente, el aumento de los ingresos per cápita o la defensa de los derechos humanos (ONU, 2018; Global Financial Integrity y Cedetrabajo, 2019).

Avances en Panamá para abordar los FFI, la importancia de una acción global coordinada

Recientemente, se han registrado avances de Panamá en términos de colaboración con sistemas de transparencia fiscal a nivel internacional, pero el proceso ha sido notoriamente lento y los logros han sido marginales. En 2018, Colombia y Panamá acordaron intercambiar automáticamente información fiscal y el acuerdo comenzó a funcionar en 2020 (Ministerio de Economía y Finanzas, 2020). Sin embargo, el acuerdo presenta deficiencias, ya que Panamá aún no ha establecido reglas claras, confiables y efectivas para obligar a las entidades legales y a los individuos colombianos con residencia fiscal en Panamá a mantener sus registros actualizados de manera periódica y precisa (Holland, 2020). Además, si un cliente contrata una firma panameña para establecer una empresa fantasma en otro paraíso fiscal, incluso si el bufete de abogados ejecuta la transacción desde territorio panameño, dicha información nunca se comparte con Colombia, pues, en última instancia, la entidad se establece en una jurisdicción que no es Panamá (OCDE, 2015b).

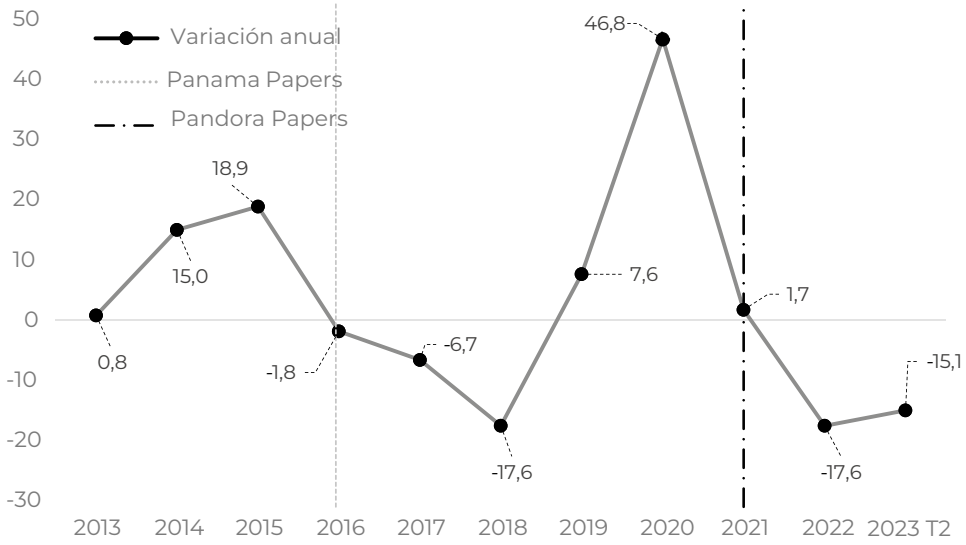
Panamá se había consolidado como un importante centro financiero en 2016 cuando estalló el escándalo de los Papeles de Panamá. A raíz de estas filtraciones, se cancelaron corresponsalías bancarias, hubo rezago en depósitos extranjeros y disminuyó la entrada de activos productivos al país (Dirección de Estudios Financieros, 2021). Zander (2021) argumenta que esta filtración puede entenderse como un evento que aumentó la percepción de corrupción en el mundo financiero, especialmente en Panamá. El autor encontró, a través de un análisis gravitacional y un modelo econométrico, que este suceso redujo los flujos de IED de los países de la OCDE no solo hacia Panamá, sino hacia las jurisdicciones extraterritoriales en general. En un estudio similar, Dyreng et al. (2016) hallaron que el escrutinio público asociado con filtraciones puede reducir la elusión fiscal y las operaciones en paraísos fiscales de las empresas acusadas de no haber revelado todas sus subsidiarias en territorios con regímenes tributarios más laxos.

Como se evidencia en la *figura 2*, el crecimiento de los depósitos extranjeros en el CBI de Panamá se desaceleró vertiginosamente en 2016, año en que se dieron las filtraciones de los Papeles de Panamá. De hecho, la variación anual se ubicó en territorio negativo hasta 2018, lo que podría estar correlacionado con el efecto perjudicial del escándalo en el flujo de depósitos extranjeros hacia ese centro financiero. En contraste, desde finales de 2018 la dinámica en los depósitos se recuperó y su crecimiento fue del 7,6% en 2019 y de un impresionante 46,8% en 2020, año en que inició la crisis sanitaria causada por la COVID-19 en el mundo.

En este punto, cabe aclarar que el análisis del efecto causal de las filtraciones sobre los depósitos extranjeros en el CBI trasciende los objetivos de este estudio y que los altos niveles alcanzados en 2020 explican, en parte, que el crecimiento de estos haya sido modesto en 2021. No obstante, es llamativo que –en un contexto de la recuperación económica– tanto en 2022 como en 2023 la variación ha vuelto a ser negativa, justo después de la ocurrencia de las filtraciones de los Papeles de Pandora. Lo anterior puede ser una señal del efecto reputacional del escándalo y de la magnitud de los depósitos que se dirigen al país centroamericano principalmente con el objetivo de que sean manejados con discreción y secretismo.

El gobierno panameño entiende que la estigmatización causada por una nueva filtración no es conveniente para su sistema financiero, más cuando siguen bajo vigilancia por parte de los organismos multilaterales que luchan contra los FFI como la OCDE, el GAFI o la UE. Por ese motivo, su reacción fue rápida y ratificaron el compromiso del Gobierno con el cumplimiento de los acuerdos de cooperación internacional que ha adquirido. El Ministerio de Economía y Finanzas de Panamá (MEF) (2021b) resaltó en un comunicado realizado en la primera semana de octubre de 2021 que Panamá está suscrito al Acuerdo de Autoridad Competente Multilateral (MCAA), a la Convención Multilateral para Implementar Medidas Relacionadas con el Tratado Tributario para

Figura 2
Variación anual del promedio de los depósitos extranjeros líquidos en el CBI.



Nota. Construcción propia con datos de la Superintendencia de Bancos de Panamá (2023a). El dato para 2023 corresponde a la variación anual para el segundo trimestre del año.

prevenir la erosión de la base y la transferencia de beneficios y a la Asistencia Administrativa Mutua en Asuntos Tributarios (MAC). Además, el gobierno argumentó que el país viene implementado el proyecto de la OCDE sobre la Erosión de la Base y Transferencia de Beneficios (BEPS) (Ministerio de Economía y Finanzas, 2021a).

A primera vista, los argumentos del gobierno panameño parecen sensatos: en 2020 se reglamentó la Ley 129 para la creación del Sistema Privado y Único de Beneficiarios Finales de Personas Jurídicas, la cual exige a las empresas extraterritoriales identificar a sus beneficiarios finales reales (Gaceta Oficial, 2020; Ministerio de Economía y Finanzas, 2021d). Adicionalmente, el MEF reportó a finales de 2021 que en el último año se habían suspendido más de la mitad de las 762.709 corporaciones que había en su registro público. Adicionalmente, se había avanzado en varias de las quince acciones comprometidas con el GAFI en términos de transparencia y cooperación fiscal (Ministerio de Economía y Finanzas, 2021a).

Empero, los datos de la filtración de los *Papeles de Pandora* indican que los esfuerzos del Gobierno panameño no han sido suficientes para regular el actuar de algunas de las empresas de su país. Por ejemplo, según los documentos filtrados por investigadores del ICJI (Medina et al., 2021), una de las firmas panameñas mencionadas en el escándalo podría estar involucrada en hechos de corrupción como los de Odebrecht y Fifagate. Esta firma se limitó a responder, en una carta al ICIJ, que la incorporación de empresas "es solo un aspecto" de sus servicios legales y que opera en "pleno cumplimiento de todos los requisitos aplicables en todas las jurisdicciones [en las que se encuentran]" (Medina et al., 2021).

Los estándares bancarios y legales internacionales requieren que las firmas profesionales dedicadas a ofrecer servicios financieros sopesen cuidadosamente el riesgo de ayudar al lavado de dinero u otros delitos inadvertidamente; no obstante, según muestran los documentos y las declaraciones de sus funcionarios, hay una firma de abogados panameña que no está segura de quiénes han sido los beneficiarios finales de varias de las empresas que ha establecido desde que comenzó a operar (Medina et al., 2021). A pesar de las similitudes entre las actividades desarrolladas por Alcogal y la OMS con las de empresas como Mossack–Fonseca, desmantelada a causa de los hallazgos de los Papeles de Panamá, de momento no se han hallado evidencias de que hayan participado en actividades ilícitas desde el punto de vista de la normatividad panameña. Lo anterior pone al descubierto algunas

de las deficiencias de la legislación de Panamá respecto a los flujos financieros internacionales.

El MEF (Asamblea Nacional, 2021) ha descrito los avances normativos de Panamá respecto a los FFI como "legislaciones en materia de regulación y transparencia fiscal internacional para (...) dejar sin motivo a los organismos de poder extranjero de colocar al país en listados discriminatorios" (p. 1). Esas declaraciones reflejan una narrativa centrada en evitar las sanciones internacionales, mejorar su estatus ante entes como la OCDE y el GAFI y atraer inversiones externas, pero no se menciona que estas acciones traen beneficios fiscales y sociales a los socios comerciales y financieros de Panamá y que, por tanto, son medidas responsables que el país centroamericano debió haber tomado tiempo atrás.

Los plazos propuestos por Panamá para ajustarse a los estándares internacionales de transparencia financiera y fiscal de la OCDE y el GAFI se han vencido en varias ocasiones, por lo que es inevitable que se levanten suspicacias al evidenciar que el proceso se reactivó en medio de la publicación de los Papeles de Pandora. Por ejemplo, a pesar de la aprobación de la Ley 129 del 17 de marzo de 2020, el Registro Único de Beneficiarios no fue reglamentado sino hasta el 25 de marzo de 2022 mediante un decreto ejecutivo. De hecho, el gobierno detalló los primeros pasos de su posible puesta en marcha solo hasta la primera semana de noviembre de 2021, en el contexto de una visita por parte del Grupo de Acción Financiera de Latinoamérica (Gafilat) (Ministerio de Economía y Finanzas, 2021d).

Diversos abogados y funcionarios panameños declaran que su país es injustamente estigmatizado en comparación con otras jurisdicciones que manejan normativas parecidas ante al secretismo financiero como Irlanda, Delaware o Suiza (Rodríguez, 2021). A este respecto, Cooley (2015) indica que las listas discriminatorias pueden tener efectos negativos sobre los derechos políticos, y Sullivan y Hayes (2010) exponen que estas se encuentran políticamente sesgadas y abiertas al lobby. Entre otros, ni Luxemburgo ni Suiza fueron inicialmente incluidos en varias de estas listas, a pesar de ser reconocidos como paraísos fiscales por la ONU (Eggenberger, 2018).

No obstante, si bien es cierto que otras jurisdicciones han sido menos increpadas por los organismos internacionales de transparencia fiscal debido a su papel en la economía mundial, eso no debería usarse como excusa para no avanzar hacia el establecimiento de un sistema financiero más transparente y sano. En últimas, Panamá tiene fuertes relaciones financieras con esas otras jurisdicciones de secreto financiero. Según el portal de rastreo de vulnerabilidad ante flujos financieros ilícitos de TJN (2021a), en 2018, Suiza fue el principal receptor de los flujos de depósitos bancarios panameños hacia el exterior. Adicionalmente, hay registro de grandes flujos de inversión directa desde Panamá hacia otros paraísos fiscales, incluidos Malta, Luxemburgo y Hong Kong, lo que plantea la duda de si se tratan en su mayoría de recursos trasladados para defraudar las arcas de los gobiernos de otros países (Nelson et al., 2020).

De hecho, en junio de 2021, la UE, a través de su código de conducta, comunicó a Panamá que consideraba su régimen fiscal territorial como pernicioso e instó al gobierno a comprometerse a realizar una serie de modificaciones normativas antes del 31 de diciembre de 2022, para que su efectiva implementación se diera a partir del primero de enero de 2023. Panamá, sin embargo, respondió que se trataba de un ataque a su soberanía fiscal y no accedió a la petición de la UE. En consecuencia, la UE tomó la decisión de incluir a Panamá en su lista de países no cooperadores en materia fiscal y de retirarle el estatus de parcialmente cumplidor que tenía por su avance previo en materia de intercambio de información fiscal (MEF, 2021a).

En junio de 2017, Panamá fue clasificada como *provisional en gran medida de cumplimiento* en el procedimiento de evaluación acelerada de la OCDE debido al progreso en la mejora de su marco legal. Pero luego, el proceso se estancó y fueron incluidos de nuevo en la lista discriminatoria del organismo (ONU, 2018). El Foro Global sobre Transparencia e Intercambio de Información con Fines Taxativos de la OCDE (2021c) destacó los avances en acuerdos de intercambio automático de información, pero señaló que aún se necesitan mejoras significativas a su marco legal doméstico para que estos sean efectivos.

Finalmente, el 23 de junio de 2023, el GAFI informó que Panamá parece haber completado el plan de acción con el que se comprometió en junio de 2019, por eso plantea que es muy posible

que el país sea removido de su lista gris, si es posible verificar *in situ* que las reformas contra el LA y el combate contra el financiamiento al terrorismo están siendo implementadas y serán mantenidas en el futuro (GAFI, 2023).

En síntesis, la problemática fiscal y social causada por los FFI es significativa y se transmite con facilidad entre los países afectados: implica el fomento de la desfinanciación de los tesoros nacionales y distorsiona los intentos de redistribución de la riqueza, haciendo que aumente la regresividad de los sistemas fiscales a nivel mundial. Se trata de un problema global y los controles sobre los FFI solo pueden funcionar si existe la voluntad, tanto de los países afectados como de los que reciben los flujos, de cooperar y mejorar su normativa. Los recursos que se podrían recuperar combatiendo efectivamente la evasión y los FFI podrían ser catalíticos para cumplir objetivos globales, como la lucha contra la pobreza, la lucha contra el cambio climático o el cumplimiento de los Objetivos de Desarrollo Sostenible (ODS) (ONU, 2018). En particular, en el contexto de la crisis sanitaria causada por la pandemia del coronavirus, es muy probable que muchos países pudieran haber estado mejor preparados, en términos de infraestructura y conocimiento, si su recaudo no se hubiera visto deteriorado por las maniobras de evasión fiscal causadas por los FFI (Ottersen et al., 2017).

Esquemas voluntarios de divulgación de riqueza oculta, un instrumento imperfecto pero efectivo en el contexto de las filtraciones de documentos financieros secretos

Las filtraciones de documentos secretos, como los Papeles de Pandora o los Papeles de Panamá, son una fuente imperfecta para evaluar la magnitud del problema de los FFI. La información presente en esas filtraciones es limitada e incompleta, por lo que se puede considerar que lo que conocemos de los FFI por este medio es solamente la punta del iceberg. No obstante, las filtraciones han motivado el inicio de investigaciones judiciales y periodísticas más profundas y hay evidencia de que han inducido a evasores a declarar sus recursos ocultos en el extranjero (Londoño–Vélez y Ávila–Mahecha, 2021).

En Colombia, las filtraciones de 2016 fueron un insumo para investigar casos de corrupción como el relacionado con la multinacional Odebrecht y el proyecto de la Ruta del Sol II, ya que es probable que esos dineros se hayan transferido a través de Panamá. La persona encargada de supervisar el proceso de adjudicación en 2010 recibió un soborno de 6,5 millones de dólares de Odebrecht Colombia para influir en la contratación. Este dinero fue depositado en el banco local Banca Privada d'Andorra a nombre de Lurion Trading Inc., una firma de papel domiciliada en Panamá (Global Financial Integrity, 2019).

Los Papeles de Panamá también le permitieron a la Dirección de Impuestos y Aduanas Nacionales (Dian) de Colombia tomar acciones de fiscalización persuasiva. La entidad envió comunicaciones a las personas implicadas en las filtraciones para que declararan sus activos ocultos por medio de un mecanismo temporal de divulgación voluntaria de riqueza, el cual estuvo activo entre 2015 y 2017. A pesar de que la Dian no tenía claridad sobre el monto que estas personas tenían en el exterior, se presentó un aumento considerable en el recaudo a través de la normalización, lo que refleja que quienes recibieron el mensaje sintieron miedo de ser descubiertos o de sufrir escarnio público, por lo que declararon su riqueza oculta de manera voluntaria (Londoño–Vélez y Ávila–Mahecha, 2021).

Londoño–Vélez y Ávila–Mahecha (2021) identificaron que aparecer en la filtración aumentó en seis veces la probabilidad de revelar cualquier riqueza oculta en el contexto de la normalización. En consecuencia, los impuestos pagados por las personas nombradas en la filtración aumentaron a más del doble. En ese momento, la política implementada por el gobierno colombiano para impulsar la declaración y repatriación de grandes capitales que estaban en el extranjero significó para el país un recaudo adicional superior a cuatro billones de pesos desde 2015 (El Espectador y Connectas, 2021a).

Estas dinámicas señalan el posible impacto que pueden tener los Papeles de Pandora en el recaudo fiscal de Colombia, más si se tiene en cuenta que el escándalo estalló prácticamente al tiempo de la aprobación de una reforma tributaria que incluía un artículo que contemplaba beneficios y descuentos para las personas que

decidieran declarar y repatriar sus activos ocultos en el exterior (Congreso de Colombia, 2021). En los documentos filtrados en octubre de 2021 se mencionan los nombres de 588 personas naturales y jurídicas colombianas que figuran como dueñas de sociedades en el extranjero. Entre los nombres se encuentran "millonarios, expresidentes, embajadores, excongresistas, grupos familiares o procesados por la justicia que han sido clientes de firmas como Alcogal", Trident Trust o OSM (El Espectador y Connectas, 2021, p. 1).

Realizar procesos de normalización tributaria frecuentemente es inadecuado e indeseable, pues le indica a los evasores que pueden evitar pagar impuestos por algún tiempo y luego repatriar sus activos con tarifas preferenciales y bajo medidas relativamente cómodas. No obstante, trabajos académicos como el de Londoño–Vélez y Ávila–Mahecha (2021), Alstadsæter et al. (2019) y Gould y Rablen (2020) han encontrado que este tipo de incentivos de declaración voluntaria de activos en el extranjero aumenta el recaudo, eleva la inversión local y disminuye la posterior elusión de impuestos por parte de los sujetos cooperantes.

Otro punto a favor de los esquemas de declaración voluntaria de riqueza oculta es que la investigación de la evasión fiscal, a través de complejas estructuras de vehículos financieros en el extranjero, suele demandar demasiados recursos por parte del Estado (Gould y Rablen, 2020). Además, no hay mucha literatura disponible sobre campañas de persecución extraterritorial que incentive a los gobiernos a implementar políticas de ese estilo (Cockfield, 2017). En ese sentido, la creación de un nuevo impuesto temporal y complementario de normalización tributaria, el cual fue aprobado en septiembre de 2021 junto con la reforma tributaria Ley de Inversión Social en Colombia, parece una medida sensata a la luz de la evidencia académica. No obstante, es imperativo implementar otras medidas de control fiscal y financiero que desincentiven las prácticas de elusión y evasión fiscal desde un principio.

En su estudio, Londoño–Vélez y Ávila–Mahecha (2021) hallaron que en Colombia el 0,01% más rico de la población es 55 veces más propenso a eludir impuestos que el 5% más rico y que los evasores esconden aproximadamente un tercio de su riqueza en el exterior. Es decir, los mecanismos de evasión de impuestos hacen que el sistema impositivo colombiano se vuelva exageradamente regresivo en la parte superior de la distribución. Los investigadores también encontraron que el último programa de divulgación de riqueza oculta ayudó a revelar recursos en el extranjero por un valor cercano al 1,73% del PIB.

Otras posibles acciones que tienen apoyo empírico en la lucha contra los FFI son: 1. La introducción del requisito de registrar e identificar a beneficiarios finales como parte de la Ley de aduanas, 2. Que la Dian se involucre en futuras evaluaciones nacionales de riesgos, 3. Penalizar con cárcel a los evasores y 4. Hacer públicas las listas de las condenas por este delito, aunque hay expertos que consideran que esta medida puede ir en contravía al derecho a la privacidad y al olvido (Baena Rojas, 2019; Global Financial Integrity, 2021b). En particular, para Colombia hay evidencia sugerente de que la evasión responde a sanciones más severas, con un aumento significativo en las divulgaciones voluntarias seis meses después de que Colombia criminalizara la evasión fiscal por primera vez en su historia (Londoño–Vélez y Ávila–Mahecha, 2021).

Sin embargo, la legislación colombiana no castiga con suficiente fuerza la evasión fiscal y los delitos relacionados con los FFI. Si bien desde 2018 evadir puede castigarse con cárcel, lo usual es que cuando los evasores son descubiertos por la Dian tienen varias instancias para declarar sus activos y pagar las multas que se les impongan, logrando que el proceso penal termine inmediatamente (Londoño, 2018).

Por otro lado, los FFI son poco estudiados por la escasez de información y datos confiables para describir y entender el problema. En ese sentido, las entidades territoriales encargadas de recolectar los impuestos de cada país deberían implementar esquemas para mejorar el manejo y la publicación de información fiscal. En el caso de Colombia, la Dian se encuentra en la capacidad de publicar información tributaria más clara para la ciudadanía, sin afectar el derecho a la intimidad de los contribuyentes, ya que es posible publicar esta información (microdatos, muestras y registros complementarios) de manera anonimizada (Ávila–Mahecha y León–Hernández, 2008). Si bien la Dian ha sido muy recelosa en publicar este tipo de información para su estudio, el 27 de enero de 2022 se

conoció la positiva noticia de que el Departamento Administrativo Nacional de Estadística (Dane) y la Dian suscribieron un acuerdo de acceso a la información tributaria y aduanera del país de manera anonimizada (Urrego, 2022). Este tipo de datos permitirán que analistas independientes evalúen los efectos de medidas como los días sin IVA, las normalizaciones tributarias o la efectividad de programas como el Apoyo al Empleo Formal.

Cinco recomendaciones de política para abordar el problema de los FFI entre Colombia y Panamá

A continuación, se presentan cinco recomendaciones de política para abordar el problema de los FFI entre Colombia y Panamá, con el fin de enfrentar sus efectos nocivos sobre la base tributaria y el bienestar de los ciudadanos de ambos países. Estas medidas han sido aceptadas y sugeridas por organizaciones multilaterales enfocadas en fomentar la transparencia fiscal y financiera internacional como TJN (2020a), GFI (2021a), la OCDE (2015a) y el GAFI (2021).

1. Implementar efectivamente el intercambio automático de información fiscal con todos los países que sea posible, con el fin de tener conocimiento sobre los activos que nacionales tienen registrados en otras jurisdicciones.

2. Hacer obligatorio el registro de beneficiarios finales para todas las personas jurídicas y corporaciones activas en las jurisdicciones, para evitar estructuras opacas que oculten a los verdaderos dueños de cuentas bancarias y empresas de papel. Colombia avanzó en la reglamentación del beneficiario final como parte de la Ley de Inversión Social y reglamentó que el registro debería empezar a implementarse sobre todas las personas naturales que, actuando individual o conjuntamente, "sean titulares, directa o indirectamente, del cinco por ciento (5%) o más del capital o los derechos de voto de una persona jurídica" (Congreso de Colombia, 2021, p. 13). Panamá reglamentó su Registro Único de Beneficiario Final a través de un decreto ejecutivo en 2022, pero allí solo deben reportarse las personas que posean el veinticinco por ciento (25%) o más del capital de la empresa (KPMG, 2022).

3. Implementar y hacer obligatorio un reporte país a país de las multinacionales. TJN (2020a) expone que el reporte país a país es una herramienta de control fiscal que permite identificar multinacionales que transfieren ganancias a paraísos fiscales para evadir impuestos. Esto lo hacen a través de falsos pasivos con empresas fantasma establecidas en jurisdicciones en las que en realidad no operan (Tax Justice Network, 2020a). Recientemente, la OCDE (2021a) publicó un conjunto de datos sobre reportes de país a país, lo cual reveló 1,3 trillones de dólares en ganancias transferidas hacia paraísos fiscales cada año, con pérdidas de 245 billones de dólares en impuestos corporativos para diferentes jurisdicciones fiscales.

4. Complementar el reporte de país a país con un sistema de tributación unitaria. Es decir, aplicar impuestos a las empresas basándose en las locaciones donde realizan sus actividades reales y no según donde declaran sus ganancias. Así, las empresas deberían pagar un solo impuesto corporativo por su operación global y no por separado, lo que actualmente les permite beneficiarse de dobles reducciones tributarias (Holland, 2020). La UE (2011) propuso el Common Corporate Consolidated Tax Base (CCCT), un impuesto unitario para la jurisdicción de la comunidad, pero este no fue implementado ante la negativa del Reino Unido e Irlanda; ocho años después, la OCDE (2019) acogió la propuesta en su pliego de reformas, pero en una forma más débil que la propuesta inicial del CCCT.

5. Equipar a las instituciones y los funcionarios encargados de recaudar impuestos adecuadamente para hacerlos sentir protegidos, seguros y justamente remunerados por su labor. De esta manera, los instrumentos de transparencia fiscal pueden ser implementados de manera más efectiva, contrarrestando posibles presiones, amenazas o sobornos de organizaciones o individuos que busquen evadir impuestos, ocultar su riqueza al fisco o retrasar el avance de sus investiga-

ciones (Holland, 2020). Por ejemplo, en 2015 se lanzó el Tax Inspectors Without Borders, un programa de la OCDE en conjunto con la ONU para que expertos hicieran auditorias fiscales por fuera de su territorio. A corte de 2018, los trece programas implementados en el marco de esta propuesta habían incrementado el recaudo en 400 millones de dólares. Es decir, cada dólar invertido en el programa elevó el recaudo en 100 dólares (OCDE, 2021b).

En síntesis, una lucha efectiva contra los FFI y sus efectos nocivos depende no solo de las acciones individuales de cada Estado involucrado, sino de la voluntad de cooperación de sus socios comerciales y financieros. Adicionalmente, las naciones tienen la responsabilidad de asegurarse de que las empresas que operan en su territorio no incurran en acciones u omisiones que impacten negativamente los sistemas fiscales de otras jurisdicciones o los derechos humanos de sus ciudadanos.

Conclusiones

En un momento en que numerosos países continúan trabajando para contrarrestar las dificultades económicas causadas por la crisis sanitaria mundial iniciada en 2020, el secreto financiero internacional y sus consecuencias deberían recibir un escrutinio estricto por parte de las autoridades fiscales de países como Colombia y Panamá.

Los vehículos de opacidad financiera han sido utilizados con frecuencia para evadir impuestos y mover dineros de origen ilícito. El problema tiene una dimensión gigantesca porque este tipo de operaciones pueden ser parte de actividades que socavan la protección de los derechos humanos de las personas de todas las regiones del mundo, especialmente en los países de ingresos bajos o medios. Estos comportamientos erosionan la base fiscal y, por lo tanto, afectan la capacidad de los Estados, como Colombia, de ofrecer servicios básicos y protección a sus poblaciones más vulnerables.

Los FFI representan un desafío a nivel mundial y requieren ser abordados en consecuencia, a medida que más países se percatan de sus efectos negativos tanto para sus poblaciones locales como para las de otras naciones. Este es un asunto que requiere disposición política y eficacia legislativa para combatir la colocación impune de activos ilícitos. Aunque hay diversas iniciativas internacionales enfocadas en enfrentar los FFI, el objetivo de reducir su impacto adverso en las finanzas estatales únicamente se puede lograr mediante una colaboración coordinada entre la mayor cantidad posible de jurisdicciones fiscales. Resulta aconsejable persistir en la búsqueda de acuerdos no solo entre Panamá y Colombia, sino en la creación de convenciones –como las auspiciadas por la ONU– que permitirían establecer y fortalecer tratados de cooperación fiscal y financiera, en aras de una lucha conjunta a nivel global contra los FFI, el crimen organizado a escala internacional, el blanqueo de capitales y el financiamiento de actividades delictivas.

Panamá cuenta con deficiencias en su normativa financiera, las cuales afectan a Colombia en términos fiscales y sociales. Por eso, el país centroamericano debe continuar implementando los compromisos que ha adquirido a nivel internacional respecto a su regulación de transparencia fiscal. Vale la pena mencionar que los acontecimientos del último año han demostrado que con voluntad política es posible que el país centroamericano se convierta en un centro financiero más transparente, generando menos externalidades negativas a sus socios comerciales y financieros.

La literatura académica parece evidenciar que los esquemas de normalización o develación de riqueza oculta en el exterior son efectivos para aumentar el recaudo fiscal y más si existen incentivos adicionales para cooperar, como las filtraciones de los Papeles de Pandora. Además, estos métodos contribuyen a reducir los gastos que el Estado debe afrontar para rastrear recursos ocultos en el extranjero. Por consiguiente, la incorporación de un proceso temporal de regularización en la Ley de Inversión Social de Colombia de 2021 parece haber sido una medida adecuada. Sin embargo, es fundamental no perder de vista que este tipo de amnistías pueden enviar señales desfavorables a los evasores, motivándolos a evadir durante cierto periodo en espera de futuras regulaciones que les permitan declarar sus activos escondidos bajo cargas impositivas y penalizaciones menores.

Se espera que este informe tenga utilidad como insumo para fomentar nuevas investigaciones sobre los FFI en América Latina, contribuyendo a construcción de una ruta hacia la adopción de sistemas de información tributaria más efectivos y transparentes. Esto a su vez facilitará el análisis y desarrollo de propuestas de política para desalentar el uso de vehículos financieros extraterritoriales con fines ilícitos.

Referencias

Alstadsæter, A., Johannesen, N. y Zucman, G. (2019). Tax Evasion and Inequality. American Economic Review, 109(6), 2073-2103. https://doi.org/10.1257/aer.20172043

Asamblea Nacional. (2021). Aprueban ajustes de normas que responden a estándares internacionales en la lucha contra la corrupción. https://www.asamblea.gob.pa/noticias/aprueban-ajustes-de-normas-que-responden-estandares-internacionales-en-la-lucha-contra-la

Ávila–Mahecha, J. y León–Hernández, I. R. (2008). Distorsión en la tributación de las empresas en Colombia: Un análisis a partir de las tarifas efectivas marginales. https://www.dian.gov.co/dian/cifras/Cuadernos%20de%20Trabajo/Distorsi%C3%B3n%20en%20la%20tributaci%C3%B3n%20de%20las%20empresas%20en%20Colombia_Un%20an%C3%A1lisis%20a%20partir%20de%20las%20tarifas%20efectivas%20marginales..pdf

Baena Rojas, J. J. (2019). La política de comercio exterior y las exportaciones colombianas. Revista de Economía Institucional, 21(41), 51-70.

Banco de la República. (2023). Inversión directa. https://www.banrep.gov.co/es/estadisticas/inversion-directa

Barake, M., Capelle–Blancard, G. y Lé, M. (2018). Les banques et les paradis fiscaux. Revue d'économie financière, 131, 189-216. https://doi.org/10.3917/ecofi.131.0189

Bayer, R. C., Hodler, R., Raschky, P. A. y Strittmatter, A. (2020). Expropriations, property confiscations and new offshore entities: Evidence from the Panama Papers. Journal of Economic Behavior and Organization, 171, 132-152. https://doi.org/10.1016/j.jebo.2020.01.002

BBC Mundo. (2021, octubre 5). Pandora Papers: Islas Vírgenes Británicas, el territorio de Reino Unido en el Caribe que se convirtió en uno de los principales paraísos fiscales del planeta. BBC Mundo. https://www.bbc.com/mundo/noticias-internacional-58797867

Bowers, S. (2020). "Everyone is doing badly", anti-money laundering czar warns. https://www.icij.org/investigations/panama-papers/everyone-is-doing-badly-anti-money-laundering-czar-warns/

Bureau Van Dijk. (s. f.). Orbis. Compare Private Company Data. https://www.bvdinfo.com/en-us/our-products/data/international/orbis

Cobham, A. y Janský, P. (2020). Estimating Illicit Financial Flows. En: Oxford University Press (Ed.), Estimating Illicit Financial Flows. https://doi.org/10.1093/OSO/9780198854418.001.0001

Cockfield, A. J. (2017). Policy forum: examining Canadian offshore tax evasion. Canadian Tax Journal, 65(3), 651-680.

Cooley, A. (2015). Authoritarianism goes global: countering democratic norms. Journal of Democracy, 26(3).

Decreto Ejecutivo 13 del 25 de marzo de 2022. (2022, 25 de marzo). Asamblea Nacional. Gaceta Oficial. https://www.organojudicial.gob.pa/uploads/blogs.dir/2/2022/10/728/decreto-ejecutivo-13-de-25-de-marzo-de-2022-reglamenta-ley-129-de-2022-que-crea-el-sistema-de-registro-de-beneficiarios-finales-de-personas-juridicas.pdf

Dirección de Estudios Financieros. (2021). Retos y efectos de permanecer en listas

discriminatorias: caso Panamá.

Dyreng, S., Hoopes, J. L., Wilde, J. H. (2014). Public Pressure and Corporate Tax Behavior. Journal of Accounting Research, 54(1), 147-186.

Economist Intelligence Unit. (s. f.). Colombia-Analysis. https://country.eiu.com/Colombia/ArticleList/Analysis/Economy

Eggenberger, K. (2018). When is blacklisting effective? Stigma, sanctions and legitimacy: the reputational and financial costs of being blacklisted. Review of International Political Economy, 25(4), 483-504. https://doi.org/10.1080/09692290.2018.1469529

El Espectador y Connectas. (2021a, 3 de octubre). Pandora Papers Colombia. El Espectador. https://reportajes.elespectador.com/arc/pandora-papers/

El Espectador y Connectas (2021b, 5 de octubre). Las sociedades offshore de Said Kamle, acusado de lavar dinero con oro ilegal. El Espectador. https://www.elespectador.com/investigacion/las-sociedades-offshore-de-said-kamle-acusado-de-lavar-dinero-con-oro-ilegal/

Fuest, C. y Riedel, N. (2012). Tax evasion and tax avoidance: the role of international profit shifting. En P. Reuter (Ed.), Draining development? Controlling Flows of Illicit Funds from Developing Countries.

GAFI. (2021). Jurisdictions under increased monitoring-June 2021. https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-june-2021.html

GAFI. (2023). Jurisdictions under increased monitoring-23 June 2023. https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-june-2023.html

García–Alvarado, F. y Mandel, A. (2022). The network structure of global tax evasion evidence from the Panama papers. Journal of Economic Behavior and Organization, 197, 660-684. https://doi.org/10.1016/j.jebo.2022.03.024

Global Financial Integrity. (s. f.). Trade Misinvoicing. https://gfintegrity.org/issue/trade-misinvoicing/

Global Financial Integrity. (2019). Illicit Financial Flows and Colombia.

Global Financial Integrity. (2021a). Illicit Financial Flows. https://gfintegrity.org/issue/illicit-financial-flows/

Global Financial Integrity. (2021b). Informe revela facturación fraudulenta a gran escala en comercio internacional de madera colombiana. https://gfintegrity.org/press-release/informe-revela-facturacion-fraudulenta-a-gran-escala-en-comercio-internacional-de-madera-colombiana/

Global Financial Integrity y Cedetrabajo. (2021). The gold standard: addressing illicit financial flows in the Colombia gold sector through greater transparency. https://secureservercdn.net/50.62.198.97/34n.8bd.myftpupload.com/wp-content/uploads/2021/02/Colombia-Gold-EN_2.10.21.pdf?time=1635452706

González, F., Prem, M. y Urzúa, F. I. (2020). The privatization origins of political corporations: evidence from the Pinochet regime. Journal of Economic History, 80(2), 417-456. https://doi.org/10.1017/S0022050719000780

Gould, M. y Rablen, M. D. (2020). Voluntary disclosure schemes for offshore tax evasion. International Tax and Public Finance, 27(4), 805-831. https://doi.org/10.1007/s10797-019-09586-1

Holland, L. (2020). Taking Panama to task: women's rights trampled by financial secrecy. Tax Justice Network. https://taxjustice.net/2020/07/16/taking-panama-to-task-womens-rights-tram-

pled-by-financial-secrecy/

ICIJ. (2021a). Pandora Papers. https://www.icij.org/investigations/pandora-papers/

ICIJ. (2021b). Pandora Papers-Power Players. https://projects.icij.org/investigations/pandora-papers/power-players/en/player/cesar-gaviria

InSight Crime. (2019). Traficantes de oro innovan a lo largo de la ruta Colombia-Panamá. https://es.insightcrime.org/noticias/noticias-del-dia/traficantes-innovan-ruta-colombia-panama/

Janský, P. y Prats, A. (2015). International profit-shifting out of developing countries and the role of tax havens. Development Policy Review, 33(3), 271-292. https://doi.org/10.1111/DPR.12113

KPMG. (2022). Reglamentación de Registro de Beneficiario Final. Carta Informativa. https://assets.kpmg.com/content/dam/kpmg/pa/cartas-informativas/Carta3-2022-ES.pdf

Ley 129 del 17 de marzo de 2020. (2020, 20 de marzo). Asamblea Nacional. Gaceta Oficial. https://www.gacetaoficial.gob.pa/pdfTemp/28985_C/GacetaNo_28985c_20200320.pdf

Ley 2155 de 2021. (2021, 14 de septiembre). Congreso de Colombia. https://dapre.presidencia.gov.co/normativa/normativa/LEY%202155%20DEL%2014%20DE%20SEPTIEMBRE%20DE%202021.pdf

Londoño, S. (2018). Penas de cárcel para evasores de impuestos en Colombia. El Tiempo. https://www.eltiempo.com/economia/finanzas-personales/penas-de-carcel-para-evasores-de-impuestos-en-colombia-300924

Londoño–Vélez, J. y Ávila–Mahecha, J. (2021). Enforcing Wealth taxes in the developing world: quasi-experimental evidence from Colombia. American Economic Review: Insights, 3(2), 131-148. https://doi.org/10.1257/AERI.20200319

Medina, B., Escudero, J. y Díaz–Struck, E. (2021). When Latin America's elite wanted to hide their wealth, they turned to this Panama firm. https://www.icij.org/investigations/pandora-papers/alcogal-panama-latin-america-politicians/

Ministerio de Economía y Finanzas. (2020). Decreto ejecutivo No. 343. https://dgi.mef.gob.pa/_6IntercambioFiscal/IFP/JReportables.pdf

Ministerio de Economía y Finanzas. (2021a). Panamá coopera con la información requerida y contribuye con una fiscalidad más transparente y equitativa con la Unión Europea. https://www.mef.gob.pa/2021/09/panama-coopera-con-la-informacion-requerida-y-contribuye-con-una-fiscalidad-mas-transparente-y-equitativa-con-la-union-europea/

Ministerio de Economía y Finanzas. (2021b). Con relación a la publicación del Consorcio Internacional de Periodismo de Investigación (ICIJ). https://www.mef.gob.pa/2021/10/con-relacion-a-la-publicacion-del-consorcio-internacional-de-periodismo-de-investigacion-icij/

Ministerio de Economía y Finanzas. (2021c). Panamá asegura ante el GAFI compromiso para reforzar las políticas contra el blanqueo de capitales, financiamientos del terrorismo y la proliferación de armas de destrucción masiva. https://www.mef.gob.pa/2021/10/panama-asegura-ante-el-gafi/

Ministerio de Economía y Finanzas. (2021d). Panamá detalla los pasos para la implementación del Registro Único de Beneficiarios. https://www.mef.gob.pa/2021/11/panama-detalla-los-pasos-para-la-implementacion-del-registro-unico-de-beneficiarios/

Nelson, L. García–Bernardo, J. y Harari, M. (2020). Submission to the Committee on the Elimination of Discrimination

against Women 76th Session Republic of Panama. https://taxjustice.net/reports/submission-to-the-committee-on-the-elimination-of-discrimination-against-women-76th-session-pertaining-to-the-eighth-periodic-report-submitted-by-republic-of-panama/

Nerudova, D., Solilova, V., Litzman, M. y Janský, P. (2020). International tax planning within the structure of corporate entities owned by the shareholder-individuals through Panama Papers destinations. Development Policy Review, 38(1), 124-139. https://doi.org/10.1111/dpr.12403

OCDE. (2015a). BEPS 2015 Final Reports. https://www.oecd.org/tax/beps-2015-final-reports.htm

OCDE. (2015b). Final BEPS package for reform of the international tax system to tackle tax avoidance. BEPS 2015 Final Reports. https://www.oecd.org/tax/beps-2015-final-reports.htm

OCDE. (2019). Signatories of the multilateral competent authority agreement on automatic exchange of financial account information and intended first information exchange date. www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/

OCDE. (2021a). Country-by-country reporting-compilation of 2021 peer review reports. https://doi.org/10.1787/73dc97a6-en

OCDE. (2021b). Tax Inspectors Without Borders. http://www.tiwb.org/

OCDE. (2021c). Tax transparency in Latin America 2021: Punta del Este declaration progress report. https://www.oecd.org/tax/transparency/documents/Tax-Transparency-in-Latin-America-2021.pdf

ONU. (2018). Informe del Experto Independiente sobre las consecuencias de la deuda externa y las obligaciones financieras internacionales conexas de los Estados para el pleno goce de todos los derechos humanos, sobre todo los derechos económicos, sociales y culturales acerca de sumisión a Panamá. https://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/37/54/Add.2

Ottersen, T., Elovainio, R., Evans, D. B., McCoy, D., McIntyre, D., Meheus, F., Moon, S., Ooms, G. y Rottingen, J. A. (2017). Towards a coherent global framework for health financing: Recommendations and recent developments. Health Economics, Policy and Law, 12(2), 285-296. https://doi.org/10.1017/S1744133116000505

Portafolio. (2016). Piden declarar a Panamá como paraíso fiscal. https://www.portafolio.co/internacional/piden-declarar-a-panama-como-paraiso-fiscal-497913

Rodríguez, M. (2021, 15 de octubre). ¿Por qué Panamá no ha podido salir de esta lista negra de la Unión Europea? La Estrella Panamá. https://www.laestrella.com.pa/nacional/211015/panama-podido-salir-lista-negra

Schmal, F., Schulte-Sasse, K. y Watrin, C. (2023). Trouble in paradise? Disclosure after tax haven leaks. Journal of Accounting, Auditing & Finance, 38(3), 706,727. https://doi.org/10.1177/0148558X20986348

Sullivan, G. y Hayes, B. (2010). Blacklisted: targeted sanctions, preemptive security and fundamental rights. https://www.ecchr.eu/fileadmin/Publikationen/Blacklisted.pdf

Superintendencia de Bancos de Panamá. (2021a). Reportes Estadísticos. https://www.superbancos.gob.pa/es/fin-y-est/reportes-estadisticos

Superintendencia de Bancos de Panamá. (2021b). Estadísticas Consolidadas. https://www.superbancos.gob.pa/es/fin-y-est/estadisticas-consolidadas

Superintendencia de Bancos de Panamá. (2023a). Balance de situación–Ámbi-

to Nacional. https://www.superbancos.gob.pa/estadisticas-financieras/balance-situacion

Superintendencia de Bancos de Panamá. (2023b). Informe de Actividad Bancaria. https://www.superbancos.gob.pa/analitica/data/otros/IAB_es.pdf

Tax Justice Network. (2020a). The state of play of beneficial ownership registration in 2020. https://www.taxjustice.net/2020/06/03/the-state-of-play-of-beneficial-ownership-registration-in-2020/

Tax Justice Network. (2020b, 18 de febrero). Financial Secrecy Index. https://fsi.taxjustice.net/en/

Tax Justice Network. (2021). Illicit Financial Flows Vulnerability Tracker. https://iff.taxjustice.net/#/profile/COL

Urrego Anderson. (2022, 27 de enero). El Dane y la Dian firman un acuerdo de acceso a la información tributaria y aduanera. La República. https://www.larepublica.co/economia/el-dane-y-la-dian-firman-acuerdo-de-acceso-a-la-informacion-tributaria-y-aduanera-3293091

Zander, T. (2021). Does corruption matter for FDI flows in the OECD? A gravity analysis. International Economics and Economic Policy, 18(2), 347-377. https://doi.org/10.1007/s10368-021-00496-4

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