

From double taxation to double non taxation: the global minimum tax (1st December 2023)

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Abstract

Since its establishment in 1919, the International Chamber of Commerce has advocated for stable and transparent tax policies, endorsing initiatives such as the BEPS project and the global minimum tax. The international tax debate, despite encountering some resistance within the OECD, increasingly involves developing countries, which express support for a United Nations-led framework convention on taxation. Against this backdrop, the European Commission is confronted with legal challenges concerning the protection of fundamental freedoms and the regulation of state aid.

Keywords: International Chamber of Commerce (ICC), BEPS, Global minimum tax, European Commission.

[Prof. Marino]

Thank you very much for being with us. We just scheduled the seminar in the afternoon since I know that certainly Michael but also Luisa are on the New York side. So, we didn't want to wake up so early and now it should be after breakfast time. Thank you for being with us, I would leave the floor by considering your topics.

[Luisa Scarcella]

Thank you very much Prof. Marino, the idea for me today is just to take you through ICC World in navigating the century of international taxation and what has been the business contribution, let's say, to the centuries of policy developments which indeed, as I showed in previous presentations, have been quite significant, especially in the last decades. So just a few words, the International Chamber of Commerce, I know many of you have already a good idea of what we do, who we are, and where we are. But just to be mindful of the presence of students, I will give you a very short few points on what we do and what we are basically. So, we were founded in 1919. So, as you can see, we were always kind of present when these tax policy developments have been occurring. And indeed, there's been quite an active role also from the business community when it comes to the importance of addressing double taxation, with the increasing tax certainty, but by seeing taxation in the broader picture of macroeconomic policies and trade, fostering cross border trade and investment. We're presenting in 130 countries, that wasn't the case in 1919, but now we are, and we have about 90 national communities in developed and developing countries. That makes quite my job interesting because when we talk about international taxation, we have to make sure that we have a consensus among companies of both sizes, industries, and from every region in the world. And we have 11 Global Policy commissions, we don't just focus on taxation, but we have to look at taxation also through the lenses of other policy developments, so really in a holistic way. And indeed, as probably all of you know and the students as well, our arbitration represents the gold standard when it comes to commercial international arbitration practice. But that's on ICC from a general perspective. What I do in ICC is I coordinate the international global tax commission. So, what we do is we focus on international tax policy, and we will present the voice of businesses in the different institutions that works on tax policy. And as I said in the previous slide, we've been there since 1919. And so, we've been there when there was the four economists report, something that we welcome very much at the time of the League of Nations as well as the League of Nations to address the problem of double taxation. But there's been very much development in the tax policy space. And so, from the economist report, we have done the model tax treaties, the OECD and the UN model tax convention. And I'm not going in depth into that because I know you have been having classes and different conversations into that, the London - Mexico model tax conventions in between the League of Nations models, and the OECD, the UN model. And finally, from Models to address double taxation, we are moved to a Base Erosion and Profit Shifting, our BEPS project. So, in the previous presentation, we were hearing about global solutions to global problems. And that's exactly the type of shift we've seen in the decades, right. So, from model on double taxation, treaty agreements between countries, we pass to multilateral type of solution with the

challenges that entails. Along all these decades, when it comes to the ICC and the business community, there's always been a focus point on the importance of addressing double taxation. But we recognize also the need to move to this global solution because it was a globalized economy that wasn't there in 1919. And that there are the limits of bilateral solution. But we always also call for the need for tax certainty and tax instrument to prevent and resolve disputes that can occur that is particularly relevant for businesses that operate in more than one country. And now from the BEPS, we heard already that we pass to our global tax reform through the two pillars tax reform. From the OECD, G20, inclusive frameworks that bring together what I'm referring for the countries. So, what has been the role of companies into these policy developments? Well, one positive side, for sure, was the presence of public consultations and the fact that there was at least a way to engage in the discussion by providing what are the concerns and the challenges the business would face when these new rules are going to be introduced. So, indeed, for us the focus still will remain after the publication of the model rules and some of the administrative guidance principally on tax certainty and administrability. So, two of the points that have been made, also in the previous slides, so the century has passed, the decades have passed, but still these still are the focus and pillars of our type of preoccupations. So, when we look at the Global Minimum Tax and ask members and companies about their concerns, the challenges they face and how we can eventually address them, we must recognize that there is significant heterogeneity in how the rules have been implemented around the world. And also, the different ways that companies would respond is also like the industry sector, but also the resources that have to put into compliance to these new rules. So, the interesting thing I was saying at the beginning in my job is that we have members from all over the world and of different sizes and different industries. What this entails is that when we had a recent conversation about the Global Minimum Tax, it was interesting to see how the occupation that concerns diversify, also based on which countries are we talking about and which regions of the world that we're talking about. But going back to tax certainty and administrability, today I'll try to summarize the concerns and the challenges that are common and shared among businesses all over the world. So, indeed, in terms of tax certainty, what is the concerns now is how the QDMTT, the income inclusion rules are going to be implemented and whether they will qualify to be according to the model rules and when it comes to the peer review. And OECD Model Rules, Commentary and Administrative Guidance are the model for the implementation of these rules. And if you are a business and operate in more than one country, indeed you want to make sure that is consistent so that you can be in a position to easily comply to all these rules. In the end I can assure that our members are asking to comply and so it is important that the rules are made in such a way that is easy. And then indeed there must be a binding dispute

prevention and resolution mechanism in place because this is the way we can solve any potential dispute that can arise. And so, it's really important when new rules are introduced and are introduced to our global scale, that these mechanisms are in place. When it comes to administrability, as I was saying before, business wants to comply, and they want rules to be workable for both tax administration and taxpayer because the success of global rules, it depends on really making the rules workable. And they want to implement systems once, what does it mean? That we need stability on the rules and when there is a lot of disperse of resources, both for tax administration and taxpayer in introducing new systems, it's important that these systems that are put in place, can stand time, and can stand the different implementation around the world. So, this is why it connects also to the need for adding UTPR and CbCR fibers that are permanent and not just transitional. This way, the system that they put in place, both tax authorities and taxpayers can really be efficient and effective for the purpose of having some rules that work. And we also have noticed, which is something that Prof. Marino was hinting at the beginning is that we see that the compliance burden is far too out of proportion in relation to the pillar two tax at stake. So, it should be taken into account too, so that there are some reality checks to be done on that. And still the automation of pillar two, it's not possible yet. So, there is no software provider that is able to provide that to the QDMTT global module solution, given the QDMTT country specific. So that's a challenge that we will have to face. Indeed, it was mentioned of tax incentives before. And this is something that when we talk to companies in developing countries it is a point that they raise quite often. And the fact that countries are now looking into how their tax incentives will be workable or not under pillar two. So, indeed, that's an area where we hope like additional guidance would come and already has been done. And capacity building is another key area, there is a benefit in having a tax administration of work that is well equipped and that knows how to apply the rules also for the taxpayer. And so, it's important and we hope that further capacity building will be provided. We know by talking to our colleagues in the different situation that is on the agenda, and this is something to be welcomed. And what we will welcome is also the engagement of private sector in explaining how the rules will affect them and implementation on the business model. There is an added value in having a very transparent and constructive dialogue, such as the one we had in the public consultation. And then I won't go into that otherwise, I'm going to be too long in my 15 minutes. But indeed, besides talking to the developing country companies, US companies, we also talked to the EU companies. The EU has been at the forefront of implementation of the tax directive on the Global Minimum Tax. And there are some questions that apply to EU headquartered companies that we need to be answered in a short time. But I'm sure the colleague from the European Commission will give more insights into that. And finally, what is the

future ahead? So, in this slide I said that something is still the same because the fact that we started with this short intervention by the four economists report of 1919, and now we move to a global type of solutions, but we also witnessed the adoption of a resolution at the UN level last week. I know Michael will get in depth into that. It's indeed a historical moment when it comes to international tax policy developments and the different policy, this discussion on which solution should be adopted. But indeed, even if the scenario, even if the policy for changes complements each other, coordinates each other hopefully, there are some key tenets that for the business community are still key and vital throughout the century and still stays the same. So indeed, there is still a need for focus on tax certainty ever stable, predictable rules that can be easily followed and implemented in order for companies to be compliant. And then it's for further instruments or strengthened instruments for effective prevention and resolution of controversies still is key, especially when we're talking on our global scale. I know of course, at European level, there are already some solutions that have been adopted in the years. But again, if we're talking about global scale, this is a priority. Rule is not only need to be clear, but also easily implementable and administrable. When we look at pillar two, we see that there is a lot of intersection with accounting, technologies, so companies have to have these keys in their employees. But we also have to make sure that this can be easily implementable, and not too overly burdened. So sustainable compliance burden is also key to make sure that we can and companies can apply and comply easily, as well as it is beneficial for the overall economy. And then corporate income tax is part of our tax policy mix. So, there are other tax measures that should be looked at and focused at, both at the domestic level and international level. And then the importance of stakeholders' engagement. At the ICC, we always try to respond to all the public consultation and engage constructively. And I think these policy developments show, from 1919 to now, that there is a very added value in talking to the different stakeholders in order to make rules easily manageable and really get to the finish line and be a success overall. So, with this, I'll thank you very much, I hope I stayed within my minutes, and I pass the floor to my fellow panelists. Thank you very much once again.

[Prof. Marino]

Thank you, Luisa. I very much appreciate two points of your speech that is part of the work we are doing. The workable, administrative, good governance, I think that is very much important on the side of taxpayers to know that the tax administrations will apply administrative, good governance in order to prevent the application of administrative if not criminal sanction, so sometimes I have in mind the Italian environment. And that is matched also with the need of solutions for dispute resolutions, so that if something happens within the application of the Global Minimum Tax in our cross-border level,

that tax administrations talk to each other much earlier than talking before a judge, that will be extremely important. Then I get your point that there still is not software for the determination of the Global Minimum Tax. That's a very interesting point, very pragmatic point, no software for the application of the Global Minimum Tax. So, thank you very much, Luisa.

[Michael Lennard]

Thank you very much. Well, I'm going to talk a little bit broadly today, not specifically on the Global Minimum Tax, but about something which I think is a response to the recent developments in terms of norm setting internationally. And it's significant because it basically reflects developing countries saying, we need more inclusion in that process. And as I'll talk about, there's a bit of a division between the developed and the developing world and the task before us is to try to bridge that in some way. So, what I'm going to do is give you some background and up-to-date developments; things are happening even at the moment in this area. The background to this is that at the end of 2022, the General Assembly of the United Nations had a vote which called for greater inclusiveness and effectiveness of international tax cooperation, effectively that's talking about norm setting. That's quite important because a lot of the discussion really lately has been about a possible greater role of the UN in terms of capacity building. But whenever you hear this discussion, it is really about, not so much about capacity development, which is very important, but about what the underlying norms are, and the concern of developing countries that despite the presence of the inclusive framework and some good work, they didn't really feel that it was inclusive as it needed to be. So, the UN Secretary General was tasked by that resolution to give a report on how more inclusive and effective tax cooperation could occur internationally, and it's not an easy task. The conclusions of the report are that true effectiveness and inclusiveness require sufficient inclusion, particularly of developing countries. That needed some UN involvement because of the way the UN is set up with 193 countries, one country, one vote, and because we have a secretariat that is representative of all those countries, the UN would need to take a greater role in this area if there was going to be greater inclusiveness and effectiveness. The report recognized the important work of the OECD and its technical capacity, and that any work going forward would involve the OECD. But it also recognized several options going forward. The three options were: a comprehensive international tax convention; secondly, a framework convention with some basic ideas including the importance of avoiding double taxation and double non-taxation and the effectiveness of dispute resolution; thirdly, the second option including a Framework Convention plus some protocols. Many countries found the latter attractive, as a comprehensive convention might be too much at once, so focusing on basic principles and urgent issues, particularly for developing countries, seemed better. The vote on the resolution showed a clear division: most of

Europe and the OECD didn't want a UN convention, arguing duplication; others said there's no duplication because there is no sufficiently inclusive forum at the moment, called a red herring by the South African delegate. The resolution called for the framework convention and protocols, including on illicit financial flows, which has driven much of the push for this resolution. The vote showed 9 abstentions, including some OECD countries, showing a north-south divide, reflecting strong feeling in the developing world that a UN tax convention is needed but also that bridging work remains. The next step was in the Budget and Finance Committee, to go before the plenary of the General Assembly. Given the numbers, no major changes are expected; a consensus resolution would be nice, but this one may be more difficult. There will be a budget for the next step: for one year, a committee will be set up to define terms of reference for organizational work and elements of the Framework Convention and potential protocols. They will not draft yet, just make recommendations, and then a convention will be negotiated. This ad hoc open-ended committee will have about 20 persons as a steering group, probably four from each of the UN's five country groupings. The recommendations will return to the General Assembly, which will decide how to begin treaty negotiations. It is a member states-led process, not driven by the Secretariat. A good aspect of the resolution, also in the Secretary General's report, is the importance of input from civil society - including business, academics, NGOs. One issue is how they participate in a member states-driven process where other stakeholders are recognized as important. There will be issues about decision making; the UN is often thought of as a majority decision body but most UN decisions are by consensus, meaning countries avoid votes even if they disagree strongly, to maintain systemic harmony. The OECD seeks consensus too but has backup rules if consensus fails to avoid vetoes by single countries. The framework might include recognition of market country rights balanced with source and residence country rights, and reference dispute settlement importance, but specifics depend on committee recommendations. Likely first protocols will address tax-related illicit financial flows and cross-border services, influenced by pillar one discussions. After the committee work, the General Assembly will again decide, with budget issues always challenging further negotiations, followed by actual negotiations, ratification, entry into force, and implementation. Issues remain, such as whether countries like the US will join, and outreach to those not voting for the resolution is ongoing. Some OECD countries are expected to engage further, especially if business and academics see this as a valuable path forward, which will increase OECD involvement. So, these are the next steps. The signal is expected to be completed by the General Assembly plenary, and the vote suggests a UN convention should exist. The importance of OECD work is recognized with several references in the resolution. However, developing countries feel inclusiveness is lacking from "nose to tail" - it's not just sitting at the table, but deciding what to negotiate, options, peer review, dispute resolution,

enforcement, interpretative decisions, Secretariat roles, and membership interaction. There are many issues ahead, making it an exciting and challenging time. The hope is for openness and transparency to include good ideas and collegial processes recognizing all stakeholders are important for an effective system. It won't be perfect but can approach perfection using expertise, goodwill, and ensuring developing countries feel the deal is fair, which is key for stability and certainty. Thank you very much.

[Prof. Marino]

Thank you very much, Michael. You mentioned challenging times; I'd add it's complex too. The vote shows 125 countries in favor versus 48 mostly OECD countries, with some abstentions from Mexico, Turkey, UAE, Iceland, and Norway. So, it will be complex and challenging. Thank you, and now I turn to Raffaele Russo, who has been with the OECD and involved in the BEPS project and is a leading expert in international tax. Thank you for joining.

[Prof. Russo]

Good afternoon, everyone. Hello Luisa and Michael. It's a pleasure to be with you today, even if only online. I'd like to look at the evolution of thinking on tax competition and tax practice, and then revisit some points Michael made. Starting from 1998, the first report on harmful tax competition focused on geographically mobile activities, excluding tax incentives designed to attract real investments in plant, building, and equipment. The report targeted preferential regimes meant to attract artificial profits. Due to political changes, the work didn't advance as planned, so the BEPS project in 2012-13 revived it. The BEPS Action Plan contains 15 actions developed in 2015. While I was involved, there was a great team working on it. The BEPS project was designed to address digital economy taxation, the first action of the plan. It stated the actions did not directly aim to change existing standards on allocating taxing rights, summarized as the source vs residence conflict, which relates to the earlier Italian seminar discussion. One BEPS action revamped harmful tax competition work, emphasizing economic substance. The focus wasn't on tax competition per se but on harmful competition based on criteria such as transparency, transfer pricing, and from 2015, requiring regimes providing incentives to justify income allocation by substance. By 2015, this was the state. Work continued as the digital economy action one report did not reach consensus solutions, though VAT consensus solutions brought in more revenue worldwide than pillar two is expected to. The controlled foreign company legislation work was less impactful than expected. The two-pillar solution agreed in October 2022, mentioned by Michael, continues the work. Now, a key point is the shift from tackling harmful tax practices to tackling tax competition tout court. This massive impact affects tax incentives introduced for substantial activities attracting real economic activities; these incentives will not work for multinationals with turnover above

750 million euros (pillar two scope). Meanwhile, we are in a double transition: digital (AI, cloud, blockchain) and environmental (fossil fuel subsidy removal, green economy). Recent developments in Dubai exemplify this. This means while we have the Global Minimum Tax, trillions in tax incentives promote these transitions, creating a strong contradiction unresolved so far. The first consequence is favoring large economies since global rules pool income within jurisdictions; large jurisdictions can blend high-tax and low-tax sectors to meet the 15% minimum tax, impossible in smaller jurisdictions. Secondly, global rules favor source or market jurisdictions, as Michael said, indirectly but effectively. This reflects the rule order decided by the inclusive framework with 140+ countries: if income is taxed below 15%, the first taxing right goes to the source country (QDMTT). This applies to income inclusion, undertaxed profit rules, and controlled foreign company rules globally. This important outcome isn't widely recognized, showing how public debate uses unhelpful categories. We often hear developing vs developed country conflicts, but these categories are confusing. For example, China negotiating with Gabon or Zambia – who is developing or developed? When New Zealand negotiates with China? These labels don't help progress. I fear the artificially created polarizations between developed/developing, North/South, right/left could hinder progress or reverse gains achieved through inclusive participation. It will be interesting to see if a third way can emerge. Thank you.

[Prof. Marino]

Thank you, Raffaele, it was very interesting, the point of the two transitions at the same time, digital transition and environmental transition, and we want to avoid the digital transition that brings tax competition, but at the same time, we stimulate the environmental transitions through incentives. So, it's indeed a sort of a paradox that is happening right now. And then again, another truth, what you said about the developing and developed countries because at the same time, Italy is a developing country within negotiation with the United States, with China, and by the way, we were talking with Paola Bartoli about the new negotiation, the new treaty with China that is not yet into a proper direction, but maybe when we negotiate a treaty with an African country, we are a developed country. So, again, it's confusing sometimes, the media, the idea that there are developing and developed countries on ground while the situation is more complex. Last but not least, I see Pierpaolo, thank you for being with us. Pierpaolo is a senior, I would say, tax legal expert at the Legal Service of the European Union Commission. So, he is strongly a lawyer, I would say, so he looks at all the discussions with, I would say, a surgery lens of the lawyer, and I thank you for enriching our discussion with the position of the European Union with what is going on around the world.

So, thank you Pierpaolo the screen is yours.

[Pierpaolo Rossi-Maccanico]

I work at the European Commission Legal Service, separate from DG TAXUD which develops EU tax policy. We advise DG TAXUD and foresee legal problems from new proposals. The new international tax framework will bring many legal issues. We focus on the effects of new taxing rights allocation discussions from the OECD and EU on rights of taxpayers and undertakings competing in the single market under different tax burdens. I'll outline main issues we'll face in the near, medium, and long term in Europe. EU law intersects national taxation mainly via two areas: prohibitions on tax restrictions protecting fundamental freedoms in the internal market, and state aid control. I will briefly describe the challenges these legal frameworks pose regarding the new international tax framework. National tax laws may restrict fundamental freedoms (free movement of goods, services, capital, persons) affecting cross-border investments; such restrictions may be justified, especially to preserve taxing rights and fight evasion/avoidance, even if resulting in double international taxation - which EU law accepts currently. The second intersection is state aid control, where the Commission has direct responsibility to ensure a level playing field. Tax advantages causing selective advantages to companies altering competition can be illegal state aid, especially when they cause international double non-taxation. This creates a paradox: from a state aid perspective, the EU fights double non-taxation to prevent undue advantages, but accepts double taxation justified by taxing rights exercise. We therefore have two conflicting trends. Our Legal Service tries to distinguish genuine tax measures (physiological) from unnecessary ones that may be challenged under EU law for restrictions or state aid issues. This must be seen cautiously, as EU law generally prevails over international agreements, including tax treaties, between member states (Article 3(5) TEU). The EU also respects international law externally and must align its tax directives with international frameworks, respecting customary international law and double taxation principles. Recent EU directives addressing anti-tax avoidance include two Anti-Tax Avoidance Directives (ATAD I and II) and a forthcoming "Unshell" proposal. The EU harmonization process fights international double non-taxation mainly via the general principle against abuse of law, developed through CJEU case law (e.g., 2020 Danish cases on beneficial ownership in Parent-Subsidiary and Interest-Royalty Directives). The EU extends anti-abuse rules conceived for cross-border situations also to domestic contexts to ensure a level playing field. The most recent legislation is the Pillar Two Global Minimum Tax Directive, which poses new challenges. It introduces a new way to allocate taxing rights dissociated from income allocation, raising legal issues on equity and fundamental rights (property rights), as taxpayers might be taxed on income they don't own. It also creates disparities among taxpayers in similar commercial situations facing different tax burdens. This challenges treaty overrides and coordination with existing double tax treaties and

customary international law, posing further legal questions. Calculating effective tax rates for top-up taxes excludes certain tax incentives, raising concerns on tax competition, as Raffaele mentioned. The global race to provide incentives for digital and green transitions complicates the picture, as some incentives are excluded while others are not, raising questions. These issues are likely to be debated in the EU Court of Justice. Regarding state aid control, the Commission faces complexity. Two notable decisions show opposite outcomes for similar double non-taxation cases: the 2003 Belgium tax rulings on US Foreign Sales Corporation and the more recent Amazon Luxembourg case. The Belgium case led to finding illegal state aid due to double non-taxation from US and Belgian systems combined, ordering recovery (waived due to legitimate expectations). The Amazon case involved the US treating a Luxembourg permanent establishment as transparent, and Luxembourg exempting its income, causing double non-taxation, but the Commission did not find state aid since no selective advantage was granted, the general rule applied. This inconsistency illustrates difficulties in applying EU rules on double taxation elimination. Emerging consensus focuses on taxing rights allocation rather than income allocation via treaties, impacting taxpayers facing non-uniform tax levels in comparable situations, leading to potential legal challenges from the Court, which prioritizes fundamental rights over sovereign tax interests. These issues will likely be resolved case by case, with future Court pronouncements providing guidance. Our Legal Service is actively reflecting and advising DG TAXUD, but progress is complicated by competing sovereign interests and complex international agreements. The EU seeks to accommodate and accompany these changes, hoping for a stable, acceptable new international tax order. Thank you.

[Prof. Marino]

Thank you very much, Pierpaolo. It was very interesting your approach to describe how the EU is fighting international double non taxation. And when you were talking, I was just reflecting what Raffaele said before, that we are switching from a fight to tax competition, to a fight to tax competition *tout court* because certainly, I agree on the fighting of the international double non taxation, but now we are switching over the need that Ireland has to increase the tax rate from 12.5 to 15%, which has nothing to do with the double non taxation, because it's certainly another field, another level playing field. So, I'm going to be curious about your thoughts within the legal services, you are always reflecting on the legal frameworks on how to avoid that this kind of minimum tax is going to make dangers, may jeopardize some issues within the European Union. Thank you very much and thank you to colleagues on the international side. Thank you, Michael and Luisa, Pierpaolo and Raffaele.