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DEVELOPING COUNTRIES AND THE ROLE OF CIVIL SOCIETY IN SHAPING THE CONTEMPORARY INTERNATIONAL TAXATION SYSTEM

PAÍSES EM DESENVOLVIMENTO E O PAPEL DA SOCIEDADE CIVIL NA MODELAGEM DO SISTEMA TRIBUTÁRIO INTERNACIONAL CONTEMPORÂNEO

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Abstract: This article discusses the role of the Civil Society in the construction of a new international tax system. It analyses which are the major players in the international taxation arena and how developing countries need special attention when compared to developed ones. It identifies three major issues related to international taxation that harms developing countries and also argues that the Civil Society, through its Non-Profit and Non-Governmental Organizations, has been contributing to the debate, moreover defending the interests of developing countries since they lack representation in the debate.
Keywords: Tax law. International Tax System. Developing countries. OECD. Non-Governmental Organizations.

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Resumo: Este artigo discute o papel da Sociedade Civil na construção de um novo sistema tributário internacional. Ainda, analisa quais são os principais players na arena tributária internacional e como países em desenvolvimento necessitam de atenção especial quando comparados aos países desenvolvidos. O artigo identifica três principais problemas relacionados à tributação internacional que prejudicam países em desenvolvimento e também aponta que a Sociedade Civil, por meio das suas Organizações Não-Governamentais sem fins lucrativos vem contribuindo para o debate, em especial defendendo os interesses de países em desenvolvimento, vez que eles têm menor representatividade no debate.
Palavras-chave: Direito tributário. Sistema tributário internacional. Países em desenvolvimento. OCDE. Organizações Não-Governamentais.

CONTENTS:

1. INTRODUCTION

In the last decades, the international tax system has been designed to respond to the issues faced by developed countries. The major player in the arena was created under the watch of rich economies or as some may call, “the rich countries club” (OECD). Even considering the role of the UN Tax Committee, a very important question is still in place: “the international taxation issues that harm developing countries have been adequately addressed?”.

The globalized era has brought many improvements to society, reducing distances never imagined before. Information flows almost instantly all around the globe, and financial operations take place in matters of seconds. On the other hand, controlling this fast-changing scenario became even harder. Also, it is essential to consider some important issues that are still present even in the 21st Century such as the rise of economic inequality[1] and extreme poverty[2].

After many financial crises, the countries' economies are in a continuous adaptation process, and in times like these, any tax base erosion and profits shifting might represent considerable losses since governments' expenditures are continuously rising, demanding an increase in revenues collection.

The scope of this article is to analyze the contributions made by the civil society, also known as the 'third sector', in designing an international taxation system that fits the needs of developing countries. For this purpose, the part 2 of this article briefly explains the international taxation and tax planning phenomena. Part 3 analyzes some important aspects of the actual international tax regime and the efforts to fight aggressive tax planning. Part 4 focuses on the needs of developing countries through a critical approach to the fact that developing countries and less developed countries are not adequately represented in the international taxation debate, exposing the contributions made by the civil society to this crucial discussion.

2. INTERNATIONAL TAXATION AND THE TAX PLANNING PHENOMENON

The concern about the double taxation issue led to the development of an international tax regime in the last century, even though it is far from being the only problem affecting the Contemporary International Tax System (CITS).[3] In

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[1] *See* Thomas Piketty, *Capital in the Twenty-First Century* (2017); Thomas Piketty, *The Economy of Inequality* (2015); Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2013); Anthony Atkison, *Inequality: What Can Be Done?* (2008).
[2] *See* Jason Hickel, *The Divide: A Brief Guide to Global Inequality and its Solutions* (2017).
[3] Marcos Aurélio Pereira Valadão, *O Sistema Tributário Internacional Contemporâneo sob a Perspectiva dos Países em Desenvolvimento: Análise Crítica*, 37(1) REVISTA NOMOS 147, 161 (2017). Marcos Aurélio Pereira Valadão adopts the expression "Contemporary International Tax System (CITS)" when addressing the actual international taxation group of principles and rules.

1927, the first model treaty to address the question of double taxation was drafted by the League of Nations Committee of Technical Experts, consolidating ideas and principles that are underpinnings of the entire contemporary international tax regime.[4] As Roy Rohatgi has pointed out, "international taxation refers to the global tax rules that apply to transactions between two or more countries (also called States) in the world. It encompasses all tax issues arising under a country's income tax laws that include some foreign element."[5].

International tax law is better understood as the international aspects of the income tax laws of particular countries because tax laws are not international since they are creations of sovereign states, to be applied domestically.[6] The fact that nations have the right to tax their residents on two bases of jurisdiction, which are nationality and territoriality, brings more challenges to design an international harmonic tax regime. The possibility of adopting a large variety of rules turns the efforts to arrange the international taxation system a difficult task, and double taxation is not the only problem tackled by this field (*e.g.*, transfer pricing and controlled foreign companies) what reveals the challenges it faces.

Differently from international tax law, domestic tax law has norms very well outlined, making understanding them easier. Also, this complexity presented by the collision between different countries' tax systems results in an arena "full of traps for the unwary and opportunities for the well-advised (...)"[7].

A consensus about how the world economy tax base should be shared between the almost 200 nations has not been reached, resulting in decisions taken unilaterally by governments without harmony.[8] Each country designs its tax

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[4] Reuven S. Avi-Yonah, *Advanced Introduction of International Tax Law* 3-5 (2015).
[5] 2 Roy Rohatgi, *Basic International Taxation* 1 (2d ed. 2007).
[6] Brian J. Arnold & Michael J. McIntyre, *International Tax Primer* 3 (2d ed. 2002).
[7] Michael S. Lebovitz & Theodore P. Seto, *Preface: The Fundamental Problem of International Taxation*, 23 LOY. L.A. INT'L & COMP. L. REV. 529 (2001).
[8] Michael S. Lebovitz & Theodore P. Seto, *supra* note 9.

system taking into consideration its particularities and specific needs. Also, in the international tax arena, one's country sovereignty cannot be suppressed by other countries unless there is an international treaty and to make things harder, there is no international tax authority to enforce any measures adopted.[9]

The transition from the Patrimonial State to the Fiscal State brought new challenges about how to finance public activities.[10] In the Fiscal tax revenues are the state's primary source of funds. However, the existence of loopholes in tax legislation opens the door to the design and implementation of tax schemes that reduce taxpayers tax burden, undermining countries' fiscal balance.

Many tax avoidance schemes are adopted to lower taxpayers' tax burden, and the consequences of it affect not only the states which have their tax bases eroded but also the taxpayers that are up to date with their tax obligations since they may end up being financially affected by the "free riders" posture.[11]

Sovereignty plays a significant role when discussing international taxation since it assures countries the power to decide how to conduct its internal policies, supposing no external interferences, mostly when dealing with domestic matters such as taxation. Similar or even identical issues might be handled in different ways by distinct countries. The international society is decentralized, having objectives and values that will not be pursued by every country[12], making harder

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[9] *See* Marcos Aurélio Pereira Valadão, *supra* note 5.

[10] For more information about the evolution of the Fiscal State, *see* Luís Eduardo Schoueri, *Tributação e Liberdade*, in *Princípios de Direito Financeiro e Tributário - Estudos em Homenagem ao Professor Ricardo Lobo Torres* 431-471 (2006).

[11] Phyllis Lai Lan Mo, *Tax Avoidance and Anti-Avoidance Measures in Major Developing Economies* 123 (2003). "Brazil's problem on tax avoidance and evasion is mainly the result of the deficiencies in the tax system and inefficient tax administration and enforcement. In the past, foreign investors took advantage of the lack of legislation governing related party transactions or tax havens by transferring profits out of Brazil. The Brazilian government implemented different anti-avoidance measures including tough sanctions for tax crimes. Unfortunately, tougher penalties did not seem to improve the situation given the fact that Brazil had a long and deplorable tradition of impunity while its inspection system remained inefficient."

[12] José Francisco Rezek, *Direito Internacional Público: Curso Elementar* 1 (11th ed. 2008).

the effort to coordinate the international understanding of any given subject since each state has the freedom to handle its concerns accordingly to its interests and internal legislation.

In the international scenario, one country cannot impose rules or obligations to other nations without mutual consent in respect to the principle non-intervention that reigns the international relations. There are some (extreme) situations when some measures are adopted, *e.g.,* sanctions or economic embargoes, used mostly to impose penalties on countries that disrespect rules that guarantee the international harmony. As Hines Jr. points, "countries design their tax systems to fit circumstances and opportunities, and as a consequence, tax regimes exhibit considerable diversity".[13]

Another important point is that in the international scenario there is no superior authority nor a permanent militia. Since countries are organized horizontally in the international plan, each one is sovereign and acts accordingly to its legal rules. In some cases, they may consent with external rules like a bilateral or multilateral treaty, but only when there is consent to celebrate a treaty, convention or other agreement that creates obligations.[14]

Also, the nonexistence of a consensus amongst countries on how to share the world's roughly 200 nations tax base between them shows how difficult it is to deal with international tax law issues and reach a standard view of the issues. Most countries unilaterally decide how to handle their tax system, an option that might result in cases of double taxation or even in double non-taxation.[15]

As very well pointed by Roy Rohatgi:

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[13] James R. Hines JR., *Do Tax Havens Flourish?* 3 (National Bureau of Economic Research, 2004).
[14] José Francisco Rezek, *supra* note 14, at 1.
[15] Michael S. Lebovitz, & Theodore P. Seto, *supra* note 7.

> Taxes are not international. There is no separate global tax law that governs cross-border transactions. Moreover, there is no international tax court or administrative body for international tax issues. All taxes are levied under their domestic law by federal, national o local governments. These tax laws have an impact on cross-border transactions. International taxation governs these domestic tax rules under customary international law and treaties.[16]

Tax treaties[17] can be considered the closest manifestation of the international tax law because when signed and internalized, they can change the structure of a country's tax system.[18] Most developed countries celebrate tax treaties with their trading partners, being normal to identify the existence of treaty networks between them. Many limitations on the power to tax can be imposed on the treaty partners, and in most times, these tax treaties are exclusively relieving.[19]

Other factors that can have an impact on a country's internal tax system are the customary practices of sovereign states or actions of international organizations that conduct works in the tax and other related fields such as the ones held by the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD).[20]

When discussing international taxation, tax planning is a critical subject and deserves some attention. Although its often associated with illegal activities such

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[16] 1 Roy Rohatgi, *Basic International Taxation* 1 (2d ed. 2007).
[17] *See generally* Marcos Aurélio Pereira Valadão, *Limitações Constitucionais ao Poder de Tributar e Tratados Internacionais* (2002).
[18] Malcon N. Shaw, *International Law* 93-94 (6th ed. 2008). "Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants. All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and arrangements are laid out which the parties oblige themselves to carry out".
[19] Brian J. Arnold & Michael J. McIntyre, *supra* note 6, at 2-3.
[20] Brian J. Arnold & Michael J. McIntyre, *supra* note 6, at 23.

as tax evasion and money laundry, this paradigm needs to be overcome, whereas this term can also be related to legal practices.[21] The mobility of people and capital as a result of the technological revolution and the growth of automation and improvement of transportation led to higher complexity in the debate about tax evasion and tax saving, mainly due to the possibilities of adopting evasive and elusive international mechanisms.[22]

In short, tax planning is a mechanism or procedure used by those who want to lower their tax burden, and the primary goal of it is to avoid, prevent or reduce the tax liability.[23] Taxpayers have the right to elect the less costly option according to their interests. As pointed by Ricardo Lobo Torres, the taxpayer has freedom of conducting his or her business as desired, being free to choose the structure of it, formatting it in a way that allows the tax saving while respecting the limits imposed by law.[24]

Roy Rohatgi defines international tax planning as follows:

> International tax planning is the art of arranging cross-border transactions with the knowledge of international principles to achieve a tax effective and lawful routing of business activities and capital flows. The planning process follows the money flows in cross-border transactions, as they pass from the host country where they arise to the home country where they eventually end. Tax planning helps to reduce the cumulative impact of taxation, as compared to the separate tax incidence in the countries through which the transactions flows. Its prime

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[21] Many people see both internal and international tax planning as a negative practice. Indeed, there are many tax schemes structured with the objective of breaking the law. Hugo de Brito Machado argues that these malpractices to lower taxes do not deserve to be named as tax planning since they are nothing more than absolute fiscal frauds, configuring an illegality. *See* Hugo de Brito Machado, *Introdução ao Planejamento Tributário* 84 (2014).
[22] Heleno Taveira Tôrres, *Direito Tributário Internacional: Planejamento Tributário e Operações Transnacionais* 35 (2001).
[23] Hugo de Brito Machado, *Introdução ao Planejamento Tributário* 84 (2014).
[24] Ricardo Lobo Torres, *Planejamento Tributário: Elisão Abusiva e Evasão Fiscal* 10-11 (2d ed. 2013).

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> objective is to receive the after-tax flows of overseas income lawfully at minimal cost and risk.[25]

Differently from domestic tax planning[26], international tax planning imposes other concerns such as the 'interrelationship of two or more tax systems, the impact of juridical and economic double taxation, and the tax compliance rules in more than one country'[27]. Tax incentives and exemptions for foreign income, availability of foreign tax credits, use of tax treaties and anti-avoidance measures are other points taken into consideration when discussing international tax planning.[28]

International tax planning faces more adversities than domestic tax planning, *e.g.,* the taxation of cross-border activities, since "they are subject to tax in more than one tax jurisdiction. Moreover, the taxpayer may have to cope with inconsistent tax laws, erratic tax authorities and high taxes in various jurisdictions".[29]

The use of the expression "tax planning" needs to be duly understood, so there are no misunderstandings about its practical meaning. There is a difference between what can be called a fiscal fraud and the right to save taxes through tax planning. The taxpayer, in most cases, has the right to choose the less expensive way to carry out its economic activities, but this right only must be assured if the taxpayers obey the law.[30] The decision to planning is not simple because several factors must be considered such as the analysis of the legislations of the involved

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[25] Roy Rohatgi, *supra* note 5, at 1.
[26] Roy Rohatgi states that "domestic tax planning is concerned primarily with the national rules of tax deductions, allowances and exemptions, and the different tax rates levied on various sources of income in a single jurisdiction". Roy Rohatgi, *supra* note 5, at 1.
[27] Roy Rohatgi, *supra* note 5, at 1.
[28] Roy Rohatgi, *supra* note 5, at 1.
[29] Roy Rohatgi, *supra* note 5, at 2.
[30] Hugo de Brito Machado, *Introdução ao Planejamento Tributário* 84 (2014).

countries, how their tax system is structured, the existence of tax treaties, and the criteria used to define residence for taxing the income.[31]

A tax plan can be classified as defensive or offensive. The first occurs when the primary objective is to avoid paying an amount of taxes that exceeds what is expected. On the other hand, the offensive or aggressive tax planning aims primarily at saving taxes at any cost, considering the reduction of the tax burden as the main motivation for practicing specific acts.[32] Countries efforts to fight the aggressive tax planning have been escalating, resulting in constant modifications on the design of tax systems (in a dynamic world, the changes might occur on a daily basis), creating tax barriers, making their internal legislation more complex and strengthening their tax administrations, giving them powers that allow a more broad and efficient supervision of tax transactions.[33] More recently, the inserction of the Principal Purpose Test (PPT clause) in the DTAs as minimum standard, as recommended by the BEPS project, is an important tool to fight aggressive tax planning.

The current stage of globalization implies more mobility of capital and labor.[34] And this mobility, in part due to the technological advances, the electronic transfers of funds, and the not so well exercised control over exchange operations

[31] Heleno Taveira Tôrres, *supra* note 22, at 53-54. Many criteria need to be observed to elaborate an action plan in the international sphere. To cite a few: (a) election of the juridical form that the investment should adopt; (b) instrumental and formal duties (accessory obligations); (c) species of withholding taxes (dividends, royalties, interest etc.); (d) existence of unilateral measures to avoid international double taxation and (e) the legal system adopted by the country.

[32] Antônio de Moura Borges, *Noções de Direito Tributário Internacional*, 26(5) Revista Fórum de Direito Tributário – RFDT 55 (2007).

[33] Marcos Aurélio Pereira Valadão & Rodrigo Senne Capone, *International Tax Planning: Double Irish Arrangement* in *Direito Tributário: XXIII Encontro Nacional do CONPEDI* 266 (2014).

[34] Reuven S. Avi-Yonah states that "labor is as mobile or more mobile than capital from the perspective of its ability to escape US taxation by moving. The same applies to other countries that have an exit tax on moving and do not tax citizens living permanently overseas. The capital/labor dichotomy assumption is wrong, and labor, like Galileo's Earth, does move despite all the claims to the contrary." Reuven S. Avi-Yonah, *supra* note 4, at 57.

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results in an international tax competition between countries to decide which one have the right to tax.[35]

Nowadays, markets are globalized, opened and competitive as they have never been before. Most governments create mechanisms to minimize or even eliminate its taxes to attract external investments and corporate activities, but several benefits arise in competitive scenarios such as the reduction in tax rates and enlargement of tax bases.[36]

International tax competition occurs when individuals or groups have the option to choose the jurisdiction that best fits their interests when deciding where to invest or work. These places have different levels of taxation, what leads to a competition between them to assure the maintenance of the competitive advantage.[37] Tax competition phenomenon can also be noticed inside countries borders (Brazil has issues related to internal tax competition, that puts at check Federation itself), a problem that is contemporary and with the digital revolution seen in the last years, more challenges will arise. The effects of international tax competition in its aggressive mode go beyond the taxation scenario, question raised and studied by several international organizations, including the civil society's ones[38].

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[35] Reuven S. Avi-Yonah, *Globalization, Tax Competition and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575 (2000).

[36] Antônio de Moura Borges, *Considerações Sobre o Combate à Concorrência Tributária Internacional Prejudicial*, 12(2) FÓRUM DE DIREITO TRIBUTÁRIO - RFDT 53 (2004).

[37] Daniel Mitchell, *A Tax Competition Primer: Why Tax Harmonization and Information Exchange Undermine America's Competitive Advantage in the Global Economy*, http://www.heritage.org/research/reports/2001/07/a-tax-competition-primer#pgfId=1151871 (last visited July 10, 2018).

[38] "Competing tax systems. Nation states are not in competition with each other in the same way that firms compete for clients. Competition can only exist in that way when consumers (in this case entire populations) can choose between competing suppliers. Trying to apply the microeconomic theory of the firm to nation states is therefore false in theory and dangerous in practice; in microeconomic theory, if a company fails it will be replaced by another company. That is not true when nation states fail; then the international community must intervene to prevent social and economic meltdown. What this suggests is that the notion of tax competition is based

However, tax options only exist because states offer them, designing their respective tax systems to attract business activities, investments or individuals with specific professional skills. By doing it, countries increase they offer of jobs, the investments flow, and because of all that they can maintain or enhance their economic growth.[39] As an essential factor in a scenario of growth, competition results in an optimization of the production and distribution, avoiding in a certain way a monopoly of the market by the ones that hold more resources, allowing economic freedom to take its place.[40] Some countries have no option but to offer fiscal benefits to foreign investors. Otherwise, they would not even consider going to these places.

Also, the existence of some competitiveness between states is crucial for their economies, since it acts diminishing global fiscal oppression, stimulating the better use of public revenues and optimizing their budgets and public services.[41] However, it is important to note that any competition should be realized transparently and honestly. When it does not occur, the competition is no longer beneficial, becoming harmful.[42]

A remarkable study about harmful international tax competition is the "Harmful Tax Competition: An Emerging Global Issue" Report, published in 1998 by the OECD, which is a result of a request made to the OECD back in 1997 to

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on political ideology rather than economic theory, and it promotes economic injustice. In practice it favours the interests of the tiny number of people who own the majority of the world's businesses. Far from promoting the efficient allocation of the financial capital, tax competition encourages mobile capital to scour the world in search of tax breaks and subsidies, which negates the entire basis of globalization theory. As a result tax competition invariably results in social harm and has to be curtailed". Tax Justice Network, *Tax Us If You Can* (2d ed. 2012), http://www.taxjustice.net/cms/upload/pdf/TUIYC_2012_FINAL.pdf (last visited July 11, 2018).

[39] Thomas F. Field, *Tax Competition in Europe and America*, 29 TAX NOTES INTL 1235 (2003).

[40] Elizabete Marisa Pinto da Costa, Concorrência Fiscal Internacional: Um Desafio à Escala Mundial 8 (2005) (unpublished Graduate Studies thesis) (on file with the Universidade do Porto library).

[41] Heleno Taveira Tôrres, *supra* note 22, at 68.

[42] Antônio de Moura Borges, *note* supra 36, at 1.

research and propose measures to combat the prejudicial international tax competition.

The OECD Report on harmful tax practices identified two types of harmful tax practices: (a) tax havens and (b) harmful preferential tax regimes.[43] Since several countries offer some kinds of tax benefits that can classify they as preferential tax regimes classification, tax havens are deeply investigated, receiving more attention because of the intensive use of them and the extension of their harmful effects.

One aspect that ends up worsening the competition phenomenon is the lack of harmonization in the international taxation scenario, as well pointed by Roy Rohatgi, who states that "harmful competition arises due to mismatches in the existing tax systems of countries that can be exploited by taxpayers. Such economic behavior may be considered as unacceptable tax avoidance by certain countries since they believe that it undermines the integrity and fairness of their tax systems".[44]

Jurisdictions classified as tax havens are the ones which offer several benefits to investors to attract mainly external capital (or maintain the capital already attracted). Most of the benefits offered are aimed to companies that have the mobility to move abroad, outsource their labor force and production, and benefits can also be extended to individuals that have a considerable net worth and are shopping for better tax rates (or even no taxes at all). Hines Jr states that:

> Countries known as 'tax havens' offer very low tax rates and other tax features that make them particularly attractive to

[43] Brian J. Arnold & Michael J. McIntyre, *supra* note 6, at 139. The essential difference between these two forms of harmful tax competition is that tax havens have no interest in preventing the race to the bottom whereas countries with harmful preferential regimes may have an interest in eliminating harmful tax competition on condition that other countries do the same. Indeed, some countries with harmful preferential tax regimes may be the victims of harmful tax competition.
[44] Roy Rohatgi, *supra* note 16, at 85.

> foreign investors. Rising volumes of international investment contribute to the growing importance of tax havens, which in turn has exposed tax haven activities to greater attention, and has prompted a number of policy responses in higher-tax countries.[45]

Nowadays, offering only tax benefits may not be enough to attract external capital. The secrecy that these jurisdictions provide, in some cases, is much more attractive than the tax benefits itself.[46] Also, other factors influence the decision to move to a new jurisdiction, not limited to tax and secrecy, such as the existence of the proper infrastructure, consumer markets, political and juridical stability. Since the market competition in the globalized era is very tight, tax benefits that result in the reduction of the tax burden are economically attractive. A good example of incentives offered that can harm the international market competition is, *e.g.*, the decision of the World Trade Organization (WTO) which ordered Brazil to withdraw some industrial subsidies under the argument that they are signals of unfair competition.[47] Subsidies may even result in a budget deficit, but from other perspectives, it is a strong instrument to attract investment (either internally or externally) and in some cases might be the only option a jurisdiction has to give some stimulus to its internal economy. Also, is important to observe that benefits not always will result in internal or international competition because of their limited reach. When analyzing benefits offered is important to identify if any distortion is being created and if the answer is no, there is no reason to fight it.

When designing a tax plan, usually the primary objective is to reduce the tax burden as much as possible while mitigating risks. There is a set of "tools" available to the taxpayer to reach the objective of saving taxes such as the misuse

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[45] James R. Hines JR., *supra* note 13, at 3.

[46] For more information about the debate over secrecy, *see generally* Marcos Aurélio Pereira Valadão, *supra* note 3, at 147.

[47] Reuters, *WTO Orders Brazil to Remove Subsidies*, https://www.reuters.com/article/us-brazil-wto/wto-orders-brazil-to-remove-subsidies-government-to-appeal-idUSKCN1B92QV (last visited 25 July, 2018).

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of transfer pricing, treaty shopping, transfer of the social or administrative headquarters to foreign countries where there is no substantial activity, international corporate restructuring, thin-capitalization and others.[48] The tax plan will specify the appropriate and necessary means and legal actions that have to be taken in order to reach the taxpayer objective, covering all the obligations imposed upon him by law and minimizing the risk of breaking it, since it is not recommended a bold plan only focused on short-term gains but susceptible to failure at any moment in the future.[49]

3. FIGHTING AGGRESSIVE INTERNATIONAL TAX PLANNING IN THE 21ST CENTURY

The efforts to address the major issues on the international tax scenario have increased in the last decades since their complexity has risen due to the digital revolution and to the level of mobility reached by capital and labor. In this international taxation scenario is possible to identify the major players who design the rules that will influence the structure of the international tax regime and will be seen in bilateral and multilateral tax treaties, shaping the way countries interact with each other.

Some aspects of the Contemporary International Taxation System (CITS) need to be addressed more closely because of their complexity. It is important to note that some of these aspects are more problematic to developing countries than to developed ones. Economic distortions that affect developing countries make harder to them address these issues as efficiently as developed ones do it.

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[48] Marcos Aurélio Pereira Valadão & Rodrigo Senne Capone, *supra* note 33.
[49] Antônio de Moura Borges, *supra* note 32.

a) Harmful Tax Competition

One of the main problems faced by the CITS is the so called harmful international tax competition, which was in the spotlight in the year of 1996, when a solicitation was made for the OECD to elaborate a study of measures to fight the distortions caused by harmful tax competition, mostly when involving investments and financing and its consequences over the domestic tax bases, work that resulted in the "Harmful Tax Competition: An Emerging Global Issue" Report, presented in 1998.[50][51]

The harmful international tax competition phenomenon was intensified in the 90's, which resulted in the reduction of tax rates of the income tax and in the concession of income tax fiscal benefits to attract investments. Also, another issue is the establishment of low or no tax jurisdictions, originating a financial center, also known as tax havens.[52]

In the beginning, when the primary concern was about harmful tax practices, the OECD also created a list of states which adopted these tax practices

[50] Antônio de Moura Borges, *supra* note 36, at 5.
[51] "Although the OECD Report is targeted at harmful tax competition, that term is not defined in the Report. The lack of any definition on harmful tax competition is understandable because the term is impossible to define precisely. Its general meaning is clear, however, in the context of the Report. The tax practices under attack in the report are those that do not advance any of the traditional tax policy goals of governments seeking to raise revenue to finance public expenditures but are adopted instead to exploit the inevitable weaknesses in the international tax rules of other taxing jurisdictions. These efforts at exploitation often lead to an unhealthy form of tax competition that results in the race to the bottom described earlier" and "The use of the word "competition" in the title of the OECD Report is perhaps unfortunate because it has caused some people to assert that the OECD is attempting to eliminate all forms of tax competition among governments. In these halcyon days of global free trade and capitalism, some people apparently believe that competition is always good and can never be harmful. The OECD position is more nuanced. On the one hand, it applauds the type of tax competition among governments that may result in more efficient, less intrusive tax regimes; for example, the kind of tax competition that led in the late 1980s to a worldwide lowering of tax rates and a broadening of tax bases. On the other hand, the Report is properly critical of countries that enact tax legislation intended to "poach" the tax base of other countries". Brian J. Arnold & Michael J. McIntyre, *supra* note 6, at 138-139.
[52] Marcos Aurélio Pereira Valadão, *supra* note 5, at 161.

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classified as aggressive ('blacklist'), and several recommendations were made for countries to curb this prejudicial agenda.[53] The issue of low or no tax was the main concern, but nowadays the attention has turned to the question of secrecy and lack of transparency. Because of the international tax competition, income tax rates have dropped in the last decades (some exceptions do exist). This issue leads to the race to the bottom, where everyone involved lose, and the labor income and consumption (tax bases that have less mobility) end suffering higher taxation to compensate the losses in tax collection from enterprises income, especially the multinational ones.

In the past decade, investigations lead to the discovery of many tax schemes being implemented around the globe by important multinationals, *e.g.,* Panama Papers, Paradise Papers, Luxembourg Leaks, Swiss Leaks and more recently, as noticed by the International Consortium of Investigative Journalists - ICIJ, the West Africa Leaks.[54] As stated on the ICIJ website, "(...) Africa loses more money to offshore secrecy than it receives in development aid".[55] In some cases, taxes are paid but the secrecy offered by these jurisdictions concerns because it can help to hide illicit money.

b) Transfer Pricing

Another major issue is transfer pricing, which might be the most relevant problem in the actual international taxation scenario because of its harmful consequences and difficult enforcement. The main objective when enterprises use transfer pricing is to allocate in another jurisdiction its profit before tax, reducing the tax burden. It occurs when operations are realized between members of a

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[53] Heleno Taveira Tôrres, *supra* note 22, at 147.
[54] *See* International Consortium of Investigative Journalists, https://www.icij.org/.
[55] International Consortium of Investigative Journalists, *Introducing West Africa Leaks* (2018), https://www.icij.org/blog/2018/05/introducing-west-africa-leaks/ (last visited July 14, 2018).

group of related corporations (or intragroup transactions). The challenge is to prevent profit shifting and to do so Countries, where these enterprises using transfer pricing are located, have to improve their enforcement system.

When addressing this issue, the arm's length principle (ALS) is adopted, which mainly consists in adjusting the taxable base considering the price of the transaction in similar conditions between non-related parties or the market value of the transaction which is not influenced by the relation between the companies.[56] The arm's length principle is present in the Model Conventions of the UN and OECD (articles 7º and 9º). The importance of the theme can also be seen in the BEPS Actions since 4 out of 15 actions address the issue of transfer pricing (Actions 8, 9, 10 and 13).

OECD has been working on the theme and published the "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations", in 1995, addressed at first to your member-countries, the Guidelines has been updated in a regular basis. After that the Committee of Experts on International Cooperation in Tax Matters of the UN created a Subcommittee of Transfer Pricing, in 2011, to support developing countries and later publishing the "United Nations Practical Manual on Transfer Pricing for Developing Countries" (2013, uptaded in 2017).

Transfer pricing is at the same time an important and extremally complex theme. Resolving it through the arm's length principle depends on comparables, imposing another obstacle since it is estimated that 60% of international transactions occur between enterprises somehow related (variation may happen

[56] Veronika Solilová & Danuše Nerudová, *Sixth Method as a Simplified Measurement for SMEs?* 10(3) EUROPEAN FINANCIAL AND ACCOUTING JOURNAL 45, 47 (2015).

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depending on the economic sector considered).[57] In this scenario, determining what an independent transaction might be can be different from what it really is.[58]

Initially, three methods were implemented to enforce transfer pricing (comparable uncontrolled price – CUP, cost-plus and resale price). When the insufficiency of such methods was noticed because all of them depend on comparables what demand a strict standard to function properly, two new methods were adopted: Comparable Profits Methods (CPM) or Transactional Net Margin Method (TNMM), and Profit Split.

An important aspect that needs to be pointed out is that developing countries are differently affected by the transfer pricing issue than developed countries, so the solutions need to address these differences. Some examples can illustrate it:[59]

> a) Developing countries are substantially exposed when their natural resources are exploited by companies (which usually occurs) in the case of extractive industries, which are potentially exporters of raw materials;
> b) For populous countries, the absence of recognition of the value of the consumer market to the allocation of value formation, and in cases of outsourcing to countries with low-cost labor (location savings);
> c) Excessive complexity of transfer pricing rules in the OECD standard (reproduced in large part in the UN Transfer Pricing

[57] *See* Marcos Aurélio Pereira Valadão, *supra* note 5, at 166.
[58] Reuven S. Avi-Yonah, *supra* note 4, at 30-31. Avi-Yonah states that: "Eventually it became clear that the classical methods usually do not work because comparables cannot be found. Economists have argued that comparables cannot be found because of the economic circumstances which cause multinationals to form. It is usually cheaper and easier to deal with independent distributors in foreign countries, so if instead a corporation sets up or acquires a foreign subsidiary, the reason is that they are avoiding some costs that would be incurred if they dealt at arm's length. The most common example is protection of intellectual property (IP), which might be lost if divulged to an unrelated distributor. The net result is that in particular industries, especially those characterized by wide geographic spread and large size, it is simply inefficient to engage in business through networks of unrelated companies; all of the transactions within these industries occur among commonly owned members of multinational groups. Accordingly, close comparables from transactions between unrelated companies tend not to exist".
[59] Marcos Aurélio Pereira Valadão, *supra* note 5, at 166.

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> Manual), which depends on great expertise, which impose great difficulty of compliance and generate excessive litigation, with significant legal uncertainty, very onerous (for taxpayers and the tax administration) and which ends up postponing the payment of taxes due; and
> d) Pricing the payment of rights related to intangibles (royalties, patents, etc.), for which developing countries are generally the source country.

In 2003, Argentina developed a new method to address the misuse of transfer pricing, called the "Sixth Method", which later was implemented by many other countries (Bolivia, Brazil, El Salvador, Uruguay and others). It is an approach to transfer pricing that helps developing nations since it simplifies the application of the CUP method. The new method is most useful when dealing with commodity products, as it requires the adoption of the market price of the goods being traded on the mercantile exchange, as a proxy for pricing a transaction between unrelated parties. Different methods exist, but there is not a "right method" to be adopted because all depends on the goods, rights and services being traded and particular aspects of each operation. As stated by Avi-Yonah, "in the foreseeable future, transfer pricing problems will remain, and solutions to the massive double non-taxation permitted under current rules are more likely to come from residence-based taxation of corporate groups, despite the uneasy nature of corporate residency determinations.".[60]

c) Treaty Abuse

Also, there is the treaty abuse issue. Tax treaties are celebrated for many reasons but most importantly to eliminate double taxation and avoid tax evasion and avoidance. There are two Model Convention Treaties, one from the OECD, which favors residence taxation and the UN model, which favors the source

[60] Reuven S. Avi-Yonah, *supra* note 4, at 33.

taxation. The UN's model is more interesting to developing countries, even though both models have many similarities. Nowadays, there are more than 3.000 treaties to avoid double taxation.[61]

Treaties are essential to avoid double taxation, what is vital to attract investment. Therefore, in some scenarios investment attraction may not occur, resulting in a weakening of the taxation system of developing countries when they celebrate treaties with developed ones, what may result in a loss of taxation at the source since tax rates are typically reduced because of these treaties.

The abusive use of these treaties to avoid international double taxation is a relevant issue in the actual CITS, what may allow tax bases shift and even may result in a double non-taxation situation. Nowadays, the new treaties celebrated include anti-abuse clauses which reduce legal certainty regarding the application of the treaty, what may ward off investors. Also, the BEPS Project addresses this question by introducing the PPT and limitation of benefit (LOB) clauses, in order to avoid treaty abuse.

Tax treaties impose limits on the tax power of contracting countries. One more time developing nations must observe that their internal legal system needs to be adapted to the treaty impositions and whenever a treaty clause is too hard to implement, developing countries may consider attaching a reservation to the treaty to avoid further questionings and problems.[62]

Other issues such as Controlled Foreign Corporations (CFC) rules, Thin Capitalization and Offshore Indirect Transfer (OIT) are also important to the CITS and need to be appropriately addressed when developing countries are involved.[63]

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[61] Marcos Aurélio Pereira Valadão, *supra* note 5, at 168.
[62] Marcos Aurélio Pereira Valadão, *supra* note 3, at 170.
[63] *See generally* Marcos Aurélio Pereira Valadão, *supra* note 3; Reuven S. Avi-Yonah, *supra* note 4.

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d) Efforts to Fight Aggressive Tax Planning

In the last decades, international taxation issues are on the spotlight because of the consequences of aggressive practices to the global economy. To illustrate that, Avi-Yonah, when discussing transfer pricing, points that the "transfer pricing rules are not working effectively" and the fact that "US multinationals currently have $2 trillion located in low-tax jurisdictions where they have little real activity". Despite transfer pricing enforcement, these profits were shifted by multinationals, what shows the failure of the transfer pricing enforcement methods.[64]

Comprehend the complexity of the international taxation system is essential to adequately address it. But questioning who is designing the rules to prevent and combat aggressive practices is also fundamental. In these days the major player in the international taxation arena is the Organisation for Economic Co-operation and Development – OECD, an International Organization which arose after World War II, that was officially born on 30 September 1961 when the OECD Convention entered into force. The OECD aims to promote policies focused on the improvement of the economic and social well-being of people not only in their member countries but all around the world. Also, to obtain better results towards harmonization of the global system, OECD provides a forum, where governments can work and discuss experiences, looking for outcomes for common problems.[65]

In the last decades, the OECD has developed a heavy structure of tax coordination (Centre for Tax Policy and Administration – CPTA) and a Model Convention. The objective is to harmonize the international taxation arena

[64] Reuven S. Avi-Yonah, *supra* note 4, at 32.
[65] OECD, *About the OECD*, http://www.oecd.org/about/ (last visited July 15, 2018).

through coordination since there is no global tax authority to enforce tax measures.[66]

Occurs that not all the recommendations made by the OECD are going to fit the needs of all countries, in particular the specific needs of developing countries. The effects of implementing some measures might result in unwanted consequences for developing countries, such as an increase in costs to run the tax administration and incapacity of attracting investment.

Nowadays, the spotlight is over the base erosion and profit shifting (BEPS) problem. According to the OECD:

> BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity. Although some of the schemes used are illegal, most are not. BEPS undermines the fairness and integrity of tax systems because businesses that operate across borders can use it to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers.[67]

In response to the intensification of this issue, the OECD developed a BEPS agenda that resulted in the BEPS Project and Action Plan with 15 actions to address the central problems of the actual CITS linked to base erosion and profit shifting practices. One major problem is that countries have the freedom to design their tax systems accordingly to their particular needs. So, if one state wants, it can lower tax rates without any external interference. Countries are not going to design equal tax systems since there are significant differences in their

[66] *See* Reuven S. Avi-Yonah, *supra* note 4, at 90. "The key observation is that in the twenty-first century unilateral approaches to tax corporations whose operations span the globe are obsolete, and a multilateral approach is both essential and feasible".
[67] About the Inclusive Framework on BEPS, check http://www.oecd.org/tax/beps/beps-about.htm (last visited July 20, 2018).

fiscal structures and tax administrations development. The primary objective is to reach a high level of fiscal cooperation to implement in countries' internal legislations norms that might help to reduce the harmful effects of aggressive tax planning.

The critical point is that the BEPS Project was designed by developed countries facing financial problems even though several countries participate and contribute to the debates conducted by the OECD. The issues faced by the CITS are mostly addressed by the BEPS Project and are not new, being for decades a concern, especially to developing countries.

About harmful international tax competition, the BEPS Action 5 "Harmful Tax Practices" focus on 'improving transparency', 'compulsory spontaneous exchange on rulings related to preferential tax regimes' and 'substantial activity for preferential regimes'. There is no action addressing the tax havens issue directly. But as stated above, the focus when discussing tax havens nowadays is the secrecy issue and not reduced or even zero tax rates anymore.

Transfer pricing is probably the most important subject in the actual CITS, and the BEPS Action Plan deals with it in Actions 8, 9, 10 and 13. Marcos Aurélio Pereira Valadão considers that transfer pricing is the most used instrument to evade taxes internationally, adopted by all economic segments, from raw minerals extraction industries to satellite software ones.[68] And the Action 6 addresses the treaty abuse strategies, reinforcing the adoption of anti-abuse rules in internal legislation to prevent the granting of benefits in inappropriate circumstances.

Although the OECD's BEPS initiative has already resulted in several studies and recommendations to countries about the actual international taxation scenario, provoking many discussions about what must be done to fight the

[68] Marcos Aurélio Pereira Valadão, *supra* note 5, at 175.

intensive use of aggressive tactics by multinationals, individuals and also countries[69] considering each country specific struggles, universal solutions do not exist, what might impede an effective implementation of the harmonization proposed by the OECD.

4. DEVELOPING COUNTRIES AND THE ROLE OF THE CIVIL SOCIETY DESIGNING AN INTERNATIONAL TAX REGIME THAT WORKS FOR ALL

The problems faced by developed and developing countries have different natures, and there is no "one size fits all" solution. The major player in the international taxation arena is undoubtedly the OECD, and most of its Member countries are developed states, even though OECD opens space in the debates for non-member countries, many times developing ones, such as Brazil. Rich countries strongly influenced the development of the international tax regime and naturally, the Organizations' recommendations and initiatives are mainly directed to the interests of its member countries and designed to fit their many times advanced structures.

Developing countries have different needs when compared to developed ones. Generally, they are searching for solutions of problems that may already been overcome by developed nations such as stabilized indicators of the UN's Human Development Index (HDI), which are health (assessed by life expectancy at birth), education by life expectancy and decent standard of living, measured by national gross income per capita. Other differences that set apart developing countries from developed ones should be considered, *e.g.,* economy size, area occupied, population size, available natural resources, political and juridical system and even cultural aspects. When changes are proposed, all these aspects

[69] Ireland is a good example of a country that used to have a loose legislation that allowed big companies to pay almost no taxes when including this country in their tax plan. *See* Marcos Aurélio Pereira Valadão & Rodrigo Senne Capone, *supra* note 33.

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need to be considered[70]. Developing countries' tax systems structures are still under development, and some of the recommendations made by the OECD cannot be implemented, sometimes because of its costs or the technical expertise needed.

Another important aspect of the actual international taxation model is that it facilitates the reallocation of financial resources internationally when individuals and enterprises are searching for tax savings, and as a result, concentration of wealth is also promoted, resulting in an increase of inequality that might compromise even the most robust democracies around the globe, once the financial power ends up concentrated in the hands of few. Aware of this scenario, several non-governmental and non-profit organizations have joined the debate to try to contribute to the construction of an international taxation model that works not for a few, but for the majority.[71]

Until recently, as stated by José Eduardo Sabo Paes, "the sociopolitical order comprised only two sectors, the public and the private, traditionally well distinct from each other, both about its characteristics as to its personality". And he continues stating that "on one side stood the State, the Public Administration, and the society; on the other, the market, the private initiative, and the individuals".[72]. But is important to notice that "the coexistence between the two [sectors – public and private] was frequently difficult, turbulent, due to questions of limits and invasions of territory (...)"[73].

Due to these difficulties, mostly because of this undesirable dualism, a "third sector" emerged, formed by private organizations with public traits, which

[70] Marcos Aurélio Pereira Valadão, *supra* note 5, at 178.
[71] Marcos Aurélio Pereira Valadão, *supra* note 5, at 156.
[72] José Eduardo Sabo Paes, *Fundações, associações e entidades de interesse social: aspectos jurídicos, administrativos, contábeis, trabalhistas e tributários* 81 (8d ed. 2013).
[73] José Eduardo Sabo Paes, *supra* note 72, at 81.

occupies an intermediary position that allows them to provide services of social interest more independently than the state itself and also being able to avoid some unacceptable market impositions.[74] The 'third sector' is composed of non-profit and non-governmental private entities (hereafter, NPOs and NGOs) which develop activities of public interest.[75] The 'third sector' is a residual and wide designation that aggregates a broad set of social organizations that are neither state-owned nor mercantile. They are private social organizations but do not seek profits, and they are driven by public or collective social objectives but are not public. The definition of this sector varies from country to country and reflect the history and the different traditions of them.[76]

The United Nations recognizes the importance of the civil society's work and contributions to the development of the ideals of the Organization's ideals:

> Civil society is the 'third sector' of society, along with government and business. It comprises civil society organizations and non-governmental organizations. The UN recognizes the importance of partnering with civil society, because it advances the Organization's ideals, and helps support its work. Here are some useful websites for members of civil society and also for those interested in the work of the UN.[77]

This sector gained importance over the course of history, linked with the evolution of the modern state in the development of the modern State. The transition from the Police State to the Liberal State has much to do with it since it was constructed based on the ideals of freedom and property protection. In this model, the State would minimally intervene in the private relations. Because of

[74] José Eduardo Sabo Paes, *supra* note 72, at 82.
[75] Rita Tourinho, *Terceiro Setor no Ordenamento Jurídico Brasileiro: Constatações e Expectativas*, 24 REVISTA ELETRÔNICA SOBRE A REFORMA DO ESTADO, at 3 (2011).
[76] Boaventura de Sousa Santos, *Para uma reinvenção solidária e participativa do Estado* in *Sociedade e Estado em transformação* (2001).
[77] United Nations, *Civil Society*, http://www.un.org/en/sections/resources-different-audiences/civil-society/index.html, (last visited July 15, 2018).

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this minimal interference, the State adopted a carelessness posture, moving away from the economic and social sectors, leaving the power concentrated in the hands of those who held the economic power, resulting in weaknesses and misery in the social plan.[78]

Thus, the Liberal State was incapable of corresponding to the social expectations. The freedom collaborated to an economic evolution but resulted in social inequality and a deficiency in the provision of essential public services to guarantee the minimum needed for a dignified existence. A new model of the state was designed, resulting in the Social State. At this moment arose the Welfare State.[79]

The Organized Civil Society assumed a position in many controversial and relevant agendas such as in taxation issues. And the work of the third sector is also recognized by countries and International Organizations, such as the United Nations[80], helping on the implementation of public politics and raising social

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[78] Rita Tourinho, *supra* note 75, at 2-3.

[79] Rita Tourinho, *supra* note 75. *See* Gosta Esping-Andersen, *After the Golden Age: The Future of the Welfare State in the New Global Order*, UNRISD (1994), http://www.unrisd.org/80256B3C005BCCF9/search/D93F019CFA85A04280256B650041F3F5 (last visited July 20, 2018): "The *welfare state*, an important mark of the 'Golden Age' of prosperity in the after war, meant much more than a simple increment of the social policies in the industrial developed world. In general, it represented an effort of the economic, moral and political reconstruction. Economically, it meant an abandonment of the orthodoxy of the pure logic of the market, in favor of the demand of the increase of the employment and gains as citizenship rights; morally, the advocacy of social justice ideas, solidarity and universalism. Politically, the *welfare state* was a part of a project of national construction, the liberal democracy, against the risk of fascism and bolshevism. Several countries declared themselves *welfare states*, not for conducting their social policies in this way, but for promoting and social national integration".

[80] United Nations, *UN and Civil Society*, http://www.un.org/en/civilsociety (last visited July 21, 2018). "The United Nations is both a participant in and a witness to an increasingly global civil society. More and more, non-governmental organizations (NGOs) and other civil society organizations (CSOs) are UN system partners and valuable UN links to civil society. CSOs play a key role at major United Nations Conferences and are indispensable partners for UN efforts at the country level. NGOs are consulted on UN policy and programme matters. The UN organizes and hosts, on a regular basis, briefings, meetings and conferences for NGO representatives who are accredited to UN offices, programmes and agencies".

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awareness on essential causes, many times resulting in debates with members of governments and the private sector. The United Nations' Secretary-General Ban Ki-moon, in his speech at the World Economic Forum in Davos, Switzerland, in the year of 2009, recognized the role of the Civil Society in the new era and stated that "Our times demand a new definition of leadership - global leadership. They demand a new constellation of international cooperation - governments, civil society and the private sector, working together for collective global good.[81]".

Tax-related problems have a high impact on state's social agenda and to help them in this fight several civil society organizations joined the cause against aggressive international tax practices in a try to contribute to the design of a fairer system. Developing countries usually suffer more from problems related to poverty and inequality, and in the last decades these issues have been growing and because of their impact, should also be globally addressed.

The UN and OECD`s Model Conventions are the ones extensively adopted by countries when dealing with international tax issues. So, since the discussions occur in these international organizations grounds, one may ask how the civil society through its organizations can contribute to the debate and also why are they interested in joining this agenda.

As stated before, since the major players control the international tax agenda, their interests and their Member states end prevailing under the interest of the several other countries that have no representation. Decisions are not democratically taken in the international arena. There is nothing such as a "global senate" with representants of each country and horizontally equal with no hierarchy. In the international grounds, economic power plays a significant role.

[81] United Nations, *supra* note 82.

As a try to make the debate fairer and even democratic, the third sector adopted an agenda that cares about developing countries' needs. One of the most active civil society's organization is the Tax Justice Network (TJN), an independent network that advocates in the area of international tax and international aspects of financial regulation. The TJN brings together several organizations from the civil society such as charities, non-governmental organizations (NGOs), social movements and individuals, all "with common interest in working for international tax co-operation and against tax avoidance, tax evasion, and tax competition" and they share a commitment to reduce poverty and inequality for the least well-off around the world.[82] The core goals of the TJN is to "create understanding and debate and to promote reform, especially in poorer countries. We are not aligned to any political party".[83]

In a democratic debate, all the interested parties should be able to participate or be at least represented, being assured that their considerations will be heard. But what can be seen is that not all countries and others interested are invited to participate in the international tax debates, and sometimes they may even be invited, but their considerations are not heard. So, in practical terms, the design of the system is over the control of very few players, a scenario that is not compatible with democratic debate.

The TJN have a very active role in the international taxation debate through the reports published and the discussions promoted. One notable report published by the TJN is "The Price of Offshore Revisited" in 2012, which focused on exposing the offshore system of tax havens and/or secrecy jurisdictions. The results of the report are impressive, estimating that approximately $21-32 trillion

[82] Tax Justice Network, *Tax Us If You Can* (2d ed. 2012), http://www.taxjustice.net/cms/upload/pdf/TUIYC_2012_FINAL.pdf (last visited July 20, 2018).
[83] Tax Justice Network, http://www.taxjustice.net/about/who-we-are/ (last visited July 20, 2018).

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of financial wealth[84] are hidden offshore, where low or zero tax was paid and under substantial secrecy. As pointed by the TJN, this impressive quantity corresponds to the size of the United States and Japanese economies combined.[85][86]

The effects of the adoption of aggressive tax schemes are very prejudicial to everyone, but mostly to those individuals located in developing countries, that relies in the states' public services. People all around the world have realized that these harmful tax-related practices keep countries from growing, kids out of the school, people dying from hunger amongst many other losses not only locally but in a worldwide base. And all these facts together show the increased need for 'tax justice advocates and their allies in governments and in the public, especially in 'source' countries where the wealth is coming from, to press the relevant authorities [...]'.[87]

But more than debating, TJN keeps monitoring the measures adopted to fight harmful tax practices. As soon as the "Addressing Base Erosion and Profit Shifting" report was published by the OECD, in 2013, TJN and other civil society's organizations published a response entitled "No More Shifty Business", stating that the problems mentioned – problems that allowed Multinational Enterprises to avoid paying their fair share of tax and undermine efforts to tackle poverty and

[84] This estimative refers only to financial wealth, excluding real estate, yachts and other non-financial assets owned via offshore structures. TJN also points that the quantity was estimated in a conservative way, what means that this number may be much bigger. Tax Justice Network, *Revealed: global super-rich has at least $21 trillion hidden in secret tax havens*, http://www.taxjustice.net/cms/upload/pdf/The_Price_of_Offshore_Revisited_Presser_120722.pdf> (last visited July 20, 2018).
[85] Tax Justice Network, *supra* note 84.
[86] "If this unreported $21-32 trillion, conservatively estimated, earned a modest rate of return of just 3%, and that income was taxed at just 30%, this would have generated income tax revenues of between $190-280 bn – roughly twice the amount OECD countries spend on all overseas development assistance around the world. Inheritance, capital gains and other taxes would boost this figure considerably." Tax Justice Network, *supra* note 84.
[87] Tax Justice Network, *supra* note 84.

inequality – were not new. They also pointed out that developing countries have been suffering from an unfair and ineffective tax system, but only when the richest economies felt the consequences of that system, the G20 and OECD decide to find solutions for it.[88]

Another concern expressed in the "No More Shifty Business" report is the need to include the developing countries in the debate since they have "suffered by far the most negative effects of ineffective and unfair international tax rules". So, any process to revisit the fundamentals of the actual CITS should include developing countries in the deliberations and decision making.[89]

Lately, during the works around the BEPS agenda, the TJN made essential contributions again. Besides monitoring the works conducted by the OECD, the TJN made suggestions when a public consult was addressed openly to the society about transfer pricing issues. The participation of the civil society is crucial. Leaving the agenda under the control of just a few might result in a work that will not address adequately the problems faced by the majority of countries, just postponing a proper debate and retreating from what matters.

The TJN is a member of the BEPS Monitoring Group (BMG), a "global network of independent researchers on international taxation, concerned especially with the effects of international taxation on development".[90] The *Transfer Pricing Comparability Data and Developing Countries* brings interesting recommendations to developing countries about the transfer pricing issue based on the BEPS initiative:

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[88] Tax Justice Network, *No More Shifty Business* 2 (2013), http://www.taxjustice.net/cms/upload/pdf/OECD_Beps_130327_No_more_shifty_business.pdf (last visited July 20, 2018).
[89] Tax Justice Network, *supra* note 88, at 2.
[90] The BEPS Monitoring Group, *What is the BEPS Monitoring Group*, https://bepsmonitoringgroup.wordpress.com/what-is-the-beps-monitoring-group/ (last visited July 26, 2018).

> (...) learn from the mistakes of the OECD countries, and build their own experience, for example the 'sixth method', or the Brazilian approach;
> Anticipate rather than await reforms likely to result from initiatives to combat BEPS, such as country-by-country reporting;
> establish methods which are clear, transparent and easy to administer without the need for significant ad hoc investigation or subjective judgment;
> coordinate transfer price scrutiny with other anti-avoidance measures such as denial of deductions for inappropriate payments to related entities.[91]

Another important non-profit and non-governmental organization is the OXFAM, which is a confederation of affiliated organizations that work in approximately 100 countries fighting the injustice of poverty. As stated by the organization, they '[...] challenge the structural causes of the injustice of poverty, and work with allies and partners locally and globally'.[92]

Poverty is rooted in human actions or inactions, what can be worsened, as an example, by base erosion and profit shifting caused by harmful tax competition, which has a direct impact on the social agenda, mainly in developing countries as history has shown.

The report *Owning Development*, written by Deborah Itriago, raises the taxation issue, pointing out that countries need to collect more taxes to ensure public services. Also, the author affirms that taxes should be raised in a progressive and in a fair way, but points that in developing countries, tax policies have been influenced by the International Monetary Fund (IMF) and national elites. It shows that it is tough to fight these harmful practices since the powerful

[91] BEPS Monitoring Group, *Transfer Pricing Comparability Data and Developing Countries* 2 (2014), https://www.oecd.org/ctp/transfer-pricing/bmg-comparibility-data-and-developing-countries.pdf (last visited July 25, 2018).
[92] Oxfam, http://www.oxfam.org/en/our-purpose-and-beliefs (last visited July 22, 2018).

ones that take advantage of them are also in high positions where they can influence how the state design its norms.[93]

Developing countries' tax and regulation policies have often been imposed, or at least strongly recommended, by the International Monetary Fund (IMF) and other international financial institutions (IFIs) as a condition of their financial support. This reduces the capacity of these nations to openly decide between different policy options, as well as their ability to control and reduce capital flight and tax dodging. Historically, the IMF have consistently favored economic efficiency and short-term tax collection goals over other objectives, often promoting taxes that are easiest to collect, with the lowest political costs, and that least affect the interests of the establishment. Such tax policies are not necessarily the most suitable for developing countries. However, recent papers from the IMF show promising signs that this approach may be changing and that they may now be ready to take a more progressive stance on taxation policy.[94]

In the last years, Oxfam has been focusing on discussing and monitoring issues related to poverty and inequality.[95] In the report *Tax incentives in the global South*, Oxfam, ActionAid UK and Christian Aid, all civil society's organizations (they entitled themselves as 'international development organizations'), recognize the role played by the private sector creating jobs, investing and promoting growth and also the importance that tax incentives can have if efficiently used. But the

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[93] Deborah Itriago, *Owning Development: Taxation to Fight Poverty* (2011), http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/rr-owning-development-domestic-resources-tax-260911-en_3.pdf, (last visited July 23, 2018).
[94] Deborah Itriago, *supra* note 93.
[95] Oxfam publishes several reports every year. To cite some more recent and related to taxation issues: *Taxing for shared prosperity: policy options for the Asia-Pacific region*, *Taxing for a more equal Kenya: a five-point action plan to tackle inequality*, *Blacklist or whitewash? What a real EU blacklist of tax havens should look like*, *Stopping the Scandals: five ways governments can end tax avoidance* and *Tax incentives in the global South*, all available at https://www.oxfam.org/en/research (last visited July 25, 2018).

problem is the inefficient use of this instrument by several countries. In the report, they state that "incentives should only ever be granted following effective and transparent mechanism for evaluating costs (environmental, fiscal, exacerbation of inequalities including gender inequality) and benefits"[96].

The civil society has been participating in the taxation debate, being recognized by the efforts to build a better world and representing the interests of those that have no means to interfere in the design of a new international taxation system. More than ever all the society's sectors must work together to fight for a fairer tax system to bring more resources to help countries fighting poverty, hunger, and inequality.

5. Final Remarks

As this study revealed, the dominant player in the design of the actual international tax system is the OECD, which many times do not give space at the debate to developing countries that have specific needs accordingly to their stage of development and their political, juridical and administrative structures.

The major tax issues that affect mostly the developing countries need to be adequately addressed. For instance, developing countries need to adopt methodologies that simplify the implementation of the arm's length principle. One example is the adoption of the sixth method when exporting and importing agricultural and extractive commodities. To avoid revenue loss tax treaties signed by developing countries must preserve taxation at source, which is more in line with the UN Model.

[96] OECD, *Tax incentives in the global South* 4 (2017), https://www.oxfam.org/en/research/stopping-scandals-five-ways-governments-can-end-tax-avoidance (last visited July 25, 2018).

Until an adjustment to reality is made, the CITS will continue to have flaws and loopholes that allow companies and individuals to aggressively design their tax plans and reduce their tax burden at the cost of countries' fiscal balance. The major players in the field need to observe the reality of developing and developed countries.

Maybe one day there will be space for developing countries discuss and be heard in the debate about international taxation policies and meanwhile, the 'third sector' efforts will be an essential contribution to the design of a fairer taxation system that fits the needs of developed and developing countries, with the focus in reducing problems that affect the entire globe such as poverty and inequality.

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