Welcome address

Josée Fecteau, OECD Director for Legal Affairs:

[0:00:00]

Dear President Amirfar, President Sorel, Dear panellists and guests, welcome and thank you very much for attending this event to celebrate the OECD's 60th anniversary. This conference is jointly organised by the OECD, the Société française de droit international (SFDI) and the American Society of International Law (ASIL).

My name is Josée Fecteau. I am the Director of Legal Affairs here at the OECD.

During this conference, we will discuss the OECD standard-setting method and whether it could serve as a model in the new global context.

Laissez-moi vous décrire très brièvement le déroulement de notre après-midi. Nous allons tout d'abord écouter une brève intervention enregistrée du Secrétaire général de l'OCDE, Monsieur Mathias Cormann, qui aurait voulu être parmi nous mais qui est occupé par la COP26.

Suivront des remarques introductives de Catherine Amirfar, Présidente de l'American Society of International Law et de Jean-Marc Sorel, Président de la Société française de droit international.

Vous allez ensuite pouvoir assister à deux tables rondes :

- La première, que j'ai l'honneur d'animer, présentera la « méthode » normative de l'OCDE, une organisation internationale atypique tant dans sa composition que dans sa gouvernance et ses méthodes de travail.

- La seconde, animée par Nicola Bonucci, associé chez Paul Hastings et ancien conseiller juridique de l'OCDE, s'interrogera sur la possibilité d'optimiser le potentiel de la méthode normative OCDE dans le contexte global actuel et les leçons que l'on peut tirer de l'expérience de l'OCDE ?

Nous conclurons avec Ulrik Vestegaard Knudsen, Secrétaire général adjoint de l'OCDE, qui présentera quelques observations sur nos débats.

Finally, let me briefly touch upon a few housekeeping matters.

- This event, as you've just noticed, is recorded in both audio and video, and we will do our best to make it available on the OECD website at a later point. I

would ask all members of the public to please turn off their video and audio during the recording of the event.

- Interpretation is available on the Zoom platform in English and French. If panellists wish to use the interpretation function, please do remember however to deactivate the function before taking the floor.

- If members of the public wish to ask questions to the panellists, I would invite them to do so in the "chat" and both Nicola and I will do our best to mesh them into the conversation with the panellists.

- Similarly, if you have any technical problems, please mention it to the staff on the "chat".

So let's start with the intervention from Mr Cormann.

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Opening remarks

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Mathias Cormann, OECD Secretary General:

[03:02:00]

President Catherine Amirfar, President Jean-Marc Sorel,

Mesdames et Messieurs, chers invités,

Je suis ravi de célébrer avec vous ce qui nous unit à l'OCDE depuis soixante ans - nos valeurs et normes communes.

Je remercie la Société française de droit international et l'American Society of International Law pour l'organisation de cet événement.

Today's event celebrates 60 years of OECD standard-setting, of substantive policy work based on strong expertise and evidence, and of constant evolution to improve how the OECD sets standards.

The Organisation has made tremendous progress to increase the visibility and the implementation of its standards. And this is of course a collective effort.

The Secretariat plays an important role but the primary responsibility lies with our Member countries which have embraced the progress we made.

Together, OECD members share a commitment to democracy, the rule of law, human rights, gender equality and a commitment to open and transparent market-economy principles.

We provide a highly effective values based international platform for cooperation to find the best possible solutions to the evolving challenges of our time. And we provide comparative data and policy analysis and evidence based advice on policy best practice and, importantly, we set standards. Our shared values and our methodology have stood the test of time.

Our standards are one of the major tools by which our shared values are given real meaning and promoted and advanced around the world.

The OECD has developed more than 450 legal instruments since its creation sixty years ago, 250 of which are still in force today. They help level the playing field. For example, standards such as the Codes of Liberalisation and Mutual Acceptance of Chemical Test data have supported international exchanges of goods, capital services and information. Standards on public governance, consumer protection and privacy have also all helped improve domestic outcomes and the well-being of citizens all around the world. In recent years, the OECD has developed innovative standards on cutting-edge issues like the taxation of multinational enterprises (BEPS) and principles for responsible stewardship of trustworthy Artificial Intelligence.

At our most recent meeting of the Council at Ministerial level three weeks ago, we have adopted three completely new legal instruments:

1. on enhancing access to and sharing of data,
2. on agile regulatory governance to harness innovation and on transparency
3. and on procedural fairness in competition law enforcement.

Five years ago, we started an OECD-wide standard-setting review. The goal of this exercise was two-fold.

First, to ensure that OECD standards remain fit for purpose and continue to support governments in the most effective way.

And Secondly, to take a step back and look at how the OECD set standards. As a result of this exercise we have cleaned up our stock of OECD Legal Instruments with 54 legal instruments abrogated and many updated.

We have also identified new areas for the Organisation to set standards, such as artificial intelligence or innovation in neurotechnology, and also improved the way we go about setting standards.

I would like to now share with you four ways on how we have improved the way we set standards.

First, we systematically develop tools to support the implementation of OECD standards. It is vital that Members and Secretariat work hand in hand on this. Over time, we have used more innovative tools and follow-up processes. In particular, we have developed what we call "implementation toolkits" which provide detailed guidance and best practices advice for each of the provisions of the concerned standard.

Secondly, we have improved our tools to promote OECD standards. To increase the visibility of our standards, we have recently revamped completely our online Compendium of OECD legal instruments. This online platform includes not only the text of the legal instruments but also important background information and documents with a downloadable booklet and unofficial translations.

Thirdly, we reach out to other international organisations and fora to maximise the reach of OECD standards. The OECD's flagship standards have been recognised and endorsed in other international organisations and fora, in particular the G20, giving them a global impact. This is increasingly important since, in today's world, the real impact of OECD standards will depend on their implementation by countries outside the OECD.

And fourthly, we try to react quickly to emerging issues. There are emerging challenges where the OECD has the potential to play a key role in setting the rules of the game, for example when it comes to the regulation of new technologies. We strive to identify these areas early on and to ensure that the OECD's voice is heard and influences the global debate because it's relevant.

The OECD standard-setting method has proven particularly useful to react quickly to emerging issues – as an example, the Recommendation on AI was developed in less than six months' time.

Chers collègues, je regrette de ne pas être avec vous aujourd'hui mais je vous laisse entre de très bonnes mains. Je vous souhaite à tous de profiter pleinement de cet évènement. La discussion que vous aurez aujourd'hui est fondamentale pour que l'Organisation continue d'améliorer son processus d'élaboration des normes. Vos interventions vont grandement contribuer à notre réflexion et je remercie tous les organisateurs et participants pour leurs interventions. Merci beaucoup.

Josée Fecteau:

[09:55:00]

May I now invite Catherine Amirfar to say a few words on behalf of the American Society for International Law. Catherine, the floor is yours.

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Introductory remarks

Catherine Amirfar, President of ASIL:

[10:10:00]

Thank you so much. Greetings everyone from New York City. Bonjour.

My name is Catherine Amirfar and I have the privilege of serving as the President of the American Society of International Law.

It's my pleasure today to help welcome you to this joint event held by the OECD, ASIL and our colleagues at the French Society for International Law on the occasion of the OECD's 60th anniversary.

On behalf of the Society I want to wish the OECD a glorious 60th. Since its foundation in 1961, the OECD has been an enterprise engaged by governments on policies to support resilient, inclusive and sustainable growth. It was and continues to be a community of like-minded. Committed to individual liberty, the values of democracy, the rule of law and defence of human rights. It is no wonder that the synergies between the OECD and ASIL remain.

ASIL was established in 1906 and chartered by the US Congress in 1960 with the mission to foster the study of International Law and promote the establishment and maintenance of international relations on the basis of law and justice. At ASIL we are proud to count ourselves among the like-minded community that also animates the OECD.

On April 7th 2018, under the inspired leadership of the then ASIL President, Lucinda Low who is with us today, ASIL and the OECD signed a Memorandum of Understanding to serve as a special basis for cooperation on legal issues ranging from anticorruption and Responsible Business Conduct to cybersecurity, data protection, migration and regulatory standard setting.

In the years since its signing, our respective Organisations have enhanced a cooperation, especially in coming together to co-host programs, in addressing topics as varied as transnationalisation of anti-corruption law and hosting OECD representatives at ASIL's Annual Meeting in 2019 in an exploration of multilateralism's evolution in navigating a rising title for nationalism.

We are very proud to join this latest collaboration with the OECD and SFDI to discuss the OECD method as a model in the new global context. Today we ask through the lens of the work of the OECD and its methods if the system set up in 1945 should evolve and if so how? It will surprise no one to hear that equally, we at ASIL, are focused on this pivotal and uncertain world affairs making it especially important for us to come together as a global community to consider and debate the issues that matter most. We've made it a priority at ASIL to identify opportunities for collaboration and it is no exaggeration to say that our work with the OECD is among one of our most valued collaborations.

I want to end by extending a special thanks to Nicola Bonucci, who's been such a brilliant and valuable member of the ASIL leadership and who of course is very well known to the OECD from his time as Director of OECD Legal Affairs. Nicola, thank you for the energy you have brought to our two Organisations, including bringing us together today for this important event. And Josée, we are so happy to be working with you. Thank you all and I look forward to the discussion.

Josée Fecteau:

[13:45:00]

Thank you so much Catherine. Now j'invite Jean-Marc Sorel qui est le Président de la Société française de droit international, de nous dire quelques mots.

Jean-Marc Sorel, Président of SFDI:

[13:59:00]

Merci beaucoup et I will speak in French. Je vais commencer par, ce par quoi ma collègue Catherine Amirfar a conclu son intervention, par remercier très sincèrement Nicola Bonucci qui est un membre de la Société française de droit International et qui fait merveilleusement le pont entre pas mal d'Organisations dont l'OCDE, que vous connaissez bien, et notre Société française. Je suis très heureux de très brièvement ouvrir cette réunion sur le 60e anniversaire de l'OCDE en compagnie de ma collègue Présidente de l'American Society for International Law. C'est toujours un grand honneur de se voir même si c'est entre New York et Paris par Zoom.

Alors, finalement je pense que les panels qui vont avoir lieu résument tous les grands questionnements du droit international, et en cela d'ailleurs ce sera très intéressant de voir que l'OCDE finalement pose les principaux problèmes de droit international que cela soit d'un point de vue institutionnel ou normatif. On y retourne la question d'un plurilatéralisme qui s'impose comme un multilatéralisme, une vocation multilatérale où on y retrouve la place de l'expertise technique et des autres parties prenantes.

On voit bien qu'aujourd'hui le cercle n'est plus un cercle uniquement interétatique, loin de là. On y retrouve également le mécanisme de suivi par les pairs et ceci bien sûr, fondamental car qui dit mécanisme de suivi dit soft law dans le monde actuel. Alors, est-ce que la soft law est l'avenir du droit international ? Je ne sais pas. C'est une question qui est posée. Pour le moins c'est le présent et c'est même le passé du droit international puisque ce fut le premier domaine dans lequel on a connu cette manière d'envisager le droit, la soft law.

Bref, je pense que l'OCDE est un laboratoire à elle toute seul qui s'adapte au monde ambiant et qui le fait progresser. Le Secrétaire General vient de rappeler les dernières grandes avancées dans ces domaines de l'OCDE et je crois que le travail est immense et qu'il continue d'être très profitable pour l'ensemble des acteurs de la planète que cela soit les États ou les secteurs privés.

Alors, quoi qu'il en soit, ce débat continue, heureusement. Un évènement qui avait déjà été co-organisé avec la Société française pour le droit International il y a 10 ans lors du 50e anniversaire de l'OCDE (le temps passe très vite) qui avait donné lieu à un ouvrage intitulé « Le pouvoir normatif de l'OCDE ». Un ouvrage très intéressant et j'ai très brièvement repris les conclusions de Catherine Kessedjian à l'occasion de cette journée il y a 10 ans et on s'aperçoit que les grands problèmes qui étaient posés sont toujours ceux qui sont posés aujourd'hui mais sans doute avec plus de force qu'ils ne l'étaient il y a 10 ans. Elle invoquait dans les points forts en conclusion l'évaluation par les pairs, elle invoquait la constante adaptation des normes en matière - pour l'OCDE et elle abordait également ce qu'elle appelait la complémentarité du droit et des normes tendres. J'aurais peut-être un petit désaccord avec elle sur « complémentarité du droit et des normes tendres ». Je pense que les normes tendres font partie du droit tout simplement. Il faut décrire, ou définir, ce que l'on entend par les formes de puissance dans la norme et autrement dit dans la soft law.

Alors comment l'OCDE peut-il optimiser encore plus ce cadre déjà très riche ? Je n'ai pas les réponses. Les panelistes vont sans doute y répondre. Pour ma part, et sous une forme de plaisanterie ou boutade si vous préférez, je dirais que l'OCDE devrait peut-être plus se politiser pour apparaître moins uniquement technique. Et à l'inverse, les organisations internationales, que je qualifierais de classiques, devraient peut-être apparaître moins politiques et plus techniques.

Un équilibre est à trouver parce que bien sûr tout est politique et tout doit le rester mais le support de l'expertise est absolument indispensable et dans ce domaine je pense que l'OCDE s'est montré absolument indispensable. Donc merci encore une fois à l'OCDE pour nous avoir associé à cette belle manifestation et je laisse maintenant la parole aux panelistes. Merci.

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1st Round Table: What is the OECD method?

Josée Fecteau:

[18:48:00]

Merci beaucoup Jean-Marc et merci à vous de fêter avec ce nouvel évènement, notre 60e anniversaire. C'était toute une année de manifestations et de célébrations. On aime beaucoup les bougies à l'OCDE. Alors on commence avec la première intervention. Permettez-moi d'abord à vous présenter les panélistes :

- **Hervé Ascensio** qui est Professeur de droit international à l'Université Paris 1

- **Lucinda Low** who is a Partner at Steptoe & Johnson in Washington and former President of the American Society of International Law

- **Sean Hagan,** visiting Professor of Law at the Georgetown University Law Center and former General Counsel of the International Monetary Fund

- **Gita Kothari** who is my Deputy, the OECD Deputy Director of Legal Affairs

Again let me remind those of you from the public who arrived a little bit late to turn off your video because this event is recorded and if you have any questions for the panellists to put them in the chat.

So my first question is to set the scene for those of you who are a bit less familiar with the OECD and with the OECD working methods. It is a question to Gita Kothari.

Gita, as one who has been closely involved with the development of OECD standards, what would you say characterises OECD standards and what trends do you see in OECD standard-setting?

Gita Kothari, OECD Deputy Director for Legal Affairs:

[20:43:00]

Thank you Josée and good morning or good afternoon to everybody. So to kick off the discussion today, as Josée said, I'll give a quick overview about OECD standards and trends that we can see. And maybe a first word on terminology. Within the OECD, we use the term "standards" in a very broad sense. It covers both policy principles and technical standards and this is in contrast to some other Organisations, for example the World Trade Organisation or the International Standards Organisation which use the word "standards" in more of a technical standards sense. So, that's maybe an important reference for what we will discuss today.

As the Secretary General mentioned, since its creation the OECD has developed many standards, in fact more than 460 standards over the 60 years of existence. We have over 250 that are in force today. As the Secretary General also mentioned, we have recently undertaken an Organisation-wide "standard-setting review", launched in 2016, to strengthen the impact and relevance of its standards. This included a review of the whole stock of OECD standards but also resulted in an in-depth reflection on how to improve the OECD's standard-setting activity going forward. A lot of what I will say in my intervention is material that has come out of this standard-setting review.

If we think about the objectives that OECD standards are seeking to fulfil, I've identified three.

The first one is to level the playing field and I think this is probably the over-arching objective that we see throughout OECD standards. So, looking at ensuring fair competition between actors on the international arena, whether States or companies. Examples here would include the work we've done in Tax Base Erosion and Profit Shifting (BEPS), the Anti-Bribery Convention of course, and Guidelines on State Owned Enterprises.

A second objective that we can see, which the Secretary General mentioned, is supporting international exchange. So, this would be facilitating the transfer of goods, capital, services and information across borders. Examples here include the Codes of Liberalisation (the investment codes), the Mutual Acceptance of Chemicals Test Data, the standards on transboundary movements of waste and the agricultural codes & schemes which include technical standards on seeds, on forest, on fruits and vegetables.

Finally, we have standards that seek to improve domestic outcomes and well-being and these are internationally agreed policies but for implementation really at the domestic level to benefit individuals and societies. Examples of those standards

include in the area of public governance, regulatory policy, digital security, privacy and consumer protection to name a few.

These objectives are not mutually exclusive. Some standards achieve two or all three of those objectives. For example, the Anti-Bribery Convention levels the playing field between companies and countries but also improves outcomes for citizens by fighting corruption.

So in a nutshell, an OECD standard sets out a collective agreement among countries about what they shall do (so our legally binding Decisions, treaties), what they should do (and those would be our Recommendations) or what they intend to do (and that would be the Declarations or other outcome documents from OECD meetings).

One key point, which I think we'll come to during the discussion today, is that the overwhelming majority of OECD standards are not legally binding: so that's 85% of standards in the OECD that are non-binding compared to 15% which are legally binding. 73% of the total stock of OECD standards are non-binding Recommendations. However, although most OECD standards are not legally binding, they entail a strong political commitment and their implementation and impact goes beyond their legal status. Again, this use of "soft law" is something we'll come back to later in the discussion.

So, I would highlight five other key features that characterise OECD standards:

- First, the way that they are developed through an evidence-based, "bottom-up" process. The work on an OECD standard does not start with a pre-determined policy end point. Rather it starts with data/information collection and the standard takes shape gradually through analysis and discussion in the OECD technical committees.

- The second highlight is the fact that decisions on adoption of standards are taken by consensus. This is possible as a result of the gradual consensus-building throughout the development process so that, by the point of adoption, all countries are already committed to the standard and its implementation.

- The third point, which the Secretary General also mentioned, is that the OECD standard-setting process can be flexible and agile to adapt to different circumstances and respond to political imperative. So while some Instruments do take years to develop, the OECD can also move quickly when it needs to. An example of this is the Recommendation on Artificial Intelligence developed in just 4 months and the BEPS Multilateral Convention, a complex multi-lateral treaty, negotiated in 18 months. And we will be seeking to beat new records with our next Multilateral Convention on Tax.

- The fourth feature to highlight is the multidisciplinary mandate. With a very broad mandate, the OECD has policy expertise in many different areas and OECD standard-setting brings together these different policy perspectives on the same issue through cross-committee work e.g. the Recommendation on Water which combined perspectives on water through the lenses of environment, regional development, agriculture, development and regulatory policy.

- Finally, the last feature I highlight is the OECD's implementation mechanisms, in particular the hallmark peer review process. In several areas, countries undergo in-depth review of their implementation of OECD standards by other countries and take concrete action in response to the resulting recommendations. There are also other ways the OECD has sought to encourage implementation, including regular sharing of experience and toolkits for implementation.

In terms of the trends, there would be three key trends that I can identify looking back over the last 60 years.

The first would be the move towards soft law. When we look at the 24 legally-binding Decisions in force today, almost all of them were adopted in the first 30 years of the OECD's existence. In the second 30 years, ie. since the early 1990's, the focus has really been on using Recommendations. So, if we look at the figures we have 54 Recommendations adopted between 1961 and 1991 and 122 Recommendations adopted between 1991 and 2021.

The second trend would be the greater global interest in and impact of OECD standards. At the outset, OECD standards really were designed exclusively for OECD Members. This becomes clear when you look at the text of some of older instruments like the Codes of Liberalisation which refer throughout to OECD Members. Over the years, as the share of global GDP and economic influence of OECD Members decreased, it became essential for the OECD to engage with countries outside the membership for its standards to reach their objectives, in particular those that were aimed at creating a level playing field. There have been some notable successes in terms of global impact in the area of tax (exchange of information, BEPS), in corporate governance and in corporate social responsibility.

The third trend I would identify is a greater inclusiveness in the standard-setting process. OECD standard-setting has gradually opened up from being a closed door process among OECD members, opening up in two ways to different policy communities within the OECD, leveraging the multi-disciplinary mandate, but also to stakeholders outside the OECD, whether we speak about non-Member countries or non-governmental stakeholders, both the private sector and civil society.

So, those are perhaps the remarks I would make at the outset and I turn it back to Josée.

Josée Fecteau:

[29:10:00]

Thank you so much Gita for this introduction that sets the scene very well. Going now from the insider view to the external view, I would turn to the other panellists. I would like to ask you (seeing this from the outside of the Organisation), if you were to select one key factor that explains the impact of the flagship of OECD standards (for example in the tax area, anti-bribery area, corporate governance, responsible business conduct, privacy) what would that factor be in your eyes? Can I call on Lucinda to kick-off the conversation?

Lucinda Low, former President of ASIL, Partner at Steptoe & Johnson:

[30:01:00]

Thank you Josée and to the OECD for organising this event. Of course, congratulations on this milestone. It's a good time to be taking stock and on behalf of ASIL, the American Society, we are delighted to be a part of this.

In truth, I would say turning to your question, it's really difficult to isolate one factor alone that has contributed to the success of the OECD because I do believe there are multiple factors that play into the mix. But taking the areas you just mentioned and building on what Gita has just said, I think what really stands out to me at the outset is how many of them do rely on soft law rather than hard law approaches.

The use of guidelines or other guidance or principle-based approaches can be found in all of the areas you mention, and some of them going back quite early. In privacy, the OECD privacy guidelines I believe were first issued in 1980 and then updated in 2013. In corporate governance, the OECD principles were first issued in 1999 and then revised in 2015. In the area of responsible business conduct, where there's a lot that the OECD has done but looking at the foundational guidelines from multinational enterprises, those go back to 1976 and have been revised multiple times since then. We have already touched on the area of tax and I join in congratulating on the BEPS Convention.

Anti-corruption (the area where I personally have probably worked most closely with the OECD) is actually a little bit of an outlier in this regard because although there are soft law instruments here that have been very important (an early Recommendation of the Council for example on tax deductibility or the good practice guidance on

internal controls that have had a big impact well beyond the OECD), there is also, as has already been mentioned, a Convention which is a hard law instrument and it of course depended on a threshold level of political will from the OECD members states. But it is a very interesting instrument because it's quite tailored. It focuses only on a core issue of bribery in International business transnational bribery and really stands in stark contrast with another number of conventions in the field which are more probably engaged. And it has become in my judgement and in the judgement of many others, the most effective of the international instruments in the field precisely because of this targeting but not only because of it. That's one important factor but you also have other features of the OECD system that I think have contributed to its success and that includes the mutual evaluation or peer review mechanism that I can perhaps talk about a little bit later. But you can't join the convention. It is open to non-OECD member States but you can't join this convention without also joining the Working Group on Bribery and that means signing up for the Peer Review (which I'll talk about later) which is quite searching and rigorous.

And those observations, Josée, allow me to draw a little broader lesson going beyond the soft law/hard law point I made earlier when talking about key factors… my sense from the outside is that there's very careful thinking and consensus building at the OECD about what's needed, what is appropriate, what can be effective. And the discussion is considered and relies on a core political will but goes beyond that political will to build a substantive consensus. So, I think there really are multiple factors at the end of the day that make this process work.

We'll talk more about this I think but the more limited membership and the sense of a peer review group is important. I think we can also highlight, and I've seen this first hand, the importance of the quality work that's done by the OECD staff in various parts of the Organisation. I think outside input as well, both systematised though Organisations like the BIAC and the TUAC (which bring in business and labour), but also more ad-hoc discussions with civil society more broadly (which certainly occur in multiple contexts) are important. It is also the willingness of the Organisation to re-examine. The Secretary General made this point. Gita has made this point. But virtually all of the guidance documents I cited to earlier have been updated or revised to reflect new experience and this adds credibility to the product and I think reduces the purely political component.

My last point, and it really goes back to the beginning where I talked about soft law, is that products in soft law form can perhaps be more easily embraced by States and others. Many are directed not at States but at different constituencies in the private sector and with the implementation tools to encourage update. I think it's a whole package, Josée, that ultimately contributes to this success. Let me stop there. Perhaps others have comments.

Josée Fecteau:

[36:27:00]

Ok, would another panellist like to jump in? Maybe Sean or Hervé?

Hervé Ascensio, Professor of International Law at the University Paris I:

[36:40:00]

I will talk in French thanks to the translation. Tout d'abord, je peux dire que je suis très heureux de participer à cet anniversaire de l'OCDE qui est une belle Organisation et une Organisation assez originale comme cela a été dit.

Je partage vraiment l'analyse faite par Lucinda Low. J'avais choisi comme facteur principal l'idée du processus normatif.

L'OCDE est en permanence engagée dans un processus de création des normes et revient sur ces normes de façon régulière. Alors, grâce aux procédures de suivi mais aussi pour s'adapter aux besoins de la société globale, et peut-être plus facilement qu'on ne pourrait le faire avec un traité, les procédures d'amendement des traités sont très lourdes en domaine économique et peut-être même spécialement en ce moment, on a besoin d'une adaptation rapide. Alors je pense que la stratification des normes sur un même thème est une marque de l'OCDE. On a parlé de la corruption bien sûr, et de la Convention de 1997 mais elle est vraiment enrichie par la Recommandation de 2009 qui intègre tout le travail de suivi qui a été réalisé sur cette Convention et également la Recommandation de 2017 sur l'intégrité publique. Tout cela forme un ensemble. Et par ailleurs, on constate aussi que l'OCDE revient régulièrement sur les normes qui sont peut-être la marque de son succès. Par exemple, sur les principes sur les prix de transferts qui sont régulièrement mis à jour. Il y a beaucoup de textes pour lesquels on a plusieurs versions, mais ces versions prennent en compte l'application qui a été faite aux normes et il y a un aller-retour entre la norme et sa mise en œuvre, son application par les administrations et par les entreprises.

Voilà l'idée qui est pour moi la plus importante. C'est ce processus constant et récursif d'une certaine façon qui vise à bien améliorer et adapter les standards.

Josée Fecteau:

[39:20:00]

Parfait, merci beaucoup. Est-ce que Sean… oui vous voulez la parole…the floor is yours Sean.

Sean Hagan, visiting Professor of Law at the Georgetown University Law Center and former General Counsel of the International Monetary Fund:

[39:33:00]

Thank you. First of all, let me congratulate the OECD for having organised this conference and Josée, thank you for including me on this panel. I think it is helpful to consider the unique quality of the OECD's work product by also looking at its governance structure. Because I do think it has some important dimensions that make it somewhat unique and I think contributes to the impact it has.

The first one is a legal point but I think it's an important one, which is that the OECD Convention delegates a considerable degree of authority to the Organisation. So in other words its members have delegated authority to the Organisation by virtue of article 5 which basically allows the Council, the principal decision making organ, to adopt decisions that are binding on its members. So, these are legally binding Decisions and even though as Lucinda pointed out, a lot of the standards are soft. Some of the critical ones, for example the Code on Capitalisation, is one of these legally binding Decisions on all members. For example, the Capital Code is obviously not only relevant for the OECD Members but is a very important analytical instrument for other Organisations including the IMF for whom I worked for many years. So, that is the first thing I would say… what I call the enabling authority that has been granted to the Organisation itself. Now, one of the reasons why the Members were willing to grant that authority to the OECD when they signed the Convention was because decisions are made by consensus, so each Member would at the end of the day have a veto but what's important is you do not have to amend the treaty. In other words, this is a decision by an organ of the Institution. These obligations do not require going back to the member countries which can often be a long and uncertain process. So, that's the first thing I would say.

The second dimension of governance that I would emphasise is when you look at International Organisations. They comprise of the political organs that basically provide political legitimacy but they also have the Secretariat which are basically the head of the institution, in the OECD's case, the Secretary General and the staff, both of whom basically owe an exclusive duty of loyalty to the institution, non-political. Different organisations balance this political and sort of technical component in different ways. For example, the IMF is perhaps on one end of the spectrum because the managing director and staff are actually responsible for the day-to-day operation of the work of the Fund and the managing director chairs the executive broad and the staff is around 2,500 for about 190 countries. On the other end of the spectrum, you have the WTO where the Secretariat plays very much a more limited role, a facilitating role where for the same number of members I think they have a staff of 640. What is

interesting about the OECD is that even though it has a limited number of Members, it has a very large staff which signals the degree to which it relies on the staff for a lot of the technical work and my view is that the quality of the work product is a function in part of sort of the non-political intellectual leadership of the staff. Both as an academic but also when I was at the Fund I was a great consumer of the work of the OECD simply because it was of extremely high quality and was very much evidenced based. There was a sense that it was a non-politicalised product.

The third thing I would point out is by virtue of having a limited Membership, there is always an issue for the OECD in having its standards essentially accepted by non-OECD countries. I experienced this for example when I was at the IMF when we would discuss the capital code and other codes. There was a degree of concern that because they were adopted by a more limited membership than the universal membership of, for example, the IMF, that they did not have the same political legitimacy. I do believe however, that the quality of the standards that the OECD have promulgated have allowed them to stand on their own and be acceptable. For example, we talk about the soft law architecture. Well, much of that was constructed after the Asian Financial Crisis when there was a perception that many of the countries had a financial instability because of the inadequacy of their domestic markets and institutions. Well, one of the standards that has been endorsed by Organisations like the IMF and the World Bank who are responsible for assessing countries, is the OECD principles on corporate governance. So, it's a good example of how OECD standards has been "universalised" by institutions like the IMF and World Bank as part of the assessment process.

So, I think it's an Organisation that really has been able, both through its legal instruments, through its governance structure but also just by virtue of the quality of its product really to have a universal reach. Thank you.

Josée Fecteau:

[46:12:00]

Thank you Sean and maybe if I can turn the other panellists. I think there are some very important characteristics of the OECD that he touched upon right here: the limited membership and, what I think you have started to point out, what are the advantages and disadvantages of this limited membership. I would like to hear others on that too. Also, on that second point you made on the impact of the fact that OECD standards are decided by consensus: what are the advantages and disadvantages of that and do you think this has been a drawback or has been an advantage in fact to having global impact? Do you think it can be reproduced in all policy areas, at least those that are of concern to the OECD, or is this particularly impactful in one or two particular areas because of our expertise?

Sean if you want to come back on any of these issues you are most welcome but can I have another panellist intervening on this issue of limited membership and consensus and how that makes OECD standards impactful? Gita?

Gita Kothari:

[47:50:00]

Thank you Josée. I think that these are some key points that have been raised by Sean and the other panellists. From the insider perspective, I would say that the OECD's limited membership has often been an advantage in terms of the speed that we are able to move in developing new standards, but I would say that it's not just the size of the membership. It's the fact, as some have already mentioned, that this limited group is composed of "like-minded" countries that share a similar political and economic vision and policy priorities which enables us to more faster and that is intrinsically linked with the ability of the OECD to adopt its standards by consensus precisely because we have this group of like-minded countries. This consensus principle clearly makes the standards stronger because it means that every single country is signing up in a way to the standard and they are committed to the standard and its implementation.

One question that I think is arising now is as we open up this standard-setting and we involve countries outside the OECD. So if we look at the BEPS Inclusive Framework that's working right now on the consequences of digitalisation, that Inclusive Framework includes the 38 OECD Members but it also includes 102 non-OECD countries. There we are seeking to develop new standards by consensus among that large group and clearly this is going to be increasing challenging and a very different scenario from when we were adopting standards with only OECD Members being involved.

And maybe just to speak a little bit about the global impact of the standards which Sean mentioned as one of his points, there are different ways that this has happened in the OECD.

One way is clearly formal adherence to OECD standards and that has really taken off in the last few years. If we look at 1990, we had 22 instances of a non-OECD country formally adhering to an OECD standard. Today, we have 839 instances of non-Members adhering to OECD standards. So clearly there's been a greater interest in standards and in using OECD standards by countries outside of the OECD.

But there are other ways that this has happened. One is that an OECD standard has been adopted or endorsed by another group. Here, the G20 has been a very important

part of how the OECD has increased its impact of standards. That was the case both in the tax field on Corporate Governance, Artificial Intelligence also, Financial Consumer Protection. So, this G20 endorsement resulted in a take-up of OECD standards outside of the membership which helped to level the global playing field. We also have the Financial Stability Board that recognised the Corporate Governance Principles as a key standard for some financial systems.

A third way is that OECD standards have sometimes been incorporated into other international legal frameworks. One older example is the Polluter Pays principle developed in the OECD which was then later incorporated into EU legislation but also the UN's 1992 Rio Declaration; or the Arrangement on Export Credits which has been recognised in the WTO's Agreements as an exception to the WTO Agreement on Subsidies and Countervailing Measures. So this global impact has been achieved through different mechanisms. As to whether it's possible in all areas, it's clearly easier in some areas than others. The success story is of course in tax where as a result of the technical expertise and convening power, the OECD has really become the place where countries come to find solutions to international tax challenges. But, in other areas, there may not always be an alignment of interests between OECD countries and countries outside the OECD, for example, on questions of privacy or internet policy.

It's also important to ask whether global impact is always the objective of an OECD standard. In some cases it clearly is when we talk about levelling the playing field but in other areas there may also be cases where OECD countries want to move faster on specific issues than what other countries are ready for.

Another point which was made earlier about the global impact and balancing the credibility of the standards: one thing we have been working on in the OECD is where we have legally binding decisions, but also in some key standards which are not legally binding, we have a review process even before a country can join the standard to ensure that by opening up the standard we don't decrease the creditability and legitimacy of the standard.

Lucinda Low:

[52:44:00]

Josée, if I can jump in here.

One small point, which Sean has laid out very well, is the "enabling" aspect of OECD membership and perhaps the disadvantages. My comment would be to raise a question in the area of peer review and mutual evaluation and how you maintain that element which I think is critical to effectiveness of many of the standards when you do open it up.

I know this has been an issue that has come up in the bribery and corruption area. For example, that one I touched on earlier which is membership in the Convention is open to non OECD countries but you have to sign up to the peer review mechanism and to the evaluation process and participation in the Working Group on Bribery.

It's an interesting example because the instrument is aimed at capital exporting countries and the OECD membership no longer represents the overwhelming percentage of capital exporting countries as it did back in the 1960s when it was formed. We have new entrants on the scene that are major players/major capital exporters, that are not part of the OECD but the question is if some of those countries join the Bribery Convention are they going to participate in that peer review process in the same spirit and with the same commitment to the facts and the evidence that is necessary to make the process work?

We know from experience that with the review process it can be very hard, even for OECD member countries. Countries have been told that their legislation doesn't meet the standards and they have to change it or that their enforcement is defective they have to change it.

We could talk about scandals in other International Organisations and pressures that countries have put on those Organisations to improve their results (I'm not naming names here but I think everyone knows what we are talking about) to illustrate that these pressures are very real and very important to countries. So how do you balance? How do you avoid not diluting the effectiveness of your instruments, of the impact of your standards and yet capture the countries and the players that you need to capture for the overall effectiveness of the standard and it credibility.

I think that can be a central dilemma in certain areas, at least of the OECD's work that I wanted to highlight. It's a changing world and how the OECD captures the right players may differ from issue to issue but that's a key challenge I would say.

Josée Fecteau:

[56:09:00]

Hervé, la parole est à vous.

Hervé Ascensio:

[56:13:00]

Merci. Il me semble que maintenant il y a une forme de dualité de l'OCDE qui est peut-être beaucoup plus nette que jusqu'à dans les années 90. C'est-à-dire, d'un côté c'est l'Organisation de ses Membres, ses Membres restants très majoritairement des pays occidentaux développés, beaucoup sont des démocraties libérales, et il est utile qu'il y ait un lieu de discussion, d'entente et de création de consensus sur la question économique entre ces pays, et il peut aussi avoir un effet d'entraînement sur certains sujets. Donc ça c'est bienvenu. Mais il y a l'autre aspect maintenant qui s'est beaucoup développé depuis 20 ans, qui est l'OCDE, une institution globale beaucoup plus ouverte avec un grand nombre de comités avec des participants qui sont parfois au-delà de 100 États et les liens avec le G20 ont aussi beaucoup accentué cet aspect, et on pourrait imaginer qu'il y a davantage des liens avec l'ONU aussi. Notamment je pense aux objectifs de développement durable. Donc la dualité elle est devenue consubstantielle à l'OCDE.

Mais finalement il y a d'autres Organisations de ce type où c'est un peu moins marqué mais ça existe aussi ailleurs. Par exemple, quand on pense dans le domaine du droit de l'environnement et le rôle de la Commission économique pour l'Europe des Nations Unies qui a élaboré un certain nombre de conventions très importantes et même au Conseil de l'Europe parce qu'il y a des conventions du Conseil de l'Europe qui sont des conventions ouvertes, je pense notamment à la cybercriminalité. Donc il y a d'autres Organisations qui ont ce double visage mais à l'OCDE je pense que c'est beaucoup plus fort et puis on voit une dynamique, qui est une évolution vers son rôle global. Peut-être que la solution consisterait à distinguer plus clairement les domaines ou les types de normes à propos desquels l'OCDE assume ce rôle de forum global et ceux pour lesquels elle est un club un peu plus fermé mais qui a aussi sa légitimité me semble-t-il.

Josée Fecteau:

[58:43:00]

Merci beaucoup Hervé. Je vais peut-être rebondir sur une question dont on a beaucoup parlé, sur des pays qui ne sont pas des Membres de l'OCDE. Parlons un petit peu peut-être des autres avec qui nous avons aussi des plus en plus des relations.

Do you think the OECD has done enough to open up to non-governmental stakeholders in its standard-setting activity? What would be in your view the advantages and the drawbacks of engaging more deeply with them?

Can I maybe call on Gita to launch the conversation here?

Gita Kothari:

[59:38:00]

I think this is an area where there has been a great evolution in, I'd say, the last 20 years or so. The OECD has really taken major strides to try to become more inclusive. It's a turnaround since some of the earlier examples which have been the very instructive negotiations of the Multilateral Agreement on Investment (MAI) which failed in large part due to the reaction of civil society organisations to what was a closed-door negotiation among what was seen as a club of rich countries. The impression was that the OECD countries were negotiating something which would then be imposed upon the rest of the world. I think Lucinda mentioned earlier that we have institutional stakeholders within the OECD. So, we have Business at OECD (BIAC) and the Trade Union Advisory Committee (TUAC). They have been long-standing partners in the OECD providing input into all kinds of work including on standard-setting.

But beyond that, what's new is the opening up of the OECD in its standard-setting processes to other stakeholders. We now have stakeholder consultations or full public consultations on all new or revised OECD standards, with more and more attention being paid to making these consultations interactive and meaningful. So rather than just putting out a draft text and inviting any input, we've started to organise workshops and seminars on the different elements of the draft standard. We've also made efforts to feed back to stakeholders about how their input is taken into account in the process so that it's not just a "check the box" exercise. It's really seen as a way to improve the resulting standard.

In addition, in some cases, stakeholders have been integrated into the discussions with countries on new or revised OECD standards. For example, the 2019 Recommendation on AI was developed through a multi-stakeholder expert group which included experts from government, industry, civil society, trade unions and academia. The ad hoc taskforce that was formed to discuss revisions to the OECD standards on transboundary movements of waste included within the group representatives of business as well as environmental Civil Society Organisations. So I think we have done a lot. Could we do more? Definitely and we continue to work on new ways to seek and reflect input from stakeholders. The objective in the end is to improve the outcomes by pooling knowledge and perspectives but also by increasing buy-in of the resulting standard. Stakeholders can be key partners actually in the implementation process in order to push countries to implement the resulting standards and for example, in the monitoring process of the implementation for the Anti-Bribery

Convention, that includes gathering input from Civil Society Organisations on the ground about how the Convention is actually being implemented.

The final point I would make is that while we do open up to stakeholder input, it is also important to recognise that there are certain stages in the normative process where it is necessary for governments to be able to exchange among themselves in order to be able to share concerns and find common ground. This is really an essential part of the consensus-building process and this space in my view, needs to be preserved while at the same time we open up at other stages of the process and we find ways to reflect stakeholder input.

Josée Fecteau:

[01:03:14]

Ok, a word about the drawbacks. What are the difficulties that the OECD is facing in interacting with Civil Society?

Gita Kothari:

[01:03:33]

The drawbacks: I think that's what I was trying to touch on in the last point. Which is finding the right balance. How do you find the right balance between opening up but at the same time preserving the space where governments can exchange among themselves and find consensus because doing that in a room that's totally open is not always easy. I think one of the examples we can see now is the work that's going on in Digitalisation and Tax, where there's been a process which has been open at certain stages inviting input, trying to take on board input, but at the same time there have been many stages where we've needed to reconvene in a closed door setting in order to try to work out some of the remaining differences. So I think the key challenge is finding the balance.

Josee Fecteau:

[01:04:29]

Anybody else on that issue?

Lucinda Low:

[01:04:33]

Yes Josée, I'll jump in here and make just a few comments. I thought Gita's remarks were very helpful and from the outside I think we did see that the MLI negotiations and the bilateral Agreement on Investment negotiations is kind of a watershed.

Indeed, when I was talking to people here in the US in preparation for this meeting that's one of the issues they flagged in terms of the participation in civil society and so I think there's no turning back from that basic concept. The question is "how"? How to make it most effective? Some people would question I think why you would have the two institutionally formalised roles. Why those and not others?

I gather in the past there have been proposals for an EIAC (an environmental consultative group) but I think with the range of issues that the OECD has been taking on, there is going to be an increasing variety of outside stakeholders and you may need to have more flexible arrangements to make sure you bring in the right mix of stakeholders to a given issue. But I completely agree with Gita that there's a multi-fold benefit if you get the balance right in terms of getting inputs that may increase the quality of the ultimate product and buy-in and assistance with implementation.

I've been part of several consultations in the context of the OECD Working Group on Bribery when the US was reviewed and helped recognise civil society inputs. That's an ad hoc example but you do hear very important things that you don't hear from the governments that reviewers need to hear. So I think some openness and flexibility is very helpful.

I will also put in a plug here for the institutional relationships that you are starting to establish. I think the example of the ASIL-OECD relationship which is really a nascent one but it's designed to be able to tap into different areas as needed by the OECD in its work or potentially beneficial whether it's in a subject matter area like environment, or anti-corruption, or trade, or whether it's more just governance in an international organisation. That institutional relationship gives you a flexibility to tap into the expertise within a membership organisation that could be helpful. So I think that should be part of the model.

Not to sound self-serving, but I think it makes sense for the Organisation going forward, if you are in this situation as I think you are, where you are going to need different constituencies to be brought in for different issues. Gita I think everybody will appreciate the need for governments to preserve some space for debate on their own and so there needs to be a balance and that's one of the hardest things. Once you open the door, where do you stop? How far do you go in terms of openness and

transparency and consultation because obviously there have to be some reasonable boundaries put on it. But that's one of them it seems to me, that you can't go so far as to prevent the countries from talking on their own when they need to talk so those would be my comments on this topic.

Josée Fecteau:

[01:08:29]

Hervé…

Hervé Ascensio:

[1:08:30]

Il y a une longue tradition à l'OCDE d'associer des parties prenantes, comme on dit les « stakeholders », depuis les années 60 s'agissant de BIAC et TUAC pour le monde des entreprises et les syndicats de travailleurs. Mais en même temps, l'OCDE n'est pas l'Organisation Internationale du Travail qui a une structure tripartie depuis l'origine et dans sa constitution. Le but vraiment c'est d'améliorer la qualité de la norme en étant à l'écoute à la fois des besoins et de la façon dont la norme pourra être appliquée. L'effectivité de la norme. Donc je pense que c'est dans cette logique dont l'OCDE a toujours associé des parties prenantes et ensuite a élargi quelque peu à « OECD watch » pour les autres organisations non gouvernementales. Il me semble qu'un élargissement supplémentaire ou une intégration plus poussée des parties prenantes dans le processus des discussions des normes peut avoir son utilité en gardant à l'esprit qu'à un moment donné, il faut que ça soient les représentants des pouvoirs publics qui décident, qui prennent la décision. Précisément parce que le but de l'OCDE c'est de coordonner les politiques économiques/publiques des États, et ça dépend peut-être aussi des sujets.

On peut imaginer que sur certains thèmes une consultation plus vaste soit absolument nécessaire. Et je pense qu'il y a aussi un autre objectif qui s'ajoute maintenant à la qualité de la norme et son évolution. C'est l'articulation entre les différentes politiques publiques parce que ça c'est un problème constant dans tous les États de ne pas concevoir techniquement des politiques publiques qui finissent par se contredire, ou qui ont des effets inattendus les unes vis-à-vis des autres. Et je pense que les préoccupations, par exemple environnementales ou de protection des droits humains, ce sont des questions que devraient être posées à propos de tous types de sujets. Et finalement cela doit être intégré dans la réflexion pour comprendre un impact éventuel. D'où l'intérêt d'une consultation assez large comme elle est pratiquée dans certains cas maintenant par l'OCDE pour lier les objectifs entre eux. On peut aussi imaginer des systèmes d'auditions. Des auditions de représentants des

consommateurs, de parlementaires dans certains cas, comme cela se fait dans d'autres organisations internationales. Voilà mes quelques commentaires sur ce thème.

Josée Fecteau:

[01:11:47]

Sean, quickly if you can…

Sean Hagan:

[01:11:53]

Josée, if it is ok with you I just want to make a brief comment directly in relation to civil society, but I want to underscore a point that was made earlier by Lucinda on the peer review process.

The one area that I worked on in this space is the Anti-Bribery Convention and in the area of corruption, there's often a real disconnect between the formal legislative process and the enforcement, and when you are assessing the extent to which there really is application of anti-corruption measures, you really have to look at enforcement. What I think is really quite remarkable about the OECD peer review process is not just that peers are involved but that they really do look at enforcement and they do really assess the extent to which the laws are actually being enforced on the ground. And that is one of the reasons why the OECD reports have credibility. It's because they don't just stop at the legislative process and that's one of the reasons why, for example transparency internationally sort of refers to the goals standard for peer review. It is also one the reasons why the IMF used the OECD Anti-bribery Convention and the peer review process for purposes of its own Article 4 consultation process.

So, I just want to underscore the point that Lucinda made, not so much just because that it's members reviewing, but because what they're reviewing. They are actually going into the field and looking at enforcement on the ground and I think that is really important.

Josée Fecteau:

[01:13:38]

Thank you so much Sean. Let's turn to a question in French.

Ce sera une question pour Hervé…pour les autres aussi main on commencera par Hervé. Comment l'OCDE a-t-elle utilisé le droit souple ou le droit tendre ou la soft law pour promouvoir des approches communes et les normes de l'OCDE ont-elles suffisamment de mordant? À votre avis Hervé ?

Hervé Ascensio:

[1:14:14]

Merci pour cette question. Je ne sais pas si c'est compréhensible pour nos amis anglophones les différentes traductions de soft law en français où on a d'abord dit « droit mou » ce qui n'était pas très positif, « droit doux », « droit tendre », bon moi j'utilise le terme « droit souple » effectivement et c'est ce que fait le Conseil d'État français également. Alors, effectivement, ce qui est frappant quand on regarde la production normative de l'OCDE c'est la myriade d'instruments de droit souple puisque qu'il y a que 15% de textes contraignant comme cela a été dit tout à l'heure. Simplement, elles ne s'ajoutent pas seulement, ce n'est pas une série d'instruments. Souvent elles sont organisées. Il y a un ordonnancement dans les différents textes et pour certains thèmes il y a même une forte densité de normes, et tout cela est très organisé. On trouve des normes de droit souple qui posent des objectifs.

Alors, parfois des impératifs s'il se trouve qu'il y a une décision qui vient compléter un texte qui s'appellerait « de principe ». Ensuite une deuxième strate avec des commentaires qui portent sur ces principes ou ces grandes règles. Par exemple, on peut penser aux commentaires officiels de l'OCDE portant sur le modèle de la Convention sur le revenu et la fortune. Et puis il y a souvent maintenant une troisième strate, c'est-à-dire des textes qui sont destinées aux professionnels et qui portent des noms variés : manuel, bonne pratique, des guides, ou encore des critères et le but là c'est de faciliter le travail des Administrations lorsqu'elles mettent en œuvre les normes dont j'ai parlé précédemment ou les procédures internes des entreprises puisqu'il y a un certain nombre de standards qui s'adressent aussi aux entreprises.

Donc pour les thèmes pour qu'on pourrait qualifier « les thèmes les plus mûrs » sur lesquels l'OCDE a le plus grand succès, en fait on a un ensemble normatif qui est assez cohérent, très développé et qui est en plus évolutif.

Alors, est-ce que cela a assez de mordant ? Est-ce qu'il y a des dents suffisantes vu l'utilisation de cette technique de droit souple ? Et on veut dire par là, est-ce qu'il ne faudrait pas un traité ou une forme de sanction qui aille au-delà du peer review ?

Alors, je pense que cela dépend des thèmes en réalité. On constate que parfois il y a des domaines où il y avait beaucoup d'instruments de droit souple et puis à un certain moment un traité devient nécessaire, par exemple je pense au traité BEPS pour utiliser

l'acronyme en anglais. C'est-à-dire le traité sur l'érosion de la base d'impositionet le transfert de bénéfces qui est un instrument juridiquement très innovant au regard du droit des traités puisqu'il consiste à réviser de manière simultanée des centaines de conventions fiscales bilatérales. Et là il y a vraiment eu une imagination juridique à l'OCDE.

Mais il y a d'autres domaines où cela paraît moins envisageable, parce qu'il y a des normes parfois qui portent sur le comportement des entreprises. Un traité ne lierait pas des entreprises d'avantage qu'un texte de droit souple. Peut-être même que ce serait moins bien perçu. Il y a aussi des domaines qui ne sont pas mûrs. Le droit souple c'est un préalable, ça prépare par la suite. On peut imaginer une forme de durcissement progressif et il y a encore des domaines où il n'y a pas de consensus, ou il est en train de se construire. Alors en fait il faut faire une analyse thème par thème.

Mais je pense que parfois le traité est souhaitable, s'impose, et parfois il n'est pas nécessaire. On peut même d'ailleurs se demander si l'OCDE n'a pas pour particularité de rester dans le droit souple aussi longtemps que possible. Alors, c'est peut-être une critique d'ailleurs que j'adresserais à l'OCDE ou pas. On peut trouver aussi que c'est bien de s'en remettre au comportement des États et des parties prenantes en leur fournissant des instruments très sophistiqués qui peuvent suffire jusqu'au point où il faut une initiative politique supplémentaire pour passer au droit dur.

Mais encore une fois, si on fait le bilan des principaux instruments de droit souple, ils sont généralement liés à un instrument de droit dur qu'il s'agisse d'un traité adopté dans le cadre de l'OCDE ou d'une décision de l'OCDE. Même la Déclaration sur les entreprises multinationales est liée à une décision qui établit les points de contacts nationaux. Alors, on arrive à quelque chose d'un peu plus étrange, c'est-à-dire la procédure est obligatoire et une fois le contenu est seulement recommandé, mais il n'empêche que c'est une forme de durcissement du droit souple qui est ainsi élaboré.

Voila !

Josée Fecteau:

[01:19:50]

C'est peut-être aussi ce gout que l'OCDE a pour la mise en œuvre qui est manifesté dans ce gendre de décision. Gita?

Gita Kothari:

[01:20:02]

Yes, thank you Josée and thank you Hervé. I think the points you made were really interesting. One thing that I think is perhaps unique, or at least characterised at the OECD, is the teeth that it gives to soft law. So, you may have an instrument which is a soft law instrument, but then there are mechanisms that are created around that instrument and the NCP, the national contact points for the Guidelines of Multinational Enterprises which is a good example where the instrument itself is soft law but then you have a binding obligation to create a national contact point to ensure the implementation of the guidelines. And I think it works because the soft law entails, as I mentioned before, such a strong political commitment.

Countries actually take these instruments just as seriously as if they were legally binding and that's maybe one of the achievements of the OECD process. The evidence based process. The consensus based decision-making. So countries, even though you have a soft law instrument, they take into consideration specific measures to implement those instruments. They're submitting to peer reviews against those standards. It's really demonstrated by the fact that, in some cases, we have countries that have abstained from or made reservations to non-binding Recommendations.

So legally there's absolutely no need to make a reservation or to abstain but that's what they do because they're so committed to the implementation of the standards. We have another example in the BEPS area where you had a package which was adopted as a political commitment and then you have peer reviews against what is essentially just a political commitment. And you have what we call "minimum standards" but minimum standards which are not legally embodied anywhere. In some cases, with respect to the bilateral treaties, there was this BEPS Multilateral Convention in order to modify the bilateral treaties. But many of the other minimum standards were never embodied in an international legal form.

So, I think this balance between the soft law and hard law is something which the OECD has played with over the years. How do you achieve consensus on the standard? Perhaps the soft law standard is a faster way to achieve consensus. It's also easier to modify in the future. So, you maintain flexibility there but then you do give some teeth to it through the implementation mechanisms that you put in place. And perhaps, just to come to this question of implementation and enforcement, the OECD clearly doesn't have any specific enforcement mechanisms. We don't have any provisions in the Convention to suspend or exclude Members that don't implement legal instruments and there are no other sanctions that are foreseen in our instruments. In any case, that could only really be implemented for the 15% of legally binding instruments. But more fundamentally, I would say that this approach, the "reward and

punishment approach", is not really in the OECD's DNA because what the OECD has evolved around is this idea that Members are supporting each other in moving towards shared objectives. That's why the OECD relies on peer review and peer pressure. That's why they have been remarkably effective because you have this community of like-minded countries that are committed to the same goals.

So it's really for me about mutual support, exchanging experiences, good practices, the implementation and toolkits are all designed to support countries in implementation.

As I also said, as the OECD develops more standards and more countries are adhering to the standards, maintaining this like-mindedness and maintaining the levels of implementation becomes more challenging.

One final point that I would make is that apart from the like-mindedness of the countries, I'd say one of the things that the OECD does successfully is creating close nit policy communities and those communities are communities also of individuals. So the individuals who participate in the discussions play an important role. They are of course conveying the position for their country but the individuals have, in some cases, quite a wide/broad influence on the process. And the fact that they all know each other, they meet at the OECD, creates relationships which also helps in the process of building consensus and in the peer review process, ensuring that each country and each individual wants to make progress and wants to show that they're moving towards the standard. So, I think this is something that the OECD does well and needs to continue to do. Which is to serve as a platform bringing not only countries together but bringing the individual policy makers together.

Josée Fecteau:

[01:25:03]

Thank you Gita. We still have a few minutes to go. I would now like to give a chance to Lucinda and Sean, who have both touched upon the peer review. I was wondering if maybe you two (or the other ones too), want to have another chance to maybe touch upon what are the ingredients that are important for you for peer reviews to work. Lucinda, do you want to come back on that one?

Lucinda Low:

[1:25:42]

Of course. Thank you Josée.

Well certainly, I noted Sean's earlier comment that in the bribery context having peer reviews touches on the difficult issue of enforcement and adds to the credibility and I think that's right. It's easier to sign a Convention and say you're going to do something then actually go out and do it and this is a particularly hard area.

So what are the ingredients for peer reviews to work? I think first of all, this intangible that Gita has talked about, this feeling that one is part of a community of like-minded participants working towards a common goal, that really is an essential it seems to me.

But then there are some other ingredients as well from my experience. One is a continued emphasis on solid technical work, both by the countries that are involved in the peer review and on the staff. Sort of focusing on the merits of the issue, the substance of the issue and trying to avoid politicisation of the review process. And you obviously want to avoid any kind of mutual back scratching that would delude the standards: *"I'll vote for you to have this be watered down if you'll vote for me"*…that's the death of peer review once you get into countries making those kinds of alliances.

I think you also have to be judicious in review. Some of these reviews take enormous resources, enormous commitments of time and there is a risk of fatigue if you do too much and so you have to choose your issues. You have to choose your moments and make sure that you can maintain the positive commitment of the countries to the process.

I also think civil society participation, and I touched on this earlier, is important because they will tell you things that governments won't and so broadening out the audience a little bit is important.

So, for me those are some of the ingredients from my experience that are important to the success of peer review process. You shouldn't be afraid of tackling hard issues. It's important to tackle the hard issues otherwise you lose credibility but how you design the process, how you carry it out become very important.

Josée Fecteau:

[01:28:46]

Thank you. Sean you want to come in?

Sean Hagan:

[01:28:50]

Yes, Josée, I hope I'm not scrambling things up too much but I do want to come back because I think Lucinda has really completed the point on peer review.

I have nothing to add but I do want to come back to this issue of soft law and hard law because my own sense is that in the space of public international law, this is really not a binary choice. It's a spectrum because hard law, when it comes to sovereign states, you can't just transpose the concept of enforcement that you would have with private actors to public actors because sovereigns are sovereign. At the same time, in the soft law space, sovereigns, because there's a limited number of actors, they tend to be very concerned about reputation and that does create incentives for compliance.

Moveover, the market also plays a role in putting pressure on countries to adhere the soft law standards. For example the FSB's essential Standards (one of which is the corporate governance principles of the OECD). Those assessments are published and the markets read these very carefully when making their own investment decisions. So, my bottom line is sometimes hard law is less hard than you think, and sometimes soft law is harder than you think, so I think we have to be careful in using these labels in a binary way.

Josée Fecteau:

[01:30:28]

Thank you so much. That's very insightful. Just one final question quickly quickly from the floor. What do you consider to be the OECD's major contributions to treaty law over the years? The participant is pointing out in particular to the treaties that you've touched upon of the BEPS agreement that way quite innovative.

Maybe Hervé, can you give us your thoughts on that one quickly and then we'll close and take a little break and pass on to Nicola for the second roundtable.

Hervé Ascensio:

[01:31:14]

Clairement le traité BEPS, d'un point de vue du droit des traités, est complément innovant parce qu'à ma connaissance c'est la première fois où l'on révise simultanément des conventions bilatérales par le moyen d'une convention multilatérale. Voilà, donc c'est un chapitre supplémentaire à ajouter au droit des traités maintenant. Voilà, donc c'est vraiment un très bel exercice, enfin un très bel instrument je trouve.

Josée Fecteau:

[01:31:47]

Well thank you all so much for this very rich discussion. It was very easy to moderate you because there was lots to say. And so thank you so much for your insights, your participation and your thoughts and I'm sure that the OECD will make good use of it and that the participants enjoyed the conversation.

We'll take a little break and if you can just reconvene in 7 minutes from now we will move to the second roundtable. Thank you so much.

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[BREAK / PAUSE]

2ⁿᵈ Round Table: How to optimise the potential of the OECD normative method in the current global context?
What lessons can we learn from the OECD's experience?

Nicola Bonucci, Partner of Paul Hastings LLP and former Director of OECD Legal Affairs:

[01:35:37]

Hello everybody. Welcome back. As my panellists are appearing via the magic of Zoom, at least 2 of them… Jean-Marc, hello… Ulrich, you are too soon but good to see you…

So welcome back for this second roundtable. My name is Nicola Bonucci. I am now a Partner at Paul Hastings but I had the privilege, the honour and pleasure to work for some 26 years at the OECD and it is really a pleasure to be here today with my wonderful group of panellists who I am going to introduce very briefly even though they would merit, all of them, a long bio.

First, going down from the top of my screen:

- **Nico Krisch**, Professor of International Law at the Graduate Institute of International and Development Studies in Geneva.

- **Dr Susan Karamanian**, Dean of the Hamid Bin Khalifa University (HBKU) College of Law in Qatar. And I have to say, co-organiser of the event we organised 10 years ago for the 50ᵗʰ anniversary in Washington with the American Society for International Law and the George Washington University, so an old friend of the OECD.

- **Jean-Marc Thouvenin**, Secrétaire générale de l'Académie de droit international de la Haye, et également professeur de droit, et également avocat.

And last but not least,

- **Andy Wyckoff**, OECD Director for Science, Technology and Innovation at the OECD and probably the longest lasting Director as of today. Andy, I think you're probably the one that has been in place for the longest.

Nous allons, en fait, reprendre le même panel et l'élargir. Les thématiques que vous avez entendues, on va essayer de les multilateraliser. On va essayer de les multilateraliser et de les internationaliser et essayer de voir s'il y a des choses, des points, des questions que l'OCDE traite qui peuvent être exportés ou non, et essayer de comprendre pourquoi.

So, I would like this panel to be as interactive as possible. I will ask questions to each of you first and then to all the panellists but I really hope that the participants will also ask questions in the chat and as I said, I also hope that there will be a dialogue and an interaction as in the first panel between the panellists.

The general theme is "how to optimise the potential of the OECD in the current global context and what lessons can we learn from the OECD's experience". As I said, we broaden the scene/the scenario and move to the basic parameters of what is multilateralism today.

Let me start with Andy first. Andy, in your view, is the OECD standard setting method fit to face the current and upcoming global challenges of digitalisation and what has been your experience so far, noting by the way, that as of yesterday there is a new G20 instrument on Children and Digitalisation based upon the OECD standards.

Andy Wycoff, OECD Director for Science, Technology and Innovation:

[01:39:48]

Thank you Nicola. I'm really happy to see you're staying very well informed and up to date.

Let me give you maybe a classic OECD answer to your question and that is, yes and no. The yes is, yes to date we've had great success actually with what I think are really important legal instruments really stretching back to 1980 when we did really pursuant work on privacy before it was what it is today. Likewise on work in the late 1990s on cryptography (which is coming back in vogue) and on e-commerce which I think has taken on a new life due to the pandemic. And then, probably most notably in 2019 are the AI Principles and, as you noted, just recently in 2021 under the Italian Presidency (which was an extraordinarily fruitful presidency for the OECD I think), were our work on broadband connectivity in the investment finance track Nicola, as well as the work on children in the digital environment, where both were embraced by the G20 which is great. It's a way of OECD projecting its work being done in the Committees to a much broader global audience.

Then lastly, in October this last year we held our annual Meeting of the Council at Ministerial level where the OECD adopted the Recommendation on Enhancing Access to and Sharing of Data (EASD), which to me is the issue of the next decade or two and I think this is just an initial contribution by the OECD. I think our success, and as you noted I have little bit of a long duty these days, is due to four factors.

I would say one is, as I noted, our long term engagement in these topics which I think have helped us attract and retain staff who are public policy cognisant but also tech savvy and this gives us the ability to scan the horizon and tap into networks that help us figure out what is the new incoming technology that may have a large impact on public policies. And by getting a little bit out in front you get there before Member countries can really have an established, dug in position on these things and it allows for more flexibility and an ability to reach a more common understanding which is a good thing. Just a quick example of this is that our work on A.I. (Artificial Intelligence) really traces back to 2016 in Takamatsu (ICT Minister's Meeting) which came from the Japanese G7 of that year and we followed up immediately with a pretty technical high-level workshop and then a conference on the topic which allowed us to scope the issue in which eventually lead to those 2019 Principles.

The second factor that I think is important for us is regular review and I think this goes to the previous session of this conference. We undertake a regular review and assess the implementation of the Principles on a periodic basis, which allows us to keep them up to date and share good practices.

The third factor (and I think Ulrich Knudsen here oversees this "horizontal project" we call at the OECD) is taking advantage of the breath of the OECD's expertise across so many different policy areas to give us both a strong evidence-base from many different dimensions but allows us to tackle our very complex problems like visual transformation or climate change from a much more whole of government multidisciplinary perspective, which I think these problems really require.   And with that, we really engage and we can come back to this wide range of stakeholders. This isn't just something we tack on to the end, these stakeholders are sitting at the table with the first draft proposal, and they include not only the business community and organised labour but since 2008, we added civil society and the technical community which is essential for doing work in this area.

The last and fourth factor: I think that we do benefit from a relatively small number of Member countries that have been leaders both in developing and using digital technologies as well as related policies, and who have a, as we call it, "like mindedness", especially around issues such as human-centred values of human rights privacy and of human agency, as well as democratic values of rule of law and transparency.

Now let me try to keep to time by just quickly summarising some of the factors that really helped us do this. One was our engagement with the G20, and as you know as a very sophisticated legal advisor and lawyer, part of the art of the deal is what we might call constructive ambiguity which allows different groups and different countries to interpret things to fit their context. And last but not least, I would call out to you and

your colleagues in the Legal Department who have been with us every step of the way on many things and that element within the OECD I think is essential.

That was the good news. Let me quickly say that I think on the horizon we are seeing some clouds which I think may make this harder going forward. The first of these is, as we were taking in the last session, it's one thing to develop principles that everyone likes, it is another one to operationalise and implement them. As was noted, we don't have an enforcement mechanism but we do have other tools and we are trying to use them.

The other thing I would say is that governance of technology is a challenge. It's changing quite a bit and we're trying to help countries rethink how best to do this but one of the things that makes this hard in the digital area is that so many Ministries are involved. Just coordinating them and getting everyone on the same page is difficult. Many of these communities have much different vocabulary and cultures about them that make this hard. Let me just give you one example: If we talk about cross border data flows involving Ministries of trade, data protection and increasingly national intelligence or justice communities, all of these group have really a different approach to these problems.

Last but not least, you know this well, is the growing politicisation of technology policy due to shifting geo-politics and concerns over the logical sovereignty which is going to make things harder going forward. Let me end there and I look forward to hearing the other panellists.

Nicola Bonucci:

[01:47:35]

Thank you Andy. And let me welcome Steve Cutts who is an old friend of the OECD but at the same time ask him to turn off his video if he doesn't mind. Thank you.

Nico, the point that Andy has just made… and actually, I thought that the first panel was fantastic but I was a bit surprised that the multidisciplinarity of the OECD was not put forward as one of the main assets and I think Andy's last point was addressing that… but how much of the OECD method of work can be replicated in the context of a more fragmented and multiple world based on your experience as an academic looking at this with some grain of salt?

Nico Krisch, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva:

[01:48:36]

Thanks Nicola. I thought it was a really fascinating panel so far… the earlier panel and also Andy's intervention just now. So it's difficult to follow up on that and especially from a birds eye view that you ask me to take there with this question. I think it really goes somewhat to the heart of much of what has been said so far. How can the OECD become or remain as relevant in the changing world order and yeah, I look at this from a more academic angle obviously being what I am.

Now, in many ways this kind of world that we are moving into or are already in, one with a much greater division say between the West and East, North and South, power shifts from the US/Europe towards other parts of the globe, from States to non-States actors as one can say, in many ways I think the OECD method is quite suited to this world and that's due to many of the factors that have already been mentioned. One being the focus on technical expertise which is sometimes able to overcome the more politicalised debate and side step the conflict or even, as Andy has just said, go ahead of the curve because of the ability to spot issues earlier than Member states are able to create established positions. Also, because of the focus on soft law that has been much debated in the first panel which is often a possible way forward when treaty making stagnates, which we know it does. Treaty making of course in many contexts has become much more difficult and therefore we see fewer treaties being concluded. Soft law then appears as an alternative and there is focus on peer review which may also be an advantage in this more divided, contested world than say, the turn to courts or the judicialised enforcement or more formalised enforcement that may have been at the forefront of peoples' thinking say 20 years ago.

In that sense, I think the OECD could be seen as being well prepared for this world. But of course that is only one side of the coin and the other is maybe the more radical contestation that global politics is facing and that the OECD has to situate itself in and deal with. I think really one important issue in this context is an aspect of the OECD that has been mentioned, especially by Catherine and maybe even more so by Gita in the previous panel. The fact that the OECD is really like a club of likeminded States in the first place, or relatively likeminded States that was clear during the Cold War, and even after the 1990s really. The likeminded group expanded to a global scope, not in membership so much but in reach. That was of course built on geo-political context in which this projection outwards was possible, like say, the face of western dominance of certain types of ideas about how the world ought to be ordered, how the countries ought to be ordered and as mentioned before, the limit of this kind of projection outwards were quite visible in the failure of the Multilateral Agreement on

Investment. So, I think this kind of tension between the cohesion of the likeminded group and the global scope is going to be evermore present.

Obviously, it is not easy to bridge those two. There might be in a more contested world like in the Cold War, more need for the limited membership, but of course that would mean foregoing the more global reach the OECD has built up over the last few years (decades really). Or one could say well we water things down so much that they would be palatable to a broader audience. None of these two options might be really helpful. I think one of the main challenges that the OECD faces (and I think it has made significant headway in this direction), is the suspicion which many people/governments around the world who are not Members have towards the OECD. A certain suspicion that this is just another form of dominance and hegemoney. I think the OECD has really made significant headway in trying to overcome that and I think much of that has to do with linkages.

So the linkages with the G20 have been mentioned several times, both the OECD working on request from the G20 but also seeking endorsement from the G20 for its products. That is a typical tool to reach a broader audience. To link up to a more global scope. But also linkages with broader standards. What we see for example, the increasing integration of the UN Guiding Principles in the OECD Guidelines on Multinational Enterprises provides a clear linkage between the UN process and the OECD process which, in a sense, strengthens both. Or say, the endorsement of the Corporate Governance Standards by the Financial Stability Board and others. That is a typical, very suitable tool for creating that linkage and also to hopefully decrease the suspicion I just talked about. The other element that has been mentioned before, especially in the previous panel, is the participation of third countries. I find it really quite fascinating the different categories of third country participation that one can observe in the OECD. Just academically, that is fascinating. The ordered form of globalising the work while nevertheless maintaining a core of the Organisation. How long that is feasible and how much contestation there will be around that method, it is difficult to tell. I think probably increasingly the OECD will need to give third countries a more equal seat at the table for many initiatives but for some of them there is already significant input from others.

Maybe a third element really might be for OECD countries to accept greater compromises. So in short, on your question, possibly there is a good space for the OECD in areas where agreements can be achieved/manufactured (maybe in the technical and political areas or in the ones that can be made more technical) and then obviously for issues of likeminded Members. So, initiatives towards the internal consumption of the Organisation. And lastly, for the more global scope, probably a way of a greater participation and inclusiveness and possibly also creating a greater balance between what the OECD stands for and the compromises that are necessary to bring others in. Something that obviously is a difficult balance to achieve which the

colleagues working within the Organisation are faced with every day. But maybe I leave it at this and we will come back to some of the themes in the discussion I'm sure.

Nicola Bonucci:

[01:56:23]

Thank you Nico. I like very much the word "linkages". I think it captures very well more of the collaboration and coordination of the usual terminology that we use amongst International Organisations. I think the word "linkages" is an excellent word in describing how the OECD has been operating at least for the last 20 years.

Which naturally brings me to a question which is both for Jean-Marc and Susan, and on purpose we decided to have two voices on this particular question because there might be also different sensitivities coming from different parts of the world.
Which is: the world that was basically set up in 1945, even though the OECD is 1960 but is still very much a product of the world of 1945, but more broadly, the world that basically was put in place around the San Francisco Declaration and the United Nations system and the standards setting that has been put in place instead, how do you see this going forward and what lessons and what points can we draw from the OECD and try to multilateralise? Or vice-versa, are there initiatives outside of the OECD and ways in dealing with some of issues that the OECD could benefit from? So, Jean-Marc, if you don't mind, I will give the floor to Susan first et après ce sera à toi.

Susan Karamanian, Dean of the Hamid Bin Khalifa University (HBKU) College of Law:

[01:58:07]

Thank you so much Nicola and good evening everyone, or good day. It's wonderful to be able to celebrate 60 years of the OECD.

I like the way you phrase the question Nicola because I do think we should look back as we look forward. We've heard a lot about standards setting and the evolution of standards setting in the OECD. So, if you look at the founding of the OECD:

- having its roots and the Organisation for European Economic Cooperation; and

- that institution emerging out of the Marshall plan and to have a vehicle/an economic recovery in the post WWII Europe; and

- facilitating the transfer of aid from North America to Europe; and

- how it has transformed into a global governance system setting standards as we've heard on anti-bribery, multinational enterprises, corporate governance and tax are just to name some;

So, getting back to Nicola's observation of likeminded. You know what was once a relatively inward looking group of industrialised States has become more outward looking, engaging an array of other States that are of OECD Members, including the OECD key partners of issues of public concern and so I think that that is what is a fundamental shift.

Then (we've talked about this already but I am going to talk a little bit more about it) there is the example of the OECD engagement with the G20 on the Inclusive Framework on Base Erosion and Profit Sharing (BEPS) and the announcement last week of 136 States committing to a minimum corporate tax rate of 15%. The OECD's involvement in tax goes back to the OEEC with a focus on the avoidance of double taxation largely to foster economic development. Yet, data gathering and analysis of information within the OECD has given the OECD the capacity to deal with the many public aspects of tax such as a heightened focus in recent years on tax avoidance. Associated with that is the related issue of tax consequences due to the digital transformation of commerce and the like. So, from my perspective, what I think is very interesting is the extent to which this concept of tax reform, keying in on the issue of tax avoidance (we've all been familiar with the Panama papers and recent papers coming out) but linking the tax reform to the UN Sustainable Development Goals has enabled a broader engagement of States on the topic.

And so, for any future standard, whether it be building on data privacy or digitalisation, a solution that is materially linked to the SGDs I think would fit with the overall rule of governance framework and resonate with States.

Just in terms of perspective and reactions to BEPS, I'll be giving a little more in terms of those that are critical, but from the States' perspectives, I think there is a lot of work that needs to be done here. There's a celebration that an agreement is reached but the concern now is in the details and what will this mean for individual States. So when we see this evolution, I think what we are seeing is a focus, as Gita has said earlier on, on levelling the playing field and dealing with policy defect of domestic outcomes and dealing with substantive issues relating to rule of law and the like, but it's embracing States beyond the OECD, and to me this is critical.

Then we haven't mentioned at all today the outreach to very important economic China and what does this mean for the future of the OECD. So, those are just some of my preliminary thoughts on this topic.

Nicola Bonucci:

[02:03:00]

Thank you Susan. Jean-Marc, compte tenu aussi de tes fonctions actuelles, tu es dans un lieu privilégié pour observer ça avec le grand angle et ce que nous apporte l'histoire, donc à toi.

Jean-Marc Thouvenin, Secrétaire générale de l'Académie de droit international de la Haye, Professeur de droit, Avocat :

[2:03:22]

Je te remercie beaucoup Nicola et je te remercie de ta confiance.

Alors, c'est vrai que tu nous invites à faire un petit zoom arrière tout en ayant à l'œil l'OCDE. En faisant un zoom arrière, moi j'ai l'impression que ce que l'on perçoit assez nettement, c'est la consolidation d'un mode de gouvernance des affaires du monde bien différent de ce qui avait été imaginé, ou de ce qu'il avait été espéré peut-être lors de la création de l'Organisation des Nations Unies.

En premier lieu, le centre de délibération mondiale s'est décalé de l'ONU, à supposer qu'il y fut un jour, et des institutions de Breton Woods vers le G20. On a parlé un peu du G20 aujourd'hui. Moi je crois que c'est un fait majeur, le G20 qui a été créé il y a un peu plus de 30 ans. Alors le processus « shifting » a sans doute été progressif. Je me souviens par exemple, lors de l'occasion de la dernière crise financière en 2007/2008, l'Assemblée Générale de l'Organisation des Nations Unies avait cherché à reprendre la main sur la gouvernance de l'économie mondiale et le G20 l'en avait empêché en prenant le devant, en lui coupant l'herbe sous le pied, notamment en créant le Conseil de stabilité financière et en mobilisant derrière lui pour faire face à des situations d'alors, une série d'institutions, le FMI bien sûr mais aussi l'OCDE ou encore l'OIT.

Alors, il me semble qu'aujourd'hui le basculement vers le G20 soit pratiquement acté. Alors, certes on peut dire que le G20 travaille surtout sur les enjeux économiques mondiaux, mais presque tous les enjeux mondiaux présentent des aspects économiques, peut-être pas tous, ou pas tous de manière prééminente, mais presque tous. Alors la dernière session très spectaculaire à mes yeux du G20 en est une illustration assez saisissante puisque la Déclaration finale que vous avez tous lu je pense, évoque non seulement l'attribution par des pays développés de 45 milliards de leurs droits de tirage spéciaux aux pays les plus vulnérables avec un objectif de 100 milliards de DTS à atteindre (ce qui constitue une réaction d'ampleur face au défi de l'après COVID-19 dans le monde et sans doute également un puissant outil de relance de l'économie mondiale), mais le G20 a également reconnu l'importance de dégager

un flux de financement climat vers les pays en voie de développement à la hauteur de USD 100 milliards par an à partir de 2020 (on est un peu en retard là-dessus) pour les aider à lutter contre les conséquences du changement climatique. Mais encore la déclaration du G20 apporte nombres d'autres thèmes y compris relatif à la santé, aux villes, à la culture, à l'éducation, au commerce, etc. Ces Déclarations, c'est vraiment frappant, sont une forme d'équivalant des discours américains ou européens sur l'état de l'union. C'est donc là au G20 que se concentre une grande part de la gouvernance mondiale.

Alors, je ne minimise pas du tout le rôle de l'ONU qui est tout à fait essentiel. J'ai beaucoup d'affection pour l'ONU. Elle fixe et défend les grands principes sans lesquels la communauté internationale ne serait pas ce qu'elle est. Elle est le reflet le plus parfait peut-être de la communauté internationale mais je crois que ce n'est pas à l'ONU que les axes de la politique mondiale se fixent. Alors naturellement le G20 n'est pas seul et c'est le second aspect qui caractérise la période actuelle puisqu'il adosse les politiques qu'il promeut au travaux d'une constellation des organisations internationales qui, chacune dans son domaine d'expertise et d'action, contribue à la genèse, à la mise en œuvre et/ou au suivi des politiques que le G20 entérine ou promeut.

Et dans cette constellation on trouve des très nombreuses institutions ou programmes relevant ou non des systèmes des Nations Unies comme ONU-Habitat, le PNUE, la FAO, l'UNESCO, l'OIT, l'OIM, etc etc mais aussi bien sûr l'OCDE qui avec le FMI sont sans doute les plus sollicitées. Alors, moi j'étais frappé de constater que l'OCDE est citée pas moins de 15 fois dans la dernière déclaration du G20. 15 fois, c'est un record dans une déclaration du G20 je pense, et dans un nombre tout à fait considérable de différents items de cette déclaration et ceci est le reflet je crois de ce qui a été souligné à tout à l'heure par Nicola.

La multidisciplinarité, elle apparait de façon criante dans cette déclaration du G20. Alors le G20 appelle l'OCDE à toutes sortes de choses. C'est un peu comme, je pense que quelqu'un l'a déjà dit mais excuse-moi si je ne me souviens plus de l'auteur, l'OCDE est un peu le couteau suisse du G20 et à ce titre elle occupe une place unique je crois dans l'architecture de gouvernance globale actuelle. Alors cette architecture, c'est un peu le 3ème aspect que je voulais aborder, demeure évidemment fragile puisque tu nous invites à réfléchir aux mouvements actuels. C'est une architecture qui demeure fragile. On a dit à l'instant qu'il y a des chiismes, des oppositions, des tensions mondiales qui se renouvellent, qui sont profondes.

C'est évidemment un élément clé. Derrière les impressions d'unité ou l'impression d'unité, ou des visions partagées qui émane de tout ceci des graves divergences opposent certains des membres du G20 sans parler des non-Membres ce qui peut naturellement nuire à la crédibilité des annonces du G20 et peut-être aussi de l'OCDE. On a entendu hier je crois (ça n'a pas beaucoup de sens mais on l'a entendu quand

même) cette notion de bla bla bla bla. C'est très agaçant, je dois le dire, mais c'est ce qu'on entend un petit peu maintenant et il faut le savoir. Ensuite si on entend promouvoir la politique mondiale, pas seulement la politique conduite par ses Membres du G20 mais la politique mondiale. Je parle du G20 dans une perspective d'intérêt général. Le G20 doit prendre garde que l'édit politique soit assis sur une vision à la fois partagée et objectivement correcte des problèmes. Des attentes de ce qu'il faut faire et de ce qui est effectivement fait. Or, et alors bien entendu, le G20 s'appuie sur l'OCDE en grande partie pour ça mais on voit bien quand même que le G20 n'est pas aussi immédiatement légitime que l'ONU et que l'OCDE n'est pas non plus aussi mondiale que l'ONU dans sa composition. On a beaucoup parlé de l'élargissement (de l'OCDE), de son ouverture, de son « inclusiveness », mais il ne reste pas moins que l'OCDE ça n'est pas l'ONU. Il faut donc, pour que le système fonctionne et synchronise durablement ; il faut convaincre que les politiques formulées par le G20 qui s'appuient sur les constellations dont je viens de parler soient légitimes objectivement aux bénéfices de tous et les meilleurs pour chacun, et ça c'est une question très complexe car exiger l'objectivité et l'indépendance de quiconque dans des domaines éminemment politiques ne va pas de soi.

Jean-Marc Sorel disait tout à l'heure : « tout est politique ». C'est une émission d'ailleurs, de France-Inter qui est très intéressante. Mais c'est vrai que dans les domaines en particulier de l'économie, l'approche politique est quand même très importante et la question qui se pose est de savoir si les OI (les organisations internationales) qui participent à la gouvernance mondiale doivent être indépendantes et cette idée est très importante, très présente… l'indépendance. Alors, moi je crois que bien sûr, les organisations internationales ne doivent pas faire primer l'intérêt de tel ou tel de leurs membres sur l'intérêt collectif de leurs membres mais quand même, elles sont faites à priori pour défendre l'intérêt collectif de leurs membres et c'est assez naturel. Ce qui peut conduire à des tensions. Je prends un exemple qui sera peut-être débattu. Un exemple de tension entre d'un côté l'OCDE qui évalue (c'était dans le rapport du G20, dans les déclarations du G20), qui évalue à un niveau assez élevé les flux nord-sud consacrés au financement de la lutte contre le réchauffement climatique (et ça a été d'ailleurs rappelé par le président Macron) et de l'autre côté par exemple OXFAM qui pointe le fait qu'une grande part de ces flux sont constitués de prêts ou investissements, pas de dons. Alors cette tension s'explique bien sûr par une incompréhension probablement feinte du mandat confié à l'OCDE qui fait du mieux qu'elle peut pour ce qui lui a été demandé (c'est vrai) par le nord. Mais en l'espèce si l'OCDE doit être (et c'est un impératif) indépendante, de tel ou tel de ses Membre, il demeure qu'elle porte peu ou prou la vision des états développés sur ce qui constitue la finance climatique et sur la manière dont on doit la calculer. Je ne dis pas, je ne prends pas position à l'égard de cette manière d'approcher les choses, mais là il peut y avoir une tension et une tension qui est liée, bien sûr, au fait que l'OCDE représente des like-minded countries et ce sont quand même des pays, pour l'essentiel, développés. Alors bien entendu, certains vont y déceler que l'OCDE

agit en fait comme un instrument de justification de l'injustice dans laquelle se trouve le global self ou plus généralement les pauvres de tous les pays. Ça n'est pas ma conception des choses mais il y a là un risque et c'est le risque que je voulais souligner.

Je conclus pour dire que selon moi l'enjeu majeur (et je crois que je rejoins certains des intervenants) pour les années à venir (si tant est encore une fois que cette forme de gouvernance mondiale devait s'imposer durablement et au bénéfice de tous dans un esprit de solidarité et ce mot est quand même très, très important… il a été promu par Yves Daudet le Président du Curatorium de l'Académie de droit international de la Haye dans sa « gracious letter » donnée lors de la dernière réunion annuelle de l'American Society of International Law… je le mentionne parce qu'on est aujourd'hui dans un évènement conjoint avec l'American Society), je crois que l'enjeu réside dans une réflexion profonde sur la manière d'assurer la plus grande légitimité de tout cela.

Résout-on la question par des voies institutionnelles en assurant par exemple une plus grande représentation de tous les États, leurs sociétés civiles, les parlements nationaux, ou encore d'autres acteurs (on parlait à l'instant, je crois que l'un des intervenants parlait de mieux associer l'organisation des Nations Unies proprement dite) ; faut-il plutôt focaliser sur les résultats des politiques conduites et en faire découler la légitimité des actions décidées ? Faut-il mieux communiquer pour rendre les axes des politiques suivis mieux compris ? Les trois, il me semble. Je te remercie Nicola.

Nicola Bonucci:

[02:14:39]

Merci à toi Jean-Marc pour cette intervention très riche and therefore, I am going to slightly shift the order of questions because I think Jean-Marc has raised an important question and I would like to follow up on that. Which is this notion of independence of International Organisations, the credibility of International Organisations. So let me ask all of the panellists about how do you see the situation today in which (and there was a reference to this in the previous panel) there have been some polemics within an important International Organisation about an index and the credibility and methodology of this index. And at the same time, you have in particular in some countries… and most specifically (by the way) the OECD countries… you have also a certain form of rejection of the expertise, of the scientific evidence or the analytical data which have all been indicated as the strength of the OECD and more generally on how the International Organisations should work. So how to do we reconcile this tension? Let me start with Andy first and then I'll give the floor to Nico.

Andy Wycoff:

[02:16:10]

Nicola, I think this is a question that keeps me up at night and one which I think the solution for us is to keep up the rigour, keep up the accountability and this means checks and balances so that we are beyond reproach in what we are doing. I think the multi-stakeholder approach here helps. But just publishing your methodology, publishing the data, have it be out there. But I also think that no one data set is perfect and I have always resisted (as you know) and met with some pressure that wanted to grab headlines. But the composite indices are problematic in general (I won't go into the math or the methodology here). But instead we tend to publish what I call scoreboards where the readers are forced to go through and kind of compile their own "cat scan" of a country or theme. This is my best way going forward and I guess I would just pause with a bit of a: *"it's very trendy now to use big data to look at some of these issues and they have nice qualities and they're much more up to date and can help you with so called weak signals"…* but the problem is the methodology and the reporting. The potential statistical bias with these is something that we don't really know exactly every dimension of and it's hard to get "samples" when you don't know what the frame is that it's a sample of. I don't know if I've made sense here but I just want to say that I think this is an ongoing issue for us going forward and I think we need to collectively think about it.

Nicola Bonucci:

[02:18:12]

Thank you Andy. Nico how can International Organisations remain credible?

Nico Krisch:

[2:18:20]

Ha! That's such an easy question right?! Short and easy! Thanks a lot! Well obviously it's really difficult. I wouldn't be able to give any conclusive answer.

One approach of course is the one that Andy outlined already which is to say you have to be good at what one does, keep the quality up and strengthen it, defend it against internal challenges.   I think that's one way but my sense is that some of the major challenges that we are seeing today, especially the backlash against elite, technocratic governments that we see in many countries for more populist corners, they won't be really satisfied with just better data or better quality of output.

Because much of really what they are about is not about better solutions to problems but more about emotional responses to a feeling of being unable to govern the world that we are living in. A feeling of a loss of self-government and that's not going to come back yet… another indicator I think that might be better and more suited and it can really only come back by a deeper connection with some of the deepest fears and anxieties that people have. I think that's something we're missing often. Maybe this is especially a danger for an Organisation that emphasizes so much on the technical quality/technical output that it produces. The more emotional part of the populist challenge and the deeper anxieties of people in a globalised economy. We have to take these somewhat into account and really deeply think about how they can be taken into account rather than brush them away and say "well that's all irrational", which it might be, but it might be just a different rationality. So, in that sense I think there is that tension.

But much of what I think International Organisations in global governance have to do here is really try to listen to what is behind those challenges and try to understand where these fears come from. The deep unsettlement that we see among people in these global markets and it might just lead to a backlash against an economic model that has obviously been part of the DNA of the OECD for some time. That is, one of liberalisation in open markets and the benefits that it can bring to both and hopefully, to all. The benefits of which not everybody sees and I think we need that linkage and a great readiness to listen. Potentially, a greater taking back and taking on of some of the challenges that are presented. I think it has to be at least one element of a way of regaining credibility, also in the eyes of those that are disenchanted with global technocracy and the like.

Nicola Bonucci:

[02:21:44]

Susan or Jean-Marc, would you like to…

Susan Karamanian:

[02:21:47]

Yes. I'd like to chime in on what Nico just said because I disagree. I think there is an element out there that will always question but what Andy was describing is the situation in which we have data and there's been a misuse of the data, incorrect analysis and things like that and how that can come about. I see that as a separate problem and one that trying to deal with the issue of populism and questioning the least and the like, I see that more in terms of long-term legitimacy of the institution. But instead, with the OECD with regard to data, at least in my judgement, the

reputation of the OECD is built on its ability to gather and analyse data and do so in an objective way while engaging States on reform issues. And we are in a situation where we can have endless questions about facts or reasonable conclusions to be drawn from them. So, a credible challenge to data presented by an institution such as the OECD could be an attack on the institution's credibility, no question about it.

I think it's interesting within the OECD that there are standards to support laws and policies, including as to research methods. In 2007 the OECD published its Principles and Guidelines for Access to Research Data from public funding although advising States in terms of standards and it aimed to promote public access to research data to inform States setting out substantive principles in the area of open access, transparency, flexibility and the like. The OECD has its own standards, for example, just looking at the quality guidelines for OECD statistics and the guidelines for collecting and reporting data on research and experimental development. And so I think, just looking at this (ie. a policy about methods, a policy that's known, a policy that's tested followed by the Institution, shared with the public), assessment of compliance on a regular basis is essential.

Having the assessment publicly disclosed would perhaps stay off what I can see as legitimate concerns. Those concerns Nico you described are the ones that are pushing the envelope "*we are never going to believe anything*" and I'm not sure the presentation of data is going to change the views. Those deal more with other legitimacy issues, but not so much just on a complete rejection of the scientific approach, things that we can potentially cure here by dealing with an assessment of the way information is gathered and presented.

Jean Marc Thouvenin:

[2:24:50]

Si je peux rebondir sur tout ça. Moi j'ai entendu (je crois) que le Secrétaire-Général a commencé la session en disant : au fond l'OCDE fait ce que les États, ses États Membres veulent qu'elle fasse. Et à la fin du jour, ce sont les membres finalement qui font. L'OCDE est un outil mais elle n'impose pas. Elle travaille sur des bases qui lui sont suggérées et le fait du mieux, ce que je disais tout à l'heure, du mieux qu'elle peut et c'est le/du mieux qu'elle peut qui doit être crédible. J'ai l'impression que tout le monde l'a dit aujourd'hui et je pense aussi que l'OCDE est un formidable outil. C'est un formidable outil pour toutes les raisons qu'on m'a dites. Alors la question de la crédibilité se pose à l'égard de qui? Alors est-ce qu'il faut que l'OCDE assure une meilleure crédibilité à l'égard de ses États Membres ? J'ai l'impression que ça marche plutôt bien de ce point de vue-là. Est-ce que l'OCDE doit être crédible vis-à-vis du G20? Quand même, dans la dernière déclaration du G20, l'OCDE est véritablement partout. Elle est citée quinze fois pour l'excellence de ses travaux et pour engager de nouveaux

travaux sur des domaines comme je disais tout à l'heure, extrêmement différents et qui sont tous cruciaux.

Faut-il être crédible vis-à-vis du grand public ? Au fond, moi j'ai l'impression que le problème qui se pose en termes de crédibilité aujourd'hui c'est plus celui des politiques, pas des experts de l'OCDE. Alors, c'est vrai qu' il y a une crise de l'expertise dans les médias, on a des experts de tout et de n'importe quoi, des pseudos experts qui s'expriment et qui racontent ce qu'ils ont dans la tête mais je suis pas sûr que l'OCDE, je crois même que l'OCDE n'a rien à voir avec tout ça et n'est pas concerné. Donc la question que je me pose est de savoir si l'OCDE devrait chercher une forme de crédibilité vis-à-vis du grand public ? Peut-être. Et si c'est le cas, cela doit se faire à travers de la communication. Parce qu'avant tout, le grand public ne connait les choses que par la communication. Il ne va pas aller lire (ce que nous avons tous fait) les rapports très longs, très intéressants, très denses. J'allais dire même exceptionnels de l'OCDE. J'ai lu pendant la semaine qui vient de s'écouler beaucoup/de nombreux rapports intéressants de l'OCDE. J'étais stupéfait de la qualité de ce travail et des informations que ça apporte. Le fait que c'est quand même la célébration des 60 ans de l'OCDE et donc il faut que je dise des choses sympathiques mais je les pense. Donc ce que je crois, si on vise le grand public ou les gens normaux j'allais dire, c'est plus à travers la communication. Peut-être qu'il y a une interrogation à avoir sur ça. J'ai vu moi que l'OCDE avait de très, très beaux Mojos : « Better policies for better lives ». Ça c'est très bien. Une entreprise vous dirait : « si je perds en crédibilité, je dois changer de nom ». Alors vous avez vu que le Libra par exemple est devenu je ne sais pas quoi. Facebook a changé de nom etc. Donc peut-être que l'OCDE devrait, si elle avait un problème avec le grand public, songer peut-être à changer de nom. Ça c'est un peu un gag.

Nicola Bonucci:

[2:28:05]

So let me continue on that and let me challenge you, Jean-Marc, a bit. Let's try to be critical of ourselves.

We've been talking a lot in the first panel and including now about the necessary interaction with the private sector. Now there are parts of the population which believe that in doing that basically an Organisation like the OECD puts at stake its credibility and independence. There have been things like that said about the work just finished now on taxation… the fact that multinationals… but even if we take a broader picture not only about the OECD… there have been a lot of polemics (and maybe I'd like to hear from Nico on that) about the WHO's relationship with the private sector or the influence that the private sector is having now in the deliberation of the Commission of the European Union in terms of human rights and due diligence.

So, at the same time, I think we all agree amongst experts that it is vital to interact with the private sector because they are a key player in the 21st century. And a number of people already mentioned, including Jean-Marc this morning, that production and implementation of norms is not anymore the exclusive responsibility of States.

So let me try to make a "tour de table" about this. How can an International Organisation interact effectively with the private sector and maintain its credibility and independence? Susan, you want to kick-off?

Susan Karamanian:

[2:30:03]

Yes and I am just going to kick it off because there is so much here. But I want to talk not about the private sector from the business component but civil society.

We've talked a lot about the OECD leadership, G20 leadership as well in the tax realm. Yet criticism over the inclusive framework, you know, it's going to be inevitable and if you take a look at the media coverage, Oxfam has been front and centre in terms of critiquing the BEPS agreement. Expressing concerns that the framework takes on tax havens (happy about that) but that the ultimate tax rate that's reached (15%) is too low and industrialised countries have an average of 23.5%. I'm talking about exemptions, talking about delayed implementation and then an overarching issue of that being the need for tax proceeds going to developing countries. So, the developed countries, the "likeminded" so to speak, are the ones that are going to potentially benefit economically from this.

On the flip side, we have criticisms from republican senators in the United States who said that they've expressed these concerns about the control of the rate of taxation and the like, yet as we've heard throughout today, the ultimate decision is going to be with the State. It's the State that has to gain the acceptance within their national systems of the standards and the like.

In the aftermath of the 2008 financial crisis, the OECD advocated a peoples centric approach to policy as to OECD countries and so I think it odd that if the OECD has advocated this approach requiring States to have a peoples centric approach, could it not ask itself to take a similar approach to its own policy and do through various means? And we heard earlier Gita talk about the importance of obtaining the public views on draft guidelines and the like and I think that there just needs to be/there is a fine line in terms of gathering and presenting data. Getting feedback as we heard to get it right. To use the data in an appropriate way and then the issue of reform and how it's used to guide reform because ultimately that's the State's responsibility.

Now it's going to be the OECD leadership at some point, collectively as well as through (as we've seen with the previous Secretary General on the tax issues), to make things come together to a certain extent. Yet to me, it is absolutely critical they have this engagement and the OECD has set up a mechanism for public engagement and the like. Yet to get the appropriate feedback, it cannot simply dictate the work because again, the reputation of the OECD is built on its ability to gather and analyse data and do so in an objective way while engaging the States on the reform issues.

Nicola Bonucci:

[02:34:09]

Nico, do you want to continue the discussion?

Nico Krisch:

[2:34:13]

Yes, thanks. I think it really quite a fascinating issue and thanks also to Susan for bringing in the contestation of the tax agreement.

I think it is very important to keep in mind the very political nature of what's being debated here, even if it is in the realm of expertise and as Jean-Marc Sorel had said before/emphasized already, the political nature of this. But that leaves us with a quandary and I think it's a quandary not only the OECD faces. Many International Organisations face this…having to deal with current issues that go ever deeper into the domestic politics of member States, not only member States but a whole host of States that are beyond the Membership. And that is: "how to engage the people/broader public".

Jean-Marc mentioned that obviously credibility towards a larger public is a greater challenge and it's not something the OECD or most International Organisations have been engaged in at all or largely in the past, largely focusing on member States. But focusing on member States means of course largely focusing on the executives, not to the exclusion or at least side-lining of other parts of the political process or the broader social processes, political parties and the like. And it's really difficult for an International Organisation to replicate somewhat the broader inclusion that you find in domestic political processes. It doesn't have a parliament or a proper parliamentary assembly, something that could guide it. Even if it had that, and we see that with other International Organisations that have tried this out, typically parliamentary assemblies live off party contestation that is not easily replicable on the global scale in a similar way. But some form of engagement I think has to be there. And I think, seen from that perspective, say kind of a democratic perspective, it's not so much about the

independence of the Organisation because when we talk about independence it is always the question "independence from whom?". Independence from special interest you can say, but in democracies simply they don't think that independence from the people is necessarily independence that any governor wants so you need to engage. You might want to create impartiality but independence of governments is a difficult goal to achieve because it always clashes with accountability.

So the question of accountability I think is pretty much front and centre and engagement of civil society I think has to be seen in this light. Some of the discussions in the last panel on civil society engagement largely came from the idea "what we need from civil society and more generally private sector engagement is on the one hand to gain expertise, they have to give us input, something that we sometimes don't have as much and buy-in so that we can get the addressees to really follow up on that.

But I think there's really a third very fundamental element in private sector participation and that is actually a proper political ideal of accountability and participation that needs to be served by this, for which you have to think about: "who do you involve?". This is not a simple question. There's all kinds of good libraries being written by political theorists about those kinds of questions. But we have another context, say in private standard setting of Organisations on the global level. We have standards like the ISEAL standards for public participation in private standard setting and they specify to a fascinating degree which stakeholders ought to be involved and how they ought to be involved and how Organisations are to give responses to these.

So, I think there's a lot of experimentation going on in the global governance scheme that somehow I think all Organisations are somewhat engaged in and trying to get onto. I think it's a pretty fundamental challenge for the Organisation to do that and in that sense, really acknowledge that what the OECD and other Organisations are doing (but the OECD maybe particularly), which is a properly kind of governmental governance function and they can't really hide behind the member State governments because it has much more influence really than that secondary function/that hiding function suggests.

Nicola Bonucci:

[02:38:51]

Andy, Jean-Marc, would you like to say a few words. We're almost reaching the… Jean-Marc and then Andy to complete.

Jean-Marc Thouvenin:

[2:39:03]

Pour mettre un petit peu de français dans la discussion. Donc ta question porte aussi (je crois) sur la manière dont l'OCDE ou les organisations internationales en général doivent intégrer dans leur réflexion les inputs/les inserts du secteur privé dont notamment (et je pense que ce que tu as en tête c'est du secteur privé du business/des business people) des grosses entreprises ou des entreprises, ou des syndicats d'entreprises etc… Je pense que c'est une question qui se pose à tous les niveaux du pouvoir. Or l'OCDE a un certain pouvoir… ne serait-ce que le pouvoir d'adopter des résolutions et des recommandations donc un certain nombre de textes qui sont censés avoir un impact sur la vie économique. Et donc c'est ce qu'on appelle le lobbying. Alors, le lobbying fait l'objet d'un encadrement qui est toujours un peu compliqué mais il y a quand même de l'expérience à cet égard, notamment au niveau de l'Union Européenne et pour l'essentiel la règle c'est la transparence la plus absolue et l'ouverture à tout type de lobbyistes qui voudraient venir apporter son écot. Donc c'est l'idée effectivement de l'inclusion de la société civile dans toutes ses composantes dans les débats et on peut penser que dans un monde pluraliste (parce que c'est de ça dont il s'agit), chacun ait les droits à la parole, y compris les personnes les plus en phase, enfin les plus concernés par le business. Là où les choses deviendraient compliqués c'est si tel ou tel secteur était capturé par le business.

Ça ce ne serait pas bon bien sûr puisque on sait très bien quelles sont les, comment dire, les impératifs des acteurs de l'économie. Leurs impératifs c'est quand même de faire du profit enfin ça fait quand même partie de ce que font les entreprises et de ce qui les caractérise. Donc il faut éviter la capture. La capture ça s'évite notamment par la qualité des experts. C'est-à-dire que, j'entendais tout à l'heure l'exposé de ce qu'est l'OCDE en termes de personnel, je crois que c'est un personnel qui est effectivement important mais aussi très qualifié et ça c'est fondamental parce que si vous avez dans une organisation des personnes qui sont pas très qualifiées, qui se retrouvent face à des gens très bien payés qui viennent faire un lobbying extrêmement convaincant mais qui cachent des choses, évidemment la capture se produit. Donc là je crois que l'un des efforts à faire c'est de maintenir le niveau de qualité du recrutement au sein de l'OCDE. Je sais qu'il est très très élevé.

Nicola Bonucci:

[02:41:45]

Andy, you want to say a word. No/Yes? Andy…

Andy Wycoff:

[2:42:04]

Nicola, ok very quickly. Sorry I may be having a bit of broadband width issue here. I just want to say that I very much agree with Susan. I think the issues of that index from one International Organisation and the greater issue of "what about scientific evidence" are two different things to debate. Then, I very much agree with where Jean-Marc was going. I feel when the private sector is in the room, and they have a definite position on these. You know, they are out to make money. I understand that. So, I think there are 2 important elements there. That's why I think broadening our multi-stakeholder approach from beyond just business organised labour to include these other groups now (civil society in particular) is really important for keeping checks and balances.

Likewise, governments have been known to be captured (and even departments within governments that are sometimes showing up as delegates) and I think this is where having a very balanced bureau for our Committees but also having just the 38 member countries sitting around a table, again, I think it's a 2nd level check on this happening. But I am very cognisant of the problem.

The last thing I would mention and really want to applaud (this is new at the OECD since you left I think, although you were a good adherent of it Nicola), is we now have an Ethics Officer whose job is to remind staff (some of whom come from academia and haven't been seeped in this kind of government service) that they have an obligation as an international civil servant to adhere to certain rules. I think just this awareness raising is very helpful. Thanks.

Nicola Bonucci:

[02:44:05]

Thank you Andy. We are reaching the conclusion. I think it is in fact time to close the second roundtable.

We touched upon a number of issues. We scratched the surface of some of them. I think the issue we have just touched upon is something that would merit a much deeper discussion about the independence of the secretariat, the values of the secretariat, the self-censorship that can sometimes exist in transnational Organisations even without having to make formal pressures. I think there is a lot of scope for discussion for another event but for now, I would first like to thank both the panellists in my roundtable and also in the previous one, and give the floor to the

Deputy Secretary General, Ulrik Knudsen, to conclude this event celebrating the 60th anniversary of the OECD. DSG, you have the floor.

Concluding Remarks

Ulrik Vestegaard Knudsen, OECD Deputy Secretary General:

[02:45:12]

Thank you very much Nicola. Thank you Presidents and thank you all participants and speakers. It's been really fascinating and stimulating to listen in on the discussions over the last, well almost 3 hours now. I've learned a lot and I think there is some inspiration there for the future. I have a couple of takeaways and maybe also a couple of observations that point to a bright future for the OECD. We have to end on a positive note so I'll try to do that.

But first, a couple of takeaways from our discussions today. I think the first one is that this method of standard setting, the OECD method, I think it is fair to say that it has not been frozen in time but it has continuously evolved to adapt to the needs of our Members and even non-Members. We have been able to respond to an ever-globalising world despite the limitations that some speakers correctly identified. I think it is fair to say that OECD standards have indeed had a major global impact, not only for the Members but also have reached beyond the limited membership. And I think the Organisation has been successful in disseminating its standards in many many ways. Many mentioned of course the tax standards that have been developed and implemented amongst the group of 140 jurisdictions in the so-called OECD-G20 inclusive framework on BEPS. I don't think I have to highlight the importance of it but I will come back to it at the end of my comments here. It will of course lead to a fundamental reform of international tax rules.

While I've been here, we have also seen the adoption of many Recommendations in the digital sphere. Many of which went to the G20. Not only the AI principles that we all mentioned but a few of them. So, this is not just opening up our standards to non-OECD Members but we are actually levelling the playing field globally. I think it is also fair to say that we are renewing ourselves by constantly engaging with stakeholders. I think the OECD network of Experts on Artificial Intelligence is a very good example. This was really born out of a dialogue that involved experts from other IOs, from the private sector, from civil society organisations and I think that could actually serve as a future model for us.

I'll also mention, as some of you did, that we have a particular strength because we cover a wide array of policy issues and this diverse expertise has really been a

comparative advantage of ours, call it multidisciplinary, call it cross-fertilisation, call it horizontal approach. We can call it all of that. I don't think we are there quite yet. We still have some work to break silence and adopt comprehensive standards that take into consideration a whole spectrum of policy needs, but I think we are evolving.

Then a second takeaway surely is that beyond our efforts to adapt our standard setting method, we have also been able to scan the horizon. We have not hesitated to review past successes and standards and I think clearly the soft law nature (droit doux ou droit souple) of OECD standards and the continuous efforts undertaken by the OECD expert bodies to monitor implementation have been supporting what you could call a "rejuvenation" of our standards, not least again in the digitalisation area as also mentioned by Andy.

I think the strength of the Organisation is its capacity to identify early on cutting edge issues and build, sometimes very very quickly as it happened with the AI principles, a consensus on game changing rules that actually could have a global reach.

And just to end on perhaps a couple of more positive observations pointing to the future. Sometimes we are underselling our own successes maybe a little bit. I would, as an economist who graduated from the University of Copenhagen in 1994, ridge on optimism from the GATT agreement, the formation of the WTO that came into effect, if I remember, on the 1st January 1995. I was very optimistic about the future of multilateralism.

But the fact is that it took 27 years from then, actually to this year, until the world again was able to come up with a truly comprehensive, binding multilateral agreement in this field of economics. And that was actually the BEPS OECD-G20 multilateral framework agreement. I would argue that for the last 27 years this is actually the most important agreement that the world has produced that is almost global. And why is that? It's because that global multilateralism has failed miserably over the last 3 decades, whether you look at the WTO or the UN, we've only been able to do plurilateral agreements or regional agreements. In other words, this is maybe the working method that we have adopted among our Members. And many of you (at least 3 of you), have mentioned the fact that we are actually not that many Members at the OECD but we've still had an opportunity to be global in our outreach. Perhaps exactly because we have encountered problems in need of recommendations or principles or norms for standards before others because we were the advanced nations. We've been able to come up with solutions perhaps a little bit ahead of the rest of the pack. This is actually also the only successes we've seen at the WTO (and even the UN) which were also plurilateral in nature and I explicitly said binding agreements because the Paris Agreement on Climate of course was not binding.

I think what we are seeing now is actually a call for the OECD to take on even more responsibility. Last week even, the WTO Director-General Ngozi Okonjo-Iweala said that maybe the OECD and other IOs should work together now on creating some sort of carbon pricing mechanism, taking inspiration from what we've done on tax. So, I think it is fair to say that maybe time is on our side. Perhaps even the times are on our side.

And then on just to echo what Jean-Marc said. Jean-Marc a mentionné que l'OCDE était mentionnée, je crois, 15 fois par le G20, and that is truly remarkable. I don't think it's laws that we can rest on. There are certainly G20 countries who are not always eager to advertise that these are actually OECD principles when they get to the G20 but nonetheless, it is a matter of fact that we are increasingly successful in influencing in what goes on in G20 meetings. I know because I have participated in six G20 Ministerials over the last 4 months and we do have an impact. We do have a voice and we do put our mark on the various declarations coming out of the G20.

So let me thank you again in saying in closing that I think this discussion has made quite clear that we shall continue to have an open and constructive approach, and a dialogue in and about our standard setting. We need to further cultivate our strengths. Thank you for mentioning them but thank you also for pointing out to risks and to flaws where we need to improve. Our standards will really only be strong if they are implemented too so we have to continue to develop tools to make sure we improve and support also the implementation and that of course is also a continuous process. So, I hope I've been sufficiently upbeat. I'm not always but in this area I am and I'd like to just thank you all again for this discussion. It's given us a lot to think about. We will listen and reflect (and I digest your wise words over the last 3 hours) and think about how to influence the last 60 years of standard setting in the OECD.

Thanks a lot.

Josee:

[02:53:51]

Merci beaucoup Ulrik. Je clore donc cette conférence. Je remercie encore une fois l'ASIL et la Société française de droit international pour nous avoir permis d'organiser conjointement cette réunion qui a été extrêmement intéressante et j'espère qu'on aura l'occasion de se retrouver pour le 70ème anniversaire de l'OCDE et qu'entretemps bien sûr, le dialogue pourra continuer d'une façon ou une autre. Merci à tous les panélistes. Merci à Nicola et merci à tous ceux qui nous ont écouté cet après-midi.

Au revoir. Thank you all.