

# Global Tax Governance

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## I. Introduction

The term global tax governance has been used by political scientists and tax scholars to address the changes in international tax law making and the interaction of countries (both developed and developing countries) with international (OECD, UN, IMF) and regional (EU) organizations.

For instance, in political science, Thomas Rixen in his book *the Political Economy of International Tax Governance* addressed the established institutional infrastructure to deal with double taxation (bilateral tax treaties, model treaties and institutions, i.e. the OECD) and the need to find cooperative solutions to deal with the issue of double non-taxation that at time (2008) was only addressed through unilateral (domestic) rules (Rixen, 2008, pp. 1 and 81). In his work, Rixen discussed, in addition to double taxation, other concepts of international taxation i.e. source vs. residence, fairness and international tax neutrality from an international political economy perspective (Rixen, 2008, pp. 57-85).

Later on, in 2016, Thomas Rixen, in his book ‘Global Tax Governance: What is Wrong with It and How to Fix It’, along with Peter Dietsch provided a definition of global tax governance stating that it “consists of the set of institutions governing issues of taxation that involve cross-border transactions or have other international implications. This definition implies that global tax governance need not, but could, involve a full or partial shift of the power to tax, that is, the right to impose taxes on citizens, to the international level. Currently, the right to tax is firmly tied to the nation-state. While global tax governance circumscribes and shapes a nation’s power to tax in various ways, it exclusively consists of institutions governing the interaction among national tax systems” (Dietsch & Rixen, 2011, pp.3).<sup>2</sup>

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<sup>2</sup> See also Rixen, T. (2011). *Tax Competition and Inequality: The Case for Global Tax Governance*

Tax scholars have also referred to the need to address fairness, neutrality, sovereignty, and the role of international organizations in dealing with tax cooperation and tax competition. For instance, in 2009, Ring discussed in her article ‘Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation’ the question of “how sovereignty shapes arguments over the merits of tax competition and how sovereignty influences the design of responses to tax competition” (Ring, 2009).<sup>3</sup>

The design of the international tax regime has also been addressed by Brauner in his 2003 article “An international tax regime in crystallization” In it, Brauner explores the benefits of a truly global approach to efficiently resolve the challenges in international taxation. Therefore, he proposes a full set of international tax rules in the form of a multilateral treaty. For this author, “key elements of the success of such a treaty would be: (1) the participation of a significant part of the major economic and trade forces in the world; (2) acceptance of non-negotiable rules as domestic legislation, such as the interpretation and arbitration clauses, which also would apply to trade with nontreaty partners; (3) a flexible but binding interpretation system similar to the OECD model commentaries; and (4) an easily accessible conflict resolution system, which would be open to the individual residents of the treaty partners” (Brauner, 2003, p.263).

In addition, in her article on hard law vs. soft law in international taxation in 2007, Christians addressed the use of these terms to explain the degree of global adherence by countries to various tax practices (Christians, 2007). Later on, in a 2013 paper, Dourado also discussed the validity of global standards in tax law in this case, exchange of information (Dourado, 2013).

In these contributions, tax scholars, as has been done by political scientists, have referred to the interaction between international organizations and countries when designing international tax rules. However, unlike political scientists, tax scholars at that time did not make reference to global tax governance, but to sovereignty, tax competition and tax cooperation.<sup>4</sup> Therefore, there was a disparity in the interaction between tax and political scientist scholars when addressing issues of global tax governance. This has been resolved in recent research projects<sup>5</sup> and recent articles by tax scholars (Rocha & Christians, 2016, pp. 1137-1196).<sup>6</sup>

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<sup>3</sup> See also Ring, D. (2009). *Who is Making International Tax Policy: International Organizations as Power Players in a High Stakes World*. Fordham Int’l LJ, 33, 649 and Ring, D. (2008). *What’s at Stake in the Sovereignty Debate: International Tax and the Nation-State*. Va. J. Int’l L., 49, 155

<sup>4</sup> e.g., See above Ring and Brauner and also Dagan, T. (2017). *International Tax Policy: Between Competition and Cooperation*. Cambridge University Press and Keen, M., & Simone, A. (2004). *Is tax competition harming developing countries more than developed?* Tax Notes International, 34(13), 1317–1326.

<sup>5</sup> ERC Project GLOBTAXGOV See supra n.1.

<sup>6</sup> See also Azam, R. (2017). *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*. Suffolk UL Rev and Kingma, S. (2019b). *Inclusive global tax governance in the post-BEPS era* and Magalhaes, T. D. (2018). *What Is Really Wrong with Global Tax Governance and How to Properly Fix It*. World Tax Journal: WTJ, 10(4), 499–536 and Ozai, I. (2019). *Institutional and Structural Legitimacy Deficits in the International Tax*

Notwithstanding the above, the boundaries between international tax cooperation and global tax governance are still indistinguishable. Some scholars discuss international tax cooperation as part of global tax governance and that, if all countries cooperate, then global tax governance will be achieved.<sup>7</sup> However, other scholars may question the use of the terminology of global tax governance since the use of global governance may involve “imposing outcomes on people, to the benefit of some and at the expense of others” (Hurd, 2020, pp.1&20).<sup>8</sup>

For Hurd, “Global governance scholars who adopt the cooperation premise should be alert to its biases and costs. By assuming that global governance follows from mutual interests pursued through cooperation, they naturally interpret international institutions as devices aimed at the common good” (Hurd, 2020, pp.1 & 20). Therefore, further research needs to be conducted on what is meant by international tax cooperation and how it may or may not contribute to global tax governance.

By assuming that the term global tax governance is used to impose outcomes on people, the question that should be asked, would be, if this is true, and countries( mainly those that are developing) still follow these (imposed) outcomes by the OECD, under what conditions can the model of global tax governance be feasible and legitimate for both developed and developing countries? This question is currently addressed in the framework of the GLOBTAXGOV ERC funded project (Hurd, 2020, p.2).

This chapter aims to contribute to the discussion of global tax governance by proposing a framework with some of the elements that can be taken into account by tax scholars when studying this issue.<sup>9</sup> For this purpose, this chapter is divided in seven parts. Part II will provide an

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Regime and Mason, R. (2020). *The Transformation of International Tax*. *American Journal of International Law*, 114(3), 353–402 and L. Faulhaber, (2020). *Diverse Interests and International Legitimation: Public Choice Theory and the Politics of International Tax*. *AJIL Unbound*, 114, 265-269

<sup>7</sup> See for instance I. Ozai arguing that “improving legitimacy in the international tax system requires additional institutional commitments to overcome the significant differences among countries in terms of resources and bargaining positions“. Ivan Ozai, “*Institutional and Structural Legitimacy Deficits in the International Tax Regime*” (2020) 12:1 *World Tax J* at 14. See also Sieb Kingma proposing an inclusive global tax governance model in *Inclusive Global Tax Governance in the Post-BEPS Era* IBFD Publications at 405.

<sup>8</sup> In his paper, Hurd challenges the view that international law, institutions, and organizations can be classified unproblematically as examples of international cooperation. He suggests, instead of using the terms international tax cooperation and governance interchangeable, to put in place of the cooperation theory, “an overtly political methodology that assumes that governance – global or otherwise – necessarily favors some interests over others”.

<sup>9</sup> For a political science approach see for instance, Rasmus Corlin Christensen & Martin Hearson (2019) *The new politics of global tax governance: taking stock a decade after the financial crisis*, *Review of International Political Economy*, 26:5, 1068-1088, Lips, W. (2018). *Great powers in global tax governance: A comparison of the US role in the CRS and BEPS*. *Globalizations*, 16(1), 104–119. ; Büttner, Tim and Thiemann, Matthias. (2017) “*Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of*

introduction to the recent international tax standards mainly exchange of information and BEPS as developed by the OECD with the political mandate of the G20. Part III will address the use of soft law vs. hard law to introduce international tax standards. Part IV will address the role of developing countries in the BEPS Inclusive Framework and the peer review of the BEPS Minimum Standards. Part V will address the validity of the outcome of these international tax standards. Part VI will address the role of the actors in global tax governance (countries, international and regional organizations, business, and civil society, among others). The final part (Part VII) will provide some concluding remarks.

## **II. The development of International Tax Standards and the role of the OECD**

### **1. Development of international tax standards**

In the past, international organizations such as the OECD and the UN provided recommendations, guidelines and standards models that have been used by developed and developing countries unilaterally or in bilateral negotiations. Before the BEPS Project, the role of the OECD was to develop standards, recommendations, and models that were followed by OECD countries and in some cases (e.g. OECD tax treaty model), by non-OECD countries.<sup>10</sup>

Despite the role of the UN (with 193 countries) as a representative of developing countries, the OECD has taken an important role in the development of tax rules, for instance regarding the use of the OECD tax treaty model<sup>11</sup>, and the OECD guidelines (e.g. transfer pricing guidelines) by OECD and non-OECD countries.<sup>12</sup> In light of the current developments in taxation, it can safely

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*International Taxation*" Accounting, Economics, and Law: A Convivium, vol. 7, no. 1, 2017. <https://doi.org/10.1515/ael-2016-0069>; R.Eccleston & H. Smith, (2016). *The G20, BEPS and the future of international tax governance*. In P. Dietsch & T. Rixen (Eds.), *Global tax governance: What is wrong with it and how to fix it* (pp. 175–198).

<sup>10</sup> See for an earlier analysis of the role of the OECD A. J. Cockfield, (2005). *The rise of the OECD as informal world tax organization through national responses to E-commerce tax challenges*. Yale Journal of Law and Technology, 8, 136–187; Ault, H. J. (2013). Some reflections on the OECD and the sources of international tax principles. Tax Notes International, 70(12), 1195–1201

<sup>11</sup> Some of these reasons could be seeking accession to the OECD (political motivation) or the result of the, bargain negotiation power between OECD and non-OECD countries. See Mosquera WTJ at 355-356. See for a study of the use of the UN Model Wijnen, W., & de Goede, J. (2013). *The UN model in practice 1997–2013*. Amsterdam: International Bureau of Fiscal Documentation.

<sup>12</sup> See for an overview of the application of arm's length and the transfer pricing guidelines by non-OECD countries, the country profiles available at <<http://www.oecd.org/ctp/transfer-pricing/transferpricingcountryprofiles.htm>> See Irma Johanna Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism" (2015) 7:3 World Tax J at 355-356

be argued that, despite the call from the UN, civil society<sup>13</sup> and some tax scholars<sup>14</sup> to give the UN a more representative role in international tax negotiations, the OECD continues to occupy this predominant role.

From a tax and international relations perspective, Christians and Keohane identified the OECD as an organization with a networking role that has facilitated the spread of best practices (Christians, 2007, pp.1-31). Keohane further stated that this network role takes place by means of “linking national officials and quasi-public bodies with their foreign counterparts for the purpose of joint decision making, coordination or information sharing” (Keohane et al, 2009, p20).<sup>15</sup>

Later the OECD, introduced multilateral projects in taxation with the political mandate of the G20, for which the main focus was the introduction in 2009 of a global standard on exchange of information and more recently (2014), a global standard on the automatic exchange of information. Unlike these projects that provide for assistance and exchange of information between countries, in the BEPS Project, the OECD focuses on substantive issues that will change the international tax architecture of developed and developing countries when they are implemented. The BEPS Project has 15 Actions, and 4 Actions (5, 6, 13 and 14) are minimum standards that countries should have in their tax systems. These Actions are soft law thus not legally binding, however, there is an expectation that they will be implemented by countries that are participating in the BEPS inclusive framework.<sup>16</sup>

The contents of the BEPS Project have been decided and approved by the BEPS 44 Group that includes the OECD, OECD accession countries and G20 countries. At the meeting in Kyoto, Japan (29 June -1 July 2016), countries (including developing countries) committed to participate as BEPS Associates in the BEPS Inclusive Framework. As of March 2021, 139 jurisdictions (BEPS 44 group and 95 additional jurisdictions) have committed to the BEPS Inclusive Framework and to the implementation of the BEPS Minimum Standards.

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<sup>13</sup> One example is the 2015 proposal by civil society, developing countries, and a few developed countries to upgrade the UN Tax Committee to an intergovernmental body which was rejected by other developed countries at the Addis Ababa conference arguing the leading role of the OECD in all tax issues. Irma Johanna Mosquera Valderrama, “Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism” (2015) 7:3 World Tax J at 375. One recent example is the work carried out by the FACTI panel which, in the recent report (February 2021) has provided 14 recommendations including recommendation 14B that proposes to create an inclusive intergovernmental body on tax matters under the United Nations <https://www.factipanel.org/explore-the-report>. This recommendation has been acknowledged and welcomed by civil society organizations such as the Tax Justice Network <https://www.taxjustice.net/press/heads-of-state-launch-historic-un-plan-to-stamp-out-global-tax-abuse/>

<sup>14</sup> Mosquera UNU-CRIS, and who else?

<sup>15</sup> See also Allen Buchanan & Robert O Keohane, “The Legitimacy of Global Governance Institutions” (2006) 20:4 Ethics & Intl Affairs 405

<sup>16</sup> See Part II below.

This description shows the leading role of the OECD in international tax matters and, therefore, the time is right to investigate the role of the OECD in the current model of global tax governance in respect of developed and developing countries.

## **2. The role of the OECD vis-à-vis developing countries**

The introduction of the international tax standard of exchange of information, and later on, the BEPS Project by the OECD with the political mandate of the G20 has resulted in a change of paradigm in the role of the OECD in international tax law making. The OECD consists of developed countries and the only way to become a member is by invitation from the OECD. In order to receive this, countries will need to initiate an accession process and comply with the OECD standards and conditions. Therefore, developing countries can only become members if the OECD decides to allow them. This has been the case of Latvia, Lithuania, and Colombia that formally became full members of the OECD in 2016, 2018, and 2020 respectively. At the time of this writing (March 2021), Costa Rica is an OECD accession candidate.<sup>17</sup>

In tax discussions, the OECD has stated that it does act adhering to the political mandate of the G20.<sup>18</sup> However, as has been argued in the past, the G20 does not represent all countries. The G20 is a political forum of governments with countries from Asia, North America, Middle East and Europe including BRICS countries and non-OECD countries such as Argentina, India, South Korea, and Saudi Arabia. In addition, even if a developing country would like to become a member, it is not possible. Countries cannot become members of the G20, since membership is a political decision made by the G20 countries (Mosquera Valderrama, 2015, pp353-354).

Based on the above, in the past, it was concluded elsewhere that the BEPS Project lacks input legitimacy in terms of participation and representation of developing countries in the agenda setting and decision making which is currently done by the OECD with the political mandate of the G20 (Mosquera Valderrama, 2015). Another tax scholar, Brauner, has also addressed the role of the OECD in the BEPS Project stating the inadequacies of the project are also due to its political origins (Brauner, 2014, pp.37-38).

The approach to legitimacy and accountability of the OECD multilateral initiatives has also been dealt with Lesage from a political science perspective. This author justly argued that “both

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<sup>17</sup> <http://www.oecd.org/about/members-and-partners/>

<sup>18</sup> See documents of the OECD regarding the BEPS Project and interviews/presentations by Pascal Saint Amans see <https://www.oecd.org/tax/beps/about/#history>  
In addition, the OECD also submits OECD Secretary General Tax report in G20 meetings (e.g. under presidencies of Germany, Argentina, Japan, Saudi Arabia) <http://www.oecd.org/g20/topics/international-taxation/publicationsdocuments/>



initiatives, which are attempts at universal governance, suffer from legitimacy issues because the G20 and OECD exclude most developing countries. Moreover, the policy outputs are not necessarily adjusted to the needs and interests of developing countries. In recent years, both the G20 and the OECD have attempted to address this issue through institutional fixes, extensive consultations with developing countries and modifications at the level of content” (Lesage, 2014, pp32-41). Therefore, Lesage called for more legitimacy and accountability of international organizations.

There are three organizations/political forums in which developing countries participate and are also relevant for international taxation. The first is the United Nations Tax Committee. The second and third one are political forums i.e. the Group of 77 (G77) at the United Nations which is a coalition of 134 developing countries and the Group of 24. The Group of 24 consists of 28 member countries established in 1971 as a chapter of the Group of 77 in order to help coordinate the positions of developing countries on international monetary and development finance issues. The Group of 24 also ensures that their interests are adequately represented in negotiations on international monetary matters.

However, the role of these three organizations/political forums in international tax law making is limited. The reasons for the limited role of the UN in taxation has been explained above.<sup>19</sup> The roles of the G77 or G24 in taxation were limited, for instance, in the recent discussion of BEPS Pillar 1. There was a proposal from the G24 countries presented in January 2019 to tax highly digitalized business (G24, 2019)<sup>20</sup>. However, this proposal was disregarded by the OECD Secretariat proposal “unified approach” presented in October 2019 which is currently under discussion by the members of the BEPS Inclusive Framework.<sup>21</sup>

The G77 has also been active for instance in the development of the United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries (UN, 2017).<sup>22</sup> This handbook has been praised by the Tax Justice Network stating that “while technical in style and cautious in approach, the UN tax handbook identifies a range of issues in which the OECD’s Base Erosion and Profit Shifting (BEPS) process has failed to deliver for lower-income countries” (Cobham, 2017).<sup>23</sup> However, no further attempts have been made by the G77 countries to play a role in the

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<sup>19</sup> See also See, e.g., Reuven S Avi-Yonah & Haiyan Xu, “Evaluating BEPS” (2017) 10:1 Erasmus L Rev 3.

<sup>20</sup> “Proposal for Addressing Tax Challenges Arising from Digitalisation” Available at: [https://www.g24.org/wp-content/uploads/2019/03/G-24\\_proposal\\_for\\_Taxation\\_of\\_Digital\\_Economy\\_Jan17\\_Special\\_Session\\_2.pdf](https://www.g24.org/wp-content/uploads/2019/03/G-24_proposal_for_Taxation_of_Digital_Economy_Jan17_Special_Session_2.pdf)

<sup>21</sup> The removal of the G24 proposal from the OECD Secretariat unified approach has been questioned by civil society see e.g. <https://www.globaltaxjustice.org/en/latest/time-developing-countries-go-beyond-oecd-led-tax-reform>

<sup>22</sup> “United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries” Available at: <https://www.un.org/esa/ffd/wp-content/uploads/2017/08/handbook-tax-base-second-edition.pdf>

<sup>23</sup> Available at <https://www.taxjustice.net/2017/09/11/new-un-tax-handbook-sets-lower-income-countries-oecd-beps/>

development of international tax standards and the current international tax negotiations. The participation of developing countries in the BEPS Project will be discussed in part IV below.

Since the introduction of the standard of exchange of information and the BEPS Project by the OECD with the political support of the G20, developed and developing countries are adhering to these standards. In respect of developing countries, tax and political science scholars have questioned their validity vis-à-vis developing countries. These concerns will be addressed in part IV below. The following section will address the use of hard law vs. soft law instruments in international taxation.

### **III. The use of soft law and hard law in international taxation**

As mentioned above, in international taxation, the rules have been developed by the OECD and the UN in the form of treaty models, guidelines, and recommendations. However, the introduction of exchange of information and the BEPS Project have created a new international tax framework with a mix between standards/best practices (soft law) and treaties (hard law).

In respect of exchange of information, countries have signed tax information exchange agreements in order to facilitate exchange of information on request in addition to the already existing Article 26 of the bilateral tax treaties (UN or OECD Tax Treaty Model). Furthermore, more than 140 countries have ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol (OECD, 2020).<sup>24</sup> Regarding automatic exchange of financial accounting information, countries have also endorsed the Common Reporting Standard CRS (OECD, 2021)<sup>25</sup>, and more than 100 have signed the CRS Multilateral Competent Authority Agreement (OECD, 2020).<sup>26</sup> These instruments have made it possible to activate automatic exchange of information on request among OECD and non-OECD countries.

In addition, a new forum has been created i.e., the Global Transparency Forum with 162 countries participating on equal footing on the implementation of the standards of exchange of information

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<sup>24</sup>“Jurisdictions participating in the convention on mutual administrative assistance in tax matters” Available at: [https://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf)

<sup>25</sup>“International framework for the CRS” Available at: <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>

<sup>26</sup> “Signatories of the multilateral competent authority agreement on automatic exchange of financial account information and intended first information exchange date” Available at: <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/crs-mcaa-signatories.pdf>



(on request and automatic). In the framework of this forum, countries are being monitored and peer reviewed on the implementation of the standards on exchange of information.<sup>27</sup>

The BEPS Project provides for four Minimum Standards, ten best practices and one multilateral instrument to modify bilateral tax treaties. Countries that are not participants in the BEPS 44 Group, have committed to participate in the implementation of the minimum standards by becoming BEPS Associates in the BEPS Inclusive Framework. In addition, countries have signed (more than 90) and ratified (more than 30) the multilateral instrument that contains two of the four minimum standards (Actions 6 and 14). However, unlike the Multilateral Administrative Convention addressed above, this multilateral instrument provides for a menu of options (opt-in, opt-out, reservations) that result in mini-bilateral negotiations among countries.

In addition, in the BEPS Inclusive Framework, it has been established that countries participate on equal footing on the implementation of the BEPS 4 Minimum Standards and that there will be a process of monitoring and peer review of the implementation. The question is to what extent this new mix of instruments and the peer review in the framework of the new institutions (i.e. Global Transparency Forum and BEPS Inclusive Framework) result in countries regarding these standards as binding or not.

In principle, regarding exchange of information, there is the requirement to sign and to exchange information and, in the event that the country does not comply, it could be possible that the country would be listed in the list of non-cooperative (and/or harmful) tax jurisdictions. However, there are other additional factors for these countries to be on the list.<sup>28</sup> Regarding BEPS, the situation is more complex since, in principle, these are minimum standards (soft law). However, unless these minimum standards have been opted in (and ratified) in the multilateral instrument (hard law)<sup>29</sup>, there is no formal obligation to adopt these standards.

However, there is an expectation that these standards will be implemented by countries that are participating in the BEPS Inclusive Framework.<sup>30</sup> As rightly argued by Christians, “becoming a

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<sup>27</sup> <http://www.oecd.org/tax/transparency/who-we-are/>

<sup>28</sup> See, on the content of the OECD and EU assessment I.J. Mosquera Valderrama, 'Regulatory Framework for Tax Incentives in Developing Countries After BEPS Action 5', (2020), 48, *Intertax*, Issue 4, pp. 446-459, <https://kluwerlawonline.com/journalarticle/Intertax/48.4/TAXI2020039>

<sup>29</sup> Assuming that the country does not provide for a tax treaty override. One example is the United States that provides for one. This could also be one of the reasons why the United States participates in the BEPS Inclusive Framework but has not signed the multilateral instrument.

<sup>30</sup> According to the OECD, “The final BEPS Reports are consensus documents, reflecting the agreement of all OECD and G20 governments. As soft law instruments, the expectation is that the conclusions of the reports will be implemented in consistent manners, as has been the case with similar multilateral initiatives co-ordinated by the OECD, such as on exchange of information for tax purposes. A monitoring mechanism will be put in place to assess implementation as well as the impact of OECD recommendations over time with all interested countries

BEPS Associate entails adopting the initiative's minimum standards and joining a new coordination architecture—the “Inclusive Framework”—organized for the purpose of measuring and monitoring BEPS compliance across countries” (Christians, 2017, p1606). Therefore, the adoption and peer review of these standards has raised questions over what exactly the consequences are for failing to comply with them.

In order to monitor the implementation of these standards, the OECD has created a system of peer review based on their experiences in other areas (corruption, trade).<sup>31</sup> According to the OECD, “peer review can be described as the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the States involved in the review, as well as their shared confidence in the process” (OECD, 2003).

In this system, countries functioning as peers with the assistance of the OECD Secretariat, review the implementation of the BEPS 4 Minimum Standards of the countries participating in the BEPS Inclusive Framework. There are several actors involved in the peer review i.e., the collective body within which the review is undertaken, the Organization Secretariat (i.e. OECD), the reviewed country, and the examiner countries.

In respect of exchange of information, the collective body is the Global Transparency Forum and, for BEPS is the BEPS Inclusive Framework. In both cases, the participation of countries is on equal footing. However, the peer reviews will be adopted subject to a “consensus minus one” rule. According to the OECD, this rule aims “at ensuring that no one jurisdiction, whether the jurisdiction under review or another jurisdiction with an isolated position, can block consensus on the adoption or publication of a report” (OECD, 2017, p22). In the authors' view, further research should be conducted on the use of a peer review to evaluate compliance (or not) with the international tax standards including the BEPS Minimum Standards.<sup>32</sup>

The following section will address the participation and representation of developed and developing countries in the BEPS Inclusive Framework and the peer review process.

## IV. Participation and representation

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participating on an equal footing”. OECD Myths and Facts about BEPS. <https://www.oecd.org/ctp/myths-and-facts-about-beps.pdf>

<sup>31</sup> See for a comprehensive review in these areas, the publications of the project PROM (Peer Review Observatory Maastricht) and also the forthcoming book Carraro, V., Conzelmann, T. & Jongen, H.: Beyond the Carrot and the Stick – The Authority of Peer Reviews in Global Governance.

<sup>32</sup> This research is being carried out in the framework of the GLOBTAXGOV Project. Supra n. 1.

The inclusiveness of the BEPS Inclusive Framework vis-à-vis developing countries has been addressed by several scholars and NGOs<sup>33</sup>. These scholars have examined (i) the legitimacy deficits of the BEPS Inclusive Framework (Mosquera Valderrama, 2020)<sup>34</sup>, (ii) the lack of true participation by developing countries in the decision making process (Christians & van Apeldoorn, 2018)<sup>35</sup>, (iii) the limited contribution of developing countries to international tax reform (Burgers & Mosquera, 2017)<sup>36</sup>, and (iv) the limited capacity of developing countries to allocate resources (technical, personnel) efficiently to address the implementation of BEPS Minimum Standards, the ratification of the multilateral instrument, and the discussions of Pillar 1 and Pillar 2 (Collier & Riedel, 2018). Some of these concerns have also been addressed by representatives of regional tax organizations (e.g. ATAF)<sup>37</sup>, OECD representatives<sup>38</sup>, IMF representatives (Crivelli, De Mooij & Keen, 2015), and representatives of tax administrations at several conferences.<sup>39</sup>

In the past, it has been argued (Mosquera Valderrama, 2015) that there is a lack of input legitimacy (participation and representation) of developing countries in the agenda setting and decision making of international tax standards. By participating in the BEPS Inclusive Framework, developing countries were required to adopt these standards, but without being able to address the

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<sup>33</sup> Regarding NGOs see for instance Action Aid. (2015). Levelling up. Ensuring a fairer share of corporate tax for developing countries. August 18, 2016 London. [www.globaltaxjustice.org/sites/default/files/levelling\\_up\\_final.pdf](http://www.globaltaxjustice.org/sites/default/files/levelling_up_final.pdf); BEPS Monitoring Group. (2015). Overall evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) project. August 18, 2016 <https://bepsmonitoringgroup.files.wordpress.com/2015/10/general-evaluation.pdf> and Tax Justice Network (2014) Briefing on Base Erosion and Profit Shifting (BEPS) Implications for developing countries <https://www.taxjustice.net/wp-content/uploads/2013/04/TJN-Briefing-BEPS-for-Developing-Countries-Feb-2014-v2.pdf>

<sup>34</sup> See also Ivan Ozai, “Institutional and Structural Legitimacy Deficits in the International Tax Regime” (2020) 12:1 World Tax J.

<sup>35</sup> See also Sissie Fung, “The Questionable Legitimacy of the OECD/G20 BEPS Project” (2017) 10:2 Erasmus L Rev 76; Ozai, I. (2020). Two Accounts of International Tax Justice. Canadian Journal of Law & Jurisprudence, 33(2), 317-339.

<sup>36</sup> See also blogpost Sol Picciotto Developing countries’ contributions to international tax reform <https://www.ictd.ac/blog/developing-countries-contributions-international-tax-reform-oecd/>

<sup>37</sup> See presentation by Logan Wort (ATAF) AT FACTI Panel Improving Cooperation in Tax Matters (Virtual Consultation), High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel) 5 May 2020 Videorecording available at <https://www.factipanel.org/events/virtual-consultation-session-improving-cooperation-in-tax-matters>

<sup>38</sup> See presentation Ben Dickinson, Head of the Global Relations and Development Division, OECD. OECD BEPS IF Online Conference 27-28 January and Tax Development Day 29 January 2021. See also Tax Sunday Conference organized by the World Bank and IMF 18 October 2020 International Tax Avoidance – What Has BEPS Accomplished for Developing Countries? Panel 2 From 20:22 <https://www.worldbank.org/en/events/2020/10/08/tax-Sunday-conference-2020#2>

<sup>39</sup> See for instance, OECD BEPS IF Online Conference 27-28 January and Tax Development Day 29 January 2021. See also Tax Sunday Conference organized by the World Bank and IMF 18 October 2020 International Tax Avoidance – What Has BEPS Accomplished for Developing Countries? Panel 2 Future directions presentations by representatives of Jamaica and Vietnam. <https://www.worldbank.org/en/events/2020/10/08/tax-Sunday-conference-2020#2>

content of these standards. This lack of input legitimacy is also shown in the current discussion of BEPS Pillar 1 and Pillar 2 that have resulted in the G24 being excluded from the “unified approach” presented by the OECD Secretariat. In a recent (2020) study by Christensen et al, the authors concluded that “structural obstacles to participation, including limitations on expert capacity, lack of political support and the absence of effective coalitions, are exacerbated by OECD/IF specific ways of working, e.g. ‘brutal’ or choreographed meeting environments, and high participation costs” (Christensen et al, ICTD, p28).<sup>40</sup> Therefore, attention should be given to the manner in which the countries participate in the decision making process of international tax standards.

In addition, the participation and representation of developing countries in the peer review process of the BEPS Minimum Standards should be carefully observed. Even though OECD and non-OECD countries participate in the BEPS Steering Group<sup>41</sup>, tax government officials have called for a more inclusive role of developing countries in decision making and in the adoption of the peer review report. For instance, in the recent meeting (27 January 2021) of the BEPS Inclusive Framework, the tax official representative of Jamaica<sup>42</sup> addressed the need for a more inclusive BEPS Steering Group.<sup>43</sup> Therefore, more research should be performed on the participation of developing countries and the role of the OECD Secretariat, the BEPS Steering Group, and the peer review process.<sup>44</sup>

## V. Outcome

International organizations and scholars have addressed the relationship between BEPS and sustainable development, as well as the contribution of the international tax standards to achieve

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<sup>40</sup> Christensen et al ICTD at 28. See also How inclusive is the inclusive BEPS <https://www.forbes.com/sites/taxnotes/2021/01/11/tax-policy-how-inclusive-is-the-oecd-inclusive-framework/?sh=2ab6542665aa>

<sup>41</sup> According to OECD FAQ „A Steering Group leads the Inclusive Framework. As its name suggests, the role of the Steering Group is to steer the Inclusive Framework and provide advice to help inform the Inclusive Framework’s decisions. The Steering Group is comprised of members of the Bureau of the Committee on Fiscal Affairs (i.e. from OECD countries), and members from BEPS Associate countries (i.e. from non-OECD countries)“.

<https://www.oecd.org/tax/beps/bitesize-beps/> See composition BEPS Steering Group <https://www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf>

<sup>42</sup> Marlene Nembhard-Parker (Chief Tax Counsel, Legislation, Treaties, and International Tax Matters - Ministry of Finance, Jamaica)

<sup>43</sup> See presentation Day 1 27 Item 3a Are we on track to finance the SDGs’: What role for Taxation. Program available at <https://www.oecd.org/tax/beps/agenda-oecd-g20-inclusive-framework-on-beps-meeting-january-2021.pdf> Webcast available from 3:02 at <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-meeting-january-2021.htm> / <https://youtu.be/hEJqRHkLQa8>

<sup>44</sup> This research is currently being carried out in the framework of the ERC GLOBTAXGOV Project.

the sustainable development goals.<sup>45</sup> The challenges that are addressed, for instance, are the need for capacity building and regional cooperation. However, the discussion is fragmented on whether the role should be for (i) the United Nations (UN Tax Committee and the recently created FACTI Panel); (ii) the OECD alone or in cooperation with other international organizations (World Bank and IMF); and/or (iii) for the countries themselves in a regional setting (Africa, Latin America, Asia). In addition, international organizations in the framework of the Platform for Collaboration on Tax have addressed the need to tackle other issues that are not BEPS related e.g. wasteful tax incentives and indirect transfer of assets. This has resulted in additional reports/ toolkits that countries can also take into account when designing their domestic and international tax rules.

The fast pace of these international tax developments makes it difficult for countries, including developing countries and also scholars to follow all of them. Developing countries are still attempting to discern how to implement the BEPS Minimum Standards in the country and/or evaluating the suitability of the BEPS Minimum Standard in the country (e.g. Botswana opting out from BEPS Action 13) (OECD, 2018)<sup>46</sup> and, in some cases, requesting technical assistance to do so (e.g. Cameroon for implementation of BEPS Action 13).<sup>47</sup> Some of these challenges have also been addressed, for instance, by OECD representatives at international organizations (World Bank/IMF) meetings.<sup>48</sup>

In the author's view, it is clear that by introducing BEPS Minimum Standards, signing and ratifying the BEPS multilateral instrument, and participating in the current discussions on BEPS Pillar 1 and Pillar 2, developing countries will a significant number of personnel as well as substantial, technical knowledge and political will to ensure that participation in these initiatives is being effective for achieving the country's own SDGs goals.

The challenges that developing countries face in the implementation of BEPS Minimum Standards and in achieving the SDGs goals have been addressed elsewhere.<sup>49</sup> Some of these challenges are

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<sup>45</sup> For instance PCT, IMF/WB meeting addressing tax and SDGs, and the recent 27 January 2021 OECD meeting addressing SDGs.

<sup>46</sup> OECD (2018), Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 1): Inclusive Framework on BEPS: Action 13, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264300057-en> at 12 and 13.

<sup>47</sup> OECD (2018), Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 1): Inclusive Framework on BEPS: Action 13, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264300057-en> at 124.

<sup>48</sup> Presentation Ben Dickinson, Head of the Global Relations and Development Division, OECD. OECD BEPS IF Online Conference 27-28 January and Tax Development Day 29 January 2021. See also Tax Sunday Conference organized by the World Bank and IMF 18 October 2020 International Tax Avoidance – What Has BEPS Accomplished for Developing Countries? Panel 2 From 16:53 <https://www.worldbank.org/en/events/2020/10/08/tax-Sunday-conference-2020#2>

<sup>49</sup> See W. Lips and I.J. Mosquera Valderrama Global Sustainable Tax Governance in the OECD-G20 Transparency and BEPS Initiatives. 14th GREIT Annual Conference Tax Sustainability in an EU and International Context. IBFD



the use of transfer pricing rules, the use of medium-term revenue strategies, the need to introduce a regulatory (administrative) framework for tax incentives, and the need to introduce tax expenditure reporting among others (Mosquera, Lesage & Lips, 2021).<sup>50</sup> In order to address these challenges and possible solutions, scholars from tax, political science, economist and international relations need to cooperate, so that comprehensive solutions can be presented.<sup>51</sup>

In addition, the solutions proposed by scholars and policy makers (ministry of finance, tax administration and/or international organizations) will require political will and, therefore, a dialogue should be established between tax officials, politicians, civil society, businesses, and business associations. This dialogue should occur at domestic, regional and international levels.

At this stage, it takes place at the international level, however, at regional and domestic levels, it is limited. Tax officials at the ministry of finance and/or tax administrations) may decide to introduce tax reforms following the international standards agreed at the OECD and/or BEPS Inclusive Framework level. These will thereafter need to be explained and discussed with politicians, businesses, and judges that may not be aware of the international tax developments and the need to change rules to achieve the SDGs

One interesting example in developing countries is the use of tax incentives for political reasons and the lack of transparency in the granting and regulation of tax incentives. In a recent book chapter, the authors argued that “there should be no room for administrative discretion on the granting of tax incentives, one person/body should be in charge of granting tax incentives and the incentive should be transparent (publicly available on the website of the tax administration or administrative agency)”. This has not been the case in developing countries, and in some cases e.g. Philippines, the COVID19 crisis has resulted in flexibility for the president for granting fiscal and non-fiscal incentives, which according to the department of finance, “will be critical as the country competes internationally for high-value investments”.<sup>52</sup> In the authors’ view, this COVID19 measure granting discretionary power to the president may affect the path taken by Philippines to

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Publications and I.J. Mosquera Valderrama, D. Lesage and W. Lips Lesage and Tax and Development: The Link between International Taxation, The Base Erosion Profit Shifting Project and The 2030 Sustainable Development Agenda (Institute of Tax Law and Economics, Faculty of Law, Leiden University), no. W-2018/3. Brugges, Belgium: UNU Institute on Comparative Regional Integration Studies (working paper)

<sup>50</sup> See <https://www.springer.com/gp/book/9783030648565#aboutBook>

<sup>51</sup> One example is the forthcoming book *Taxation, International Cooperation and the 2030 Sustainable Development Agenda* edited in cooperation with 2 International Political Economist scholars and with contributions from Economist, Political scientists, tax officials, tax scholars

<https://www.springer.com/gp/book/9783030648565#aboutBook>

<sup>52</sup> Website Department of Finance <https://taxreform.dof.gov.ph/tax-reform-packages/p2-corporate-recovery-and-tax-incentives-for-enterprises-act/>. Accessed 16 June 2020. See Report to the Joint Congressional Oversight Committee dated 8 June 2020. <https://www.officialgazette.gov.ph/downloads/2020/06jun/20200608-Report-to-the-Joint-Congressional-Oversight-Committee.pdf> at 15. Accessed 16 June 2020.



increase the transparency and reduce the discretionary power in granting tax incentives. Therefore, even if it is not a BEPS issue, the use of tax incentives shows the different views/interests of actors in tax law decision-making.<sup>53</sup> The following section will address the role of actors in global tax governance.

## VI. Actors

In global tax governance, there are different actors that can be mentioned, for instance, at international and regional levels:

- International organizations (OECD, UN, G24, G77, WB, IMF), Committees/Panels (UN Tax Committee, FACTI Tax Panel) and UN regional Hubs (e.g. United Nations Economic and Social Commission for Asia and the Pacific UNESCAP, and United Nations Economic Commission for Africa UNECA);
- Advocacy groups (ICRIT, Tax Justice Network, BEPS Monitoring Group, Oxfam, Action Aid); think tanks (CEP);
- International and regional (tax administrations) network: Network of Tax Organizations NTO, Intra-European Organization of Tax Administrations IOATA, African Tax Administration Forum ATAF, Inter-American Centre of Tax Administrations CIAT, Study Group on Asian Tax Administration and Research SGATAR, International Tax Compact ITC.<sup>54</sup>

In addition, at a domestic level, it is also important to take into account the role of the actors that will give shape to the content of the international tax standards and, in some cases, will influence or change the commitment made by countries' representatives at the international level.<sup>55</sup> These actors are tax administrations, ministry of finance, law-makers (legislative), judges, advocacy network, scholars, business, and business associations among others. The role of these actors in

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<sup>53</sup> These different views have been addressed in several (online) seminars organized in the framework of the GLOBTAXGOV Project. See summary discussions at blog GLOBTAXGOV <https://globtaxgov.weblog.leidenuniv.nl/reports-conference-papers/>

<sup>54</sup> On the role of the EU see in general Panayi C. Panayi, Europeanization of Good Tax Governance, 36(1) Y.B. Eur. L. 442 (2017) and vis-a-vis third (non-EU) countries including developing countries Irma Johanna Mosquera Valderrama, 'The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries', (2019), 47, Intertax, Issue 5, pp. 454-467.

<sup>55</sup> For instance, despite the ministry of finance agreeing to introduce the rule of commissioner arrangements in the MLI, the Dutch Parliament when discussing the MLI decided not to agree, until there is not a specific provisions to deal with dispute resolution regarding commissioner arrangement structures.

the implementation of BEPS has been addressed by Sadiq et al in a comparative study of 18 (developed and developing countries) (Sadiq, Sawyer & McCredie, 2019).

However, further empirical research needs to be conducted to ascertain what is the role (if any) of the actors in the implementation of BEPS and whether there are differences in its implementation, and if so, are these differences explained in light of the differences in tax systems and tax culture. I have argued in the past, that “the study of differences in culture provide the local tuning that makes that for a transplanted concept the rules are different in the recipient country than the ones in the donor” (Mosquera Valderrama, 2020, p727). In our view, the proposed approach to tax culture takes into account that “the differences in attitudes and beliefs in a country’s legal and tax system require the study of the way that the development of law takes place is ‘law in action’ and not only the introduction of a concept in the formal law of the country ‘law in the books’ (Mosquera Valderrama, 2020, p728).

Therefore, when studying the transplant of BEPS Minimum Standards into countries belonging to the BEPS Inclusive Framework, I argue the need to address “the use of the concept of legal culture for identifying the role of the different parties (stakeholders) in the transplantation process and in the development of legal (tax) rules. These parties can be, for instance, the courts with tax competence, tax lawmakers, taxpayers, tax administrations, business associations, tax advisors, scholars, and civil society (NGOs). This study of legal culture will need not only desk research, but also empirical research (interviews and/or surveys) to the parties (stakeholders)” (Mosquera Valderrama, 2020, p728). This empirical research is currently conducted in the framework of the ERC GLOBTAXGOV Project.<sup>56</sup>

## VII Concluding remarks

This chapter has highlighted some of the main elements that can be addressed when studying global tax governance and the current discussions from a tax scholarship perspective of these elements. The elements that are addressed are the distinction between hard law vs. soft law, the participation and representation of the OECD, G20 and non-OECD/non-G20 including developing countries in setting the international tax agenda, the results (outcome) of the current international discussions, and the role of the actors (international and domestic) in the implementation of international tax standards.

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<sup>56</sup> In our project we carry out research in eight countries from different geographical regions, with different tax systems and different tax cultures (Mexico, Colombia, Senegal, Nigeria, India, the Netherlands, Spain, and Australia). Supra n.1

In the author's view, the study of global tax governance from different perspectives (tax, political, economy) facilitates the cross-fertilization of research findings between different disciplines. This approach affords opportunity to provide solutions that are more comprehensive to achieve the goals highlighted by international organizations and countries (reducing BEPS practices and achieving the 2030 Sustainable Development Agenda). The topic of global tax governance is a relevant topic of discussion, however, it does require certain caution when referring to it by scholars, organizations, and policy makers in general. Not everything can be explained in terms of global tax governance, and the differences in approach by political scientists regarding global tax governance vs. tax cooperation should be also taken into account.

Notwithstanding the above, the current interests by tax scholars in research projects and literature on global tax governance allows them to facilitate the exchange of ideas in which not only tax technical issues are being discussed, but also attention is given to policy making and the role of actors in that process. This will allow understanding the differences in the participation/representation in decision making, the differences in the commitment to international tax standards, and the different content of these standards upon transplantation of these standards into the recipient country's tax system and tax culture.

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