Legal transplants and international tax standards

Irma Johanna Mosquera Valderrama
Associate Professor of Tax Law – Principal Investigator ERC GLOBTAXGOV Project
Topics

Legal transplants and legal culture
International tax standards
Socio-legal methodological approach
Case study: The Netherlands
1. Legal transplants and legal cultures

**Legal transplants**
- “Moving of a rule or a system of law from one country to another” (*Watson 1974*)

**Legal cultures**
- “how culture shapes the operation of formal legal institutions’ in a legal system” (*Gibson and Caldeira, 1996*)
1. Legal transplants and legal cultures

Reasoning for legal transplants
(i) authority (*Watson, 2002*)
(ii) prestige and imposition (*Sacco, 1991*)
(iii) chance and necessity (*Örücü, 1999*),
(iv) expected efficacy of the law (*Berwowitz et al, 2000*),
(v) political, economic and reputational incentives (*Schauer 2000*).

Law in the books vs. law in action (*Ewald 1978*)

Placing law in context (*Nelken 2010, Sousa de Santos 2002 and Tamanaha 2008*).

Local tuning and cross-fertilization (*Örücü, 2002*)

Relevance
2. International tax standards

- OECD organization with a networking role for the spread of best practices (*Keohane et al.*, 2009)
- Due to the G20 political mandate, the OECD introduced the project to tackle profit shifting by multinationals (BEPS)
- OECD, G20 and OECD Accession countries participated in the decision making (BEPS 44 group)
- In the BEPS Inclusive Framework, 117 countries participate on the implementation of BEPS 4 Minimum Standards (Actions 5, 6, 13 and 14)
- 73 countries did not participate in BEPS decision making process
2. International tax standards

4 Minimum standards

10 Best practices

1 Multilateral Convention

INCLUSIVE FRAMEWORK

117 COUNTRIES

BASE EROSION PROFIT SHIFTING (BEPS) Decision making: BEPS 44 GROUP

G20

OECD

SIGNATORIES

83 COUNTRIES
3. Socio-legal methodological approach

**FIRST RESEARCH OBJECTIVE: FEASIBILITY**

**Goal**
To investigate the transplant of the 4 minimum standards

**Methodology**
- **Primary Data**
- **Secondary Data**
- **Data Analysis**
- **Interview**
- **Case Study**
- **Surveys**

**PI: Use of legal transplant for international tax law making**

**PhD 1:** the Netherlands, Spain, Ireland, Australia, Mexico and the United States

**PhD 2:** Colombia, India, Nigeria, Senegal, Singapore, and South Africa
Global Tax Governance: GLOBTAXGOV
4. Case study: The Netherlands

• Open economy, 9th largest export economy in the world

• Legal system: Mixed approach — civil law in private law and common law in case law and trade law (*Smits 1998*)

• Tax system: Northern European tax system influenced by civil law, common law and German tradition (*Thuronyi 2003*)

STARTING POINT FOR ANALYSIS

• Tax law: Local context: Political, legal and cultural context (*Mosquera 2007; Omri 2010*)

• Tax culture: To identify the role of the different parties in the transplantation and in the development of tax rules to implement BEPS
4. Case study: The Netherlands

- Developed country: member of the OECD; BEPS 44 group and BEPS Inclusive Framework
- Member of the EU: Required to implement:
  - Some of the BEPS best practices: EU Anti-tax Avoidance Directives ATAD 1 and 2; Administrative cooperation Directive (mandatory disclosure)
  - Some EU initiatives go further than BEPS: Exit taxation and general anti-avoidance rule in ATAD 1
- Political context
  -Leaks: Panama papers and Paradise papers and civil society
  - The Netherlands makes it easy for multinationals to avoid taxation
  - The Dutch government wants to overturn this image

*Implements BEPS 4 Minimum Standards, implements EU rules and changes two main features of the tax system (ruling practices, and the treatment of interest and royalty payments)*
4. Case study: The Netherlands

Legal transplant and context

• Why is the Netherlands adopting BEPS? Focus on Minimum Standards and some reference to best practices
• How is the Netherlands adopting BEPS?
• Historical development of the BEPS rules in the Netherlands
• Are the rules going further than BEPS? Due to EU? Political change of image?
• Are BEPS rules the same? Or have they changed upon transplantation?
• The mismatch between the BEPS and the current tax rules of the selected countries (e.g. arbitration, defensible position of the taxpayer)
• Problems that these countries have in implementing BEPS and the solutions: Share experiences and best practices
4. Case study: The Netherlands

Tax culture

• Preliminary Analysis of primary data:
  • Political changes influence the implementation of BEPS in the Netherlands
  • Parliament and Government documents: Principles play a role in BEPS: Equality, certainty, transparency, and in some cases proportionality (rulings)
  • Are these principles the same for business? Tax advisors? Business associations? What principles are important for them?

• Tax culture
  • Role of the different parties in the transplant of BEPS and in the development of tax rules to implement BEPS
  • Tax culture: tax law makers, taxpayers, tax administration, courts with tax competence, business associations and tax advisors (Role of the courts and tax administration in BEPS Action 6).
Visit us at
• Leiden University, Institute of Tax Law and Economics

• GLOBTAXGOV project receives funding from the EU H2020 Research & Innovation Programme and European Research Council
Blog https://globtaxgov.weblog.leidenuniv.nl/

• Twitter: @GLOBTAXGOV