

Tax Transplants and Legitimacy of the BEPS 4 Minimum Standards: A Case Study

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1. Legitimacy concerns

- 2013: OECD-G20: BEPS 44
- 2015: BEPS INCLUSIVE FRAMEWORK (IF): Commitment to implementation of BEPS 4 Minimum Standards
- Regional Organizations (AU, CARICOM), countries, regional tax organizations (ATAF) and civil society:
 - Fast pace process and other non-BEPS Priorities
 - Role of the UN
 - Global Fair Deal?
 - Alternative solutions to Pillar 1 and Pillar 2 proposals
- 2020: GOVERNANCE? CO-CHAIR BEPS IF
- 2022: UN Resolution General Assembly: Instrument or Framework for International Tax Cooperation: Inclusive and Effective.

2. BEPS Tax Transplant

- Starting Point: Legal Transplant: “As the moving of a rule of a system of law from one country to another, or from one people to another” Watson
- See [The Study of the BEPS 4 Minimum Standards as A Legal Transplant: A Methodological Framework](#) Intertax Vol 48 Issue 8-9. 2020
Addressing (i) who participate and why, (ii) how the tax system and tax culture influence the process, and (iii) what are the rules that will be implemented (outcome)

Reasons (WHY?)

If legitimacy concerns, why non-OECD, non G20 countries participate in BEPS IF, and in the peer review process?

2. BEPS Tax Transplant

1. Expected Efficacy of Law

General: Raise revenue, tackle base erosion and profit shifting by multinationals

Specific: Transfer (mis)pricing, lack of access to information by tax administrations on multinationals, implementation of tax avoidance rules including rules to prevent treaty shopping, and to limit base erosion

2. Chance and necessity

E-learning activities, induction programs, twinning projects, and tailored country assistance

3. Political, economic and reputational incentives

EU Standard of Tax Good Governance, and list of non-cooperative jurisdictions.

3. Case study

How is the peer review process taking place? Are countries complying with the implementation of BEPS 4 Minimum Standards?

- BEPS 4 Minimum Standards: Soft law. However, for countries who have signed and ratified the MLI, Action 6 and 14 will be hard law.
- MLI to modify bilateral tax treaties, with choices: Covered agreements, opt-in, opt-out.
- Countries chosen: Non-OECD, non G20 countries at the time that BEPS Project was taken place. NO participation in decision-making process of the content of the BEPS Project

Congo, Cameroon, Costa Rica (now OECD member), Jamaica, Peru (OECD Accession process), Sri Lanka, Vietnam

Source: OECD documents incl. terms of reference and methodology, peer review reports.

BEPS Action 5 (only exchange of rulings). For harmful tax regimes see Heitmuller F. and Mosquera I.J. [Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future.](#) Journal of International Economic Law 2021, 00, 1–18 .

Country	Action 5	Action 6	Action 13	Action 14	BEPS MLI
Congo	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019, 2020, 2021	Reviewed 2019, 2020, 2021,2022	Review Deferred	No signatory
Cameroon	Reviewed 2017, 2018	Reviewed 2018, 2019 2020, 2021	Reviewed 2018, 2019, 2020, 2021	Review Deferred	Yes Signatory. In force 1-Aug 2022
Costa Rica	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019 2020, 2021	Reviewed 2018, 2019, 2020,2021,2022	Review Deferred	Yes Signatory and yes in force-1-Jan 2021
Jamaica	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019 2020, 2021	Reviewed 2018, 2019, 2020, 2021,2022	Review Deferred	Yes Signatory. Not yet in force
Peru	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019 2020, 2021	Reviewed 2018, 2019, 2020,2021,2022	Review Deferred	Yes signatory. Not yet in force.
Sri-Lanka	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019 2020, 2021	Reviewed 2018, 2019, 2020,2021,2022	Review Deferred	Not signatory
Viet Nam	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019 2020, 2021	Reviewed 2019, 2020,2021,2022	Reviewed Stages 1 and 2	Yes signatory. Not yet in force.

Source Own compilation based on OECD documents.

4. Peer review process: Case study

- OECD peer review should be conducted in a manner that is clear: target the areas of risk, ensures that jurisdictions are treated fairly and equally, and is resource efficient.
- Input peer reviewed country (reply to peer review questionnaire), input from other countries (peers), review by OECD Secretariat (FHTP, FTA MAP FORUM, CbC Reporting Group)

Some observations

- Adequate level of commitment and mutual trust
- It requires human and financial resources.
- Result: Lack of input by peers and role of FHTP and CbC Reporting
- Most countries still in the process of introducing changes to their tax systems (exchange of information of rulings, CbC reporting). Action 14, developing countries excluded. From 7 countries only Vietnam reviewed

4. Peer review process: Case study

BEPS Action 5 and 13

- Developing countries still in the process to put in place a domestic: legal and administrative framework and to facilitate exchange of CbC reports and rulings.
- Not clear, how these 2 standards benefit the countries, the reasons for countries not to answer the peer review questionnaire or addressing the peer review recommendations.

BEPS Action 6

- Countries still in the process of implementing the minimum standard. No information on why countries are not making the changes.
- Congo-Sri Lanka no yet signed MLI. From the other 5, only 3 have ratified MLI (Cameroon and Costa Rica).
- Awaiting ratification, and in case of bilateral negotiations: lack of resources and technical knowledge to re-negotiate tax treaties

4. Peer review process: Case study

BEPS Action 14

“MAP Forum should defer the review of any such member that is a developing country and is not an OECD or G20 country if that member has not yet encountered meaningful levels of MAP requests and there is no feedback from other members of the FTA MAP Forum indicating that the jurisdiction’s MAP regime requires improvement”

- OECD wants to review this deferral in light of MLI and recent developments in Pillar 1 (with dispute resolution mechanisms).
- Difficult to reach consensus
- Mandatory arbitration?
 - ***Whether all countries want to continue with this deferral of peer review of BEPS Action 14, and if so what will happen when more systematic and strong dispute resolution mechanisms are needed in light of the introduction of Pillar 1 rules and its Multilateral Convention.***

5. Legitimacy Peer review process

Accountability, transparency, inclusiveness and openness

(V. Schmidt, (2012) Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput', 61 Political Studies)

• **Accountability**

Why some countries are being excluded (or not reviewed) or do not provide input to the peer review questionnaire. Why countries have not yet signed or ratified the MLI?

Whether the purpose of the peer review “to ensure effective and consistent implementation” is being met, and how this contributes to accountability of the peer review process vis-à-vis countries participating in the BEPS Inclusive Framework?

5. Legitimacy Peer review process

Transparency

- **Strict requirement of confidentiality regarding the peer review documents.** The constraints regarding confidentiality of the peer review reports/input of the countries as well as the limited participation of stakeholders result in a lack of transparency, of the peer review process which may have an effect on the throughput legitimacy of the peer review process.
- **Lack of transparency of the decision making of the Plenary of the BEPS Inclusive Framework and the Steering Group,** Christensen et al

“Plenaries evaluate progress and take final decisions, on a consensus basis, on proposals prepared by subordinate bodies. The plenary is the formal decision-making body, and the final step in a process which identifies and resolves disagreements between countries in advance. Many interviewees described its meetings as choreographed:

‘It is a room of approval where everything has been well prepared and orchestrated (...) the sauce has been made, the dish is served. If you say that the salt is missing, you want to add something (...) they will tell you that the dish is prepared’ (lower income country) done. It is at the Steering Group level that the dish is prepared.(Lower-income country)”

Christensen et al ‘At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations’. ICTD Working Paper 115 at 10-11

5. Legitimacy Peer review process

Inclusiveness and Openness

- Countries participating in the BEPS Inclusive Framework
- 3 important actors can be mentioned
 - i. a collective body that consists of the countries which are members of the BEPS Inclusive Framework,
 - ii. the OECD Secretariat (with additional parties such as FHTP, FTA MAP Forum, CFA, and CbC reporting group)
 - iii. the BEPS Steering Group.
- For BEPS Action 14, taxpayer to provide input to peer review. In practice very limited
- The input of other stakeholders for the peer review has not been sought by the OECD. Regarding the BEPS Action 13, the OECD stated that *“Because peer review is an intergovernmental process, business and civil society groups’ participation in the formal evaluation process and, in particular, the evaluation exercise and the discussions in the CbC Reporting Group is not specifically solicited”*.

5. Legitimacy Peer review process

Inclusiveness and Openness

- The peer review process of the BEPS 4 Minimum Standards has received little attention in tax scholarship and little attention has been given to the legitimacy of the actors in the peer review process. To our knowledge, only Christensen et al addressed the role of the BEPS Steering Group in 2021 stating that

“The most intensive policy negotiations take place within the Steering Group, despite its advisory status. Meeting several times a year, it brings together 24 individuals from countries equally split between members and non-members of the OECD’s Committee of Fiscal Affairs. Steering Group members are nominated by states and formally elected by the IF’s membership, but participate in a personal capacity. The election process is heavily steered by the OECD secretariat, which identifies capable and influential individuals, while ensuring geographical balance?”

At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations. Rasmus Corlin Christensen, Martin Hearson and Tovony Randriamanalina. ICTD Working Paper 115

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