

Implementation BEPS mínimum standards

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Topics

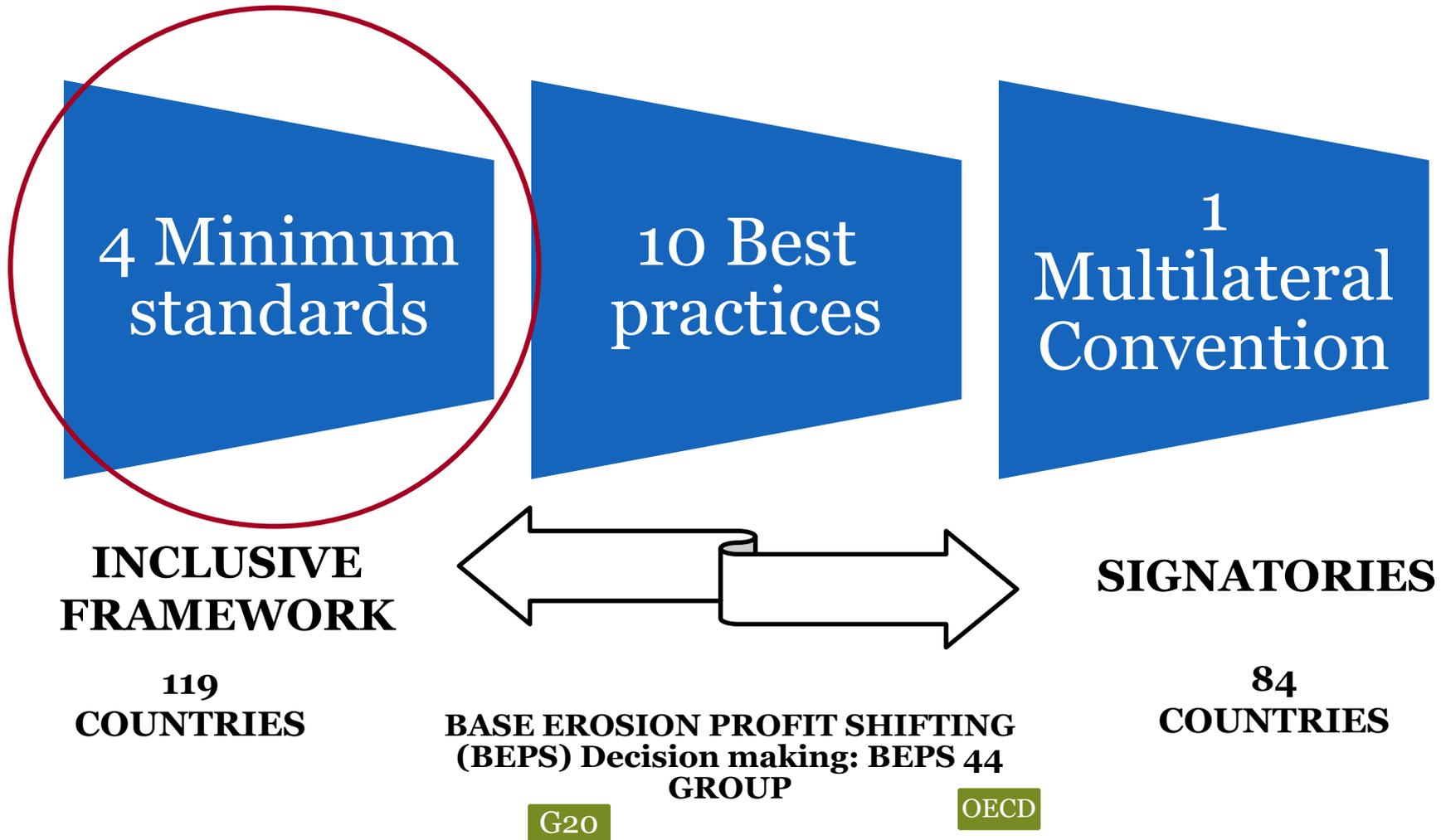
Minimum standards BEPS

Principal Purpose Test

Conclusions and recommendations



1. BEPS



1. BEPS and tax treaties

BEPS to prevent tax base erosion and profit shifting by multinationals

- 4 Minimum Standards
- 10 Best Practices
- 1 Multilateral Convention

Implementation of BEPS

Countries are making different choices in the implementation of BEPS

See I.Mosquera. Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative. Bulletin for International Taxation, 2018 (Volume 72), No. 3

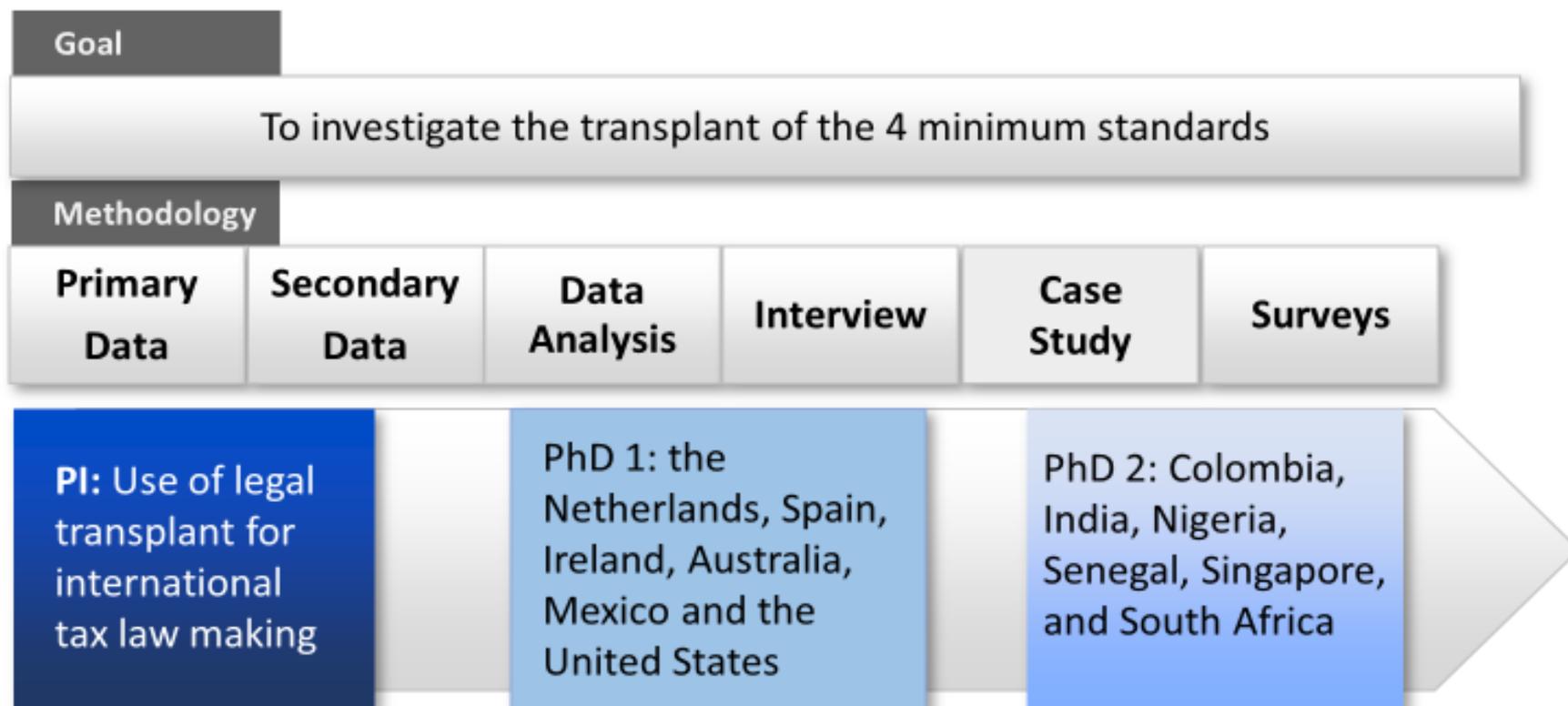
Changes of BEPS (and MLI) to tax treaties

- Dual resident entities
- Permanent establishment
- Domestic linking rules
- Prevent treaty abuse provisions and avoidance of double non-taxation
- Effective dispute resolution mechanisms (including arbitration)

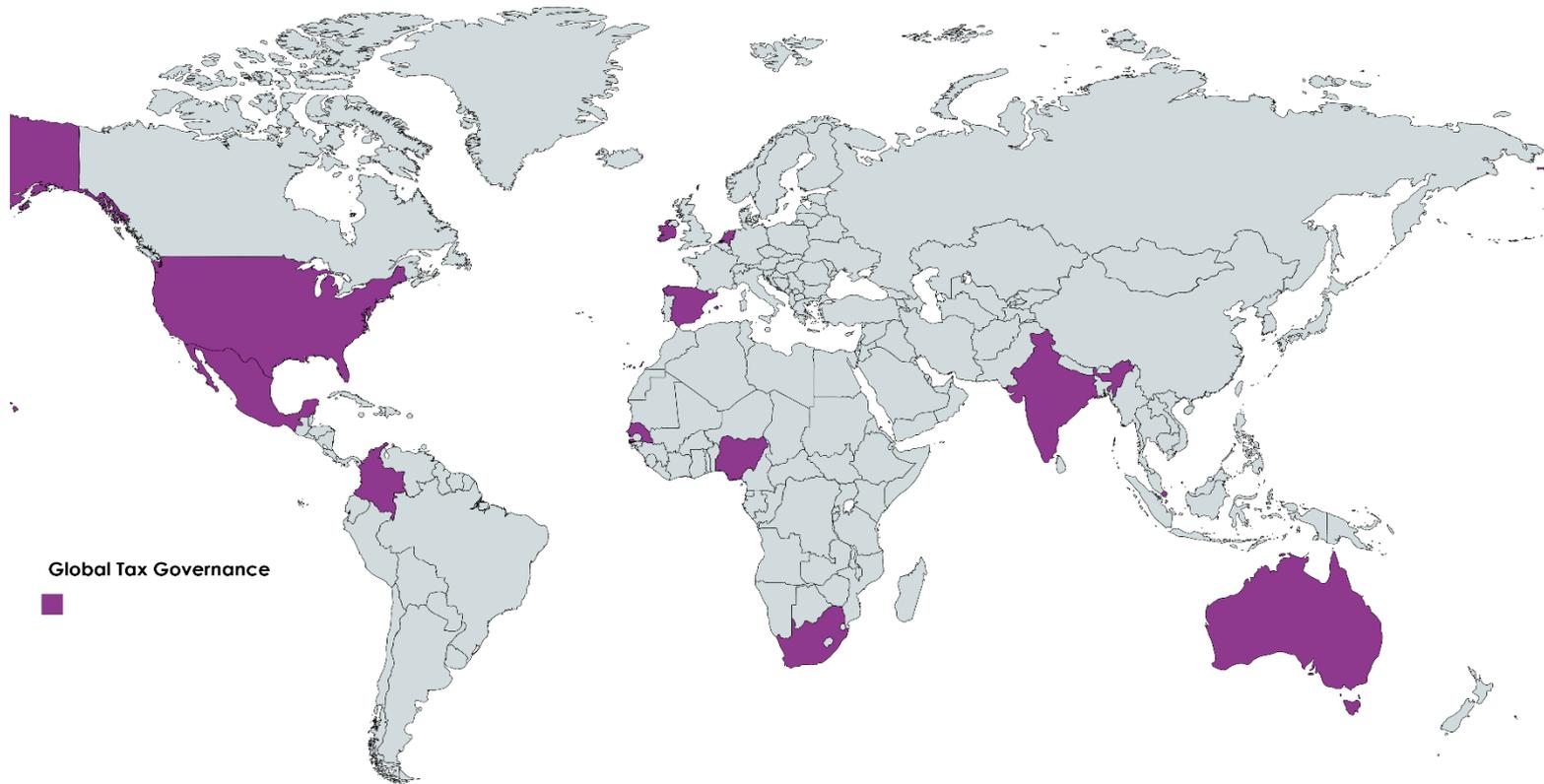
NOT: allocation of taxing rights between residence and source!!

2. Socio-legal methodological approach

FIRST RESEARCH OBJECTIVE: FEASIBILITY



Global Tax Governance: GLOBTAXGOV



3. BEPS and developing countries: Treaty abuse

- “Complex menu of options” due to the opt-in; opt-out clauses: PPT (with or without discretionary relief), Detailed LOB, PPT as interim measure, Supplement PPT with simplified LOB
- Difficult to manage due to capacity constraints and tax treaty policy choices
- Mismatching of choices may result in multiple mini-treaty negotiations
- Changes in tax treaty policy e.g. from PPT to simplified LOB with PPT (e.g. some Latin American countries)
- Some examples:
 - The Netherlands and Singapore PPT with discretionary relief
 - Colombia PPT as interim measure but intend to apply PPT with simplified LOB
 - Argentina PPT with simplified LOB
 - Costa Rica PPT
 - Burkina Faso and Cameroon: No option and then?
 - Senegal: Reservation to apply PPT if there is main purpose test

3. BEPS and developing countries: Treaty abuse

- One of the principal purposes vs. main purpose, sole purpose
 - e.g. commercial reason and tax reason: PPT applies if “one of the principal purposes” is a tax reason
 - Large tax benefit in taxation does not mean always application PPT –if in accordance to the object and purpose of the treaty
 - LOB test may pass, but under PPT not
 - PPT discretionary relief (or not) may raise competition among countries since the tax administrations will have a discretionary power
- Some scholars: Recommend to choose for artificiality (objective –wholly artificial arrangements) instead of reasonable test (subjective) test. Desirable?
- Tax Administration and Taxpayer: Burden of proof.
 - Subjective element: **Reasonable** to conclude having regard to all relevant facts and circumstances that “one of the principal purposes...”
 - Objective element: **Establish** that granting of a benefit in accordance with the object and purpose of the relevant treaty provisions.

3. BEPS and developing countries: Treaty abuse

- Object and purpose of (i) provision in the treaty? AND (ii) treaty in general?
- Provision in the treaty: Use PPT to solve sloppy drafting or bad treaty negotiation?
- GAAR in some countries only for sloppy drafting if the outcome was so unlikely that no legislation was introduced to prevent to counter such outcome
- GAAR in all cases also in case of sloppy drafting
 - Will countries if fail to apply PPT, still use GAAR to deny treaty benefits?
- GAAR only if authorized in the DTT (analysis in accordance to the object and purpose of the treaty)
- GAAR even if not authorized in the treaty (e.g. Argentina), and how the analysis will take place?

3. BEPS and developing countries: Treaty abuse

- Not clear the relationship PPT and GAAR
- PPT not easy to interpret in practice
 - Leeway to interpretation by the tax administration and tax court (raise competition in the application of the PPT)
 - No certainty for taxpayer. Rules should be clear transparent: Availability, clarity, simplicity and reliability
 - Repair of sloppy negotiation or drafting of treaty provision that will be also influenced by the title and preamble of the treaty
 - Would have been useful to use the test of artificiality (objective) instead of the reasonable test (subjective)?

4. Conclusions -Recommendations

- Not clear the relationship PPT and GAAR
- What happens with countries non- participants of the BEPS inclusive framework and/or MLI?
- Complexity of options: Therefore, consolidation version of tax treaties is desirable, but what if the version binds the tax administration? Less of two evils?
- PPT not easy to interpret in practice
- Leeway to interpretation by the tax administration and tax court
- No certainty for taxpayer. Rules should be clear transparent: Availability, clarity, simplicity and reliability
- Repair of sloppy negotiation or drafting of treaty provision that will be also influenced by the title and preamble of the treaty
- Would have been useful to use the test of artificiality (objective) instead of the reasonable test (subjective)?

4. Conclusions -Recommendations

- International tax standards have changed through BEPS, but not yet clear how these new standards will benefit developing countries?
 - more uncertainty and compliance cost for companies
 - tax competition for developing and developed countries vis-à-vis countries not implementing the BEPS minimum standards (inclusive framework 119, MLI 84, 193 countries in the world)
- Research on the differences in the implementation of the minimum standards is needed.

See GLOBTAXGOV project 12 countries research.

EU-ERC funded research project (2018-2023): GLOBTAXGOV: A New Model of Global Governance in International Tax Law Making

Global Tax Governance and G20

- The different approaches to the implementation of BEPS Actions lead to peculiar and undesired forms of tax competition. We observe that countries implementing BEPS are sometimes in disadvantage with respect to countries that are not implementing BEPS.
- Balancing competition and BEPS implementation is needed to achieve a global model of tax governance in which developed and developing countries compete on a level playing field.
- We asked the G20 leaders to promote regional cooperation in the implementation of international standards, including BEPS. ***The G20 should facilitate the creation of regional (or, for that matter, sub-regional) peer review and consultancy mechanisms that would allow countries to set and revise their own goals and targets for implementation, getting regular feedback from neighbouring countries.*** The G20 should actively promote regional learning processes.

G20 Policy Brief on Tax Competition prepared under the G20 Argentinian Presidency. . Task Force Trade, Investment and Tax Cooperation (T20). May 2018. <https://t20argentina.org/publicacion/tax-competition/>

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