Output Legitimacy deficits of the BEPS inclusive framework

Irma Mosquera Valderrama[1]

Table of Contents

1. Introduction 2
2. BEPS Inclusive framework: Concerns and problems of developing countries 3
   2.1. Short overview BEPS Inclusive Framework 3
   2.2. Concerns of developing countries regarding the BEPS Inclusive Framework 5
   2.3. Initiatives from the international organizations 7
3. BEPS Inclusive framework: Output legitimacy deficits vis-à- vis developing countries 8
   3.1. Action 5: Harmful tax competition 8
      3.1.1. Exchanges of rulings and ruling practice 8
      3.1.2. Preferential tax regimes 8
      3.1.3. Output legitimacy deficits 10
   3.2. Action 6: Prevention of Treaty Abuse 12
      3.2.1. Principal Purpose Test 12
      3.2.2. Output legitimacy deficits 13
   3.3. Action 13: Transfer Pricing Documentation 15
      3.3.1. Transfer Pricing Documentation 15
      3.3.2. Output legitimacy deficits 16
   3.4. Action 14: Making Dispute Resolution Mechanisms More Effective 16
      3.4.1. Making Dispute Resolution Mechanisms more Effective 16
      3.4.2. Output legitimacy deficits 17
4. Conclusions and recommendations 17

[1] Associate Professor of Tax Law, Faculty of Law University of Leiden, the Netherlands. The author can be contacted at irma.mosquera@gmail.com

1. Introduction

The OECD with the political support of the G20 introduced in 2015 a package to tackle the shifting of profits by multinationals. This Base Erosion and Profit Shifting Project (BEPS) aims to provide OECD-, G20 and non-OECD/non-G20 (including developing countries) with tools to tackle tax base erosion and profit shifting by introducing 15 Actions to deal with transfer pricing, harmful tax regimes, tax treaty abuse, among others.

This contribution follows the previous work of this author regarding the input and output legitimacy[2] of the BEPS Project vis-á-vis developing countries. The input legitimacy addressed the participation, and representation of developing countries in the setting of the agenda and the drafting of the content of the BEPS Project. The output legitimacy addressed the search for collective solutions to tackle base erosion and profit shifting including the mechanisms to achieve those solutions which differ between OECD and non-OECD (developing) countries.[3]

Since the introduction of the BEPS Project (October 2015), two changes have taken place at the OECD level to address the concerns of input legitimacy of the BEPS Project vis-á-vis developing countries.

The first change was the introduction in 2016 of the BEPS Inclusive Framework in which developing countries were invited to participate on an equal footing. The BEPS Inclusive Framework contains 4 Minimum Standards[4] which are required to be implemented by countries. At the time of writing (December 2017), more than 110 countries including OECD, G20 and developing countries have committed to the implementation of these 4 Minimum Standards.[5] The second change was the commitment by more than 70 countries to the OECD multilateral instrument (MLI). The MLI signed in June 2017 and it modifies bilateral tax treaties in respect of some changes adopted in the BEPS Project.[6] The OECD expects that more countries will sign the MLI in the forthcoming period.[7]

The global impact of the BEPS inclusive framework is shown since more than half of the 193 countries around the world have committed to implement these standards. Despite of this global impact, in the author's opinion, the input legitimacy deficits for developing countries have not been solved since the BEPS Inclusive Framework has not made changes to the agenda and to the content of the BEPS Actions as decided by the BEPS 44 group (G20, OECD and OECD accession countries). Developing countries are invited to participate on equal footing but they do not have any decision-making role, since equal footing

---

[2] The definition of legitimacy uses the distinction made by Scharpf between input legitimacy i.e. government by the people and output legitimacy i.e. government for the people. F. Scharpf, *Governing in Europe: Effective and Democratic*, (Oxford University Press 1999) p. 7.

[3] I.J. Mosquera Valderrama, Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism, 7 World Tax J. 3 (2015), Journals IBFD.

[4] See section 2.1. below.

[5] Members of the Inclusive Framework on BEPS available at https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf

[6] The MLI addresses the BEPS Actions dealing with hybrid mismatches, treaty abuse, permanent establishment and alternative dispute resolution (Actions 2, 6, 7, and 14 respectively). The purpose of the MLI is to swiftly implement the tax treaty related BEPS measures.

[7] 6 countries have expressed their intention to sign the MLI. These countries are Côte d'Ivoire, Estonia, Jamaica, Lebanon, Panama and Tunisia. http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

is only for purposes of the implementation of the BEPS 4 minimum standards based on the BEPS Project Actions as decided by the BEPS 44 group.

The lack of input legitimacy can be to some extent allowed if output legitimacy exists. This means than the solutions of the BEPS Project are a response to the problems of not only OECD and G20 but also for countries outside the BEPS 44 group including also developing countries. However, this is not the case, since as rightly argued by the UN Chief of International Tax Cooperation Michael Lennard, the BEPS project was never designed to deal with issues faced by developing countries.[8] This is also true for the BEPS Inclusive Framework which is based in the BEPS Project.

The focus of this contribution will be on the output legitimacy deficits of the BEPS Inclusive Framework.[9] This paper will address the underlying problems that developing countries face in implementing the BEPS 4 Minimum Standards and on the possible solutions to alleviate them. The main question addressed in this paper is what are the output legitimacy deficits in the implementation of the BEPS 4 Minimum Standards in developing countries, and what can be done to enhance the output legitimacy of these initiatives in respect of developing countries?

In order to answer this question, this contribution is structured as follows. Section 2 will provide a short introduction to the BEPS Inclusive Framework including the concerns of developing countries regarding the implementation of the BEPS Minimum Standards. Section 3 will address the output legitimacy deficits of the 4 BEPS Minimum Standards in developing countries. Section 4 will provide the conclusions and recommendations for further research.

2. BEPS Inclusive framework: Concerns and problems of developing countries

2.1. Short overview BEPS Inclusive Framework

From the 15 Actions of the BEPS Project, 4 BEPS Actions have been introduced as Minimum Standards. The countries members of the BEPS Inclusive Framework are required to implement the 4 BEPS Minimum Standards. These Minimum Standards deal with harmful tax competition (Action 5), treaty abuse (Action 6), transfer pricing documentation including country by country reporting (Action 13) and making dispute resolution mechanisms more effective (Action 14).[10] The other Actions (1,2,3,4,7,8,9,10,11,12) comprise recommendations and best practices for countries to implement.

---

[8] Michael Lennard, 'Base Erosion and Profit Shifting and Developing Country Tax Administrations' (2016) 44 Intertax, Issue 10, at 745

[9] The MLI is outside the scope of this contribution. See for a discussion on MLI: García Antón, R. (2016) *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?* 8 World Tax Journal, Journals IBFD; Bravo, N. (2016) *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*. Vol. 8. No. 3. World Tax Journal. Journals IBFD; Grinberg, I. (2016) *The New International Tax Diplomacy*. 104 Georgetown Law Journal, pp. 1137-1196.

[10] The OECD MLI has also introduced two of the minimum standards mainly the principal purpose test of Action 6 which is complemented with the Limitation on Benefits (LOB) provision and the mutual agreement procedure of Action 14. The analysis of the MLI is outside the scope of this contribution, however, these two standards may also have consequences for the tax treaties of countries participating in the BEPS Inclusive Framework and in the OECD MLI. For instance, in respect of Action 6, unlike in the BEPS Inclusive Framework where the evaluation will take

Despite the OECD'S focus on the BEPS 4 Minimum Standards, it is important to keep in mind that countries have made different choices to implement BEPS Actions which are only considered best practices. These choices have been addressed in the 2017 International Fiscal Association (IFA) Congress[11] and in several conferences addressing BEPS implementation in Latin America[12] and Europe.[13]

For instance, some Latin American and Central American countries including countries which are members of the BEPS Inclusive Framework (Brazil, Colombia) and others which are not members (e.g. Bolivia, Ecuador, Dominican Republic) have chosen to address Action 3 (Controlled Foreign Corporation CFC rules), Action 7 (permanent establishment), Action 8 to 10 (Transfer Pricing) and Action 12 (disclosure of aggressive tax planning arrangements).[14]

Countries in the Africa region have stressed the importance of transfer pricing (Actions 8 to 10 and 13) instead of the BEPS Minimum Standards of Action 5 (harmful tax competition) and Action 14 (making dispute resolution mechanisms more effective).[15] In the Asian Region, in addition to transfer pricing (Actions 8 to 10 and 13), countries such as Singapore have chosen to work on Action 14. Action 5 has received less attention by countries in the Asian region.[16] These examples illustrate the lack of a coordinated approach to, and of priorities by countries in, the implementation of BEPS Actions.

---

into account the introduction of the PPT, in the MLI in addition to the possibility to introduce the LOB; there is also the possibility to opt-in and opt-out (reservations) clauses. The operation of these reservation clauses in practice may raise several concerns as pointed out already by tax scholars. Accordingly, the complexity of the opt-in and opt-out clauses in the positions of the countries may result in "a complex menu of options" that will be difficult to manage due to capacity constraints. R. García Antón, *Untangling the Role of Reservations in the OECD Multilateral Instrument: The OECD Legal Hybrids*, 71 Bull. Intl. Taxn. 10 (2017), Journals IBFD; C. Silberztein, B. Granel & J-B. Tristram, *OECD Multilateral Convention to Prevent BEPS: Implementation Guide and Initial Thoughts*, 24 Intl. Transfer Pricing J. 5 (2017), Journals IBFD.

[11] A. Christians and S. Shay. General Report that includes the developments of BEPS in respect of 48 countries such as EU countries, the United States, Canada, Singapore, Australia and some Latin American countries (Argentina, Brazil, Colombia, Mexico and Venezuela) and one African country (South Africa). Assessing BEPS: origins, standards, and responses Tax treaties and tax avoidance: application of anti-avoidance provisions. Cahiers de droit Fiscal International. International Fiscal Association, Volume 102A, IBFD, 2017.

[12] At the IFA Latin America Regional Congress one of the panels was dealing with Tax Planning in the context of BEPS showed the importance for Latin American countries not only of Action 6 (Treaty anti-abuse measures) but also of Action 12 (disclosure of aggressive tax planning arrangements. Panel 2 dealing with Tax Planning in the context of BEPS (*Planificación transnacional agresiva y abuso de tratados: herramientas de derecho interno y derecho internacional convencional para contrarrestarlos en la era BEPS*). https://www.aaef.org.ar/ifabuenosaires2017/Programa.php

[13] High-level Conference Implementing Key BEPS Actions: Where do we stand? Conference 29 June to 1 July 2017, Rust, Vienna. This conference discussed reports of several EU countries, the United States, Canada, Australia, China, Indonesia, Japan, Pakistan, Singapore, Turkey, and some Latin American (Argentina, Brazil, Costa Rica, Colombia, Mexico) and some African countries (Kenya and South Africa). Book forthcoming 2018.

[14] Bolivia, Ecuador and Dominican Republic. Panel 2 dealing with Tax Planning in the context of BEPS (*Planificación transnacional agresiva y abuso de tratados: herramientas de derecho interno y derecho internacional convencional para contrarrestarlos en la era BEPS*). IFA Latin American Regional Congress. 31 May to 2 June 2017.

[15] See reports South Africa and Kenya at the High-level Conference Implementing Key BEPS Actions: Where do we stand? Conference 29 June to 1 July 2017, Rust, Vienna (Rust Conference) and reports Mauritius and Kenya Assessing BEPS: origins, standards, and responses Tax treaties and tax avoidance: application of anti-avoidance provisions. Cahiers de droit Fiscal International. International Fiscal Association, Volume 102A, IBFD, 2017.

[16] E-T.G. Lee, S.Y. Yong & C. (Cindy) Wong, *Chapter 10: Taxation and BEPS – Singapore's Perspective* in *Asian Voices: BEPS and Beyond* (S. Sim & M-J. Soo eds., IBFD 2017), Online Books IBFD.

2.2. Concerns of developing countries regarding the BEPS Inclusive Framework

The BEPS 4 Minimum Standards will be subject to a peer review and monitoring process in all countries participating in the BEPS Inclusive Framework under the auspices of the OECD. According to the OECD, "the monitoring of the four minimum standards will ensure that all members, as well as jurisdictions of relevance, will comply with the standards in order to ensure a level playing field. [17] This peer review is already taking place for some countries in respect of two of the BEPS Minimum Standards (Action 5 and Action 14).

The implementation of international standards and the peer review of such implementation is not new for the OECD or for countries. In the past with the standard of transparency (exchange of information) countries participating in the Global Transparency Forum were required to implement measures to ensure efficient and timely exchange of information. The peer reviews of such implementation have had an impact in countries since countries were required to change their laws to ensure the timely exchange of information and even some countries such as Switzerland and Uruguay have removed their bank secrecy to ensure the efficient exchange of information. [18]

Based on this experience, the OECD has introduced the BEPS Inclusive Framework where all countries who have committed to the implementation of the BEPS Minimum Standards participate. The result is that countries will be evaluated by means of a peer review mechanism on the implementation of the Minimum Standards. Even though it is not mandatory to make changes, the peer pressure may result in future changes in the domestic law of the countries who are regarded as not compliant with the standard.

Therefore, developing countries have questioned whether these 4 Minimum Standards is what the countries need? And, how their commitment to implement BEPS may result in other problems? Developing countries implementing the 4 Minimum Standards are concerned about the technical expertise that is required to implement these standards. This may result in countries focusing on the implementation of the 4 Minimum Standards leaving behind issues of great importance such as domestic tax collection or tax evasion. The countries participating in the BEPS Inclusive Framework have a schedule for the implementation of these Minimum Standards, and if the Minimum Standards have not been implemented, the OECD will give a negative review which may also have consequences for the country.

The implementation of the 4 Minimum Standards have also raised concerns of fairness, since developing countries are required to introduce changes into their domestic law and tax treaties, but some important issues of concern for these countries such as allocation of taxing right between residence and source, taxation of the informal economy, and the need of countries to attract investment by means of tax incentives are not deal with in the BEPS Project.[19]

During the regional consultations carried out in Latin America, Middle America, Africa and Eastern and Central Europe by the OECD,[20] developing countries have expressed their concerns regarding the shortcomings of the BEPS 4 Minimum Standards. For instance, in a September 2016 meeting, countries from the Latin American and Caribbean region expressed their concerns on the consequences derived

[17] http://www.oecd.org/tax/beps/beps-about.htm#monitoring
[18] See OECD Global Transparency Forum at http://www.oecd.org/tax/transparency/
[19] I. Burgers and I. Mosquera Corporate Taxation and BEPS: A Fair Slice for Developing Countries?' (Erasmus Law Review, 2017 (08) Special edition on the taxation of multinationals in a post-BEPS age.
[20] The regional meetings are available at http://www.oecd.org/tax/beps/beps-regional-meetings.htm

from not being able to partially or fully implement the BEPS 4 Minimum Standards considering their own priorities and specific countries' features'".[21] The countries also expressed concerns for the high level of complexity and resources needed to implement the BEPS measures, especially for countries with tax administrations struggling with low capacity.[22]

In November 2016, in a regional meeting of the Inclusive Framework of BEPS in African French speaking countries, the participating countries expressed their need for capacity building and training.[23] These countries also highlighted the importance of finding out the costs and benefits that the implementation of BEPS Actions will have with respect to their domestic revenue and the need of these countries to maintain some of their preferential tax regimes in order to attract investment.[24] Furthermore, these countries asked for more flexibility in the time schedule and on the methodology to be used to implement the BEPS Minimum Standards.[25]

In a November-December 2016 meeting, some countries in the Asian-Pacific Region noted the limited resources (e.g. personnel, financial support) that these countries have to implement the BESP measures and have welcomed a regional based approach to encourage further collaboration among the regions.[26] In April 2017, Eastern and Central European countries also highlighted the limited resources and the need to address other non-BEPS issues such as the taxation of the informal (shadow) economy.[27] These countries also stated in October 2017, that even though their highest priority is to comply with the minimum standards, there are several challenges in the implementation mainly : "a lack of capacity in terms of skilled personnel, information technology and financial resources together with timetable constrains, and legal and administrative obstacles to implementation".[28]

Despite the concerns of countries regarding the differences between developed and developing countries with respect to the BEPS Project and the problems in capacity (resources, technical knowledge) of developing countries to implement the BEPS Inclusive Framework, the OECD has continued with the BEPS

[21]Example of a priority for these countries is the possibility to attract investment by means of tax incentives. Regional meeting of the Inclusive Framework on BEPS for Latin America & the Caribbean. Montevideo, Uruguay. 21 to 23 September 2016. Co-chair summary,at 3. http://www.oecd.org/tax/beps/beps-regional-meeting-co-chairs-summary-lac-september-2016-montevideo.pdf

[22] Iibd. at 2.

[23] OECD and CREDAF hold regional meeting of the Inclusive Framework on BEPS for francophone countries http://www.oecd.org/tax/beps/oecd-holds-regional-meeting-of-the-inclusive-framework-on-beps-for-francophone-countries.htm

[24] Chair summary para. 4 http://www.oecd.org/fr/fiscalite/beps/resume-co-presidents-reunion-regionale-du-cadre-inclusif-beps-tunis-2016.pdf

[25] Chair summary conclusion. Ibid. The flexibility has been also requested in a second meeting stating the "need to foresee appropriate deadlines for the implementation of the minimum standards by developing countries". Surprisingly enough in this meeting the different concerns of developing countries were not being addressed. Instead these countries were very keen to receive the toolkits and the support for implementation of BEPS measures and the MLI (e.g. transfer pricing toolkit and tax treaty negotiation toolkit) and the importance to raise awareness of the political authorities regarding the implementation of BEPS and the MLI. See Regional meeting 3 to 5 July 2017. http://www.oecd.org/tax/beps/cotonou-summary-of-discussions-july-2017.pdf

[26] Chair summary http://www.oecd.org/tax/beps/co-chairs-summary-asia-pacific-beps-regional-meeting-december-2016.pdf

[27] Chair summary http://www.oecd.org/tax/beps/tblisi-co-chairs-statement-april-2017.pdf

[28] Chair summary http://www.oecd.org/tax/beps/co-chairs-summary-eastern-europe-central-asia-beps-regional-meeting-2017.pdf

4 Minimum Standards. The terms of reference for monitoring and peer review of these Standards have been published on the OECD website and the peer review has already started.[29]

2.3. Initiatives from the international organizations

To help developing countries implement the BEPS Inclusive Framework, the OECD has developed partnerships with regional tax organizations such as the Inter-American Centre for Tax Administrations (CIAT), the African Tax Administration Forum (ATAF) and the Study Group on Asian Tax Administration and Research (SGATAR). However, these partnerships will not result in a regional tailored BEPS Project, but rather these regional tax organizations will provide assistance for the implementation of the BEPS 4 Minimum Standards.

In addition, new initiatives have been taken by international organizations such as the OECD, the IMF, the World Bank and the UN. For instance, in order to coordinate the cooperation regarding international tax issues for low-income countries, in April 2016, the IMF, WB, UN and the OECD launched the Platform for Collaboration on Tax. [30] One of the Platform's main tasks is to develop toolkits to assist developing economies in implementing efficiently BEPS Action items and addressing additional specific (non-BEPS) tax issues. For the OECD the main objective of the toolkits is to help developing countries with the implementation of measures to better combat the erosion of the tax base.[31] These toolkits[32] containing reports, guidance, model legislation, train-the-trainers materials and other tools which are designed to support capacity building".[33]

It is too early to evaluate the effectiveness of these toolkits; however, developing countries are interested in these toolkits, as was shown in the second regional meeting of the African French Speaking countries that took place in July 2017. In this meeting, the countries expressed their interest in the toolkit to address the access to comparable data for transfer pricing analyses, the toolkit to address transfer pricing documentation and the toolkit on tax treaty negotiation.[34]

Finally, the OECD has initiated pilot projects between developed and developing countries to solve some of the capacity concerns. [35] It is not yet clear which countries are participating in the pilot project and also if the effectiveness of these projects will be evaluated by the OECD.

---

[29] The first batch of peer reviews regarding Action 5 and Action 14 have already been published in the OECD website. See the OECD website About the Inclusive Framework on BEPS http://www.oecd.org/tax/beps/beps-about.htm

[30] See developing countries and BEPS at the OECD website http://www.oecd.org/tax/developing-countries-and-beps.htm

[31] See Regional meeting African French Speaking Countries 3 to 5 July 2017. http://www.oecd.org/tax/beps/cotonou-summary-of-discussions-july-2017.pdf

[32] Up till the time of writing (December 2017), three toolkits have been released being: (i) Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment; (ii) Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses; (iii) Taxation of Offshore Indirect Transfers. The other toolkits that will be released are (iv) Transfer Pricing Documentation requirements; (v) Tax Treaty Negotiation; (iv) Base Eroding Payments; (v) Supply Chain Restructuring; and (vi) Assessment of BEPS risks.

[33] Information available at http://www.oecd.org/tax/beps/platform-for-collaboration-on-tax.htm

[34] See Regional meeting 3 to 5 July 2017. http://www.oecd.org/tax/beps/cotonou-summary-of-discussions-july-2017.pdf at 3.

[35] According to the website of the OECD: "The Global Forum, in conjunction with the World Bank Group and other Global Forum members, is conducting pilot projects for developing countries to support their implementation of the Standard. It is intended that several pilot projects be undertaken in 2015 and 2016. Pilot projects are undertaken as a

The main issues that can be raised with respect to the implementation of the 4 Minimum Standards by developing countries will be addressed in section 3 below.

3. BEPS Inclusive framework: Output legitimacy deficits vis-à- vis developing countries

The main questions addressed in this Section are: what are the differences between developing and developed countries regarding the implementation of the Minimum Standards? and what are the output legitimacy deficits of the BEPS 4 Minimum Standards in respect of developing countries?

3.1. Action 5: Harmful tax competition

3.1.1. Exchanges of rulings and ruling practice

In general terms, rulings are "written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts"[36]. These rulings can be advanced tax rulings (to seek clarity in the application of tax law) or advanced pricing agreements (to seek clarity on the use of an appropriate transfer pricing methodology). In respect of the exchange of rulings, this will not change with the implementation of Action 5 since the instruments to exchange information are already available. Developing countries have already endorsed exchange of information (spontaneous and automatic). See section 3.1.2. below.

Even though advanced pricing agreements are being introduced in non-OECD countries, advance tax rulings are still a feature of developed tax systems such as the United Kingdom, the Netherlands, Germany, Australia and South Africa. [37]These countries have established ruling tax practices, and therefore, these countries are currently in the process of exchanging their rulings and ensuring that their tax ruling policy is in light with the minimum standard of BEPS Action 5. [38]

3.1.2. Preferential tax regimes

From a developing country perspective, the minimum standard of Action 5 does not imply extensive changes in the tax system of these countries, since most of the developing countries do not have a

---

collaborative effort between the Pilot country and a developed country that has agreed to partner with the Pilot country, the Global Forum Secretariat, the World Bank Group and other organisations where relevant. Three pilot projects have already commenced: Albania (partnering with Italy); Colombia (partnering with Spain) and the Philippines (partnering with Australia). The pilot projects will employ a step-by-step approach to implementation. The intention is that over time, each developing country participant (the "Pilot country") would reach full implementation in accordance with the Standard. http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/
See also Pilot project outline available at https://www.oecd.org/tax/transparency/technical-assistance/aeoi/AEOI-pilot-project-briefing.pdf

[36] http://www.oecd.org/ctp/glossaryoftaxterms.htm

[37] C. Waerzeggers, and C. Hillier, 2016, "Introducing an advance tax ruling (ATR) regime—Design considerations for achieving certainty and transparency," Tax Law IMF Technical Note Volume 1, 2/2016, IMF Legal Department.

[38] For instance, in the Netherlands, "an special audit unit within the tax authorities reviews tax rulings and audit s the corporate income tax returns (including minimum substance requirements) of taxpayers failing within their competence (the competence comprises services compliance without a tax ruling). See M. Lukkien and A. Roelofsen. The Netherlands. Assessing BEPS: origins, standards, and responses Tax treaties and tax avoidance: application of anti-avoidance provisions. Cahiers de droit Fiscal International. International Fiscal Association, Volume 102A, IBFD, 2017 at 557.

preferential regime[39], nor are these countries in the list of non-cooperative jurisdictions[40] of the OECD. This is mainly due to the adoption of the standard of exchange of information on request and the new standard of automatic exchange of information by developed and developing countries. At the time of writing, more than 90 countries have signed the CRS MCAA (Multilateral competent authority agreement to implement the Common Reporting Standard) and more than 110 jurisdictions have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. [41]

However, this may change due to the introduction in the EU anti-avoidance package of the EU standard of good governance for EU and non-EU countries.[42] The EU standard of good governance takes into account transparency, exchange of Information, and fair tax competition. Therefore, a scoreboard has been introduced to evaluate countries in light of this EU standard. [43] According to the EU Commission, the scoreboard will help to "determine the potential risk level of each country's tax system in facilitating tax avoidance".[44] The risk indicators are (i) transparency and exchange of information; (ii) the existence of preferential tax regimes and (iii) the existence of a tax system no corporate income tax or a zero corporate tax rate. [45]

As a result of this approach towards good tax governance which is broader than exchange of information; some countries which have been regarded as compliant for the OECD, for the EU are regarded as non-

[39] Some preferential regimes such as the South African headquarter regime, the Colombian Foreign Portfolio Investment regime, the Argentina Promotional Regime for the Software Industry has been already evaluated in the BEPS Action 5 as not harmful (Colombia and Argentina) or as potentially harmful but not actually harmful (South Africa). See OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, OECD Publishing, Paris, at 64.

[40] Non-cooperative jurisdictions are countries who have not cooperative in the implementation of the tax transparency standards including exchange of information.

[41] This change is mainly due to the adoption of the standard of exchange of information on request and the new standard of automatic exchange of information by developed and developing countries. At the time of writing, more than 90 countries have signed the CRS MCAA (Multilateral competent authority agreement to implement the Common Reporting Standard) and more than 110 jurisdictions have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Information available at http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf and at http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf

[42] In the EU anti-avoidance package the EU Commission introduced the 2016 EU Communication on an External Strategy which addresses the EU's approach towards third countries in respect of good governance and fair tax competition (COM (2016) 24: 5). This Communication introduces the requirement of a standard of good governance and fair competition in the bilateral and regional agreements concluded by EU countries and by the EU with third countries including developing countries.

[43]The EU has decided to introduce the standard of fair tax competition and for this purpose, a scoreboard has been developed by the EU Commission (September 2016) to be discussed a the EU Code of Conduct Group Council. Scoreboard available at https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf

[44] In this scoreboard, "the Commission has analysed all non-EU countries and tax jurisdictions in the world to determine their risk of facilitating tax avoidance. This pre-assessment was based on a wide range of neutral and objective indicators, including economic data, financial activity, institutional and legal structures and basic tax good governance standards. As a first step, the scoreboard presents factual information on every country under three neutral indicators: economic ties to the EU, financial activity and stability factors. The jurisdictions that feature strongly in these three categories are then set against risk indicators, such as their level of transparency or potential use of preferential tax regimes". http://www.baltic-course.com/eng/modern_eu/?doc=124117

[45] Press release First Step Towards a New EU List of Third Country Jurisdictions. Available at https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf . At 2

cooperative tax jurisdictions. For instance, in the list published by the EU in December 2016, developing countries such as Panama, Puerto Rico, Honduras, Guatemala, Costa Rica, Bolivia, Uruguay, Paraguay, Liberia, Trinidad and Tobago Botswana, and Somalia were listed by EU countries individually as non-cooperative jurisdictions.[46] This list is update once per year, therefore, in the new update published in December 2017, developing countries such as Mongolia, Namibia, Panama, Trinidad and Tobago, and Tunisia were listed as non-cooperative jurisdictions.[47] All of these countries except Trinidad and Tobago are regarded by the OECD as largely or partially compliant with the standard of exchange of information.[48] However, for the EU these countries represent a potential risk to facilitate tax avoidance.

In light of the above, it is safe to argue that the introduction of the requirement by the EU of the standard of good governance to be introduced in all agreements concluded by the EU with third countries and the publication of the EU scoreboard mentioned above, may result in new changes from OECD (and EU) countries with respect to a new list of non-cooperative jurisdictions.

3.1.3. Output legitimacy deficits

Following the analysis of the implications of BEPS Action 5 for developing countries, it is submitted that this Action does not fit developing countries' needs, and therefore, there is an output legitimacy deficit of this Action with respect to developing countries. The problems that have been identified by developing countries during the regional consultations regarding this Action is the lack of ruling practice, the excessive use of incentives and the lack of a coordinated approach that may result in more tax competition among developing countries (see sections 2.1 and 2.2. above).

3.1.3.1. Exchange of rulings and ruling practice

One difference between developed and developing countries is that the ruling practice in developing countries is very limited. From a developing 's country perspective, most of the time these rulings have not been regulated in the domestic legislation or if there are laws to allow these rulings, the rulings are practically non-existent. If one example may illustrate this is the recent peer review of Action 5 where countries such as Colombia only have one ruling.[49] Some of the rulings that have been found in developing countries are the Advance Pricing Agreements for transfer pricing. However, the use of these rulings is not yet expanded. One important reason is the lack of trust between the taxpayers and the tax

[46] List available at https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/tax-good-governance-world-seen-eu-countries_en

[47] The list of December 2017 has less countries than the list of December 2016. Other countries that are in the December 2017 are for instance:American Samoa, Bahrain, Barbados, Grenada, Guam, Korea (Republic of), Macao SAR, Marshall Islands, Palau, Saint Lucia, Samoa, and United Arab Emirates. See information available at https://ec.europa.eu/taxation_customs/tax-common-eu-list_en

[48] However, it is important to keep in mind that some countries are provisionally largely compliant (Samoa, Panama, United Arab Emirates), or provisionally partially compliant (Marshall Islands). According to the OECD, the provisional overall rating is part of the fast-track review procedure and it is expected that these countries will undergo a full review under the 2016 Terms of Reference of the Standard of Exchange of Information. Information available at http://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/

[49] The peer review report states that "In practice, Colombia issued one past ruling. For the period 1 April 2016-1 February 2017, Colombia did not issue any future rulings. These rulings are not published" OECD (2017), Harmful Tax Practices - Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264285675-en at 77.

administration with the result that only few rulings in transfer pricing are available in developing countries.[50]

Therefore, with respect to the ruling practice, it is submitted that before the exchange of rulings can take place, the tax administration of developing countries should also enhance the ruling practice. However, the development of the ruling practice can only take place if tax authorities in developing countries build a new relationship with the taxpayer based on transparency, mutual trust, certainty and respect for taxpayer rights.[51]

3.1.3.2. Preferential tax regimes and tax incentives

The use of tax incentives has been highlighted in publications by scholars, practitioners and government officials regarding BEPS.[52] Some countries have addressed the use of tax exemptions, tax holidays or special tax regimes in the Asian Region (e.g. Philippines[53] Singapore[54]), in the Latin American Region (e.g. Colombia, Chile, Peru, Bolivia, Argentina, Uruguay)[55] and in the African Region (e.g. Mauritius[56] and South Africa[57]). Another example that may also result in tax base erosion is the use of stability clauses in several Latin American countries and African countries.[58] In addition, the use of free trade zones or special

[50]If one example may illustrate this is Colombia, a country that had to change its tax rulings practice to incentivate taxpayers to make use of these advanced pricing agreements. One exception is South Africa that has binding private rulings. See I.J. Mosquera Valderrama et al., Tools Used by Developing Countries to Counteract Aggressive Tax Planning in the Light of Transparency (Intertax, forthcoming February 2018).

[51] I.J. Mosquera Valderrama, The Rights of Multinationals in the Global Transparency Framework: McCarthyism?, 18 Derivs. & Fin. Instrums. 1 (2016), Journals IBFD. Section 1.

[52] See Shay, S. and Christians, A. General Report Assessing BEPS: origins, standards, and responses. IFA Cahiers 2017 - Volume 102A, at 38; Asian Voices: BEPS and Beyond (S. Sim & M-J. Soo eds., IBFD 2017), Online Books IBFD; and High-level Conference Implementing Key BEPS Actions: Where do we stand? Conference 29 June to 1 July 2017, Rust, Vienna.

[53] K. Jacinto-Henares, Chapter 6: A Commentary on the BEPS Project and Its Influence on Developing Countries in Asian Voices: BEPS and Beyond (S. Sim & M-J. Soo eds., IBFD 2017), Online Books IBFD. Section 6.3.4.

[54] -T.G. Lee, S.Y. Yong & C. (Cindy) Wong, *Chapter 10: Taxation and BEPS – Singapore's Perspective* in *Asian Voices: BEPS and Beyond* (S. Sim & M-J. Soo eds., IBFD 2017), Online Books IBFD. Section 10.4.1.

[55] The use of tax incentives including the existence of special tax zones subject to a more favourable tax regime (e.g. exemption or deferral of income or corporate income tax) has been addressed in the recent IFA Latin American Conference. Seminar 3: Tax Incentives (*Incentivos tributarios: Recomendaciones OECD y experiencia regional. Armonización de políticas fiscales para la atracción de la inversión extranjera directa y el crecimiento económico).* Presentations available (in Spanish) at https://www.aaef.org.ar/ifabuenosaires2017/index.php

[56] Even though Mauritius has been regarded as one preferential tax regime by other countries such as India and South Africa, this has changed due to the removal of Mauritius from the OECD list. According to the IFA reporter for Mauritius "The concerns around preferential IP regimes do not apply in the Mauritius context. As regards non-IP regimes, the type of regime which may be the most relevant to Mauritius is the "holding company regime". The Action 5 final report identifies these regimes as being problematic if there is no substantial activity in relation to the core activities associated with the types of income typically earned by those companies (such as interest, dividends, rents, royalties". See L. Doman-Brette and J. Hague. Mauritius IFA in Assessing BEPS: origins, standards, and responses. IFA Cahiers 2017 - Volume 102A at 524.

[57] See A.W.Oguttu IFA Report South Africa in Assessing BEPS: origins, standards, and responses. IFA Cahiers 2017 - Volume 102A at 707.

[58] Examples of countries are in Latin America: Peru, Chile, Colombia (until 2013) applicable to specific economic sectors and in Africa: Ghana, Zambia an South Africa applicable to the extractive industry. This author has stated in the past that stability contracts "may result in tax base erosion and in the limitation of the government's power to levy taxes. These countries agree on stabilization clauses/contracts with investors (companies) in order to protect the investor from changes in the tax legislation. These clauses effectively guarantee that legislative changes will not be applicable to the taxpayer for the period of the contract/clause (i.e., five, ten or twenty years)" .See I.J. Mosquera

exporting zones can also result in tax base erosion. [59] Free trade zones or special exporting zones are found in countries in the Asian region (e.g. Philippines), the Latin American region (e.g. Chile, Colombia and Uruguay) and in the African Region (e.g. Kenya[60]).

Even though the OECD aims to also address preferential tax regimes in Action 5, the critical assessment of the tax incentives in developing countries is lacking. This author has argued elsewhere that this new era of BEPS and transparency brings some challenges for tax authorities in their relationship with taxpayers. This goes beyond the toolkit on tax incentives developed by the Platform for Collaboration on Tax (see section 2.3. above).

In the author's opinion, developing countries should re-evaluate their lengthy tax incentives, lengthy stability agreements (clauses)[61], and the excessive number of free trade zones, taking into consideration their usefulness to enhance sustainable investment. Tax incentives in developing countries should be re-evaluated to find out their benefit for the country since these incentives would mainly result in tax base erosion.[62] One of the risks of the extensive use of tax incentives and stability agreements is that companies may leave the country once the tax incentive or agreement is no longer in place. [63] However, this should not be dealt with in Action 5 but with a regional approach that considers the needs of countries in a specific region, and the design of tax incentives in a coordinate way that prevent unfair tax competition in the region.

3.2. Action 6: Prevention of Treaty Abuse

3.2.1. Principal Purpose Test

The minimum standard to tackle treaty shopping is the principal purpose test (PPT) which is applicable when one of the principal purposes was to obtain a tax treaty benefit. However, the application of this test raises several problems.

Valderrama, The BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead, 43 Intertax 10 (2015), pp. 622 and 623.

[59] A. Laukkanen, *Special Tax Zones in Developing Countries and Global Tax Policy*, 70 Bull. Intl. Taxn. 10 (2016), Journals IBFD. See also for an analysis of Asia and Africa: Stein, H "Africa, Industrial Policy and Export Processing Zones: Lessons from Asia" in Noman, A. Botchway, K., Stein, H and .Stiglitz, J. ed. Good Growth and Governance in Africa: Rethinking Development Strategies (Oxford: Oxford University Press, 2012)

[60] Section 6 C. Migai. Kenya report at the High-level Conference Implementing Key BEPS Actions: Where do we stand? Conference 29 June to 1 July 2017, Rust, Vienna.

[61] The toolkit on tax incentives has also addressed the use of these clauses and the distortions for investment. Accordingly "investment laws sometimes even contain stability clauses for investors against adverse legislative changes, as a sign of government's commitment. Such stability provisions, however, create an uneven playing field between old and new investors and can lead to significant distortions. Such situations should not last for too long. Government might therefore need to renegotiate existing incentive provisions or provide reasonable, time-bound incentives to new investors".

[62] This recommendation is also in line with the 2014 OECD Report addressing the impact of BEPS in Low Income Countries. The report stated that base erosion results from the use of wasteful tax incentives designed to attract investment. The report stated: "tax incentives, including corporate income tax exemptions in free trade zones, continue to undermine revenue; where governance is poor, they may do little to attract investment — and when they do attract foreign direct investment (FDI), this may well be at the expense of domestic investment or FDI into some other country". Part 1. Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries. July 2014. at 21.

[63] See I.J. Mosquera Valderrama, The BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead, 43 Intertax 10 (2015), pp. 625-7627.

The first problem is the unbalanced burden of proof between tax administration and taxpayer. The tax administration is required to *reasonable* conclude having reviewed all facts and circumstances that one of the principal purposes was to obtain a tax treaty benefit. However, the taxpayer needs to *establish* that the granting of a benefit was in accordance with the object and purpose of the relevant treaty provision. The use of *reasonable* vs. *establish* creates a higher burden for the taxpayer in favour of the tax administrations.[64]

The second problem is that the analysis of the PPT is made by the tax administration on a case by case basis considering the facts and circumstances of the case. All evidence must be weighed by the tax administration. This may result in a different assessment by tax administration of the PPT, which may also result in less certainty for the taxpayer on the application of the PPT by tax administrations. [65]

The third problem is the interpretation of the principal purpose test. Even though the PPT refers to the object and purpose of the specific treaty provision, scholars have questioned whether the interpretation should consider the treaty as whole.[66] This situation may also raise new problems in interpretation taking into account that a broader interpretation of the treaty can result in the principal purpose test to be applicable even if the specific treaty provision did not prevent such an outcome. One example could be in case that there is a situation of double non-taxation, and in such case, even though the specific provision did only prevent double taxation by allocating taxing rights, the broader scope of double non-taxation can result in the country applying the principal purpose test, and therefore, claiming the right to tax such income. [67]

These problems will have an effect in the implementation of the Minimum Standard (PPT) in developed but also in developing countries. The fear is that the application of the purpose test will result in more tax disputes and more uncertainty for the taxpayer.

3.2.2. Output legitimacy deficits

This Action 6 is relevant for developing countries. However, the specific tax treaty policy features of developing countries should be taken into account by the OECD since one size does not fill all. This is true since the implementation of the PPT as a minimum standard requires countries to have a tax treaty

---

[64] See L. de Broe and J. Luts. BEPS Action 6: Tax Treaty Abuse. Intertax, Volume 43, Issue 2, 2015 at 132.

[65] See M. Lang, BEPS Action 6: Introducing an anti-abuse rule in tax treaties, Tax Notes International and D. Weber, "The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law", Erasmus Law Review, 08, (2017).

[66] See Reinout Kok, 'The Principal Purpose Test in Tax Treaties Under BEPS 6', 44(5) Intertax (2016);; P. Baker, The BEPS Action Plan in the light of EU Law: Treaty Abuse, 2015 BTR, no 3; and

[67] See for instance Argentina: Molinos Rio de la Plata. In this case, "the tax treaty abuse concept was not specifically addressed by the courts. However, the courts did give special consideration to the fact that the amendments to the Chilean law created a double non-taxation situation, which was against the original purpose of the tax treaty". Decision of the National Tax Court, chamber D, Molinos Rio de la Plata SA, 14 August 2013 in A.A. Verstraeten, *Argentina: Treaty Entitlement and Abuse: Argentina's Molinos Case* in *Tax Treaty Case Law around the Globe 2015* (M. Lang et al. eds., IBFD 2016), Online Books IBFD. Another case was in respect of the Decision 578 of 2004 of the Andean Community (CAN) which prevents double taxation by granting taxation rights on assets to the member country where the asset is located of source. In a Colombian Tax Court (CE) ruling (Ruling 18884 of 21 August of 2014); the CE stated that "Decision 578 promotes not only the avoidance of double taxation but also the avoidance of double non-taxation and therefore, taxation must occur in at least one of the CAN member countries in order to apply the provisions to prevent double taxation" Since Peru did not levy taxes on the assets, Colombia was allowed to levy net worth tax on the assets located in Peru. Colombia; Andean Community - Colombian Tax Court rules on net worth tax on assets held in member countries of the Andean Community (18 Sep. 2014), News IBFD.

network. However, developed countries are the ones with an extensive treaty network, and therefore, by agreeing to the PPT the developing countries have already limited their tax treaty negotiation to this clause.

The question is how this clause will operate in practice considering the lack of tax treaty negotiation expertise of developing countries? Some developing countries participating in the BEPS Inclusive Framework have concluded few bilateral tax treaties in contrast to the extensive treaty network of developed countries such as Luxembourg, the Netherlands, the United States, the United Kingdom, and France.

Some examples of developing countries with tax treaties concluded at the time of writing (December 2017) are for instance Costa Rica (7 treaties: 2 signed and in force, 2 pending entry into force and 3 under negotiation); Burkina Faso (4 treaties: 1 signed and in force, pending entry into force, and 1 under negotiation); Cameroon (5 treaties: 4 signed and in force, and 1 pending entry into force); Peru (8 treaties: 7 signed and in force and 1 pending entry into force); and Senegal (11 treaties: 9 signed and in force, 2 pending entry into force). [68] The question is will the toolkit on treaty negotiation or the pilot projects between developed and developing countries (see section 2.3. above) be sufficient for developing countries? In this author's opinion, this toolkit is not enough, and therefore, training on the job should be provided but also education for future tax treaty negotiators, by participating in international tax law programs. This requires long term investment in education.

Another question that needs to be raised is what happens if the treaty did not provide an anti-abuse provision mainly due to the lack of expertise of the tax treaty country negotiator? Should the application of the PPT be allowed in such a case? Would not be this application of the PPT against the good faith of parties negotiating tax treaties, and in such a case how the application of the PPT will influence the certainty for the investor considering the provisions of the treaty?

For example, the tax treaty between Colombia and Spain was the first tax treaty concluded by Colombia. This tax treaty was concluded at the same time than the bilateral investment treaty, and therefore, the staff of the tax administration together with the staff of the Ministry of Trade participated in the negotiations. The result was a treaty that includes the Most Favoured Nation Treatment which was used at that time in bilateral investment treaties. In addition, this treaty has minimum requirements (beneficial ownership) in respect of substance for passive income such as dividends.[69] This treaty has received a lot of attention from the tax administration and from scholars since the treaty has been used for several tax arrangements which are not in accordance with the object and purpose of the treaty provision. However, the government of Colombia has not been able to re-negotiate this tax treaty, but since both countries have committed to the BEPS Inclusive Framework (without any reservation regarding this treaty), it is safely to assume that the principal purpose test (PPT) will be introduced in the said tax treaty.[70]

---

[68] Source IBFD Tax Treaty Database.

[69] See Section 4.4. I.J. Mosquera Valderrama, *The International Tax Treaty Policy of Colombia*, 67 Bull. Intl. Taxn. 4/5 (2013), Journals IBFD.

[70] Colombia and Spain have also signed the MLI and no reservation has been made to the application of the principal purpose test. See MLI positions at http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

However, the question is whether the PPT should be used to solve sloppy drafting of the tax treaty provision and bad treaty negotiation? Or should be only used when the outcome was so unlikely that no provision or legislation was introduced to counter such outcome. In this case, Colombia could have benefited by re-negotiating the tax treaty with Spain before the PPT since it was evident the concern of the tax administration of the use of this treaty for treaty shopping.[71] Further research should be carried out on the implications of the PPT and LOB in the tax treaty policy of developing countries in the Latin American, Central American, Asian and African regions.

3.3. Action 13: Transfer Pricing Documentation

3.3.1. Transfer Pricing Documentation

Action 13 is one of the Actions that has been regarded as of importance for developing countries to get all information possible to analyze the multinational global operations. However, there are differences in the way that this Action is implemented by countries. Some countries have already started to develop tax rules to include the requirements of transfer pricing documentation, these are mostly developed (OECD) countries (e.g. the Netherlands, Mexico and Chile), countries who are applying to become OECD members (Colombia, Brazil and Peru) and some emerging countries (South Africa).

In contrast, other countries have chosen only the master file and/or local file, and they have left the country by country reporting outside these rules (e.g. local file in Argentina) and other countries have decided to delay the start date for implementation (e.g. Singapore[72]). Some other countries have not yet implemented any rules (e.g. Mauritius).

The exchange of the country by country reporting also depends on the Multilateral Competent Authority Agreement (CbC MCAA).[73] Up till the time of writing (December 2017), more than 60 countries have signed this agreement.[74] In principle, exchange is only made between tax administrations. However, this may change in the European Union due to the proposal to introduce mandatory public country by country reporting.[75] The exchange will need to have safeguards to protect the confidentiality of the information shared, and this will be even more important if public disclosure of country by country reporting is enacted

---

[71] See I.J. Mosquera Valderrama, The BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead, 43 Intertax 10 (2015) at 621.

[72] For financial years on or after 1 January 2017. This is one year later, since CbC reporting applies for financial years on or after 1 January 2016. C. H. Lim Singapore Report. Assessing BEPS: origins, standards, and responses. IFA Cahiers 2017 - Volume 102A, at 687.

[73] As stated by the OECD, the purpose of the CbC MCAA is to set forth rules and procedures as may be necessary for Competent Authorities of jurisdictions implementing BEPS Action 13 to automatically exchange CbC Reports prepared by the Reporting Entity of an MNE Group and filed on an annual basis with the tax authorities of the jurisdiction of tax residence of that entity with the tax authorities of all jurisdictions in which the MNE Group operates. Information available at http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/country-by-country-reporting.htm

[74] https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf

[75] In the EU , the discussion regarding public disclosure of country by country reporting is also depending on whether the information is regarded as accounting (position held by the European Commission) or tax information (position held by European Council of Ministers). See https://www.bna.com/european-union-countrybycountry-n57982082862/

worldwide. Only time will tell how this will work in the future, and what safeguards can be implemented to guarantee the confidentiality of the information exchanged. [76]

3.3.2. Output legitimacy deficits

Action 13 is relevant for developing countries. However, the countries will have problems using the information collected and carrying out the proper transfer pricing audits following the analysis of the information. This will require collaboration among countries with the help of regional tax organizations, but also training of tax officials in those countries. Asian countries have referred to collaboration to include "sharing how jurisdictions are making effective use of the data with respect to risk identification, intelligence and measuring the ongoing size and scale of BEPS".[77]

3.4. Action 14: Making Dispute Resolution Mechanisms More Effective

3.4.1. Making Dispute Resolution Mechanisms more Effective

Action 14 addresses mutual agreement procedures (MAPs) to reach an agreement between tax administrations in respect of a tax dispute.[78] Few developing countries (and also developed countries) have referred to the implementation problems of this Action 14. This is mainly due to the fact that countries have not ranked this Action in their priorities.[79] However, this is the first minimum standard that the OECD has started to review.[80]

The terms of reference for the peer review has identified four key areas: preventing disputes, availability and access to MAPs, resolution of MAPs cases, and implementation of MAPs agreements.[81] The schedule of peer review has been already published and the peer review of the first batch of countries has already started.[82] Interesting in this schedule is that the peer review for most of the developing countries has been deferred until 2020. [83]

The reason for this deferral is stated in the terms of reference: "the 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 Forum Tax Administration MAP Forum indicating that the jurisdiction's MAP regime

---

[76] See for a discussion on this issue F. Debelva and I. Mosquera. Privacy and Confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions. Intertax vol.45 (5), 2017, pp. 365-367

[77] M. Konza & R. Thomson, *Chapter 7: BEPS Challenges in Asia and Australia's Response* in Asian Voices: BEPS and Beyond (S. Sim & M-J. Soo eds., IBFD 2017), Online Books IBFD

[78] As stated by the OECD, the Mutual Agreement Procedure allows designated representatives (competent authorities) from the governments of the contracting states to interact with the intent to resolve international tax disputes. OECD. Manual on Effective Mutual Agreement Procedures. Available at https://www.oecd.org/ctp/38061910.pdf at 9.

[79] This was also the conclusion presented at the IFA Congress in Rio where the most relevant actions identified by the 48 countries as explained by the General report are Transfer Pricing including country by country reporting, treaty abuse and harmful tax (Actions 8 to 10, 13, 6 and 5 respectively).

[80] See http://www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm

[81] Terms of reference available at the OECD website http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf

[82] These countries are Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States.

[83] The countries which peer review has been deferred until 2020 are Benin, Costa Rica, Egypt, Gabon, Georgia, Jamaica, Kenya, Pakistan, Paraguay, Senegal, Seychelles, Uruguay. http://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf

requires improvement".[84] This statement acknowledges the lack of MAP rules in developing countries. Surprisingly enough, the terms of reference do not refer to the UN guidelines on mutual agreement procedure which can be used by developing countries to introduce MAP rules.[85]

3.4.2. Output legitimacy deficits

This author has argued elsewhere that one of the questions that should be addressed is whether the terms of reference will take into account the technical and administrative constraints of developing countries to introduce MAP rules and to provide an effective solution to tax disputes by means of the MAP.[86]

This concern has been also highlighted by Oguttu when addressing the problems in the implementation of MAP rules in African countries. In respect of African countries, Oguttu has rightly stated that "African countries need to ensure that MAPs function effectively, and that MAPS are transparent and accessible to taxpayers. African tax administrations should set aside funds to train their staff regarding MAPs. They should also be more active in supporting taxpayers who apply for MAPs and should not try to influence taxpayers to give up their right to MAPs, and taxpayers should not be prohibited, as part of settlement negotiations with tax administrations, from claiming the full amount of tax suffered in exchange for not proceeding with a MAP". [87] Therefore, Oguttu rightly recommends that "in line with international guidance on effective MAPs that has been provided by the minimum standards set out in the Final Report on Action 14 and the UN Guide on MAPs for developing countries, African countries should publish clear guidelines and procedures to access MAPs that clearly specify the circumstances in which MAPs will be applied, the time limits in which taxpayers can approach the CAs, who is the CA, what documentation is required to be submitted with the application for a MAP, the interaction of MAPs with domestic legislation and estimated timelines".

This recommendation is also true for countries in Latin America, Central America and the Asian region. Furthermore, the MAP procedure should also give more certainty to the taxpayer, however, since this procedure is between competent authorities (CA), the protection of the taxpayer is left to each country's domestic legislation. Some scholars have recommended the introduction of the ombudsman in the MAP procedure in order to guarantee that the taxpayers' rights are taken into account.[88]

4. Conclusions and recommendations

The main questions addressed in this article are what are the output legitimacy deficits in the implementation of the BEPS 4 Minimum Standards in developing countries, and what can be done to enhance the output legitimacy of these initiatives in respect of developing countries?

The short overview of problems raised by developing countries in section 2 shows that from an output legitimacy perspective, the OECD and the G20 will still need to address these problems and to provide

---

[84] Para. 8 Assessment methodology. P. 20. BEPS Action 14 Peer Review Documents http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf

[85] See on the use of these guidelines for African countries http://www.un.org/esa/ffd/tax/gmap/Guide_MAP.pdf

[86] I. Burgers and I. Mosquera Corporate Taxation and BEPS: A Fair Slice for Developing Countries?' (Erasmus Law Review, 2017 (08) Special edition on the taxation of multinationals in a post-BEPS age.

[87] A.W. Oguttu, Resolving Treaty Disputes: The Challenges of Mutual Agreement Procedures with a Special Focus on Issues for Developing Countries in Africa, 70 Bull. Intl. Taxn. 12 (2016), Journals IBFD.

[88] Section 2.3. K. Perrou. The Ombudsman and the Process of Resolution of International Tax Disputes – Protecting the "Invisible Party" to the MAP. World Tax Journal, 2018 (Volume 10), No. 1.

solutions to the concerns that these countries have raised in the implementation of the BEPS inclusive framework.

The responses by international organizations have been the development of toolkits and pilot projects. However, it is submitted that these solutions are not sufficient for developing countries considering the different concerns among regions. Therefore, this article calls for tailored solutions for developing countries which should include the regional approach considering the different needs from African French Speaking Countries, African English-Speaking countries, Latin American and Caribbean countries, and the Eastern and central European countries. The lack of regional tax coordination has been addressed by Asian countries which are very concerned about the differences among the countries in the region and their different needs. This concern is also applicable to countries in the Latin American, Central American and African region. Therefore, the BEPS should be tailored to the needs of developing countries and more specific to the countries in the regions.

In addition, the analysis of each of the BEPS 4 Minimum Standards for developing countries in section 3 from the perspective of developing countries shows that one size does not fit all. Therefore, the OECD and the BEPS Inclusive Framework should consider the differences among countries which may result in a different implementation of the Minimum Standards. Therefore, more work should be done on the complexity of the development of international tax standards due to the differences in tax systems and tax culture.[89] Further research should be encouraged to find out how will the BEPS minimum standards be transplanted into the tax system of these countries? how can the differences in tax systems and tax cultures of these countries influence the content of these minimum standards? And what is the role of the EU and the OECD in international tax law making.[90]

[89] This is in line with the theory of legal transplants and legal culture provided in comparative law as used by tax scholars. Legal transplants addresses "the moving of a rule or a system of law from one country to another" . In Watson's view, specific rules, institutions, legal concepts and structures can be borrowed. Thuronyi, a tax scholar, has also stated that the study of legal transplants "includes developing an understanding of the legal culture and studying how rules have changed or persisted when transplanted from one system into another". This knowledge contributes to learn "how people in different countries think about tax law and how actors in different legal systems behave". See A. Watson Legal transplants, 1974 Scottish Academic Press Ltd. Edinburgh at 21 and V. Thuronyi. Comparative Tax Law, 2003 Kluwer Law International, the Netherlands at 4.
The use of legal transplants, tax systems and tax culture has been addressed by this author elsewhere. See I. Mosquera Valderrama. The interaction of tax systems and tax cultures in an international legal order for taxation, Diritto e Pratica Tributaria Internazionale, CEDAM, Italy. Volume 5, issue 2, 2008 at 841-869.

[90] This will be the topic of the ERC starting grant (2018-2022) awarded to this author for the project '*A New Model of Global Governance in International Tax Law Making'* which will analyze the implementation of the BEPS 4 Minimum Standards in 12 countries in Africa, Asia, Europe and Latin American and North American region and the role of the EU and OECD in the setting of international tax standards.