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Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative

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In this article, the author considers output legitimacy deficits in the context of the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative, with special emphasis on the issues and problems that this raises for developing countries.

1. Introduction

In 2015, the OECD, with the political support of the G20, introduced a package of measures to deal with the shifting of profits by multinational enterprises (MNEs). The OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative is intended to provide OECD and G20 member countries and non-OECD and non-G20 counties, including developing countries, with mechanisms with which to counter tax base erosion and profit shifting by way of 15 Actions to deal with, inter alia, transfer pricing issues, harmful tax regimes and treaty abuse.

This article follows on from a previous article by this author regarding the input and output legitimacy[1] of the OECD/G20 BEPS initiative with regard to developing countries. Input legitimacy addresses the participation and representation of developing countries in setting the agenda and in the drafting of the content of the OECD/G20 BEPS initiative. Output legitimacy addresses the search for collective solutions to deal with base erosion and profit shifting, including the mechanisms to realize these solutions, which differ between OECD member countries and non-OECD, i.e. developing, countries.[2]

Since the introduction of the OECD/G20 BEPS initiative in October 2015, two changes have occurred at an OECD level to address the concerns of input legitimacy regarding the OECD/G20 BEPS initiative in respect of developing countries. The first change was the introduction in 2016 of the Inclusive Framework of the OECD/G20 BEPS initiative (the "BEPS Inclusive Framework"), under which developing countries were invited to participate on an equal footing. The BEPS Inclusive Framework contains the BEPS four minimum standards, which countries must implement (*see* section 2.1.). At the time of writing this article in December 2017, more than 110 countries, including OECD and G20 member countries and developing countries, have committed themselves to the implementation of the BEPS four minimum standards.[3] The second change was the commitment by more than 70 countries to the OECD "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (MLI).[4] The MLI was signed in June 2017 and modifies bilateral tax treaties with regard to some changes adopted in the OECD/G20 BEPS initiative.[5] The OECD anticipates that more countries will sign the MLI in the future.[6]

The BEPS Inclusive Framework has had a global effect, as more than half of the 193 countries worldwide have committed themselves to implementing the standards. However, despite this effect, in the author's opinion, the input legitimacy deficits for developing countries have not been resolved, as the BEPS Inclusive Framework has not made changes to the agenda and to the content of the various Actions as decided by the BEPS 44 group, which consists of G20 member countries, and OECD member countries and OECD accession countries. Developing countries have been invited to participate on equal footing, but they do not have any decision-making role, as the equal footing is only for the purposes of the implementation of the BEPS four minimum standards based on the various Actions as decided by the BEPS 44 group.

A lack of input legitimacy is to some extent permissible if output legitimacy exists. This means than the solutions adopted by the OECD/G20 BEPS initiative are a response to the problems of not only OECD and G20 member countries but also of countries outside the BEPS 44 group, including developing countries. However, this is not the case, for, as was rightly argued by the UN Chief of International

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1. I.J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 World Tax J. 3 (2015), Journals IBFD. This 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. *See* F. Scharpf, *Governing in Europe: Effective and Democratic* p. 7 (Oxford U. Press 1999).
2. Mosquera Valderrama, id.
3. A list of the member countries of the Inclusive Framework on BEPS is available at www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.
4. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties IBFD [hereinafter *MLI*].
5. The *MLI* addresses the Actions that deal with hybrid mismatches, treaty abuse, permanent establishments (PEs) and alternative dispute resolution, i.e. Actions 2, 6, 7, and 14, respectively. The purpose of the *MLI* is to quickly implement the measures in the OECD/G20 BEPS initiative that relate to tax treaties.
6. At the time of writing this article, a further six countries had expressed their intention to sign the *MLI*. These were Estonia, the Ivory Coast, Jamaica, Lebanon, Panama and Tunisia. *See* www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

Tax Cooperation, Michael Lennard, the OECD/G20 BEPS initiative was never designed to deal with the issues faced by developing countries.[7] This is also true for the BEPS Inclusive Framework, which is, itself, based in the OECD/G20 BEPS initiative.

The focus of this article is on the output legitimacy deficits of the BEPS Inclusive Framework.[8] This article also addresses the underlying problems that developing countries face in implementing the BEPS four minimum standards and with regard to the possible solutions to alleviate them. The primary questions addressed in this article are: what are the output legitimacy deficits in the implementation of the BEPS four minimum standards by developing countries, and what can be done to enhance the output legitimacy of these initiatives with regard developing countries?

In answering these questions, this article is structured as follows. Section 2. provides a short introduction to the BEPS Inclusive Framework including the concerns of developing countries regarding the implementation of the BEPS four minimum standards. Section 3. then addresses the output legitimacy deficits of the BEPS four minimum standards in developing countries. Finally, section 4. contains the conclusions of the article and recommendations for further research.

2. The BEPS Inclusive Framework: Concerns and Problems for Developing Countries

2.1. A short overview of the BEPS Inclusive Framework

From the 15 Actions of the OECD/G20 BEPS Project, four Actions have been implemented as minimum standards. The countries that have signed up to the BEPS Inclusive Framework must implement the BEPS four minimum standards. These minimum standards are dealt with in Action 5 (Harmful tax competition), Action 6 (Treaty abuse), Action 13 (Transfer pricing documentation including country-by-country (CbC) reporting) and Action 14 (Making dispute resolution mechanisms more effective).[9] The other Actions, i.e. 1, 2, 3, 4, 7, 8, 9, 10, 11 and 12 consist of recommendations and best practices for countries to implement.

Despite the OECD'S focus on the BEPS four minimum standards, it is important to note that countries have made different choices in implementing the various Actions, which are only regarded best practices. These choices were addressed during the 2017 International Fiscal Association (IFA) Congress[10] and in other conferences that addressed implementation of the OECD/G20 BEPS initiative in Europe[11] and in Latin America.[12] For instance, some Central American and Latin American countries, including countries that are members of the BEPS Inclusive Framework, for example, Brazil and Colombia, and others that are not members, for example, Bolivia, the Dominican Republic and Ecuador, have chosen to address Action 3 (Controlled foreign corporation (CFC) rules), Action 7 (Permanent establishments (PEs)), Actions 8 to 10 (Transfer pricing) and Action 12 (Disclosure of aggressive tax planning arrangements).[13]

Countries in Africa have emphasized the importance of transfer pricing (Actions 8 to 10 and 13) instead of the BEPS minimum standards of Action 5 and Action 14.[14] In Asia, in addition to transfer pricing (Actions 8 to 10 and 13), countries such as Singapore have chosen to work on the standards outlined in Action 14. Action 5 has received less attention from countries in Asia.[15] These examples illustrate the absence of a coordinated approach to, and of priorities adopted by countries in, the implementation of the various Actions.

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7. M. Lennard, *Base Erosion and Profit Shifting and Developing Country Tax Administrations*, 44 Intertax 10, p. 745 (2016).
8. A consideration of the *MLI* is outside the scope of this article. For a discussion of the *MLI*, *see* R. García Antón, *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?*, 8 World Tax J. 2 (2016), Journals IBFD; N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8 World Tax J. 3 (2016), Journals IBFD; and I. Grinberg, *The New International Tax Diplomacy*, 104 Georgetown L. J. 5 (2016).
9. The *MLI* also introduced two of the minimum standards, i.e. the principal purpose test (PPT) of Action 6, which is complemented by the limitation on benefits (LOB) provision and the mutual agreement procedure (MAP) of Action 14. An analysis of the *MLI* is outside the scope of this contribution, but these two standards may also have consequences for the tax treaties of the countries participating in the BEPS Inclusive Framework and the *MLI*. For instance, with regard to Action 6, and in contrast to the BEPS Inclusive Framework where any evaluation takes into account the introduction of the PPT, the *MLI* and the possible introduction of the LOB, there is the possibility to opt-in and opt-out of clauses, i.e. make reservations. The operation of these reservation clauses in practice could give rise to various concerns as has already been noted by tax scholars. Consequently, the complexity of the opt-in and opt-out clauses in the positions of the countries could result in "a complex menu of options" that is difficult to manage due to capacity constraints. *See* 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 and 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.
10. A. Christians & S. Shay, *General Report*, in *Assessing BEPS: Origins, standards, and responses* (IFA Cahiers vol. 102A, IBFD 2017), Online Books IBFD includes developments regarding the OECD/G20 BEPS initiative in respect of 48 countries, such as Member States of the European Union, Australia, Canada, Singapore, and the United States, some Latin American countries, i.e. Argentina, Brazil, Colombia, Mexico and Venezuela, and one African country, i.e. South Africa.
11. High-level conference "Implementing Key BEPS Actions: Where do we stand?", 29 June-1 July 2017, Rust, Vienna, Scientific Conference organized by the Institute for Austrian and International Tax Law, Vienna, Austria. The conference discussed reports of several EU Member States, Australia, Canada, China, Indonesia, Japan, Pakistan, Singapore, Turkey and the United States, some Latin American countries, i.e. Argentina, Brazil, Costa Rica, Colombia and Mexico, and some African countries, i.e. Kenya and South Africa. A book on this topic is forthcoming in 2018.
12. At the IFA Latin America Regional Congress, Panel 2, which dealt with "Tax Planning in the context of BEPS", revealed the importance for Latin American countries not only of Action 6, but also of Action 12. *See 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 America Regional Congress, 31 May-2 June 2017, available at www.aaef.org.ar/ifabuenosaires2017/Programa.php.
13. Bolivia, the Dominican Republic and Ecuador. *See* Panel 2 dealing with "Tax Planning in the context of BEPS", *supra* n. 12.
14. *See* the reports regarding Kenya and South Africa at the high-level conference "Implementing Key BEPS Actions, *supra* n. 11, and L. Doman-Brette & J. Hague, *Mauritius*, in IFA, *supra* n. 10.
15. E-T.G. Lee, S.Y. Yong & C. Wong, *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 four minimum standards are to be subject to a peer review and monitoring process in all of the countries participating in the BEPS Inclusive Framework under the auspices of the OECD. According to the OECD:

> [t]he 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.[16]

The peer review process is already taking place for some countries with regard to two of the BEPS four minimum standards, i.e. Action 5 and Action 14.

The implementation of the international standards and the peer review of such implementation is not new for the OECD or for countries. In the past, given the standard of transparency, i.e. exchange of information, countries participating in the Global Transparency Forum were required to implement measures to ensure the efficient and timely exchange of information. A number of countries have been required to change their laws to ensure the timely exchange of information and some, such as Switzerland and Uruguay, have even relaxed their bank secrecy to ensure the efficient exchange of information.[17]

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

Consequently, developing countries have questioned whether the BEPS four minimum standards are what such countries need. In addition, could the commitment to implement BEPS result in other difficulties? Developing countries that are implementing the BEPS four minimum standards are concerned about the technical expertise that is required to implement the standards. This may result in countries focusing on the implementation of the BEP four minimum standards having to disregard issues of great importance, such as domestic tax collection or tax evasion. In this context, it should be noted that the countries participating in the BEPS Inclusive Framework have a schedule for the implementation of the BEPS four minimum standards and, if these minimum standards have not been implemented, the OECD will give a negative review, which could have consequences for that country.

The implementation of the BEPS four minimum standards have also raised concerns of fairness, as developing countries must introduce changes into their domestic law and the tax treaties that these countries have concluded. However, several important issues of concern for these countries, such as allocation of taxing right between residence and source states, the taxation of the informal economy and the need for countries to attract investment by way of tax incentives, are not deal with in the OECD/G20 BEPS initiative.[18]

During the regional consultations carried out in Africa, Central America and Latin America, and in Central and Eastern Europe by the OECD,[19] developing countries expressed their concerns regarding the shortcomings of the BEPS four minimum standards. For instance, in a September 2016 meeting, countries from the Caribbean and the Latin American expressed their concerns of the consequences derived from not being able to partially or fully implement the BEPS four minimum standards, given their priorities and the features of the tax system of specific countries.[20] These countries also expressed concerns regarding the high level of complexity and resources required to implement the measures of the OECD/G20 BEPS initiative, especially for countries with tax administrations that have a low capacity.[21]

In November 2016, at a regional meeting regarding the BEPS Inclusive Framework with regard to African French speaking countries, the participating countries expressed the need for capacity building and training.[22] These countries also highlighted the importance of establishing the benefits and costs that the implementation of the various Actions of the OECD/G20 BEPS initiative would have on their domestic revenue and the need for these countries to maintain some of their preferential tax regimes to attract investment.[23] In addition, these countries asked for more flexibility in the time schedule and on the methodology to be used to implement the BEPS four minimum standards.[24]

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16. OECD, *About the Inclusive Framework on BEPS* (OECD), available at www.oecd.org/tax/beps/beps-about.htm#monitoring.
17. OECD, *Global Transparency Forum* (OECD), available at www.oecd.org/tax/transparency.
18. I. Burgers & I.J. Mosquera Valderrama, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?*, Erasmus L. Rev. 1, *Special Edition on the Taxation of Multinationals in a Post-BEPS Age* (2017).
19. *See* OECD, *Regional Meetings of the Inclusive Framework on BEPS*, details of which are available at www.oecd.org/tax/beps/beps-regional-meetings.htm.
20. An example of priorities of these countries is the possibility to attract investment by way of tax incentives. *See* OECD, *Regional Meeting of the Inclusive Framework on BEPS for Latin America & the Caribbean*, Montevideo, Uruguay, 21-23 Sept. 2016. Co-chair's Summary, p. 3 (OECD 2016), available at www.oecd.org/tax/beps/beps-regional-meeting-co-chairs-summary-lac-september-2016-montevideo.pdf.
21. Id., at p. 2.
22. OECD, *OECD and CREDAF hold regional meeting of the Inclusive Framework on BEPS for francophone countries* (OECD 2016), available at www.oecd.org/tax/beps/oecd-holds-regional-meeting-of-the-inclusive-framework-on-beps-for-francophone-countries.htm.
23. OECD, *Réunion régionale du Cadre inclusif sur le BEPS pour les pays francophones*, Tunis, Tunisia, 22-24 Nov. 2016. Co-chair's Summary, para. 4 (OECD 2016), available at www.oecd.org/fr/fiscalite/beps/resume-co-presidents-reunion-regionale-du-cadre-inclusif-beps-tunis-2016.pdf.
24. Id., Co-chair's Summary, Conclusion. Flexibility was also requested in a second meeting, where the "need to foresee appropriate deadlines for the implementation of the minimum standards by developing countries" was noted. Surprisingly, at this meeting, the different concerns of developing countries were not addressed. Instead, these countries were very keen to receive the "toolkits" and the support for implementation of the measures contained in the OECD/G20 BEPS initiative and the *MLI*, for example, the transfer pricing toolkit and treaty negotiation toolkit, and the importance of raising the awareness of the political authorities with regard to the implementation of the OECD/G20 BEPS initiative and the *MLI*. *See* OECD, *Regional Meeting of the Inclusive Framework on BEPS for French Speaking Countries*, Contonou, Benin, 3-5 July 2017 (OECD 2017), available at www.oecd.org/tax/beps/cotonou-summary-of-discussions-july-2017.pdf.

At a November-December 2016 meeting, some countries in the Asia-Pacific region noted the limited resources, for example, regarding personnel and financial support, that these countries have to implement the measures in the OECD/G20 BEPS initiative and welcomed a regional approach to encourage further collaboration in the region.[25] In April 2017, Central and Eastern European countries highlighted the similarly limited resources and the need to address other non-base erosion and profit shifting issues, such as the taxation of the informal, i.e. the shadow, economy.[26] These countries also stated in October 2017 that, even though their highest priority is to comply with the BEPS four minimum standards, there are several challenges in the implementation of the BEPS measures, these mainly being:

> a lack of capacity in terms of skilled personnel, information technology and financial resources together with timetable constraints, and legal and administrative obstacles to implementation.[27]

Despite the concerns of countries regarding the differences between developed and developing countries in respect of the OECD/G20 BEPS initiative and the problems of capacity, i.e. resources and technical knowledge, of developing countries in implementing the BEPS Inclusive Framework, the OECD has continued with the BEPS four minimum standards. The terms of reference for monitoring and peer review of the BEPS four minimum standards have been published on the OECD website and the peer review process has already started.[28]

2.3. Initiatives from international organizations

In order to assist developing countries to implement the BEPS Inclusive Framework, the OECD has developed partnerships with various 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). These partnerships will not, however, result in a tailored regional OECD/G20 BEPS initiative. Rather, these regional tax organizations are to provide assistance regarding the implementation of the BEPS four minimum standards.

In addition to the work of the OECD, new initiatives have been instigated by international organizations such as the International Monetary Fund (IMF), the World Bank and the United Nations. For instance, in order to coordinate cooperation regarding international tax issues with regard to low-income countries, in April 2016, the OECD, together with the IMF, the World Bank and the United Nations initiated the Platform for Collaboration on Tax.[29] One of the Platform's main tasks is to develop "toolkits" with which to assist developing economies in efficiently implementing the various Actions of the OECD/G20 BEPS initiative and in addressing additional specific, non-base erosion and profit shifting, tax issues.For the OECD, the primary objective of the toolkits is to help developing countries to implement measures to better counter the erosion of the tax base.[30] The toolkits[31] contain reports, guidance, model legislation, train-the-trainers material and other tools that are designed to support capacity building.[32]

It is too early to evaluate the effectiveness of these toolkits. However, developing countries are interested in these toolkits, as indicated in the second regional meeting of the African French speaking countries that took place in July 2017. At this meeting, countries expressed their interest in the toolkit to address access to comparable data with regard to transfer pricing analyses, the toolkit to address transfer pricing documentation and the toolkit on treaty negotiation.[33] Finally, the OECD has initiated pilot projects involving developed and developing countries to resolve some of the capacity concerns.[34] It is, however, not yet clear which countries are participating in the pilot project and if the effectiveness of these projects will be evaluated by the OECD.

The main issues with regard to the implementation of the BEPS four minimum standards by developing countries must now be addressed. These are considered in section 3.

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25. OECD, *Regional Meeting of the Inclusive Framework on BEPS for the Asia-Pacific Region*, Manila, the Philippines, 29 Nov.-1 Dec. 2016, Co-chairs' Summary (OECD 2016), available at www.oecd.org/tax/beps/co-chairs-summary-asia-pacific-beps-regional-meeting-december-2016.pdf.
26. OECD, *2nd Regional Meeting of the Inclusive Framework on BEPS for Eastern European and Central Asia Countries*, Tbilisi, Georgia, 5-7 Apr. 2017, Co-chairs' Statement (OECD 2017), available at www.oecd.org/tax/beps/tblisi-co-chairs-statement-april-2017.pdf.
27. OECD, *3rd Regional Meeting of the Inclusive Framework on BEPS for Eastern European and Central Asia Countries*, Bratislava, Slovak Republic, 18-20 Oct. 2017, Co-chairs' Statement (OECD 2017), available at www.oecd.org/tax/beps/co-chairs-summary-eastern-europe-central-asia-beps-regional-meeting-2017.pdf.
28. The first batch of peer reviews regarding Action 5 and Action 14 have already been published on the OECD website. *See* OECD, *About the Inclusive Framework on BEPS* (OECD), available at www.oecd.org/tax/beps/beps-about.htm.
29. OECD, *Developing countries and BEPS* (OECD), available at www.oecd.org/tax/developing-countries-and-beps.htm.
30. OECD, *supra* n. 24.
31. At the time of writing this article, three toolkits had been released. These were: (1) Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment; (2) Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses; and (3) Taxation of Offshore Indirect Transfers. The other five toolkits that will be released are: (4) Transfer Pricing Documentation Requirements; (5) Tax Treaty Negotiation; (6) Base Eroding Payments; (7) Supply Chain Restructuring; and (8) Assessment of BEPS Risks.
32. OECD, *Platform for Collaboration on Tax* (OECD), available at www.oecd.org/tax/beps/platform-for-collaboration-on-tax.htm.
33. OECD, *supra* n. 24. at p. 3.
34. 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 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 organizations 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." *See* OECD, *Automatic Exchange Portal*, available at www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance. *See also* the Pilot Project outline in OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes* (OECD 2015), available at www.oecd.org/tax/transparency/technical-assistance/aeoi/AEOI-pilot-project-briefing.pdf.

3. The BEPS Inclusive Framework: Output Legitimacy Deficits and Developing Countries

3.1. Introductory remarks

The two main questions addressed in this section are what are the differences between developing and developed countries with regard to the implementation of the minimum standards and what are the output legitimacy deficits of the BEPS four minimum standards in respect of developing countries?

3.2. Action 5: Harmful tax competition

3.2.1. Exchanges of rulings and ruling practice

In general, rulings are defined as a "written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts".[35] Such rulings can be advanced tax rulings, i.e. seeking clarity in the application of tax law, or advanced pricing agreements (APAs), i.e. seeking clarity on the use of an appropriate transfer pricing methodology. With regard to the exchange of rulings, this does not change with the implementation of Action 5, as the instruments to exchange information are already available. Developing countries have also already endorsed the exchange of information, i.e. both spontaneous and automatic. *See* section 3.2.2.

Even though APAs are being introduced by non-OECD countries, advance tax rulings are still a feature of the tax systems of developed countries, such as Australia, Germany, the Netherlands, South Africa and the United Kingdom.[36] These countries have established ruling tax practices and are, therefore, currently in the process of exchanging their rulings and ensuring that their tax ruling policy aligns with the minimum standard of Action 5.[37]

3.2.2. Preferential tax regimes

From the perspective of a developing country, the minimum standard of Action 5 does not imply extensive changes in the tax system of these countries, as most developing countries do not have a preferential regime[38] nor are these countries on the list of non-cooperative jurisdictions[39] 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 this article, more than 90 countries had signed the Multilateral Competent Authority Agreement to implement the Common Reporting Standard (CRS MCAA) and more than 110 jurisdictions had signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[40]

However, this may change given the introduction in the EU anti-avoidance package of the EU standard of good governance for EU Member States and non-EU countries.[41] The EU standard of good governance takes into account transparency, exchange of information, and fair tax competition. Consequently, a "scoreboard" has been introduced to evaluate countries in light of the EU standard.[42] According to the Commission, the scoreboard will help to "determine the potential risk level of each country's tax system in facilitating tax avoidance".[43]

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35. OECD, *Glossary of Tax Terms* (OECD), available at www.oecd.org/ctp/glossaryoftaxterms.htm.
36. C. Waerzeggers & C. Hillier, *Introducing an Advance Tax Ruling (ATR) Regime – Design Considerations for Achieving Certainty and Transparency*, 1 Tax Law Technical Note 2 (2016).
37. For instance, in the Netherlands, "[a] special audit unit within the tax authorities reviews tax rulings and audits the corporate income tax returns (including minimum substance requirements) of taxpayers falling within their competence (the competence comprises service companies without a tax ruling)". *See* M.E. Lukkien & A. Roelofsen, *The Netherlands*, in IFA Cahiers vol. 102A, *supra* n. 10, at sec. 1.4.3.
38. Some preferential regimes, such as the Argentina Promotional Regime for the Software Industry, the Colombian Foreign Portfolio Investment regime and the South African Headquarters regime, have been already evaluated in relation to Action 5 as not being harmful, as in the case of Argentina and Colombia, or as potentially but not actually harmful, as in the case of South Africa. *See* OECD/G20, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – Action 5: Final Report* p. 64 (OECD 2015), International Organizations' Documentation IBFD [hereinafter *Action 5 Final Report*].
39. Non-cooperative jurisdictions are countries that have not cooperated in the implementation of the tax transparency standards, including exchange of information.
40. 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. *See* www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf and at www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf.
41. By way of the EU anti-avoidance package, the European 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 (*see* European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, p. 5, COM(2016) 24, EU Law IBFD). The Communication introduces the requirement of a standard of good governance and fair competition in the bilateral and regional agreements concluded by Member States and by the European Union with third countries, including developing countries.
42. The European Union has decided to introduce the standard of fair tax competition and, for this purpose, a scoreboard was developed by the European Commission in Sept. 2016 to be discussed by the EU Code of Conduct Group Council. For details of the scoreboard, *see* European Commission Press Release, First step towards a new EU list of third country jurisdictions: Scoreboard (13 Sept. 2016), available at https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf.
43. In the 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". *See* The Baltic Course, *Tax good governance: The EU promotes fair rules in the world tax* (16 Sept. 2016), available at www.baltic-course.com/eng/modern_eu/?doc=124117.

The risk indicators are as follows: (i) transparency and exchange of information; (ii) the existence of preferential tax regimes; and (iii) the existence of a tax system with no corporate income tax or a zero corporate income tax rate.[44]

As a result of this approach towards good tax governance, which is broader than exchange of information, some countries that have been regarded as compliant by the OECD, are regarded as non-cooperative tax jurisdictions by the European Union. For instance, in the list published by the European Union in December 2016, developing countries such as Bolivia, Botswana, Costa Rica, Honduras, Guatemala, Liberia, Panama, Paraguay, Puerto Rico, Somalia, Trinidad and Tobago, and Uruguay, were listed individually by Member States as non-cooperative jurisdictions.[45] This list is updated once a year and, 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.[46] All of these countries, except for Trinidad and Tobago, are regarded by the OECD as largely or partially compliant with the standard of exchange of information.[47] However, for the European Union, these countries represent a potential risk to facilitate tax avoidance. Given the foregoing, it is safe to argue that the introduction of the requirement by the European Union of the standard of good governance to be introduced in all of the agreements concluded by the European Union with third countries, and the publication of the EU scoreboard referred to previously, may result in further changes on the part of OECD member countries and EU Member States with regard to a new list of non-cooperative jurisdictions.

3.2.3. Output legitimacy deficits

3.2.3.1. Initial remarks

Following the analysis of the implications of Action 5 for developing countries, it is submitted that this Action does not fit the needs of developing countries and there is, therefore, an output legitimacy deficit in respect of this Action with regard to developing countries. The problems that have been identified by developing countries during the regional consultations on Action 5 are the absence of ruling practices, the excessive use of incentives and the lack of a coordinated approach that could result in greater tax competition between developing countries (*see* sections 2.1. and 2.2.).

3.2.3.2. Exchange of rulings and ruling practices

One difference between developed and developing countries is that the ruling practices in developing countries are very limited. From the perspective of a developing country, most of the time such rulings have not been regulated for in domestic legislation or, if there are laws to permit these rulings, the rulings are practically non-existent. If one example can illustrate this, it is the recent peer review of Action 5 where countries, such as Colombia, were noted as only having one ruling.[48] Some of the rulings that have been found in developing countries are APAs with regard to transfer pricing. However, the use of these rulings is not yet widespread. One important reason for this is the lack of trust between taxpayers and tax administrations, with the result that only few rulings in respect of transfer pricing are available in developing countries.[49]

Consequently, with regard to ruling practices, it is submitted that, before the exchange of rulings can take place, the tax administrations of developing countries should enhance their ruling practices. However, the development of the ruling practices can only take place if the tax authorities in developing countries build a new relationship with taxpayers based on transparency, mutual trust, certainty and respect for taxpayer rights.[50]

3.2.3.3. Preferential tax regimes and tax incentives

The use of tax incentives has been highlighted by scholars, practitioners and government officials with regard to base erosion and profit shifting.[51] Some countries have addressed the use of tax exemptions, tax holidays or special tax regimes in Africa, for example, Mauritius[52] and South Africa,[53] in Asia, for example, the Philippines[54] and Singapore,[55] and in Latin America, for example, Argentina,

44. European Commission, *supra* n. 42, at p. 2.
45. European Commision, Common EU list of third country jurisdictions for tax purposes (Dec. 2016).
46. The list of Dec. 2017 includes fewer countries than the list of Dec. 2016. Other countries that are included in the Dec. 2017 list are, for example, American Samoa, Bahrain, Barbados, Grenada, Guam, Korea (Rep.), Macao, the Marshall Islands, Palau, Saint Lucia, Samoa and the United Arab Emirates. *See* European Commision, Common EU list of third country jurisdictions for tax purposes (Dec. 2017), available at https://ec.europa.eu/taxation_customs/tax-common-eu-list_en.
47. It is, however, important to remember that some countries are provisionally largely compliant, for example, Panama, Samoa and the United Arab Emirates, or provisionally partially compliant, for example, the 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. *See* OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes* (OECD), available at www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings.
48. The peer review report states that "[i]n 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". *See* OECD, *Harmful Tax Practices – Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5* p. 77 (OECD 2017), available at http://dx.doi.org/10.1787/9789264285675-en.
49. *See*, for example, Colombia, which is a country that had to change its tax rulings practice to incentivize taxpayers to make use of APAs. An exception is South Africa, which 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 Feb. 2018).
50. I.J. Mosquera Valderrama, *The Rights of Multinationals in the Global Transparency Framework: McCarthyism?*, 18 Derivs. & Fin. Instrums. 1, sec. 1. (2016), Journals IBFD.
51. Christians & Shay, *supra* n. 10, at sec. 3.2.; Sim & Soo eds., *supra* n. 15; and high-level conference "Implementing Key BEPS Actions", *supra* n. 11.
52. Even though Mauritius has been regarded by other countries as having a preferential tax regime, such as India and South Africa, this has changed due to the removal of Mauritius from the OECD list of uncooperative jurisdictions. According to the IFA reporter for Mauritius, "[t]he 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". OECD/G20, *Action*

Bolivia, Chile, Colombia, Peru and Uruguay.[56] A further example that may also result in tax base erosion is the use of stability clauses by several African and Latin American countries.[57] In addition, the use of free trade zones and special exporting zones can also result in tax base erosion.[58] There are free trade zones and special exporting zones in countries in Africa, for example, Kenya,[59] in Asia, for example, the Philippines, and in Latin America, for example, Chile, Colombia and Uruguay.

Even though the OECD also intends to address preferential tax regimes in Action 5, the critical assessment of the tax incentives in developing countries is lacking. The author has argued elsewhere that this new era following the OECD/G20 BEPS initiative, combined with the concomitant transparency, results in challenges for tax authorities with regard to their relationship with taxpayers.[60] This goes beyond the toolkit on tax incentives developed by the Platform for Collaboration on Tax (*see* section 2.3.).

In the author's opinion, developing countries should re-evaluate their tax incentives, stability agreements (clauses)[61] and the excessive number of free trade zones that they have, taking into consideration their usefulness in encouraging sustainable investment. Tax incentives in developing countries should also be re-evaluated to establish their benefit for the country, as such incentives often only result in tax base erosion.[62] One of the risks of the extensive use of tax incentives and stability agreements is that enterprises may leave the country in question once the tax incentive or agreement is no longer available.[63] However, this should not be dealt with in Action 5 but, rather, by adopting a regional approach that takes into account the needs of countries in a specific region and the design of tax incentives in a coordinate way to prevent unfair tax competition in the region.

3.3. Action 6: Prevention of treaty abuse

3.3.1. Principal purpose test

The minimum standard to counter treaty shopping is the principal purpose test (PPT). This applies when one of the principal purposes was to obtain a treaty benefit. However, the application of the PPT raises several problems, which are considered below.

The first problem is the unbalanced burden of proof between tax administrations and taxpayers. The tax administration must only have reasonable grounds to conclude that, having reviewed all of the relevant facts and circumstances, one of the principal purposes of the action undertaken is to obtain a treaty benefit. However, a taxpayer must establish that the granting of a benefit was in accordance with the object and purpose of the relevant treaty provision. The use of a "reasonable" criterion as opposed to an "established" criterion gives rise to 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, taking into account the circumstances and facts of the case in question. All of the evidence must be considered by the tax administration. This may result in a different assessment by a tax administration of the PPT, which may also result in less certainty for a taxpayer regarding the application of the PPT by that tax administration.[65]

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5 Final Report, *supra* n. 38, 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 dividends, interest, royalties and rents. *See* Doman-Brette & Hague, *supra* n. 14, at sec. 7.1.1.

53. A.W. Oguttu, *South Africa*, in IFA Cahiers vol. 102A, *supra* n. 10, sec. 2.1.4.
54. K. Jacinto-Henares, *A Commentary on the BEPS Project and Its Influence on Developing Countries*, in Sim & Soo eds., *supra* n. 15, at sec. 6.3.4.
55. Lee, Yong & Wong, *supra* n. 15, at sec. 10.4.1.
56. The use of tax incentives including the existence of special tax zones subject to a more favourable tax regime, for example, the exemption or deferral of income or corporate income tax, was addressed in the recent IFA Latin America Regional Congress, *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 economic*, available in Spanish at www.aaef.org.ar/ifabuenosaires2017/index.php.
57. Examples of such countries in Latin America are Chile, Colombia (until 2013) and Peru, with various regimes applying to specific economic sectors and, in Africa, Ghana, South Africa and Zambia, with regimes that apply to the extractive industry. In the past, the author has stated 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 Valderrama, *The BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead*, 43 Intertax 10, pp. 622 and 623 (2015).
58. A. Laukkanen, *Special Tax Zones in Developing Countries and Global Tax Policy*, 70 Bull. Intl. Taxn. 10 (2016), Journals IBFD. For an analysis with regard to Africa and Asia, *see* H. Stein, *Africa, Industrial Policy and Export Processing Zones: Lessons from Asia*, in *Good Growth and Governance in Africa: Rethinking Development Strategies* (A. Noman et al. eds., Oxford U. Press 2012).
59. C. Migai, *Kenya*, sec. 6, in the high-level conference "Implementing Key BEPS Actions", *supra* n. 11.
60. Mosquera Valderrama, *supra* n. 57, at pp. 626-627.
61. The toolkit on tax incentives also addresses the use of these clauses and the distortions for investment. Consequently, "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". *See* World Bank, *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*, A Report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank p. 29, available at https://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.pdf.
62. This recommendation is also in line with the OECD Report of 2014 that addressed the effect of base erosion and profit shifting in low-income countries. The Report stated that base erosion results from the use of wasteful tax incentives that are typically designed to attract investment. The Report also went on to state that: "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". *See* OECD, *Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries* Part 1, p. 21 (OECD 2014).
63. Mosquera Valderrama, *supra* n. 57, at pp. 625-627.
64. L. De Broe & J. Luts, *BEPS Action 6: Tax Treaty Abuse*, 43 Intertax 2, p. 132 (2015).
65. M. Lang, *BEPS Action 6: Introducing an Anti-Abuse Rule in Tax Treaties*, 74 Tax Notes Intl. 7 (14 May 2014) 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 L. Rev. 8 (2017).

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

These problems have an effect in the implementation of the BEPS Action 6 with regard to the PPT in both developed and developing countries. The concern is that the application of the PPT would result in more tax disputes and greater uncertainty for taxpayers.

3.3.2. Output legitimacy deficits

Action 6 is relevant for developing countries. However, the specific treaty policy features of developing countries should be taken into account by the OECD, as a one-size-fits-all approach does not resolve all of the related problems. This is true, as the implementation of the PPT as one of the BEPS four minimum standards requires states to have a substantial treaty network. However, it is typically developed countries that have extensive treaty networks and, therefore, by agreeing to the PPT, developing countries limit their treaty negotiation position with regard to this clause.

Consequently, the question is how will this clause operate in practice, taking into account the lack of treaty negotiation expertise in developing countries? Some developing countries that have participated in the BEPS Inclusive Framework have only concluded a few bilateral tax treaties in contrast to the extensive treaty networks of developed countries, such as France, Luxembourg, the Netherlands, the United Kingdom and the United States.

Some examples of the limited treaty networks of developing countries at the time of writing this article in December 2017 are Burkina Faso with four tax treaties, one signed and in force, two pending entry into force and one under negotiation, Cameroon with five tax treaties, four signed and in force and one pending entry into force, Costa Rica, with seven tax treaties, two signed and in force, two pending entry into force and three under negotiation, Peru with eight tax treaties, seven signed and in force and one pending entry into force, and Senegal with eleven tax treaties, nine signed and in force and two pending entry into force.[68] The question is will the toolkit on treaty negotiation and/or the pilot projects between developed and developing countries (*see* section 2.3.) be sufficient for developing countries? In the author's view, this toolkit will not be enough and, therefore, not only on-the-job training should be provided, but also education for treaty negotiators by way of participation in international tax law programmes. This requires a long-term investment in education.

Another question that must be addressed is what happens if the tax treaty in question does not have an anti-abuse provision that primarily results from the lack of expertise of the treaty negotiator? Should the application of the PPT be permitted in this case? Would such an application of the PPT not run counter to the good faith of parties negotiating tax treaties and, in this case, how would the application of the PPT influence certainty for investors given the provisions of the tax treaty?

For instance, the Colombia-Spain Income and Capital Tax Treaty (2005)[69] was the first tax treaty concluded by Colombia. The Colombia-Spain Income and Capital Tax Treaty (2005) was concluded at the same time as a 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 that the Colombia-Spain Income and Capital Tax Treaty (2005) includes a most-favoured nation (MFN) clause, which was, at that time, often included in bilateral investment treaties. The Colombia-Spain Income and Capital Tax Treaty (2005) also contains minimum requirements, i.e. a beneficial ownership test, with regard to passive income, such as dividends.[70] Consequently, the Colombia-Spain Income and Capital Tax Treaty (2005) has received a significant amount of attention from the tax administration and from scholars, as it has been used in several tax arrangements that do not accord with the object and purpose of its provisions. Colombia has not been able to renegotiate the Colombia-Spain Income and Capital Tax Treaty (2005), but, as both Colombia and Spain have committed to the BEPS Inclusive Framework, without any reservation regarding this tax treaty, it is safe to assume that the PPT will be introduced into this tax treaty.[71]

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66. R. Kok, *The Principal Purpose Test in Tax Treaties Under BEPS 6*, 44 Intertax 5 (2016) and P. Baker, *The BEPS Action Plan in the light of EU Law: Treaty Abuse*, Brit. Tax Rev. 3 (2015).
67. *See*, for example, the decision of the Argentine *Tribunal Fiscal de la Nación* (Federal Tax Court, TFN) in AR: TFN Chamber D, 14 Aug. 2013, *Molinos Rio de la Plata SA*. 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". *See* A.A. Verstraeten, *Argentina: Treaty Entitlement and Abuse: Argentina's* Molinos *Case*, in *Tax Treaty Case Law around the Globe 2015* sec. 1. (M. Lang et al. eds., IBFD 2016), Online Books IBFD. Another relevant circumstance is that of the Andean Community in *The Commission of the Andean Community Decision 578 Regime for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion* (4 May 2004), Treaties IBFD, which prevents double taxation by granting taxation rights on assets to the source member country in which the asset is located. In addition, the decision of the Colombian *Consejo de Estado* (Tax Court, CE) ruling in CO: CE, 21 Aug. 2014, Ruling 18884 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". As Peru did not levy taxes on the assets, Colombia was permitted to levy net worth tax on the assets located in Peru. *See* *Colombian Tax Court rules on net worth tax on assets held in member countries of the Andean Community* (18 Sept. 2014), News IBFD.
68. *See* the IBFD Treaties Collection, available at www.ibfd.org.
69. *Convention between the Kingdom of Spain and the Republic of Colombia for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (31 Mar. 2005), Treaties IBFD.
70. I.J. Mosquera Valderrama, *The International Tax Treaty Policy of Colombia*, 67 Bull. Intl. Taxn. 4/5, sec. 4.4. (2013), Journals IBFD.
71. Colombia and Spain have also signed the *MLI* and have not made any reservation regarding the application of the PPT. *See* the *MLI* positions, available at www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

However, the question arises as to whether the PPT should be used to resolve the sloppy drafting of a treaty provision and poor treaty negotiation or should it only be used where the outcome in question was considered to be so unlikely that no provision or legislation was introduced to counter such an outcome. In this case, Colombia could have benefited by renegotiating the Colombia-Spain Income and Capital Tax Treaty (2005) before the introduction of the PPT, as it was evident that the Colombian tax administration had concerns regarding the use of this tax treaty for treaty shopping.[72] Further research should, therefore, be undertaken regarding the implications of the PPT and limitation on benefits (LOB) provisions in respect of the treaty policy of developing countries in Africa, Asia, Central America and Latin America.

3.4. Action 13: Transfer pricing documentation

3.4.1. Transfer pricing documentation

Action 13 is regarded as being of importance for developing countries for such countries to be able to obtain all of the information possible to analyse the global operations of MNEs. There are, however, differences in the way in which Action 13 is implemented by countries. Some countries have developed and/or are starting to develop tax rules that include requirements in respect of transfer pricing documentation. These are mostly developed countries, i.e. OECD member countries, such as Chile, Mexico and the Netherlands, countries that are in the process becoming OECD member countries, such as Brazil, Colombia and Peru, and certain emerging countries, such as South Africa.

In contrast, other countries have chosen to only adopt the Master File and/or Local File approach as outlined in Action 13, and have omitted CbC reporting for these rules.[73] Other countries have decided to delay the implementation date in respect of the CbC rules (for example, Singapore),[74] while other countries have not implemented any rules (for example, Mauritius).

The exchange of the CbC reporting also depends on the Multilateral Competent Authority Agreement (CbC MCAA).[75] At the time of writing this article, more than 60 countries had signed the CbC MCAA.[76] In principle, exchange occurs only between tax administrations. However, this may change in the case of the European Union due to the proposal to introduce mandatory public CbC reporting.[77] The exchange will have to have safeguards to protect the confidentiality of the information shared and this will be even more important if public disclosure of CbC reporting is enacted worldwide. Only time will tell how this will work in practice and what safeguards could be implemented to guarantee the confidentiality of the information exchanged.[78]

3.4.2. Output legitimacy deficits

Action 13 is relevant for developing countries. However, such countries will probably experience problems in using the information collected and carrying out the proper transfer pricing audits following the analysis of the information. This will not only require collaboration among countries with the help of regional tax organizations, but also the training of the tax officials of those countries. In this context, it should be noted that Asian countries have referred to collaboration as including "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".[79]

3.5. Action 14: Making dispute resolution mechanisms more effective

3.5.1. Making dispute resolution mechanisms more effective

Action 14 addresses mutual agreement procedures (MAPs) that are used to reach an agreement between tax administrations with regard to a tax dispute.[80] Few developing countries, and for that matter developed countries, have referred to the implementation problems of Action 14. This is mainly due to the fact that countries have not included Action 14 among their priorities.[81] However, this is the first of the BEPS four minimum standards that the OECD has started to review.[82]

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72. Mosquera Valderrama, *supra* n. 57, at p. 621.
73. *See*, for example, the Local File reporting requirements in Argentina.
74. For financial years on or after 1 Jan. 2017. This is one year later, as the CbC reporting rules typically apply to financial years ending on or after 1 Jan. 2016. *See* C.H. Lim, *Singapore*, in IFA Cahiers vol. 102A, *supra* n. 10, at sec. 2.1.7.
75. As stated by the OECD, the purpose of the CbC MCAA is to set out the rules and procedures that may be necessary for the competent authorities of jurisdictions to implement Action 13 so as to be able to automatically exchange the CbC reports prepared by the reporting entity of an MNE group and filed on an annual basis with the tax authorities of the residence jurisdiction of that entity with the tax authorities of all jurisdictions in which the MNE group operates. *See* OECD, *Country-by-Country reporting* (OECD), available at www.oecd.org/tax/automatic-exchange/about-automatic-exchange/country-by-country-reporting.htm.
76. *See* www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf.
77. In the European Union, the discussion with regard to the public disclosure of CbC reporting also depends on whether the information is regarded as accounting, which is the position adopted by the European Commission, or tax information, which is the position held by European Council of Ministers. *See European Union: Country-by-Country Reporting Data - Accounting or Tax Information?*, Bloomberg News, (17 Nov. 2016), available at www.bna.com/european-union-countrybycountry-n57982082862.
78. For a discussion on this issue, *see* F. Debelva & I. Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, 45 Intertax 5, pp. 365-367 (2017).
79. M. Konza & R. Thomson, *BEPS Challenges in Asia and Australia's Response*, in Sim & Soo eds., *supra* n. 15.
80. As stated by the OECD, a MAP permits the designated representatives, i.e. the competent authorities, of the governments of the contracting states to interact with the intent to resolving international tax disputes. OECD, *Manual on Effective Mutual Agreement Procedures (MEMAP)* p. 9 (OECD 2007), International Organizations' Documentation IBFD, also available at www.oecd.org/ctp/38061910.pdf.
81. This was also the conclusion presented at the IFA Congress in Rio where the most relevant actions identified by the 48 countries as explained in Christians & Shay, *General Report*, in IFA Cahiers vol. 102A, *supra* n. 10 relate to transfer pricing, CbC reporting, treaty abuse and harmful taxation (Actions 8-10, 13, 6 and 5 respectively).
82. OECD, *BEPS Action 14 Peer Review and Monitoring* (OECD), available at www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm.

The terms of reference for the peer review have identified the following four key areas: (i) preventing disputes; (ii) availability and access to MAPs; (iii) the resolution of MAP cases; and (iv) the implementation of MAPs.[83] The schedule of peer review has been published and the peer reviews of the first batch of countries have started.[84] In this respect, it should be noted that, in the schedule, the peer reviews for most developing countries have been deferred to 2020.[85] The reason for this deferral is stated in the following terms:

> 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 requires improvement.[86]

This statement acknowledges the lack of rules for MAPs in developing countries. Surprisingly, the terms of reference do not refer to the UN guidelines on MAPs, which can be used by developing countries to introduce rules regarding MAPs.[87]

3.5.2. Output legitimacy deficits

This author has argued elsewhere that one of the questions which should be addressed is whether the terms of reference will take into account the technical and administrative constraints of developing countries in introducing MAP rules and in providing an effective solution to tax disputes by way of a MAP.[88] This has been also highlighted by Oguttu (2016) in addressing the problems of the implementation of rules regarding MAPs in African countries. With regard to African countries, Oguttu (2016) 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.[89]

Consequently, Oguttu (2016) correctly 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.[90]

This recommendation also holds true for countries in Asia, Central America and Latin America. In addition, the MAP procedure should give more certainty to taxpayers, as, given that this procedure is one between the competent authorities, the protection of the taxpayer is left to each country's domestic legislation. In this context, some scholars have recommended the introduction of an ombudsman into the MAP procedure to guarantee that the rights of taxpayers are taken into account.[91]

4. Conclusions and Recommendations

The primary questions addressed in this article are what are the output legitimacy deficits in the implementation of the BEPS four minimum standards in developing countries and what can be done to enhance the output legitimacy of these initiatives with regard to developing countries? The short overview of problems raised by developing countries in section 2. reveals that, from the perspective of output legitimacy, the OECD and the G20 still need to address these problems and to provide solutions to the concerns that these countries have raised in the implementation of the BEPS Inclusive Framework.

The response of international organizations has been the development of toolkits and pilot projects. However, it is submitted that these solutions are insufficient for developing countries given the different concerns among regions. Consequently, this article calls for tailored solutions for developing countries, which should include a regional approach due to the different needs of African English speaking countries, African French speaking countries, Latin American and Caribbean countries, and Central and Eastern European countries. The lack of regional tax coordination has been addressed by Asian countries, which are concerned with regard to the differences among the countries in the region and their different needs. This concern also applies to countries in Africa, Central America and Latin America.

83. The terms of reference set out in OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms: Peer Review Documents* (OECD), available at www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
84. The countries involved at are Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States.
85. The countries in respect of which the peer reviews have been deferred until 2020 are Benin, Costa Rica, Egypt, Gabon, Georgia, Jamaica, Kenya, Pakistan, Paraguay, Senegal, the Seychelles and Uruguay. *See* OECD, *BEPS Action 14: Peer Review and Monitoring: Assessment Schedule for Stage 1 Peer Reviews* (OECD), available at www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf.
86. OECD, *supra* n. 82, at p. 20, para. 7.
87. On the use of these guidelines for African countries, *see* UN, *Guide to the Mutual Agreement Procedure Under Tax Treaties* (UN), available at www.un.org/esa/ffd/tax/gmap/Guide_MAP.pdf.
88. Burgers & Mosquera Valderrama, *supra* n. 18, at p. 37.
89. 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, sec. 9. (2016), Journals IBFD.
90. Id.
91. K. Perrou, *The Ombudsman and the Process of Resolution of International Tax Disputes – Protecting the "Invisible Party" to the MAP*, 10 World Tax J. 1, sec. 2.3. (2018), Journals IBFD.

As a result, the OECD/G20 BEPS initiative should be tailored to the needs of developing countries and more specifically to the countries in these regions.

The analysis of each of the BEPS four minimum standards in respect of developing countries in section 3. from their perspective demonstrates that a one-size-fits-all approach does not work. Consequently, the OECD and the BEPS Inclusive Framework should consider the differences between countries, which may result in a different implementation of the BEPS four minimum standards. As a result, 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.[92] Further research should, therefore, be encouraged to establish how the BEPS four minimum standards will 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 the BEPS four minimum standards, and what is the role of the European Union and the OECD in international tax lawmaking.[93]

92. This is in line with the theory of legal transplants and legal culture provided in comparative law as used by tax scholars. Legal transplants address "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* p. 21 (Scottish Academic Press Ltd. 1974) and V. Thuronyi, *Comparative Tax Law* p. 4 (Kluwer L. Intl 2003), respectively. The use of legal transplants, tax systems and tax culture has been addressed by this author elsewhere. *See* I.J. Mosquera Valderrama, *The Interaction of Tax Systems and Tax Cultures in an International Legal Order for Taxation*, 5 Diritto e Pratica Tributaria Internazionale 2, pp. 841-869 (2008).

93. This will be the topic of the European Research Council (ERC) starting grant (2018-2022) awarded to this author in respect of the project "A New Model of Global Governance in International Tax Law Making", which will analyse the implementation of the BEPS four minimum standards in 12 countries in Africa, Asia, Europe, Latin America and North America and the role of the European Union and the OECD in the setting of international tax standards.