Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism

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Issue: World Tax Journal, 2015 (Volume 7), No. 3
Published online: 6 October 2015

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Early drafts of the findings of this article have been presented at the Conference Developing Democracy: Conversations on Democratic Governance in International, European and Comparative Law organized by the Cambridge Journal of International Comparative Law (May 8-9 2015, Cambridge, the United Kingdom) and at the Law and Society Association Meeting (May 28-30 2015, Seattle, the United States). The author is grateful for the comments of Prof. Dr Pasquale Pistone, Dr Peter Hongler and Dr Ricardo Garcia to early drafts of this article. The author is also grateful to Lubomira Balharová and Lukas Vician for their background research.

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1. Introduction and Background

The 2008 economic crisis increased the need for countries to obtain revenue and to strengthen transparency in order to tackle tax fraud, and tax evasion due to the illicit flow of capitals resulting from the use of tax havens and offshore financial centres.[1] In addition, countries committed to tackle international tax avoidance and the effects of exploitation of cross-border disparities across tax systems in the form of aggressive tax planning.[2]

1. Tax havens are countries where taxes are levied at a low rate or not rate at all. Even though a tax haven can also be regarded as offshore financial centers, there could be some differences in the two concepts. Offshore financial centres "reduce revenue available to developing countries where they act as a destination for income streams and wealth protected by a lack of transparency and show a refusal or inability to exchange information with revenue authorities who may have taxing rights in respect of that income or those assets". *OECD Promoting Transparency and Exchange of Information for Tax Purposes: A background information brief*, (21 April 2010), p. 6.
2. The concept of aggressive tax planning has only become of common usage over the past few years in connection with the work undertaken by the OECD and refers to forms of tax arbitrage that exploit cross-border disparities across tax system. As indicated in the European Commission Recommendation of 6 December 2012 on Aggressive Tax Planning C (2012)8806 Final at 2.. it "exploits the differences in tax systems by taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability".

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Governments decided in the G20 and G8 meetings[3] to put international tax cooperation higher on the political agenda with a view to finding an effective solution to such problems.

The first step of this new global governance of international taxation was to introduce a global standard of transparency including exchange of information on request.[4] For this purpose, the OECD following the G20's mandate promoted several initiatives, such as the Global Transparency Forum and the 2010 Protocol to the OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("MAC"). An interesting feature of these initiatives is that they were addressed to OECD countries and non-OECD countries including developing countries.

In 2013, a new global standard i.e. automatic exchange of information was introduced by the OECD following the G20's mandate.[5] This new standard was developed in the Common Reporting Standard on Automatic Exchange on Financial Information ("CRS") and the Multilateral Competent Authority Agreement to Automatic Exchange on Financial Information ("MCAA"). The CRS and the MCAA follow the introduction of agreements to implement the Foreign Account Tax Compliance Act ("FATCA") to exchange financial account information of US taxpayers.[6] The global standard can be implemented by OECD and non-OECD countries including developing countries. If the country decides to endorse the CRS and sign the MCAA, the standard of automatic exchange of information will need to be implemented by 2017 (early adopter) or by 2018. In August 2015, three new reports were released by the OECD to help countries and financial institutions implement the new global standard.[7]

The second step of this shift towards a comprehensive coordination of international taxation was made by the OECD, once more under the political mandate of G20,[8] in 2012: the BEPS Project and its Action Plan.[9] This time the focus was on the boundaries of the exercise of taxing sovereignty. The BEPS Action Plan aims to tackle tax base erosion and profit shifting by introducing rules to deal with transfer pricing, harmful tax regimes, tax treaty abuse, hybrid mismatches among others. Moreover, in Action 15 the OECD introduces a multilateral (binding) instrument to modify bilateral tax treaties in respect of the changes adopted in BEPS.[10] The multilateral instrument will be developed by an international conference with a mandate for 2 years. At the time of writing, more than 80 countries, including G20, OECD and non-OECD countries have committed to participate in the international conference to develop the BEPS Multilateral Instrument.[11]

The adoption of the multilateral instruments to enhance transparency and exchange of information and the current discussion of a BEPS multilateral instrument for OECD and non-OECD countries set the framework for a shift from bilateralism to multilateralism. This article argues that for the multilateral instruments to be successful, these instruments should be legitimate vis-à-vis non-OECD countries including developing countries. In the past, other attempts to create a

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3. G20 Summits in Los Cabos (Mexico), Washington (the United States), London (the United Kingdom) and Pittsburgh (the United States), and G8 Summits in L'Aquila, Lecce (Italy) and Hokkaido (Japan).
4. The standard of transparency requires exchange of "foreseeably relevant" information (on request), respect for taxpayers' rights including right to confidentiality, removal of bank secrecy, the availability of reliable information and the powers by the country (tax administration) to obtain such information.
5. The G20 meeting of September 2013 in St. Petersburg endorsed the development of a new global tax standard i.e. automatic exchange of information. Tax Annex to the St. Petersburg G20 Leader's Declaration. September 2013, para 3, available at http://www.mofa.go.jp/files/000013928.pdf.
6. The FATCA aims to tackle offshore tax evasion and non-compliance by US taxpayers with foreign accounts. FATCA is applicable to the reporting by financial institutions worldwide to the Internal Revenue Service of foreign accounts held by US Taxpayers. *See* http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-FATCA.
7. The reports are the Common Reporting Standard Implementation Handbook, the Offshore Voluntary Disclosure Programmes (practical experience of 47 countries in relation to voluntary disclosure programmes) and the Model Protocol to the TIEA that provides the basis for jurisdictions wishing to extend the scope of their existing TIEAS to also cover the automatic and/or spontaneous exchange of information. These reports are available at <http://www.oecd.org/ctp/exchange-of-tax-information/the-oecd-takes-further-steps-to-putting-an-end-to-offshore-tax-evasion.htm>
8. The BEPS and the Action Plan have been endorsed in the G20 meetings at Mexico (June 2012) and St. Petersburg (September 2013) respectively. G20 Leaders Declaration in St. Petersburg of 6 September 2013. *See* in particular, para. 50 of the Declaration, where it has been stated that: "In a context of severe fiscal consolidation and social hardship, in many countries ensuring that all taxpayers pay their fair share of taxes is more than ever a priority. Tax avoidance, harmful practices and aggressive tax planning have to be tackled…". *See* https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf.
9. The OECD stated in the BEPS Project that "multinational enterprises have been able to greatly minimise their tax burden by means of exploiting tax arbitrage opportunities and by going beyond the boundaries of acceptable tax planning". Base Erosion Profit Shifting Action Plan, OECD, (19 July 2013), pp. 7 and 8.
10. If adopted, this multilateral instrument will coexist with the existing bilateral tax treaty network. Therefore, in the report of Action 15 published in September 2014, a toolbox is provided to elaborate on how this multilateral instrument will modify the network of bilateral tax treaties, and the level of commitment that the countries may have vis-à-vis this multilateral instrument. OECD (2014), Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, available at DOI 10.1787/9789264219250-en.
11. *See* information available at http://www.oecd.org/tax/treaties/work-underway-for-the-development-of-the-beps-multilateral-instrument.htm.

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multilateral instrument for OECD and non-OECD countries, for instance in the field of taxation[12] and investment,[13] have not been successful mainly due to the criticism that the instrument favours developed countries and in some cases due to the lack of take up and commitment to a multilateral instrument.[14]

Non-OECD (developing countries) should not only have a consultative role, but a true decision-making role. In respect of non-OECD countries, a distinction should be made between BRICS[15] countries and developing countries. The BRICS countries are regarded as emerging economies and even though these countries are non-OECD countries, they have a role in decision making by being members of the G20 and by participating on equal footing in the BEPS 44 group.[16] This article focuses on the developing countries which are not represented in the BEPS 44 group.

This article argues that in order to enhance legitimacy of the OECD in respect of developing countries, the latter countries should be involved in the setting of the agenda and in the drafting of the content of the OECD multilateral instruments on exchange information and in the BEPS multilateral instrument. As rightly argued by Pistone in respect of the adoption of the Global Transparency Forum and the MAC, the widespread use and adoption of these instruments by OECD and non-OECD countries has not reflected any decision-making process by the countries that are adopting these instruments. The challenge for all countries is "to supplement the existence of multilateral legal instruments on mutual assistance with a true multilateralism also in the decision-making phase".[17] This is also true for the BEPS Project since the contents of the Action Plan that will be dealt with in the multilateral instrument have been decided by the OECD following the G20's mandate.

2. Aim and Methodology

This article aims to analyse the multilateral action and instruments that have been and are being developed by the Organization for Economic Cooperation and Development ("OECD") to enhance transparency and exchange of information and the Base Erosion Profit Shifting ("BEPS") Project in light of the principle of legitimacy vis-à-vis non-OECD (developing) countries.

The question addressed in this article *is under what conditions can the OECD multilateral instruments and the BEPS Project be regarded as legitimate for non-OECD (developing) countries?* For this purpose, the definition of Scharpf, includingthe distinction between input legitimacy i.e. government by the people and output legitimacy i.e. government for the people, will be taken into account.[18]

In order to answer this question, this article will provide a description of the legitimacy of international tax law making by international organizations and the role of the OECD in respect of OECD and non-OECD countries. Thereafter, the OECD multilateral instruments to enhance transparency and exchange of information and of the BEPS Project will be assessed in respect of the input and output legitimacy. The assessment of input legitimacy will take into account transparency, participation, and representation of developing (non-OECD) countries in the setting of the agenda and the drafting

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12. In the past, attempts by the League of Nations to implement a multilateral Convention have not been successful. Tax scholars have also made a plea for a multilateral tax treaty. See for instance, V. Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 Brook. J. Intl L. 1641 (2001) and response by D. Ring, *Prospects for A Multilateral Tax Treaty*, Brooklyn Journal of International Law 26, no.4 (2001): 1699-1710.
13. If one example may illustrate this is the failure to negotiate the Multilateral Agreement on Investment (MAI). According to the OECD: "Negotiations on a proposed multilateral agreement on investment (MAI) were launched by governments at the Annual Meeting of the OECD Council at Ministerial level in May 1995. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries. Negotiations were discontinued in April 1998 and will not be resumed". <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> For the analysis of the contents of MAI and the reasoning for its failure see also S. Picciotto and R. Mayne, *Regulating International Business: Beyond Liberalization* (MacMillan Press Ltd. September 1999).
14. Only few cases of successful multilateral tax treaties may be found being the most important the Nordic Multilateral Tax Treaty. Other multilateral tax treaties have been developed in regional organizations such as the Andean Community Multilateral Tax Treaty, East African Community ("EAC") Tax Treaty, but these treaties have not always been ratified by all countries (EAC), nor have been these treaties used as model to negotiate tax treaties within the region or with other countries outside the region (Andean Community and EAC).
15. The BRICS countries are made up of Brazil, Russia, India, China and South Africa. The impact of the BRICS in the international tax regime has been thoroughly analysed in Y. Brauner & P. Pistone (eds.), BRICS and the Emergence of International Tax Coordination, IBFD 2015, Online Books IBFD.
16. The OECD Committee on Fiscal Affairs (CFA), which is the steering body for the BEPS Project, brings together 44 countries on an equal footing: all OECD members and the BEPS Associates (8 non-OECD G20) and OECD accession countries: Argentina, Brazil, China, Colombia, India, Indonesia, Latvia, Russia, Saudi Arabia and South Africa. BEPS Information Brief, available at http://www.oecd.org/ctp/beps-2014-deliverables-information-brief.pdf.
17. P. Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, 6 World Tax J. 1 (2014), p. 4, Journals IBFD.
18. F. Scharpf, *Governing in Europe: Effective and Democratic*, (Oxford University Press 1999) p. 7.

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of the content of the OECD multilateral instruments to exchange information and the BEPS multilateral instrument. The analysis of output legitimacy will address the shared goals i.e. to tackle tax fraud, tax evasion and aggressive tax planning and the solutions presented by the G20 and OECD, adopted by OECD and non-OECD countries. The analysis of output legitimacy will also take into account the differences in objectives and resources between OECD and non-OECD (developing) countries.

Section 3. will address the relationship between legitimacy and international tax law making. Section 4 will address the role of the OECD vis-à-vis developing countries and the membership of countries to the G20, OECD and the Global Transparency Forum. Sections 5. and 6. will address the assessment of the input and output conditions for legitimacy of the OECD multilateral instruments to exchange information and the BEPS Project. Section 7. will provide a conclusion.

3. Legitimacy and International Tax Law Making

3.1. Legitimacy and tax law making

In general, citizens give consent to the government to take decisions that will benefit the society in general.[19] The decisions taken by the government will be regarded as legitimate and therefore these decisions will be accepted by the citizens. The government will then have legitimate political authority to act on behalf of their citizens.

In taxation, the expectations of the citizen (taxpayer) may be different taking into account that the citizen is paying taxes to the government without any specific retribution.[20] However, the raising of taxes by governments meets legitimate purposes that will benefit the society since the taxes paid will help raise revenue, which will be used for public services (e.g. health, education, infrastructure, etc.). The citizens give consent and authority to the government to act on their behalf to collect tax revenue to achieve public goals and to provide public services. Because of this consent, the government may be held accountable to the citizens in respect of the government decisions and actions.

Furthermore, as rightly stated by Dagan in a democratic society, the payment of taxes also gives to the taxpayer the right to participate and to have a saying in the design of the tax system.[21] By means of this principle, the taxpayer represented by the democratically elected lawmaker (parliament/congress) will participate in the design of the tax system. This citizen (taxpayer) right is embedded in the principle of “no taxation without representation” that provides a guarantee against arbitrary taxation by the government.

The following paragraphs will analyse the relationship between legitimacy and international tax law-making by international organizations.

3.2. Legitimacy and international tax law-making by international organizations

In general, it can be argued that international organizations do not have the consent of the citizens, but of the states that may decide to become members of the international organization and that the membership to international organizations will be democratic. This is for instance the case in respect of membership to the OECD, World Trade Organization, the United Nations, etc. In the analysis of multilateral institutions, Keohane et al. state that the democratic standard for authorization is particularly high in respect of multilateral institutions. Since for the establishment of such institutions “consent of each participant member state is required, and must be ratified using whatever domestic constitutional procedures it specifies”.[22] In this case, the procedure will be the ratification by the lawmaker of the country, which signed the international agreement addressing the membership to the international organization.

However, even if the process to become a member of the international organization is a democratic process, the legitimacy of the international organizations is conditioned to these organizations having demos (political community expressed in the concept of the nation). In the past, as rightly stated by Ring, it was assumed that the international organizations should have deemed to have *demos*. However, the absence of *demos* did not mean that an international organization or body could not accrue power; rather that it limited the degree of legitimacy.[23] Ring further states that

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19. J. Rawls, *Political Liberalism*, New York: Columbia University Press (1993) and M. Weber, *The Theory of Social and Economic Organization*, Talcott Parsons (ed.), New York: Free Press (1964).
20. One of the features of tax is that it is a required payment to the government for which the taxpayer does not receive anything in return. Unlike fees for which the taxpayer may receive something in return (e.g. fee paid to the Municipality to obtain a driver licence, certificate, etc.).
21. T. Dagan, *Tax, law and development*, Y. Brauner & M. Stewart (eds.), Edward Elgar Publishing, 2013, p. 62.
22. R. Keohane, S. Macedo & A. Moravcsik, *Democracy-Enhancing Multilateralism* (2009), International Organization, 63, at 25, available at http://dx.doi.org/10.1017/S0020818309090018.
23. D. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State. Virginia Journal of International Law* 49, (2008), p. 67.

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“essentially, if real power is being transferred to another level of decision making beyond the state, that body must itself earn democratic legitimacy and cannot rely on the pre-existing legitimacy of the nation-states”. [24]

Other scholars have also questioned the sovereignty and legitimacy of the state in respect of the OECD’s work. For instance Cockfield, when addressing the OECD work on e-commerce shows the rise of the OECD as an “informal world tax organization”.[25] For this author, one of the problems of the OECD is the limited access to OECD membership. Therefore, Cockfield recommends introducing a two-tier membership to promote the legitimacy of the OECD reform with non-OECD members. This two-tier structure will “provide opportunities to non-members to provide opportunities for them to voice their concerns and assist with the design reform efforts”.[26]

Furthermore, when referring to the OECD’s work on harmful tax competition Christians stated that this work evidences an emergent vision of sovereignty and the creation of a transnational social contract. This social contract entails positive obligations or duties of nations in exercising the power to tax” that is referred as a nation’s “sovereign duty” to other nations.[27] As this author rightly states: for the social contract to hold, non-OECD countries “must also seek advantage through bargaining rather than staying in the state of nature through unfettered competition”.[28] Furthermore, Christian states that another advantage for non-OECD countries could be “the promise of continued financial assistance from OECD countries”.[29]

Since the 2008 economic crisis, citizens (taxpayers), governments and international organizations (G20 and OECD) aim to tackle tax fraud, tax evasion, aggressive tax planning and to ensure that companies and individuals are paying the right amount of tax (fair share).

In order to achieve these goals, international organizations such as the OECD (following the mandate of the G20) have decided to pursue with the issuing of multilateral instruments in order to enhance transparency and exchange of information and also use such instruments to implement the BEPS Project.[30] The European Union as a supranational institution has also introduced instruments to achieve these goals.[31]

In principle, the OECD is an international organization that develops instruments that are not binding by nature.However, by means of political decision based on the membership to the OECD, it can be argued that these instruments have been accepted and that the OECD countries will most likely adopt them (*see* section 4.1.). Countries which are not members of the OECD, including in particular developing countries, should not be bound by the OECD instruments. However, since these countries also need to tackle tax fraud, tax evasion and aggressive tax planning, these countries are open to adopt the OECD multilateral instruments to exchange information and the BEPS Project. This situation creates a shift in legitimacy and the question is under what conditions this shift will then need to take place?

This article argues that G20 and OECD countries (including countries that are planning to accede to the OECD) are (politically) bound by the decisions of the G20 and the OECD. Therefore, the actions of these international organizations

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24. Ibid.
25. On the argument of the creation of an International Tax Organization *see also* Y. Brauner, *An International Tax Regime in Crystallization* 56, Tax L. Rev. 259 (2003).
26. *See*, for instance, A.J. Cockfield, *The Rise of the OECD as Informal “World Tax Organization” through National Responses to E-Commerce Tax Challenges*, 9 Yale J. L. & Tech. 59 (2006) p. 185.
27. According to Christians, “the OECD’s work on harmful tax competition suggests that all states might be thought to owe each other some due in tax system design, irrespective of the relative advantages or disadvantages that deference to a particular norm or principle might present for any one state. This theory is consistent with (and perhaps evidence of) a belief that some sort of social contract among states exists, and that the contract is not a mere theoretical apparition but carries real requirements: states may actually expect other states to act in some affirmative ways as a result of their status as fellow sovereign members of international society”. A. Christians, *Sovereignty, Taxation and the Social Contract*, 18 Minn. J. Int’l L. 99 (2009), pp. 101-102.
28. Ibid.
29. Ibid. For the technical assistance, *see* 2000 OECD Progress Report in Identifying and Eliminating Harmful Tax Practices, pp. 20 and 21, available at http://www.oecd.org/ctp/harmful/2090192.pdf.
30. Even though the OECD aims to conclude a multilateral instrument at the International Conference, the implementation of the BEPS actions can also be made by means of unilateral and bilateral instruments. This is the so-called substance of multilateralism as rightly argued by P. Pistone in the presentation form and substance of national tax sovereignty in the era of International Tax Standards. 10th GREIT annual conference: EU BEPS; Fiscal transparency, Protection of Taxpayer Rights and State Aid, Amsterdam, 17 September 2015.
31. At EU level, these actions are for instance the recently (2014-2015) approved amendments to the EU Savings Directive, Merger Directive, Interest and Royalties Directive, and the Administrative Cooperation Directive. More recently (May 2015), the EU introduced a tax transparency package that provides for several measures to tackle tax avoidance. These measures include the automatic exchange of tax rulings, the introduction of disclosure requirements for multinationals, and the application of a general anti-abuse rule introduced in the Common Consolidated Tax Base Project, among others. According to the EU website: “the next step will be an Action Plan on corporate taxation in summer 2015. It will include launch of a debate on the Common Consolidated Corporate Tax Base (CCCTB) and ideas for integrating new OECD/G20 BEPS actions at EU level”. *See* http://ec.europa.eu/taxation_customs/taxation/company_tax/transparency/index_en.htm#initiatives.

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can be legitimate vis-á-vis the citizens of the countries that are members of these organizations. However, the use of the multilateral instruments to exchange information and the BEPS Project by developing countries may raise issues concerning the legitimacy of these instruments in respect of developing countries and their citizens.

In principle, developing countries have been invited to participate on equal footing in the Global Transparency Forum and the BEPS has convened an international conference where developing countries have been also invited to participate. However, it is this author's opinion that the limited participation of developing countries in the setting of the agenda and the drafting of the content of the multilateral instruments to exchange information and the BEPS Action Plan may reduce the legitimacy of these instruments vis-á-vis developing countries. Furthermore, the conditions for legitimacy should address the shared goals, the mechanisms to achieve these goals taking into account the differences between developed and developing countries and the participation and protection of the citizens (taxpayers) in these instruments.

In this context the assessment of legitimacy in respect of the OECD multilateral instruments to exchange information and of the BEPS Project will be carried out in section 5. and 6., respectively. The discussion of legitimacy is more important now that an international conference has been convened to discuss a multilateral BEPS instrument.

At the time of writing, there is consensus for a multilateral agreement. Nevertheless, since the conference that will be in charge of drafting the text of the multilateral instrument needs to start negotiations, as rightly stated by Eicke, it is not clear whether the time will be right and "how many compromises and mini package deals will be necessary to achieve an agreement that does not sacrifice the higher goals".[32] The risk may exist that countries fail to reach consensus on the provisions of the multilateral instrument and that such agreement will have several reservations by countries that will make the implementation of the provisions of the agreement more difficult for OECD and non-OECD countries including developing countries.

The following paragraphs will address the definition of legitimacy, and it will provide the framework for the analysis of legitimacy of the OECD multilateral instruments and the BEPS Project.

3.3. Defining legitimacy

3.3.1. Legitimacy

The concept of legitimacy can be used with different interpretations and connotations but as rightly stated by Van Staden, the main question to be answered in legitimacy is what gives them the right to do that? Van Staden argues that legitimacy dealt with the decisions that bind members of the community and the acceptance by these members of those rules.[33]

The concept of legitimacy has been used to address the role of the European Union as a supranational institution,[34] as a principle of international economic law,[35] and as a principle of administrative law[36] among others. More recently, in the field of taxation, the concept of legitimacy has been used by tax scholars to explain the development of international tax rules for instance by using the concepts of (i) Baldwin as used by Stewart to analyse the legitimacy of transnational tax information networks mainly to exchange information[37] and of (ii) Habermas as used by Peters to analyse the legitimacy of tax law.[38]

32. R. Eicke, *A BEPS Multilateral Instrument – Practical Solution or Elusive Pipe Dream?* Tax Notes International, 10 November, 2014, p. 528.
33. A. van Staden, *The Right to Govern: The Democratic Legitimacy of the European Union*, Study 20, (Clingendael Institute 2003), p. 20.
34. Ibid. B. Kohler & B. Ritterber (eds.), *Debating the Democratic Legitimacy of the European Union*, Rowman & Littlefield Publishers, The United States (2007).
35. M. Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, Working Paper presented at the Inaugural Conference of the Society of International Economic Law, Working Paper No. 14/08. Geneva, (15-17 July 2008).
36. For instance in Administrative Law, *see* D.C. ESTY, *Good Governance at the Supranational Scale: Globalizing Administrative Law* (2006), Faculty Scholarship Series, Paper 428, The Yale Law Journal, pp. 1490-1523.
37. Following Baldwin, Stewart has made the evaluation of this "transnational tax information networks" mainly to exchange information in accordance to the following elements: a legislative mandate, democratic accountability (including transparency), expertise, efficiency and effectiveness of these networks, due process and taxpayer rights and the inclusiveness of these networks. Stewart rightly concludes that the legitimacy of the exchange of information networks is affected by the due process (taxpayer rights), effectiveness and inclusiveness of the networks. Therefore, Stewart recommends to governments and supranational organisations to take further steps to enhance legitimacy in order to have sustained growth of "transnational" tax administrative cooperation. M. Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, 4 World Tax Journal 2 (2012), pp. 170-177, Journals IBFD.

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This article will use a broader concept of legitimacy as developed by Scharpf, which has been used in models of governance including EU governance.[39] The use of this approach rather than the one of Baldwin and Habermas is justified in the interaction between input and output legitimacy.The following paragraphs will address the input and output legitimacy as developed by Scharpf.

3.3.2. Input and output legitimacy

Scharpf states that input legitimacy means that all people affected by the decision should be brought together in deliberations searching for win-win solutions on which all can agree.[40] The concepts related to input legitimacy have been approached differently by scholars. Van Staden states that “political choices are considered legitimated to the extent that they reflect the ‘will of the people’, while offering citizens channels for political participation and possibilities to select their leaders”.[41] Viley states that concepts that are related to input legitimacy are for instance participation, transparency, representation, openness of the agenda setting process, comprehensive and coherent public discourse.[42]

For Scharpf, ‘output legitimacy’ results in the capacity “to solve problems that require collective solutions because they could not be solved through individual action, through market exchanges, or through voluntary cooperation in civil society.” [43] Under the concept of output legitimacy, an action will be perceived legitimate if it is effective in achieving citizens’ goals and if it can provide solutions to citizens’ problems.[44]

Taking into account the elements of input and output legitimacy developed by Scharpf[45], the conditions for legitimacy of the OECD instruments and the BEPS Multilateral Instrument will be analysed in Section 5 and Section 6 respectively. Section 4. will address the role of the OECD in the development of international tax norms.

4. The Development of International Tax Norms by the OECD and G20

4.1. The OECD aims and role

The OECD aims were stated in the 1960 Convention.[46] To achieve these aims,[47] the OECD may develop standards, recommendations and models to be used by OECD countries.[48] From an international relations perspective, Keohane

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38. According to Peters and his analysis of Habermas’ writing, taxes need to originate from a political and legal system that has its roots in the communicative processes of society. In respect of the decision-making procedure presented by Habermas, Peters concludes that the procedures of the OECD do not quite meet the standard. First, there are the substantial problems with the possibilities of non-members to participate on equal terms in the deliberation about the ongoing problems. Moreover, there are the problems with the openness and the transparency of these procedures. Peter rightly states that “although the OECD is certainly trying to make sure that all interested parties and affected citizens can be ‘part’ of these procedures, there continues to be an eroding doubt about the factual public nature of these deliberations.” C. Peters, *On the Legitimacy of International Tax Law* (IBFD 2014), IBFD Doctoral Series (31), ch. 10, p. 378, Online Books IBFD.
39. *See*, for instance, F. Scharpf, *Legitimacy intermediation in the Multilevel European Polity and its Collapse in the Euro Crisis* (2012), MPIfG Discussion Paper 12/6.
40. F. Scharpf, *supra* n. 18, p. 7.
41. A. van Staden, *supra* n. 33, p. 11.
42. M. Vileyn, *Democratic Legitimacy in multi-level political systems: what wan we learn from federal theory*. In this paper, the author quotes several scholars addressing the concepts related to Scharpf’s input legitimacy and output legitimacy. Paper presented at the EUSA Twelfth Biennial International Conference 3-5 March 2011, p. 5.
43. F. Scharpf, *supra* n. 18, p.11.
44. M. Vileyn, *supra* n. 42, p. 6.
45. In addition to the distinction between input and output legitimacy, another scholar, Schmidt, introduces throughput legitimacy as a new intermediary concept to fill in the gap between input and output legitimacy and to ensure the trustworthiness of the processes. Schmidt argues that the concepts related to this throughput legitimacy are efficacy of the many different forms of governance processes and the adequacy of the rules they follow in policymaking. Accountability: Responsiveness to participatory input demands and to be held responsible for the output decisions. Transparency: Demands some form of scrutiny by a specific forum. Inclusiveness and the openness of the institutions to civil society. A distinction between input and throughput legitimacy will not be made in this article, since the main goal of this article is to provide some general thoughts on legitimacy in taxation. The analysis of input vs. throughput will need further research that can be developed in a following article in this matter. *See* V. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput*, Political Studies Association, (2012), p. 14.
46. The countries that participated in the Convention were Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Convention dated 14 December 1960.
47. These aims are mainly to achieve sustainable economic growth and employment, to contribute to sound economic expansion in member and non-member countries and to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international negotiations (art. 1 of the 1960 Convention).
48. Article 5 of the 1960 Convention states that in order to achieve these aims the OECD “may (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations”.

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has identified the OECD as an organization with a networking role. In this role, the OECD facilitates the spread of best practices by means of "linking national officials and quasi-public bodies with their foreign counterparts for the purpose of joint decision making, coordination or information sharing".[49]

From a tax perspective, the role of the OECD in the development of international norms has been addressed by tax scholars.[50] However, taking into account the use of the multilateral instruments to enhance transparency and exchange of information and the BEPS Project not only by OECD countries but also by non-OECD countries, the role of the OECD needs to be revisited.

The following paragraphs will address the conditions for membership to the G20 and the OECD to analyse whether developing countries can voluntarily become a member to these international organizations, and if not, in which way developing countries can interact with the OECD.

4.2. Membership to the G20 and the OECD

The G20 is a political forum of governments with countries from Asia, North America, Middle East and Europe.[51] Only few countries of the African and Latin American region are members i.e. Argentina, Brazil, Mexico and South Africa. The G8 is also a political forum with the European Union and 7 countries (since 2014, 6 countries due to the suspension of Russia).[52] Following the 2008 economic crisis, the G8 and G20 have set up the agenda for a higher level of international tax cooperation.[53]

The concerns for legitimacy of the OECD multilateral instruments to exchange information and the BEPS Project have been addressed in the past by tax scholars. In respect of exchange of information, Pistone rightly argues the questionable legitimacy of the international standards for fiscal transparency. This author states that "an unprecedented political legitimacy of G20 determined the desirable standard and left its implementation and monitoring to the newly established global forum on tax transparency".[54] Pistone further states that these standards "were in fact the outcome of the will of a limited group of countries which imposed their decisions on all others".[55] However, for Pistone, "the sound policy on which the international agreed standards for fiscal transparency are based" and the broad implementation of these standards in the framework of the Global Transparency Forum has gradually released the initial tension in the decision-making process.[56]

In respect of BEPS, Brauner rightly argues that by means of the mandate of the G8 and G20, the OECD "was required to provide solutions for the very same problems it has been working on for a long time" but this time with a political backing.[57]

Thus, in principle, the legitimacy of the multilateral instruments to exchange information and the BEPS Project was justified for countries members of the G8 and G20 and for the OECD countries. However, for developing countries, there is a de facto power of the G8, G20 and the OECD that has taken control over the dynamics of international cooperation and global governance. In this process, the role of actors such as the United Nations, developing countries, civil society, citizens, and businesses is limited. Since these actors have a consultative role or no role at all in the decision making. Therefore, in order to solve this deficit in the decision-making process, this article recommends to give participation and representation to these actors in the drafting of the content of multilateral instruments (*see* sections 5.2.2. and 6.2.2.)

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49. As rightly described by Keohane, the OECD is the home base for a vast network of working groups, expert groups and conferences, which involve approximately 40,000 individuals, R. Keohane et al., *supra* n. 22, p. 20. *See also* J. Salzman *Decentralized administrative Law in the Organization for Economic Cooperation and Development*, Duke Law School Legal Studies Research Paper Series, Research Paper No. 77, 2005, Durham, N.C.: Duke University School.
50. For instance, Ault has addressed the development by the OECD of guidelines, reports, model rules and model treaties. H. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms* (2009), Brook. J. Intl L. 757, Vol. 34:3, pp. 757-781; and D. Ring, *Who is Making International Tax Policy? International Organizations as Power Players in a High Stakes World* (2010), Boston College Law School, Research Paper 185, (July 2010).
51. Among these countries are for instance, the United States, Canada, India, Japan, Russia, South Arabia, South Korea, Turkey and some European countries such as France and Italy along with the European Union representing all EU countries.
52. These countries are in addition to Russia, Canada, France, Germany, Italy, Japan, the United Kingdom and the United States.
53. *See supra* n. 3.
54. For arguments given by Pistone in the presentation form and substance of national tax sovereignty in the era of international tax standards, *see supra* n. 30, p. 6.
55. P. Pistone, *supra* n. 17, p. 4.
56. Ibid.
57. Y. Brauner, *BEPS: An Interim Evaluation*, 6 World Tax J. 1 (2014) pp. 9-10, Journals IBFD.

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Membership to the OECD is available only upon invitation from the OECD.The OECD has 34 member countries. Membership to the OECD is generally regarded as a synonym of economic development, thus leading to the common understanding that OECD members are developed countries. From a tax perspective this statement is in line with the mission of the OECD in establishing the technical content for the exercise of sovereignty on the international scenario, which pursues the policy interest of developed countries, which are in most cases capital exporters.

From the Latin American region, two countries are currently members of the OECD i.e. Chile (South America) and Mexico (Mid-America). Furthermore, it is fairly clear that at least one more Latin American country, namely Colombia, is pursuing OECD membership. This is fairly reflected in the strong commitment of this country to align its international tax policy with that of OECD countries. At the time of writing, there are no African countries members of the OECD.

Countries invited to become members of the OECD need to participate in a long and complex accession procedure. It may be possible for countries that are not yet ready to become members of the OECD to have a status of observer[58] and to participate actively in the discussions. This was the case of Colombia before May 2013 when Colombia was invited to join the OECD.

Another relationship with the OECD is the one of the BRICS countries i.e. Brazil, Russia, India, China and South Africa. These countries are G20 and also OECD accession countries. Some of these countries i.e. Brazil and South Africa have an enhanced agreement with the OECD.

As rightly stated by Brauner and Pistone, the BRICS countries have changed the dynamics in the global tax world since these countries represent the shift of power from the OECD towards emerging countries.[59] Some of the reasons given by these authors is that some BRICS countries such as China and India are challenging the OECD dominance.[60] Another reason is that the BRICS countries have affirmed their right to decide their own tax policy. Some examples provided by these authors are for instance: India that has "consistently adopted specific tax treaty provisions on services. Brazil has consistently included tax sparing clauses (up to the extreme consequence of not concluding treaties with important countries, or terminating a treaty with Germany) and China pursues its international tax policy goals along different schemes depending on whether it is signing a treaty with a developed or developing country".[61] Furthermore, for several years Russia was on its way to OECD membership and therefore also the tax treaties of this country have been aligned to the pattern of the OECD Model Convention. However, the geopolitics changed in connection with the Ukrainian crisis and it now seems that Russia is more pursuing an alignment with the BRICS instead.

The following paragraph will address the role of the OECD vis-à-vis non-OECD (developing) countries including the Global Transparency Forum. As mentioned in the introduction, the BRICS countries are outside the scope of this article.

4.3. The role of the OECD vis-à-vis non-OECD (developing) countries

4.3.1. Use of OECD standards, recommendations and models by non-OECD (developing) countries

As mentioned in section 4.1., OECD countries are committed to implement and comply with the OECD decisions, standards, recommendations and models. However, throughout the past decades, there has been a growing trend also in non-OECD countries as to the use of the OECD instruments, in particular the OECD Model instead of the one provided by the United Nations by non-OECD countries including developing countries.[62]

58. For instance, Argentina is an observer in the Committee of Fiscal Affairs.
59. Brauner & Pistone, *Introduction*, *supra* n. 15, p. 3.
60. Ibid. *See* especially footnote 5 in the Introduction that provide some examples of this dominance such as "the leadership of an ex-Indian official of the new Global Forum on Transparency and Exchange of Information for Tax Purposes (*see* http://www.oecd.org/tax/transparency) and China's involvement in the development of the UN's Practical Manual on Transfer Pricing for Developing Countries".
61. Brauner & Pistone, *Chapter 18: The BRICS and the Future of International Taxation*, *supra* n. 15, p. 498.
62. *See* P. Pistone, *General Report, in The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (M. Lang, P. Pistone, J. Schuch & C. Staringer (eds.), Cambridge University Press 2012 pp. 1-8. *See also* on the use of the OECD Model and UN Model V. Daurer, *Tax Treaties and Developing Countries*, (Kluwer 2014. For a case study of the use of the OECD Model and the UN Model in Africa *see* R. Krever & V. Daurer, *Choosing between the UN and OECD Tax Policy Models: An African Case Study*, EU Working Papers RSCAS 2012/60, European University Institute, 2012. *See*, for a survey on the use of the UN Model. W. Wijnen & J. de Goede, *The UN Model in Practice 1997-2013*, Survey carried out by the International Bureau of Fiscal Document at the request of the Committee of Experts on International Co-operation in Tax Matters of the United Nations, available at http://www.un.org/esa/ffd/wp-content/uploads/2014/11/9STM_FinalPublishedVersionIBFD.pdf.

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Non-OECD countries may adopt the OECD model when negotiating with OECD (developed) country.[63]In some cases, there could be a political motivation, in case that the country is seeking OECD membership e.g. Colombia (still in the accession procedure).[64] In other cases, the use of the OECD model is the result of the bargain and powers of negotiation from the OECD country vis-à-vis the non-OECD country. For instance, the Netherlands stated in the Dutch Tax Treaty Policy Memorandum that when negotiating tax treaties with developing countries the use of the UN Model can be accepted if it is consistent with the international tax treaty policy of the developing country.[65] From an economic perspective, the motivation to conclude tax treaties has been addressed by Zagler and Braun in a case study of 4 countries i.e. Brazil, Colombia, Uruguay,and South Africa.[66] Another example of the predominance of the OECD as global conveyor of aggregation in international tax policies is the use of the OECD Transfer Pricing Guidelines[67] including the application of the transfer pricing methods and the arm's length principle.[68]

4.3.2. Dialogue and development of partnership and initiatives with non-OECD countries and regional organizations

In the past, the interaction between the OECD vis-à-vis the non-OECD countries has been addressed by tax scholars.[69] The OECD has developed partnership and initiatives with governments and regional tax organizations to promote social and economic progress. For instance, the OECD has a partnership with the African Tax Administration Forum (ATAF) that has 24 countries and it has developed joint reports on Revenue Statistics with the Inter-American Centre of Tax Administrations (CIAT) that has 38 countries mostly in Latin America.

However, it is this author's opinion that this interaction does not mean that these regional organizations have an active role in the design of a global tax system. The regional organizations such as the ATAF and CIAT have as their main role the coordination of consultations within the region but the content of the tax rules have already been decided by the OECD. These meetings also contribute to create a forum to exchange ideas among countries regarding the implementation of the tax rules in their respective regions. This has been the case for instance in respect of the implementation of the global standard on exchange of information and the BEPS Project (*see* sections 5.1.2. and 6.1.2.).

Notwithstanding the above, the most important initiative in which OECD and non-OECD countries can become members is the Global Transparency Forum ("Forum"). This Forum will be addressed in the following paragraph.

4.4. Membership to the Global Transparency Forum

The Forum was created in 2000 under the auspices of the OECD and it provides a multilateral framework in the area of transparency and exchange of information. The Forum was restructured in the September 2009[70] Global Forum meeting to have all members (OECD, G20 and non-OECD countries) on equal footing. In order to become a full member, countries are required to pay a flat fee (once) of EUR 15,000.More recently, a Global Forum African Initiative has been created in 2014.[71] Among the objectives of this African initiative are to raise awareness in African countries of the

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63. Some of the reasons have been discussed by Brauner and Pistone stating mainly "three factors: (i) the influential role of OECD countries on the political scenario, (ii) the increased stability of the OECD Model Convention since 1992, linked to periodic quality updates to the Commentary on the OECD Model, which (iii) caused the international tax community to perceive the OECD as the maker of best practices on international taxation. These elements expanded the sphere of influence of the OECD on international tax matters well beyond the boundaries of its member countries, and have even brought several non-OECD countries to include a large number of OECD-patterned clauses in their bilateral treaties with non-OECD member countries". Brauner & Pistone, *supra* n. 15, p. 495.
64. I.J. Mosquera Valderrama, *Colombia – The International Tax Treaty Policy of Colombia*, 67 Bull. Intl. Taxn. 4/5 (2013), Journals IBFD.
65. I.J. Mosquera Valderrama, *Dutch Tax Treaty Policy Regarding Latin American Countries*, Tax Notes Int'l, (29 July 2013) p. 466.
66. *See* the case study carried out by Zagler and Braun of the motivation of four countries to conclude tax treaties i.e. Brazil, Colombia, South Africa and Uruguay. J. Braun & M. Zagler, *An Economic Perspective on Double Tax Treaties with(in) Developing Countries*, 6 World Tax J. 3 (2014), Journals IBFD.
67. OECD Transfer Pricing Guidelines address the application of the transfer pricing methods and the arm's length principle for the valuation, for tax purposes of cross-border transactions between associated enterprises by non-OECD countries, available at http://www.oecd.org/ctp/transfer-pricing/transfer-pricing-guidelines.htm.
68. *See* for an overview of the application of arm's length and the transfer pricing guidelines by non-OECD countries, the country profiles, available at http://www.oecd.org/ctp/transfer-pricing/transferpricingcountryprofiles.htm.
69. For instance, Ault referred to the dialogue with non-OECD members regarding the development of the OECD Recommendations on Harmful Tax Competition. *See* Ault, *supra* n. 50, p. 772. In a broader perspective, Ring stated the increased interest of the OECD to expand connections with non-OECD countries for instance by developing tax programmes mainly on a regional basis with these countries. D. Ring, *supra* n. 51, pp. 125-126.
70. At the 2009 Global Forum meeting a self-standing secretariat based in the OECD was established and it was agreed on reviewing the effective implementation of the OECD standard of transparency including exchange of information on request.
71. This African Initiative is a joint effort of African Tax Administration Forum (ATAF), Studies Center of Tax Administration Directors, the OECD, the World Bank and individual African members of the Global Transparency Forum.

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benefits of the Forum and to contribute to capacity building of tax administrations to effectively exchange information. The assessment of the participation and representation of countries that are members of the Global Transparency Forum (including developing countries) will be addressed in section 5.2.2.

4.5. Intermediate conclusion

The description provided in this section shows the limited access by non-OECD (developing) countries to the OECD or G20 bodies. From all three organizations, the Global Transparency Forum is the organization that is open to membership and includes at the time of writing (August 2015) 126 OECD and non-OECD countries including developing countries.

Taking into account the criteria for membership to G20 and the OECD described above, one may argue that one of the reasons of this lack of participation is the difficulty for countries to have access to the OECD due to the length and conditions of the accession procedure. In fact, even if developing countries want to become members of the OECD, this decision will not depend on them, but on the OECD invitation and on the review of the application by such countries of the OECD Standards on a wide range of policy areas as determined by the OECD.[72] Even more difficult will be the membership of these countries to the G20 governmental meetings since that decision is a political decision.

The following sections 5. and 6. will assess the conditions for legitimacy of the OECD multilateral instruments to exchange information as developed and of the BEPS Project mainly taking into account the input and output legitimacy in respect of non-OECD (developing) countries.

5. Legitimacy and the Multilateral Instruments to Exchange Information

5.1. General issues

Section 5. will assess the conditions of input and output legitimacy of the OECD multilateral instruments vis-á-vis non-OECD (developing) countries and their citizens.

Following the definition of Scharpf provided in section 3.3.2., input legitimacy will take into account the participation of all countries in the decision-making process and in the search of solutions on which the views of the OECD and non-OECD countries including developing countries are represented. Output legitimacy will take into account the problems of countries and citizens and the search for collective solutions to these problems.

In respect of exchange of information, countries have acknowledged the need to change the rules and to put international tax cooperation higher on the agenda. In order to achieve international tax cooperation, multilateral instruments have been developed by the OECD following the G20's political mandate. However, since developing countries are neither members of the OECD nor the G20, it is this author's opinion that for these instruments to be regarded as legitimate, the process where these rules are being adopted should be a democratic process where all parties (including developing countries) can participate. In this context, the assessment of input legitimacy of the OECD multilateral instruments to exchange information will take place. Input legitimacy will address transparency, participation and representation of developing (non-OECD) countries in the setting of the agenda and the drafting of the content of the OECD multilateral instruments to exchange information.

In respect of output legitimacy, this article argues that even though OECD and non-OECD (developing) countries have the same goals; the mechanisms to achieve these goals differ taking into account the differences in resources between developed and developing countries. It is this author's opinion that OECD countries may have a greater benefit from the instruments to exchange information. The main reason is that exchange of information may result in more revenue for countries that have the technological and administrative resources to deal with the information exchanged. Developing countries will need an additional motivation to exchange information, and this could be for instance revenue sharing between developed and developing countries. Another motivation could be for developed countries to finance technological equipment and training for developing countries in order to deal with exchange of information.

Furthermore, the output legitimacy should be assessed taking into account whether the multilateral instruments to exchange information provide solutions to citizens' (taxpayers) problems. One of the drawbacks of this international tax cooperation is that the introduction of changes following the peer review by the Global Transparency Forum may be in detriment of taxpayers' rights. Therefore, this section will address the question of whether the multilateral instruments to

72. "The accession procedure is complex and can be long, as it involves a series of examinations to assess a country's ability to meet the OECD standards in a wide range of policy areas." Information available at http://www.oecd.org/about/membersandpartners/.

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exchange information protect the taxpayers' rights an if not, what solutions can be presented in order to protect these rights.

5.2. Input legitimacy assessment

5.2.1. Assessment: Transparency

In principle, in terms of transparency, meaning for this purpose the public access to documents and publications, it can be safely argued that this standard of transparency is being met (in theory) in respect of the current multilateral initiatives for international taxation. In general, the key documents, the background information in form of information brief, press releases, etc. are available to everyone on the website of the OECD – Centre for Tax Policy and Administration and at the OECD Bookshop.[73]

However, in practice, it is this author's opinion that the access to the documents should be given at the same time that the instrument is being developed. The time between the adoption of the instrument and the access by the public to the content of the instrument should be reduced to the minimum in order to increase the transparency of the decision making.

Up until the time of writing, the key documents available on the OECD website (i.e. terms of reference, methodology and assessment criteria) lack of information on the decision-making process. These document should provide information on the way that the interest of the parties (tax administration and taxpayer) was weighted and whether there was any participation of representatives of taxpayers in the drafting of the key documents.

Countries are being assessed in the peer review mainly on whether the information is or not exchanged within the 90 days period stated in the terms of reference. In order to comply with this time limit, countries are changing (and repealing) their tax rules in detriment of the taxpayers' right to be notified, object and appeal to the exchange.[74] In this context, it is this author's opinion that since the provisions in the terms of reference result in the taxpayers' right being reduced, then, the legitimacy in terms of transparency should have clear information on how the assessment criteria were developed and what were the considerations for the adoption of the terms of reference including the participation or not of the taxpayers in this process.

5.2.2. Assessment: Participation: Representation in the agenda setting and in the decision-making process

5.2.2.1. Membership

5.2.2.1.1. Global Transparency Forum

The membership to the Global Transparency Forum is an open process to which OECD and non-OECD countries can adhere by means of becoming a member of the Forum and by using the international agreements to exchange information i.e. bilateral tax treaties to prevent tax evasion and double taxation; and tax information exchange agreements (TIEAs). The participation is democratic since it requires the consent by the country and therefore, each agreement (Tax Treaty, TIEA) needs to be ratified by the countries in parliament/congress in accordance to each country's constitutional and legal requirements.[75]

5.2.2.1.2. Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The MAC started in 1988 as a multilateral convention available to OECD countries. However, in 2010, the MAC was amended so that non-OECD countries including developing countries could benefit from this convention.[76] The main goals of the MAC are to provide an international instrument to facilitate exchange of information i.e. on request, automatic, spontaneous and to facilitate assistance in recovery and service of documents.

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73. Information is available on the website of the OECD. In respect of the initiatives to exchange information and mutual assistance in tax matters, *see* http://www.oecd.org/ctp/exchange-of-tax-information/.
74. *See* sec. 5.3.2.
75. For example, in Colombia, the OECD-Council of Europe Convention on Mutual Administrative Assistance in Tax Matters was approved by the Congress on July 2013. Thereafter the Constitutional Court reviewed and approved this Convention on decision of January 2014 (C-032/14). After this procedure, Colombia deposited the instrument of ratification march 2014 and then this Convention entered into force. I. Mosquera, N. Quiñonez & D.D. Quiñonez, *Colombia approves OECD-CE Multilateral Convention*, U.S. TIEA, Tax Notes International, (15 July 2013), p. 234.
76. The introduction of Protocol 2010 was the result of the call of the G20 at its April 2009 London Summit to align the Convention to the international standard on exchange of information on request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment. Information available at http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm.

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In principle, all countries can become party to the MAC. However, the Coordinating body of the convention will decide whether or not to accept a country following the review of the confidentiality rules and practices of the country and the membership of the country to the Global Transparency Forum.[77] At the time of writing, the MAC has been ratified by over 60 countries (OECD and non-OECD countries).[78]

It is this author's opinion that even though the content of the MAC is desirable as an international instrument for exchange of information, one of the drawbacks of the MAC is that taxpayers' rights are not guaranteed. In the Preamble, the MAC stated the relationship between international cooperation and taxpayers' rights by stating that "a co-ordinated effort between States is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst at the same time ensuring adequate protection of the rights of taxpayers." [79] However, in practice, the MAC leaves the taxpayers' rights to be notified, to object and to appeal to the exchange of information to the domestic legislation. One of the reasons to have a multilateral instrument is to have a potential global tool to address a global problem. Therefore, one may wonder whether it is consistent to leave the protection of rights in such context at the national level. In the author's view, if global problems require global answers, then also the issues connected with the effective protection of taxpayers' rights should find global answers, since it constitutes a global problem.

Since, one of the consequences of the peer review by the Global Transparency Forum is the reduction or repeal of the taxpayers' rights at domestic level, one may question the output legitimacy of the MAC to provide solution to citizens' problems and to protect taxpayers' rights. The assessment of the output legitimacy of the MAC will be addressed in section 5.3.2.

5.2.2.1.3. Common Reporting Standard and the Competent Authority Agreement

OECD and some non-OECD countries, i.e. G20, accession and developing countries, have endorsed a new global standard i.e. automatic exchange of information. This standard was developed in the OECD Declaration on Automatic Exchange of Information and in the Common Reporting Standard ("CRS"). In these instruments, countries committed to implement the new global standard swiftly and on a reciprocal basis and recognize the need to provide technical assistance to developing countries to help them benefit from the new global standard.[80] Subsequently, countries agreed to sign the Multilateral Competent Authority Agreement ("MCAA") to facilitate the exchange of financial account information. At the time of writing, the MCAA has been signed by 61 countries including non-OECD countries.[81]

From the analysis of these multilateral instruments, one may argue that the dynamics in the relationship between international cooperation and taxpayers' rights have changed since these multilateral instruments leave the protection of taxpayers' rights to national law and unlike the MAC no reference to taxpayers' rights has been made.

In this context, it is submitted that the change from the standard of exchange of information on request to a higher standard i.e. automatic exchange of information calls for the involvement of the taxpayers since their rights can be affected in the exchange of information, for instance in case of leak to the press that may cause financial and personal consequences to the taxpayer, family and business. However, the taxpayers have not participated in the decision-making process in which these instruments were adopted.

These developments in exchange of information also raise the question on how does the OECD and the countries that have signed or endorsed these instruments see the taxpayers? Are the taxpayers regarded as objects in the exchange of information? Or are the taxpayers holders of rights? In the latter case, how can these instruments can guarantee that the taxpayers' rights are protected and respected in this environment of global governance of international taxation? The issue of taxpayers' rights will be deal with in section 5.3.2.

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77. *Convention on Mutual Administrative Assistance in Tax Matters*, Procedural Fact sheet, Non-OECD/Council of Europe Member, p. 2, available athttp://www.oecd.org/ctp/exchange-of-tax-information/Procedural%20Fact%20sheet%20Non%20OECD%20or%20Council%20of%20Europe%20Member.pdf.
78. *See* Chart of Participating Jurisdictions, available at http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf.
79. OECD and Council of Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD Publishing.
80. The first instrument to address the importance of technical assistance for the implementation of the global standard on automatic exchange of information in developing countries was the OECD Declaration on Automatic exchange of information in tax matters endorsed in May 2014 by 47 countries. OECD Declaration on Automatic Exchange of Information in Tax Matters, Adopted on 6 May 2014, available at http://www.oecd.org/mcm/MCM-2014-Declaration-Tax.pdf.
81. *See* List of Jurisdictions at http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf.

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The following paragraphs will address the bodies involved in decision making and subsequently, the assessment of input legitimacy in terms of participation and representation in the agenda setting and in the decision-making process will be made.

5.2.2.2. Bodies involved in decision making

The Global Transparency Forum refers to the Steering Group created in 2009. This Group assists the Global Forum in respect of the future work of the forum. In general, the Steering Group consists of OECD countries, countries identified in the past as preferential regimes such as Barbados, Cayman Islands and Isle of Man, and some non-OECD countries such as Kenya, Brazil and Uruguay.[82]

In addition, as mentioned in section 4.4., since 2009, the participation of the countries that are members of the Forum is on equal footing. Despite this participation, two problems that may affect the legitimacy of the Forum should be taking into account. The first one is the limited number of countries that participate in the discussion of the content of the peer review. Once the peer review has been presented, it will be discussed and approved by the 30 countries members of peer review group. Thereafter, the 126 members of the Forum will be asked to adopt the peer review report.

In order to prevent that a country can block the adoption or publication of a review, the report will be adopted in accordance to the consensus minus one rule. However, this may also raise problems if the country that opposes is the one that is being subject to a peer review. Therefore, it is submitted that the adoption of the peer review and the use of the consensus minus one rule will also affect the legitimacy of the decision making in the Forum.

The MAC established a Coordinating Body that consists of competent authorities of the parties to the convention. The role of this Coordinating Body is to monitor, implement and furnish opinions on the interpretation of the convention upon party request. Furthermore, this body "shall recommend any action likely to further the general aims of the convention. In particular it shall act as a forum for the study of new methods and procedures to increase international co-operation in tax matters and, where appropriate, it may recommend revisions or amendments to the convention" (art. 24 (3) and (4)). The participation of the countries to this Coordinating Body is limited to the countries, which have ratified the MAC. Article 24(3) of the MAC states that countries "which have signed but not yet ratified, accepted or approved the convention are entitled to be represented at the meetings of the co-ordinating body as observers".

Neither the CRS nor the MCAA refers to a specific body for the implementation or interpretation of the provisions in the standard and the agreement. In respect of difficulties in the implementation or interpretation. Section 6(1) of the MCAA states that the competent authority may request consultations to develop appropriate measures to ensure that the MCAA is fulfilled. In addition, the Commentary to the underlying section 6(1) states that consultations can also take place to analyse the quality of the information received. These consultations may be requested by the countries that have endorsed the MCAA.

5.2.2.3. Participation and representation in the agenda setting and in the decision-making process

Based on the description of the decision making provided in section 4., it is submitted that the international agreed standards for transparency and exchange of information have resulted from a political mandate of some countries, i.e. G20 as developed by the OECD. These standards are being implemented by OECD and non-OECD countries.

In respect of the Global Transparency Forum, the membership to the Forum requires countries (OECD and non-OECD) to comply with the standard of transparency. The Peer Review Group[83] monitors by means of a peer-review process[84] the compliance by the country with the standard of transparency including the exchange of information, which should be

82. According to the website of the Global Transparency Forum, the Steering Group Composition consist of Barbados, Brazil, Cayman Islands, China, France, Germany, India, Italy, Indonesia, Japan, Isle of Man, Kenya, Singapore, South Africa, Spain, Switzerland, United Arab Emirates, United Kingdom and the United States. For more information, *see* http://www.oecd.org/tax/transparency/steeringgroup.htm.

83. According to the website of the Global Transparency Forum, the Peer Review Group Members are Bahamas, Bermuda, Brazil, British Virgin Islands, Cayman Islands, China, France, Ghana, Georgia, Germany, Hong Kong, India, Indonesia Italy, Japan, Jersey, Korea, Liechtenstein, Malta, Mauritius, Mexico, the Netherlands, Norway, Samoa, Singapore, South Africa, Spain, Switzerland, the United Kingdom, the United States and Uruguay. *See* http://www.oecd.org/tax/transparency/peerreviewgroup.htm.

84. The peer reviews happen in two phases: Phase 1 is a review of each jurisdiction's legal and regulatory framework for transparency and the exchange of information for tax purposes and Phase 2 involves a survey of the practical implementation of the standards. Background Information Brief (November 2013) p. 3, *see* http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf.

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made timely and efficient.[85] In the assessment of input legitimacy, it is submitted that one of the drawbacks in the setting of the agenda is the limited participation of non-OECD countries. Once the initiative is drafted by the OECD in the form of an agreement or a convention, then the countries may endorse or adopt them. However, there are no provisions in those agreements to enable the non-OECD countries to submit changes. The only way for the non-OECD countries to participate is to be in one of the coordinating bodies mentioned above. That is the case of Uruguay and Brazil in respect of the Peer Review Group and of Kenya in the Steering Group, bodies of the Global Transparency Forum. However, even if the countries are allowed to participate as members of the Global Transparency Forum these countries will also be obliged to change their tax policy in order to be regarded as a compliant country with the standard of transparency. This has been the case for Uruguay, a country that participates in the Peer Review Group but that due to the same peer review in phase 1 was declared as not compliant with the standard of transparency.[86] Therefore, Uruguay made changes to its tax system that were acknowledged in the supplementary peer review report in phase 1.[87]

The participation of the non-OECD (developing) countries in the drafting of the content of the OECD multilateral instrument and in the decision-making bodies is limited to a consultative role. This situation is difficult to change since the membership to the OECD, G20 and the decision-making bodies of these international organizations is a political decision with limited access by developing countries. Therefore, and in order to enhance input legitimacy, it is important to find other ways to enhance the participation and representation of developing countries for instance by introducing the participation of the civil society, business representatives and taxpayers' organizations.

The participation of civil society in multilateralism has been addressed by Keohane et al., who stated that "multilateral institutions that generate and involve civil society networks and organizations can thereby enhance transnational discussions, creating new forms of participation that may partially compensate for participatory forms that are lost".[88]

However, it should be borne in mind that the involvement of NGOs as stakeholders is limited to a consultative role. It is submitted that even though NGOs may engage participation of the people by fostering a media campaign or by starting boycotts; the NGOs should not be regarded as representative of the people.

Since the participation of NGO's is not a good replacement for the conditions at which input legitimacy should have taken place, it is this author's opinion that the participation and representation of taxpayers and business representatives is necessary to enhance the input legitimacy of the multilateral instruments to exchange information. Their participation is justified since they will also be affected by these new developments in exchange of information.

This participation is nowadays more relevant since a Working Group on Automatic Exchange of Information ("AEOI group") has been created within the Forum.[89] The AEOI group will take forward the work that the G20 has mandated to the Global Forum. The AEOI group will develop a mechanism to monitor and review the implementation of the new global standard for automatic exchange of information and a framework to offer technical assistance to developing countries in meeting the standard.

In this context, it is this author's opinion that an active participation of governments, civil society, business representatives and taxpayers in the Forum and in the AEOI group would protect the governments' need to collect revenue but also

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85. The terms of reference of the peer review of the Global Transparency Forum state that the effective exchange of information means that the exchange should be within 90 days, and in case that such deadline cannot be met, then, an update of the progress of the request should be given by the Supplying state to the Receiving State. Global Forum Terms of Reference (November 2013). Background Brief. Annex I, p. 6, available at http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf.
86. The outcome of the peer review in phase 1 of Uruguay stated the progress of Uruguay in improving its legal and regulatory framework in order to be able to effectively exchange tax information. However, according to the report some deficiencies were "identified in its domestic laws, particularly with regards to bearer shares, and identity information relating to certain trusts. Possible impediments to effective access to information were also identified as a result of a notification right allowed to taxpayers, and the duty of confidentiality imposed on trustees." *See* the EOI Portal page for Uruguay, available at http://eoi-tax.org/jurisdictions/UY.
87. The supplementary report evaluated the steps taken by Uruguay to respond to the recommendations of the Phase 1 report. The report stated that Uruguay "expanded its network of EOI agreements with relevant partner jurisdictions. Uruguay also took positive steps to ensure the availability of ownership information on relevant foreign companies and adequate accounting information for all entities as well as to capture ownership information in relation to bearer shareholdings and provide for appropriate enforcement measures to ensure availability of ownership information. However, some gaps remain and Uruguay should act upon recommendations relating to bearer shareholdings and provision of relevant enforcement measures". Information available at OECD Global Transparency Forum report October 2012, *see* http://www.oecd.org/countries/niue/globalforumontaxtransparencywelcomesnewmembersandreviews12countries.htm.
88. R. Keohane et al. provide an example of this participation in a multilateral organization such as the World Bank that engages civil society in quite institutionalized ways including the creation of a Civil Society Policy Forum. R. Keohane et al., *supra* n. 22.
89. The Working Group was formed as a voluntary group and it has 63 member (OECD and non-OECD) countries and 3 observers from International Organizations i.e. the Commonwealth Secretariat, the European Commission and the World Bank, information available at http://www.oecd.org/tax/transparency/AEOI-group-members.pdf.

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the citizens (i.e. taxpayer). This participation should also be complemented with the development of multilateral instruments to protect taxpayer's rights.[90] The following section will address the assessment of the output legitimacy of the multilateral instruments to exchange information.

5.3. Output legitimacy assessment

One of the arguments of this article is that the OECD and the G20 have decided to take common actions against tax fraud, tax evasion and aggressive tax planning. However, as analysed in section 5.2., developing countries have been required to sign and endorse these instruments so that the strong countries (i.e. G20 and OECD) can be successful in countering the fight against tax evasion and aggressive tax planning. Therefore, it is this author's opinion that the input legitimacy of the OECD multilateral instruments to exchange information in respect of developing countries is not being met.

Taxpayers have also not participated in the decision-making process of these multilateral instruments. Moreover, in these instruments the protection of the taxpayers' rights have been left to domestic legislation. However, due to the developments of the peer review by the Global Transparency Forum, the taxpayers' rights available in the domestic legislation have been reduced or repealed. Then, the question to be asked is if the rights of the taxpayers have been affected by these multilateral instruments should the participation of the taxpayer in the decision of the agenda and content of these instruments be required?

It is this author's opinion that even though the common goals are valid, all parties affected by the multilateral instruments, should have the right to participate in the decision-making process. Therefore, it is submitted that one of the conditions for the multilateral instruments to be legitimate is the participation and representation of developing countries and taxpayers in the decision-making process.

This section 5.3. will address the output legitimacy of the multilateral instruments to exchange information in respect of the developing countries and their citizens. The question at hand in this section is are these instruments effective in achieving citizens' goals and providing solutions to citizens' problems? The first part of the assessment will take into consideration the mechanisms to achieve these goals, taking into account the differences in resources between OECD and developing countries. The second part will address the effectiveness of these instruments to provide a solution to the taxpayer problems including the protection of the taxpayers' rights.

5.3.1. Assessment: Common goals and mechanisms to achieve these goals

5.3.1.1. Common goals

Before 2013, the OECD acted in respect of the preferential tax regimes and tax havens by means of the introduction of a list of non-cooperative jurisdictions. The Global Transparency Forum required preferential regimes and tax havens to sign at least 12 Tax Information Exchange Agreements ("TIEAs") in order to be removed from the list of non-cooperative jurisdictions.[91]

Therefore, the participation of preferential tax regimes and tax havens in TIEAs was conditioned to the use of blacklists. These countries decided to conclude TIEAs so they could be removed from the list of non-cooperative jurisdictions.[92] The use of the instruments developed by international organizations, such as blacklist and international reports, has been addressed by Brodzka and Garufi. As rightly stated by these authors, these reports, "even if not legally binding, [...] have significant political value and are more effective. A State that is not compliant with the standard is placed on a list of 'bad' jurisdictions and its reputation is at risk".[93]

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90. The taxpayers' rights will be addressed in section 5.3.2.
91. The Forum has a working group on Exchange of Information that developed in 2002, the Model Agreement on Exchange of Information in Tax Matters ("TIEA") to be used by OECD and non-OECD countries in order to establish effective exchange of information. This Working Group consisted of representatives from OECD member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. These countries were identified as preferential tax regimes or tax havens by the OECD.
92. At the time of writing (August 2015), 38 countries have committed to implement or are already implementing the standard of transparency by means of concluding TIEAs and therefore these countries have been removed from the list of non-cooperative jurisdictions. Information available at http://www.oecd.org/countries/caymanislands/jurisdictionscommittedtoimprovingtransparencyandestablishingeffectiveexchangeofinformationintaxmatters.htm.
93. A. Brodzka & S.Garufi, *The Era of Exchange of Information and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters*, 52 Eur. Taxn. 8 (2012), p. 401, Journals IBFD.

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Since 2013, a new global standard on automatic exchange of information has been introduced in the CRS and the MCAA. This new standard should be implemented by G20, OECD and non-OECD countries endorsing the CRS.[94]

The description above shows that G20, OECD and non-OECD countries have common goals and that exchange of information is desirable for developed and developing countries. However, one of the problems in this process is whether these goals should prevail over citizens and their rights. The assessment of these multilateral instruments in light of the taxpayers' rights will be made in section 5.3.2.

5.3.1.2. Mechanisms to achieve common goals and revenue sharing

The question that needs to be addressed in this section is whether the solutions developed by the OECD and the Global Transparency Forum may result in the same amount of revenue for developed and developing countries. Up until the time of writing there are no statistics or studies from the OECD regarding whether tax fraud and tax evasion have been reduced by means of the exchange of information and, in case of mutual assistance in tax collection, whether more revenue has been generated by the countries.

One of the problems in the exchange of information are the costs that need to be incurred by developing countries to set up the infrastructure, to pay salaries to tax officials and the costs for the processing and sending of the information to developed countries. The multilateral instruments such as the MAC state in art. 26 that "ordinary costs incurred by the requested state in providing assistance will not give rise to reimbursement by the applicant state". These costs should be assumed by the requested state mainly on the basis of reciprocity. However, it is this author's opinion that for developing countries, the exchange of information with developed countries will increase the costs since these countries will have to arrange the use of office space and furniture, to buy computers, to hire more personnel and to update software to include the use of electronic database systems.[95] The question is if the state is a developing country and the costs should be assumed by this country, how these costs will be compensated by the flow of exchange of information.[96]

Developing countries will need an additional motivation to exchange information, and this could for instance be revenue sharing between developed and developing countries. Another motivation could be for developed countries to finance technological equipment and training for developing countries in order to deal with exchange of information.

In the past, the institutional analysis of administrative cooperation in tax matters was analysed.[97] As argued by Turina, it is relevant to design an incentive-based approach (i.e. revenue sharing) as a policy tool to ensure ex ante compliance with administrative assistance agreements.[98] An empirical study carried out by Paolini et al.states that "revenue sharing compensates the developing economy for the loss of tax base, the cost of implementing tax auditing and (in case of firm relocation) also for the financial subsidy paid to firms to stay.[99] Therefore, this study concludes that it is possible for developing countries to voluntarily sign a tax treaty that includes exchange of information, tax audit and revenue sharing.[100]

5.3.1.3. Differences in resources between developed and developing countries

By means of the OECD multilateral instruments, developing countries have been given the opportunity to benefit from exchange of information. However, it is submitted that despite wanting the same goals and providing the same solutions, developed countries will benefit more than developing countries from the exchange of information. The main reason is that exchange of information may result in more revenue for countries with advanced computer equipment and software system to exchange information. Another reason is that developing countries may not always have the administrative

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94. A total of 80 countries, which are members of the Global Transparency Forum, have expressed their commitment to implementing the CRS. Information Brief Common Reporting Standard, p. 3., available at http://www.oecd.org/tax/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief.pdf.
95. Examples of these electronic systems are for instance the Common Communication Network, TLW Mail Systems, Electronic Forms, Encrypted CD's and Track and Trace Emails. *See* X. Oberson, *General Report, 2013 International Fiscal Association (IFA): Exchange of Information*, Cahiers de droit fiscal international, (IBFD 2013), pp. 37-38, Online Books IBFD.
96. *See* for economic studies in the asymmetrical flows of exchange of information between developed and developing countries: J. Braun & M. Zagler, *An Economic Perspective on Double Tax Treaties with(in) Developing Countries*, 6 World Tax J. 3 (2014), Journals IBFD; and J. Ligthart & J. Voget (2009), *The Determinants of Cross-Border Tax Information Sharing: A Panel Data Analysis*, mimeo, Tilburg University.
97. A. Turina, *Information-based Administrative Tax-Cooperation, Consolidating Standards, Emerging Actors and Evolutionary Perspectives,* (Doctoral Thesis defended at Bocconi University Milan 2013).
98. Ibid., p. 66.
99. D. Paolini et al., *Tax treaties with developing countries and the allocation of taxing rights. European Journal of Law and Economics*, Eur. J. Law Econ. vol. 38, no. 2, October, Springer (2014).
100. Ibid.

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capacity and knowledge to deal with tax audits arising from the exchange of information that may involve complex transfer pricing issues or complex aggressive tax schemes.[101]

In the past, the complexity and need for expertise for the use of tax information exchange networks was addressed by Stewart. Stewart rightly argued that "national tax agencies make significant claims of expertise in administration and collection of data. They must be able to manage high level computing systems, and data storage and transmission systems, as well as legal and financial expertise to identify and utilize relevant data".[102]

Furthermore, the implementation of the standard of automatic exchange of information may have consequences for developing countries and the protection of confidentiality of the information exchanged. In order to ensure the confidentiality of the information, the country will need to have technological equipment and software to deal with the access to information, storage of information, handling of information, use of databases, and use of electronic systems to exchange information. Moreover, the country should have an electronic monitoring system as a protection against unauthorised access and to monitor the use of the exchange of data.

It is submitted that unlike some developed countries such as the United States and Canada,[103] developing countries do not have the financial resources, administrative capacity and technological equipment to process the information and to guarantee that the information will be secured and protected. In case that business and personal information of the taxpayer is leaked to the press or third parties, the result may be financial consequences for the taxpayer and/or business.[104] The following section will assess the output legitimacy that should take into account the citizen (taxpayer) including the protection of taxpayers' rights.

5.3.2. Assessment: Providing solutions to citizen's problems and protecting taxpayers' rights[105]

5.3.2.1. Providing solutions to citizens' problems

One of the arguments of this article is that in the application of the standard of transparency and the exchange of information following the peer review by the Global Transparency Forum, countries will most likely introduce changes in their domestic legislation to comply with the recommendations of the Forum. These changes may be in detriment to the (citizen) taxpayer, and therefore, the OECD needs to enhance the output legitimacy vis-à-vis the taxpayer. As Stewart rightly argues "as transnational information exchange becomes more widespread and involves more developing countries as well as multilateral exchange, or even the establishment, in time of central repositories of information, legitimacy in the form of due process will become of increasing concern."[106]

5.3.2.2. Protecting taxpayers' rights

Although the Forum provides for an open membership to all countries, once the country has become a member to the Forum, the standard of transparency will be applicable. The relationship thus comprises two parties, on the one hand the Global Transparency Forum and its review of the standard of transparency and on the other the country who is being subject to this review. The aim of countries is to exchange information swiftly (without any delay) and to be regarded by the Peer Review Group as compliant with the standard of transparency.

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101. The responses by developing countries to the UN questionnaires dealing with BEPS discussed in section 6.3. address the problems regarding transfer pricing by developing countries.
102. M. Stewart, *supra* n. 37, p. 173.
103. For instance, the United States has such an electronic monitoring system whereas Canada has introduced safeguards to protect the confidentiality of the information exchanged. As a result, Canada will only exchange information with countries that have sufficiently secure and compatible data encryption technology. Canada National Report, 2013 International Fiscal Association (IFA): Exchange of Information, Cahiers de droit fiscal international. International Bureau of Fiscal Documentation, Amsterdam, the Netherlands 2013 p. 172.
104. The misuse of the tax information exchanged and the leak to the press of business data may result in financial consequences for the taxpayer. This was analysed by the US Court of Appeals for the Ninth Circuit addressing *Aloe Vera of America v. the United States*. In this case, Aloe Vera claimed civil damages due to the unauthorized disclosure in the Japanese news of the information exchanged under the provisions of the DTT between the United States and Japan. Aloe Vera claimed damages based on the duty of the tax administration in the United States to ensure that the confidentiality of the exchange of information should be protected. The Arizona Federal Judge awarded the plaintiffs USD 1,000 each in statutory damages. The claim by the plaintiffs was USD 52m. *Aloe Vera of America et al. v. United States*, case number 2:99-cv-01794, in the U.S. District Court for the District of Arizona.
105. The taxpayers' rights addressed are procedural rights such as right to inspect the files, to notification, to be heard, to object and to appeal to the exchange of information. These taxpayers´ rights should give to the taxpayer an active role to prevent situations that may result in a breach of confidentiality or misuse of personal and business data exchanged.
106. Stewart, *supra* n. 38, p. 176.

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As a result of this peer review, countries are introducing changes in the domestic law (e.g. by reducing or repealing the taxpayer's right to notification and appeal to exchange of information) and international tax law policy (e.g. by concluding TIEAs, or by repealing the reservation to article 26 of the OECD bilateral tax treaty Model) to comply with such standard.

It is submitted, that in the application of the standard of transparency by the Global Transparency Forum, the role of the citizen (taxpayer) is not being taken into account. Accordingly, one of the problems with the implementation of the standard of transparency is that because of the peer review by the Global Transparency Forum, countries have changed their domestic law mainly to repeal or reduce the taxpayers' rights (e.g. the right to notification and to challenge the exchange of information). In this regard, the IFA 2015 general report states that in accordance to the branch reports for Austria, Liechtenstein, the Netherlands, Portugal, Switzerland and Uruguay state that the procedure to notify the taxpayer including the possibility to challenge the exchange of information "have been removed entirely or cut down. In all cases, the removal of the right to notification and to challenge came about as a result of pressure from the OECD Forum on Transparency and Exchange of Information, and as a result of a threat to give a lower peer review rating to the countries concerned".[107]

The multilateral instruments i.e. MAC, CRS and MCAA have left the protection of taxpayers' rights to domestic legislation. However, as explained above, the peer review process by the Global Transparency Forum has diminished the domestic safeguards by countries regarding taxpayers' rights in exchange of information. Rights such as notification, appeal, etc. have been reduced or repealed by countries in order to be regarded as compliant with the standard of transparency. In this context, it is this authors' opinion that even though the adoption of international (multilateral) standards addressing exchange of information is necessary and it could be the best solution for all countries, the (citizen's) taxpayers rights in exchange of information should be protected.[108]

The protection of taxpayers' right in exchange of information has been also addressed by the EU Working Party on Data Protection in respect of the introduction of automatic exchange of information in the CRS and the MCAA. For the EU Working Party, "while the exchange of information is legitimately regarded as an essential tool in the fight against tax evasion, it is nevertheless necessary to ensure that such an objective of general interest is pursued with full respect for individuals' fundamental rights, in particular the right to private life and the protection of personal data as required by European and international legal instruments". [109] For the EU Working Party, "in order to ensure adequate data protection, it is necessary to provide in the domestic laws and the international instruments for substantive provisions that put in place adequate data protection safeguards".[110]

In respect of developing countries, another reason to introduce safeguards is to prevent situations where the leaking of information may result in risky situations for both the taxpayer and his family (e.g. kidnapping/extortion).[111] The taxpayer (citizen) should have the right to intervene and to object in case that the country receiving the information does not have the resources to guarantee the confidentiality of the taxpayer's information. This solution should be further developed following the research of best practices introduced by developed and developing countries regarding the safeguards to protect the confidentiality of the information exchanged.

The taxpayers' rights are more needed now due to the adoption of the new global standard of automatic exchange of information by the CRS and the MCAA. By means of automatic exchange of information, not only specific information will be exchanged but also information in bulk. Therefore, countries should take into account that due to the fast pace in

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107. P. Pistone & P. Baker, *IFA General Report: The Practical Protection of Taxpayers' Fundamental Rights*, IFA Cahiers 2015 – Volume 100B, p. 62.
108. *See also* on this argument, A.P. Dourado, *Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies*, European University Institute, Working Papers RSCAS 2013/11, p. 3.
109. Letter Article 29 Data Protection Working Party to the OECD addressing the Common Reporting Standard dated 18 September 2014, p. 2. The Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Re. Ares (2014) 3066381, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140918_letter_on_oecd_common_reporting_standard.pdf.pdf.
110. The Working Party refers to the Case C-293/12 and C-594/12 Digital Rights Ireland, Seitilinger a.o. stating that: "this is illustrated by the recent decision of 8 April 2014 of the Grand Chamber of the Court of Justice (CJEU). In that judgment, the Court stressed the need for legislation to provide access for the competent national authorities to personal data and their subsequent use for purposes of prevention, detection or criminal prosecutions. The Court required objective criteria determining the limits for such operations, given the extent and seriousness of the interference with the fundamental rights as enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union". Ibid., pp. 4 and 5.
111. The exchange of information with some Latin American and African countries with higher level of corruption and kidnapping should be carefully monitored to protect the confidentiality of the information exchanged and the use of the taxpayer's personal and business information by the persons authorized by law and for the purposes for which the information is exchanged. In order to prevent these situations, the security safeguard principle as developed in the 2013 OECD Privacy Guidelines should be implemented. This principle states that personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data. OECD Privacy Guidelines, p. 15, available at http://www.oecd.org/sti/ieconomy/privacy.htm.

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which automatic exchange of information is going to take place, the result may be less supervision to check the accuracy and use of the information by the receiving and supplying authorities.

As rightly stated by Bentley, in respect of the rise in soft law but also applicable to the developments in the rules to exchange information, revenue administrators "have to engage with and understand taxpayers as much as they can. To do this effectively they have to protect taxpayers and set up the frameworks that provide effective rule of law both under the law and through the daily operation and administration of the law".[112]

In this context, the question that should be addressed by the OECD is how the multilateral instruments to exchange information will guarantee the right to confidentiality, right to privacy, right to be heard and due process. These rights should be guaranteed by countries as part of the rule of law and by international organizations to enhance the legitimacy of the multilateral instruments vis-à-vis the taxpayer. This author recommends to the OECD, the Global Transparency Forum and the governments to address the shortcomings of the domestic provisions to protect confidentiality and use of personal data.

5.4. Intermediate conclusion

The current multilateral instruments to enhance transparency and exchange of information does not meet the requirement of transparency and participation in the OECD initiatives. The approach of governments and the OECD and G20 may raise problems since the agenda and the content of the multilateral initiatives have been decided by the OECD and the G20 where not all countries are being represented. Before moving from the global standard of exchange of information (on request) to a higher standard, being the automatic exchange of information, the OECD should enhance the participation of citizens, businesses and civil society in the decision-making bodies and in the agenda setting process of the Global Transparency Forum, the MAC, CRS and the MCAA.

The goals of governments, citizens, the OECD and the G20 are to tackle tax fraud, tax evasion, and aggressive tax planning by means of enhancing the standard of transparency and exchange of information. These goals are the same for OECD and non-OECD countries, including developing countries. However, the OECD should address the differences in technology, resources and personnel between developed countries and developing countries so that all countries can benefit from the exchange of information and can share the costs and revenue related to exchange of information. The country needs to have the technological and administrative capacity to apply the international standards developed by the OECD including the MAC, CRS and the MCAA and the safeguards to protect the taxpayers' rights to confidentiality, due process, privacy, amongst others.

6. Legitimacy in the BEPS Project and the Multilateral Instrument

6.1. General issues

This section will assess the conditions of input and output legitimacy of the BEPS Project and the multilateral instrument vis-á-vis non-OECD (developing) countries.

In order to tackle aggressive tax planning and base erosion and profit shifting, the OECD following the G20's political mandate has developed the BEPS Project. The decisions are taken on equal footing by the BEPS 44 group that includes G20, OECD and OECD accession countries. Developing countries are outside the BEPS 44 group and therefore, developing countries do not participate in the decision-making process of the BEPS. It is this author's opinion that for the BEPS Project to be regarded as legitimate, developing countries should have equal footing in the decision-making process of the BEPS. In this context is that the assessment of input legitimacy of the BEPS will take place. The assessment of input legitimacy will address the transparency, participation, and representation of developing countries in the setting of the agenda and the drafting of the content of the BEPS Project.

At the time of writing, an International Conference has been convened to develop the BEPS multilateral instrument where OECD and non-OECD countries including developing countries have been invited to participate. However, this conference may lack legitimacy since the BEPS actions that will be discussed at the International Conference (i.e. agenda) has already been decided by the OECD.

In respect of output legitimacy, this article argues that the goals and mechanisms to achieve these goals differ between OECD and non-OECD (developing) countries. This section will elaborate on some of the goals of developing countries

112. D. Bentley, *The Rise of 'Soft Law' in Tax Administration - Good News for Taxpayers?* , 14 Asia-Pac. Tax Bull. 1 (2008), p. 38, Journals IBFD.

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that are outside the BEPS Project. These goals are: the use of tax incentives, the allocation of tax treaty rights in accordance to residence and source, the tax treaty cost/ benefits analysis in the negotiation of tax treaties, and the relationship between tax and investment and the importance of bilateral investment treaties. Finally, this section will address some of the BEPS actions that have been identified by the OECD as relevant for developing countries and the differences in resources between developed and developing countries.

6.2. Input legitimacy assessment

6.2.1. Assessment: Transparency

In principle, in terms of transparency, the BEPS Project meets the criteria of transparency. The key documents, the draft actions, the webcasts[113] and the background information are available to everyone at the website of the OECD – Centre for Tax Policy and Administration addressing BEPS[114] and at the OECD Bookshop. However, the deliberations among states in respect of the BEPS are not available at the OECD website. Therefore, the position of the OECD countries and non-OECD countries in respect of the BEPS Project and its Action Plan is not clear. The OECD's Task Force on Tax and Development[115] has also carried out meetings to deal with BEPS but the agenda, outcome and minutes of these meetings are not available to the public.[116]

6.2.2. Assessment: Participation: Representation in the agenda setting and in the decision-making process

The OECD has opened the BEPS Project to OECD and non-OECD countries, including developing countries. However, only the G20, OECD and OECD accession countries have a role in decision making by participating on equal footing in the BEPS 44 group.[117]

In contrast, developing countries do not participate in the decision-making process. These countries have a consultative role in the BEPS Project. For instance consultations have been carried out by the OECD with Latin American and African countries either in the specific regions or at the headquarters of the OECD.[118] In addition, business organizations, trade unions and civil society organisations have been given the opportunity to comment on discussion drafts, and to participate in public consultation meetings and via webcasts.

One of the problems in the adoption of the BEPS Project and the multilateral instrument that will need to be addressed by OECD and non-OECD countries is whether the multilateral instrument should be ratified by the countries in the Parliament/Congress in accordance to each country's constitutional and legal requirements, and if so how this ratification will take place.

In this regard, it is important to note that the United States Congress in a letter to the US Treasury Department stated that "the Congress is tasked with writing the tax laws of the United States, including those associated with cross-border activities of US companies. Regardless of what the Treasury Department agrees to as part of the BEPS project, Congress will craft the tax rules that it believes work best for U.S. companies and the U.S. economy. Close consultation between Congress and the Treasury Department should inform the BEPS discussions. We expect that as we move forward on

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113. *See* OECD BEPS website http://www.oecd.org/tax/beps-webcasts.htm.
114. *See* OECD BEPS website http://www.oecd.org/ctp/beps.htm.
115. The OECD's Task Force on Tax and Development was created in January 2010 following the Joint Meeting on Tax and Development between the Committee on Fiscal Affairs (CFA) and the Development Assistance Committee (DAC). The role of the Task Force is to advise the OECD Committees in delivering a Tax and Development Programme to improve the enabling environment for developing countries to collect taxes fairly and effectively. Information available at http://www.oecd.org/tax/tax-global/taxanddevelopment.htm.
116. On the website, the minutes from the plenary meetings of the Task Force are available, but not from the meetings regarding BEPS. The only documents regarding BEPS are Part 1 and Part 2 of the Report Impact of BEPS in Low Income Countries. The discussions following up those reports within the OECD and with the developing countries have not been made available.
117. The OECD Committee on Fiscal Affairs (CFA), which is the steering body for the BEPS Project, brings together 44 countries on an equal footing: all OECD members and the BEPS Associates (8 non OECD- G20) and OECD accession countries: Argentina, Brazil, China, Colombia, India, Indonesia, Latvia, Russia, Saudi Arabia, South Africa. BEPS Information Brief, *see* http://www.oecd.org/ctp/beps-2014-deliverables-information-brief.pdf.
118. The OECD stated that "*direct consultations with developing countries were held in February and March 2014 at events organised by the OECD (in Asia and Latin America), the African Tax Administration Forum (in South Africa) and the Centre de rencontres et d'études des dirigeants des administrations fiscales (in Paris). The report also draws on dialogue with developing countries at meetings of the Task Force on Tax and Development (in October 2013 and March 2014), the meeting of the OECD Global Forum on Tax Treaties (in September 2013) and the meeting of the OECD Global Forum on Transfer Pricing (in March 2014)*". Part 1 Report Impact of BEPS in Low Income Countries to G20 Development Working Group on the Impact of BEPS in Low Income Countries, July 2014, p. 3 Report, available at http://www.oecd.org/ctp/tax-global/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf.

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U.S. tax reform, U.S. tax policy will not be constrained by any concessions to other nations in the BEPS project to which Congress has not agreed".[119] This letter of the United States Congress shows the importance for lawmakers to have a saying in the BEPS Project. This letter is relevant for the discussion of legitimacy since at the time of writing , the United States is not yet a participant in the International Conference. Therefore, it can be safely argued that lawmakers in countries that are participating in the international conference will also want to have a saying in the adoption of the BEPS Project and its multilateral instrument. The following paragraphs will assess the input legitimacy of the BEPS Project and its multilateral instrument in respect of non-OECD (developing) countries.

6.2.2.1. Participation and representation of non-OECD (developing) countries

The idea behind the introduction of the BEPS Project including the Action Plan is that these measures are necessary for countries to raise more revenue by means of tackling aggressive tax planning, base erosion and profit shifting. Even though this argument is valid for non-OECD (developing) countries, it is submitted that since developing countries are not on equal footing with OECD countries,[120] their participation in the decision-making process and in the agenda setting process is limited.

The setting up of the International Conference available for OECD and non-OECD countries to draft the BEPS Instrument may not solve this democratic deficit since it will be limited in scope (BEPS instrument) and time (2 years) and non-OECD (developing) countries will not feel legitimized by the actions of such international conference. The political will of countries to deal with BEPS issues is clear, but it is also clear that non-OECD (developing) countries should be truly engaged in this process.

Due to this democratic deficit, the risk exists that there will be a lack of commitment of non-OECD (developing) countries to the BEPS multilateral instrument. Therefore, it is recommended that in order to enhance the democratic participation of non-OECD countries and the legitimacy of the BEPS Project, equal footing should be given to all countries in the way that the Global Transparency Forum did, and if necessary, perhaps the creation of a BEPS Forum should be considered by the OECD.

The OECD and the International Conference should provide solutions to the differences in resources between OECD countries and non-OECD (developing) countries. Developing countries may lack economic resources and personnel to participate in all relevant BEPS meetings. This has been addressed by the OECD in the BEPS webcasts stating that in the international conference not all countries may have the resources (travel expenses) to participate.[121] However, no specific solutions have been presented in order to solve this problem.

In case of participation (attendance) by a developing country in the International Conference, the lack of technical expertise and resources may result in a limited participation. In some other cases, the participation of the developing country may be conditioned to the need of these countries to have funding for technical assistance and in some cases seeking OECD membership. Thus, even though developing countries are invited to participate, the legitimacy of the participation may be diminished taking into account that in some cases, the developing country can be regarded as a weak state.

Buchanan and Keohane,[122] when referring to legitimacy of global governance institutions, rightly stated, "these institutions are often dominated by a few powerful states, but weaker states would suffer serious costs by not participating. Insofar as these conditions obtain, the weaker states' consent is not genuinely voluntary, regardless of whether they are democratic. Yet voluntariness is generally thought to be a necessary condition for consent to play a legitimating role." The result is then that the legitimacy of the participation of weak states may be compromised.

The participation of the weaker state has been also addressed in respect of exchange of information by Dagan. This author rightly states that countries may participate in international tax cooperation networks even though it is not clear that the same interests are being shared. Dagan argues that "in the past 50 years or so, OECD countries led cooperation on a number of international tax issues and consistently pushed for other countries to join their cooperative efforts, using

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119. Letter of the Senate Finance Committee (Chairman Orrin G. Hatch) and House Ways and Means Committee (Chairman Paul D. Ryan) to the Secretary of the Treasury Jacob Lew of June 9, 2015, available at http://www.finance.senate.gov/newsroom/chairman/release/?id=ff0b1d06-c227-44be-8d5a-5f998771188b.
120. Unlike the Global Transparency Forum where all members are on equal footing. *See* section 5.2.2.1.
121. OECD, Webcast 5: Update on 2014 Deliverables, 15 December 2014, Webcast, available at http://www.oecd.org/ctp/webcast-update-on-2014-deliverables-december.htm.
122. A. Buchanan & R. Keohane, *The Legitimacy of Global Governance Institutions*, Paper presented at the Normative and Empirical Evaluation of Global Governance Conference, (16 to 18 February 2006), p. 8.

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power pro-cooperation rhetoric that involves cooperative games (such as the prisoners' dilemma) in which cooperative strategies are beneficial for all actors involved".[123]

In context of BEPS, it is submitted that some countries even though members of the BEPS 44 group may have a very passive role in decision making. One may think of some new accession countries such as Argentina, Colombia, Indonesia and Latvia for which the costs of not participating in the BEPS may influence their accession procedure.[124]

In order to solve the problems with input legitimacy, it is recommended the creation of a BEPS-Forum with all members on equal footing, and the participation of the United Nations and Regional Organizations. Until now, the United Nations has participated by providing contributions, but it is not involved in deciding the agenda and drafting the content of the BEPS actions. The regional organizations have not participated in this process except the regional tax organizations such as the African Tax Administration Forum and the Inter-American Centre of Tax Administrations (*see* section 5.2.2.3.).

6.2.2.2. Participation of the United Nations

In this multilateral decision-making mechanism, the role of the United Nations ("UN") can be relevant, since it represents the developing countries, i.e. most of the countries of Latin America and African regions.[125] However, it is submitted that up till now the role of the UN in respect of developing countries is limited mainly due to the lack of participation of developing countries in the initiatives of the United Nations, the lack of support to give the UN Committee of Experts on International Cooperation in Tax Matters (" UN Tax Committee") a more important role and in the choice for South-to-South cooperation by means of partnerships between developing countries.

In 2013, the United Nations stated in the General Assembly Resolution, the importance of cooperating with developing countries in having modernized tax systems, efficient tax collection, and to enhance international tax cooperation to tackle tax evasion and capital flight.[126] Furthermore, in 2013, the UN developed a questionnaire where the BEPS issues from the perspective of developing countries was addressed. In addition to this questionnaire, background papers drafted by legal scholars regarding specific topics were available on the UN website.[127] The topics addressed by the questionnaire and the background papers have been discussed in two workshops in 2013 and 2014 by scholars, government officials of developing countries under the auspices of the UN and with the cooperation of the OECD.[128]

However, one of the drawbacks of the UN-BEPS is the limited response to the questionnaire by developing countries since only Lesotho, Ghana, Tonga and Zambia provided short answers to the questionnaire on BEPS issues. In addition, two NGOs answered this questionnaire being Christian Aid/Action Aid and Oxfam South Africa.[129] Therefore, and due to this lack of participation, it may safely be argued that the impact of this questionnaire in developing countries was very low compare to the OECD BEPS initiatives.

It is submitted that if the United Nations wants to play a more important role in international tax cooperation and the BEPS, the participation by developing countries in the UN initiatives should be regarded as necessary for developing

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123. T. Dagan, *Chapter 2: BRICS: Theoretical Framework and the Potential of Cooperation*, *supra* n. 15, p. 24.
124. The OECD accession countries are: Argentina, Brazil, China, Colombia, India, Indonesia, Latvia, Russia, Saudi Arabia and South Africa.
125. The discussion at the United Nations is taking place and a Subcommittee on Base Erosion and Profit Shifting for Developing Countries has been created in October 2013. This Subcommittee has organized for instance the workshop on Tax Base Protection for Developing Countries that took place in New York on 4 June 2014. In this workshop, representatives of developing countries, OECD representatives, and academic scholars discussed the implications of the BEPS for developing countries. Information, available at http://www.un.org/esa/ffd/uncategorized/tax-first-workshop.html.
126. The United Nations has stated in the General Assembly resolution 68/204 of 20 December 2013 the importance of international tax cooperation and to strengthen technical assistance of developing countries. The General Assembly stated as follows "*Recalls the resolve of Member States to enhance and strengthen domestic resource mobilization and fiscal space, including, where appropriate, through modernized tax systems, more efficient tax collection, the broadening of the tax base and the effective combating of tax evasion and capital flight, and reiterates that, while each country is responsible for its tax system, it is important to support national efforts in these areas by strengthening technical assistance and enhancing international cooperation and participation in addressing international tax matters*"
127. H. Ault and B. Arnold, *Protecting the Tax Base of Developing Countries: An Overview*, Draft paper No. 1 May 2013. This paper is available in the background material of the First Workshop at <http://www.un.org/esa/ffd/uncategorized/tax-first-workshop.html>
128. The first workshop addressed preventing tax treaty abuse, taxation of services including taxation of fees for technical services, protecting the tax base in the digital economy, tax incentives and tax base protection issues. In the second workshop the following topics were addressed permanent establishment, hybrid mismatches, limiting interest deductions, taxation of capital gains, treaty abuse and transparency and disclosure. These papers are available at the website of the United Nations as Background Material to the First and Second Workshop on Tax Base Protection for Developing Countries. Information available for the first workshop at: <http://www.un.org/esa/ffd/events/cd-2014-tax-second-workshop.html> and for the second workshop at <http://www.un.org/esa/ffd/uncategorized/tax-first-workshop.html> .
129. Other countries that provided answers to the questionnaire are Brazil, Chile, China, India, Malaysia, Mexico, South Africa, Singapore and Thailand. See summary responses to BEPS questionnaire available at <http://www.un.org/esa/ffd/wp-content/uploads/2014/10/10STM_CRP12_BEPS1.pdf>.

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countries. The participation by developing countries will reinforce the role the UN as the institution with the power to defend the interest of developing countries from G20 and OECD countries. However, the role of the UN should be also accepted by G20 and OECD countries including also the OECD.

During the recent (July 2015) Financing for Development Conference in Addis Ababa ("2015 Conference"), developing countries and civil society were calling for a more predominant role of the United Nations including the upgrade of the UN Tax Committee to an intergovernmental body.

The Civil Society Forum advocated for a forum where every country can participate, not just the richest. The civil society stated in the declaration that "a key reason why the global tax system has failed is that more than half of the world's countries are currently excluded from the decision-making process on global tax standards".[130] Therefore, the civil society stressed that "we need to fundamentally change the tax rules, and not having every country represented in writing those rules to make sure they work for everyone is not only undemocratic but also unfair".[131]

Developing countries also called as a precondition for more cooperation in international tax matters "a more inclusive mode of discussion and a seat at the table in the policy decision making on financing for development".[132] In that context, developing countries were proposing upgrading the UN Committee of Experts on International Cooperation in Tax Matters to an intergovernmental body, or at least to strengthen the Committee vis-à-vis the role of the Organisation for Economic Cooperation and Development (OECD) on tax cooperation.[133]

The proposal of the UN Tax Committee as intergovernmental body was rejected by developed countries. These countries argued the leading role of the OECD in all tax issues.[134]

In the 2015 Conference four initiatives were launched in the area of international tax cooperation: the Addis Tax Initiative. Another initiative is the IMF/World Bank tax initiative to strengthen tax collection: Tax Inspectors Without Borders, and a new regional network of tax administrators in the Asia-Pacific region.[135]

In this context, it could safely be argued that the attention of developing countries will be directed to enhance South-to-South cooperation. If one example illustrates this, it is the endorsement by developing countries of the Addis Tax Initiative. This initiative aims to create a "partnership in capacity building in the field of domestic revenue mobilisation/taxation, in which each country takes its responsibilities, cooperates and supports each other".[136]

Taking into account the importance of the South-to-South cooperation for developing countries, it is recommended to the OECD and the UN to find ways to enhance the participation of developing countries in the BEPS Project and perhaps specific funded research should be carried out on the implementation of the BEPS measures and the comparison of South-to-South best practices.[137]

6.2.2.3. Participation of regional organizations

The consultations of the BEPS Project with countries have been supported by regional tax organizations.[138] Despite these consultations, it is submitted that one of the solutions to enhance the legitimacy of the BEPS is the participation

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130. Ibid., p. 4.
131. In its declaration, the civil society states: "We reiterate the need and strongly recommend the establishment of an intergovernmental, transparent, accountable, adequately resourced tax body with universal membership, that leads global deliberations on international tax cooperation. Such a body will strengthen the ability of developing countries to generate significant sustainable financing for development through, for example, combating corporate tax dodging in developing countries and balancing the allocation of taxing rights between source and residence countries. It should also support the efforts of peoples in developing countries to develop their own progressive, rights-based, equitable tax systems and laws, free of such pressures imposed by lenders and developed country governments". Ibid.
132. UN News Centre, 14 July 2015: UN Negotiations resume on financing framework to advance global development, available at http://www.un.org/apps/news/story.asp?NewsID=51411#.Vgg2hfQUtFc.
133. Ibid.
134. *See* paras. 28 and 29 of the Resolution 69/313 adopted by the General Assembly on 27 July 2015, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/313.
135. Ibid.
136. Financing for Development Conference – The Addis Tax Initiative Declaration, p. 1, available at http://www.taxcompact.net/documents/Addis-Tax-Initiative_Declaration.pdf.
137. One example of a research of best practices is the research carried within the framework of the Project Sustainable Tax Governance in Developing Countries Through Global Tax Transparency (DeSTaT) in which this author also participates. Website of the DeSTaT Project: http://www.jus.uio.no/ior/english/research/projects/global-tax-tranparency/.
138. The website of the OECD regarding BEPS addresseses cooperation with tax organizations such as African Tax Administration Forum and the Inter-American Tax Centre. In respect of the BEPS, the OECD does not specifically set any initiatives to cooperate between the OECD and the Regional Organizations. *See* OECD 2013 Global Relations report http://www.oecd.org/mcm/C-MIN%282013%2913-ENG.pdf.

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of the regional organizations on an equal footing. Examples of these regional organizations in Latin America and Africa are the African Union, Southern African Development Community, East African Community, South American Nations, Pacific Alliance, Andean Community and Common Market of the South amongst others. The OECD should develop a strategy that involves the participation of these regional organizations in the International Conference. Non-OECD countries are members of at least one of those regional organizations and since the process to become a member of these organizations is democratic and political, the participation of these regional organizations should be regarded as necessary to enable the decision-making power of non-OECD countries in the BEPS Project and its multilateral instrument.

6.3. Output Legitimacy Assessment

In respect of the BEPS Project, problems with output legitimacy may arise since the goals and mechanisms to achieve these goals are different between developed countries and non-OECD (developing) countries.

6.3.1. Differences in goals between developed and developing countries

The differences in the goals of developed and developing countries have been addressed by the IMF Paper[139] and the OECD Report for low-income countries ("the OECD Report").[140] The goals of developing countries which are outside the scope of BEPS are the use of tax incentives, the allocation of tax treaty rights in accordance to residence and source, the tax treaty costs/benefits analysis to be made for the negotiation of tax treaties, the introduction of transfer pricing rules and the limited administrative capacity of tax administrations.

6.3.1.1. Tax incentives

One of the issues that have received attention from the IMF and the OECD is the issue of tax incentives. The main reason is that due to the existence of tax incentives including tax holidays; tax base erosion already takes place in these countries. In the past, developing countries were recommended by the IMF to develop targeted incentives.[141] The IMF Paper addressed the issue of tax incentives as one of the reasons for corporate tax spillover being the impact that one country's international tax practice has on other countries. The IMF stated that for developing countries, the key issues are preventing tax treaty shopping, indirect transfer of interest in assets, interest deductibility and the introduction of clear and simplified transfer pricing rules.[142]

The OECD Report stated that tax incentives have a direct impact on the tax base of developing countries and give rise to no taxation or taxation at a lower rate.[143] More recently (July 2015), following the invitation of the G20's Development Working Group,[144] the IMF, the OECD, the UN and the World Bank published a report with options for low income countries' effective and efficient use of tax incentives for investment.[145]

6.3.1.2. Source and residence taxation and tax treaties

Another issue addressed in the OECD Report is the balance between source and resident taxation in the tax treaties. The OECD stated in the Report that the BEPS consultations with developing countries have also highlighted the "need to critically assess the costs and benefits of entering into tax treaties, and balance the policy objectives of revenue collection on the one hand and creating the right environment for foreign direct investment (FDI) on the other".[146] Even though this

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139. V. Tanzi & H. Zee, *Tax Policy for Emerging Markets: Developing Countries*, (2000) National Tax Journal, National Tax Association, vol. 53, no. 2, pp. 299-322, June.
140. In 2014, the OECD published a report addressing the impact of BEPS in Low Income Countries ("the Report"). In the first part of the Report, the OECD evaluates the impact of the Action Plan in Low Income Countries and it adds other issues that should be considered for these countries that are not included in such action plan (e.g. use of tax incentives by developing countries). In the second part of the Report, the OECD presented the potential actions to assist developing countries to meet the challenges of the most relevant actions of BEPS. The Report states that in order to address treaty shopping it is important to strengthen the capacity development on treaty negotiation and to identify the tax policy considerations for countries to conclude a tax treaty including a cost/benefit analysis, *supra* n. 118.
141. Tanzi & Zee, *supra* n. 139.
142. IMF Policy Paper Spillovers in International Corporate Taxation, International Monetary Fund, Washington, D.C, 9 May 2014, p. 24.
143. Part 1 Report to G20 Development Working Group, *supra* n. 118, p. 8.
144. Report published on 9 July, available at http://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment-call-for-input.pdf.
145. This report was open for consultation until 5 August 2015 to be submitted to the G20 Leader Summit meeting in November 2015. Report and Background document available at the OECD website at http://www.oecd.org/ctp/tax-global/consultation-on-options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.htm.
146. Part 1 Report to G20 Development Working Group, *supra* n. 118, p. 9.

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issue is not a tax planning /avoidance issue and therefore outside the scope of BEPS, the OECD Report stated that, the BEPS Project "provides an opportunity to lay the ground for this legitimate debate".[147]

From the information available at the OECD website and in the Report, it is not clear how this legitimate debate regarding tax treaties will take place. It is this author's opinion, that in this debate, the OECD and the UN should also take into account the lack of expertise of developing countries in drafting complex provisions in the tax treaty or in their application by the tax administration. One example of the complexity of tax treaty negotiations can be for instance in the negotiation on the limitation on benefits clause that may result in different approaches depending on whether on the other side of the negotiation table there is a developed country (such as the United States, Canada, Switzerland, Belgium or the Netherlands) or a developing country.[148]

The OECD should address how useful (or not) a multilateral instrument is for countries that are at early stages of concluding bilateral tax treaties. The use of a multilateral instrument can perhaps be useful for countries that have concluded more than a dozen tax treaties, which are mostly developed countries including Western European countries, the United States, Canada, Mexico, some countries in South America (Chile, Brazil and Colombia) and Asia (Japan, South Korea and China). However, other countries in Africa (Rwanda and Burundi) and Latin America (Ecuador and Bolivia) with a limited or no treaty network would most likely not benefit from this multilateral instrument.

6.3.1.3. Taxation and investment and the use of bilateral investment treaties

Despite the importance of tax incentives and allocation of taxing rights as non-BEPS issues that should be addressed by developing countries, it is this author's opinion that other issues that should also be addressed concern the extractive industry in the Latin American and African region. In respect of the extractive industry, one should take into account issues such as the change of concession sharing agreements for production sharing agreements, the repeal of stability agreements for the extractive industry,[149] and the transparency of the payments made by extractive (oil, mining, gas) companies to these governments.[150]

In addition, it is submitted, that another feature of countries in the Latin American and African region that should be addressed is the importance of bilateral investment treaties. The countries in these regions are host countries, which may agree on bilateral investment treaties to protect the foreign investor.[151]

Some of these issues have been addressed in the July 2015 Report from the OECD, the UN, the IMF and the WB regarding tax incentives.[152] In this author's view, one of the consequences of the use of bilateral investment treaties

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147. Ibid.
148. In the conference "Pay Taxes Where you Add the Value" organized by the Ministry of Foreign Affairs on the 2 July 2015, the chairman of one of the panels (I.J.J. Burgers) addressed in the panel the complexity in the application of the limitation of benefits provision for developing countries. In this panel, the feasibility of including, instead of a limitation of benefits, a main purpose test provision which can be less complex and can be left to interpretation by the judiciary of developing countries was discussed. The topic of the panel was: "Support to developing countries: How to assist them to fight tax evasion and tax avoidance and to collect their fair share of taxes?". *See* information about the conference and papers at http://effectivecooperation.org/wordpress/2015/06/19/international-tax-conference-pay-your-taxes-where-you-add-the-value/.
149. Countries in South America and Sub-Saharan Africa agree on the use of stability clauses/contracts that 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. 5, 10 or 20 years). Such stability clauses have previously applied to the extractive industry (e.g. Ghana, Zambia and South Africa) and to specific economic sectors (e.g. Colombia until 2012 , Peru and Chile). The lack of information on stability clauses for instance in Sub-Saharan Africa leads to less transparency and accountability on the part of investors and governments regarding the potential benefits of such clauses. In fact, the Tax Justice Network in Africa argues that these clauses "prevent future governments from renegotiating contract provisions, possibly including limits to length of the contracts" and therefore reduce the governments' bargaining power in international negotiations. The Nairobi Declaration on Tax and Development made at the Pan-African Conference on Taxation and Development, 25-26 March 2010; information on the Tax Justice Network is available at www.taxjusticeafrica.net.
150. Transparency may be obtained by means of disclosure of payments received by the government following for instance the model of the Extractive Industry Transparency Initiative. The Extractive Industries Transparency Initiative (EITI) is now being used by 46 countries all around the world. Information available at http://eiti.org/.
151. Bilateral investment treaties aim to protect the foreign investor in the host state from expropriation and discriminatory treatment by means of introducing national treatment, compensation for expropriation and dispute resolution clauses.
152. The report states that "Where a tax incentive is provided, it is important to consider whether the relevant investment treaties might unintentionally be automatically accorded to other taxpayers, not originally intended to benefit from the tax incentive (such as under a most-favoured nation clause). Moreover, protections under the investment treaty (such as stabilization clauses) may make it hard to withdraw the tax incentive when it no longer serves the original purpose, or may require compensation not otherwise payable. Also important is which dispute settlement procedure would apply if tax issues fall under the investment treaty (usually there is a binding arbitration clause), and what should be done to prepare for such a possibility. These issues are best considered in conjunction with those responsible for negotiating the investment treaties". Report available at http://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment-call-for-input.pdf,, p. 29.

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is that the underlying countries may be bound by the provisions of these treaties. In these cases, it could be possible that the repeal of the incentives may result in indirect expropriation for which compensation can be claimed following an investor-state dispute. Therefore, some countries are revisiting the use of dispute resolution clauses in bilateral investment treaties and procurement contracts between the investor and the government since investors may use these clauses to prevent going to local courts and instead seek compensation in international tribunals.[153]

6.3.2. Mechanisms to achieve these goals and differences in resources between developed and developing countries

The starting point of the BEPS is the base erosion and profit shifting by means of aggressive tax planning by multinationals. In principle, this is a problem for developed countries since these countries are where the headquarters of multinationals are located.[154] However, among the BEPS actions that the OECD Report has considered as relevant for developing countries and that may also affect the economic activities of multinationals in these countries is the transfer pricing including the country-by-country reporting (Action 13) and disclosure arrangements (Action 12).[155]

In respect of the BEPS Project and the implications for low-income countries including developing countries, this author argues that in general, use of transfer pricing and country-to-country reporting and disclosure arrangements are useful for developing countries. The reason behind that is that it will provide more information on the multinational activities and the amount of taxes and the countries where taxes are being paid. However, it is submitted that the developing country will need to have access to the country-to-country reporting at the level of the multinational and not only at the level of the local subsidiary or branch and also the tax administration should be informed of aggressive tax planning schemes that may involve the developing country.[156]

It is submitted that the disclosure arrangements will mean that taxpayers and tax advisors will have to provide the whole tax arrangement not only to the tax authority of the country where the multinational is located but also to the countries where the subsidiaries/ branches are located. The exchange of information of these arrangements will need to be subject to rules of confidentiality and to safeguards to guarantee that the information is confidential. However, can the developing countries then guarantee the confidentiality? Some of the problems of developing countries relate to corruption, lack of technical knowledge and appropriate computer systems to exchange the information. Therefore, proper safeguards will need to be put in place to guarantee the right to confidentiality and the right to privacy in exchange of information as recommended in section 5.3.2.

6.4. Intermediate conclusion

In respect of the input legitimacy of the BEPS Project and its multilateral instrument, the OECD should enhance the transparency and the participation of developing countries in the content of the BEPS actions and in the International Conference. Even though all countries (OECD and non-OECD countries) are invited to participate in the BEPS Multilateral Instrument, the agenda setting and the content of the initiatives have been decided by the OECD with a consultative role of non-OECD countries. Furthermore, there are differences between OECD and non-OECD (developing) countries in respect of the objectives, resources, and expertise to participate in the BEPS Project. Therefore, it is recommended to enhance the participation of the United Nations and Regional Organizations in the BEPS Project.

In respect of output legitimacy, problems may arise in the BEPS Project since the goals of developed countries may differ from the goals of non-OECD (developing) countries. The IMF Paper and the OECD Report have addressed non-BEPS issues for developing countries such as tax incentives and allocation of rights between source and residence. However, other issues that should be also addressed are the transparency in respect of the extractive industry, the consequences of the repeal of tax incentives in respect of the bilateral investment treaties, the training required for tax

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153. For instance in Colombia, the president has issued Presidential Directive No. 4 on 11 November 2014. In such Directive, the President addressed the dispute resolution clauses in contracts between the State and private parties (including foreign investors). He states that whether or not the dispute should be solved by international tribunals should be carefully analysed on a case-by-case basis and that in principle should be the Administrative Court in Colombia the one with the competence to decide on the disputes arising between the State and private parties.
154. *See* the UNCTAD report on FDI, tax and development, The fiscal role of multinational enterprises: towards guidelines for Coherent International Tax and Investment Policies, A working paper for review and feedback, (26 March 2015), available at http://investmentpolicyhub.unctad.org/.
155. Another action that has been also considered relevant is Action 6 dealing with Tax Treaty Abuse. The implications of this Action 6 for developing countries has been addressed by I.J. Mosquera Valderrama, *The BEPS measures to deal with aggressive tax planning in South America and Sub-Saharan Africa: The challenges ahead,* Intertax. October 2015.
156. *See* on this argument D. Ring. Transparency and Disclosure. September 2014, available at http://www.un.org/esa/ffd/wp-content/uploads/2014/09/20140923_Paper_TransparencyDisclosure.pdf.

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treaty negotiations, and the usefulness (or not) of a multilateral instrument to modify tax treaties for countries that are at the early stages of concluding tax treaties.

From the BEPS measures, developing countries may benefit from for instance the use of country-by-country reporting, disclosure of aggressive tax planning arrangements among others. However, for these measures to be successful, the countries will need to have access to all activities of the multinational (master file of the country-by-country reporting) and not only the local (country-sourced) activities. Furthermore, the developing country will need to have the technological and administrative capacity to protect the confidentiality of the information exchanged under these actions.

7. Conclusions

This article elaborated on the OECD multilateral instruments to enhance the standard of transparency including exchange of information on request and automatic, the BEPS Project, and its multilateral instrument in light of input and output legitimacy as developed by Scharpf.

In respect of the OECD Multilateral instruments to enhance transparency and exchange of information, this article concludes that the input legitimacy is not met. The reason is that developing countries do not participate in the agenda setting and the decision-making process. Even in the Global Transparency Forum that provides for an equal footing to member countries, not all developing countries are part of the decision-making bodies (Steering Group and Peer Review). Moreover, because of the peer review assessment of the standard of transparency countries will be required to make changes to the domestic law and international tax treaties.

Since developed and developing countries aim to tackle tax fraud, tax evasion and aggressive tax planning, it may be argued that the output legitimacy i.e. common goals will compensate for the problems identified in respect of input legitimacy. However, the OECD and developing countries should take into account that before moving to a higher standard i.e. automatic exchange of information, the differences in resources: technological and personnel will need to be addressed. In addition, the protection of taxpayers' rights taking into account the domestic safeguards of the international instruments and the peer review process should be addressed so that these instruments are also legitimate vis-á-vis the citizen (taxpayer).

In respect of the BEPS Project and its multilateral instrument, this article concludes that the input and output legitimacy requirements are not met. The participation of developing countries is limited to a consultative role in respect of the agenda and the content of the BEPS Action Plan. The setting up of the international conference does not solve this problem of legitimacy since it is for a specific period and for specific actions that have been decided by the OECD. Furthermore, the OECD should take into account the differences in goals between developed and developing countries. Developing countries also have problems regarding the extractive industry, the base erosion through tax incentives, and the use of bilateral investment treaties and international tribunals for dispute resolution between host (developing) countries and foreign investors (developed countries).

It is recommended to the OECD to provide more clarity on the way that the decision making is going to take place at the international conference. Finally, it is suggested to carry out further research on the feasibility of developing a multilateral instrument that will include the changes that BEPS wants to introduce in taxation as an alternative to the re-negotiation of tax treaties. The risk may exist that countries fail to reach consensus on the provisions of the multilateral agreement and that such agreement will have several reservations or opting out provisions by countries that may result in a lack of commitment to the provisions of the agreement by the OECD and the non-OECD countries.

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