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# BEPS and the New International Tax Order

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# BEPS and the New International Tax Order

*Allison Christians**

*Nations across the world are currently engaged in a coordinated international effort, ostensibly to curb excessive tax avoidance by the world's biggest multinational companies. This Article contends, however, that the most likely impact will be to entrench a monopoly held by a small number of rich countries over the policymaking processes that created the tax avoidance problem to begin with. To examine this contention and probe possible solutions to it, the Article considers the legal and institutional components of the coordination project, by situating them historically and analyzing their multi-functionality as both norm diffusion and institutional reinforcement mechanisms. The Article concludes that while history has repeatedly taught the world to be pessimistic about the potential for meaningful reform of the international tax order, there are reasons for cautious optimism in some of the recently-introduced institutions and processes. To avoid perpetual returns to a damaging status quo, careful attention will need to be devoted to ensuring meaningful participation by countries that have been systematically excluded from the global tax policy dialogue to date.*

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## INTRODUCTION

Rich countries have long sought to overcome tax jurisdiction gaps and overlaps by engaging in consensus building over nonbinding soft law norms via the Organisation for Economic Co-operation and Development (OECD). The OECD's most recent initiative seeks to counter certain forms of international tax avoidance, which it has coined "Base Erosion and Profit Shifting" (BEPS).[1] In response to past criticisms of its exclusive and insular grip on the development of the global tax policy norms that led to BEPS, the OECD invited selected non-member states to participate in developing its initiative. It now invites all countries of the world to sign on to a new framework it is building for BEPS implementation.

The new framework is not merely a means to achieve consistent implementation of a specific set of mutually-agreed tax goals, however. More fundamentally, the new framework is a means to forestall the rise of rival international tax policy-making institutions and networks that challenge the OECD's tax policy prescriptions. Even while it ostensibly expands its reach outward to non-OECD countries, the norm diffusion mechanisms of BEPS seem to entrench the OECD's monopoly over tax policy making: the bad old days of exclusivity and insularity may not yet be excised after all. It remains to be seen whether the new framework, at minimum, sets a path for a more inclusive international tax order going forward.

BEPS is more forceful than previous OECD initiatives, laying down three tiers of norms in the form of "minimum standards," "recommendations," and "best practices" to be operationalized in both OECD and non-OECD member states via multiple soft and hard

1. *BEPS Actions*, OECD.ORG, http://www.oecd.org/ctp/beps-actions.htm (last visited Oct. 19, 2016).

law mechanisms. The mechanisms express the distinct nature of these norm tiers. The OECD expects its thirty-four member states—including Australia, Canada, Japan, Korea, the United States, and Western Europe—to directly implement the first tier, minimum standards, by legislation and treaty. The organization is currently negotiating and will deliver a specified set of the second tier, recommendations, in the form of a new multilateral instrument that is currently under negotiation. It has or will soon embed other recommendations and certain best practices in other OECD documents, such as guidelines and model treaties. Finally, it will engage in peer review of all of the minimum standards, as well as peer monitoring of some of the recommendations and some other practices not currently articulated as consensus positions.

Responding to concerns about the legitimacy of articulating global consensus positions from a body with exclusive membership, the OECD worked with certain non-OECD members—referred to as "BEPS invitees"—to build the BEPS consensus.[2] It has now invited all interested non-OECD states to become "BEPS Associates."[3] Becoming a BEPS Associate entails adopting the initiative's minimum standards and joining a new coordination architecture—the "Inclusive Framework"—organized for the purpose of measuring and

2. OECD, *About BEPS and the Inclusive Framework*, *Invitees and Countries of Relevance*, http://www.oecd.org/ctp/beps-about.htm#invitees ("A group of other countries and jurisdictions are participating in the inclusive framework, while they are considering whether or not to commit to the implementation of the BEPS Package. These countries and jurisdictions participate as Invitees"); *see* G20, G20 LEADERS DECLARATION 9 (2012), http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf (supporting work of OECD on BEPS); OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 25 (2013) [hereinafter OECD 2013 BEPS REPORT], https://www.oecd.org/ctp/BEPSActionPlan.pdf ("[I]nterested G20 countries that are not members of the OECD will be invited to be part of the project as Associates, i.e. on an equal footing with OECD members (including at the level of the subsidiary bodies involved in the work on BEPS), and will be expected to associate themselves with the outcome of the BEPS initiative. Other non-members could be invited to participate as Invitees on an ad hoc basis."). BEPS invitees included China and India, key G20 states, among others. *See, e.g.*, Ernst & Young, *Global Tax Alert: BEPS Associates Increased to 82 Countries* 2 (June 2016), http://www.ey.com/Publication/vwLUAssets/BEPS_associates_increased_to_82_countries/$FILE/2016G_01859-161Gbl_BEPS%20associates%20increased—%20to%2082%20—countries.pdf (depicting a map of BEPS Associates and Invitees).

3. *All Interested Countries and Jurisdictions to Be Invited to Join Global Efforts Led by the OECD and G20 to Close International Tax Loopholes*, OECD.ORG (Feb. 23 2016), http://www.oecd.org/newsroom/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm.

monitoring BEPS compliance across countries.[4] The parameters of compliance with many of the BEPS norms will not be clear until countries agree to terms of reference for peer review, which will occur within one or more subsidiary network bodies.[5] All OECD member-

4. *See* OECD, *About BEPS and the Inclusive Framework*, http://www.oecd.org/ctp/beps-about.htm. Prior to BEPS, the OECD engaged in peer review via three networks: the Forum on Harmful Tax Practices (FHTP), the Forum on Tax Administration MAP Forum (the FTA MAP Forum), and the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum)—each of which included non-OECD states to various extents. STAFF OF JOINT COMM. ON TAXATION, JCX-139-15, BACKGROUND, SUMMARY, AND IMPLICATIONS OF THE OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT 8 (2015), https://www.jct.gov/publications.html?func=startdown&id=4853 (describing the Forum on Harmful Tax Practices); *Forum on Tax Administration*, OECD.ORG, https://www.oecd.org/tax/forum-on-tax-administration/ (last visited Nov. 11, 2016); *Global Forum on Transparency and Exchange of Information for Tax Purposes*, OECD.org, http://www.oecd.org/tax/transparency/ (last visited Nov. 11, 2016). In the course of the BEPS initiative, the OECD sought changes at the level of the OECD Council to expand access by non-OECD members to the Committee on Fiscal Affairs itself, in order to enable it to invite BEPS Associates as equal participants in further BEPS negotiation and implementation. OECD, BACKGROUND BRIEF: INCLUSIVE FRAMEWORK FOR BEPS IMPLEMENTATION 1, 5–6 (2016), https://www.oecd.org/tax/background-brief-inclusive-framework-for-beps-implementation.pdf. The OECD settled on the term "Inclusive Framework" to describe a set of measures or functions that the OECD will use to make equal participation by nonmembers possible under the framework of the OECD, despite the limited membership of the organization as a whole, rather than forming a wholly new international institution or turning to the United Nations to host future tax policy development. *See* OECD, DEVELOPING A MULTILATERAL INSTRUMENT TO MODIFY BILATERAL TAX TREATIES, ACTION 15–2015 FINAL REPORT 3 (2015) [hereinafter ACTION PLAN 15], http://www.oecd-ilibrary.org/docserver/download/2315401e.pdf (stating that in the process of the BEPS deliberations, the "G20 and OECD countries . . . worked on an equal footing," with the input of the European Commission). The G20 is an international network of finance ministers and central bankers from eleven high-income countries and eight lower-income countries, plus representatives from the European Union, the International Monetary Fund (IMF), and the World Bank. Twelve of its member countries are OECD member countries; of the remaining eight countries, five have been invited to join the OECD, and the remaining three have been invited to participate in OECD deliberations in a capacity other than as members. *OECD Invites Five Countries to Membership Talks, Offers Enhanced Engagement to Other Big Players*, OECD.ORG (May 16, 2007), http://www.oecd.org/general/oecdinvitesfivecountriestomembershiptalksoffersenhancedengagementtootherbigplayers.htm ("OECD countries agreed to invite Chile, Estonia, Israel, Russia, and Slovenia to open discussions for membership of the Organisation and offered enhanced engagement, with a view to possible membership, to Brazil, China, India, Indonesia, and South Africa.").

5. Most of the BEPS implementation mechanisms involve the Global Forum on Transparency and Exchange of Information for Tax Purposes, with 135 members; the Forum on Tax Administration MAP Forum, with 46 members, comes into play in the case of treaty-based dispute resolution. See further discussion *infra* Section II.D. Terms of reference for Action 14 were released in October 2016. OECD, BEPS ACTION 14 ON MORE EFFECTIVE DISPUTE RESOLUTION MECHANISMS: PEER REVIEW DOCUMENTS (2016) [hereinafter ACTION 14 TERMS OF REFERENCE], http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-

and BEPS Associate-governments were expected to begin integrating BEPS guidelines into their domestic tax practices as early as January of 2016.[6]

The strength of the OECD consensus appears variable. Compliance with some of the minimum standards is to be measured in a peer monitoring body, while others are apparently left to good faith alone (but likely future reassessment as well). Fidelity to some recommendations will similarly be peer-monitored, while other recommendations and best practices will be released in the new multilateral treaty, the OECD Model Treaty, guidance, or some combination thereof, leaving uncertainty regarding the extent to which a given principle will ultimately be adopted in national contexts or otherwise form persuasive, let alone binding, authority. Peer monitoring will also extend to certain legal regimes for which the OECD has not yet articulated a consensus position. This confirms that the OECD will seek future rounds of consensus-building framed and informed by the BEPS initiative.

The OECD's work on BEPS thus represents a continuing progression toward a global tax regime guided and policed by its key

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dispute-resolution-peer-review-documents.pdf. Because this document was released just prior to the publication of this article, its contents have not been analyzed herein.

6. *See BEPS-Frequently Asked Questions: Top 10 FAQs About BEPS*, OECD.ORG [hereinafter *BEPS-Frequently Asked Questions*], http://www.oecd.org/ctp/beps-frequently askedquestions.htm (last visited Oct. 10, 2016) ("A comprehensive package of measures has been agreed upon. Countries are committed to this comprehensive package and to its consistent implementation. These measures range from new minimum standards to revision of existing standards, common approaches which will facilitate the convergence of national practices and guidance drawing on best practices."). There are some indications that states are fulfilling this mandate. For example, several states have adopted or are in the process of adopting legislation requiring additional tax disclosure by large multinational corporations, in accordance with the minimum standard on Country by Country reporting. *See, e.g.*, Finance Bill of 2015, Part H (2015) (India), http://indiabudget.nic.in/ub2016-17/memo/mem1.pdf; Finance Bill (Bill No. 95/1976), Pt. 31 (Ir.), http://www.finance.gov.ie/sites/default/files/Finance%20Bill %202015%20As%20Initiated.pdf; Høringsnotat forslag om endring av forskrift om land for landrappor tering, (2016), (Nor.), https://www.regjeringen.no/contentassets/5181c 306504e4bd18031b327d5034a31/hoeringsnotat.pdf; Country-by-Country Reporting, 81 Fed. Reg. 42,482, 42,482–92 (June 30, 2016) (to be codified at 26 C.F.R. pt. 1) (U.S.); Australian Taxation Office, *Law Companion Guidelines, LCG 2015/3, Subdivision 815-E of the Income Tax Assessment Act 1997: Country-by-Country Reporting*, ATO.GOV.AU, https://www.ato.gov.au/law/view/view.htm?DocID=COG%2FLCG20153%2FNAT%2FATO %2F00001&PiT=99991231235958%20-%20P30 (last visited Nov. 17, 2016); HMRC, *Policy Paper, Country by Country Reporting*, GOV.UK (Feb. 26, 2016) (U.K.), https://www.gov.uk/ government/publications/country-by-country-reporting-updated/country-by-country-report ing-updated#detailed-proposal; *infra* Section II.A.

member states. Yet it must proceed cautiously against the foil of sovereign autonomy that is seen as critical to the legitimacy of the institution as the curator of a transnational network rather than a supra-national authority. Maintaining this balance requires diplomacy and pragmatism on the part of those seeking to change the substance of national legislation and administrative practices as well as international bargains among sovereign states.

Overseeing the drafting of multilateral agreements, deploying model language and guidelines, and establishing peer review of national practices collectively endow OECD norms with greater law-like impact and increase its claims on national cooperation, all while maintaining the position that the organization is not "imposing" any rules on sovereign states.[7] This is a delicate balance, the successful navigation of which will impact the coherence of the international tax regime going forward. Given the competing aims of sovereignty and soft law cooperation, finding a stable balance is unlikely. More likely, some individuals, companies, and countries will continue to benefit from lack of global tax coherence, taking full advantage of gaps and inconsistencies in the international tax regime in their tax planning and tax rulemaking, respectively. Other countries may suffer from the negative effects of tax planning and strategically designed foreign tax rules that makes raising revenues from international transactions and activities virtually impossible.[8]

As a result, countries will try to continually revisit the BEPS bargain. Those that sought and expected but ultimately realize neither increased tax revenues nor investment are likely to seek consensus on alternative policy choices to those addressed in 2015. Those that sought compromises on tax policy to protect their foreign investment promotion strategies are likely to continue to defend those policy choices. How the newly revised institutional framework built to implement BEPS will impact this future bargaining is an open question. Countries that fall into the former category and that were not meaningfully involved in the initial BEPS development will likely

7. *See* Allison Christians, *Networks, Norms, and National Tax Policy*, 9 WASH. U. GLOBAL STUD. L. REV. 1, 26–27 (2010) (describing OECD's network-based policy making and its general opacity, afforded to it because "the OECD is not a law-making body and is not open to direct public scrutiny in the same manner").

8. Some countries will successfully turn to alternative sources of tax revenue, such as consumption, excise, property, and estate taxes, while others will have fewer choices. For a discussion, see Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, 42 U.B.C. L. REV. 239 (2010).

be especially interested to know whether the OECD's new inclusivity will ultimately translate into a better chance to meet their revenue goals going forward.

Accordingly, it is important to establish the baseline for global tax policy negotiation as the BEPS consensus unfolds in implementation. That is the aim of this Article. To do so, it examines the OECD's framework for BEPS norms and implementation mechanisms in order to make predictions about where the OECD will lead the world next in terms of both substantive rule modifications and international tax relations. Part I explains the role of the OECD as a tax policy consensus-building network and the hard and soft law instruments and processes it uses to achieve its ends. Part II sketches a matrix of the OECD's current tax policy priorities, as indicated by the plans laid out in the 2015 BEPS reports. Part III analyzes how the chosen mechanisms entrench the OECD's position as the principal architect of international cooperation on tax, and probes at the prospects for the new Inclusive Framework in allowing challenges to historical patterns of norm-making. The Article concludes with an analysis of the potential for meaningful reform of the international tax order stemming from some of the OECD's recently-introduced institutions and processes.

## I. UNDERSTANDING THE INTERNATIONAL TAX LAW ORDER

To understand why taxation depends on international cooperation, and how the OECD has been pivotal in developing it, requires a basic facility with the central conflicts inherent to the exercise of taxing income in an economically globalized world. When capital, goods, and (to a lesser extent) labor move around the globe with little restriction, several countries may, in accordance with generally accepted principles, claim the same taxpayer, the same transaction, or the same activity.[9] Equally, and according to the same principles, some taxpayers, transactions, and activities fall in the space between jurisdictional rules.[10] The result can be overlapping tax

9. *See, e.g.*, Allison Christians, *How Nations Share*, 87 IND. L.J. 1407, 1414–15 (2012). For example, where a resident of Canada earns a dividend on stock in a French company, it is universally accepted that France, as the state of the source of the income, is entitled to tax the dividend upon its payment, while Canada, as the state of residence of the recipient, is entitled to tax the dividend upon its receipt.

10. *Id.* at 1416. For example, this could happen if a resident of Canada receives an amount from a French source that is exempt from taxation in France because it does not meet a given

claims—"double taxation"—or gaps in taxation, sometimes referred to as "double non-taxation."[11] Both double-taxation and double non-taxation can be addressed through unilateral action to some extent, but where they cannot, they become tax base coordination problems.

For some kinds of tax, states have dealt with base coordination problems by trading policy autonomy for cooperation. This entails entering into multilateral treaties and using supranational institutions to monitor compliance, mediate disputes, and impose remedies in cases of breach.[12] These kinds of "hard law" methods have been used more sporadically and less uniformly in income taxation.[13] Instead, states rely on a combination of mainly bilateral treaties[14] tied together and reinforced by a web of "soft law" coordination methods,[15] including "network-based collaboration, modeling, and peer pressure."[16]

The legal order created by this combination of methods has evolved over a century under the guidance of various international

statutory threshold, while also being exempt from taxation in Canada because it is not considered income under domestic principles.

11. *Id*. at 1415–20. Double taxation could occur due to source-residence overlap, or it could occur because two (or more) countries view a given income as domestic source or view a given taxpayer as a resident for tax purposes. *Id*. Double non-taxation may be caused by a lack of effective rules and coordination among states, or strategic tax competition by states, or both. *Id*.

12. The most visible of these agreements is the General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187. Tax scholars have occasionally studied how forms of taxation other than tariffs fit within the WTO paradigm. *See, e.g.*, Michael Daly, *WTO Rules on Direct Taxation*, 29 WORLD ECON. 527 (2006); Paul R. McDaniel, *Trade and Taxation*, 26 BROOK. J. INT'L L. 1621 (2001). This line of inquiry has recently reopened in light of the European Union's fiscal state aid cases, which have raised scrutiny regarding the nature of certain tax regimes as subsidies. *See* Allison Christians & Marco Garofalo, *Using Tax as an Investment Promotion Tool*, http://papers.ssrn.com/sol3/abstract=2796126.

13. Christians, *supra* note 9, at 1419.

14. There are a few notable exceptions, including regional income tax conventions and multilateral agreements for cross-border cooperation in tax administration. *See, e.g.*, OECD AND COUNCIL OF EUROPE, THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS (2011), http://www.oecd-ilibrary.org/docserver/download/2311331e.pdf (recently expanded and expected to play a key role in the implementation of the BEPS norms). *See infra* Part III.

15. Allison Christians, *supra* note 7, at 3–4.

16. *Id*. at 3. International law scholars use the term 'soft law' to describe norms that may not themselves constitute law but . . . compel a law-like sense of obligation in states. *See, e.g.*, C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 850–51 (1989). For a discussion regarding the use of the term in the context of tax policy, see Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 WIS. INT'L L.J. 325 (2007).

organizations, with the OECD at the center.[17] In successfully deploying a combination of hard and soft law instruments and processes and consistently building upon its past practices, the OECD has formed a complex pluralistic legal environment in which iterative cycles of norm formation, implementation, contestation, and redefinition take place.[18] As the latest iterative cycle, the BEPS initiative vividly illustrates how hard and soft law mechanisms and processes combine to form a recognizable international legal order.

### *A. Legal Instruments*

The first form of international tax coordination involves hard law, which includes domestic laws as well as international treaties. States initially turned to domestic solutions to solve the problems of both double- and non-taxation arising as a result of cross-border business and investment activities.[19] Double-taxation, which occurs when more than one country seeks to tax a given income stream and no one country's claim is exclusive, was seen as so destructive a force that states were quick to produce unilateral solutions.[20] Two methods prevail: credits against domestic taxes for foreign taxes paid and exemptions from domestic tax for foreign income.[21] However, unilateral solutions are typically seen as second-best solutions compared to coordinated allocation of taxing rights among

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17. The League of Nations was instrumental to developing tax cooperation mechanisms in the early 1920s and its influence continues to today, principally under the direction of the OECD. *See id.* at 9–14. Other institutions and networks, including the International Chamber of Commerce, the United Nations (UN), the International Monetary Fund (IMF), and the World Bank (WB), have involved themselves in various international tax policy efforts over the years, but the OECD has eclipsed these rival sources through a unique combination of geopolitical power dynamics, dedicated expertise, and fidelity to tradition. *See* PETER CARROLL & AYNSLEY KELLOW, THE OECD: A STUDY OF ORGANISATIONAL ADAPTATION (2011); Richard Eccleston, *The OECD and Global Economic Governance,* 65 AUSTL. J. INT'L AFF. 243, 243–46 (2011).

18. For more analysis of the recursive cycle of international tax law, see Allison Christians, *Historic, Comparative and Evolutionary Analysis of Tax Systems*, *in* SEPARATION OF POWERS AND TAX SYSTEM EFFECTIVENESS 287, 287–309 (Misabel de Abreu Machado Derzi ed., 2010), http://ssrn.com/abstract=1674673, and Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1147 (2007).

19. *See generally* Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000).

20. *See, e.g.*, Christians, *supra* note 9, at 1416–17.

21. *Id.*

countries.[22] States have therefore consistently sought alternatives to unilateral mechanisms by pursing bilateral and multilateral agreements on tax.

By way of example, like most countries, Canada's income tax act generally provides Canadian taxpayers a credit for taxes paid to foreign countries on dividends received from foreign companies (to the extent such dividends would be subject to tax in Canada).[23] Since, in the absence of constraints, it is likely that such foreign countries would also tax dividends paid by their companies to nonresidents,[24] Canada might never collect revenue on foreign dividends received by its residents. At the same time, knowing that other countries intend to impose tax on dividends received by their residents from foreign sources might incentivize other countries to impose (or raise) their own taxes to the same level. It is for this reason that early opponents

22. A credit is a second-best solution to the problem of double taxation because it limits the residence country's jurisdiction to tax to a residual (if any) after the source or host country imposes its tax. An agreement among countries to alter that result might be viewed as a better solution because it would typically limit the source country to a lower (or zero) tax rate in order to preserve the ability of the residence country to collect tax on the income. However, this position is not without controversy since in a treaty between countries of different economic means, the country expected to cede its right to tax is often the poorer one. *See, e.g.*, Tsilly Dagan, *BRICS: Theoretical Framework and the Potential of Cooperation*, *in* BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION 15, 17–18 (Yariv Brauner & Pasquale Pistone eds., 2015). An exemption is a second-best solution because it does not take into account taxation in the other jurisdiction at all, thus creating the potential for double non-taxation and incentivizing tax competition. In this case, coordination among countries is necessary to ensure that the income is subject to tax in at least one country. The idea that all income should be taxed once is sometimes referred to as the "single tax principle." *See, e.g.*, Reuven Avi-Yonah, *Who Invented the Single Tax Principle?: An Essay on the History of U.S. Treaty Policy*, 59 N. Y. L. SCH. L. REV. 305, 306–07 (2014).

23. *See* Income Tax Act, R.S.C. 1985, c 1, s 126 (5th Supp. Can.).

24. This is likely but not certain: In a formative report on double-taxation produced in 1923, economists posited that source-based taxation may fall on the source state rather than the investor in certain cases; they therefore predicted that source countries would shy away from imposing source taxation on non-residents, while residence countries would need information from source countries in order to impose residence-based income taxation. GIJSBERT W. J. BRUINS ET AL., REPORT ON DOUBLE TAXATION 40–42 (1923) (explaining that source countries would avoid source taxation because it would either drive investment away to lower-tax source jurisdictions, or force the jurisdiction to offer higher returns to compensate for the tax). Consistent with this prediction, many countries provide various reductions and exemptions from tax for foreign investors. For an overview, see ERNST & YOUNG, WORLDWIDE CORPORATE TAX GUIDE (2016), http://www.ey.com/Publication/vwLUAssets/Worldwide_Corporate_Tax_Guide_2016/$FILE/2016%20Worldwide%20Corporate%20Tax%20Guide.pdf (providing an overview of tax laws across 162 countries).

to the foreign tax credit in the United States called the regime "a present of the revenue to other countries."[25]

Tax treaties are a means (among other aims) to recalibrate this allocation of taxing rights. They do so by reducing source-based taxes, thereby reducing the tax credit amount and leaving some residual room for taxation by the residence country in a source-residence overlap situation.[26] Thus, the grand bargain of the international tax order has been to use treaties to reduce source-based taxation in order to make the residence country's relief measures less costly in terms of revenue foregone to foreign countries.

Double non-taxation is the opposite problem, and it has been understood as a potentially destructive force in terms of protecting the tax base (although it has not always been viewed as equal in negative impact to the problem of double-taxation). Prior to BEPS, double non-taxation was typically addressed unilaterally through the use of allocation, valuation, and general and specific anti-avoidance rules, such as the adjustment of inter-company prices within an affiliated group (transfer pricing) and the deeming of certain payments to resident owners of controlled foreign corporations (such as subpart F in the United States and the foreign accrual property regime in Canada).[27]

Laws to coordinate overlapping tax jurisdictions, whether in the form of domestic statutes, treaties, or judicial determinations, are a product of domestic legislative and regulatory power. They cannot be mandated by a non-state body, a foreign governmental body, or any

25. EDWIN R. A. SELIGMAN, DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION 135 (1928).

26. *See, e.g.*, Dagan, *supra* note 19, at 944–45 (explaining that signatory countries use treaties not to address double taxation, since that is accomplished in domestic statutes, but rather to change the allocation of taxing rights, generally in order to reduce that collected by host countries in favor of increasing that collected by home countries); Veronika Daurer & Richard Krever, *Choosing Between the UN and OECD Tax Policy Models: An African Case Study*, 22 AFR. J. INT'L & COMP. L. 1, 1–2 (2014) ("Treaties limit the source country's taxing rights, leaving more room for the country in which the investor or business is resident to tax the profits."); Mitchell B. Carroll, *International Tax Law: Benefits for American Investors and Enterprises Abroad*, 2 INT'L L. 692, 693–94 (1968) (explaining that the United States originally became interested in pursuing treaties because they "would reduce the amount of foreign taxes that could be credited against the United States tax . . . and possibly leave something for the Treasury to collect").

27. For the definition of Subpart F income in the United States, see 26 U.S.C. § 952 (2012); for the statutory references to foreign accrual property income in Canada, see Income Tax Act, R.S.C. 1985, c 1, ss 94, 94.1 (5th Supp. Can.).

other group outside the parameters of a negotiated treaty. However, states have long used international organizations and networks, especially the OECD, to influence the shape of law by developing the means for policy learning and emulation to take place. This has been accomplished through a combination of models, guidance, and peer review. This is why the OECD is often described as purveyor of soft law: it has successfully used these non-binding but persuasive methods to curate the international tax order as we recognize it today.[28]

### *B. Model Treaties and Guidance*

If asked to source the defining principles that comprise the international tax law order, most tax law experts would quickly point to the OECD's model income tax convention (OECD Model)[29] as the wellspring.[30] Some 3,000 bilateral (hard law) tax treaties are said to reflect the OECD Model. In fact, those 3,000 treaties also reflect the influence of two other models as well: one developed by the United Nations (UN Model) and the other by the United States (U.S. Model).[31] Over time, there has been fairly strong convergence among

28. *BEPS-Frequently Asked Questions*, *supra* note 6. ("[The BEPS outputs] are soft law legal instruments. They are not legally binding but there is an expectation that they will be implemented accordingly by countries that are part of the consensus. The past track record in the tax area is rather positive. . . . [A]ll OECD and G20 countries have committed to consistent implementation in the areas of preventing treaty shopping, Country-by-Country Reporting, fighting harmful tax practices and improving dispute resolution.").

29. OECD, MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL (2014) [hereinafter OECD MODEL], http://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf.

30. *See* U.N. DEPT. OF ECON. & SOC. AFFAIRS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, at vi (2011), http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf ("[T]he OECD Model Tax Convention on Income and on Capital . . . ha[s] had a profound influence on international treaty practice . . . ."); *see generally* REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME (2007); HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS (2d ed. 2004); AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION II: PROPOSALS ON UNITED STATES INCOME TAX TREATIES (1992).

31. The newest version of the U.S. Model is formally referred to as the *United States Model Income Tax Convention*. UNITED STATES TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION (2016) [hereinafter U.S. MODEL], https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf. The U.S. Model is structurally very similar to the OECD and U.N. Models; yet, it stands alone as a conveyer of certain tax policy standards specific to the United States. *See* Allison D. Christians, *Tax Treaties*

the models, with the U.S. Model being heavily influential on the others given the importance of the United States in global markets.[32] Indeed, the OECD's action items concerning treaty use and abuse are expressly conditioned on developments in the U.S. Model language.[33] For example, in late 2015, the U.S. Treasury released proposed changes to the U.S. Model in draft form in order to globalize U.S. policy preferences in the context of the BEPS initiative; this ensured that its policy plans were reflected in OECD documents.[34]

Perhaps owing to the success of the OECD Model, and perhaps reflecting the success of other legislative modeling examples, the OECD has introduced model legislation as part of the BEPS initiative, specifically with respect to new multinational "country by country" (CbC) reporting requirements.[35] It remains to be seen whether OECD model legislation will have the same impact as the OECD Model, and whether the OECD will begin to supplement the rules

*for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639, 654 (2005). The 3,000 figure is an estimate generally agreed among tax law experts to reflect reality.

32. *See generally* Michael Lennard, *The UN Model Tax Convention as Compared with the OECD Model Tax Convention–Current Points of Difference and Recent Developments*, ASIA-PACIFIC TAX BULLETIN, Jan./Feb. 2009 (describing the origins of and differences between the model tax treaties); Reuven Avi-Yonah & Martin Tittle, *The New United States Model Income Tax Convention*, 61 BULL. FOR INT'L TAX'N 224 (2007) (comparing U.S. and OECD Model treaties).

33. OECD, PREVENTING THE GRANTING OF TREATY BENEFITS IN INAPPROPRIATE CIRCUMSTANCES, ACTION 6–2015 FINAL REPORT 11 (2015) [hereinafter ACTION PLAN 6], http://www.oecd-ilibrary.org/docserver/download/2315331e.pdf (noting that the OECD planned to revise its work on anti-treaty shopping in 2016, pending the adoption by the United States of new provisions in the U.S. Model).

34. *See, e.g.*, *U.S. Proposes Changes to Model Tax Treaty Meant to Influence BEPS Talks*, BLOOMBERG BNA DAILY TAX REP. (May 21, 2015), http://www.bna.com/us-proposes-changes-n17179926965; J.P. Finet, *U.S. Model Tax Treaty Proposals Were Meant to Influence OECD*, 148 TAX NOTES 1482 (2015) (reporting that Quyen Huynh, Treasury associate international tax counsel, stated that "the LOB approach is the U.S.'s preferred method for addressing treaty abuse and that Treasury wanted to influence some of the discussions at the OECD with the release of the proposed revisions to the U.S. model treaty"). The U.S. Treasury released the new U.S. Model in February 2016, with changes reflecting the extensive comments it received on the draft language. *Treasury Announces Release of 2016 U.S. Model Income Tax Treaty*, TREASURY.GOV (Feb. 17, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0356.aspx. For a discussion of some of the new features in the new U.S. Model and their connection to the BEPS initiative, see Allison Christians & Alexander Ezenagu, *Kill Switches in the New U.S. Model Tax Treaty*, 41 BROOK. J. INT'L L. 1043 (2016).

35. *See* OECD, ACTION 13: COUNTRY-BY-COUNTRY REPORTING IMPLEMENTATION PACKAGE 9–13 (2015) [hereinafter ACTION 13 IMPLEMENTATION PACKAGE], https://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf.

laid out in the model legislation by regulations laid out in commentary, as it has done with the OECD Model.

Scholars occasionally examine the status of tax norms articulated in OECD guidance, especially the commentaries to the OECD Model, as a source of authority for tax administrators and courts. Experts have long debated whether these declarations are or should be viewed by courts as a legitimate source of interpretive authority, especially where the bilateral treaty in question is modeled, in whole or in part, after the OECD Model.[36] Bilateral treaties may be viewed in some sense as encompassing unilateral reservations to the OECD Model, which thereby takes on some semblance of a *de facto* multilateral treaty. Whether this accurately depicts how a given judicial body would view the OECD Model or commentary depends on the country and the case.[37]

This uncertain legal status allows states to be opportunistic about their decision to cooperate or remain autonomous in specific tax policy matters. Cooperation appears to be most likely when like nations act in like fashion, and when they perceive that doing so will be in their long-term interest.[38] By aggregating the shared tax priorities of its

36. *See, e.g.*, Michael Lang & Florian Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 AUSTL. TAX F. 95 (2008); Frank Engelen, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, 60 BULL. FOR INT'L TAX'N 105 (2006); David R. Tillinghast, *Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial; But Could They Possibly Be Legally Binding?*, 35 TAX MGMT. INT'L J. 580 (2006).

37. *See, e.g.*, Canada v. GlaxoSmithKline Inc., [2012] 3 S.C.R. 3, paras. 20–27; Marzen Artistic Aluminum Ltd. v. The Queen, [2014] T.C.C. 194, para. 177 ("Canadian courts have endorsed the use of the *OECD Guidelines*. The *OECD Guidelines* do not have the force of law but rather, are intended as tools to assist in determining what a reasonable business person would have paid if the parties to a transaction had been dealing with each other at arm's length."); Taisei Fire & Marine Ins. Co. v. Comm. of Internal Revenue, 104 T.C. 535, 547–48, 550 (1995) (citing language in OECD commentaries (1977) as an authoritative source of interpretation for a U.S. treaty with Japan, where the relevant provisions mirrored the OECD Model Convention (1963) in effect when the treaty was ratified, where the Court sought to "giv[e] effect to the intent of the Treaty parties" by "examin[ing] the treaty's 'purpose, history and context,'" and where the Court noted that the use of the 1977 commentaries was appropriate even though adopted later in time because they "reflect[ed] the original intention of the commentary to the 1963 model").

38. *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 51–52 (1984) ("[I]ntergovernmental cooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of a process of policy coordination."); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 553 (2000) ("Self-regulated cooperation without enforcement by a leviathan is possible . . . when there is a commitment 'to follow the rules so long as (1) most similarly situated individuals adopt the same

member states, the OECD provides like nations with an opportunity to adopt a uniform approach.[39] However, some states might be able to ignore or even contradict the agreed norm where defection is perceived to be preferable.[40]

A major impediment to cooperation in taxation would occur if one or more key states could unilaterally withdraw from a particular norm without losing its or their status in the network. This occurred with the OECD's Harmful Tax Practices initiative of the late 1990s, from which the United States abruptly withdrew its support without suffering any exclusion from the ongoing deliberations of the OECD.[41] As problems become more complex in the implementation phase, and the consequences of implementation on differently situated states become clearer, some states will be tempted to defect from the norm for strategic ends. The network approach can be undermined by adverse national acts, by lack of institutional capacity to compel compliance, or by a combination thereof. Peer review might add a cost to defection to some parties, while having little or no impact on others.

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commitment and (2) the long-term expected net benefits to be achieved by this strategy are greater than the long-term expected net benefits for individuals following short-term dominant strategies.'").

39. This may occur in part because "dialogue that enables an issue to be defined as a problem constitutes incentives to subscribe to a global regime." BRAITHWAITE & DRAHOS, *supra* note 38, at 553.

40. *See, e.g.*, Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 163 (2009) (demonstrating that transnational regulatory networks built upon mainly soft law coordination mechanisms are "ill-equipped to effectively address enforcement problems," as illustrated in the case of the Basel Committee on Banking Supervision, whose 1988 Basel I Accord "gradually unraveled as national regulators adopted self-serving exceptions and interpretations because the Committee had little effective leverage to enforce its rules," and in the case of the International Organization of Securities Commissions, whose bilateral securities regulation agreements "painstakingly avoid commitments that would bind . . . powers to act against important domestic interests in specific cases").

41. *See* Andrew Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"*, 4 COLUM. J. TAX. L. 1, 48 (2011) (describing the events surrounding the withdrawal of the United States from the Harmful Tax Project following the election of George W. Bush to the presidency); Press Release No. PO-366, U.S. Dep't of the Treasury, Treasury Secretary O'Neill Statement on OECD Tax Havens (May 10, 2001), https://www.treasury.gov/press-center/press-releases/Pages/po366.aspx (explaining the U.S. Treasury's decision to "re-evaluate the United States' participation in the Organization for Economic Cooperation and Development's working group that targets 'harmful tax practices'").

### *C. Peer Review and Monitoring*

The OECD has used peer review over many decades and for many purposes, including to assess various states' fidelity to the OECD's stated tax policy goals.[42] Peer review is defined as "an examination of one state's performance or practices in a particular area by other states."[43] As an exercise of self-monitoring by agreeing states (rather than decrees or mandates issued by a supranational authority), peer review serves multiple functions. First, it is a means to publicize noncompliance with a previously agreed standard of conduct—a function that may have more ability to compel compliance than even hard law judicial or quasi-judicial enforcement mechanisms.[44] Second, peer review may be a source of persuasive authority in achieving domestic legal reforms.[45] This cuts both ways however; depending on the political moods in play, lawmakers may find it useful to use the foreign or distant nature of the OECD as a reason to reject policy positions.

Peer review requires countries to agree in advance on the parameters of review, which involves drafting "terms of reference" that lay out the standards and criteria for evaluation, as well as agreement as to the time, manner, place, and outcome of evaluation.[46] The OECD's terms of reference for peer review within the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) are instructive as policy precedent likely to influence successive iterations of peer review, and were in use long before the BEPS initiative.[47] The following table provides an overview of what is involved in formulating terms of reference.

42. For a discussion of the origins, evolving goals, and uses of peer review at the OECD, see CARROLL & KELLOW, *supra* note 17, at 31–34.

43. *Id.* at 31.

44. *Id.* at 5; *see also* Verdier, *supra* note 40, at 167–68 (discussing the prospects for cooperation in non-binding transnational regulatory networks).

45. *The OECD's Peer Review Process: A Tool for Co-Operation and Change*, OECD.ORG, https://www.oecd.org/site/peerreview/ (last visited Nov. 18, 2016) ("[R]ecommendations resulting from [peer] review can . . . help governments win support at home for difficult measures.").

46. *See* OECD, TERMS OF REFERENCE TO MONITOR AND REVIEW PROGRESS TOWARDS TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES 2 (2010) [hereinafter 2010 EOI TERMS OF REFERENCE], http://www.oecd.org/ctp/44824681.pdf; ACTION 14 TERMS OF REFERENCE, *supra* note 5.

47. *See generally The OECD's Peer Review Process*, *supra* note 45; OECD, 2016 TERMS OF REFERENCE TO MONITOR AND REVIEW PROGRESS TOWARDS TRANSPARENCY AND

**Table 1: Elements of Peer Review: Information Exchange Within the Global Forum**

| **Element** | **Examples in the Text** |
|---|---|
| Articulation of Standards to be Assessed | Foreseeably relevant tax information must be available and accessible to tax authorities; there must be a "legal basis for . . . exchange."[48] |
| Methodology | "Peer Review Group assessors shall determine if the access powers in a given jurisdiction cover the right types of persons and information and whether rights and safeguards are compatible with effective exchange of information."[49] |
| Sources of Internationally Agreed Standards | 2002 OECD Model Agreement on Exchange of information in tax matters; OECD Model Tax Convention Art. 26 and Commentaries thereto; 2005 Report of the Joint Ad Hoc Group on Accounts; 2006 OECD and 2013 Global Forum Manuals on Information Exchange; 2004 Guidance Notes developed by the OECD Forum on Harmful Tax Practices; FATF Recommendations and guidance on transparency and beneficial ownership; Global Forum Guide on the protection of confidentiality of information exchanged for tax purposes.[50] |
| Schedule of Review | Two phase process; "*Phase 1 Reviews: The legal and regulatory framework*";[51] "*Phase 2: Monitoring and reviewing of the actual implementation of the standards.*"[52] |
| Output of Review Process | A rating "for each of the essential elements and an overall rating."[53] |

EXCHANGE OF INFORMATION ON REQUEST FOR TAX PURPOSES (2016) [hereinafter 2016 EOI TERMS OF REFERENCE], https://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf.

48. 2010 EOI TERMS OF REFERENCE, *supra* note 46, at 14.
49. *Id.* at 6.
50. *Id.* at 2–3.
51. *Id.*
52. *Id.* at 10.
53. 2016 EOI TERMS OF Reference, *supra* note 47, at 9.

Terms of reference and statements of assessment methodology provide a higher level of detail and reflect more clearly the intentions of the agreeing parties as to the meaning of previously agreed standards. As will become clearer in the context of the BEPS initiative, the real work of OECD norm implementation thus occurs in the setting of the terms of reference and assessment method.[54] At that stage, ambiguities previously accepted for the sake of achieving consensus must finally be articulated as workable rules that can be applied consistently across countries and yield to comparative analysis. Assigning items to peer review is a clarifying and norm-hardening exercise. In particular, the assignment of OECD norms to peer review offers the OECD an opportunity to refer to its own non-binding models and guidance as a "legal basis" for determining how tax information exchange is to take place among countries.[55]

The BEPS initiative thus represents a cycle of reformulation of the hybrid hard and soft law international tax order. The recent cycle of cooperation in taxation among OECD member states has also extended to key international organizations, which have worked both independently and cooperatively in the past to make their own distinct imprints on global tax norms.[56] Most recently, the international

54. *See, e.g.*, OECD, MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE, ACTION 14–2015 FINAL REPORT 38 (2015) [hereinafter ACTION PLAN 14], http://www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm ("The core documents for the peer monitoring process will be the *Terms of Reference* and the *Assessment Methodology*. The *Terms of Reference* will be based on the elements of the minimum standard . . . and will break down these elements into specific aspects against which jurisdictions' legal frameworks, MAP programme guidance and actual implementation of the minimum standard are assessed. The *Terms of Reference* will provide a clear roadmap for the monitoring process and will thereby ensure that the assessment of all jurisdictions is consistent and complete. The *Assessment Methodology* will establish detailed procedures and guidelines for peer monitoring of OECD and G20 countries and other committed jurisdictions by the FTA MAP Forum (see element 1.6 of the minimum standard) and will include a system for assessing the implementation of the minimum standard.").

55. *See, e.g.*, 2016 EOI TERMS OF REFERENCE, *supra* note 47, at 12.

56. For example, the influence of the IMF on tax policy in lower-income countries, especially in the preference for consumption taxation, is well known and has been relatively well-studied in the tax literature. *See generally* Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT'L L.J. 139 (2003); Miranda Stewart & Sunita Jogarajan, *The International Monetary Fund and Tax Reform*, 2 BRIT. TAX REV. 146 (2004). Conversely, the emergent influence of non-government organizations, such as Oxfam, Action Aid, and the Tax Justice Network, has only more recently come to the attention of tax policy scholars. *See e.g.*, Allison Christians, *Tax Activists and the Global Movement for Development Through Transparency*, *in* TAX, LAW AND DEVELOPMENT 288, 290–92 (Miranda Stewart & Yariv Brauner eds., 2013).

organizations announced their development of a "Platform for Collaboration" on tax among the OECD, the IMF, the World Bank, and the United Nations.[57] In this new era of cooperation among governments and international organizations, "the OECD will lead the work on building and implementing" global implementation of tax policy norms, "based on [its] comparative advantages and capabilities."[58] Accordingly, the OECD is using its BEPS initiative to build upon its history as the locus of global fiscal policy development.

## II. NORM DEVELOPMENT: FOUR MINIMUM STANDARDS

The BEPS initiative is poised to be a pivotal turning point in the iterative policy cycle of the international tax order. Within a very short time, the OECD articulated its view of the various elements of BEPS, arranged for detailed study in working parties, and developed consultation drafts and processes to engage relevant stakeholders—governments, taxpayers, and practitioners, as well as academics and other nongovernmental observers.[59] Many, but not all, of the stakeholders are professionals in tax, accounting, or economics. The vast majority are professionals from the government and legal sector; academics, independent researchers, and nongovernmental organizations are also represented but more thinly spread.[60] Many of the stakeholders focused primarily on the technical aspects of the BEPS reforms, but many also focused on broader policy questions.[61]

57. INTERNATIONAL MONETARY FUND ET AL., THE PLATFORM FOR COLLABORATION ON TAX: CONCEPT NOTE 1, 3 (2016), https://www.imf.org/external/np/sec/pr/2016/pdf/pr16176.pdf.

58. *Id.* at 5, 8.

59. Work on BEPS officially began in June 2012 with an announcement by the G20 in support of the initiative. G20, *supra* note 2, at 1, 9. By February of 2013, the OECD released its initial report, identifying the fifteen action item areas and setting a "rapid" timeline of as little as twelve months for delivery of action items. OECD 2013 BEPS REPORT, *supra* note 2, at 24 (stating tautologically that "[t]he pace of the project must be rapid so that concrete actions can be delivered quickly," and laying out the expectation that "the Action Plan will largely be completed in a two-year period, recognising that some actions will be addressed faster as work has already been advanced, while others might require longer-term work").

60. The OECD reports that over 1,400 submissions were received during the BEPS initiative from industry, advisers, NGOs, and academics. ACTION PLAN 15, *supra* note 4, at 3.

61. *See* OECD, *Comments Received on Public Discussion Draft: BEPS Action 15, Development of a Multilateral Instrument to Implement the Tax Treaty Related BEPS Measures* (June 30, 2016), http://www.oecd.org/ctp/treaties/public-comments-received-discussion-draft-Development-of-MLI-to-Implement-Tax-Treaty-related-BEPS-Measures.pdf (providing a

Stakeholders varied broadly in terms of geographic and cultural origins, and encompassed a broad spectrum of political leanings and goals.[62]

Given that the OECD is a consensus-building network, the organization generally lacks the power to mandate domestic legal changes within its member states, let alone non-member states.[63] Nor can it accurately describe its consensus positions as a record of promises made by member states to each other, absent a signed multilateral treaty to that effect. Instead, the OECD uses language of expectation and aspiration.[64] However, the OECD does perform a function that moves states toward common undertakings, namely, by expressing claims on behalf of its member states about agreements they have made to move in concert toward a stated regulatory goal.[65]

In the absence of agreement on enforcement backed by sanctions, the good faith of the parties in carrying out mutually agreed policy choices appears to be the main force driving these claims to outcomes. Peer monitoring may help clarify ambiguities, highlight deviations from expectations, and lead to another cycle of bargaining. On the other hand, it may also lead to lowered standards in the name of convenience, expediency, diplomacy, or otherwise.[66]

compilation of the submissions received by the OECD in response to its request for input of May 2016).

62. *Id.*

63. However, the OECD Council occasionally adopts international agreements to which member states are bound unless they enter reservations. For an example, see Econ. and Dev. Review Comm., *Mandate*, https://www.oecd.org/site/ecoedrc/mandate.htm (last modified May 4, 2009).

64. *See, e.g.*, OECD 2013 BEPS REPORT, *supra* note 2, at 9 (noting that its "international standards" have sought to address tax coordination problems "in a way that respects tax sovereignty" and that "[c]ountries have long worked and are strongly committed to eliminate . . . double taxation in order to minimise trade distortions and impediments to sustainable economic growth, while affirming their sovereign right to establish their own tax rules").

65. *See, e.g.*, ACTION 14 TERMS OF REFERENCE, *supra* note 5, at 5 ("This report contains a commitment by countries to implement a minimum standard to ensure that they resolve treaty-related disputes in a timely, effective and efficient manner. All members of the inclusive framework on BEPS ('Members') commit to the implementation of the Action 14 minimum standard and to have their implementation reviewed pursuant to the Terms of Reference and Assessment Methodology agreed by Members.")

66. *See, e.g.*, Verdier, *supra* note 40, at 171 (noting that transnational regulatory networks "can effectively solve some, but not all, problems of international regulatory cooperation," and, "[i]n particular, [they] are unlikely to be effective in areas that raise significant distributive or enforcement problems").

The OECD produced action plans on fifteen items in the BEPS initiative, of which several contain minimum standards designed for either unilateral or bilateral country-level implementation. Other action items include changes to the OECD Model and guidance, as well as undertakings to engage in further dialogue and agreement.[67] The OECD organized its minimum standards into four categories: Country-by-Country (CbC) reporting, tax treaty abuse, harmful tax practices, and cross-border tax dispute resolution.[68] Each minimum standard is laid out as a prescriptive rule accompanied by various recommendations and best practices. This Part examines the four minimum standards in turn and considers how accompanying recommendations will develop into more minimum standards over time by being embedded in OECD models and guidance, being subject to peer review, or both.

### *A. CbC Reporting*

A main driver of the BEPS initiative has been the desire of many OECD members to reconfigure how states place boundaries around the tax planning of major multinational corporations. The OECD's adoption of CbC reporting for this purpose is a momentous event, clearly occasioned by the work of international tax justice advocacy groups.[69] The core idea of CbC reporting is that multinational companies should disclose how much tax they pay in each country in which they operate, and that every country in which a multinational

67. Some of the action items provide for actions to be executed by governments internally or in the future, while others do not directly call for governmental response with a minimum standard, recommendation, or best practice. The latter include: OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, ACTION 1–2015 FINAL REPORT (2015) [hereinafter ACTION PLAN 1], http://www.oecd-ilibrary.org/docserver/download/2315281e.pdf; OECD, MEASURING AND MONITORING BEPS, ACTION 11–2015 FINAL REPORT (2015) [hereinafter ACTION PLAN 11], http://www.oecd-ilibrary.org/docserver/download/2315361e.pdf; OECD, MANDATORY DISCLOSURE RULES, ACTION 12–2015 FINAL REPORT (2015) [hereinafter ACTION PLAN 12], http://www.oecd-ilibrary.org/docserver/download/2315371e.pdf; ACTION PLAN 14, *supra* note 54; and ACTION PLAN 15, *supra* note 4.

68. *BEPS-Frequently Asked Questions*, *supra* note 6, at 3.

69. For an analysis of how these groups made their policy goals the subject of OECD attention, see Christians, *supra* note 56, at 290–92 (describing the push for country-by-country reporting as an outgrowth of international efforts by nongovernment organizations to shed light on corruption in the natural resources sector with the Extractive Industries Transparency Initiative).

company operates should have equal access to the information of the MNE group.[70]

Tax justice advocacy groups have consistently called for CbC disclosure to be public.[71] The rationale is that public scrutiny is a necessary check on an otherwise obscure global system in which governments accept and even facilitate the means by which multinationals strategically assign their incomes geographically in order to avoid paying tax.[72] In contrast, the OECD has limited CbC reporting to governments, and attached strict use and confidentiality limitations.[73] Not only must governments keep CbC reports they receive from taxpayers or from other governments confidential from both the public and even other agencies or departments within the government, but they may not use these reports, without more, to challenge specific taxpayers regarding their transfer pricing positions.[74]

The OECD's version of CbC reporting is thus intended to provide states with a diagnostic tool that may trigger an audit process. It will also generate more data and information that may aid in future tax-policy making with respect to multinationals, depending on the degree of confidentiality, which is under vigorous debate. Many experts believe that public disclosure of CbC reports is only a matter of time, especially as the European Union has already proposed that certain CbC reports be made public.[75] Until that proposal is adopted,

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70. *See id.*

71. *See* RICHARD MURPHY, TAX JUSTICE NETWORK, COUNTRY-BY-COUNTRY REPORTING: SHINING LIGHT ONTO FINANCIAL STATEMENTS 3–4 (2010), http://www.taxresearch.org.uk/Documents/CBCDec2010.pdf (listing reasons for public disclosure, including serving the interests of shareholders and the broader public).

72. *Id.*

73. OECD, ACTION 13: GUIDANCE ON THE IMPLEMENTATION OF TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING 5–6 (2015) [hereinafter ACTION 13 GUIDANCE], https://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf (outlining confidentiality, consistency, and appropriate use as conditions to obtaining and using CbC reports).

74. *Id.*; ACTION 13 IMPLEMENTATION PACKAGE, *supra* note 35, at 13 (including appropriate use and confidentiality in model legislation); *id.* at 19 (including appropriate use and confidentiality in a multilateral agreement to govern information exchange). In addition, the Action 13 Implementation Package contains a lengthy confidentiality and data safeguards questionnaire to "ensure the confidentiality of exchanged tax information and limit its use to appropriate purposes." *Id.* at 23.

75. *See Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches*, at 2, COM (2016) 198 final (Apr. 12, 2016) (stating that "greater transparency on the side of companies is needed to enable public scrutiny of whether tax is paid where profits

governments would, under current OECD standards, impose requirements on firms and share reports with each other according to international agreements subject to multiple confidentiality assurances.[76]

The minimum standard for CbC involves three parts: (1) domestic adoption of procedures for a three-tiered reporting system of three documents, consisting of the master file, local file, and CbC report; (2) adoption of the necessary international agreements and procedures to automatically exchange CbC reports; and (3) submission to periodic OECD monitoring.[77] The OECD is operationalizing each of these parts with a combination of interrelated hard and soft law instruments that build upon and reinforce one another, further ensuring that the OECD will continue to have a central role in setting and policing tax policy norm development and compliance in this area. In particular, the OECD has:

- issued model CbC reporting legislation suitable for adoption by lawmakers;[78]
- drafted model competent authority agreements to facilitate the consistent exchange of information based on existing double tax conventions and tax information exchange agreements (TIEAs), which are themselves based on OECD models;[79]
- developed "rules" for electronic gathering, sorting, and transmission of CbC Reports;[80]

are produced" and that "[t]his proposal requires that MNEs disclose publicly in a specific report the income tax they pay together with other relevant tax-related information").

76. The CbC regime may also imply accepting some new technical rules (generally to be applied through the Transfer Pricing Guidelines). *See* ACTION 13 GUIDANCE, *supra* note 73, at 5; ACTION 13 IMPLEMENTATION PACKAGE, *supra* note 35, at 12.

77. *See* ACTION 13 FINAL REPORT, at 37–69.

78. ACTION 13 IMPLEMENTATION PACKAGE, *supra* note 35, at 9–13.

79. *Id*. at 31; *Country-by-Country Reporting*, OECD.ORG, https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/country-by-country-reporting.htm (last visited Nov. 23, 2016).

80. OECD, COUNTRY-BY-COUNTRY REPORTING XML SCHEMA: USER GUIDE FOR TAX ADMINISTRATIONS AND TAXPAYERS 3 (2016), http://www.oecd.org/tax/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations-and-taxpayers.pdf (describing its contents as a "common template" of "rules regarding transfer pricing documentation" that were prepared in accordance with the "requirements" of Action 13).

- drafted a multilateral competent authority agreement (CbC MCAA) to further facilitate consistent information exchange;[81]
- tied the CbC MCAA to an existing OECD-initiated agreement, the Convention on Mutual Administrative Assistance in Tax Matters (MAATM);[82] and
- tied CbC reporting to peer review via the Inclusive Framework.[83]

CbC appears to be a top priority for BEPS implementation. The origin of this focus is likely attributable to NGOs, which pressured OECD countries to significantly change the ways in which they gather and share tax information related to the conduct of multinationals in the hopes that transparency will bring about substantive legal reform.

With multinational tax planning increasingly being featured in print and online media as aggressive and abusive "tax dodging," and

81. This agreement is in turn based on (in the OECD's words, "inspired by") the OECD's Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA), which was "concluded in the context of the implementation of the Common Reporting Standard," another OECD regime. *Country-by-Country Reporting*, *supra* note 79. The international agreements to facilitate the consistent implementation of tax information exchange could serve as a case study on the incremental use of the OECD to crystallize the tax policy preferences of its key member states. *See* OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTY REPORTING, ACTION 13–2015 FINAL REPORT 10 (2015), http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm ("Consistent and effective implementation of the transfer pricing documentation standards and in particular of the Country-by-Country Report is essential.").

82. As the OECD explains, the MAATM requires its parties to mutually agree on the scope of and procedures for automatic exchange of tax information; the CbC MCAA is one mechanism to achieve that mutual agreement. *See* OECD, *supra* note 79. As of the end of November 2016, the MAATM had 107 signatories. *Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters, Status–21 November 2016*, OECD.ORG https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf (last visited Nov. 27, 2016). As of October 21, 2016, the CbC MCAA had 49 signatories. *Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-By-Country Reports, Status as of 21 October 2016*, OECD.ORG, https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf (last visited Nov. 27, 2016).

83. ACTION 13 IMPLEMENTATION PACKAGE, *supra* note 35, at 5, 17; *see also BEPS-Frequently Asked Questions*, *supra* note 6 ("Mechanisms will be developed to monitor jurisdictions' compliance with their commitments and to monitor the effectiveness of the filing and dissemination mechanisms. The outcomes of this monitoring will be taken into consideration in thorough review planned for 2020, which will also reassess whether modifications are required to the content of the reports.").

public reaction accordingly intensifying,[84] national legislators and policymakers in key states seem to have viewed the OECD as well-positioned to respond.[85] CbC delivery will occur through multiple mechanisms, and will likely be a focus for ongoing norm development.

Related to the minimum standard for CbC reporting, the OECD makes a number of recommendations related to transfer pricing rules, which is an issue area of major significance for states and for the international tax community.[86] Most, if not all, of the OECD's recommendations on transfer pricing will be deployed in revised transfer pricing guidelines, which OECD members and BEPS Associates are expected to respect.[87] Some countries have incorporated the transfer pricing guidelines into national legislation.[88] Among these countries, the revised guidelines may need to be explicitly

84. *See, e.g.*, *The Tax Dodging Bill Campaign*, TAXDODGINGBILL.ORG, http://taxdodgingbill.org.uk/home/index.php (last visited Nov. 23, 2016); *Corporate Tax Dodging*, OXFAM.ORG, https://www.oxfam.org/en/tags/corporate-tax-dodging (last visited Nov. 23, 2016); Jesse Drucker, *Occupy Wall Street Stylists Tap into Public Rage Over Corporate Tax Dodgers*, FIN. POST (June 11, 2013, 9:44 AM), http://business.financialpost.com/news/economy/uk-uncut-taxes-corporate; *How to Stop Tax Dodging*, ACTIONAID.ORG, http://www.actionaid.org.uk/102021/how_to_stop_tax_dodging.html (last visited Nov. 23, 2016); Lynnley Browning, *Insight: Microsoft Use of Low-Tax Havens Drives Down Tax Bill*, REUTERS (July 27, 2011, 7:07 PM), http://www.reuters.com/article/2011/07/27/us-microsoft-tax-idUSTRE76Q6OB20110727; *see also* Christians, *supra* note 56, at 297–98 (outlining efforts of tax activists to tie cuts in social programs to the tax affairs of multinational companies).

85. OECD 2013 BEPS REPORT, *supra* note 2, at 8, 11 (explaining the origin of the OECD's BEPS initiative as a response to "developments [that] have opened up opportunities for MNEs to greatly minimise their tax burden," which "has led to a tense situation in which citizens have become more sensitive to tax fairness issues," and stating that "[i]t has become a critical issue for all parties" and that "[t]he G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner"); *see also* G20, *supra* note 2, at 9 (affirming its support for the OECD to undertake its work on BEPS).

86. *See* OECD, ALIGNING TRANSFER PRICING OUTCOMES WITH VALUE CREATION, ACTIONS 8-10–2015 FINAL REPORTS 9 (2015) [hereinafter ACTION PLAN 8-10], http://www.oecd-ilibrary.org/docserver/download/2315351e.pdf.

87. *See* OECD, OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS 20–22 (2010), http://www.oecd.org/ctp/transfer-pricing/transfer-pricing-guidelines.htm.

88. *See* ERNST & YOUNG, WORLDWIDE TRANSFER PRICING REFERENCE GUIDE 2015–16, at 26, 125, 228, 331 (2016), http://www.ey.com/Publication/vwLUAssets/EY-Worldwide-transfer-pricing-reference-guide-2015-16/$File/EY_Worldwide_Transfer_Pricing_Reference_Guide_2015-16.pdf (explaining that OECD Transfer Pricing Guidelines have been explicitly incorporated in domestic laws in some countries, including, *inter alia*, Australia, Germany, and Ukraine, while they have been deemed to be relevant or appropriate sources of interpretation in others, including, *inter alia*, Namibia).

incorporated, while in others the revised guidelines may be incorporated by reference. Whether the current or revised transfer pricing guidelines serve as legal or persuasive authority in a court of law is a distinct issue. The OECD's main recommendations with respect to transfer pricing are for countries to:[89]

- revise allocation rules to attribute risks to related parties on the basis of control and financial capacity;[90]
- revise allocation rules to prevent legal ownership as the sole determinant of source of income attributed to intangibles;[91]
- revise allocation rules to attribute value to companies that perform important functions;[92]
- limit non-controlling companies to risk-free return or less on financial transactions;[93] and
- limit values attributed to group synergy to companies contributing to synergistic benefits.[94]

The OECD expects its guidance in this area, in particular the commentary and the transfer pricing guidelines themselves, to serve "as the basis for legislation in OECD countries and an increasing number of non-OECD economies."[95] Past experience has taught the

89. *See* ACTION PLAN 8-10, *supra* note 86, at 53–54 (describing revisions to OECD Transfer Pricing Guidelines).

90. *Id.* at 10 ("[R]isks contractually assumed by a party that cannot in fact exercise meaningful and specifically defined control over the risks, or does not have the financial capacity to assume the risks, will be allocated to the party that does exercise such control and does have the financial capacity to assume the risks.").

91. *Id.* ("[L]egal ownership alone does not necessarily generate a right to all (or indeed any) of the return that is generated by the exploitation of the intangible.").

92. *Id.* ("The group companies performing important functions, controlling economically significant risks and contributing assets, as determined through the accurate delineation of the actual transaction, will be entitled to an appropriate return reflecting the value of their contributions.").

93. *Id.* at 11 ("If [an] associated enterprise does not in fact control the financial risks associated with its funding (for example because it just provides the money when it is asked to do so, without any assessment of whether the party receiving the money is creditworthy), then it will not be allocated the profits associated with the financial risks and will be entitled to no more than a risk-free return, or less if, for example, the transaction is not commercially rational and therefore the guidance on non-recognition applies.").

94. *Id.*

95. OECD, OECD'S CURRENT TAX AGENDA 10 (2012), https://www.oecd.org/tax/OECDCurrentTaxAgenda2012.pdf. For a discussion of the implications of this kind of

OECD the value of such guidance, so it is unsurprising that the architecture of BEPS implementation with respect to transfer pricing features multiple overlapping methods with guidance as the central unifying feature. Indeed, OECD guidance is expressly intended to serve as a means to achieve convergence on a longer time scale for items that were not susceptible to immediate consensus during the initial BEPS bargaining. For example, the OECD states:

> In addition [to the four minimum standards], existing standards have been updated and will be implemented, noting however that not all BEPS participants have endorsed the underlying standards on tax treaties or transfer pricing. In other areas, such as recommendations on hybrid mismatch arrangements and best practices on interest deductibility, countries have agreed a general tax policy direction. In these areas, they are expected to converge over time through the implementation of the agreed common approaches, thus enabling further consideration of whether such measures should become minimum standards in the future. Guidance based on best practices will also support countries intending to act in the areas of mandatory disclosure initiatives or CFC legislation.[96]

Because the transfer pricing guidelines are still under negotiation at the OECD, the level of detail for the various recommendations and related prescriptions remains to be seen. However, given the inherent difficulties of clarifying the arm's length standard, it is expected that the current BEPS initiative will not close the matter of transfer pricing as an issue but will merely highlight new areas for further contestation and re-negotiation going forward. NGO pressure to move away from the arm's length standard in favor of some form of combined reporting with formulary apportionment may intensify if the post-BEPS consensus fails to relieve perceived problems with the administration of transfer pricing by lower-income countries.

### *B. Harmful Tax Practices*

The second issue area for which the OECD has articulated a minimum standard is a continuation of an initiative that the OECD has been developing since the late 1990s, namely, addressing the

"globalized localism," see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 177–82 (2d ed. 2002).

96. *BEPS-Frequently Asked Questions*, *supra* note 6.

problem of tax competition.[97] As the OECD discovered in its early work on this subject, there is inconsistent consensus among countries regarding what constitutes acceptable versus non-acceptable tax competition, and what to do about the latter.[98] Impasse on the matter is likely because all countries engage in tax competition to some degree or another, but some use more sophisticated and less transparent mechanisms than others.[99]

The OECD's effort to address harmful tax practices is articulated as a quest to develop a "level playing field," upon which countries may use their tax systems to attract inward investment, but only to the extent such efforts are aimed at "real" investment as opposed to paper profits allocated to shell companies with little or no ascertainable operations in the host country.[100] Ongoing efforts to identify targeted country practices rather than singling out countries themselves became a necessity after the OECD's efforts in the 1990s appeared to focus on small, non-OECD countries while overlooking the contributions of its own membership to the overall phenomenon of harmful tax competition.[101]

While the focus on non-member states remains difficult to overcome, Action 5 expresses a commitment by OECD member states (and by extension, BEPS Associates) to counter harmful tax practices in general.[102] However, the minimum standard specifically calls for states to undertake two commitments. The first is to align domestic legal or administrative practices to a single standard, namely, the use of a "nexus approach" for allocating the income from intellectual property.[103]

97. For a discussion and analysis of the original harmful tax practices initiative, see Allison Christians, *Sovereignty, Taxation, and Social Contract*, 18 MINN. J. INT'L L. 99 (2009).

98. *Id.* at 116–20.

99. *See, e.g.*, PETER DIETSCH, CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION 80, 94–103 (2015) (categorizing forms of tax competition, with practices to be defined as unacceptable according to a combination of their intent and outcome, and explaining that "[a]ny fiscal policy of a state is unjust and should be prohibited if it is *both* strategically motivated *and* has a negative impact on the aggregate fiscal self-determination of other states").

100. OECD GLOBAL FORUM ON TAXATION, A PROCESS FOR ACHIEVING A GLOBAL LEVEL PLAYING FIELD 2 (2004), https://www.oecd.org/ctp/harmful/31967501.pdf.

101. Christians, *supra* note 97, at 115.

102. OECD, COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE, ACTION 5–2015 FINAL REPORT 3–4 (2015) [hereinafter ACTION PLAN 5], http://www.oecd-ilibrary.org/docserver/download/2315321e.pdf.

103. *Id.* at 67.

The nexus rule is, simply stated, the OECD's compromise position on the so-called "patent box" incentive regimes, which are an increasingly popular form of tax competition across OECD member states.[104] Patent box regimes are not necessarily consistent with past OECD definitions of non-harmful tax practices, so the OECD's inclusion of a nexus rule in the BEPS initiative may be seen as a minor step, if any step at all, in combatting harmful tax practices.

Under this minimum standard, tax authorities that grant preferential tax treatment for intellectual property-related income via administrative rulings are to exchange such rulings, subject to peer review, but there are no penalties or prohibitions to be imposed in the event countries deviate from the nexus-based minimum standard.[105] Moreover, the nexus standard itself is yet to be settled, with some countries interpreting nexus in a manner that is or may be inconsistent with that of others.[106]

Relatedly, states committed to use agreed grandfathering rules if modifications to their intellectual property tax regimes will include transition rules.[107] The OECD is also developing the means to spontaneously exchange six types of administrative rulings:

- rulings related to preferential regimes;

104. *See, e.g.*, ROBERT ATKINSON AND SCOTT ANDES, INFO. TECH. & INNOVATION FOUND., PATENT BOXES: INNOVATION IN TAX POLICY AND TAX POLICY FOR INNOVATION 5 (2011), http://www.itif.org/files/2011-patent-box-final.pdf (listing countries that have adopted patent box regimes and describing major features thereof).

105. ACTION PLAN 5, *supra* note 102, at 45–60 (detailing plan for ruling exchange).

106. The type of nexus rule in the new U.S. Model is illustrative as it may conflict with European Union case law, which has held that countries may not provide research and development credits conditioned on the location of the research and development in a particular state, owing to EU rules on the free movement of capital. *See, e.g.*, Case C-39/04, Laboratoires Fournier SA v Direction des vérifications nationales et internationals, 2005 E.C.R. I-2068, I-2076 ("Article 49 EC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State.").

107. Accordingly, countries with existing patent box rules that are deemed to be inconsistent with the BEPS Action Plan may choose to include transition rules to delay implementation of the rules necessary to become compliant with the minimum standard, but only with respect to firms already eligible for the existing patent box regime. This is the case with respect to the United Kingdom, for example. Its existing patent box regime is grandfathered until June 30, 2021 for firms that were in the regime prior to July 1, 2016. *See* HM Revenue & Customs, *Corporation Tax: Patent Box - Compliance with New International Rules*, GOV.UK (Dec. 9, 2015), https://www.gov.uk/government/publications/corporation-tax-patent-box-compliance-with-new-international-rules/corporation-tax-patent-box-compliance-with-new-international-rules.

- cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings;
- rulings giving a downward adjustment to profits;
- permanent establishment (PE) rulings;
- conduit rulings; and
- any other type of ruling where the Global Forum agrees in the future that the absence of exchange would give rise to BEPS concerns.[108]

Related to the minimum standard are the following recommendations, most or all of which will be operationalized through OECD guidance, revisions to the OECD Model, or inclusion in a multilateral agreement:

- implement and apply hybrid mismatch rules in accordance with policy objectives of the Action 2 report;[109]
- undertake internal periodic "review of the operation of the [hybrid mismatch] rules as necessary to determine whether they are operating as intended";[110]
- make information about hybrid mismatch exchange procedures available to taxpayers;[111]
- undergo periodic OECD monitoring of interest deduction limitation rules according to a

108. ACTION PLAN 5, *supra* note 102, at 47–51.

109. Action Plan 2 calls on countries to preserve "the underlying policy objectives of the report." OECD, NEUTRALISING THE EFFECTS OF HYBRID MISMATCH ARRANGEMENTS, ACTION 2–2015 FINAL REPORT 94 (2015) [hereinafter ACTION PLAN 2], http://www.oecd-ilibrary.org/docserver/download/2315291e.pdf. This includes:

> (a) agree guidance on how the rules ought to be applied; (b) co-ordinate implementation on the rules (primarily as to timing); (c) agree how the rules should apply to existing instruments and entities that are caught by the rules when they are first introduced (i.e. transitional arrangements); (d) undertake a review of the operation of the rules as necessary to determine whether they are operating as intended; (e) agree procedures for exchanging information on the domestic tax treatment of instruments and entities in order to assist tax administrations in applying their rules to hybrid mismatch arrangements within their jurisdiction; (f) endeavour to make such information available to taxpayers; and (g) provide further commentary on the interaction between the recommendations in the report and the other Items in the *BEPS Action Plan* (OECD, 2013).

*Id.*

110. *Id.*

111. *Id.*

process to be determined (presumably in the Inclusive Framework);[112]

- adopt procedures to inform the Global Forum if tax benefits are provided to specified intellectual property assets;[113]
- adopt measures to monitor and gather data on companies benefitting from tax regimes that are designed to promote development in disadvantaged areas;[114]
- adopt procedures to spontaneously exchange statistical information with respect to specified intellectual property-related rulings;[115] and
- adopt procedures to spontaneously exchange statistical information with respect to cases of insufficient intellectual property-ruling related data gathering and exchange.[116]

It seems clear that countering harmful tax practices involves a complex, yet abstract, list of items and issues that do not yet appear to have full consensus among the BEPS constituency at that level of fine detail. The only item of clear consensus is a nexus rule that itself has yet to be clarified in a manner capable of consistent implementation across OECD member states and BEPS Associates. The future use of

112. OECD, LIMITING BASE EROSION INVOLVING INTEREST DEDUCTIONS AND OTHER FINANCIAL PAYMENTS, ACTION 4–2015 FINAL REPORT 13 (2015), http://www.oecd-ilibrary.org/docserver/download/2315311e.pdf ("A co-ordinated implementation of the recommended approach will successfully impact on [sic] the ability of multinational groups to use debt to achieve BEPS outcomes. To ensure the recommended approach remains effective in tackling BEPS involving interest, the implementation, operation and impact of the approach will be monitored over time, to allow for a comprehensive and informed review as necessary.").

113. ACTION PLAN 5, *supra* note 102, at 67.

114. *Id.* ("[S]ome regimes designed to promote development in disadvantaged areas will need to be monitored and that countries will be required to keep data on the companies benefitting from those regimes.").

115. *Id.* at 68 ("[C]ountries that provide taxpayer-specific rulings that fall within the framework will be expected to provide statistical information that includes the following: (i) the total number of spontaneous exchanges sent under the framework, (ii) the number of spontaneous exchanges sent by category of ruling, and (iii) for each exchange, [the names of the] country or countries [with which information was exchanged].").

116. *Id.* ("Countries should also provide details of the cases where they had insufficient information to identify all the countries that they needed to exchange with and therefore applied a best efforts approach. This information should be broken down by category of ruling and should include a brief description of the efforts undertaken to identify relevant related parties.").

guidance and peer review, particularly in the absence of a standard, will likely reveal the path forward. Presumably, several of these issues will beget more concrete standards when the OECD undertakes its planned BEPS reassessment phase in 2020.[117]

### *C. Tax Treaty Abuse*

The third issue area for which the OECD has articulated a minimum standard is in addressing the problem of abuses of the bilateral tax treaty system, which, as introduced above,[118] can result in gaps between tax jurisdictions that lead to double non-taxation. While some gaps are intentionally created by states seeking inward investment, the phrase "tax treaty abuse" is generally used to connote planning by taxpayers that was in some fashion not intended (or is no longer accepted) by the parties to the affected treaties.[119] The OECD proposes to counter these gaps by revising the terms of treaties going forward.[120]

The minimum standard in this area involves an optional menu: (1) adoption in all new treaties (as well as the new OECD Model and the MLI) (2) a principle purpose test alone, (3) a principal purpose test combined with a limitation on benefits provision, or (4) a limitation on benefits provision combined with a specified anti-conduit rule.[121] It is not yet clear what will happen if countries take inconsistent positions in their bilateral treaties. Nor is it clear how a multilateral treaty works with an array of options for the signatories.

Additional mainly treaty-based BEPS recommendations related to treaty abuses include the following:

- address hybrid mismatches in accordance with revisions to Article 1 of the OECD Model;[122]
- include an express statement about a common intention to eliminate double taxation without

117. *See, e.g.*, ACTION 13 GUIDANCE, *supra* note 73, at 3; ACTION PLAN 5, *supra* note 102, at 27; ACTION PLAN 8-10, *supra* note 86, at 64.

118. *See supra* text accompanying notes 23–25.

119. *See* Richard L. Reinhold, *What It Tax Treaty Abuse? (Is Treaty Shopping an Outdated Concept?)*, 53 TAX LAW. 663, 672–83 (2000).

120. *See generally* ACTION PLAN 6, *supra* note 33.

121. *Id.* at 9–10.

122. *See generally* ACTION PLAN 2, *supra* note 109.

creating double non-taxation or treaty shopping opportunities;[123] and

- include a saving clause to preserve domestic taxation of residents subject to specified exceptions.[124]

There is some overlap of purpose and scope in these minimum standards and items to be addressed in updates to the OECD Model per other action items, as well as the items to be introduced in the MLI, the subject of Action 15. Further clarity should be attained when the multilateral treaty is released for signature.[125]

### *D. Cross-Border Dispute Resolution*

The final category of the OECD minimum standards involves treaty-based dispute resolution.[126] This standard builds upon existing provisions in the OECD Model, specifically the "mutual agreement procedure" of Article 25.[127] The OECD's goal is to implement streamlined mutual agreement procedures to respond to the increase in double taxation that is expected to occur as countries adopt anti-BEPS measures.[128] The minimum standard states that countries have agreed to do the following:

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123. *See* ACTION PLAN 6, *supra* note 33, at 10. The inclusion of this provision in the preamble to new treaties appears designed to provide administrators and courts the ability to apply general anti-abuse rules to tax treaties, by clarifying the intentions of the parties and conveying something about the "spirit" of the text.

124. *Id.* at 86. A saving clause is a provision that prohibits residents of a treaty country from using the treaty to reduce their residence-based taxation, thus confining the use of treaties to the reduction of tax at source for the benefit of nonresidents. *See* U.S. MODEL, *supra* note 31, at 2 (article one, paragraph four). The United States includes such a provision in all U.S. tax treaties save a very old one, with Pakistan. Convention Between the United States of America and Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Pak.-U.S., July 1, 1957, 10 U.S.T. 984; *see* Christians, *supra* note 31. However, the use of the saving clause mechanism by the United States is distinct because the United States is the only country in the world that taxes individuals as if they are residents purely on the basis of citizenship, which may be acquired voluntarily but is also conferred automatically by birth and by lineage in many and varied circumstances. Accordingly, the saving clause prevents individuals who are citizens and residents of other countries, and who also have U.S. person status, from using a U.S. tax treaty to reduce their U.S. tax liability; this would be inapposite in any case not involving the United States. A saving clause might be adapted to defeat so-called round tripping, but such practices might also be addressed in limitation on benefit and other safeguards.

125. ACTION PLAN 15, *supra* note 4, at 3.

126. *See* ACTION PLAN 14, *supra* note 54, at 13.

127. OECD MODEL, *supra* note 29, at 38–39 (article twenty-five).

128. ACTION PLAN 14, *supra* note 54, at 9.

- "[e]nsure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- [e]nsure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- [e]nsure that taxpayers can access the MAP when eligible."[129]

Action 14 is careful to distinguish good faith and timely resolution under the mutual agreement procedure from any obligation to accept binding arbitration as a method of dispute resolution. Although binding arbitration is a method preferred by several key countries, including the United States, it has not yet risen to the level of established consensus. Nevertheless, it is expected to be included in the MLI as an optional provision to be elected on an opt-in rather than opt-out basis.[130] The submission of treaty-based dispute resolution to peer monitoring increases the likelihood of exerting pressure on countries that do not use arbitration and whose mutual agreement procedures may therefore appear to lag behind or be more cumbersome than others.

In addition to the minimum standard, and in connection with peer review of country implementation, the OECD calls all countries to join the "Forum on Tax Administration MAP Forum" (the FTA MAP Forum).[131] This redundantly named body had forty-six members at

129. *Id.*

130. *See, e.g.*, Nathalie Bravo, *The Proposal for a Multilateral Tax Instrument for Updating Tax Treaties*, *in* BASE EROSION AND PROFIT SHIFTING (BEPS): THE PROPOSALS TO REVISE THE OECD MODEL CONVENTION 327, 343 (Michael Lang et al. eds., 2016).

131. ACTION PLAN 14, *supra* note 54, at 16 ("In light of the objectives of the FTA MAP Forum – and, in particular, in view of the role of the FTA MAP Forum in monitoring the implementation of the minimum standard set out in this Report . . . countries should become members of the FTA MAP Forum and participate fully in its work."). The OECD's Forum on Tax Administration was formed in 2002. *Forum on Tax Administration*, *supra* note 4. It created the FTA MAP Forum in 2013. Forum on Tax Admin., *FTA Work Programme 2013/14*, OECD.ORG, https://www.oecd.org/site/ctpfta/ftaworkprogramme201213.htm (last visited Nov. 25, 2016); *see also* Forum on Tax Admin., *Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous Map Improvement*, OECD.ORG, http://www.oecd.org/site/ctpfta/map-strategic-plan.pdf (last visited Oct. 19, 2016) [hereinafter *Multilateral Strategic Plan*] ("The Forum on Tax Administration has determined that competent authorities from among the FTA-member countries shall form a forum (the FTA MAP Forum) to meet

the time the Action 14 Report was issued.[132] While details have not yet been formally released, it appears that countries that elect to become BEPS Associates will simultaneously become members of the various tax-related OECD forums and committees. The OECD describes the FTA MAP Forum as "a subsidiary body of the OECD Committee on Fiscal Affairs [that] brings together Commissioners from 46 countries to develop on an equal footing a global response to tax administration issues in a collaborative fashion."[133] The FTA MAP Forum was "created to deliberate on general matters affecting all participants' MAP programmes," and has developed a "multilateral strategic plan" to improve MAP "in order to meet the needs of both governments and taxpayers and so assure the critical role of the MAP in the global tax environment."[134]

As a minimum standard with an envisioned outcome rather than a specified rule, the dispute resolution standard is distinct from the foregoing three minimum standards. It lacks concrete criteria and implicitly relies on cooperation among states, rather than being capable of unilateral implementation. The other three minimum standards are capable of being carried out by states independently, by adopting appropriate rules into national legislation and administrative practice, regardless of the action or inaction of other states. Even if non-cooperation by other states would be damaging to the implementing state, the implementation language, and in some cases the peer review mechanism, would be capable of measuring compliance with the first three minimum standards on a state-by-state basis, but that is not the case for dispute resolution. Achieving improvements in MAP resolution seems comparatively abstract relative to, for example, adopting a nexus-based rule for locating the income of intangibles. It is also heavily dependent on the cooperation of the partner country with which the dispute has arisen, unless the OECD means to imply that states have committed to reducing the resolution time even if that means compromising legal principles and rules.

Thus, the dispute resolution minimum standard appears to be a modest, incremental step toward the ultimate incorporation of

regularly to deliberate on general matters affecting all participants' programs for conducting mutual agreement procedures.").

132. *See Forum on Tax Administration*, *supra* note 4.

133. ACTION PLAN 14, *supra* note 54, at 16 (footnote omitted).

134. *Id.*

mandatory binding arbitration—a priority of only a few key OECD states at this time. Its inclusion on the MLI agenda and in the Model Tax Convention marks this policy as a highly likely candidate for a more concrete minimum standard in a future iteration of cooperation to counter BEPS.

## III. IMPLEMENTATION ARCHITECTURE: FIVE PILLARS

Having reviewed the core elements of implementation, we may now categorize the BEPS priorities in some fashion by examining the nature of their implementation plans. The following table (Table 2) summarizes the five mechanisms that will be used to implement the various BEPS standards, recommendations, and best practices, or what we may describe as the five pillars in the architecture of the international tax order. They are:

(1) domestic adoption (law/practice);
(2) adoption in new bilateral treaties;
(3) adoption in the forthcoming multilateral instrument (MLI);
(4) adoption in OCED models and guidance; and
(5) peer review within the OECD Inclusive Framework.

Each of these pillars fulfills a distinct function in the development and deployment of global tax norms. It is important to note that as of this writing, there is no cross-country comparison of domestic legislation implementing BEPS, nor are there drafts of the proposed MLI,[135] the revised OECD Model, or the revised transfer pricing

135. On May 31, 2016, the OECD released a document it referred to as a "public discussion draft" of the MLI, however there are no terms to be reviewed because, as the OECD stated in the Action Plan, "the draft text of the multilateral instrument is the subject of intergovernmental discussions in a confidential setting." OECD, BEPS ACTION 15: DEVELOPMENT OF A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY RELATED BEPS MEASURES 1 (public discussion draft ed. 2016) [hereinafter MLI DISCUSSION DRAFT], http://www.oecd.org/tax/treaties/BEPS-Discussion-draft-Multilateral-Instrument.pdf. Instead, the MLI Discussion Draft explains why the OECD undertook this project and what has happened so far, describes what BEPS changes will be covered in the MLI once drafted, lays out three "technical issues" the OECD faces in drafting the MLI, and finally gives the call for input. *Id.* at 1–3. The three issues, in brief, are that the MLI must be able to modify existing treaties by using "compatibility clauses," that the MLI will be broadly worded and so will require commentary and maybe explanatory notes for consistent interpretation, and that the MLI will

guidelines, and only one set of terms of reference for peer review has been released.[136] Accordingly, the table below contains several areas of uncertainty regarding potential overlap or multiplication of implementation modes. For example, it is not always clear from the OECD's action plans whether proposed reforms will be introduced only in the MLI, only in the OECD Model, only in the transfer pricing guidelines, or in some combination thereof; these uncertainties are indicated by bracketing prescribed reforms where relevant.

**Table 2: Five Mechanisms to Implement BEPS**[137]

| **[1] Domestic Adoption (Law/Practice)** | **[2] Adoption in New Bilateral Treaties** | **[3] Adoption in MLI** | **[4] Adoption in OCED Models and Guidance** | **[5] Peer Review and Monitoring** |
|---|---|---|---|---|
| CbC Reporting | CbC Exchange | | [CbC Exchange] | Compliance with Standard (via Global Forum) |
| IP Nexus Rule | | | | Compliance with Standard Preferential Rulings-HTP Forum |
| | PPT/LOB/ Combination | PPT/LOB/ Combination [Saving Clause, Modified Preamble] | PPT/LOB/ Combination; Saving Clause; Modified Preamble | Compliance with Standard (Inclusive Framework) |

be in French and English but will interpret thousands of treaties written in different languages. *Id.* at 2–3.

136. ACTION 14 TERMS OF REFERENCE, *supra* note 5.

137. For ease in reading, this table omits all citations to the minimum standards discussed above and includes only references to action plans not discussed in the foregoing section.

| | | | | |
|---|---|---|---|---|
| Improve MAP Resolution | | Change MAP Resolution-Mandatory Binding Arbitration | Change MAP Resolution -Multilateral MAP Possible | Compliance with Standard (MAP Resolution Time and Good Faith), via FTA MAP Forum |
| | | Modify PE Definitions, Exceptions[138] | Modify PE Definitions, Exceptions | |
| | | Hybrid Mismatch Rule | Hybrid Mismatch Rule | |
| | | | | Improve OECD Access to Data[139] |
| | | | Interest Deductibility Limitations; [Mandatory Disclosure, Exchange via JITSIC][140] | Interest Deductibility Rules |
| | | | Modification s to TP Allocation, Valuation | |
| | | | | CFC Definitions |

The mechanisms used for implementation confirm that CbC reporting and exchange, countering treaty abuse, and the IP nexus rule are main priority areas for the OECD. Terms of reference regarding the scope of peer monitoring will further crystallize these high-priority items. At the same time, the presence of alternatives even

138. ACTION PLAN 1, *supra* note 67; ACTION PLAN 8-10, *supra* note 86; OECD, PREVENTING THE ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS, ACTION 7–2015 FINAL REPORT 9–13 (2015), http://www.oecd-ilibrary.org/docserver/download/2315341e.pdf.

139. ACTION PLAN 11, *supra* note 67.

140. ACTION PLAN 12, *supra* note 67, at 81–82.

in consensus areas suggests that harmonization will not be achieved in this phase of BEPS implementation, and it is not clear how the options will be applied in the context of the MLI.

As the newest pillar in the international tax order, the MLI is particularly notable for its potential to permanently alter the architecture of international tax relations. The MLI is a multilateral agreement designed to be capable of "modifying" all existing tax treaties at once.[141] The potential impact of the MLI depends very much on its legal design, which has not yet been crystallized, but some preliminary observations may be made.

The MLI is not a protocol to existing treaties. Rather, it is a separate treaty that is intended to either supplement or address specified omissions in existing bilateral treaties without overriding the remaining provisions.[142] The distinction between supplementing and overriding could be significant in terms of the MLI's operation and interpretation. A treaty that is amended by a protocol operates on a consolidated basis, under which the protocol explicitly adds wholly new provisions or overrides specified provisions in the prior treaty (and prior protocols, where applicable), or both.[143] A protocol typically strikes certain portions of the treaty and inserts new language.[144] The

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141. ACTION PLAN 15, *supra* note 4, at 9.

142. ACTION PLAN 15, *supra* note 4; *see also* Bravo, *supra* note 130, at 347–50.

143. *See, e.g.*, Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 INT'L TAX & BUS. LAW. 1, 16–18 (1986) (explaining the process whereby tax treaties are negotiated and entered into in the United States); Bravo, *supra* note 130, at 347–50 (discussing general views of hierarchy of authority of treaties).

144. For example, the Canada-U.S. double tax convention has been modified multiple times by protocol, and the government of Canada provides an unofficial consolidated version online. *See* Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital, https://www.fin.gc.ca/treaties-conventions/unitedstates-etatunis-eng.asp (explaining that this "consolidated version of the Canada-United States Convention with Respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007, is provided for convenience of reference only and has no official sanction"). In contrast, the IRS provides a consolidated version of the same treaty through four protocols, and separately includes the most recent protocol. IRS, Canada – Tax Treaty Documents, https://www.irs.gov/businesses/international-businesses/canada-tax-treaty-documents. Each protocol indicates the portions of the original treaty and prior protocols that are thereby struck and what new provisions are added. *See, e.g.*, Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital Done at Washington on 26 September 1980 as Amended by the Protocols Done on 14 June 1983, 28 March 1984, 17 March 1995 and 29 July 1997 (2007), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-Canada-9-21-2007.pdf.

MLI may not be capable of striking portions of existing treaties to the extent the text of one treaty diverges from that of the next.[145] Further, as the MLI will be released only in English and French,[146] this problem is accentuated by the existence of hundreds of treaties in other languages. Because of these difficulties, the MLI is being designed as a stand-alone instrument that is to be read in some fashion alongside existing treaties. This raises the possibility of inconsistent application and interpretation, which is already a central problem in the interpretation of existing tax treaties.[147] The OECD plans to counter this via "compatibility clauses" to attain consistency and harmonization.[148]

It is not yet clear how the MLI will function in terms of its relationship with the existing bilateral treaty network.[149] One possibility is that the instrument is transitory, and will only extend its provisions to current treaties until some future date at which they will be modified by protocols. To the extent any treaties remain static while others adopt the provisions of the MLI through protocol, the MLI would be a permanent treaty but with decreasing applicability over time. An opposite result could be that the MLI would itself be expanded by protocol, and thereby extend its coverage and ultimately replace the bilateral treaties it modifies by making them superfluous or defunct. If that happens, the multilateral modification function may be an exercise in creeping harmonization as well as a means to

145. While most bilateral tax treaties are based at least in part on the OECD Model, this does not ensure consistency, as each treaty is ultimately the product of bargaining between the parties.

146. MLI DISCUSSION DRAFT, *supra* note 135, at 3.

147. Vogel, *supra* note 143, at 29–43.

148. *See* Bravo, *supra* note 130, at 343.

149. The discussion that ensued at a public meeting regarding the MLI in July 2016 demonstrated that the technical workings of this instrument were at that time yet unknown. *See Public Consultation on the Multilateral Instrument to Implement the Tax-Treaty Related BEPS Measures*, OECD (July 7, 2016), http://video.oecd.org/2878/or/Public-consultation-of-the-Ad-Hoc-Group-on-the-Multilateral-Instrument.html [hereinafter *OECD Public Consultation*] (providing meeting transcript and video recording). Some commentators thought the OECD should develop new commentary to be developed to explain the MLI, that new commentary should supersede existing commentary to the OECD Model, that any country signing on to the MLI should be required to sign on to the commentary as well, that national interpretations of the MLI should be subject to peer review within the OECD, and that national interpretations of the MLI should be made public in order to build a common approach and expose inconsistent positions. OECD, COMMENTS RECEIVED ON PUBLIC DISCUSSION DRAFT, BEPS ACTION 15: DEVELOPMENT OF A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY RELATED BEPS MEASURES (2016), http://www.oecd.org/ctp/treaties/public-comments-received-discussion-draft-Development-of-MLI-to-Implement-Tax-Treaty-related-BEPS-Measures.pdf.

gradually ossify other forms of OECD soft law into hard law. This seems especially likely to the extent provisions in the MLI are also replicated in the OECD Model, since this would reopen the discussion about the legal status of the commentaries to the OECD Model. Moreover, if the commentaries are drafted by working parties of OECD members, there is a divergence of participation.

Like the other four pillars of international tax, the MLI appears intended to bring about a much more cohesive integration of international tax policies across sovereign states. It is, finally, the multilateral agreement on tax that the original experts at the League of Nations had so hoped for and worked toward.

If the OECD is successful in achieving its goals in developing the MLI, the logic of further integration and harmonization through multilateral regulatory and quasi-judicial review will be primary topics for negotiation in the not-too distant future. The architecture of BEPS implementation thus takes on an important role as patterns of agenda-setting and norms of inclusion and participation determined today set the stage for cooperation tomorrow.

Arguably, the Inclusive Framework is the key accomplishment of the BEPS initiative, as this is the means by which the OECD will cement its position as the institution where tax policy development takes place for the foreseeable future. The OECD made three promises to all countries that join the Inclusive Framework: first, that the OECD measures will protect the participant country's tax base; second, that participation in the framework will enable the country to be "part of an inclusive dialogue on an equal footing [to] directly shap[e] the standard setting and monitoring processes on BEPS issues"; and third, that participation will allow countries to access "capacity building support for the implementation process including guidance on developing Action Plans for BEPS implementation."[150] These are common forms of soft law governance designed to ensure states comply even in the absence of legal consequences for noncompliance.

In the summer of 2016, the OECD gathered representatives of more than eighty countries in Kyoto to discuss the structure and functions of the Inclusive Framework, which will include drawing up

150. OECD, INCLUSIVE FRAMEWORK ON BEPS: A GLOBAL ANSWER TO A GLOBAL ISSUE 2 (2016), https://www.oecd.org/tax/flyer-implementing-the-beps-package-building-an-inclusive-framework.pdf.

terms of reference for peer review and monitoring.[151] The OECD set up a steering group and decided on procedure for accepting new members to transition on timeline requirements.[152] The task of the steering group is to determine how peer review on the various minimum standards and peer monitoring of related prescriptions will proceed.[153] The steering group membership is made up of twelve of the member countries of the G20 in addition to eight BEPS Associates.[154] The Inclusive Framework thus introduces a potential avenue for non-OECD countries to have a meaningful say in norm building exercises undertaken by the OECD, but with a great deal of agenda-setting directed mainly by OECD member states, the outcome is not yet certain.

## IV. IMPLICATIONS AND CONCLUSIONS

With the combined elements and mechanisms of BEPS, including the use of the new Inclusive Framework to monitor national compliance with the minimum standards and achieve consensus on issues that fell short of universal agreement in the current initiative, the OECD might be said to be giving birth to a new global tax order complete with rules, audits, and reform processes. There will most certainly be a BEPS 2.0 and beyond. A still-unanswered question is whether the expanding forum can successfully rally non-OECD countries behind OECD-led initiatives for the indefinite future. This is perhaps not the order envisioned by those who have in the past called for global tax coordination in a supranational body for the sake of pursuing global tax justice. If the OECD-based regime is not fully supranational yet, it is close. The development of the first truly multilateral agreement on tax, as the original architects of

151. *First Meeting of the New Inclusive Framework to Tackle Base Erosion and Profit Shifting Marks a New Era in International Tax Co-operation*, OECD.ORG (June 30, 2016), http://www.oecd.org/countries/georgia/first-meeting-of-the-new-inclusive-framework-to-tackle-base-erosion-and-profit-shifting-marks-a-new-era-in-international-tax-co-operation.htm [hereinafter *First Meeting*].

152. OECD, DOC. NO. DCD/DAC/RD(2016)12/RD1, TAX AND DEVELOPMENT: AN UPDATE 2 (2016) [hereinafter TAX AND DEVELOPMENT: AN UPDATE], http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/RD(2016)12/RD1&docLanguage=En (explaining the developments at the Kyoto meeting and describing the composition of the steering group).

153. OECD, *First Meeting*, *supra* note 151.

154. *See* OECD, Steering Group of the Inclusive Framework on BEPS: Members, at http://www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf.

international tax cooperation first envisioned a century ago, is a significant step.

In particular, establishing an Inclusive Framework is a momentous event in international tax governance. It seems clear that in developing a wholly new institution to bring OECD and non-OECD members together in a problem-solving forum, the OECD seeks to create a body that appears for all purposes to be as inclusive as the United Nations. However, the new OECD forum is not in fact similarly inclusive—the BEPS initiative was initiated by and for its member countries, and extension beyond the OECD is generally meant to further the agreed agenda rather than open up the discussion to consider new items.[155]

Even so, the Inclusive Framework might facilitate the participation of stakeholders beyond member country government representatives and private sector tax professionals, namely the nongovernmental sector. Nongovernmental organizations, such as the Tax Justice Network, were instrumental in creating the socio-political conditions that led the OECD to develop the BEPS initiative, and they will have an interest in participating in tax governance going forward. At least some nongovernmental organizations and independent researchers have called for an international tax organization that would bring together all countries to engage in cooperation and end tax competition. The OECD's new Inclusive Framework may not be the

155. *See* TAX AND DEVELOPMENT: AN UPDATE, *supra* note 152, at 2 (describing the OECD agenda and explaining that the OECD's goal is to "build[] on previous efforts to integrate and support developing countries into the norm setting work of the OECD"); *see also* Dagan, *supra* note 22, at 17–18. That the agenda setting stage has passed is confirmed in the Action 14 Terms of Reference, which explains that

> [t]he terms of reference do not alter the Action 14 minimum standard and in case of any differences arising from the interpretation of any elements of the terms of reference and the Action 14 minimum standard, the review of the assessed jurisdiction shall be conducted based on the minimum standard contained in the 2015 Action 14 Report.

ACTION 14 TERMS OF REFERENCE, *supra* note 5, at 9. This suggests that any concerns not raised in the context of the preparation of the 2015 Action 14 Report will not be raised in the implementation phase. It is possible, however, that the OECD will consider new ideas and issues in 2020. The OECD has implied in discussions with non-OECD states that there may be room for such deliberation. TAX AND DEVELOPMENT: AN UPDATE, *supra* note 152, at 2 ("The Inclusive Framework is already providing a venue for developing countries to raise new ideas and concerns, supported by more institutionalised regional meetings of the Framework. There are already calls on the OECD to help on tax policy analysis, and some fundamental tax issues of concern to developing countries (such as the allocation of taxing rights between source or residence countries) are surfacing.").

one envisioned by these tax justice advocates, but it may prove to be adaptable to their purposes.

As the OECD moves from building and articulating consensus positions to implementing agreed standards, recommendations, and best practices in the BEPS process, the organization is both expanding and hardening the multiple ways in which it manages global tax policy discourse. The BEPS action reports are merely the beginning of an iterative cycle of pluralistic legal regime development. The implementation phase will provide a rich array of data for further analysis in the years to come.