

The Study of the BEPS 4 Minimum Standards as A Legal Transplant: A Methodological Framework*

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This policy note aims at setting a methodological framework for the study of legal transplants in taxation and more specifically to the use of the comparative legal theories of legal transplants, legal (tax) systems and legal (tax) culture to study the implementation of the Base Erosion and Profit Shifting (BEPS) 4 Minimum Standards. Attention will be given to the following questions who is participating as donor or recipient and why? how the tax systems and tax culture (actors) influence the process? and what are the rules that will be implemented?

By using comparative legal theories, this policy note allows to explain the reasons why countries decided to implement the BEPS 4 Minimum Standards. These reasons are for instance, prestige, political incentives, and chance and necessity. Furthermore, the study of the differences in tax systems and tax culture can allow policy makers in international organizations and countries to understand the transplantation process and the development of tax rules implementing the BEPS 4 Minimum Standards. The theory of tax systems will take into account the differences between civil law, common law and mixed legal systems. The theory of tax culture will take into account the behaviour, values and attitudes of the relevant actors (the courts with tax competence, tax law-makers, taxpayers, tax administration, business associations, tax advisors, scholars, and civil society Non-Governmental Organization (NGOs.)). In order to illustrate these differences, this policy note has addressed the implementation of the Principal Purpose Test in the countries participating in the BEPS Inclusive Framework.

Keywords: Legal transplants, tax culture, BEPS, global tax governance, principal purpose test, international taxation.

I INTRODUCTION

The overall aim of this policy note is to develop a methodological framework for the study of the BEPS 4 Minimum Standards in light of comparative law theories of legal transplants, legal system and legal culture.

In 2013, the OECD with the political mandate of the G20 introduced the Base Erosion and Profit Shifting (BEPS) Project. The aim of this project was to tackle aggressive tax planning by multinationals.¹ The BEPS Project and its Inclusive Framework provided for the introduction of 4 Minimum Standards. These Minimum Standards comprise four of the fifteen Actions of the BEPS Project which has been developed by the OECD with the

political support of the G20. The BEPS 4 minimum standards that should be implemented are countering of harmful tax practices and exchange of rulings (Action 5), preventing of treaty abuse (Action 6), re-examining transfer pricing documentation including country by country reporting (Action 13), and enhancing resolution of disputes (Action 14).

The contents of the fifteen Actions has been decided by the OECD, G20 and OECD accession countries (i.e. the BEPS 44 group).² However, with this BEPS Inclusive Framework, countries outside the BEPS 44 group have been also invited to participate on equal footing in the implementation, monitoring and peer review of the 4

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¹ BEPS refers to 'tax planning strategies that exploit gaps in the architecture of the international tax system to artificially shift profits to places where there is little or no economic activity or taxation'. OECD, BEPS Frequently asked questions. <https://www.oecd.org/ctp/BEPS-FAQsEnglish.pdf> (accessed June 2020).

² On decision making by the BEPS 44, see I. J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 World Tax J. 3 (2015).

Minimum Standards. As of June 2020, 137 jurisdictions³ have committed to participate in this Framework and to implement these Minimum Standards.

The BEPS Project also contains in Action 15 a Multilateral Instrument to modify bilateral tax treaties (in force since July 2018). This Multilateral Instrument contains two of the 4 Minimum Standards (i.e. Action 6 and Action 14). As of June 2020, ninety-four jurisdictions have signed the Multilateral Instrument and for forty-seven of these jurisdictions,⁴ the Multilateral Instrument has entered into force after deposit of the instrument of ratification.

The participation of non-OECD, non-G20 countries in OECD-G20 initiatives is not new. In 2009, the OECD with the political mandate of the G20 introduced the global standard on exchange of information and since 2013 automatic exchange of financial accounting information.⁵ But unlike exchange of information which has been mainly introduced in bilateral and multilateral instruments⁶ and aims at international tax cooperation among countries, the BEPS 4 Minimum Standards contains detailed rules that will need to be introduced by law-makers in the domestic and treaty law of the countries committed to the BEPS Inclusive Framework.

Therefore, countries participating in the BEPS Inclusive Framework are not only required to change their tax treaties, but also to align their domestic laws with the BEPS 4 minimum standards. For instance, at domestic level, countries have (1) modified their preferential tax regimes to remove any harmful features, (2) introduced rules to provide for automatic exchange of rulings, (3) introduced requirements for reporting of

transfer pricing documentation, and (4) introduced rules to make possible the resolution of tax disputes.

At treaty level, countries have also changed their tax treaty abuse provision (either through bilateral negotiation or in the Multilateral Instrument) which will also influence the application of domestic anti-abuse provisions in the country. Countries have also introduced the mutual agreement procedure and in some cases also introduced a mandatory arbitration provision (even though it is not required in the minimum standard). The changes made in the countries' tax system and tax treaties have been monitored in the peer review reports.⁷ Scholars have addressed the changes introduced by BEPS in several articles dealing either with the content of a specific Minimum Standard in a specific country or region,⁸ or the Multilateral Instrument⁹ or by addressing the legal system¹⁰ and cultural differences¹¹ in the implementation of BEPS. However, in the literature, the articles addressing the BEPS as a legal transplant are scarce,¹² and the use of comparative law theories to study BEPS are lacking.

By using comparative legal theories, this policy note will introduce the methodological framework to the study of the BEPS 4 Minimum Standards as a legal transplant in order to identify the reasons why countries have committed to implement the BEPS 4 Minimum Standards. In addition, the theory of legal transplants can be useful to study how these Minimum Standards will be implemented in the jurisdictions participating in the BEPS Inclusive Framework taking into account the differences in legal systems (i.e. civil law, common law, mixed system). Furthermore, the theory of legal culture can be useful to understand if there are differences in the

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³ OECD, Members of the OECD/G20 Inclusive Framework (Dec. 2019), <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> (accessed June 2020).

⁴ OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (status as of 27 May 2020), <https://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf> (accessed June 2020).

⁵ See Global Forum on Transparency and Exchange of Information. OECD, *The Global Forum*, <https://www.oecd.org/tax/transparency/> (accessed June 2020).

⁶ To facilitate exchange of information several bilateral and multilateral instruments have been adopted/introduced by countries. Countries have concluded more bilateral tax treaties, tax information exchange agreements (TIEAs). Countries have also signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, endorsed the Common Reporting Standard on Automatic Exchange of Financial Accounting Information, and signed Multilateral Competent Authority Agreements.

⁷ The peer review reports are available for each standard at the OECD website. See OECD, *International Collaboration to End Tax Avoidance*, <https://www.oecd.org/tax/beps/> (accessed June 2020).

⁸ M. A. Ahmed, *Pakistan: Bracing for BEPS*, 48(3) Intertax 329–345 (2020); A. W. Oguttu, *Resolving Treaty Disputes: The Challenges of Mutual Agreement Procedures with a Special Focus on Issues for Developing Countries in Africa*, 70 Bull. Int'l Tax'n 12 (2016), s. 9; *Implementing Key BEPS Actions: Where Do We stand?*, WU Series Volume 12 (M. Lang, et al. eds, 2019). The book contained several reports of several EU Member States, Australia, Canada, China, Indonesia, Japan, Pakistan, Singapore, Turkey and the United States, some Latin American countries, i.e. Argentina, Brazil, Costa Rica, Colombia and Mexico, and some African countries (Kenya and South Africa); *Voices: BEPS and Beyond* (S. Sim & M.-J. Soo eds, IBFD 2017); C. V. Duran et al., *2018 BEPS in Latin America (Part I): A Review of the Implementation of Minimum Standards and the Peer Review Process*, IBFD White paper (2018) and C. V. Duran et al., *BEPS in Latin America (Part II): A Review of the Implementation of Actions 2, 3, 4 and 12*, IBFD White paper (2018); A. Christians & S. Shay, *General Report*, in *Assessing BEPS: Origins, standards, and Responses*, IFA Cahiers vol. 102A (IBFD 2017), includes developments regarding the OECD/G20 BEPS initiative in respect of forty-eight countries, such as Member States of the European Union, Australia, Canada, Singapore, and the United States, some Latin American countries, i.e. Argentina, Brazil, Colombia, Mexico and Venezuela, and one African country, i.e. South Africa.

⁹ For a discussion of the MLI, see R. García Antón, *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?*, 8(2) World Tax J. (2016); N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8(3) World Tax J. (2016); M. Lang, *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (Kluwer Law International 2018).

¹⁰ See for instance I. J. Mosquera Valderrama & Irene J. J. Burgers, *Review of Anti-Avoidance Measures of a General Nature and Scope: general Anti-Avoidance Rules and Other Measures*, 73(10) Bull. Int'l Tax'n (2019). Another example is the recent analysis of the UK GAAR in J. Freedman, *The UK General Anti-Avoidance Rule: Transplants and Lessons*, 73(6) Bull. Int'l Tax'n (2019).

¹¹ A. Myszkowski *Mind the Gap: The Role of Politics and the Impact of Cultural Differences on the OECD BEPS Project*, 70(5) Bull. Int'l Tax'n (2016).

¹² One exception is Freedman, *supra* n. 10.

implementation of these Minimum Standards and to explain the reason for these differences. The study of the BEPS 4 Minimum Standards as a legal transplant in light of the differences in legal (tax) systems and legal (tax) culture is currently being carried out in the framework of the project GLOBTAXGOV¹³

This policy note is structured as follows. Section 2 provides a short introduction to the study of legal transplants, legal systems and legal culture in taxation. Section 3 will analyse the BEPS as a legal transplant and will provide the methodological framework to study the BEPS 4 Minimum Standards as a legal transplant. Section 4 will provide the conclusions and recommendations for further research.

2 THE STUDY OF LEGAL TRANSPLANTS, LEGAL SYSTEMS AND LEGAL CULTURE IN TAXATION

2.1 General Features of the Theory of Legal Transplants¹⁴

In the general theory of comparative law, the phenomenon of legal transplants has been referred to by scholars in different ways.¹⁵ Sacco claims that comparative law amongst others studies 'the way in which legal institutions are connected, diversified, and transplanted from one country to another'.¹⁶ To address legal transplants, words such as borrowing, reception, imitation, and legal transposition have been used.¹⁷

Despite of the use of different terminology, the essence of legal transplants as initially¹⁸ formulated by Watson as

'the moving of a rule or a system of law from one country to another'¹⁹ still remains. In Watson's view, specific rules, institutions, legal concepts and structures can be borrowed.²⁰ In the same direction, Zongling states that even a whole legal system, a whole code or a whole branch of law of the foreign country can be transplanted.²¹ Nonetheless, it should be noted as rightly argued by Watson that transplanting the rules does not imply that the spirit of a legal system is transplanted as well.²²

Smits argues that legal transplants imply that, in principle, the legal rule transplanted will be the same in the recipient countries as in the donor country. However for Smits upon transplantation into another legal system the legal rules will change and therefore legal transplants are not possible.²³ It is not the purpose of this policy note to further analyse whether the term legal transplant is a good description of the phenomenon of borrowing rules or legal concepts of one country (i.e. donor) into that of another country (i.e. recipient). Hence, for the purpose of this description the term legal transplants will be used.

In this article, I shall follow the approach of Watson and Zongling in respect of the transplantation into a legal system of rules, codes, branches of law, etc.

Legal transplants can take place by means of imposed reception (authority) or voluntary reception. Moreover, transplantations can take place because the law-maker makes the decision to transplant (part of) the law of another country (intended transplantation) or due to the globalization of the world-business economy (unintended transplantation).

Transplantation may for instance be imposed by a supranational institution such as the European Union for countries wishing to join the European Union ('*acquis*

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¹³ The Research Project GLOBTAXGOV investigates 'A New Model of Global Governance in International Tax Law Making' in twelve countries. See *supra* n. 1.

¹⁴ This section is based in the PhD dissertation by I. J. Mosquera Valderrama, *Leasing and Legal Culture: Towards Consistent Behaviour in Tax Treatment in Civil Law and Common Law Jurisdictions* (VDM Publishing 2010).

¹⁵ There are two authors that initially addressed the concept of legal transplant, i.e. Watson and Kahn-Freund. Ewald has pointed out Watson as the initiator of the theory of legal change where 'the growth of law is principally to be explained by the transplantation of legal rules'. W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43(4) Am. J. Comp. L. 489 (1998). However, there are other divergent views, pointing at Kahn Freund as the one who introduces legal transplants mainly taking into account the use of legal transplants and the relationship between law and society. See O. Kahn-Freund *On Uses and Misuses of Comparative Law*, 37(1) Mod. L. Rev. (1974). For an analysis of both theories in legal transplants, see A. Grant & I. Mosquera Valderrama, *Análisis del Contexto y Fiscalidad Internacional: El Trasplante de los Estándares Mínimos del Proyecto BEPS Dentro y Fuera de la OCDE* (Analysis of Context and International Tax: The Transplant of the BEPS Project Minimum Standards Inside and Outside the OECD), in *Tributación internacional. Fiscalidad en las inversiones transfronterizas* 93–112 (A. Cubero Truyo & P. Masbernat eds, Spain: Aranzadi 2020).

¹⁶ R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law, Instalment II of II*, 39 Am. J. Comp. L. 388 (1991).

¹⁷ Various terms have been used to refer to transplantation and its process. For instances Öriücü argues that 'Classical statements of legal transplants use terms such as transplant, reception, imposed reception, solicited imposition, crypto-reception and inoculation. These terms have been superseded and a colourful vocabulary has been created highlighting, cross-fertilization, infiltration, infusion, transposition, emulation, engulfment, grafting, re-potting, cross-pollination, digestion, salad bowl and melting pot'. E. Öriücü, *Chapter 1. Unde vendit, quo tendit comparative Law?*, in *Summary Comparative law in the 21st century* 7 (E. Öriücü & A. Harding eds, Kluwer Law International 2002).

¹⁸ Ewald has pointed out Watson as the initiator of the theory of legal change where 'the growth of law is principally to be explained by the transplantation of legal rules'. W. Ewald, *supra* n. 15, at 489.

¹⁹ A. Watson, *Legal Transplants* 21 (Scottish Academic Press Ltd., 1974).

²⁰ A. Watson, *Legal Transplants and European Private Law*, 4(4) Elec. J. Comp. L. (2000).

²¹ S. Zongling, *Legal Transplant and Comparative Law*, *Revue Internationale de droit comparé*, 855 (1999).

²² Watson, *supra* n. 20.

²³ J. Smits, *Chapter 8: On Successful Legal Transplants in a Future Ius Commune Europaeum*, in *Summary Comparative Law in the 21st century* 143 (E. Öriücü & A. Harding eds, Kluwer Law International 2002); See also P. Legrand, *European Legal Systems Are Not Converging*, 45(1) Int'l & Comp. L. Q. 79 (Jan. 1996).

communautaire) or by other international institutions such as the International Monetary Fund ('IMF').²⁴

Intended transplantation can take place for instance where the law-maker carries out a comparative research of the tax system (or a tax concept) of other countries in order to implement the system or specific rules into its own system. For example the general reporter in the study in respect of group taxation conducted by the International Fiscal Association in 2004 pointed out that in group taxation regimes 'key ideas were transplanted from one jurisdiction to another in the past, by way of comparative studies by policy-makers'.²⁵

Unintended transplantation can take place due to globalization. Gerber rightly argues that globalization 'brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It influences what legal professionals ... know about foreign law'.²⁶ Thus, in the world-business economy where cross-border transactions take place, legal practitioners may influence the transplant of one concept into their tax system.

Different reasons have been given by scholars as to the predominant factor in determining which laws are transplanted.²⁷ Legal transplants may take place because of (1) authority,²⁸ (2) prestige,²⁹ (3) chance and necessity,³⁰ (4) expected efficacy of law,³¹ and (5) political, economic and reputational incentives.³²

*Examples*³³:

(1) Authority: For Watson, the explanation of the development of legal transplants lies in the need for authority. Watson refers that: 'In the absence of legislation, which typically has been scarce for private law, law making is left to subordinates – judges and jurists – who, however, are not given power to make law. They must justify their opinion. It will not do to say "This is my decision because I like the result". They must seek authority'.³⁴

(2) Prestige: Some Latin American countries follow the French private law system because of the prestige that this legal system achieved resulting in the reception by Latin American countries of the French Code (*Code Napoléon*)³⁵. For instance, Colombia voluntarily, almost blindly transplanted the French Code. According to Berkowitz, 'the laws were chosen and adopted without even considering their contents'.³⁶

(3) Efficacy of law: In order to create a more neutral system the Dutch classical system in 1997 was replaced by a modified classical system similar to the system applied in Belgium. In 2002, for similar reasons, Germany replaced the imputation system for a similar system.³⁷

(4) Chance and necessity: For instance the substance over form doctrine in taxation in civil law countries has its 'roots in the Roman law concept of dispositions *in fraudem legis*'.³⁸ Notwithstanding this approach, in principle, in the Netherlands (to some extent a civil law country), the concept of *fraudem legis* is applicable without recognition to the substance over form doctrine.³⁹

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²⁴ For example, the use of the IMF Fund-supported programmes that have resulted in countries making changes to their tax systems in order to raise revenue. As referred by Vito Tanzi stating that 'many of the Latin American countries that have faced macroeconomic difficulties and that have chosen to go to the IMF for Fund-supported programs have given a particular importance to the objective of raising revenue'. V. Tanzi, *Taxation in Latin America in the Last Decade. Center for Research on Economic Development and Policy Reform*, Stanford University, Working Paper Number 76, at 2 (2000). See s. 2.2, *infra*.

²⁵ Y. Masui, *General Report*, in *Group Taxation*, Cahiers de droit Fiscal International Volume 89b, 29 (SDU Uitgevers 2004).

²⁶ D. J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law* 75 Tul. L. Rev. 950 (1990).

²⁷ For an historical overview of the key developments and debates within the legal transplant literature, see T. S. Goldbach, *Why Legal Transplants?* 15(583) Ann. Rev. L. & Soc. Sci. 601 (2019).

²⁸ A. Watson, *Legal culture v. Legal Tradition*, in *Epistemology and Methodology of Comparative Law*, Ch. 1 2–3 (M. van Hoecke ed., Hart Publishing 2004).

²⁹ R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)*, 39(2) Am. J. Comp. L. 398 (1991).

³⁰ E. Örtücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, 4(1) Elec. J. Comp. L. 1 (1999).

³¹ D. Berkowitz, K. Pistor & J. F. Richard, *Economic Development, Legality and the Transplant Effect*, CID working papers No. 39, 16 (Mar. 2000).

³² F. Schauer, *The Politics and Incentives of Legal Transplantation*, CID Working Paper No. 44, 22 (Apr. 2000).

³³ See Valderrama, *supra* n. 14. See also I. J. Mosquera Valderrama, *Legal Transplants and Legal Culture in the Study of Tax Law*, 143 *Forfaitair* 13, 17 (2004); I. J. Mosquera Valderrama, *Legal Transplants and Comparative Law*, 1(2) *Revista Colombiana De Derecho Internacional* 261, 276 (2003).

³⁴ Watson, *supra* n. 28, at 2–3 One example in private law is the use of Roman Law including the *Corpus Iuris Civilis* in civil law countries. Therefore, in order to seek authority, judges can refer to the use of private law concepts such as property, possession, usufruct as developed in Roman Law. See for instance, R. Domingo Osle, *The Law of Property in Ancient Roman Law* (June 2017), <https://ssrn.com/abstract=2984869> (accessed June 2020).

³⁵ In the search for a civil Code by Latin American countries the French Code was regarded as 'the product of the Great Revolution, rooted in a world of ideas on which the Latin Americans had frequently drawn to justify their own struggles for independence. In its compactness and terseness of phrase the Code civil was far ahead of any other model, and furthermore it was so full of traditional concepts and ideas, especially from Roman law, i.e. reception represented no breach with the legal institutions familiar to the Spanish and Portuguese settlers'. K. Zweigert & H. Kötz, *Introduction to Comparative Law* 113–114 (3d ed., translated by Tony Weir, Clarendon Press 1998).

³⁶ Berkowitz, Pistor & Richard, *supra* n. 31, at 7.

³⁷ The Dutch classical system applied up to 1997 caused double taxation and was not neutral towards financing. The Belgium modified classical system did not have these drawbacks. In 1997 the Dutch decided to replace their classical system with a modified classical system. See Valderrama, *supra* n. 14, at 12.

³⁸ In this regard, the general reporter Zimmer regarding the study of the substance over form doctrine in taxation concluded that: 'the Roman concept of *in fraudem legis*' underlies the tax avoidance concept in many of the civil law countries but its impact varies greatly from country to country'. *Form and substance in tax law*, Cahiers de droit Fiscal International Volume 87a, 43 (F. Zimmer ed., SDU Uitgevers 2002).

³⁹ According to Yzerman, in tax law, the intention of the legislator to regulate economic activities constitutes a reason that in taxation 'the economic intention must be taken into consideration in interpreting and characterising a specific case'. R. Yzerman, *The Netherlands*, in Zimmer, *ibid.*, at 452.

In common law countries like the United States the concept of substance over form has been developed by the judiciary for tax law purposes. In the United States ‘as a federal state with varying private law rules among the states, the need for tax law concepts is more obvious’.⁴⁰ The result is that the legal transplant of the doctrine of substance over form has taken place differently among countries. Among the reasons for these differences can be argued the need for a specific statutory provision or the development of this doctrine by the judiciary for private law and/or for tax law purposes.

(5) Political, economic and reputational incentives: For instance in the field of private law mainly for political reasons the Dutch Civil Code has been transplanted in former Communist countries in Central and Eastern Europe.⁴¹ The Dutch system was at the time of transplantation considered as an ideal model for the reforms that took place in those countries, as the Netherlands is considered a relatively neutral country.⁴² Another example is the introduction of the ‘*acquis Communautaire*’ (i.e. European Union law: accumulated legislation, legal acts, and case law) to be adopted by countries wishing to join the European Union.⁴³

The following section will address the use of the theory of legal transplants in taxation.

2.2 Legal Transplants in Taxation

Even though legal transplants have taken place for a long time in the field of tax law, the study of legal transplants in taxation is not extensive and mainly limited to some articles by tax scholars.⁴⁴ One of the first tax scholars to address legal transplants in taxation was Victor Thuronyi, an International Monetary Fund (IMF) official providing tax technical assistance to countries in the design and reform of tax systems around the world. In 1996, Victor Thuronyi referred to the use and borrowing of the concepts of tax legislation by developing and transition countries.⁴⁵

Thereafter, in 2003,⁴⁶ Thuronyi addressed in a comparative tax law book that the study of legal transplants ‘includes developing an understanding of the legal culture and studying how rules have changed or persisted when transplanted from one system into another’.⁴⁷ According to Thuronyi, in studying legal transplants, it is important not only to identify where they have occurred but also to assess their success.⁴⁸

More recently (since 2007), tax scholars have addressed in some articles the different approaches for studying the legal transplants, i.e. functional approach (Gabarino⁴⁹) and contextual approach (Marian⁵⁰), and case studies on the transplantation of concepts: leasing (Mosquera⁵¹); corporate tax law provisions (Le⁵²); place of effective management (Burgers⁵³); process of legal transplants in China

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⁴⁰ Zimmer, *supra* n. 38, at. 25.

⁴¹ Öricü points out the phenomenon of ‘Dutch experts participating in the drafting of a Model Civil Code as well as Codes on Criminal law and Criminal Procedure for the CIS countries. Those involved are Armenia, Azerbaijan Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Russia, the Ukraine, and Uzbekistan’. Öricü, *supra* n. 30, at 94.

⁴² In this regard, Smits refers to the reasoning behind the adoption of the Dutch code among them (1) the mixture of a market economy and the idea of social *Rechtsstaat*, (2) the Dutch experience as an importing country and (3) the influence by German, French and English Law what makes the Dutch Code an outcome of thorough comparative studies. J. Smits, *A European Private Law as a Mixed System: Towards a Ius Commune Through the Free Movement of Legal Rules*, 5 Maastricht J. Eur. & Comp. L. 63 (1998); See also J. Smits, *Systems Mixing and in Transition: Import and Export of Legal Models: The Dutch Experience*, in Netherlands Reports to the Fifteenth International Congress of Comparative Law 47–69 (E. H. Hondius ed., Antwerpen/Groningen 1998).

⁴³ Examples of these countries are, for instance, Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Moldova and Serbia.

⁴⁴ For the history of legal transplants in taxation, see Special Issue on *Histories of Legal Transplantations*, 10(2) Theoretical Inquiries L. (2009), <https://www.degruyter.com/view/journals/til/10/2/til.10.issue-2.xml> (accessed June 2020). A modern example is the introduction of VAT which was first implemented in France in 1954 and then introduced in EU law in the 1960s. I. Leuene, *The EU VAT Experience: What Are the Lessons?*, 2 Tax Analysts 257, 282 (2011). The VAT has now spread worldwide. See for instance, the study of VAT in Africa in *VAT in Africa* (R. E. Krever ed., Pretoria University Law Press 2008).

⁴⁵ R. K. Gordon & V. Thuronyi, *Tax Legislative Process*, in *Tax Law Design and Drafting* vol.1, 12 (V. Thuronyi ed., International Monetary Fund 1996).

⁴⁶ In 2016, a new (second edition) of this book was published. Edited by Victor Thuronyi, Kim Brooks, and Borbala Kolozs. Since the analysis of legal systems and legal transplants was initiated by Thuronyi, this section will address the book of Thuronyi as published in 2003. The reason is the focus of this paper on the initial study of comparative tax law by tax scholars and the use of the term legal transplants in taxation.

⁴⁷ V. Thuronyi, *Comparative Tax Law* 5 (Deventer: Kluwer Law International 2003).

⁴⁸ *Ibid.*, at 4.

⁴⁹ C. Gabarino, *Comparative Taxation and Legal Theory: the Tax Design Case of the Transplant of General Anti-Avoidance Rules*, 11(2) Theoretical Inquiries L. 765, 766, 790 (2010).

⁵⁰ O. Y. Marian, *The Discursive Failure in Comparative Tax Law*, 58 Am. J. Comp L. 415, 470 (2010).

⁵¹ See Valderrama, *supra* n. 14.

⁵² C. T. N. Le, *Transplants of Some Aspects of Corporate Income Tax Law: The Case of Malaysia, the Philippines and Vietnam* (2006), <https://www.rug.nl/research/portal/files/2834013/Le.PDF> (accessed June 2020). This PhD provides a historical comparative study of some elements of the company tax system of Malaysia, the Philippines, and Vietnam in relation to that of the original donors (the UK, US, advice from IMF, and other organizations) and in relation to each other.

⁵³ I. J. J. Burgers, *Some Thoughts on Further Refinement of the Concept of Place of Effective Management for Tax Treaty Purposes*, 35(6/7) Intertax 378, 386 (2007).

(Li)⁵⁴; general anti-avoidance rules (GAARs) (Li,⁵⁵ Gabarino⁵⁶ and Freedman⁵⁷); and the different categories of transplanted concepts and regimes (Dourado⁵⁸). This shows that the interest on the topic is currently gaining relevance mainly due to the interest of tax scholars in comparative tax law. Therefore, it could be expected that, in the future, more articles on tax transplants will be available.

As mentioned in section 2.1. above, comparative law scholars have also addressed that legal transplants can take place due to (1) authority, (2) prestige, (3) chance and necessity, (4) expected efficacy of law, and (5) political, economic and reputational incentives.

When applying these criteria to taxation, we can find some examples of the reasons why tax transplants take place, for instance:

(1) Authority: For instance, tax changes requested by international organizations such as the International Monetary Fund (IMF) in order to receive funding supported programmes.⁵⁹

(2) Prestige: The introduction by developing countries of tax expenditure analysis 'which has been practised in OECD countries since the 1970s'⁶⁰ to increase fiscal transparency and improve policy making.⁶¹

(3) Chance and necessity: The transplant from Brazil to Colombia of the financial transaction tax mainly due to the need to find additional revenue resources.⁶² Another example is the introduction of the standard of automatic exchange for financial accounting information in order to collect more tax revenue and to enhance cooperation between tax administrations.⁶³

(4) Expected efficacy of law: The use of the arm's length principle to prevent transfer pricing manipulation by companies.⁶⁴

(5) Political, economic and reputational incentives: The introduction of the EU standard of Good Tax Governance (transparency, exchange of information, fair taxation, and BEPS four minimum standards) in order to get access to the EU Development Funds and to obtain the benefits of trade and investment agreements.⁶⁵

The following sections will address the theoretical framework for the study of legal systems and legal culture in taxation.

2.3 General Features of the Theory of Legal Systems⁶⁶

2.3.1 Definition

A legal system can be defined as 'a body of law systematically unfolding, between the parts of which there is coherence and consistency'.⁶⁷ According to Glendon et al, the evolution of the legal system is a 'dynamic process involving a group of functionally related, mutually conditioning, interdependent elements, which together give the system its special character'.⁶⁸ Among these elements can be mentioned the vocabulary used for legal concepts, the categories and classification of rules, the law-making process and the methods of interpretation.⁶⁹ As a result of the particularities of a legal system, comparative scholars have grouped legal systems based on the common elements within a country's legal system.

Notes

⁵⁴ J. Li, *Tax Transplants and the Critical Role of Processes: A Case Study of China*, 84 Osgoode Legal Studies Research Paper Series (2015).

⁵⁵ J. Li, *Tax Transplants and Local Culture: a Comparative Study of the Chinese and Canadian GAAR*, 11(2) *Theoretical Inquiries L.* 665, 685 (2010).

⁵⁶ See Gabarino, *supra* n. 49.

⁵⁷ See Freedman, *supra* n. 10.

⁵⁸ A.P. Dourado, *Chapter 6: Is This a Pipe? Validity of a Tax Reform for a Developing Country*, in *Tax, Law and Development* 153–155 (Y. Brauner & M. Stewart eds, Edward Elgar Publishing Ltd. 2013).

⁵⁹ See IMF, *supra* n. 24. See also M. Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44(1) *Harv. Int'l L. J.* 139, 142, 191 (2003).

⁶⁰ Y. Brauner & M. Stewart, *Introduction: Tax, Law and Development*, in *Tax, Law and Development*, Ch. 1 (Y. Brauner & M. Stewart eds, Edward Elgar Publishing Ltd. 2013).

⁶¹ L. Phillips, *The Globalization of Tax Expenditure Reporting: Transplanting Transparency in India and the Global South in Tax*, in *Tax, Law and Development*, Ch. 8 (Y. Brauner & M. Stewart eds, Edward Elgar Publishing Ltd. 2013).

⁶² This financial transaction tax is different than the one in the European Union. In Colombia, a tax on financial transactions was transplanted voluntarily from Brazil into the Colombian tax system to 'make up for revenues lost by lowering the valued-added tax rate'. See the blogpost at C. Hoyos, *Will Colombia Be Able to Get Rid of the Financial Transactions Tax (FTT)?* *Kluwer International Tax Blog* (7 Apr. 2015), <http://kluwertaxblog.com/2015/04/07/will-colombia-be-able-to-get-rid-of-the-financial-transactions-tax-ftt/> (accessed June 2020).

⁶³ This standard follows the introduction of FATCA (Foreign Account Tax Compliance Act) and the need for countries to have access to financial accounting information. OECD, *Automatic Exchange Portal*, <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (accessed June 2020).

⁶⁴ See for instance, R. S. Avi-Yonah, *The Rise and Fall of Arm's Length: a Study in the Evolution of U.S. International Taxation*, *U. Mich. L. & Econ. WP* 7–17 (2017).

⁶⁵ I. J. Mosquera Valderrama, *The EU Standard of Good Tax Governance in Tax Matters for Third (Non-EU) Countries*, 47(5) *Intertax* 454, 467 (2019).

⁶⁶ This section is based in the PhD dissertation by I. J. Mosquera Valderrama See *supra* n. 14.

⁶⁷ E. Örtücü, *An Exercise on the Internal Logic of Legal Systems in Legal Studies*, in *The Journal of the Society of Public Teachers of Law*, Butterworths 3 (2006), at 310.

⁶⁸ M. A. Glendon et al., *Comparative Legal Traditions in a Nutshell* 74 (2d rev. ed. West Group 1999).

⁶⁹ R. David & J. Brierley, *Major Legal Systems in the World Today* 19 (3d rev. ed. Stevens&Sons 1985).

2.3.2 Classification of Legal Systems

In comparative law theory, the classification of legal systems as pointed out by Thuronyi, provides ‘insight to the historical roots of any particular country’s system, thereby providing a better understanding of the underlying legal culture’.⁷⁰ In this context, a classification of legal systems has been provided amongst others by David⁷¹ dividing between romano-germanic (civil law), common law, socialist law, Muslim/Hindu law, Jewish law and Far East law. Zweigert and Kötz⁷² reduced the classification into the following ‘Western’ legal systems: Romanistic,⁷³ Germanic, common law, and Nordic legal system.

The main common legal systems around the world are common law, civil law and mixed systems⁷⁴ (e.g. common law and civil law). The main features of civil law are to be found in its historical roman roots and later on due to the codification. In civil law systems, the initial development was directed towards private law (civil and commercial) mainly through the reception in other countries of the French Code (*Code Napoléon*) for private law. Later on other branches of law such as administrative law were also developed. In the civil law legal system general rules are given by the law-maker based on principles of law that are later interpreted by the judiciary within the limitations given by the principle of the separation of powers.⁷⁵ The ideas of justice and morality behind these principles and the role of scholars influence the formulation of such principles.⁷⁶

The common law system is divided into English (United Kingdom) Law and the Law of the United States of America. In general, the law in the common law system are specifically – on a case basis – developed, judge-made law rather than formulating a ‘general rule of conduct for the future’.⁷⁷ Hence, the judiciary is left with more freedom in law-making and interpretation. In

this system the distinction between private law and public law is not recognized, but rather a distinction is made between common law and equity.⁷⁸ The rules of common law are to be found in the decisions of the judiciary.

In principle, the sources of law are similar in civil law and common law legal systems. However, the emphasis and the role of each source of law may differ for example with regard to the role of case law in common law by contrast to the importance of legal scholarship in civil law.⁷⁹ For Thuronyi, in common law countries scholars’ writings (doctrine), ‘is not acknowledged as an independent source of law but in practical terms treatises and writings are relied on by courts and practitioners to the extent they are persuasive’.⁸⁰ The classification of sources of law and the hierarchy may vary in accordance with the specific features of the legal system object of study.

2.4 Legal Systems in Taxation⁸¹

2.4.1 Classification of Tax Systems

For cross-country comparisons, a broader classification of tax systems by means of identifying the ‘basic structural features of the tax laws of countries’⁸² has been proposed by Thuronyi⁸³:

(1) Common law tax systems: Law systems in the Commonwealth countries (e.g. Australia, Barbados, United Kingdom) and American countries (e.g. Liberia, Philippines and United States);

(2) Civil law tax systems: Law systems of countries of French influence (e.g. Algeria, Cameroon, France, and Mauritania) and Latin American countries (e.g. Argentina, Chile and Colombia);

(3) Northern European tax systems: Law systems applied by Germanic countries (e.g. Austria, Germany,

Notes

⁷⁰ Thuronyi, *supra* n. 47, at 23.

⁷¹ David & Brierley, *supra* n. 69, at 22–25.

⁷² Zweigert & Kötz, *supra* n. 35, at 73.

⁷³ By contrast to the approach of David to one Romano-Germanic family, Zweigert and Kötz proposed a new division between ‘a Germanic family (Germany, Austria, Switzerland, and a few affiliated systems) and a Romanistic family (France and all the systems which adopted the French Civil Code, along with Spain, Portugal and South America)’, Zweigert & Kötz, *ibid.*, at 68–69.

⁷⁴ For a classification of mixed systems in comparative law, see E. Örtücü, *What is a Mixed Legal System: Exclusion or Expansion?*, 12(1) *Elec. J. Comp. L.* 1, 18 at 5 (May 2008), www.ejcl.org/121/art121-15.pdf (accessed June 2020).

⁷⁵ By means of the application of the principles of separation of powers, the judiciary when interpreting is ‘denied law making power’. J. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 30 (Stanford University Press 1969).

⁷⁶ David & Brierley, *supra* n. 69, at 22.

⁷⁷ *Ibid.*, at 24.

⁷⁸ ‘Equity is a series of remedies evolved mainly in the fifteenth and sixteenth centuries and applied by the court of the chancellor in order to complete, and occasionally correct, the Common law which had become insufficient and defective’. David & Brierley, *supra* n. 69, at 334, 339.

⁷⁹ Careful approach towards generalizations has been rightly suggested by Sauveplanne. For this author the difference between the two systems is that ‘in civil law systems the starting point for legal reasoning is formed by the provisions of the written law, whereas in common law systems this starting point is formed by the decisions of the courts’. J. G. Sauveplanne, *Codified and Judge Made Law*, 45(4) *Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde* 95 (1982).

⁸⁰ Thuronyi, *supra* n. 47, at 63.

⁸¹ This section is based in the PhD dissertation by I. J. Mosquera Valderrama. See *supra* n. 14.

⁸² Thuronyi, *supra* n. 47, at 25.

⁸³ Thuronyi, *supra* n. 47, at 43–44.

and Luxembourg); Dutch countries (Netherlands⁸⁴ and Suriname); Nordic countries (e.g. Denmark, Finland, Iceland, and Sweden); Belgium and Baltic countries (Estonia, Latvia and Lithuania).

2.4.2. Civil Law and Common Law Tax Systems

The general differences between the civil and common law in matters of tax law have been described by Thuronyi.⁸⁵ An overview of these differences is given in the table 1 below.

Table 1

| CIVIL LAW TAX SYSTEM | COMMON LAW TAX SYSTEM |
|--|---|
| Formal and systematic aiming to define and categorize taxes. Tendency towards a scheduler (analytic) approach. Tax laws gathered into a single tax code. | In general, a global (synthetic) approach to income with rules for deductions applicable to all types of income. In the United States, in addition to the Federal power to tax, the states are granted taxing power (e.g. income tax and sale taxes). |
| Use of private law concepts for tax law purposes. | Autonomy of tax law from other branches of law. |
| The judiciary is limited in the powers of interpretation. The draft of detailed tax statutes by the law-maker leaves a small space (if any) for interpretation to the judiciary. | Concepts and detailed interpretations of the statute are made by the judge. |

The following section will address the use of the theory of legal culture.

2.5 General Features of the Theory of Legal Culture⁸⁶

The study of legal culture has been used in the past to compare the relationship between law and society.⁸⁷ According to Gibson and Caldeira the following uses may be argued⁸⁸:

- Legal culture may be used to search for ‘anthropological traditions’ for example when searching for customary law in a legal system;
- Legal culture may be used to find out ‘how culture shapes the operation of formal legal institutions’ in a legal system;
- Legal culture may be used as a tool for searching the values of the ‘broader mass public’ by means of a mass opinion survey.

The study of the legal culture can focus on the legal and cultural environment (external factors) of the recipient countries (i.e. countries receiving the legal transplant) and/or on the description of values, beliefs, and attitude towards law (internal factors). In respect of the classification of Gibson and Caldeira, the first two uses refer to the external factors in a legal system whereas the third use refers to the internal factors being the values of a society.

The search for culture in a legal system results in a description of the ‘historical, social economic, political, cultural and psychological context which has made a rule or proposition what is’.⁸⁹ It should be kept in mind that describing and measuring culture is a difficult task and thus from the description of legal culture for the recipient countries different conclusions can be drawn in accordance to the elements used to describe legal culture. The several and different definitions of legal culture in legal scholarship are set out below. This table 2 aims to illustrate the differences in approach towards legal culture.

Notes

⁸⁴ In principle, the division between common law and civil law is also followed by Thuronyi in the tax systems resulting in Colombia and France regarded as civil law countries whereas the United States is regarded as a common law country. Thuronyi points out the Netherlands tax system has been influenced by German law, and therefore in his classification, the Dutch tax system belongs to Northern European tax systems. Thuronyi, *supra* n. 47, at 38.

⁸⁵ The division between common law and civil law has been proposed by Thuronyi to ‘highlight basic differences in legal style’ Thuronyi, *supra* n. 47, at 25–32.

⁸⁶ This section is based in the PhD dissertation by I. J. Mosquera Valderrama. See *supra* n. 14.

⁸⁷ The discussion in the legal scholarship regarding the relationship between law and society refers to the contextualist approach to the study of law. For this purpose, Ewald has referred that law is not an autonomous discipline, insulated from the surrounding society; rather, if one wishes to study a foreign legal system, one should view the law in its wider context and study its social function. Not law in books, but law in action is the proper object of study for the contextualist’. W. Ewald. *The Jurisprudential Approach to Comparative Law: A Field Guide to Rats*, 46(4) Am. J. Comp. L. 702 (1998).

⁸⁸ J. L. Gibson & G. A. Caldeira, *The Legal Cultures of Europe*, 30(1) L. & Soc’y Rev. 58–59 (1996).

⁸⁹ M. van Hoecke & M. Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47(3) Int’l & Comp. L. Q. 496 (July 1998).

Table 2

LEGAL CULTURE DEFINITIONS

Blankenburg: Legal culture can be explained in terms of a 'complex interrelationship on four levels: the level of values, beliefs and attitudes towards law; patterns of behaviour; institutional features; the body of substantive as well as procedural law'.⁹⁰

Cotterrell: This author refers not to legal culture but to legal ideology: 'It can be regarded not as a unity but rather as an overlay of current of ideas, beliefs, values and attitudes embedded in, expressed through and shaped by practice'.⁹¹

Friedman: Legal culture 'refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds'.⁹²

Grosheide: Legal culture is 'used in a double sense, encompassing both the general consciousness of law in society at large, and the specific relation to law of the legal profession'.⁹³

Merryman: This author does not refer to legal culture but to legal tradition: 'A set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the policy, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective'.⁹⁴

The common element in these definitions is the distinction between the external factors and the internal factors and the choice for one or both factors in the definition of legal culture. Accordingly, Blankenburg and Merryman

refer to organization, institutional features and operation of a legal system (external factors) as part of legal culture. The attitudes, beliefs and values (internal factors) are addressed in the definitions provided by Blankenburg, Cotterrell, Friedman and Grosheide.

2.6 Legal Culture in Taxation

In general terms, Thuronyi argues that the understanding of legal culture in the field of taxation, contributes to find out the 'key elements of legal traditions for tax law'.⁹⁵ For a definition of culture, Thuronyi uses the definition of Merryman as legal tradition described in the table above. In addition, the approach to culture as tradition has been introduced in research carried out by the World Bank in the field of tax reform. For example, the tax reform on property (immovable assets) in Indonesia was built on 'an established tax culture'. Without providing a definition of tax culture, reference is made to culture and tradition stating that there is a 'well-established property tax tradition both among the citizens-taxpayers and the tax administration'.⁹⁶

Although a definition and elements of legal (tax) culture are difficult to provide, the definitions provided by legal scholarship described in section 2.5. above are useful to study legal culture in taxation.⁹⁷ The study of legal (tax) culture can explain the differences among donor (international/supranational organization or country) and recipient (countries receiving the legal transplant) or among recipient countries.

These differences in culture provide the local tuning⁹⁸ that makes that for a transplanted concept the rules are different in the recipient country than the ones in the donor. Furthermore, the proposed approach to tax culture takes into account that the differences in attitudes and beliefs in a country's legal and tax system require the

Notes

⁹⁰ E. Blankenburg & F. Bruinsma, *Dutch Legal Culture* (2d rev. ed., Kluwer Law 1994).

⁹¹ R. Cotterrell, *The Concept of Legal Culture*, in *Comparing Legal Cultures*, Socio-Legal studies series 21–22 (D. Nelken ed., Dartmouth Publishing Company Limited 1997).

⁹² L. Friedman, *The Concept of Legal Culture: A Reply* in *Comparing Legal Cultures*, Socio-Legal studies series, 34 (D. Nelken ed., Dartmouth Publishing Company Limited 1997).

⁹³ Concept used by Grosheide to explain the legal borrowing. F.W. Grosheide, *Legal Borrowing and Drafting International Commercial Contracts in Some Methodological Reflections: Comparability and Evaluation Essays on Comparative Law, Private International Law and International Commercial Arbitration in Honour of Dimitra Kokkini-Iatridou* 70 (K. Boele-Woelki ed., Martinus Nijhoff Publishers 1994).

⁹⁴ J. Merryman, *The Civil Law Tradition: An introduction to the Legal Systems of Western Europe and Latin America* 2 (Stanford University Press 1969). In this regard, Ehrman has referred to the definition of Merryman as follows: 'For a writer who uses the concept of "legal tradition" in much the same way as this book speaks of legal culture'. H. Ehrman, *Legal Culture Its Determinants, Its Comparability*, Comp. Legal Cultures 8 (Prentice-Hall 1976).

⁹⁵ Thuronyi has referred to the definition of Merryman. Thuronyi, *supra* n. 47, at 3 & 5.

⁹⁶ R. Kelly, *Property Taxation in Indonesia: Challenges from Decentralization* (2003), https://www.lincolnst.edu/sites/default/files/pubfiles/788_kelly03web.pdf (accessed June 2020).

⁹⁷ See also the Special Issue *Comparative Tax Law and Culture*, 11(2) Theoretical Inquiries L. (2010), <https://www.degruyter.com/view/j/ti1.2010.11.issue-2/issue-files/ti1.2010.11.issue-2.xml> (accessed June 2020).

⁹⁸ This concept is borrowed from comparative law and it is described by Öricü as follows: 'If the old models are abandoned with "optimistic normativism" while new legal models are looked for, a transplanted legal system not compatible with the culture in the receiving country, without the appropriate transposition and tuning, will create only a virtual reality. In answer to the question, how do legal ideas, institutions and structures find their way from one location to another, it has been aptly put that "laws do not have wings". This alone highlights the importance of those who move the law and help in its internalization, and hence, what I call "tuning"'. E. Öricü, *Law as a Transposition* 51 *Int'l & Comp. L. Q.* 208 (2002).

study of the way that the development of law takes place is 'law in action' and not only the introduction of a concept in the formal law of the country 'law in the books'.⁹⁹

For this article, I follow the approach towards the role of the different institutions (external factors) and their behaviour (internal factors) in the context of legal culture. In this context, I argue the use of the concept of legal culture for identifying the role of the different parties (stakeholders) in the transplantation process and in the development of legal (tax) rules. These parties can be, for instance, the courts with tax competence, tax lawmakers, taxpayers, tax administrations, business associations, tax advisors, scholars, and civil society (NGOs). This study of legal culture will need not only desk research, but also empirical research (interviews and/or surveys) to the parties (stakeholders).

2.7 Final Remarks

Comparative law scholars have been using the concept of legal transplants to describe the process of borrowing rules from one country (donor) to another (recipient) or from international or supranational organizations (donor) to countries (recipient). Legal transplants may take place because of (1) authority, (2) prestige, (3) chance and necessity, (4) expected efficacy of law, and (5) political, economic and reputational incentives.

In general, to address legal transplants, words such as borrowing, reception, imitation, and legal transposition have been used. Despite of the use of different terminology, the essence of legal transplants initially formulated by Watson as 'the moving of a rule or a system of law from one country to another'¹⁰⁰ still remains.

In Watson's view, specific rules, institutions, legal concepts, and structures can be borrowed. Nonetheless, it should be noted, as rightly argued by Watson, that transplanting the rules does not imply that the spirit of a legal system is transplanted as well. This definition and approach to legal transplants is still valid at the time of writing of this article.

However, the study of legal transplants is not enough in comparative law. Therefore, comparative studies require not only addressing the differences in the concept that is transplanted but also the reason why these differences take place. In order to explain these differences, I

have argued in the past that the study of the differences in legal (tax) systems and the differences in the legal (tax) culture can be useful.¹⁰¹ Scholars in general but also tax scholars are required to analyse 'how the existing system works, and why it works that way, in order to have a firm basis for understanding what changes may be both desirable and feasible'.¹⁰²

The study of legal (tax) systems can contribute to study the differences between common law, civil law, and mixed systems (common law and civil law) that can have an influence on the development of concepts, rules, institutions, and structures that are being transplanted. Furthermore, the study of legal culture can allow understanding the reasons for the differences in the transplantation of concepts among the donor and recipient or among recipient countries. The following section will address the use of comparative legal theories to study the transplant of the BEPS 4 Minimum Standards.

3 THE STUDY OF THE BEPS 4 MINIMUM STANDARDS AS A LEGAL TRANSPLANT

By using comparative legal theories, this policy note will analyse the BEPS as a legal transplant in order to identify the reasons why countries have committed to implement the BEPS 4 Minimum Standards. In addition, the theories of legal transplants, legal (tax) systems and legal (tax) culture can be useful to study how the BEPS 4 Minimum Standards will be implemented in the jurisdictions participating in the BEPS Inclusive Framework. Furthermore, these theories can be also useful to find out if there are differences in the implementation and to explain the reason for these differences.

In the past, I have analysed the differences in the implementation of BEPS and demonstrated that a one-size-fits-all approach does not work.¹⁰³ Consequently, the OECD, the G20 and the BEPS Inclusive Framework should consider the differences between countries, which may result in a different implementation of the BEPS 4 minimum standards. More work should be done on the complexity of the development of international tax standards due to the differences in legal (tax) systems and legal (tax) culture.

For the implementation of BEPS 4 Minimum Standards, is therefore, important to carry out desk and empirical (interviews) research to establish how these

Notes

⁹⁹ The discussion in the legal scholarship regarding the relationship between law and society refers to the contextualist approach to the study of law. For this purpose, Ewald has referred that law is not an autonomous discipline, insulated from the surrounding society; rather, if one wishes to study a foreign legal system, one should view the law in its wider context and study its social function. Not law in books, but law in action is the proper object of study for the contextualist'. Ewald, *supra* n. 87, at 702.

¹⁰⁰ Watson, *supra* n. 19, at 21.

¹⁰¹ I. J. Mosquera Valderrama, *The Interaction of Tax Systems and Tax Cultures in an International Legal Order for Taxation*, 5(2) *Diritto e Pratica Tributaria Internazionale* 842, 867,869 (2008).

¹⁰² R. M. Bird, *Tax Policy and Economic Development* (Johns Hopkins University Press 1992).

¹⁰³ See I. J. Mosquera Valderrama, *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72(3) *Bull. Int'l Tax'n* (2018).

Minimum Standards will be transplanted into the tax systems of the countries and how can the differences in tax systems and tax cultures of these countries influence the content of the BEPS 4 minimum standards.

Currently research is being carried out by this author in the framework of the project (GLOBTAXGOV) for twelve countries (civil law and common law countries in different geographical regions) to find out (1) how the BEPS 4 minimum standards will be transplanted into the tax system of jurisdictions participating in the BEPS Inclusive Framework, (2) how can the differences in tax systems and tax cultures of these countries influence the content of the BEPS 4 minimum standards, and (3) what is the role of the OECD in international tax lawmaking.¹⁰⁴

3.1 BEPS as a Legal Transplant

In this article, I argue that the introduction of the BEPS four minimum standards (Actions 5, 6, 13, and 14) is a tax transplant for non-OECD, non-G20, including developing countries since jurisdictions have committed to the implementation of these standards in their tax systems by participating as BEPS Associates in the BEPS Inclusive Framework.

The countries participating in the BEPS Inclusive Framework have been (or will be) reviewed in their com-

mitment to these standards,¹⁰⁵ and some of these peer reviews may also result in changes in tax systems, e.g. introduction of country-by-country reporting rules, introduction of a principal purpose test in tax treaties, and the repeal of some preferential regimes considered as harmful tax regimes.¹⁰⁶

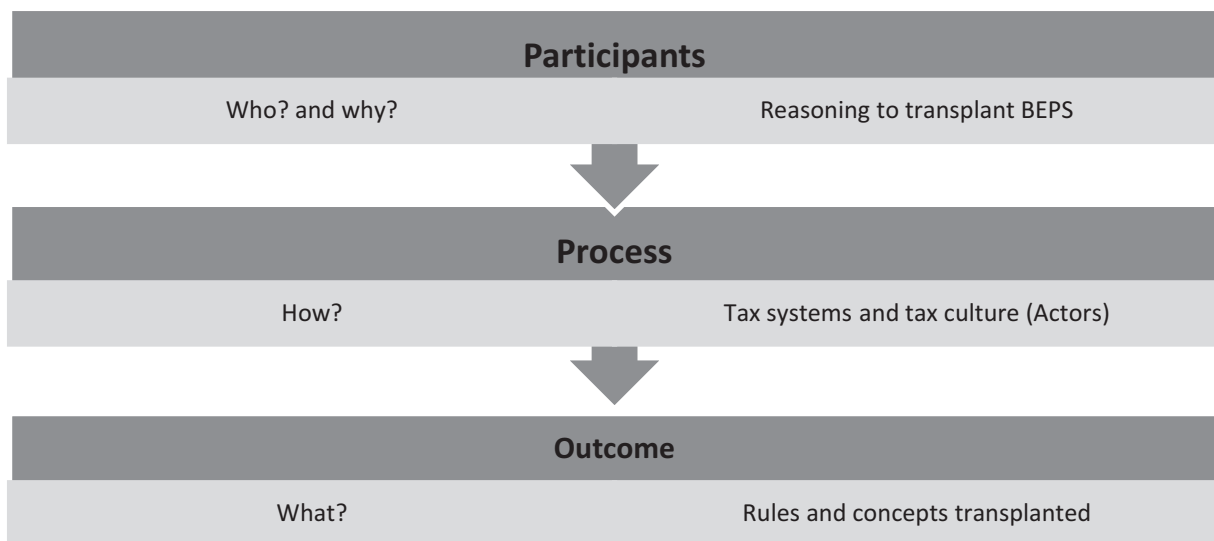
In the following paragraphs, attention will be given to the following questions: who participate and why (section 3.2.), how the tax system and tax culture influence the process (section 3.3.), and what are the rules that will be implemented (outcome) (section 3.4.). The relationships among these objectives is explained in the figure 1 below.

3.2 Reasoning for Transplant of BEPS: Who? and Why?

3.2.1 Who? and the Role of non-OECD, non-G20 Countries

I have argued in the past that the content of the BEPS Project and the BEPS four minimum standards was decided by the OECD with the political mandate of the G20 and that non-OECD, non-G20 countries did not participate in the decision making process or the agenda setting of the BEPS Project. The decision making was made by the BEPS 44 group (G20, OECD and, at that

Figure 1



Notes

¹⁰⁴ See *supra* n. 1 and blog GLOBTAXGOV, <https://globtaxgov weblog.leidenuniv.nl/> (accessed June 2020).

¹⁰⁵ These peer reviews have already taken place for some of the countries participating in the BEPS Inclusive Framework. See OECD, *BEPS Actions*, <http://www.oecd.org/tax/beps/beps-actions/> (accessed June 2020).

¹⁰⁶ According to the OECD, 'The OECD/G20 Inclusive Framework on BEPS actively monitors the implementation of all the BEPS Actions and reports annually to the G20 on this progress. The implementation of the BEPS Minimum Standards is of particular importance, and each of these is the subject of a peer review process that evaluates the implementation by each member and provides clear recommendations for improvement. Peer reviews of the BEPS minimum standards are an essential tool to ensure the effective implementation of the BEPS package'. OECD, *How Are We Monitoring Implementation*, <http://www.oecd.org/tax/beps/beps-actions/> (accessed June 2020).

time, OECD accession countries) and non-OECD, non-G20 countries had only a consultative role in this process. Therefore, the BEPS Project lacked of input legitimacy vis-à-vis non-OECD, non-G20 countries.¹⁰⁷

In order to address these concerns of legitimacy, the OECD created the BEPS Inclusive Framework in which all countries are invited to participate on an equal footing. However, the equal footing is only for purposes of implementation, since these countries cannot change the content of these standards.

3.2.2 Why? Reasoning to Transplant BEPS

In light of the way that BEPS has developed and taking into account the theory of legal transplants developed in sections 2.1. and 2.2. above, in my view, the transplant of BEPS can be regarded as an intended transplantation since the jurisdiction participating in the BEPS Inclusive Framework implements the BEPS four minimum standards into its own tax system.¹⁰⁸

Furthermore, even if it is not clear why non-OECD, non-G20 countries including developing countries are introducing the BEPS four minimum standards, from the regional consultations, it can be safely argued that these countries want to participate in the BEPS Inclusive Framework (prestige¹⁰⁹) mainly based on the argument that countries 'do not want to be on the menu but at the table' as mentioned by several developing countries¹¹⁰

and, in some cases, countries are seeking OECD membership (political incentives).¹¹¹

From the regional consultations,¹¹² it is also clear that non-OECD, non-G20 need to raise more revenue by tackling aggressive tax planning and are also interested in receiving support for implementation of the BEPS standards¹¹³ and the toolkits, especially the toolkits on transfer pricing and tax treaty negotiation developed by the Platform for Collaboration on Tax¹¹⁴ (chance and necessity).

3.3 The Differences in Tax Systems and Tax Culture Influencing the Transplant: How?

In respect of the differences in tax cultures, one tax scholar, Myszkowsky, has addressed the differences in socio-economic and political approaches of countries implementing BEPS and the impact of cultural differences on the interpretation of anti-abuse provisions.¹¹⁵

Furthermore, as rightly argued by Dourado, a critical review of the legal transplant should be carried out by tax scholars taking into account 'their appropriateness for the country undergoing a reform'.¹¹⁶ If one example can illustrate this, for instance, it is the choice of the United States to participate in the BEPS Inclusive Framework but not to sign the multilateral instrument and to choose to engage in bilateral negotiations to comply with BEPS Action 6, in this case, by not introducing the Principal

Notes

¹⁰⁷ This policy note follows from a previous article by this author regarding the input and output legitimacy of the OECD/G20 BEPS initiative with regard to developing countries. Input legitimacy addresses the participation and representation of developing countries in setting the agenda and in the drafting of the content of the OECD/G20 BEPS initiative. Output legitimacy addresses the search for collective solutions to deal with base erosion and profit shifting, including the mechanisms to realize these solutions which differ between OECD member countries and non-OECD, i.e. developing, countries. See I. J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: the Challenges of Multilateralism*, 7(3) World Tax J. (2015). This definition of legitimacy builds on the distinction made by Scharpf between input legitimacy, i.e. government by the people, and output legitimacy, i.e. government for the people. See F. W. Scharpf, *Governing in Europe: Effective and Democratic?*, 7 (Oxford U. Press 1999).

¹⁰⁸ See OECD, *Background Brief Inclusive Framework on BEPS* (OECD Publishing 2017) https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf (accessed June 2020). This argument can be true for African countries. For instance, 'in the 2014 Outcome notes that it is imperative that all African countries are involved in the BEPS process. Africa must use the opportunity to shape the issues in the 15 Action Point project to address Africa's concerns to ensure that sufficient attention is given to the different levels of readiness of African tax administrations to address BEPS, and their resource and capacity limitations' (ATAF, *Outcomes Document: Consultative Conference on New Rules of the Global Tax Agenda* (18–19 Mar. 2014) cited in A. W. Oguttu, *Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan* WP 54 ICTD 22 (June 2016) (accessed June 2020).

¹⁰⁹ For the OECD, 'joining the Inclusive Framework offers the opportunity to interested countries and jurisdictions to participate in the BEPS related work on an equal footing with other OECD and G20 countries. Being part of the Inclusive Framework on BEPS will facilitate the implementation, as well as the peer review processes of the Members, by providing them further guidance and support, including guidance covered by the Platform for Collaboration on Tax established among the IMF, the OECD, the UN and the World Bank Group.' See OECD *ibid.*, at 8.

¹¹⁰ For instance, see also M. Hearson, *Africa Responds to the Inclusive Framework's Digital Tax Agenda* (7 Aug. 2019), <https://www.ictd.ac/blog/africa-responds-to-the-inclusive-frameworks-digital-tax-agenda/> (accessed June 2020) for the discussions on digital economy Pillar 1 and Pillar 2 addressing the need to participate in international settings such as the BEPS Inclusive Framework.

¹¹¹ This is the case of Colombia that participated in the BEPS 44 Group as OECD Accession country, and in the BEPS Inclusive Framework as OECD Member country.

¹¹² See OECD, *Regional Meeting of the Inclusive Framework on BEPS for French Speaking Countries* (3–5 July 2017) www.oecd.org/tax/beps/cotonou-summary-of-discussions-july-2017.pdf (accessed June 2020).

¹¹³ For instance, by participating in BEPS Twinning Projects with developed countries. 'These projects result in technical assistance delivered by a developed country or international organization to a developing country aimed at the implementation of the global standards'. See W. Lips & I. J. Mosquera Valderrama, *Global Sustainable Tax Governance in the OECD-G20 Transparency and BEPS Initiatives*, in *Tax Sustainability in an EU and International Context* (C. Brokelind & S. Van Thiel eds, IBFD 2020). For an overview of these projects see I. J. Mosquera Valderrama, Dries. Lesage & Wouter Lips, *Tax and Development: The Link Between International Taxation, the Base Erosion Profit Shifting Project and the 2030 Sustainable Development Agenda*, WP W-2018/4 UN-CRIS (2018), <http://cris.unu.edu/tax-and-development-link-between-international-taxation-base-erosion-profit-shifting-project-and> (accessed June 2020).

¹¹⁴ For the different tools for developing countries to enhance capacity building in BEPS see the OECD, *What is BEPS?*, <http://www.oecd.org/tax/beps/about/#tools> (accessed June 2020).

¹¹⁵ A. Myszkowski, *supra* n. 11.

¹¹⁶ In this case, Dourado refers to the pure exportation of legal solutions which is also a feature of legal transplants. See Dourado, *supra* n. 58.

Purpose Test but by introducing a limitation on benefits provision combined with a conduit financing arrangement provision.¹¹⁷

This approach can help to understand the differences in implementation and to identify the role of the different parties (actors) in the transplantation process and in the development of tax rules to implement BEPS. In respect of the BEPS 4 minimum standards, the actors (stakeholders) that can have influence in the legal transplant of these standards are the courts with tax competence, tax lawmakers, taxpayers, tax administrations, business associations, tax advisors, scholars, and civil society (NGOs).

The following section will illustrate the differences in the rules and concepts transplanted with a case study of one of the BEPS 4 Minimum Standards (BEPS Action 6 mainly the Principal Purpose Test).

3.4. The Differences in the Rules and Concept Transplanted: What?

In the study of legal transplants of the BEPS four minimum standards, the starting point should be that, taking into account the differences in tax systems and tax cultures among the jurisdictions participating in the BEPS Inclusive Framework, the implementation of these standards will be different among these jurisdictions. In order to illustrate these differences, a case study of the BEPS Action 6 mainly principal purpose test will be presented in the following paragraphs.

The principal purpose test (PPT) is a treaty GAAR that aims to prevent tax treaty abuse. However, the analysis of the elements of a GAAR, i.e. tax scheme, tax benefit, and taxpayer's purpose, and the interaction between domestic and treaty GAARs and the application of the PPT may create differences in the application of the PPT taking into account the differences between legal and tax systems.

For instance, in civil law, general rules are given by the law-maker based on principles of law that are later interpreted by the judiciary within the limitations given by

the principle of the separation of powers. The result is a legal and formalistic approach to the interpretation of rules. Common law is based on judge-made law rather than formulating a general rule of conduct for the future. Therefore, the judiciary is left with more freedom in law making and interpretation.¹¹⁸ Mixed systems may provide a combination of both civil and common law. For instance, South Africa has a statutory GAAR, 'but the South African courts can also use common law legal principles to counter tax avoidance, such as the test for a simulated transaction or substance over form'.¹¹⁹

These differences can also have an influence in the interpretation of the threshold for the application of the principal purpose test which has provided for an intermediate threshold test (i.e. if one of the main purposes is met). There are three different approaches in domestic GAARs – intermediate (one of the main purposes) versus narrow (exclusive/sole purpose) versus broad (one of the purposes) — that are available to countries and their courts. Countries have chosen different thresholds when applying the domestic GAARs,¹²⁰ for instance, a narrow approach (Belgium, Brazil, France, Luxembourg, Spain, and Turkey) or a broad approach (India, New Zealand) and, therefore, these differences will need to be taken into account.

Two questions 'that can be raised: (1) are these countries going to change their approach due to the principal purpose test; and, if not, (2) how will the interpretation by courts take place? Will the approach be addressed separately (i.e. an intermediate approach for the PPT and a narrow or broad approach for GAARs)?'¹²¹

Furthermore, the differences in legal (tax) culture can also explain the role of the actors in the implementation of the PPT by countries. For instance, when presenting BEPS Action 6, the tax administration will normally take a very short time to address BEPS Actions 6 whereas scholars and tax advisors can give an extensive presentation due to the difficulties of implementing BEPS Action 6.¹²² Some issues addressed by scholars and tax advisors relate to the wording of the PPT, for instance, reasonable to conclude, facts and circumstances, entitlement to treaty

Notes

¹¹⁷ As stated in the peer review report of Action 6 (Mar. 2019), 'the United States expects to comply with the minimum standard through a detailed LOB which is not available through the MLI. Therefore, the United States did not sign the MLI and will implement the minimum standard bilaterally'. See OECD, *Prevention of Treaty Abuse – Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6, OECD/G20 Base Erosion and Profit Shifting Project 249* (OECD Publishing 2019).

¹¹⁸ See Valderrama, *supra* n. 14, at 18.

¹¹⁹ See I. J. Mosquera Valderrama et al., *Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency*, 46(2) *Intertax* 140, 145, 156 (2018). See also C. West & J. Roeleveld, *South Africa*, in *Tax Avoidance Revisited in the EU BEPS Context*, Ch. 24, 617–632 (A. P. Dourado ed., IBFD 2017).

¹²⁰ See P. Rosenblatt & M. E. Tron, *General Report in Anti-Avoidance Measures of a General Nature and Scope – GAAR and Other Rules*, IFA Cahiers de droit fiscal international vol. 103a (SDU 2018), s. 2.6. See also I. J. Mosquera Valderrama & Irene J.J. Burgers *supra* n. 10, s. 3.

¹²¹ See blog post at GLOBTAXGOV by I. J. Mosquera Valderrama, *What Does PPT Says About Global Tax Governance* (29 July 2019), <https://globtaxgov weblog.leidenuniv.nl/2019/07/29/what-does-the-ppt-say-about-global-tax-governance/> (accessed June 2020).

¹²² Some of the main articles are V. Chand, *The Principal Purpose Test in the Multilateral Convention. An In-Depth Analysis*, 46(1) *Intertax* 18, 44 (2018); D. Duff, *Tax Treaty Abuse and the Principal Purpose Test – Part 1*, 66(3) *Can. Tax J.* 619, 677 (2018) and D. Duff, *Tax Treaty Abuse and the Principal Purpose Test – Part 2*, 66(4) *Can. Tax J.* 947, 1011 (2018); B. Kuźniacki, *The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI*, 10(2) *World Tax J.* 233, 294 (2018); P. Piantavigna, *The Role of the Subjective Element in Tax Abuse and Aggressive Tax Planning*, 10(2) *World Tax J.* 193, 232, (2018); D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) Versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law*, 1 *Erasmus L. Rev.* 48, 59 (2017); and S. van Weeghel, *A Deconstruction of the Principal Purpose Test*, 11(1) *World Tax J.* 3, 45 (2019).

benefits, and the interaction with GAARs. Only with these topics is it possible to spend at least one day discussing these issues in detail. In three comparative studies,¹²³ differences were found in the way that the GAARs are applied by countries and the role of the taxpayer, tax administration, and judiciary.¹²⁴

Two questions can be raised: Is everything as simple and easy to enforce as the tax administration is presenting it, or is it more complicated? In order to find answers to these questions, further (empirical) research should be carried out to identify the problems in the application of the PPT and the solutions from these actors to overcome these problems (e.g. more channels for informal communication between tax administrations and tax advisors, use of rulings or circulars to provide more certainty, or wait until the tax cases are before the judge to discuss the application of the PPT).¹²⁵ This research is currently carried out in the framework of the European Research Council funded project GLOBTAXGOV in twelve jurisdictions participating in the BEPS Inclusive Framework. This project studies the relationship between the PPT and the use of domestic or treaty GAARs taking into account their own legal (tax) systems and legal (tax) cultures.

4 CONCLUSIONS AND RECOMMENDATIONS FOR FURTHER RESEARCH

Some tax scholars have been giving attention to the study of legal transplants in taxation. In order to understand what changes are needed but also what changes are feasible, we need to also understand the countries, and this can be only done with the application of the comparative law theories of legal transplant, legal system and legal culture into taxation.

For this purpose, I argue that there is a three-step approach to analyse the legal transplants in taxation. The first step is to find out who is participating as donor (institution or country) or recipient country and why. The second step is to study the process by researching how the tax systems and tax cultures (actors) influence the process. The third is to study the outcome, i.e. what are the rules that are being transplanted, what are the differences between the donor rules and the recipient

countries' rules, and can these differences be reconciled? This framework is useful for understanding current processes of harmonization and/or convergence in international tax law making.

In light of the proposed three-step approach, the aim of this policy note was to provide a methodological framework to study the implementation of the BEPS 4 Minimum Standards in the countries participating in the BEPS Inclusive Framework. This methodological approach is used in the framework of the research Project (GLOBTAXGOV). This project studies the legal transplant of the BEPS 4 Minimum Standards in twelve (civil law, common law, mixed law) countries in different regions (Africa, Latin America, Europe and Asia Pacific). The BEPS 4 Minimum Standards contains detailed rules that will need to be introduced by law-makers in the domestic and treaty law of the countries committed to the BEPS Inclusive Framework.

Starting point is that the OECD with the political mandate of the G20 decided on the agenda and the content of the BEPS 4 Minimum Standards. These BEPS 4 Minimum Standards were transplanted to non-OECD, non-G20 countries by means of the invitation by the OECD to these countries to participate in the BEPS Inclusive Framework. The result is an intended transplantation.

There are different reasons that can explain why countries decide to implement (transplant) these standards. These reasons are for instance, prestige, political incentives, and chance and necessity. Furthermore, the differences in tax system and tax culture can also influence the content of the 4 Minimum Standards. In this case, not only the civil law vs. common law legal (tax) system differences can influence the rules made for the implementation of the Minimum Standards, but also the legal (tax) culture i.e. role of the parties (stakeholders) can influence the way that the rules implementing BEPS have developed. The theory of tax culture will take into account the behaviour, values and attitudes of the relevant actors (the courts with tax competence, tax law-makers, taxpayers, tax administration, business associations, tax advisors, scholars, and civil society (NGOs.) that can influence the transplantation process and the development of tax rules implementing the BEPS 4 Minimum Standards. The differences in tax system and tax culture have been illustrated in respect of the implementation of the Principal Purpose Test.¹²⁶

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¹²³ L. E. Schoueri & M. C. Barbosa, *Brazil*, in *GAARs – A Key Element of Tax Systems in the Post-BEPS World*, Ch. 6 109–45 (M. Lang et al. eds, IBFD 2016); A. P. Dourado, *Tax Avoidance Revisited in the EU BEPS Context*, in *Tax Avoidance Revisited in the EU BEPS Context*, Ch. 1 3–23 (A.P. Dourado ed., IBFD 2017); and see Valderrama et al., *supra* n. 119.

¹²⁴ For instance, Schoueri and Barbosa have referred to the Carrefour case (Judgment 103–23.290, of 12 May 2007). This case demonstrates that the Brazilian Administrative Council of Tax Appeals (Conselho Administrativo de Recursos Fiscais CARF) is even prepared to distort the sham doctrine as a means to enforce the business purpose argument: the decision was reasoned on 'the absence of any business or corporate purpose in the merger undertaken', but eventually concluded that 'the case should be qualified as sham'. The misuse of intricate doctrines and the consequences on legal certainty and equality, considered central to the rule of law, are discussed by Schoueri and Barbosa. It is felt from decisions in Brazil that authorities have a priori judgment over certain tax planning structures, and the business purpose doctrine is fit to give grounds to virtually any challenge in growing insecurity for taxpayers. See Schoueri & Mateus, *supra* n. 123. See also Valderrama et al., *supra* n. 119, at 146–7.

¹²⁵ The implementation of the principal purpose test by countries participating in the BEPS Inclusive Framework have been addressed by this author elsewhere. See I. J. Mosquera Valderrama, *BEPS Principal Purpose Test and Customary International Law*, Leiden J. Int'l L. 1–22 (2020).

¹²⁶ This project is still ongoing, and it is expected to provide the results (desk and empirical research) in 2023. See GLOBTAXGOV, <https://globtaxgov weblog.leidenuniv.nl/>.