POLICY NOTE

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

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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. 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 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). 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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* The writing and research carried out for this article is the result of the European Research Council (ERC) research in the framework of the Global Tax Governance (GLOBTAXGOV) Project (2018-2023). This Project investigates international tax law making, including the adoption of OECD and EU standards by twelve countries. See Global Tax Governance (GLOBTAXGOV), https://globtaxgov.weblog.leidenuniv.nl/ (accessed June 2020). The GLOBTAXGOV Project has received funding from the ERC under the European Union’s Seventh Framework Programme (FP/2007-2013) (ERC Grant agreement n. 758671). An early version of this article was presented at the Workshop: How Countries Learn to Tax: Complexity, Legal Transplants and Legal Culture. This workshop was co-organized by GLOBTAXGOV, Lorentzcenter-Netherlands Institute of Advanced Studies and additional funding Leids Universiteits Fonds, 25 Feb. to 1 Mar. 2019, Leiden University, the Netherlands. The author is grateful for the feedback provided by the discussants and participants at this workshop. Workshop report, https://globtaxgov.weblog.leidenuniv.nl/files/2019-04/GLOBTAXGOV-HOW-COUNTRIES-LEARN-TO-TAX-Conference-Report-1.pdf

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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.orgctp/BEPS-FAQsEnglish.pdf (accessed June 2020).

Minimum Standards. As of June 2020, 137 jurisdictions 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, 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. But unlike exchange of information which has been mainly introduced in bilateral and multilateral instruments 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. 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, or by addressing the legal system and cultural differences in the implementation of BEPS. However, in the literature, the articles addressing the BEPS as a legal transplant are scarce, 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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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, enforced the Common Reporting Standard on Automatic Exchange of Financial Accounting Information, and signed Multilateral Competent Authority Agreements.


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 GLOBTAXGOV. 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 Transplants

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

Despite the use of different terminology, the essence of legal transplants as initially formulated by Watson as ‘the moving of a rule or a system of law from one country to another’ still remains. In Watson’s view, specific rules, institutions, legal concepts and structures can be borrowed. 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. 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.

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. 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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57 The Research Project GLOBTAXGOV investigates ‘A New Model of Global Governance in International Tax Law Making’ in twelve countries. See supra n. 1.
58 This section is based in the PhD dissertation by J. J. Mosquera Valderama, Leasing and Legal Culture: Towards Consistent Behaviour in Tax Treatment in Civil Law and Common Law Jurisdictions (VDM Publishing 2010).
59 There are two authors that initially address 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, 45(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 Use and Misuse of Comparative Law, 37(1) Mod. L. Rev. (1934). For an analysis of both theories in legal transplants, see A. Grant & J. Mosquera Valderama, 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 95–112 (A. Cobos Toyo & P. Masbernat eds, Spain: Anuarios 2020).
61 Various terms have been used to refer to transplantation and its process. For instance Örücü 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, infiltração, infusion, transplantation, emulation, engulfsment, grafting, m-planting, cross-pollination, digestion, salad bowl and melting pot’. E. Örücü, Chapter I. Unde vendit, quo tendit comparative Law?, in Soniaery Comparative Law in the 21st century 7 (E. Örücü & A. Harding eds, Kluwer Law International 2002).
62 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.
66 Watson, supra n. 20.
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communitaire) 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 Vini 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 programmes have given a particular importance to the objective of raising revenue’. Y. Tanzi, Taxation in Latin America in the Last Decades. Center for Research on Economic Development and Policy Reform, Stanford University, Working Paper Number 76, at 2 (2000). See n.s. 2.2, infra.


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 Olo, ‘The Law of Property in Ancient Roman Law’ (June 2017), https://ssrn.com/abstract=2084869 (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 remained so strong with the legal institutions familiar to the Spanish and Portuguese settlers’. K. Zweigert & H. Kötz, Introduction to Comparative Law 113–114 (4d 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 ex fraudem legis underlies the tax avoidance concept in many of the civil law countries but its impact varies greatly from country to country’. Form et substantia in tax law, Cahiers de droit Fiscal International Volume 87a, 45 (F. Zimmer ed., SDU Uitgevers 2002).

39 According to Yezerman, 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. Yezerman, ‘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’. 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. 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. 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.

The following section will address 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. 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.

‘Thereafter, in 2003,’ Thunoronyi 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’. According to Thuronyi, in studying legal transplants, it is important not only to identify where they have occurred but also to assess their success.

More recently (since 2007), tax scholars have addressed in some articles the different approaches for studying the legal transplants, i.e. functional approach (Gabarino), and contextual approach (Marian), and case studies on the transplantation of concepts: leasing (Mosquera), corporate tax law provisions (Le), place of effective management (Burgers), process of legal transplants in China.
(Li)\textsuperscript{54}; general anti-avoidance rules (GAARs) (Li,\textsuperscript{55} Gabarino and Freedman); and the different categories of transplanted concepts and regimes (Dourado\textsuperscript{56}). 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.\textsuperscript{59}

(2) Prestige: The introduction by developing countries of tax expenditure analysis which has been practised in OECD countries since the 1970s\textsuperscript{60} to increase fiscal transparency and improve policy making.\textsuperscript{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.\textsuperscript{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.\textsuperscript{63}

(4) Expected efficacy of law: The use of the arm’s length principle to prevent transfer pricing manipulation by companies.\textsuperscript{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.\textsuperscript{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 Systems\textsuperscript{66}

#### 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.’\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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


\textsuperscript{56} See Gabarino, supra n. 49.

\textsuperscript{57} See Freedman, supra n. 10.


\textsuperscript{62} This financial transaction tax is different than the one in the European Union.

\textsuperscript{63} 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.

\textsuperscript{64} See supra

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\textsuperscript{66} See supra

\textsuperscript{67} See supra

\textsuperscript{68} See supra

\textsuperscript{69} See supra
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. In this context, a classification of legal systems has been provided amongst others by David dividing between roman-germanic (civil law), common law, socialist law, Muslim/Hindu law, Jewish law and Far East law. Zweigert and Kötz reduced the classification into the following ‘Western’ legal systems: Romanistic, Germanic, common law, and Nordic legal system.

The main common legal systems around the world are common law, civil law and mixed systems (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 (law 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. The ideas of justice and morality behind these principles and the role of scholars influence the formulation of such principles.

The common law system is divided into English (United Kingdom) Law and the Law of the United States of America. In general, rules 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’. 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. 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. For Thuronyi, in common law countries scholars’ writings (doctrine), is not acknowledged as an independent source of law but in practical terms treaties and writings are relied on by courts and practitioners to the extent they are persuasive. 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 Taxation

For cross-country comparisons, a broader classification of tax systems by means of identifying the ‘basic structural features of the tax laws of countries’ has been proposed by Thuronyi. (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, Sweden, Norway, Denmark).
and Luxembourg); Dutch countries (Netherlands 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. An overview of these differences is given in the table 1 below.

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<tr>
<th>CIVIL LAW TAX SYSTEM</th>
<th>COMMON LAW TAX SYSTEM</th>
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<tr>
<td>Formal and systematic aiming to define and categorize taxes.</td>
<td>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).</td>
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<tr>
<td>Tendency towards a scheduler (analytic) approach. Tax laws gathered into a single tax code.</td>
<td>Use of private law concepts for tax law purposes.</td>
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<tr>
<td>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.</td>
<td>Concepts and detailed interpretations of the statute are made by the judge.</td>
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The following section will address the use of the theory of legal culture.

2.5 General Features of the Theory of Legal Culture

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

- 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 it is’. 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.

<table>
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<tr>
<td>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.</td>
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<tr>
<td>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.</td>
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<td>86 This section is based in the PhD dissertation by I. J. Mosquera Valderrama. See supra n. 14.</td>
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<td>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, isolated 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).</td>
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<td>89 M. van Hoecke &amp; M. Warrington, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, 47(3) Int’l &amp; Comp. L. Q. 496 (July 1998).</td>
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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, Thunini 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, Thunini 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

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95 Thunini has referred to the definition of Merryman. Thunini, supra n. 47, at 3 & 5.
98 This concept is borrowed from comparative law and it is described by Otirici 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”’. E. Otirici, 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'.

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’ 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. 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’.

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. 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

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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.


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 commitment 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...
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 (prestige)109 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, Myszkowski, 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

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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 J. J. Mosquera Valderrama, Legitimacy and the Making of International Tax Laws: the Challenges of Multilateralization, 7(1) 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. governments for the people. See F. W. Scharpf, Governing in Europe: Effectives and Democratics?, 7 (Oxford U. Press 1999).


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.


114 For the different tools for developing countries to enhance capacity building in BEPS as 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.
The Differences in the Rules and Concept

Valderrama, intermediate (one of the main purposes) versus

See OECD, The Principal Purpose Test (PPT) in BEPS Action 6 and the ML

'Supra

See for instance, a narrow

I. J. Mosquera Valderrama et al.,

See 66(4) Can. Tax J. 947, 1011 n. 10, s. 3.

Some issues addressed by scholars and tax advisors

Mixed systems may provide

that are available to countries and their

Prevention of Treaty Abuse

Part 2,

Part I –

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).

See supra n. 14, at 18.


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, differences were found in the way that the GAARs are applied by countries and the role of the taxpayer, tax administration, and judiciary.

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). 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 contain 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.

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523 L. E. Schoueri & M. C. Barbosa, Brazil, in GAAR – 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.

524 For instance, Schoueri and Barbosa have referred to the Carrefour case (Judgment 103), in Intertax, 46(4), 2018, 732–45 (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. See also Schoueri & Matias, supra n. 123.

525 This is still unsung, and it is expected to provide the results (desk and empirical research) in 2025. See GLOBTAXGOV, https://globtaxgov weblog.leidenuniv.nl/.