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## **How countries learn to tax; Complexity, legal transplants and legal culture, 25 February to 1 March 2019: Workshop report**

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# HOW COUNTRIES LEARN TO TAX

## Complexity, legal transplants and legal culture

25 February to 1 March 2019

-Workshop report-

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## Summary

The workshop touched upon a multitude of topics. These can be subsumed under the following main headers:

It included **methodological considerations** around doing comparative law and combining methods of comparative law with methods from other fields such as history, political science, sociology, computer science and accounting research.

**Empirically**, it focused on understanding how a transplant process actually works and why it takes place, i.e. who the actors are that make a transplant happen. This included meso-level perspectives, focusing on actors such as bureaucracies, experts, lawmakers, companies, accounting firms and others, but also perspectives which focused more on states as a whole and their role as norm makers and takers. The analyses thereby drew from experiences from many different countries around the world and included a number of historical perspectives as well. The participants also discussed evidence on the extent to which convergence is occurring, using the example of the tax treaty system and the implementation of the BEPS standards.

**Theoretically**, several key concepts were discussed such as the notion of “expertise”, “international standard”, the concept of “transplant” itself and possible alternative metaphors as well as the history of the idea. It was also examined how one can approach the empirical fact of transplants or international convergence of rules from a normative and philosophical point of view.

This document reports the discussions that took place during the five days in a chronological manner. The last section contains an outline of possible topics and approaches for a follow-up workshop.

The report does not systematically differentiate between individual opinions that not everyone might share and consensus. It rather reports which bits and pieces of the debates caught the attention of the reporters and other note takers. It may therefore rather be seen as something stimulating further discussion than a fixed document.

Power point presentations are available on the GLOBTAXGOV blog:  
<http://globtaxgov.weblog.leidenuniv.nl/files/2019/04/Program-with-timetable-and-slides-How-countries-learn-to-tax.pdf>

## Day 1

Day 1 included:

- A presentation by Irma Mosquera Valderrama on legal transplants and international tax standards
- A presentation by Assaf Likhovski covering a historical perspective of legal transplants
- A presentation by Jan Smits on legal transplants in comparative (private) law research
- Small group and plenary discussions on legal transplants in international tax law

The day started with a description of the purpose and activities of the Lorentz Center, the host of the workshop.

### Irma Mosquera Valderrama on “Legal Transplants and International Tax Standards”

Irma presented the main lines of research of the GLOBTAXGOV Project, focusing on the role of the concept of legal transplants in the analysis of the Minimum Standards of the OECD BEPS Project.

In particular, the role of the OECD/G20 and the EU was discussed, and the three main goals of the GLOBTAXGOV Project were described; however, since the notion of legal transplants is mainly related to the first one (i.e. to investigate the feasibility of the transplant of the Minimum Standards), more attention was given to it. In this respect the importance of legal cultures influencing the transplant of a rule was stressed with the example of the implementation process in the Netherlands.

### Assaf Likhovski on “A Historical Perspective of Legal transplants”

The presentation started with a literature overview of the concept of legal transplants, including an analysis of “diffusion studies” in social sciences, most notably via the work of William Twining. The existence of many metaphors dedicated to define the reality of diffusion of rules — transplant, transfer, reception, imposition, influence, diffusion, import, imitation, migration, borrowing, entanglement — was also pointed out.

Attention was paid to the ideological assumptions that can be attached to legal transplants. Additionally, the interest of the concept of legal transplants for many different audiences was explored; in this sense:

- From a practical point of view, the concept could be of interest for law reformers, law and development scholars and other specialists; and
- From an academic perspective, the notion of legal transplants could be obviously of use for comparative lawyers, but also for law and society scholars (in this sense the classic question of law being attached to or detached from society was posed), institutional economists, and also historians.

Subsequently, a historical overview of the concept of transplants was presented, starting from the earlier and more positivist approaches, influenced by nationalism and the national nature of most modern legal history scholarship. However, Likhovski argued that globalization meant a recent transnational, comparative and global turn in legal history. In this sense, he supported this claim via a few examples, namely the European Society for Comparative Legal History (established in 2009), and

the *Comparative Legal History* journal, established in 2013. These examples would reflect a growing interest of historians in the concept of legal transplants. The concept of legal transplants could therefore be used for studying several periods of history (e.g. the spread of Roman law or, more recently, the spread of British common law in the imperial period, the spread of the Napoleonic codes in Europe, or the influence of European law in non-Western empires (Japan, the Ottoman Empire) and states (modern Turkey).

Likhovski also pointed out that legal transplants can be used in different legal fields (private law, corporate law and, of course, tax law), although the intensity with which legal transplants have been studied in these fields would be uneven, and the methodologies have also varied. Finally, several literature examples were pointed out and briefly discussed in order to illustrate the aforementioned claims.

Likhovski concluded with an assessment of the advantages and disadvantages of turning to history in respect of legal transplants. Although it is obviously advantageous to have access to archives in light of historical hindsight and that there are numerous available case studies, it poses challenges such as the impossibility of using social science methods such as interviews (for actors are long gone), the tendency of historians not to generalize and theorize, and the fact that societies change make it hard to learn from older political and social structures that may no longer be comparable.

### Jan Smits on “Legal Transplants in Comparative (Private) Law Research”

The last presentation of the day by Jan Smits turned back to the earlier modern theory of legal transplants as proposed by Watson in order to understand the use of the concept from the perspective of comparative private law research. Taking into account that ‘most changes in most systems are the result of borrowing.’ (Watson 1974), Smits pointed out four main reasons for using the notion of legal transplants: prestige, imposition, efficiency and coincidence.

Smits argued that in order to assess the success of a legal transplant in the field of taxation,, the following should be taken into account:

- an ‘evaluation framework for legal transplants in taxation’ should be identified; and
- it should be determined whether tax law is a suitable field for developing such a framework

Understanding success as uniformity would be problematic (in this sense, the Legrand-Watson debate was brought to the table), and the evolutionary theory of legal development — by which organism and environment are understood as key concepts — should be taken into account. Finally, Smits wondered how could the tax law discipline take into account the possibility of law being tied to the socio-economic environment in which it has to operate.

### Small group discussion: The concept of legal transplants and how to research it

One group including Andrea, Jan, Irma, Tarcisio, Manon, Kim and Frederik discussed the feasibility of using the concept of legal transplants, which gave the following answers to the below topics:

#### **The sense of using the concept of legal transplants**

This group raised several conceptual remarks in this respect, namely that:

- It might not if one takes a systemic/global rather than an international perspective. In the first, everything is already interconnected and no transplants in that sense take place;
- national cultures may or may not be right categories to analyse what is going on. Socio-economic (or epistemic) communities could also be explored;
- law, understood as a self-referential system (Luhmann, Teubner,..) may raise questions on the importance of the impact of culture; and
- it should be important to differentiate between several levels of conflict: at the design and at the implementation level.

### **The practical issues of using the concept of legal transplants**

In this respect, the group pointed out that it is important to know what the goal is when the argument of legal transplants is being used.

In this respect, the possibility of assessing the concept of harmonization in a Legrand-style analysis could be an example. Another possibility would be to look at the quality of the peer-review process of the Minimum Standards. Finally, a third possibility would be to look at the goal of a whole process and check whether it is fulfilled or not. In summary, there are many goals that can be achieved through the use of the notion of legal transplants, and the practical issues would differ between one choice or the other.

### **Legal aspects from international law that can influence a legal transplant**

It was pointed out by the group that the use of either the monistic or the dualistic conception of international law should be established (monistic = international law is already part of law; dualistic = international law is separate and needs to be integrated with domestic law)

### **On researching transplants**

The group deemed important to differentiate between first-order and second order observations. For instance, if one researches on the first order (eg.. by interviewing people) one might get their perceptions of problems and their causes, but this need not be the actual problems and causes, since they are only perceptions.

Setting limits to research is something that should be considered: Where does a transplant start and where does it end? Law, the group argued, is a dynamic process.

\* \* \*

Monday ended with a well-deserved wine and cheese evening, in which participants continued to discuss related issues in a more informal way.

## Day 2

The second day saw the following presentation:

- A presentation on revisiting trajectories of tax reform, by Miranda Stewart
- A presentation by Allison Christians on the theory of legal culture.
- A presentation on methods for ascertaining the impact of context in the legal transplant of new rules, by Omri Marian.

Additionally, small discussion groups and plenary sessions were established throughout the day.

### Miranda Stewart on “Revisiting trajectories of tax reform

Miranda Stewart did a review of her article “Global Trajectories of Tax Reform: Mapping Tax Reform in Developing and Transition Countries” (2003), now 15 years old, in order to update it to present times. She started focusing on elements that have changed in the last years, namely:

- Context: the global context of tax reforms has somewhat changed. At the time, everyone talked about globalization, now we have digitalisation and perhaps even a trend to deglobalization with regards to trade.
- Agencies: Now, as well as global institutions, politicians themselves are involved in international tax policy issues (e.g. there is a direct communication between ministerial offices), taxation of MNEs has become political.
- Experts remain important in tax reform but are more diffuse: they are still divided between those who understand the broad picture of tax reform and those more specialised technicians focused on detailed legal drafting.

The different approaches of the World Bank and the IMF were explored in the original article; historically there were different approaches (e.g. when the World Bank is in favour of tax incentives, the IMF seems to be rather against them). There has been increasing alignment of their discourses, but the OECD remains dominant in international taxation. The increasing role of the EU was also mentioned. Most importantly, progressivity and redistribution, which had largely disappeared from tax reform discourse of the 1990s, has returned as a goal of tax policy, although its implementation is still challenging.

Assaf mentioned that something similar might happen to tax policy as what happened to monetary policy in the recent decade. While monetary was a theme of public debate long time again, it then became clearly a domain of experts. But now it has “taken back” by broader public debate.

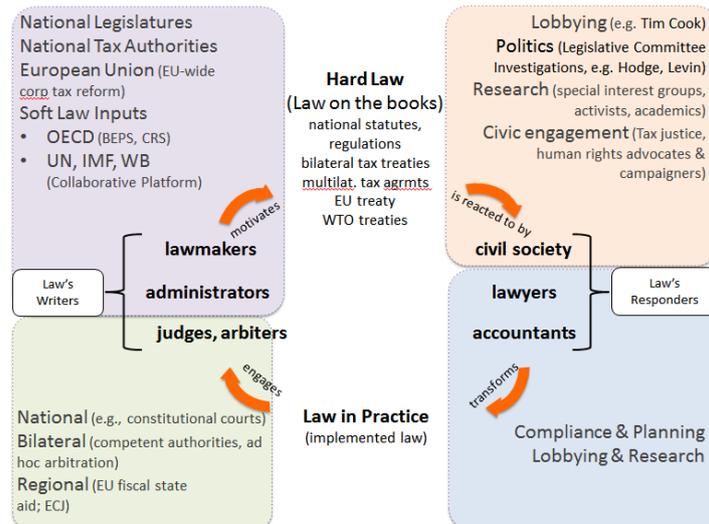
### Allison Christians on “Tax as Transnational Legal Order”

Christians’ presentation revolved around the notion of studying tax law under the perspective of the transnational legal order concept. In this respect, a series of ideas were launched to the audience, such as:

- How should the cycle of law making process be studied
- The importance of studying the main players in international tax policy and to find out any possible deficiencies.
- The possibility of politicians being more performative than legislative.

With the following chart, Christians illustrated how the law making cycle in taxation could look like:

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In the discussion, Tsilly Dagan pointed out that policy competition might be something desirable.

## Morning plenary discussion: Which are the actors in legal transplants?

The plenary discussion that followed took up the input from both presentations and aimed at collecting further ideas on who the important actors in transplants are, as well as how and why to research them.

### On researching actors of legal transplants:

- When researching legal transplants, it is necessary to delimit the research: do you stop at the administrative, legislative, political, practical, judiciary level?
- You also have to articulate the timeframe, and perhaps you cannot make claims beyond that timeframe.
- You can also look at the changes over time and see if they prove a transplant. It is not about the actors being good at bad, and you are not looking at success, but whether there has been a legal transplant or not.
- What is an actor and how should it be defined? - A definition: look at whether effects can be attributed to the collectivity rather to the subunits that make this collectivity.
- Why researching who the actors are? the study becomes very general (e.g. "it's the IMF"). Why create the list? Because there is a focus in academia on a very narrow set of these relevant actors.
- One could use the "Legal formants" approach by Rodolfo Sacco<sup>1</sup> - knowing what is the transplant that we are studying would be crucial.

### Who are the actors (in addition to the already mentioned) and what features do they have?

- Importance of authority - authority may be achieved through e.g. expertise.
- Who is the actor can depend on who tells the story. Storytelling makes a difference. Therefore, those who "tell the story" would also be influential (these might be often academics).
- Academics: functionally differentiated. Some academics are experts in e.g. think tanks, OECD. Others are writing articles for general newspapers. Other academics are old-fashioned "para

<sup>1</sup> Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)," *The American Journal of Comparative Law* 39, no. 1 (1991): 1-34.

scientists". Their influence depends on the function. In a more long term level, influence could be influenced through teaching.

- Sometimes there can be no circulation of information.
- Epistemic — Piaget distinction between meta-, para- and science. The higher the influence of pressure groups (this influence can be more or less transparent), the more they want to appear, the more transparency they show. Dark corner: problem of selection of meaning from the "noise". You should use a mathematical model to filter intensity, to separate meaning from noise, wheat from chaff.

Andrea Pitasi proposed the following typology:

- o Level 1: Formal system with valid law-making power and authority
- o Level 2: Formal system with an effective policy making/modelling power (think tanks)
- o Level 3: Agenda setters (media? lobbyists?)
- o Level 4: are "noise generators". (are they really actors?)

Some complexities:

- Some actors might be hybrid: International organizations are actors but also forums for nation states
- Some that are perceived as actors, such as the EU, might not be so unified: Wouter Lips pointed out that, for example, the Commission has a very strong role in e.g. State Aid and overcoming the unanimity requirement, but the Council is pulling the breaks on the Commission. However, this dynamic will come to an end because "States are getting anxious" with proposals such as the qualified majority for tax issues. Therefore, the Commission's role may be weaker in the near future
- The bias of legal citation, or how to identify "who said what (first)". This is related to the sending-receiving narrative in legal transplants: is it accurate? "It is impossible to find out who came up with an idea."
- Peter Hongler pointed out that the OECD is silent on who gave them the idea on certain rules. Many of them are proposed by the business community. Therefore, transparency is important.
- Irma added that actors (individuals) can move from one institution to another, for example tax advisors into the tax administration.
- Are we understating the role of the Big 4? There is a lot of individual movement: someone from the government may be motivating other actors. The narrative is probably a lot messier. People do not stay on specific buckets.

Empirical discussion and examples:

- The National Tax Association in the US used to be more dominated by lawyers, but now there are more economists. The change of the dominant background of the people involved is also relevant.
- For those working on small / developing countries: expert communities inside such a country are usually small and often in the government, and have a close articulation with external experts (IMF, OECD). Are experts inside the administration important in these countries? Treasury v. Revenue.

- The Colombian Transfer Pricing reform was to 80% written by tax lawyers. Failure of the enactment of law? Surinam income tax law amended by the IMF, but the Surinamese felt that it was written by the Dutch and hasn't implemented it yet.
- “Noise generators”: the notion that an idea rises and gains traction because it has merit may not be true. Example: CbCR was a concept by the TJN that was used by the OECD. This has elevated the TJNs status, and has given rise to another concept (“illicit financial flows”), which has left no room for other topics, such as the CIT decline.

## Omri Marian on “Tax Transplants and Local Context”

In his presentation, Marian dealt with the importance of local context in the adoption of legal transplants, with the possibility of the convergence of tax laws as a starting point. In this respect, Marian presented the analysis of tax treaties in order to determine whether their language converges after the entry into force of an updated model convention. The analysis shows that there is indeed

Marian then explained how different schools of thought in comparative law would find different meaning (both in contents and in terms of normative assessment):

- Functionalists: Similarity of problems, therefore common solutions (convergence)
- Culturalists: Defining a problem requires moral judgment. Problem is a relativist term.
- Critical comparatists: Harmonization/divergence is an interest-driven outcome. Cui bono?

Marian concluded that it should be accepted that there are different methods, and that eclecticism would be therefore inevitable. However, eclecticism should not be mistaken as ‘do whatever you want’, because it would become “methodologically unstable”. Instead, comparatists should “pursue political projects, harnessing their mature eclectic pragmatism to political objectives which can be embraced or contested”. Identification of a clear political goal would dictate the method of assessment.

In other words, being aware of the method or theory under which legal transplants are studied should be a good starting point.

In the discussion, Tsilly pointed out the uniqueness of treaties in the wider population of legal transplants. Treaties strike a deal between actors. There may be symmetrical and asymmetrical treaties. One can argue that the OECD pushes the deal in other to support OECD actors. However, law is not everything, enforcement also matters: There is a tag price, but certain clients get reductions.

Further, with regards to treaties, it was pointed out that Art. 3(2) of the OECD Model Convention dealing with the treaty's interpretation might be particularly relevant.

## Afternoon discussions

### Group discussions

The group formed by Kingma, Mejía, Grant, Dagan and Jogarajan dealt with the following topics regarding culture, actors and context:

- A difference between culture and context should be established: for instance, in a time in which MNE tax avoidance is being talked about a lot in the public in Australia this would be part of the context; however, the culture in Australia is that tax planning is legitimate. Finally, the Revenue authority should be understood as an actor — same for MNEs, advisors... Also, the movement of individuals across actors is relevant.

- Other actors, such as TJN, might also be studied.
- 2 levels of transplantation game: (i) MNEs, competition, etc; and (ii) gender issues and the like (things that are highly cultural)
- If countries think they need to create incentives to attract MNEs, they will do what customers like... State intervention level vs. market. Market element (economic environment) would be context. Tax is more than revenue raising — it is also about e.g. changing behaviour (sugar tax?)
- Sugar tax - In this case there would be some support for the functional approach. If many countries are adopting it, there may be something to it. Instrumental conception of tax.
- What about unintended consequences when tax affects us in ways that we didn't expect? Would this be cultural?
- Issues regarding taxpayers' identity — eg childcare?
- These are all different aspects of the interaction between taxpayers (society) and tax. But is it "culture"?
- Another idea: taxation commodifies everything (residency if you are rich, and so on).
- How much of this is at play when you have to "put a price tag" on certain behaviour and export tax norms from one country to another?
- Problem across fields with transplants: Legrand's POV. Transplants may work when there are many other things interacting with them, but not elsewhere, where that "context" is lacking.
- The structure of the State implementing and enforcement would be a "contextual" element. It would determine the success of a transplant.
- Impact of BEPS (example): some countries commit to implement everything but lack the capacity to implement anything.
- The commitment to a measure v. the likelihood to implemented is also a contextual element.
- "Sending a signal" — all countries are in for signing treaties such as investment treatments, even if they don't know what's in there.

### Plenary discussion

The following ideas deserved attention in the plenary discussion:

- When cultural differences are too big, maybe legal transplants should be avoided.
- Cultural difference doesn't dictate that transplants are necessarily bad.
- Can a legal transplant change the culture? Isn't the point of law to achieve cultural change?
- Transparency: here, harmonization could be desirable. Should you then by having global approaches influence the culture of other State?
- Tax expenditure — the notion of an expenditure would be more acceptable than eg just "giving stuff for free" to poor people.
- Tax has "unique features" — ?
- Gender budgeting initiatives — a classic legal transplant analysis could be done in this respect. What if gender budgeting was a BEPS standard or something like this?
- Industry-based considerations — lobbying may be happening out of the tax sphere and override it.

## Day 3

Day 3 included

- A presentation by Kim Brooks on the discipline of comparative tax law.
- A presentation by Kerrie on studies in the field of accounting on tax laws
- Small group and plenary discussions on doing comparative tax law

### Kim Brooks on “Comparative Legal Research Perspectives: Tax Law”

#### Presentation

Brooks has created a dataset of work that has been done in the field of comparative tax law. This is non-exhaustive, but quite complete for the period since 1990 and for work in English.

Brooks classified this work according to the theoretical frameworks used by the authors, by the subject of study, by the methods employed as well as by the purposes of doing the comparisons.

8 purposes of doing comparisons were identified by Kim in the works of the authors analyzed:

1. To better understand what happens in your own place, if you look at the outside
2. To learn about other systems, describe other jurisdictions
3. Draw general conclusions about legal regimes and law:
4. To search for a common core (that may serve as base for further harmonization)
5. Try to achieve legal change in your country (the majority of work)
6. Explain why a country’s law are the way they are
7. To spread higher-order values
8. See tax as a social response to human problems. Eg compare how tax produced different social realities

As conclusions, noted that most scholars do not go further than to say a rule exists without providing context and reasons. There are few female authors doing comparative work, no authors writing from developing countries, few studies are conducted about developing countries and there is a focus on high-income country tax policy problems.

#### Discussion

In the subsequent discussion, Tarcisio Magalhaes brought up Hart’s concept of an internal and an external point of view on law. Without an internal point of view on law while comparing one is lacking necessary context.

It was added that a ninth purpose of doing comparative law could be to look into other countries to deconstruct global discourses and global ideas. (eg is BEPS an issue?)

Assaf said that it would be important to not only focus on work by people in law schools, because others do more thick comparisons.

### Kerrie Sadiq on “Comparative Experiences and Multidisciplinary Approaches: Accounting Law Perspective”

#### Presentation

Sadiq presented the general approaches to taxation taken by accounting research as well as results of a recent study on BEPS implementation in 19 countries<sup>2</sup>, a study on transparency and corporate social responsibility<sup>3</sup> as well as a recent paper done on tax avoidance in Australia<sup>4</sup>.

Accounting studies investigate how accounting is used by individuals, organizations and government as well as the consequences that these practices have in turn on societal actors. With regards to taxation, it is investigated for example how markets react to tax disclosures.

Research in accounting is data-driven and strives to allow for studies to be replicated. Researchers use for example interviews, surveys or statistical data to investigate theories empirically. Often data is triangulated, meaning that several data sources are used in combination.

The study on BEPS implementation's purpose is to assess the jurisdictional responses of different countries towards the BEPS process. Sadiq and her co-authors found a considerable variation between the different countries regarding the extent to which BEPS actions are implemented.

The study on transparency applies methods of quantitative text analysis to transcripts from hearings of the Australian parliament. It finds that corporate attitudes towards tax transparency have changed over time from a disgusted and insolent attitude to a positive, proactive and conciliatory stance.

Finally, in the third paper, Sadiq and co-authors applied Bourdieu's theory of social fields to data about attitudes towards corporate tax avoidance gathered from media articles and interviews conducted with all involved stakeholders in Australia. It mapped the field of power and investigated the relation between stakeholder's *habitus* (education, upbringing etc.) and their stance towards corporate tax avoidance.

## Discussion

The discussion that followed highlighted several issues: Among others, the use of charts in the presentation was discussed. It was pointed out that the risk of using charts is to oversimplify reality and thereby sending an (unintended) normative message. The same holds true for the use of certain colours (such as green, red) or presenting information in a certain order. Presenting information vertically might imply a ranking although this might not have been the intention. It was also mentioned that such messages can be understood differently in different cultural contexts: For example, the colours green and red are mostly associated with the dichotomy positive/negative in Western countries, whereas in China the reverse is true.

Some critique was raised with regards to the mapping exercise of powerful actors in tax reform. It is not easy to follow how actors are identified and how their power is assessed. The concern about unintended normative messages as discussed above may apply here as well.

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<sup>2</sup> Adrian Sawyer, Kerrie Sadiq, and Bronwyn McCredie, eds., *Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 16 Countries* (Fiscal Publications, 2019).

<sup>3</sup> McCredie, B and Sadiq, K "Is Transparency the New Politics of Tax and Corporate Social Responsibility?"

<sup>4</sup> Mattia Anesa et al., "The Legitimation of Corporate Tax Minimization," *Accounting, Organizations and Society*, 2018.

## Small group discussion: International Standards and Technical Experts

One group including Diana van Hout, Allison Christians, Tarcisio Magalhaes, Anne Mania, Adrian Grant and Germaine Rekwest discussed the role of international standards and technical experts in transplants.

### The nature of international standards

This group raised several conceptual questions on the topic: Do these standards get their authoritative status by being called “international”? Do you implement international standards because they are international? Is it important to distinguish between OECD standards or UN guidelines?

The participants drafted a list of examples of international standards in the area of taxation:

- International Financial Reporting Standards (IFRS) developed by the International Accounting Standards Board (IASB) (IFRS)
- Transfer Pricing Guidelines
- UN Model Convention
- OECD Model Convention
- BEPS MMSSS
- BEPS recommendations and best practices
- MNE Guidelines
- IMF Model tax codes? Model VAT?
- Inclusive Framework Peer review???
- OECD VAT standards
- etc.

But they questioned then how one can more objectively identify what a standard is and which standards are imposed by international pressure? Is it possible to talk about a degree (“Heat Level”) of pressure? This might determine what is and what is not a standard.

Another interesting question is: When does a “bad idea” far from being standard become an international standard? Do you need an authority to propose it?

### The role of experts in standard setting

It was argued that it is the role of the experts (eg OECD experts) to come in and make the ideas standards. Is this also true about academic experts? One can argue that if academic experts refer to something as a custom, then it becomes obligatory, and then it becomes law. The scenario could possibly be that when experts identify a good idea, they point to it and policy follows it. This is a bad idea because experts cannot possibly know that their model is universal: “Paradigm of expertise”.

But how big is the influence of the tax experts? Are they just “water carriers”/“missionaries”? How does an idea spread? Are there other elements besides the quality of the idea itself? Or is there a power/network/etc. influencing it?

### What makes someone an expert?

- Be correctly networked
- Be charismatic
- Look the part (pale male stale?)

## Small Group discussion: Comparative Tax Law Research

Another group including Miranda Stewart, Afton Titus, Sieb Kingma and Frederik Heitmüller started from the input that Kim gave in his presentation and discussed further how comparative tax law research should be done and what purposes it could serve.

### What is the purpose of comparative tax law research?

The group asked first: What do we mean by project-driven or purpose-driven research? Is not all law research project or purpose driven? However, it is not always clear what the purpose is. People's research is maybe not as effective as it could be because they are not clear on the purpose.

On the other hand a relevant question is, whether there should be a point to transplanting laws, or doing comparative research?

Maybe we need a more operational approach to comparative law research – need to take account of administration, etc.- especially from a developing country perspective – do they have the capacity, administrative etc. to do this activity.

### Engaging Law reform in your own country

From a practical point of view, is looking at other tax laws in other countries useful? Can it be done, is it adaptable?

- Policy and law makers, business lobbyists, etc often do this
- What is the role of academic research in this? Can they participate in this process?
- Could be critical – what could or not work? Could be predictive: How would it actually work in this country?
- Could explain how it would have unintended effects or outcomes in the system, be incoherent, or just critique the underlying policy

### Global standards vs. domestic standards

Comparative law could also help disentangling what really is a global normal and what are actually domestic norms. It could for example question if the BEPS norms are really global norms or whether they are the norms of some specific countries? Can comparative tax law research actually show this, or the opposite?

With regards to for example the PPT one could ask whether this is really an international standard, or a national standard extended. Can we really attribute any origin or country specific situation to the general standard? There has not been the work done to identify if there is a rule already in a country, or if it would operate successfully there or not or whether elevating the norm to the status of global standard is just bullying.

Questions could be: Was the PPT really embedded in laws? Was it really transplanted? How was it transplanted? Are there commonalities or differences across legal families, regions, etc, common law, civil law, etc? The IFA cahiers are a resource for comparative analysis – an expert report from a jurisdiction.

### Doing comparative research: The case of GAARs

The group further discussed practical problems of comparative research at the example GAARs: If we want to compare for example how GAARs change BEPS, the comparative research would require

knowledge about the practice and culture, etc. in the country of research. But how can you do it? Travel to “far-away places” – interviews with government, academics, practitioners, taxpayers – but still these might not tell the truth. And what happens if there are no cases in a jurisdiction even if there is a GAAR? If there is a new GAAR does it produce more or less uncertainty?

This also means that “BEPS comparisons” and rankings of “BEPS performance” do not tell the whole story. UK ranks highly in terms of BEPS implementation, but also aims to have the most competitive tax system.

### **Caveats of comparative research**

The group then asked what caveats of comparative research there possibly can be:

- Some are easily identifiable such as, language barriers, hard to access data, no use of interviews, no travel to the country, secondary sources only, etc ...
- But others are less obvious: Eg, common law country lawyers are more familiar with case law, they look for this in other jurisdictions, if they don’t see it they cannot identify what else might be going on, or what is an interesting question to ask
- Common core, versus diversity – If you favor either harmonisation or diversity, then you see and establish this in your research.

### **Plenary discussion: Comparative research for development?**

The plenary discussion first focused on how “good” comparative research can be conducted.

It was called attention to the fact that a lot of comparative studies are ignoring local context. Before for example we start comparing the implementation of BEPS, we need to start comparing the laws in place, how the administration works, etc. and not simply assume that such things are equal across countries.

It needs to be kept in mind that comparative research is a creative process that creates a new narrative rather than “tells the truth” about another country. To do good research, one should first start with a concept and ask preliminary questions such as:

How do you define what you are looking at? What is the unit of analysis? Depending on this, which disciplines do you need? Does the methodology need to be replicable? What is the audience of the specific comparative tax scholarship? To each other, to policymakers, to the general public?

One should also think and make clear whether wants to assess what the problems are or whether one aims at solving a pre-defined problem.

The discussion then turned more specifically to the workshop’s overarching theme, “How countries learn to tax?” as well as the ideas of norm migration or legal transplants and their role in development.

What is the function of norm migration? It was recalled that the original phrase “learning to tax” comes from a 1962 paper by Nicholas Kaldor<sup>5</sup>. It was debate whether the notion of developing countries “learning to tax is still appropriated”. Arguments were that high-income countries are still learning as well to cope with BEPS. Moreover, in his article Kaldor mainly talks about domestic issues. It was questioned whether contemporary international issues can be solved domestically.

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<sup>5</sup> Nicholas Kaldor, “Will Underdeveloped Countries Learn to Tax,” *Foreign Aff.* 41 (1962): 410.  
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On the other hand, it was referred to Angus Deaton's work which mainly claims that domestic policy and not global policy is key for development<sup>6</sup>. It might therefore be warranted to ask whether global tax governance is really going to make a change?

What are alternatives then to the notion of "countries learning to tax"? One might rather talk about countries imitating other countries (market of ideas) or about empowerment. But how can empowerment be done? Can only a cooperative effort empower countries? Or can empowerment also mean being less cooperative, being more obscure, and having more aggressive policies?

In this regard the topic of the Addis Ababa Action Agenda (AAAA) as an example of international cooperation focused on developing countries was discussed<sup>7</sup>. It was pointed out that the Agenda is a consensus document, this is why the allocation of taxing rights does not figure in it. It was mentioned that the UN starts to split up forces in tax: The UN Manual for the negotiation of tax treaties<sup>8</sup> is not linked to AAAA. Thus, there is no level of consolidation of knowledge

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<sup>6</sup> Angus Deaton, *The Great Escape: Health, Wealth, and the Origins of Inequality* (Princeton University Press, 2013).

<sup>7</sup> [https://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA\\_Outcome.pdf](https://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf)

<sup>8</sup> <https://www.un.org/development/desa/capacity-development/tools/tool/united-nations-manual-for-the-negotiation-of-bilateral-tax-treaties-between-developed-and-developing-countries/>

## Day 4

On the fourth day took place:

- A small presentation round where all people not giving a formal presentation during the workshop briefly laid out what topics they are currently working on.
- Tsilly Dagan presented her work on global justice, domestic distributive justice and legitimacy.
- Four of the PhD researchers who participated in the workshop presented their current work.

### Tsilly Dagan on “Global Justice, Domestic Distributive Justice and Legitimacy”

Tsilly Dagan gave a presentation on global justice, domestic distributive justice and legitimacy.

She first introduced the differentiation between the cosmopolitan and the statist conception of global justice. While in the cosmopolitan perspectives, individuals are key and justice needs to be achieved between all individuals in the world, the statist conception highlights the specific role of the state. In the statist perspective, justice is a political concept. Hence, it exists among individuals who belong to a political community. There is no duty of justice (except from humanitarian duties) beyond the state. The duty of justice within the state emerges due to the unique relationship of “coercive co-authorship”: Coercive means that membership is not a matter of choice for the subject, and co-authorship means that the state implicates the will of its subjects, hence, they have to be given equal consideration in rule-making. According to Nagel this does not happen [at least yet] at the global level between individuals, there is a complete mediation by states, which is why the responsibility to achieve justice (beyond humanitarian justice) rests [only] upon the state. Under tax competition, this relation of coercive co-authorship is under threat, due to mobility and “sovereignty à la carte”. Mobility & fragmentation mean that for mobile subjects, membership in a state becomes elective and is no longer coercive. Moreover, states offer better “deals” to the mobile. Such mobility is encouraged by a divergence between national rules (global fragmentation). Each state offers a different menu of rules. Hence, states are no longer coercive for all taxpayers, and they don’t treat all taxpayers equally (but rather preferably treat the mobile).

Dagan raised the question what the effect of convergence on these phenomena is.

#### Presentation

The input from Dagan was taken up in a subsequent discussion. It was pointed out that the phenomenon of fragmented sovereignty applies to more areas than tax planning and that it happens differently in practice than as posited by the Tiebout Model<sup>9</sup>. Mobility does not mean that actors have to choose for one jurisdiction, but they can cherry-pick from different jurisdictions, eg tax rules from one jurisdiction, tort law from another, and dispute resolution from still another.

Sieb Kingma indicated that it is unlikely that the state will get its sovereignty back. One might need to bridge a compromise between coordination and leaving some parts of national sovereignty untouched. To address phenomena such as treaty shopping and hybrid mismatches, coordination is necessary, but should the Cayman Islands be forced to adopt a corporate income tax if they do not need one?

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<sup>9</sup> Charles M. Tiebout, “A Pure Theory of Local Expenditures,” *Journal of Political Economy* 64, no. 5 (1956): 416–24.

It was questioned whether there was actually one point in time where legitimacy has become undermined? Was there ever a point in time when sovereignty was not eroded?

Assaf added a historical perspective on sovereignty. For most of the time sovereignty was fragmented. The pure sovereign Westphalian state existed only for a short period of time.

Laurens van Apeldoorn pointed out that in the statist vision, if the coercive co-authorship relation is undermined, then there is no relation of justice between the states' subjects anymore. He questioned however whether Nagel's theory is the best theory to use. He stressed the need to see tax competition together with other aspects of globalization. Globalization is good and bad. It carries with it the disadvantage of tax competition but also has advantages on the other hand. Domestic justice might require from a state that it enters into the global economy although it might lead some disadvantages.

Allison Christians raised some critique on the statist vision and the concept of sovereignty. States have power to regulate (in good or in bad ways). But they might not regulate in a good way, not because of constraints by other nations, but rather because of the power of certain individuals and multinationals which "divide and conquer" or play out jurisdictions against each other.

## Manon Wintgens on "The international tax system as a complex system"

### Presentation

Manon Wintgens presented her PhD project "The international tax system as a complex system". A complex system is a system whose components interact with each other, often in a non-linear way. Such a system arises due to evolution, self-organization or emergence. Manon uses an approach based on pattern mining and network modelling.

Her goal is to understand behaviour and complexity of the tax treaty system via the analysis of tax treaties (including only full tax treaties and not EOI treaties). This means investigating how the global tax treaty network changes over time and what variables could possibly explain these changes. Manon showed a visual representation of the tax treaty system and analysed how changes of certain articles covariate with changes of other articles.

### Discussion

After the presentation, input was sought from the audience on what other relevant questions could be:

It was suggested to investigate in what direction changes in treaties move (in terms of concessions given by each party) to say something about how the deal between countries changes. This is easy to operationalize for rate changes but somewhat more difficult PE rules (although maybe possible).

Another idea was to add the interaction between treaty and domestic measures. A meta-analysis could be done of papers that assess the impact of treaties on FDI and what data is used by these papers. It was proposed to trace the expansion of certain concepts of tax treaties such as the Arm's-Length-Standard. It was further pointed out that international treaties are rather fragile connections among states compared to for example connections through supranational institutions. One cannot always be sure that a connection (a treaty) means something. A difficulty is also to deal with the meaning that changes have. A change of 20 articles could be just as important as one meaningful change in only one article.

## Maarten Manse on: “The governmentality of taxation. Funding, founding and formulating the (colonial) fiscal state”

### Presentation

Manse presented results from his field work in Indonesian archives on the tax system in colonial Indonesia.

He introduced the works on governance by Michel Foucault and James Scott as theoretical foundation, especially the concept “governmentality” or art of governance. Governmentality means simplifying information; collecting data and making it understandable (by using for example maps and averages etc.). Being able to do that on the other hand means influence and shapes societies. States try to produce the societies which they control, by shaping behaviour. The goal is the management of their subjects (tax laws, inheritance, etc.).

He pointed out that the role of the colonial tax system was not principally revenue generation. It was because on the long term the Dutch colonizers thought that whatever happened had to happen under guidance. There was the conviction that there was an educative element to taxation and thus it was more important to include people in the state system than to achieve a financial gain.

### Discussion

In the subsequent discussion further areas of research were suggested such as: What can we know about colonial states by looking comparatively at them?

Can we make an analogy with the international arena and think about countries as subjects of the international organization?

What is the difference between colonial and non-colonial tax systems? Colonial states might be weaker than non-colonial, but on the other hand, the mandate of colonial officials was much larger than in continental.

A question was raised with regards to the concept of governmentality. Could one argue that the governmentality of the colonial state just replaces another governmentality? This can be said in so far that previously existent inter-village alliances were destroyed.

It was added that another case where the concept of governmentality might be adequate is the case of US tax imperialism in Puerto Rico.

Dagan pointed out that the taxation is shaping everyday life by pigeon-holing different attributes of life. This means that the tax system requires putting things into drawers and reduces human behaviour into single scale of behaviour. This might be seen as commodification of humans. A contrasting example is the Israeli Kibbutz, where each member contributes to public goods according to ability and needs (no taxation).

There also other societies without concept of (individual) property, which means that there was no need for tax system (eg indigenous Australia).

## Frederik Heitmüller on “Actors in International Tax Law Making”

### Presentation

Heitmüller presented his work on the role that different societal actors play in the formation of international tax law at the example of the BEPS project. He showed a visual presentation highlighting the complexity of the process of a transplants, the interconnectedness between different kinds of actors as well as the different interests that these could have. He introduced the framework of “actor-centric institutionalism”, which directs attention primarily on actors at a meso-level, meaning that it neither focuses on individuals nor large-scale organizations such as states but on organizations at the intermediate level (firms, bureaucracies, etc.). He also discussed that it is not always easy to draw boundaries around an actor: Is every individual multinational enterprise an actor? Or are MNEs collectively one actor?

### Discussion

This last point was taken also taken up in the discussion that followed. It was argued that MNEs do not collectively constitute an actor because firms in different sectors have different interests (eg natural resources or finance).

Christians on the other hand rather highlighted the role of actors on the micro-level, i.e. individuals. These might be more important than the organizations that they are part of in determining actions and preferences.

## Adrian Grant on “BEPS Implementation Analysis. Evaluating the Transplant of Minimum Standards in OECD Countries”

### Presentation

Grant presented an outline to apply legal transplants theory to the BEPS minimum standards as well as about methodological and conceptual difficulties that arise in connection with it. He addressed to approaches, one of analytical and one of normative nature. The first approach consists of a comparison of the impact of the BEPS project in EU versus non-EU countries, which could highlight the specific role of EU law in mediating the implementation process. The other consists in critically evaluating the idea of resorting to international cooperation in light of the inherent difficulties to implement cooperative measures in domestic contexts.

### Discussion

In the discussion, Omri Marian pointed out that one could consider analysing BEPS under one of the three main approaches of comparative law:

- Functional approach: comparison of what the BEPS project is actually doing vs. what it was thought to do (Allison taking issue with it, since unclear what it is)
- Cultural approach – why in and itself is not possible (Legrand of BEPS)
- Critical approach: What is the interest of the players involved? Is it the OECD, the countries, or actors within? Who is marginalized? Countries itself, or people in it or industries? BEPS Project a pure political advancement of interest specific power actors in the international arena.

It was pointed out that maybe the 4 minimum standards do not entirely represent the implementation of BEPS. An interesting question would also be to ask why the standards are the only thing that came out of it?

The differentiation of EU and non-EU countries and thus the impact of EU law / not EU law was considered as interesting.

Miranda Stewart pointed out that one rationale for countries to participate in the BEPS project could be to disrupt, especially as time goes by.



