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ARTICLE

Throughput Legitimacy of the Peer Review Process of the Four Beps Minimum Standards: A Case Study

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This article focuses on the Base Erosion Profit Shifting (BEPS) Project and more specifically on the peer review of the four BEPS minimum standards. The first part of this contribution introduces the analysis of this process in the context of a case study of seven countries participating in the BEPS Inclusive Framework: Cameroon, Congo, Costa Rica, Jamaica, Peru, Sri Lanka, and Viet Nam. Thereafter, this article will provide the analysis of the peer review process by using the concept of throughput legitimacy developed by Schmidt (in other areas than tax law) that includes accountability, transparency, inclusiveness and openness. Its use can contribute to enhancing the governance of the peer review process and increasing legitimacy at the same time and thereby strengthening countries' compliance with the four BEPS minimum standards. Its use can also facilitate helping countries that are part of the BEPS Inclusive Framework to build trust in the peer review process. In light of the findings of the case study, this article concludes that there are throughput legitimacy deficits and that these should be addressed by the OECD and countries participating in the BEPS Inclusive Framework. This article's preliminary findings can be used for further research by the OECD, regional organizations, scholars, civil society, and think tanks to improve countries' compliance with the four BEPS minimum standards.

Keywords: BEPS, peer review process, OECD, international taxation, legitimacy, throughput legitimacy, Inclusive Framework, developing countries

1 Introduction

Since the 2008 financial crisis, governments and international organizations have sought ways to work together in an attempt to effectively address tax evasion, tax fraud, and aggressive tax planning by multinationals. The OECD has been a key part of this process and has created initiatives to achieve these goals with the support of the G20. In 2013, the OECD introduced measures to tackle base erosion and profit shifting by multinationals with what is known as the BEPS Project. It contains four minimum standards that aim to deal with aggressive tax planning by multinationals. These measures include: Countering harmful tax practices and spontaneous exchange of rulings (Action 5), countering tax treaty abuse (Action 6), transfer pricing documentation and country-by-country reporting (CbCR) (Action 13), and improving dispute resolution mechanisms (Action 14).[1] Since the four BEPS minimum standards are not regarded as hard law but soft law, countries may decide whether or not to implement them. Despite this feature, countries are doing so.[2]

In order to monitor the implementation of these standards, the OECD has created a system of peer review that is based on its experiences in exchange of information[3] and other areas[4] (corruption, trade). In this system, countries acting as peers with the assistance of the OECD Secretariat review the implementation of the four BEPS minimum standards. Until now, the literature has focused on the legitimacy (or lack of) of the BEPS Project and the participation and representation of (or lack of) non-

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1 The other actions (1, 2, 3, 4, 7, 8, 9, 10, 11, 12) comprise recommendations and best practices for countries to implement. However, the OECD is expecting that areas such as hybrid mismatches (Action 2) and best practices on interest deductibility (Action 4) will 'converge over time through the implementation of the agreed common approaches, thus enabling further consideration of whether such measures should become minimum standards in the future'. *See* Question 4 FAQ BEPS, http://www.oecd.org/tax/beps/beps-frequentlyaskedquestions.htm (accessed 30 Jul. 2023).

2 Some of the reasons why countries are doing these have been addressed in another article. *See* I. J. Mosquera Valderrama, *Policy Note: The Study of the BEPS 4 Minimum Standards as a Legal Transplant: A Methodological Framework*, 48(8) Intertax 719–732 (2020), https://kluwerlawonline.com/journalarticle/Intertax/48.8/TAXI2020067, doi: 10.54648/TAXI2020067 (accessed 30 Jul. 2023).

3 Work performed under the framework of the Global Transparency Forum with currently 168 tax jurisdictions, https://www.oecd.org/tax/transparency/who-we-are/members/ (accessed 30 Jul. 2023).

4 *See* for a comprehensive review in these areas, the publications of the project PROM (Peer Review Observatory Maastricht). *See* V. Carraro, T. Conzelmann, & H. Jongen, *Fears of Peers? Explaining Peer and Public Shaming in Global Governance,* 54(3) Cooperation & Conflict 335–355 (2019), doi: 10.1177/0010836718816729 (accessed 30 Jul. 2023).

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OECD, non-G20 countries, including developing countries, in the BEPS Project and the BEPS Inclusive Framework.[5] However, little attention has been given to the peer review process of these standards.

In this context, the first part of this article will introduce the analysis of the peer review process of the four BEPS minimum standards in light of a case study. Thereafter, the analysis of throughput legitimacy as developed by Schmidt[6] (in other areas than tax law) will be provided. The primary question for this analysis is whether there are throughput legitimacy deficits regarding the accountability, transparency, inclusiveness,[7] and openness of the OECD Secretariat, the BEPS Steering Group, and the BEPS Inclusive Framework.

In order to provide the analysis of the peer review process, this contribution will study the peer review of the four BEPS minimum standards in seven countries: Cameroon, Congo, Costa Rica, Jamaica, Peru, Sri Lanka, and Viet Nam. All of these countries have been reviewed (or partially reviewed) for almost all (except Action 14[8]) of the BEPS minimum standards. These countries were non-OECD, non G20 countries at the time that the BEPS Project was initiated. Since then, all have joined the BEPS Inclusive Framework as BEPS Associates and have committed to implementing the four BEPS minimum standards. Furthermore, Costa Rica has become an OECD Member,[9] and Peru is in the accession process to also become one.[10]

For this article, the OECD documents including terms of reference, methodology, and the peer review reports will be used. The analysis and comparison of the latter of the seven countries is not exhaustive, however, it focuses on some of the primary elements that have been highlighted in the peer review report that can be important for the main argument of this article, i.e., the throughput legitimacy deficits of the BEPS peer review process. The preliminary findings of this article can be used for further research by the OECD, regional organizations, scholars, civil society, and think tanks to improve countries' compliance with the four BEPS minimum standards.

2 Throughput legitimacy of the BEPS peer review process

The legitimacy of the BEPS Inclusive Framework has been addressed by scholars, regional organizations, and more recently by the OECD and the United Nations General Assembly.[11] However, no attention has been given to the role of the peer review process to enhance legitimacy. To alleviate this deficiency, this article will analysis this by employing the concept of throughput legitimacy as developed by Schmidt (in other areas than tax law. Schmidt introduces throughput legitimacy as a new intermediary concept to fill in the gap between input and output legitimacy and to ensure the trustworthiness of the processes.[12] Schmidt argues that the concepts related to it that should be taken into account by policy makers are (1) accountability and responsiveness to participatory input demands and to be held responsible for the output decisions; (2) transparency to address the demands and to have some form of scrutiny by a specific forum; and (3) inclusiveness and the openness of institutions to civil society.[13] According to Schmidt, the approach to throughput legitimacy necessitates not only accountable, transparent, and accessible institutional processes but also requires 'productive deliberative interrelationships among actors in the wide variety of throughput governance processes that make up the coordinative discourse of the policy sphere'.[14]

The use of throughput legitimacy can contribute to enhancing the governance of the peer review process and increase legitimacy at the same time and therefore countries' compliance with the four BEPS minimum standards. Its use can also facilitate helping countries that are part of the BEPS Inclusive Framework to build trust in the peer review process. The analysis of the throughput legitimacy of

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5 *See* R. Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 Suffolk U. L. Rev. 517, 586 (2017); A. Christians & L. van Apeldoorn, *The OECD Inclusive Framework*, 72(4/5) Bull. Int'l Tax'n (2018), doi: 10.59403/288pdc, Journals IBFD; *See also* I. J. Mosquera Valderrama, inaugural lecture *Global Tax Governance: Legitimacy and Inclusiveness*, https://globtaxgov.weblog.leidenuniv.nl/2023/06/30/global-tax-governance-legitimacy-and-inclusiveness-why-it-matters/ (accessed 30 Jul. 2023).

6 V. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, 61 Pol. Stud. 17 (2013), doi: 10.1111/j.1467-9248.2012.00962.x (accessed 30 Jul. 2023).

7 On inclusiveness, *see* Mosquera Valderrama, *supra* n. 5.

8 From the seven countries of study, the peer review of six of them have been deferred and, for one country (Viet Nam), the first and second peer review stages have taken place. OECD Schedule of peer reviews BEPS Action 14, http://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf This deferral was discussed in the consultation document on Action 14. *See* https://www.oecd.org/tax/beps/public-consultation-document-beps-action-14-2020-review-november-2020.pdf (accessed 30 Jul. 2023).

9 https://www.oecd.org/newsroom/oecd-welcomes-costa-rica-as-its-38th-member.htm (accessed 30 Jul. 2023).

10 https://www.oecd.org/mcm/Roadmap-OECD-Accession-Process-Peru-EN.pdf (accessed 30 Jul. 2023).

11 For a brief overview of the developments, *see* Mosquera Valderrama, *supra* n. 5.

12 V. Schmidt & M. Wood *Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance.* Pub. Admin., 97 727–740, 728 (2019), doi: 10.1111/padm.12615 (accessed 30 Jul. 2023).

13 Schmidt, *supra* n. 6, at 14.

14 *Ibid.*, at 17.

the peer review process of the four BEPS minimum standards will be provided in section 4 below. However, first, the following section will investigate the peer review process in the context of a case study of seven countries participating in the BEPS Inclusive Framework: Cameroon, Congo, Costa Rica, Jamaica, Peru, Sri Lanka, and Viet Nam.

3 Case study: Peer review of the implementation of the four BEPS minimum standards in seven countries

3.1 *Peer Review*

For the OECD, 'peer reviews should be conducted in a manner that is clear; targets the areas of risk, ensures that jurisdictions are treated fairly and equally; and is resource efficient'.[15] It states that, by establishing a monitoring and peer review system, it aims to ensure that members of the BEPS Inclusive Framework 'comply with the standards in order to ensure a level playing field'.[16] For this purpose, the OECD has invited countries to participate in the review process so that they are able to once again examine 'their own tax systems and to identify and remove elements raising BEPS risks'.[17]

In general, the peer review consists of two phases. Phase 1 is the implementation of the action, i.e., a minimum standard is evaluated for Inclusive Framework members according to the schedule of review. Phase 2 focuses on monitoring the follow-up of the recommendations resulting from jurisdictions' phase 1 report.[18]

In order to carry out the peer reviews, the terms of reference and assessment methodology[19] have been approved by the BEPS Inclusive Framework with some updates/reviews in 2020 (BEPS Action 13) and 2021 (BEPS Actions 5 and 6).[20] These documents provide the common understanding of the standards or criteria against which to evaluate the implementation of the BEPS minimum standards.

The following sections will provide the case study of the implementation of the four BEPS minimum standards in seven countries.

3.2 *Case Selection*

In order to analyse the legitimacy of the peer review of the BEPS Minimum Standards, seven developing countries were selected for a case study. Four (Cameroon, Congo, Costa Rica, and Sri-Lanka) have been members of the BEPS Inclusive Framework since its creation (30 June 2016),[21] and the others three joined soon afterwards (Jamaica in July 2016, Peru in December 2016, and Viet Nam in June 2017). Since all of them were non-members of the BEPS forty-four group, they did not participate in the agenda setting and decision-making process of the content of the BEPS Project and its fifteen Actions including the four BEPS minimum standards. However, since then, Costa Rica has become an OECD Member, and Peru is in the accession process to do so.

Two of the seven countries are closely cooperating with the OECD regarding the implementation of international tax standards. For instance, Viet Nam has signed a memorandum of understanding to enhance cooperation (competition, investment, and tax) with the OECD.[22] Cameroon is participating in an OECD induction programme to implement international tax standards.[23] Neither the induction programme nor the memorandum of understanding are on the OECD's website for Congo, Jamaica, or Sri Lanka. However, Jamaica's tax administration representative has now been appointed co-chair of the BEPS Inclusive Framework.[24]

All seven countries have been peer reviewed with respect to BEPS Actions 5, 6, and 13. BEPS Action 5 addresses the preferential tax regimes that can be regarded

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15 http://www.oecd.org/ctp/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework.pdf (accessed 30 Jul. 2023), at 7.

16 https://www.oecd.org/tax/beps/about/#monitoring (accessed 30 Jul. 2023).

17 *See* https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf, at 8. (accessed 30 Jul. 2023).

18 One exception is Action 13 that has three phases (stages): Phase 1 focuses on the domestic legal and administrative framework. It also covers certain items of exchange of information network and includes an initial review of certain aspects of confidentiality appropriate use as these are prerequisites for exchange of information. Phase 2 concerns the exchange of information framework and appropriate use. Phase 3 will cover all three key aspects of jurisdictions' implementation, including the actual exchange of CbCRs. OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 1) Inclusive Framework on BEPS: Action 13*, OECD Publishing Paris (2018) https://doi.org/10.1787/9789264300057-en, at 16–17 (accessed 30 Jul. 2023).

19 'The peer review will evaluate the implementation of the standard against an agreed set of criteria. They are set out in terms of reference, which include each of the elements that a jurisdiction needs to demonstrate it has fulfilled in order to show proper implementation of the standard. The manner in which the peer review is undertaken is set out in an agreed methodology. The methodology sets out the procedural mechanics by which jurisdictions will complete the peer review, including the process for collecting the relevant data, the preparation and approval of reports, the outputs of the review and the follow up process. The methodology contemplates collecting the data points relevant to the peer review by using standardised questionnaires, sent to the reviewed jurisdiction as well as the peers (i.e., the other members of the Inclusive Framework on BEPS)'. *Supra* n. 15, at 7.

20 *See supra* n. 17, at 8–10.

21 https://www.oecd.org/tax/beps/first-meeting-of-the-new-inclusive-framework-to-tackle-base-erosion-and-profit-shifting-marks-a-new-era-in-international-tax-co-operation.htm (accessed 30 Jul. 2023).

22 https://www.oecd.org/countries/vietnam/oecd-and-viet-nam-sign-mou-to-deepen-co-operation-and-support-reforms.htm accessed 30 Jul. 2023.

23 https://www.oecd.org/countries/cameroon/oecd-launches-programme-to-assist-cameroon-to-implement-new-international-tax-standards.htm (accessed 30 Jul. 2023).

24 https://www.oecd.org/countries/jamaica/jamaica-s-marlene-nembhard-parker-appointed-co-chair-of-oecd-g20-inclusive-framework-on-beps.htm (accessed 30 Jul. 2023).

as harmful and the exchange of rulings. The latter includes the domestic and administrative framework as well as the international framework to facilitate the exchange of rulings. BEPS Action 6 focuses on the introduction of the minimum standard to prevent treaty shopping in either a multilateral treaty or through bilateral tax treaty negotiations. The BEPS Action 13 Report addressed the domestic and administrative framework, confidentiality, and appropriate use of CbCRs and the existence of an international framework for their exchange.

BEPS Action 14 has been deferred for six of the seven countries with only Viet Nam being peer reviewed for it.

In the peer reviews of the seven countries, limited input from other countries has been provided, for instance, Indonesia, Italy, and Japan for BEPS Action 6 (*see* section 3.3.2.) and some countries concerning the peer review of BEPS Action 14 in Viet Nam (*see* section 3.3.3.) Therefore, it is mainly based on information provided by the reviewed country in the peer review questionnaire and information publicly available and collected by the OECD, the Forum on Harmful Tax Practices (FHTP), and the CbC Reporting Group.

Unlike BEPS Actions 5 and 13, BEPS Action 6 (and also the deferred BEPS Action 14) can be introduced either in bilateral tax treaties or by signing and ratifying the BEPS Multilateral Instrument (BEPS MLI) that modifies those agreements. This may also create problems for countries that have a limited tax treaty network which is the case for Costa Rica and Congo with three of them. In addition, the menu of choices of the BEPS MLI makes it possible for countries to apply and negotiate it bilaterally with other countries.[25] The current status of the BEPS MLI is provided in the table in section 3.3.2.1. when addressing BEPS Action 6.

The current status of the countries with respect to the peer review of the BEPS Minimum Standards is the following.

Country	*Action 5*	*Action 6*	*Action 13*	*Action 14*
Congo	Reviewed 2017, 2018,2019, 2020,2021	Reviewed 2018, 2019, 2020, 2021,2022	Reviewed 2019, 2020, 2021,2022	Review Deferred
Cameroon	Reviewed 2017, 2018	Reviewed 2018, 2019 2020, 2021,2022	Reviewed 2018, 2019, 2020, 2021	Review Deferred
Costa Rica	Reviewed 2017, 2018,2019,2020, 2021	Reviewed 2018, 2019 2020, 2021,2022	Reviewed 2018, 2019,2020,2021, 2022	Review Deferred
Jamaica	Reviewed 2017, 2018,2019, 2020,2021	Reviewed 2018, 2019 2020, 2021,2022	Reviewed 2018, 2019, 2020, 2021,2022	Review Deferred
Peru	Reviewed 2017, 2018,2019,2020, 2021	Reviewed 2018, 2019 2020, 2021,2022	Reviewed 2018, 2019, 2020,2021,2022	Review Deferred
Sri-Lanka	Reviewed 2017, 2018,2019,2020, 2021	Reviewed 2018, 2019 2020, 2021,2022	Reviewed 2018, 2019,2020,2021, 2022	Review Deferred
Viet Nam	Reviewed 2017, 2018, 2019,2020,2021	Reviewed 2018, 2019 2020, 2021,2022	Reviewed 2019, 2020,2021,2022	Reviewed Stages 1 and 2

Source: Own compilation based on OECD documents (as of 30 July 2023).

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[25] In all of these cases, the choice is left to the country and, even in the MLI, countries may introduce reservations to its application. The result is that countries can decide to apply the MLI to all, to most, or to some tax treaties. In the latter two cases, the country affords the possibility to negotiate the contents bilaterally.

3.3 *Findings and Observations of the Peer Review of the Case Study*

3.3.1 *BEPS Action 5 and 13*

In general, the peer review of BEPS Actions 5 and 13 evaluate whether the domestic (legal and administrative framework) and the international instruments (bilateral/multilateral) for exchange of rulings[26] (BEPS Action 5) and the framework for exchange of CbCRs (BEPS Action 13) have been put in place.

For Action 5, the peer review evaluates the preferential tax regimes and the exchange of rulings. Both reviews take place in different reports. Terms of reference are only available for the exchange of rulings.

For preferential tax regimes, the peer review and mainly the FHTP examine the preferential regimes that can regarded as harmful and assess whether they need to be repealed or amended to eliminate the harmful features.[27] The consequences of using preferential regimes for developing countries have been addressed elsewhere by this author.[28]

At the October 2020 meeting of the FHTP, from the seven countries, only Jamaica was evaluated concerning the special economic zone regime which was (at that time) in the process of being amended.[29] After amendment and, at the October 2022 meeting of the FHTP, Jamaica's regime was qualified as not harmful.[30] Therefore, none of the seven countries in the study is regarded as a harmful tax regime by the FHTP. In light of these developments, the case study will focus on the transparency framework of BEPS Action 5 concerning the exchange of rulings.

For this, the peer review evaluated the introduction of a domestic legal and administrative framework applicable to rulings. This framework included, for Action 5, a description of the type of rulings that can be issued by tax authorities (if any), the process for issuing and exchanging these rulings, and the measures to safeguard their confidentiality and appropriate.

For BEPS Action 13, the peer review evaluated the scope of application of Action 13 (definitions, threshold), the rules for filing a CbCR, the use of templates to exchange the information, and the measure to safeguard the confidentiality and appropriate use of the CbCRs.

The following paragraphs will provide a comparison of the seven countries of the study of the peer review reports of BEPS Action 5 for the exchange of rulings (2017, 2018, 2019, 2020 and 2021) in section 3.3.1.1. and BEPS Action 13 for Exchange of CbCRs (2018, 2019, 2020, 2021, and 2022) in section 3.3.1.2. At the end of each section, a table with a summary of the findings will be provided. Thereafter, some observations on the peer review of these two BEPS Actions in the seven countries in the study will be provided in section 3.3.1.3.

3.3.1.1 Findings Case Study BEPS Action 5 (Exchange of Rulings)

In the 2017 peer review report,[31] the seven countries of the study were reviewed. However, from them, Cameroon, Congo, Jamaica, and Sri-Lanka did not complete the peer review questionnaire, therefore, the review was made by the FHTP based on publicly available information. For instance, the report mentioned that, according to that information, 'it appears' that Cameroon and Congo can legally issue rulings. Due to the lack of input from the reviewed country, the recommendations made for these four countries were general and primarily based on the terms of reference (to establish a domestic legal framework and an effective information gathering process).

In the 2017 peer review report, Costa Rica, Peru, and Viet Nam provided input on the peer review questionnaire. No recommendations were made for Peru. The main recommendations for Costa Rica and Viet Nam were:

– to apply the best efforts approach to identify potential exchange jurisdictions for past and future rulings, to introduce a process to identify the ultimate parent company, including the person responsible for issuing rulings, and to provide training to tax officials in charge of filing the template for the rulings (Costa Rica); and
– to complete the templates for all relevant rulings and to ensure the timely exchange of their information (Viet Nam).

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[26] In general, rulings are defined as a 'written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law toa specific set of facts'. OECD, Glossary of Tax Terms (OECD), www.oecd.org/ctp/glossaryoftaxterms.htm. Such rulings can be advanced tax rulings, i.e., seeking clarity in the application of tax law, or advanced pricing agreements (APAs), i.e., seeking clarity on the use of an appropriate transfer pricing methodology. *See* s. 3.2.1. I. J. Mosquera Valderrama. *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72(3) Bull. Int'l Tax'n 2018, https://scholarlypublications.universiteitleiden.nl/handle/1887/59348, doi: 10.59403/se9pt3 (accessed 30 Jul. 2023).

[27] OECD, *BEPS Action 5 on Harmful Tax Practices – Transparency Framework: Peer Review Documents, OECD*, Paris (2021), www.oecd.org/tax/beps/beps-action-5-harmful-tax-practices-peer-reviewtransparency-framework.pdf (accessed 30 Jul. 2023).

[28] F. Heitmüller, I. J. Mosquera Valderrama. *Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future*, 24(2) J. Int'l Econ. L. 473–490 (22 Apr. 2021), doi: 10.1093/jiel/jgab019. *See also* I. J. Mosquera Valderrama, *Regulatory Framework for Tax Incentives in Developing Countries After BEPS Action 5*, 48(4) Intertax 446–459 (2020), https://kluwerlawonline.com/journalarticle/Intertax/48.4/TAXI2020039, doi: 10.54648/TAXI2020039 (accessed 30 Jul. 2023).

[29] http://www.oecd.org/tax/beps/harmful-tax-practices-peer-review-results-on-preferential-regimes.pdf (accessed 30 Jul. 2023).

[30] https://www.oecd.org/tax/beps/harmful-tax-practices-peer-review-results-on-preferential-regimes.pdf (accessed 30 Jul. 2023).

[31] OECD, *Harmful Tax Practices – Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5,* in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2017), http://dx.doi.org/10.1787/9789264285675-en (accessed 30 Jul. 2023).

In the 2018 peer review report,[32] all seven countries of the study were reviewed. However, Sri-Lanka did not complete the peer review questionnaire, therefore, the review was carried out by the FHTP. Three countries did not receive recommendations (Cameroon, Jamaica, and Peru). Costa Rica and Viet Nam received the same recommendation as in 2017. Congo and Sri-Lanka also received the general recommendations made in 2017 (to establish a domestic legal framework and an effective information gathering process).

The six countries that completed the peer review questionnaire can issue rulings but, in practice, none had been issued (at the time of the review). However, the 2018 peer review report stated that Viet Nam received three requests for unilateral advanced pricing agreements (APAs) that are under review or in a prefiling stage. No further information was provided in this report.

In the 2019 peer review report,[33] six countries were reviewed with the exception of Cameroon. According to the report, at the time of the review, Cameroon is one of the thirty jurisdictions 'which are not able to legally, or in practice, issue rulings in scope of the transparency framework, and therefore no separate peer review report is included for these jurisdictions'.[34]

As in 2017 and 2018, Sri-Lanka did not complete the peer review questionnaire. Unlike 2018, Congo did not complete it. Therefore, for Sri-Lanka and Congo, the review was completed by the FHTP. These two countries were recommended to finalize the information gathering process and to put in place a domestic legal framework allowing spontaneous exchange of information. Costa Rica, Jamaica, and Peru received no recommendations whereas Viet Nam received the same recommendation as in 2017 and 2018.

As in 2019, in the 2020 peer review report,[35] six countries were reviewed with the exception of Cameroon. From those, Congo and Sri Lanka did not provide a completed peer review questionnaire, and it is not known whether they have implemented the transparency framework to facilitate the exchange of rulings. The recommendations regarding the information gathering process and exchange of information made in previous reports were still in place for these two countries.

Regarding rulings, in theory, Congo and Sri Lanka can issue two types of rulings, however, it was not known if they have done so since no information was provided by them. The peer review did not provide further information.

Costa Rica, Jamaica, and Peru meet all of the aspects addressed in the terms of reference. Therefore, no recommendations were made. Viet Nam received the same recommendation as the 2017, 2018, and 2019 reports, i. e., to complete the templates for all relevant rulings and to ensure the timely exchange of their information.

As in the 2019 and 2020 peer review reports, in the 2021 peer review report,[36] six countries were reviewed except for Cameroon. Costa Rica, Jamaica, and Peru did not receive any recommendations.

As in the previous reports, Congo did not provide a completed peer review questionnaire.

According to the peer review report, Sri Lanka provided a peer review questionnaire, and it has met all aspects of the terms of reference. No recommendations were made to it, however, the peer review report stated (at that time) that, in practice, Sri Lanka has not issued rulings within the scope of the transparency framework, and no exchanges have taken place.

Viet Nam did not provide a peer review questionnaire, and there is no information why it did not do so. The same recommendations in the 2017–2019 reports remained available.

The peer review reports have also addressed the international framework of the countries to facilitate the exchange of rulings with other jurisdictions. In order to do so, countries need to have signed and ratified multilateral (the Convention on Mutual Administrative Assistance in Tax Matters) and bilateral instruments (tax treaties).[37] The multilateral convention makes it possible to exchange information on request, both automatic and spontaneous. Bilateral tax treaties enable exchanging information on request and spontaneously. Since BEPS Action 5 mentions spontaneous exchange of rulings, in principle, either the multilateral convention or the

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32 OECD, *Harmful Tax Practices – 2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2019), https://doi.org/10.1787/7cc5b1a2-en (accessed 30 Jul. 2023).

33 OECD, *Harmful Tax Practices – 2019 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2020), https://doi.org/10.1787/afd1bf8c-en (accessed 30 Jul. 2023).

34 The relevant jurisdictions that do not issue rulings in scope of the transparency framework are: Belize, Bulgaria, Burkina Faso, Cameroon, Cook Islands, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Dominica, Greenland, Haiti, Liberia, Macau, Maldives, Monaco, Mongolia, Montserrat, Nigeria, North Macedonia, Oman, Pakistan, Papua New Guinea, Paraguay, Saint Vincent and the Grenadines, Saudi Arabia, Serbia, Sierra Leone, Tunisia, Trinidad & Tobago, and Zambia. *Ibid.*, at 9 and 20.

35 OECD, *Harmful Tax Practices – 2020 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2021),https://doi.org/10.1787/f376127b-en (accessed 30 Jul. 2023).

36 OECD, *Harmful Tax Practices – 2021 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2022), https://doi.org/10.1787/4034ce42-en (accessed 30 Jul. 2023).

37 Another bilateral instrument is the Tax Information Exchange Agreement (TIEA) which is an alternative instrument to tax treaties and only for the purposes of exchange of information. However, from the seven countries of the study, only Costa Rica concluded these TIEAs in 2009 with Argentina and in 2011 with Australia, Denmark, Faroe Islands, Finland, Greenland, Iceland, Norway, and Sweden. Since these TIEAs were concluded before the BEPS Project was initiated, these agreements will not be addressed in this section. *See* an overview of TIEAs at https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm (accessed 30 Jul. 2023).

bilateral treaties are a sufficient legal basis for the exchange of information.

From the seven countries of the study, five are party to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Cameroon, Costa Rica, Jamaica, Peru, and Viet Nam) and two countries are not (Congo, Sri-Lanka).[38] The bilateral network (bilateral tax treaties or TIEAs) is different among countries, for instance, with very few treaties at the time of this writing, i.e., Costa Rica (4) and Congo (3); others with a few more treaties, i.e., Cameroon (12), Peru (10), and others with a more extensive network, i.e., Jamaica (26), Sri-Lanka (46), and Viet Nam (76).

The following table summarizes some of the responses/recommendations in the framework of BEPS Action 5 Exchange of rulings.

3.3.1.2 Findings Case Study BEPS Action 13 (Country by Country Reporting)

Regarding the domestic legal and administrative framework in BEPS Action 13, the analysis of the 2018 peer review report[39] of five out of the seven countries of study (except Congo and Viet Nam) shows that Cameroon and Jamaica, at that time, did not yet have this framework in place. However, Cameroon mentioned in the 2018 report that it intended to implement the CbC reporting requirements and that it had sought technical assistance from the OECD 'for a consistent implementation of the minimum standard into its domestic legal framework'. This assistance took place in the last quarter of 2017 and continued in 2018.[40] Both Jamaica and Cameroon were recommended to establish a domestic legal and administrative framework.

Other countries, i.e., Costa Rica and Sri-Lanka, did not have a complete legal and administrative framework and, therefore, recommendations were made in the peer review report to complete it. For Costa Rica, recommendations were made concerning the definition of the ultimate parent entity and the filing deadline. For Sri-Lanka, they regarded the amendment of clarification of the annual consolidated group revenue threshold calculation and the introduction of legislation or guidance to suspend local filing until they have met the necessary conditions to apply such rules.

Peru was the only country meeting all of the terms of reference relating to the domestic legal and administrative framework.

Viet Nam was excluded since this country only joined the BEPS Inclusive Framework in June 2017 (i.e., a new joiner). Congo was also omitted from the peer review even though the 2018 peer review report did not address the reason for this.[41] In general, in addition to opting out (only Botswana did so), other reasons to be excluded are capacity constraints or an impact of natural disasters (which was the case of the Turks and Caicos Islands). Therefore, the only reason that might be argued as a reason for Congo to be excluded could be capacity constraints.

The 2019 peer review report[42] stated that Cameroon, Congo, and Jamaica did not have the domestic and legal framework nor the international framework for exchange of CbCRs in place. Therefore, the OECD recommended to these countries to introduce the framework as soon as possible. Congo was reviewed for the first time in the 2019 report.

Costa Rica made the changes required, but Sri-Lanka still needed to make modifications to clarify rules (revenue threshold and local filing). Peru did not have any recommendations for the domestic and legal framework.

Unlike the 2018 report, Viet Nam was reviewed in 2019. It had the domestic and legal framework in place, but some changes are needed (e.g., local filing).

The 2020 peer review report[43] shows the same situation as that in the 2019 report regarding Cameroon, Congo, and Jamaica and, therefore, the recommendation of the peer review was to have the framework as soon as possible.

Peru and Viet Nam did not receive recommendations on the domestic and legal framework. However, they did for the international framework for exchange of CbCRs. It was primarily suggested to have the necessary processes and written procedures in place to ensure that the exchange of information is in accordance to the terms of reference.

Costa Rica received recommendations on the definition of ultimate parent entity and to ensure that CbCR filing deadlines are being met.

Sri-Lanka still needed to make changes to the domestic and legal framework to clarify rules (revenue threshold and local filing) and to the bilateral framework to facilitate the exchange of information.

Notes

38 http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf (accessed 30 Jul. 2023).

39 OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 1): Inclusive Framework on BEPS: Action 13*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (2018), http://dx.doi.org/10.1787/9789264300057-en (accessed 30 Jul. 2023).

40 *Ibid.*, at 124.

41 *Ibid.*, at 12 and 13.

42 OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 2): Inclusive Framework on BEPS: Action 13*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris 2019), https://doi.org/10.1787/f9bf1157-en (accessed 30 Jul. 2023).

43 OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 3): Inclusive Framework on BEPS: Action 13*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2020), https://doi.org/10.1787/fa6d31d7-en (accessed 30 Jul. 2023).

Action 5: Exchange of Rulings

Country	*Questionnaire Completed by Country*	*Recommendations General: Domestic Legal Framework and Put in Place Effective Information Gathering Process*	*International Framework for Exchange of Information: Multilateral Convention on Mutual Administrative Assistance in Tax Matters /or Bilateral Tax Treaties*
Congo	2017 No 2018 Yes 2019 No 2020 No 2021 No	2017 General recommendations 2018 General 2019 General 2020 General 2021 General	Bilateral Tax Treaties
Cameroon	2017 No 2018 Yes 2019 Excluded peer review (country not able to issue rulings (legally or in practice) 2020 Excluded peer review 2021 Excluded peer review	2017 General 2018 None 2019 No reviewed.	Party Multilateral Convention Bilateral Tax Treaties
Costa Rica	2017 Yes 2018 Yes 2019 Yes 2020 Yes 2021 Yes	2017 Best efforts approach, training officials, and introducing a process to identify the ultimate parent company 2018 Same Recommendations 2019 None 2020 None 2021 None	Party Multilateral Convention Bilateral Tax Treaties
Jamaica	2017 No 2018 Yes 2019 Yes 2020 Yes 2021 Yes	2017 General 2018 None 2019 None 2020 None 2021 None	Party Multilateral Convention Bilateral Tax Treaties
Peru	2017 Yes 2018 Yes 2019 Yes 2020 Yes 2021 Yes	2017 None 2018 None 2019 None 2020 None 2021 None	Party Multilateral Convention Bilateral Tax Treaties
Sri Lanka	2017 No 2018 No 2019 No 2020 No 2021 Yes	2017 General 2018 General 2019 General 2020 General 2021 Compliant – No recommendations	Bilateral Tax Treaties
Viet Nam	2017 Yes 2018 Yes 2019 Yes 2020 Yes 2021 No	2017 Timely exchange and complete templates 2018 Same Recommendations 2019 Same 2020 Same 2021 Same	Party Multilateral Convention Bilateral Tax Treaties

Source: Own compilation based on OECD documents (as of 30 July 2023).

As in the 2020 peer review report, the one for 2021[44] shows that Cameroon, Congo, and Jamaica did not yet have the domestic and international framework to implement Action 13. Despite their lack of compliance highlighted by the peer review reports, there are no reasons why these countries have not implemented the domestic and legal framework nor why they have not enacted the bilateral relationships to exchange the CbCRs. Therefore, it is not clear what is lacking in these countries (technical capacity or any other) to make these changes and what the OECD or any other technical assistance body (e.g., Tax Inspectors Without Borders) is doing to help these countries. It is also not clear what the concerns of countries are regarding the implementation of this framework.

The recommendations for Costa Rica concerning the domestic legal framework have been removed in the 2021 report. In it, Costa Rica was regarded as being compliant with the standard. However, for the international framework for exchange of CbCRs, Costa Rica was recommended to ensure their complete and timely filing and

Notes

[44] OECD, *Country-by-Country Reporting – Compilation of 2021 Peer Review Reports: Inclusive Framework on BEPS: Action 13*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2021), https://doi.org/10.1787/73dc97a6-en (accessed 30 Jul. 2023).

exchanges. Therefore, it should provide the details of numbers and timeliness of reports received and exchanged for the period covered by this peer review report.

As it was recommended in previous peer review reports, Sri Lanka still needed to made changes to the domestic and legal framework in order to clarify rules (revenue threshold and local filing). In addition, regarding the bilateral exchange of information, it needed to take steps to implement the necessary processes or written procedures to facilitate the exchange of information.

Peru continued being compliant. The recommendation concerning the international framework for exchange of CbCRs was removed.

Viet Nam was regarded as being compliant for the domestic and legal framework except for the need to ensure that enforcement provisions for the effective implementation of CbC Reporting files are in place. Furthermore, it was recommended that Viet Nam take steps to implement the necessary processes or written procedures to facilitate the exchange of information.

The 2022 peer review report[45] stated that the recommendations made to Cameroon, Congo, Jamaica, Sri Lanka, and Viet Nam in the 2019 peer review report were still in place. They refer to the need to introduce the domestic and legal framework as soon as possible as well as the bilateral exchange of information to facilitate the exchange of CbCRs and to facilitate their appropriate use.

Costa Rica complied with the domestic and legal framework. However, it should take steps to develop the international framework to facilitate exchange of CbCRs as was recommended in the 2021 peer review report. Peru did not receive any recommendations.

Finally, the exchange of the CbCRs can only occur if the countries have activated the instruments for this including activating bilateral relationships under the CbC Multilateral Competent Authority Agreement[46] (CbC MCAA) that allows automatic exchange of information or by having qualifying competent authority agreements in effect with jurisdictions of the Inclusive Framework. These must meet the confidentiality, consistency, and appropriate use conditions with the country that has an international exchange of information agreement in effect that allows for the automatic exchange of tax information.

At the time of this writing, from the seven countries of the study, only Peru and Costa Rica have activated these bilateral relationships (Peru has 45, and Costa Rica has 54). However, unlike Peru that receives and sends CbCRs, Costa Rica has notified as a non-reciprocal jurisdiction and, as such, will not receive those submitted to tax authorities in other jurisdictions.[47] Therefore, even if the domestic framework has been introduced (which is the case of Sri-Lanka and Viet Nam) and the filing of a CbCR has already begun, the lack of an international framework would make it difficult for countries to exchange CbCRs with other countries.

The following table summarizes some of the responses/ recommendations in the framework of BEPS Action 13. However, unlike BEPS Action 5, there is no reference in the peer review reports regarding whether countries received a questionnaire for the purposes of the peer review. However, since the countries provided a reply to the review, it will be addressed as input from the country.

3.3.1.3 Some Observations on the Peer Review of BEPS Action 5 and BEPS Action 13

The analysis of the peer review reports for the countries of the study shows that, regarding BEPS Action 5 (exchange of rulings) and BEPS Action 13 (CbCRs), developing countries are still in an early stage of implementing the minimum standards including establishing a domestic legal and administrative framework and to facilitate the exchange of CbCRs and rulings with other jurisdictions. Therefore, it is not yet clear how these two standards can benefit the countries and also what are the reasons that they did not answer the peer review questionnaire or are not addressing the peer reviewing recommendations.

Very little information is provided in the peer reviews with the exception of Cameroon that mentioned in the 2018 peer review report on Action 13 that it needed technical assistance from the OECD. However, despite receiving this technical assistance, Cameroon has not yet implemented the necessary framework, and there is no further reference to it in the 2019 or 2020 peer review report addressing Action 13. Regarding BEPS Action 5, Cameroon has not been reviewed since 2018, but there is no information why there has not been any additional peer review of this country. Unlike in the peer review of Action 13, the technical assistance was not mentioned in the peer review report of Action 5.

That Action 13 BEPS Minimum Standard still has not been implemented in Cameroon, Congo, Jamaica, Sri Lanka, and Viet Nam after so many years without any reasons on why this is happening does not contribute to improving

Notes

[45] OECD, *Country-by-Country Reporting – Compilation of 2022 Peer Review Reports: Inclusive Framework on BEPS: Action 13*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2022), https://doi.org/10.1787/5ea2ba65-en (accessed 30 Jul. 2023).

[46] https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ (accessed 30 Jul. 2023).

[47] OECD, *supra* n. 45, at 67.

Action 13

Country	*Reviewed/Input from Country*	*Recommendations*	*International Framework for Exchange of Information: Activate bilateral exchange by signing CbC MCAA*[48]
Congo	2018 Excluded peer review Reviewed 2019, 2020, 2021, 2022	2019 Introduce legal and administrative framework 2020 Same recommendations 2021 Same recommendations 2022 Same recommendations	No
Cameroon	2018 Input (technical assistance is needed) Reviewed 2018, 2019, 2020, 2021, 2022	2018 Introduce legal and administrative framework 2019 Same recommendations 2020 Same recommendations 2021 Same recommendations 2022 Same recommendations	No
Costa Rica	Reviewed 2018, 2019, 2020, 2021, 2022	2018 Complete legal and administrative framework 2019 No recommendations 2020 Some recommendations regarding CbCR filing deadlines and some definitions. 2021 Take steps to facilitate exchange of CbCRs. 2022 Take steps to facilitate exchange of CbCRs.	Yes since 2016
Jamaica	Reviewed 2018, 2019, 2020, 2021, 2022	2018 Introduce legal and administrative framework 2019 Same recommendations 2020 Same recommendations 2021 Same recommendations 2022 Same recommendations	No
Peru	Reviewed 2018, 2019, 2020, 2021, 2022	2018 No recommendations 2019 No recommendations 2020 Recommendations regarding procedures to ensure exchange of information under the bilateral framework for exchange of CbCRs. 2021 No recommendations 2022 No recommendations	Yes since 2018
Sri Lanka	Reviewed 2018, 2019, 2020, 2021, 2022	2018 Complete legal and administrative framework 2019 Same recommendations 2020 Same recommendations 2021 Same recommendations 2022 Same recommendations	No
Viet Nam	2018 Excluded peer review Reviewed 2019, 2020, 2021, 2022.	2019 Changes needed (e.g., local filing). 2020 No recommendations 2021 Recommendations regarding procedures to ensure exchange of information under the bilateral framework for exchange of CbCRs. 2022 Same recommendations	No

Source: Own compilation based on OECD documents (as of 30 July 2023).

compliance of other countries with this standard. There is no information in either the peer review reports or from the OECD regarding the situation/pressure/commitments for the implementation of BEPS Action 13 by Cameroon, Congo, and Jamaica. This discussion may take place at the BEPS Steering Group but, since the discussions are confidential, it is not possible to know the reasons why countries are not complying with BEPS Action 13.[49]

Two countries that are very active in following BEPS implementation are Costa Rica and Peru. One reason could

Notes

[48] https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf, (accessed 30 Jul. 2023).

[49] *See* s. 4 below and *see also* on the role of the Steering Group and the decision making at the Plenary Meeting of the BEPS Inclusive Framework, R. Christensen, M. Hearson & T. Randriamanalina, *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations,* ICTD Working Paper 115, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15853/ICTD_WP115.pdf?sequence=9 (accessed 30 Jul. 2023).

be that both countries aim to become (or have become) members of the OECD and, therefore, they have the motivation to comply with the BEPS minimum standards.

3.3.2 *BEPS Action 6*

The following paragraphs will provide a comparison of the seven countries of this study regarding the peer review reports of BEPS Action 6 (2018, 2019, 2020, 2021, 2022) in section 3.3.2.1. At the end of the section, a table with a summary of the findings will be provided. Thereafter, a number of observations on the peer review of BEPS Action 6 in the countries of this study will be provided in section 3.3.2.2.

3.3.2.1 Findings Case Study BEPS Action 6

BEPS Action 6 recommends the introduction of a preamble statement that tax treaties will also prevent 'double non-taxation'. In addition, it proposes the introduction of a provision to prevent treaty abuse principal purpose test (PPT) combined with limitation on benefits clause (LOB) (simplified or detailed or a detailed LOB with a provision to prevent conduit financing arrangements).

In order to apply the provisions of the BEPS Multilateral Instrument (MLI) (i.e., preamble, PPT with or without an LOB/or conduit arrangement provisions), both countries must make the same choice, otherwise, the provision will not apply. However, the menu of choices makes it difficult for countries to agree on the same provision.[50]

From the seven countries of the study, two have not yet signed the BEPS MLI, i.e., Congo and Sri-Lanka. The peer review report does not provide information on the reason why or on the choice to have these treaties negotiated bilaterally. Congo has only three tax treaties, but Sri-Lanka has forty-six and will therefore need some time resources and personnel to review their tax treaties in order to comply with the BEPS Action 6.

In addition, the peer review report when reviewing Congo stated that none of the three tax treaties (Italy, France, and Mauritius) comply with the minimum standard. However, Italy, in its peer review of Congo, 'indicated that its agreement with Congo did not give rise to material treaty shopping concerns for Italy'. Therefore, the OECD recommended Congo to formulate a plan for the implementation of the minimum standard in its agreements for which no steps have yet been taken and that were concluded with members of the BEPS Inclusive Framework (France and Mauritius).[51] These statements indicate that, even though Congo did not comply with the minimum standards, the reply from Italy to the peer review questionnaire was sufficient for effectuating the recommendation to Congo to include the minimum standards in the tax treaty with Italy.

Sri Lanka is implementing the preamble statement and the PPT. With India, the LOB will also be included. Sri Lanka has stated in the 2022 peer review report that 'steps have been taken (other than under the MLI) to implement the minimum standard in its agreements with Belgium, the Czech Republic, Denmark, India, Luxembourg, the Netherlands, Pakistan, Romania, and Switzerland'.[52]

At the time of this writing, five countries (Cameroon, Costa Rica, Jamaica, Peru, and Viet Nam) have signed the MLI. From these, only three, i.e., Cameroon, Costa Rica, and Viet Nam, have ratified it and, therefore, the BEPS MLI is only in force for these three countries. In the peer review reports of Cameroon, Costa Rica, Jamaica, and Peru, there was no information as to why the MLI has not yet been ratified and if that will happen soon.

According to the peer review report, Costa Rica is implementing the minimum standard through the inclusion of the preamble statement and the PPT.[53] Costa Rica included three tax treaties (Germany, Mexico, and Spain) in the initial document of the BEPS MLI as covered agreements. However, in the final document that was ratified, Costa Rica did not list the tax treaty with Germany,[54] stating that the content of BEPS Action 6 in the tax treaty with Germany will be negotiated bilaterally. Another treaty that was not addressed as a covered tax treaty in the MLI is the tax treaty with United Arab Emirates. It is not clear if the content of the standard will also be negotiated bilaterally.

Cameroon is implementing the minimum standards through the inclusion of the preamble statement and the PPT. It has signed and ratified the BEPS MLI and, therefore, those provisions are applicable to the six tax treaties concluded and in force (i.e., with Canada, France,

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50 There is extensive literature in tax scholarship addressing the implementation of BEPS Action 6. Some of it has been addressed in I. J. Mosquera Valderrama, *BEPS Principal Purpose Test and Customary International Law*, Leiden J. Int'l L. 33(3):745-766 (2020), doi: 10.1017/S0922156520000278 (accessed 30 Jul. 2023).

51 OECD, *Prevention of Tax Treaty Abuse – Fifth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris 98 (2023), https://doi.org/10.1787/9afac47c-en (accessed 30 Jul. 2023).

52 OECD, *Prevention of Tax Treaty Abuse – Fourth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2022), https://doi.org/10.1787/3dc05e6a-en at 278 (accessed 30 Jul. 2023).

53 OECD, *supra* n. 51, at 100.

54 https://www.oecd.org/tax/treaties/beps-mli-position-costa-rica-instrument-deposit.pdf (accessed 30 Jul. 2023).

Morocco, South Africa, Tunisia, and United Arab Emirates).[55]

Viet Nam is implementing the preamble statement and the PPT and signed the MLI in February 2022 with 75 of the 76 tax treaties being covered by it.[56] It entered into force on 1 September 2023. Since Viet Nam signed the MLI recently, the 2022 peer review report still provided recommendations regarding this issue.

Jamaica is implementing the minimum standards through the inclusion of the preamble statement and the PPT combined with the LOB. It has signed but not yet ratified the BEPS MLI, therefore, the provisions are not yet applicable to the sixteen treaties (in force) concluded by Jamaica.[57] From them, one is covered by the CARICOM agreement (eleven countries[58]). However, in the 2020 peer review report, it was stated that 'Jamaica acknowledges that the CARICOM Agreement does not at this stage comply with the minimum standard and that discussions to bring this agreement up to date would be contemplated'.[59] This was also ratified in the 2021 peer review report.[60]

Peru is implementing the minimum standard through the inclusion of the preamble statement and the PPT. It also stated in the peer review report that 'while it accepts the application of the PPT under the MLI, it intends where possible to adopt an LOB provision through bilateral negotiation. The agreements that will be modified by the MLI will come into compliance with the minimum standard once the provisions of the MLI take effect'.[61]

Peru has signed but not yet ratified the BEPS MLI. According to the peer review report, it signed in 2018, listing nine of its eleven tax agreements. Unlike the 2018 peer review report, in the 2021 version, Peru included Decision 578 of the Andean Community Commission[62] that is currently under renegotiation to include the minimum standards.[63] Peru has also stated that the tax treaty with Japan complies with these and that it is currently taking steps (other than under the MLI) to implement the minimum standards in its agreements with Brazil and Switzerland.[64]

The following table summarizes some of the responses/recommendations in the framework of BEPS Action 6.

Action 6

Country	*Input by Countries BEPS IF (peers)*	*Some Observations Choice Countries and/or Information Provided by Countries in Peer Review*	*BEPS MLI*
Congo	Italy (tax treaty does not give rise to treaty shopping)	Not clear of Congo's choice and if treaties will be amended throughout bilateral or by signing the MLI.	No signatory
Cameroon	No input by countries	Chose preamble and PPT. Provisions of MLI applicable to all tax treaties.	Yes Signatory in force 1 August 2022
Costa Rica	No input by countries	Chose preamble and PPT. Provisions of MLI applicable to tax treaties (some exceptions i.e., Germany and the United Arab Emirates).	Yes Signatory and in force 1 January 2021
Jamaica	No input by countries	Chose preamble, PPT combined with LOB. Acknowledges that CARICOM does not comply with the minimum standard.	Yes Signatory. Not yet in force
Peru		Chose preamble, PPT and, in some cases, LOB throughout bilateral negotiation.	Yes signatory. Not yet in force.

Notes

55 https://www.oecd.org/tax/treaties/beps-mli-position-cameroon-instrument-deposit.pdf (accessed 30 Jul. 2023).

56 https://www.oecd.org/tax/beps/lesotho-thailand-and-viet-nam-sign-landmark-agreement-to-strengthen-their-tax-treaties.htm. To the author's knowledge, the only tax treaty not included as a covered agreement is the tax treaty with the United States.

57 From the treaties mentioned in the peer review of BEPS Action 5, the following treaties have not been addressed in BEPS Action 6: Faroe Islands, Finland, Greenland, and Iceland since these treaties are not bilateral tax agreements but tax exchange information agreements.

58 Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment, St. Michael Barbados, 6 Jul. 1994; between: Antigua and Barbuda (18 Feb. 1998), Barbados (7 Jul. 1995), Belize (30 Nov. 1994), Dominica (19 Jun. 1996), Grenada (1 Mar. 1996), Guyana* (26 Nov. 1997), Jamaica (16 Feb. 1995), St. Kitts/Nevis (8 May 1997), St. Lucia (22 May 1995) St. Vincent (12 Feb. 1998) and Trinidad & Tobago (29 Nov. 1994).

59 OECD, *supra* n. 52, at 167.

60 OECD, *supra* n. 51, at 168.

61 OECD, *supra* n. 52, at 231. *See also* OECD, *supra* n. 51.

62 Peru stated in the peer review report that Decision 578 of the Andean Community Commission has not been listed under the MLI as it is a decision of the Commission of the Andean Community. However, in the 2021 peer review report, this position changed and, therefore, Decision 578 was included. The current members of the Andean Community are Bolivia, Colombia, Ecuador, and Peru.

63 OECD, *supra* n. 52, at 231.

64 *Ibid.*

Country	Input by Countries BEPS IF (peers)	Some Observations Choice Countries and/or Information Provided by Countries in Peer Review	BEPS MLI
		MLI for most of their tax treaties (Brazil, Switzerland). Acknowledges that Decision 578 Andean Community is currently being renegotiated to include the minimum standards	
Sri Lanka	Indonesia and Japan (tax treaty does not give rise to treaty shopping)	Chose preamble, PPT, and LOB in one case (India). Chose bilateral negotiation instead of MLI.	Not signatory
Viet Nam	Japan (tax treaty does not give rise to treaty shopping)	Chose preamble and PPT. Included 52 of the 76 tax treaties as covered agreements under the MLI.	Yes signatory and in force 1 September 2023.

Source: Own compilation based on OECD documents (as of 30 July 2023).

3.3.2.2 Some Observations on the Peer Review of BEPS Action 6

The description above shows that countries are still behind the implementation of BEPS Action 6 either by signing and ratifying the BEPS MLI or by choosing to negotiate their tax treaties bilaterally. The peer review reports do not provide a sufficient amount of information on why countries are not making the changes. They are mainly a description of the compilation of tax treaties given by the countries in their answers to the peer review questionnaire. It could be possible that one of the reasons behind the non-implementation is the lack of resources or technical knowledge on how to renegotiate these tax treaties. This could be the case, for instance, of Sri-Lanka that is now required to do so for forty-six tax treaties.

Even though Cameroon, Costa Rica, Jamaica, Peru, and Viet Nam have signed the MLI, only Cameroon and Costa Rica have actually ratified it while Congo and Sri Lanka have not yet signed it. For the other countries, there is still the question of whether it will be ratified and, if so, what would be the choice regarding the implementation of BEPS Action 6. Will all tax treaties be covered or only some of them? Will the country engage in bilateral negotiations?

The description of the implementation of BEPS Action 6 shows that there is a lack of transparency of the peer review process and the ratification of the MLI. In our view, the peer review reports could provide information from the countries on the process of ratification of the MLI. Since the document provided upon signing the BEPS MLI is not binding and only the final document ratifying it that has been deposited at the OECD is the binding document. it could be possible that some these countries may still be waiting for other counterpart/countries to introduce their final choices in the ratification instrument.

3.3.3 *BEPS Action 14*

The following paragraphs will provide an analysis of the peer review reports of BEPS Action 14 of one of the seven countries of this study in section 3.3.3.1. Since it is only one country, unlike BEPS Actions 5, 6, and 13, no table with a summary of the findings will be provided. Thereafter, some observations on the peer review of BEPS Action 14 will be provided in section 3.3.3.2.

3.3.3.1. Findings Case Study BEPS Action 14

From the seven countries, the only country that has been reviewed regarding BEPS Action 14 is Viet Nam. The peer review for stage 1[65] occurred before Viet Nam signed the MLI (not yet in force). Therefore, some of the recommendations of the peer review may change after the MLI entered into force on 1 September 2023.[66]

For stage 1, the peer review report from Viet Nam received input from 11 countries,[67] and most of them (8 of 11) have experiences with the country in handling MAP cases. The peer review states two recommendations (beyond the scope of the MLI) that refer to the changes to the APAs[68] programme to allow roll-back of bilateral APAs and the repeal of additional

Notes

65 According to the terms of reference 'Stage 1 involves the review of the assessed jurisdiction's implementation of the minimum standard based on the jurisdiction's legal framework for MAP and the application of this framework in practice ("Stage 1 Peer Review"). Stage 2 involves the review of the measures taken by the assessed jurisdiction to address any shortcomings identified in its Stage 1 Peer Review ("Stage 2 Peer Monitoring")'. OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents, OECD/G20 Base Erosion and Profit Shifting Project*, OECD, Paris (2016), www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-mechanisms-peer-review-documents.pdf at 20 (accessed 30 Jul. 2023).

66 For instance, regarding the recommendation to introduce Art. 25 (1 to 3) which will be met once Viet Nam introduces the treaties that are lacking these provisions as the covered tax agreements in the signature and ratification of the MLI instrument.

67 Austria, China, Denmark, Germany, Hungary, Japan, Korea, Poland, Singapore, Switzerland, and Turkey.

68 *See supra* n. 26.

requirements to facilitate that MAP cases are solved in a timely manner.[69]

For stage 2, the same 11 countries as those in stage 1 in addition to the Netherlands and Spain provided input. Viet Nam has received recommendations. For instance, some of them are ratifying the MLI as soon as possible as well as the introducing the possibility of a roll back of bilateral APAs in appropriate cases. Additionally, it is recommended that Viet Nam improve the access of taxpayers to MAPs regardless of whether domestic remedies have been finalized.

3.3.3.2 Some Observations on the Peer Review of BEPS Action 14

Most developing countries have received a deferral regarding the peer review of BEPS Action 14. The 2016 peer review document stated that:

> the MAP Forum should defer the review of any such member that is a developing country and is not an OECD or G20 country if that member has not yet encountered meaningful levels of MAP requests and there is no feedback from other members of the FTA MAP Forum indicating that the jurisdiction's MAP regime requires improvement.[70]

However, with more countries participating in the BEPS Inclusive Framework, signing the MLI, and the recent developments in Pillar 1 (that provides for a dispute resolution mechanism), the OECD wanted to revisit the need for this deferral. In the 2021 public consultation document prepared by it,[71] the OECD asked, 'Please share any general comments on your experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with jurisdictions that obtained a deferral of their peer review'.[72]

In the same document, the OECD acknowledged the difficulties of achieving consensus on this topic, stating that:

> The proposals included in this consultation document have been prepared by the Secretariat. While many jurisdictions expressed support for most of the proposals, several jurisdictions also raised strong concerns with some of them. They do not represent the consensus views of the Inclusive Framework, the Committee on Fiscal Affairs (CFA) or their subsidiary bodies, but are intended to provide stakeholders with substantive proposals for analysis and comment.[73]

In the 2021 progress report on BEPS to the G20, the OECD stated that one of the outcomes of the public consultations on Action 14 is 'support for mandatory, binding arbitration for more tax certainty'.[74] However, it is not clear whether this is the position of developing countries.

The concerns from developing countries regarding mandatory arbitration were also addressed during the discussions on the Pillar 1 proposal to tax the highly digitalized business.[75] The introduction of mandatory arbitration in Pillar 1 rules was not possible due to the concerns of developing countries and also the work of the African tax Administration Forum in the discussion concerning Pillar 1 and Pillar 2. For instance, while in the midst of the discussions of Pillar 1, in the technical note published by the African Tax Administration Forum (ATAF), the Cross-Boder Taxation (CBT) Technical Committee stated, 'The CBT recognises the need to develop robust and effective tax dispute resolution mechanisms but does not support this being by mandatory arbitration'.[76]

The question that remains is whether all countries want to continue with this deferral of peer review of BEPS Action 14 and, if so, what will happen when dispute resolution mechanisms that are more systematic and stronger are needed in light of the introduction of Pillar 1 rules and its multilateral convention. Since the new rules are expected to come into effect soon including also the implementation package agreed in July 2023,[77] this question is currently more relevant and urgent. The

Notes

[69] According to the peer review report, 'Peers experienced some difficulties in resolving MAP cases, in particular in obtaining position papers from Viet Nam's competent authority, as well as responses to position papers issued by peers. In addition, Viet Nam's competent authority, for some cases, needs to ask approval from the Ministry of Finance to resolve MAP cases, which bears a risk that MAP cases cannot be resolved in a timely manner. Viet Nam was therefore recommended to ensure that adequate resources are made available for the competent authority function in order to resolve MAP cases in a timely, efficient and effective manner as well as the more timely issuing of position papers and responses thereto and sufficient authority for staff being present at the face-to-face meeting'. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Viet Nam (Stage 1): Inclusive Framework on BEPS: Action 14*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris 2021) , https://doi.org/10.1787/417776da-en at 10 (accessed 30 Jul. 2023).

[70] OECD (2016), *supra* n. 65, at 20–21.

[71] https://www.oecd.org/tax/beps/public-consultation-document-beps-action-14-2020-review-november-2020.pdf (accessed 30 Jul. 2023).

[72] *Ibid.*, at 6.

[73] *Ibid.*, at 3.

[74] *Supra* n. 16, at 3.

[75] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Jul. 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.htm (accessed 30 Jul. 2023).

[76] Paragraph 3.9. Technical Note. CBT/TN/03/2019 ATAF, https://events.ataftax.org/includes/preview.php?file_id=40&language=en_US (accessed 30 Jul. 2023).

[77] In a political statement on the two pillar solution published in Jul. 2023 initiated by the OECD, 138 members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework) delivered a package to further implement it to address the tax challenges arising from the digitalization of the economy. These measures include the introduction of a Multilateral Convention on Amount A of Pillar One (open for signature in the second half of Jul. 2023), some guidance for Amount B on Pillar One that will be subject to public consultations, the framework for the implementation of the subject to tax rule under Pillar Two to be introduced under a

following section will address the throughput legitimacy of the peer review process.

4 Some observations on the throughput legitimacy of the peer review process of the BEPS 4 minimum standards

The following section will address the main observations in the context of throughput legitimacy theory following the analysis of the peer review process as described in the OECD documents and in the peer review reports of the countries of this study. The concepts related to throughput legitimacy that will be addressed in this article are accountability, transparency, inclusiveness, and openness. By analysing these, this article will provide recommendations on what the OECD and countries of the BEPS Inclusive Framework should do (1) to be accountable, transparent, responsive, and inclusive, and (2) to enhance developing countries' commitment to the peer review process.

4.1 *Accountability*

The implementation of the four BEPS minimum standards by countries participating in the BEPS Inclusive Framework are subject to peer review in accordance with the terms of reference and methodology published at the OECD[78] according to which:

> the purpose of a peer review is to ensure the effective and consistent implementation of an agreed standard and to recognise progress made by jurisdictions in this regard. The peer review evaluates the implementation of the standard against an agreed set of criteria. These criteria are set out in terms of reference, which include each of the elements that a jurisdiction needs to demonstrate it has fulfilled in order to show effective implementation of the standard.
>
> The peer review has been conducted in accordance with the agreed methodology. The methodology sets out the process for undertaking the peer review, including the process for collecting the relevant data, the preparation and approval of annual reports, the outputs of the review and the follow up process.[79]

However, from the analysis of the peer review reports of this case study, it is not clear why some countries continue to be excluded (or not reviewed) or do not provide input to the peer review questionnaire. Regarding BEPS Action 5, this is the case of Cameroon (excluded from the peer reviews for 2019, 2020, 2021), and Congo and Sri Lanka do not always provide their reply/input to the peer review questionnaire despite the fact that these countries have received general recommendations (Congo 2017, 2018, 2019, 2020, 2021) and Sri Lanka (2017, 2018, 2019, 2020). The reply form countries could help to enhance the exchange of best practices and the accountability of the countries participating in the BEPS Inclusive Framework. Until now, the reasons are not clear why countries may or not be excluded and what the responses are to the recommendations of the peer review report.

Regarding BEPS Action 13, Cameroon, Congo, Jamaica, Sri Lanka, and Viet Nam have not yet complied with implementing the domestic legal and administrative framework despite several requests to do so in the peer review reports (2019, 2020, 2021, 2022). For the implementation of the international framework for exchange of CbCRs, only two countries have activated this framework, i.e., Costa Rica and Peru. The peer review reports do not provide information on what the obstacles or reasons are for other countries not to activate this framework.

Concerning BEPS Action 6, only three of the seven countries have signed and ratified the MLI (Cameroon, Costa Rica, and Viet Nam). Congo has not signed the MLI, and there is no information on whether it will be doing so. Additionally, there is no information in the peer review reports why Jamaica and Peru have not yet ratified the MLI. The question is whether the purpose of the peer review 'to ensure effective and consistent implementation' is being met and how this contributes to accountability of the peer review process vis-à-vis countries participating in the BEPS Inclusive Framework.

Furthermore, the deferral of BEPS Action 14 demonstrates that countries are not prepared to introduce this standard. This is also the case in the peer review of BEPS Actions 5, 6, and 13 that show that countries still need to change their domestic and regulatory framework and sign/ratify their international (bilateral or multilateral) framework to facilitate the exchange of CbCRs and exchange of rulings as well as to introduce measures in tax treaties to counter tax treaty abuse.

Since the content of the peer review reports do not provide much information on the reasons why countries comply or fail to do so with the implementation of the standards, then the accountability of the countries (reviewed/reviewer), the OECD Secretariat, and the different reporting groups (CbC Reporting Group, FHTP) cannot be assessed.

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multilateral instrument, and a plan to support the implementation the coordinated implementation of the two-pillar solution, https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf (accessed 30 Jul. 2023).

[78] *See* http://www.oecd.org/tax/beps/beps-about.htm#monitoring (accessed 30 Jul. 2023).

[79] OECD, *supra* n. 32.

4.2 *Transparency*

According to the OECD, there is a strict requirement of confidentiality of the peer review documents. The constrains concerning this and the input of the countries as well as the limited participation of stakeholders result in a lack of transparency of the peer review process which may have an effect on its throughput legitimacy.

As stated in the terms of reference for Actions 5 and 13:

> the documents produced by a reviewed jurisdiction during a review (including responses to the questionnaire for reviewed jurisdictions, responses to the peer input questionnaire and responses to the Secretariat's queries) as well as draft reports and written comments on draft reports will be treated as confidential and for official use only. These documents should not be made publicly available.[80]

Any breach of confidentiality should be brought to the attention of the FHTP and CbC Reporting Group who will decide on the appropriate action in consultation with those relevant parties as appropriate.[81] However, regarding Action 13, the terms of reference state that 'the annual report will remain confidential but will be made public if the Inclusive Framework decides to declassify it'.[82] To the author's knowledge, this has not yet taken place.

The terms of reference for BEPS Action 6 refer to confidentiality, stating that:

> No part of any report or other document produced in the context of the review process for the implementation of the minimum standard on treaty shopping should be made publicly available in any form or manner prior to its publication or before the Inclusive Framework on BEPS indicates that such document should not be treated as confidential. Any breach of confidentiality shall be brought to the attention of the Inclusive Framework on BEPS for a decision on the most appropriate action to take.[83]

Regarding BEPS Action 14, it states that:

> It is important for members of the FTA MAP Forum and the CFA to recognise that no part of any report should be made publicly available in any form or manner prior to its publication. In addition, members of the FTA MAP Forum should treat all documents produced in the course of the review of any jurisdiction (e.g. documents describing a jurisdiction's MAP regime, responses to the questionnaire, MAP statistics and draft reports) as confidential and should not make them publicly available, unless approval of their release has been obtained from the CFA. Strict respect for the confidentiality of this work is essential to the credibility of the monitoring and peer review process. Any breach of confidentiality shall be brought to the attention of the FTA MAP Forum and the CFA for their decision on the most appropriate action to take.[84]

However, confidentiality cannot be an obstacle to transparency. Recently, when discussing the transparency of the decision making of the plenary of the BEPS Inclusive Framework and the steering group, Christensen et al, addressed the lack of transparency of these discussions. According to these authors:

> Plenaries evaluate progress and take final decisions, on a consensus basis, on proposals prepared by subordinate bodies. The plenary is the formal decision-making body, and the final step in a process which identifies and resolves disagreements between countries in advance. Many interviewees described its meetings as choreographed:
>
> 'It is a room of approval where everything has been well prepared and orchestrated (…) the sauce has been made, the dish is served. If you say that the salt is missing, you want to add something (…) they will tell you that the dish is done. It is at the Steering Group level that the dish is prepared.(Lower-income country)'.[85]

This also has consequences for the inclusiveness and openness which is addressed in the following section 4.3.

Therefore, the question to be asked in this contribution is what the OECD can do to improve the transparency on the adoption of the peer review reports. Additional information is required on what measures have been taken with countries that do not complete the questionnaire or those that do not introduce the recommendations. The findings of the study of the peer review report in the case study (*see*

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80 Paragraph 18 OECD, 5 *supra* n. 27, at 18 and para. 38 OECD*, BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents: October 2020,* in *OECD/G20 Base Erosion and Profit Shifting Project,* OECD, *Paris* (2020), https://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf at 24 (accessed 30 Jul. 2023).

81 *Ibid.*

82 Paragraph 38, *ibid.*

83 Paragraph 37 OECD, *BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Revised Peer Review Documents*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2021), www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriatecircumstances-revised-peer-review-documents.pdf at 11 (accessed 30 Jul. 2023).

84 Paragraph 37 OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD, Paris (2023), www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-reviewdocuments.pdf (accessed 30 Jul. 2023).

85 Christensen et al., *supra* n. 49, at 10–11.

section 3.3. above) shows that the information in the peer review reports is inconclusive for ascertaining whether countries are (or are not) implementing the four BEPS minimum standards.

4.3 *Inclusiveness and Openness*

In the peer review process, three important actors can be mentioned, i.e., a collective body that consists of the countries that are members of the BEPS Inclusive Framework, the OECD Secretariat (with additional parties such as the FHTP, FTA MAP Forum, CFA, and CbC Reporting Group[86]) and the BEPS Steering Group.[87] In addition, for BEPS Action 14, other actors are the taxpayer (individuals and corporations) and associations of taxpayers (e.g., business and industry associations) from peer reviewed jurisdictions. Regarding taxpayers, the OECD states in the terms of reference of BEPS Action 14 that, since the primary users of the mutual agreement procedure is the taxpayer, 'it is important that taxpayers are able to provide input on their experience on the MAP process'.[88] However, in practice, this has rarely been used by taxpayers. For instance, in Israel, there was input from only one of them.[89]

The input of other stakeholders for the peer review has not been sought by the OECD. For instance, concerning BEPS Action 13, the OECD stated:

> Because peer review is an intergovernmental process, business and civil society groups' participation in the formal evaluation process and, in particular, the evaluation exercise and the discussions in the CbC Reporting Group is not specifically solicited. The publication of the schedule of upcoming reviews would enable interested parties to provide information either to tax administrations or to the OECD Secretariat. However, as the process works on the basis of a peer review system, the report ultimately reflects the views of the peers of the reviewed jurisdictions.[90]

The peer review process of the four BEPS minimum standards has received little attention in tax scholarship and the legitimacy of the actors in the peer review process. To this author's knowledge, only Christensen et al addressed the role of the BEPS Steering Group in 2021 by stating:

> The most intensive policy negotiations take place within the Steering Group, despite its advisory status. Meeting several times a year, it brings together 24 individuals from countries equally split between members and non-members of the OECD's Committee of Fiscal Affairs. Steering Group members are nominated by states and formally elected by the IF's membership, but participate in a personal capacity. The election process is heavily steered by the OECD secretariat, which identifies capable and influential individuals, while ensuring geographical balance?[91]

These limitations have been acknowledged by the OECD in the 2021 report to the G20 on BEPS and developing countries. The OECD stated:

> While recent developments are encouraging, developing countries with limited capacities continue to face challenges to their active participation in the Inclusive Framework, particularly due to the pace of the work over multiple workstreams which have been progressed simultaneously. Many are on a steep learning curve, having to adapt to new ways of intergovernmental co-operation. There is also a view that the agenda is not sufficiently reflective of developing countries' interests.[92]

In order to address these concerns, the OECD has institutionalized the creation of two chairs of the BEPS Inclusive Framework since February 2022 for which one is from an OECD/G20 country, and one is from a non-OECD/nonG20 country. The OECD states:

> The Inclusive Framework stakeholders should, as a priority, reflect on governance arrangements to ensure a broad and systematic inclusion of developing countries. This could include consideration of representation in the leadership of the Inclusive Framework and its subsidiary bodies, and updating the mandate of the Advisory Group for Co-operation with Partner Economies.[93]

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86 Ad Hoc Joint Working Party 6 – Working Party 10 sub-group (hereafter referred to as the 'CbC Reporting Group'.

87 This group 'helps steering the work carried out by the Framework, ensuring efficiency and effectiveness, mainly with regards to the implementation of the BEPS measures" Background brief Inclusive Framework on BEPS Jan. 2017, https://www.oecd.org/tax/beps/background-brief-inclusive-framework-on-beps.pdf, at 15. List of members, https://www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf (accessed 30 Jul. 2023).

88 Paragraph 17. OECD (2016), *supra* n. 65, at 22.

89 OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Israel (Stage 1): Inclusive Framework on BEPS: Action 14*, in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2018), https://doi.org/10.1787/9789264304284-en (accessed 30 Jul. 2023).

90 Paragraph 25. OECD (2020), *supra* n. 80, at 20.

91 Christensen et al., *supra* n. 49, at 10–11.

92 OECD, *Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors*, Italy, OECD, Paris 13 (Oct. 2021), https://www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.pdf (accessed 30 Jul. 2023).

93 *See ibid.,* at 45.

Another article by this author questions whether 'the proposed co-chair by one developing country of the BEPS Inclusive Framework recommended in the OECD report to the G20 and the Ministerial Dialogue would be enough for developing countries' participation in the decision-making process and to enhance the legitimacy of the OECD vis-à-vis developing countries'.[94]

For the peer review process, one problem that can affect the inclusiveness and openness is the lack of input by peers (countries) and the role as examiners in the FHTP and the CbC Reporting Group. For the peer review to be effective, a common understanding is necessary along with an adequate level of commitment and mutual trust. The adequate level of commitment should be in terms of both human and financial resources for participants, i.e., members of the BEPS Inclusive Framework, to fully engage in the process at different times, as examiners, as active members in the BEPS Inclusive Framework, and as subject of examination. This has not occurred in the countries analysed in this case study.

Since there is no rotation system of countries nor geographical (America, Africa, Europe, Asia) focus for peer reviews, in principle, all 143 jurisdiction members of the BEPS Inclusive Framework can provide their review on the BEPS minimum standards of the reviewed country. However, the limited amount of input from developing countries to the peer reviews demonstrates that countries are not using this process to address their needs and concerns vis-à-vis other countries in the BEPS Inclusive Framework. One reason could be the lack of resources (technical, personnel, financial), the focus on only specific countries, or the short deadlines for the peer review input.

In cases when peer review input is provided, the input is limited and, therefore, it is not clear how this peer review has contributed to providing a state of equality. In addition, the peer review reports analysed in the case study show that developing countries (at least the seven countries in this study) are still in the process of introducing changes to their tax systems (e.g., exchange of information of rulings, CbCR regulations, mutual agreement procedure rules) and, therefore, developing countries may not benefit from a peer review at this stage.

The lack of experience of developing countries also contributes to other risks of this peer review process since: (1) there are unqualified countries as examiners (for instance, in the case of developing countries that are at the early stages of the issue of rulings but have to function as examiners vis-á-vis countries with extensive ruling practice); and/or (2) there is a bias stemming from national or political interests towards the other countries subject to peer review. Therefore, in light of the input from countries in the peer review, it can be argued that developing countries have not been taking advantage of the possibility to provide and receive feedback in the process. These findings have been addressed in this case study with seven developing countries.

5 Conclusions and recommendations for further research

This article analysed the peer review process of the four BEPS minimum standards in seven countries (Cameroon, Congo, Costa Rica, Jamaica, Peru, Sri Lanka, and Viet Nam). These countries became members of the BEPS Inclusive Framework and, since then, one country (Costa Rica) has become a member of the OECD and another country (Peru) is in the accession process. The analysis of the peer review process occurred in light of the concept of throughput legitimacy as developed by Schmidt (in areas other than tax law). The concepts related to throughput legitimacy that have been addressed in this article are accountability, transparency, inclusiveness, and openness.

In the author's view, the analysis of the peer review process through the perspective of throughput legitimacy can help to ascertain which problems of legitimacy the OECD may encounter during the process and how to resolve these issues. This analysis is also necessary to ensure that the implementation process of BEPS is valid and that countries and multinationals comply voluntarily with the implementation of the four BEPS minimum standards.

The main question addressed in this article was whether there are throughput legitimacy deficits regarding the accountability, transparency, inclusiveness, and openness of the OECD Secretariat and its bodies (FHTP, CbC working group, FTA MAP Forum), the BEPS Steering Group, and the BEPS Inclusive Framework. Taking into account the analysis of the peer review process as set up by the OECD Secretariat and the BEPS Steering Group of the seven countries in this study, this article concludes that there is throughput legitimacy deficits (i.e., lack of transparency, openness, inclusiveness) in the peer review process and that they should be addressed by the OECD and countries participating in the BEPS Inclusive Framework. Therefore, this article recommends that more work should be done by the OECD Secretariat and the BEPS Inclusive Framework to improve the governance of the peer review process. This could be done by ensuring that the process has more accountability, transparency, and inclusivity and is open to all stakeholders.

Furthermore, from the observations of the analysis of the peer review reports of the four BEPS minimum standards in the seven countries in section 3, it can be

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[94] This question is even more relevant in the context of the concerns raised by developing countries and regional (tax) organizations as well as the current role of the United Nations in these discussions. *See* Mosquera Valderrama, *supra* n. 5.

concluded that further research is also needed to understand what constitute the limitations of countries to implement the BEPS minimum standards as well as the reason why some countries as peers provide their input to the peer review and/or reply to the peer review questionnaire as a peer reviewed country. Finally, this article peremptorily requests more research on the implementation of the four BEPS minimum standards in countries participating in the BEPS Inclusive Framework including their compliance or not with those as well as their peer review process and the costs of non-compliance with it.[95]

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[95] Some of this research is already carried out in the framework of the GLOBTAXGOV research project where the implementation of the four BEPS minimum standards is being assessed in eight countries (Australia, Colombia, India, Mexico, the Netherlands, Nigeria, Senegal, and Spain). Two PhDs in the GLOBTAXGOV project are currently working on this topic. Some of the GLOBTAXGOV research has already been published in several articles and also book chapters (open access) in the GLOBTAXGOV blog available here https://globtaxgov.weblog.leidenuniv.nl/ (accessed 30 Jul. 2023).