

Cape Town, 15 January 2021
Commissioned by the Ministry of Foreign Affairs, Netherlands
Policy and Operations Evaluation Department (IOB)

The Relevance of the BEPS Recommendations for Developing Countries

Final Report

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List of Abbreviations

AfDB	African Development Bank
ALP	Arm's length principle
APA	Advance Pricing Agreements
ATAD	Anti-tax avoidance directive
ATAF	African Tax Administration Forum
ATI	Addis Tax Initiative
ATR	Advance Tax Rulings
BEPS	Base Erosion and Profit Shifting
CATA	Commonwealth Association of Tax Administrators
CbCR	Country-by-Country reporting
CFC	Controlled foreign company
CIT	Corporate income tax
COMESA	Common Market for Eastern and Southern Africa
CREDAF	<i>Centre de rencontre des administrations fiscales</i>
DRM	Domestic resource mobilisation
DTC	Double taxation convention
DWG	G20 Development Working Group
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
FHTP	Forum for Harmful Tax Practice
GAAR	General Anti-Abuse Rule
HNWI	High Net Worth Individuals
IBFD	The International Bureau for Fiscal Documentation
IF	OECD/G20 Inclusive Framework on BEPS
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
IOB	Policy and Operations Evaluation Department of the Dutch MFA
LoB	Limitations on benefits
MAP	Mutual Agreement Procedure
MCAA	Multilateral Convention on Mutual Assistance in Tax Matters as amended by the 2010
MFA	Ministry of Foreign Affairs, Netherlands
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS
MNE	Multinational enterprises
NGO	Non-governmental organisation
OECD	Organisation for Economic Cooperation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
PE	Permanent Establishment
PPT	Principal Purpose Test
SADC	Southern African Development Community
TIEAs	Tax information exchange agreements
TIWB	Tax Inspectors Without Borders
ToR	Terms of Reference
TP	Transfer Pricing
UN	United Nations

1. Introduction

1.1 Background

The G20/OECD Base Erosion and Profit Shifting project identified 15 Action Points to “tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment”.¹ The development of the Action Points was driven by the OECD with political support from the G20, however developing country positions were not always considered or included.² The Inclusive Framework (IF) was only created in 2016 with the aim to “ensure interested countries and jurisdictions, including developing economies, can participate on an equal footing in the development of standards on BEPS related issues, while reviewing and monitoring the implementation of the OECD/G20 BEPS Project”.³ These developments naturally lead to the question whether the BEPS project aims are in the interests of developing countries. While not entirely comparable, it may also be asked whether the developments within the EU in the area of tax avoidance assist to strengthen the tax systems in developing countries, for example ATAD.

1.2. The Commissioned Research Questions

The research in this report, commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs, aims to identify the priorities of developing countries on BEPS and compare them to the resulting 15 recommendations on BEPS resulting from the OECD-project.

Box 1: Research Questions from the Terms of Reference (ToR)

1. RQ1: What are the 15 OECD BEPS recommendations and which implementation options are available for participating countries?
2. RQ2: To what extent are the 15 OECD BEPS-recommendations and implementation options considered in line with the priorities of developing countries on BEPS and why?
3. RQ3: To what extent is the implementation of the 15 OECD-BEPS recommendations by participating countries in line with the priorities of developing countries?

The above questions are particularly focussed as this report forms only one aspect of a larger project. As per the ToR, the overarching themes within which this report is to be contextualised are:

¹ OECD, *What is BEPS*, (available at: <https://www.oecd.org/tax/beps/about/>) (last accessed 22 November 2020).

² I. Ozai, Institutional and Structural Legitimacy Deficits in the International Tax Regime, 12 *World Tax J.*, sec. 2.2. (2020), Journal Articles & Papers IBFD. While this is disputed by the OECD who indicate that consultation did occur (see OECD, *Myths and Facts about BEPS*, (2015) (available at: <https://www.oecd.org/ctp/myths-and-facts-about-beps.pdf>) (last accessed 22 November 2020)), others support this claim of exclusion (or at least side-lining) (see for example, BEPS Monitoring Group, *Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project*, 2015, (available at: <https://static1.squarespace.com/static/5a64c4f39f8dceb7a9159745/t/5af4b8a270a6ade56d28ed88/1525987492642/general-evaluation.pdf>) (last accessed 22 November 2020).

³ OECD, *Overview of the Inclusive Framework on BEPS* (available at: <https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf>) (last accessed 22 November 2020).

1. *Has the Netherlands succeeded in including developing countries and their priorities in discussions on international agreements on countering tax avoidance?*
2. *To what extent are the interests of developing countries considered by the Netherlands when implementing recommendations of international discussions on countering tax avoidance?*

1.3. Project Scope

RQ1 requires a brief description of the resulting 15 OECD BEPS-recommendations and implementation options available for participating countries. The mapping of the implementation alternatives serves to identify whether the recommendations can be implemented in different ways leading to different effects.

RQ2 considered whether the recommendations and implementation options (as identified in RQ1) are in line with the priorities of developing countries with respect to BEPS issues in general, which include other tax avoidance areas related to international taxation that are not covered by the OECD BEPS-project. The scope here is limited to a considered of the relevance of the BEPS-recommendations for developing countries expressed either by the developing countries and/or regional organizations themselves as well as any positions expressed in academic literature. For RQ2, the commissioned focus is on selected sub-Saharan African countries. Based on the final sample (see below, RQ2 will be structured to firstly review BEPS concerns of the sample countries in general, before linking these to the 15 BEPS Action Points. Should certain BEPS concerns (general) not coincide with those expressed in the BEPS Action Plan, an attempt will be made to identify the causes of such misalignment (e.g. structure of their economies, concerns over policy changes and autonomy, implementation capacity etc.).

RQ 3 focuses on the implementation of the OECD BEPS-recommendations by participating countries and to what extent the choices made reflect the priorities of developing countries as identified under RQ2. To potentially contrast the implementation choices of developed countries relative to developing countries, the BEPS implementation by Australia, Canada, Netherlands and United Kingdom are considered. This provides with a geographically diverse group of developed countries.

1.3.1 Sample selection

The ToR refers to the following countries:

Figure 1: Map of Africa – ToR countries highlighted



Created with mapchart.net

From this listing, it is evident that some countries share certain commonalities, while others appear as outliers to the study. While all the countries are members of the African Union, the table below categorises the counties by recognised economic groupings in Africa.

Box 2: Sample Africa Countries by Economic Grouping

COMESA ⁴	EAC ⁵	ECOWAS ⁶	IGAD ⁷	SADC ⁸
Burundi	Burundi	Ghana	Ethiopia	Malawi
Ethiopia	Kenya	Liberia	Kenya	Tanzania
Kenya	Rwanda		Uganda	Zambia
Malawi	Tanzania			
Rwanda	Uganda			
Uganda				
Zambia				

As key institutions in the implementation of the BEPS Action Plan, it is telling to evaluate the ToR country selection against membership of the IF, Global Forum and whether these countries have signed the MLI (Action 15 and some implementation of other BEPS Action Points).

Further, and particularly relevant to this project, Burundi, Ethiopia, Ghana, Malawi, Rwanda, Tanzania and Uganda are **not** members of the IF, but are partly represented by the observer status of ATAF and CATA. The AfDB is also an observer to the IF.

Burundi, Ethiopia, Malawi and Zambia do not participate in the OECD Global Forum, however the AfDB, ATAF and the AU Commission are observers to the Global Forum.

Box 3: IF and Global Forum membership of ToR African country sample

Inclusive Framework ⁹	Global Forum ¹⁰	MLI signatories ¹¹	MCAA signatories ¹²
Kenya	Ghana	Kenya (26-11-2019)	Ghana (10-07-2012) (01-09-2013 in force)
Liberia	Kenya		Kenya (08-02-2016) (01-11-2020 in force)
Zambia	Liberia		Liberia (11-06-2018) (not in force)
	Rwanda		Uganda (04-11-2015)

⁴ <https://www.comesa.int/>

⁵ <https://www.eac.int/>

⁶ <https://www.ecowas.int/>

⁷ <https://igad.int/>

⁸ <https://www.sadc.int/>

⁹ OECD, *OECD/G20 Inclusive Framework on BEPS: Progress Report July 2019–July 2020*, Annex A (p. 34), (2020) (available at: <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf>) (last accessed 22 November 2020)

¹⁰ OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes* (available at: <https://www.oecd.org/tax/transparency/who-we-are/members/>) (last accessed 22 November 2020).

¹¹ OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting*, (available at: <https://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf>) (last accessed 22 November 2020).

¹² OECD, *Multilateral Convention on Mutual Assistance in Tax Matters as amended by the 2010 Protocol*, Jurisdictions Participating in the Convention on Mutual Administrative Assistance In Tax Matters (available at: https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (last access 22 November 2020)

			(01-09-2016 in force)
	Tanzania		
	Uganda		

As can be observed from the above table, the sample is poorly represented on the IF, as signatories to the MLI and, to a lesser extent, on the Global Forum. However, some of the missing countries can be considered to be partly represented by the observers to these bodies. Particularly relevant will be AfDB, ATAF, AU Commission and CATA. The most relevant would be ATAF and CATA as regards implementation of BEPS Actions.

In respect of these observer bodies, it is to be noted that all, apart from Ethiopia, are members of ATAF. In addition, Ghana, Kenya, Malawi, Rwanda, Tanzania, Uganda and Zambia are members of CATA.

1.3.2. Adjustment to the sub-Saharan Africa sample

Ethiopia is not a participant directly or through observer parties in the IF or Global Forum but may be indirectly influenced by global developments. Data is limited.

The inclusion of Burundi and Rwanda is mostly limited to the information from observer organisations as these countries do not participate in either the IF or the Global Forum directly. Similarly, reference to the remaining African countries when referring to the IF or Global Forum should take into account whether the country participates directly or only indirectly.

1.4. Structure of the report

Chapter 2 will outline the 15 BEPS Action Points recommendations and optionality of application (RQ1).

Chapter 3 will outline the BEPS concerns of the sub-Saharan African countries in the sample based on publicly available information (RQ2 – first part).

Chapter 4 will combine the findings of chapters 2 and 3 to map the BEPS recommendations against the identified BEPS concerns of the sample of countries and analyse any inconsistencies or omissions (RQ2 – second part and part of RQ3).

Chapter 5 will outline the implementation of the various BEPS measures by selected developed countries (RQ3).

Chapter 6 will contrast the findings from chapters 4 and 5 (RQ3).

2. Outline of BEPS Action plan recommendations and optionality

2.1. Introduction to the BEPS Actions

As indicated in 1.1. above, the BEPS Action Plan was developed by the OECD following the mandate from the G20. Participation by countries in the development of the Action Plan was therefore limited.

Box 4: BEPS Action Points

Action	Name
1	Addressing the Tax Challenges of the Digital Economy ¹³
2	Neutralising the Effects of Hybrid Mismatch Arrangements ¹⁴
3	Designing Effective Controlled Foreign Company Rules ¹⁵
4	Limiting Base Erosion Involving Interest Deductions and Other Financial Payments ¹⁶
5	Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance ¹⁷
6	Preventing the Granting of Treaty Benefits in Inappropriate Circumstances ¹⁸
7	Preventing the Artificial Avoidance of Permanent Establishment Status ¹⁹
8-10	Aligning Transfer Pricing Outcomes with Value Creation ²⁰
11	Measuring and Monitoring BEPS ²¹
12	Mandatory Disclosure Rules ²²
13	Transfer Pricing Documentation and Country-by-Country Reporting ²³

¹³ OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241046-en>

¹⁴ OECD (2015), Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241138-en>

¹⁵ OECD (2015), Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241152-en>

¹⁶ OECD (2015), Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241176-en>

¹⁷ OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241190-en>

¹⁸ OECD (2015), Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241695-en>

¹⁹ OECD (2015), Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241220-en>

²⁰ OECD (2015), Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241244-en>

²¹ OECD (2015), Measuring and Monitoring BEPS, Action 11 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241343-en>

²² OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241442-en>

²³ OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241480-en>

14	Making Dispute Resolution Mechanisms More Effective ²⁴
15	Developing a Multilateral Instrument to Modify Bilateral Tax Treaties ²⁵

These 15 Actions should be categorised in a number of ways. Firstly, four were identified as minimum standards (being actions 5, 6, 13 and 14). Actions 8-10 (and action 13 in part) to transfer pricing issues. Finally, actions 2, 6, 7 and 14 were to be addressed in treaty revisions (see also action 15 (the MLI) and the 2017 revisions to the OECD Model). Many of the actions required countries to make changes to their domestic law.

2.2. Action 1 - Addressing the Tax Challenges of the Digital Economy

On the release of the final report in 2015, little was recommended. It was rather recognised in this report that more work in the area of direct taxation was to be done. Limited recommendations were made with respect to indirect taxes (such as VAT) and recommendations for changes to domestic law were made in the “the 2016 International VAT Guidelines and complemented by the 2017 report on Mechanisms for the effective collection of VAT/GST where the supplier is not located in the jurisdiction of taxation and the 2019 report on The role of digital platforms in the collection of VAT/GST on online sales which provide guidance on implementation to jurisdictions”.²⁶ According to the OECD, some 50 countries have since adopted such rules.

On 22 October 2020, the fruits of the further work conducted within the framework of the IF was presented. The two reports, Pillar One²⁷ and Pillar Two²⁸ both confirmed that neither report had reached a firm solution, but that the “pillars” paved the way towards a solution (that may be implemented through a multilateral means).

As a solution has not yet been reached, no specific recommendations can be tested or optionality evaluated.

2.3. Action 2 - Neutralising the Effects of Hybrid Mismatch Arrangements

The BEPS Action 2 addressed two forms of hybrid mismatch i.e. both in terms of financial instruments and in the form of the entity. Recommendations were made for both amendments to the tax treaties as well as to the domestic law.

²⁴ OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264241633-en>

²⁵ OECD (2015), Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 -2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264241688-en>

²⁶ OECD (see at: <https://www.oecd.org/tax/beps/beps-actions/action1/>) (last accessed 22 November 2020).

²⁷ OECD (2020), Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris,
<https://doi.org/10.1787/beba0634-en>.

²⁸ OECD (2020), Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris,
<https://doi.org/10.1787/abb4c3d1-en>

In terms of the domestic law, it was recommended that countries insert linking rules into their legislation to facilitate the denial of a deduction in that country where either the income is not included in the other country or a second deduction is permitted in the other country. The recommendations were also cognisant of the possibility of such rules creating double taxation and proposed solutions to prevent such instances.

As Action 2 is not a minimum standard, countries were free to adopt or ignore these recommendations. Further, three different mismatches were identified. The OECD report indicated that the failure to apply the linking rules in one country did not prevent the application in another, but equally recognised that “co-ordination in the implementation and application of the hybrid mismatch rules to ensure that the rules are effective and to minimise compliance and administration costs for taxpayers and tax administrations”²⁹ were also necessary. Standard design features were therefore recommended. The outcome for any particular country depends on its underlying domestic law and the options selected.³⁰

In terms of the treaty recommendations, these were to be included in an update to the OECD Model (and were within the 2017 OECD Model updates and also partly addressed in the MLI as a mechanism to implement such changes across all covered tax agreements). The treaty amendments are covered within the context of Action 15 below as the optionality brought by the MLI needs to be considered.

2.4. Action 3 - Designing Effective Controlled Foreign Company (CFC) Rules

Two issues were identified with respect to CFC rules. Firstly, it was identified that CFC Rules had not kept pace with modern business operating norms and, secondly, that numerous countries still did not include CF rules in their legislation. It was further noted by the OECD that this action was geared towards providing the good design principles for the inclusion of CFC rules recognizing that policy concerns of individual countries required that: “the recommendations provide flexibility to implement CFC rules that combat BEPS in a manner consistent with the policy objectives of the overall tax system and the international legal obligations of the country concerned”.³¹

This action is not included as a minimum standard. The recommendations were to be implemented at a domestic legislative level. Essentially the CFC recommendations aid the design of CFC rules to prevent the shifting of profits to foreign subsidiaries (usually located in lower taxed jurisdictions).

²⁹ OECD (2015), Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241138-en> at 12.

³⁰ B. Kuzniacki, A. Turina, T. Dubut, A. Mazz, N. Quiñones, L.E. Schoueri, C. West, P. Pistone, F. Zimmer, Preventing Tax Arbitrage via Hybrid Mismatches: BEPS Action 2 and Developing Countries (February 27, 2017). WU International Taxation Research Paper Series No. 2017-03, Available at SSRN: <https://ssrn.com/abstract=2941617> or <http://dx.doi.org/10.2139/ssrn.2941617>

³¹ OECD (2015), Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241152-en> at 10.

2.5. Action 4 - Limiting Base Erosion Involving Interest Deductions and Other Financial Payments

The erosion targeted under this action pertains to:

- “Groups placing higher levels of third party debt in high tax countries.
- Groups using intragroup loans to generate interest deductions in excess of the group’s actual third party interest expense.
- Groups using third party or intragroup financing to fund the generation of tax exempt income”.³²

The recommendations to address this form of erosion and profit shifting relate to changes in domestic law. The recommendations were proposed as a package that represented best practice, but further made suggestions as to elements that may be considered optional. It was further recognised that the recommendations would also impact Actions 2 and 3 (discussed above). Finally, it was also recognised that the manner of implementation would differ between countries that applied a single entity versus a group approach to taxation.

2.6. Action 5 - Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – minimum standard

Action 5 continued the work of the Forum on Harmful Tax Practice (FHTP). The report recommended that: (i) reviews be conducted into preferential regimes to test whether such regimes are harmful; (ii) IP regimes should require substantial activity and (iii) that the exchange of tax rulings should be compulsorily and spontaneously exchanges by countries.

The peer review for the exchange of rulings required evaluation of:

1. Information gathering process;
2. Exchange of information;
3. Confidentiality of information received;
4. Statistics.

The exchange of information requirements naturally fits within the considerations of Action 13 as well as it relates to the institutional capabilities for the exchange.

2.7. Action 6 - Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – minimum standard

Action 6 requires IF members to commit to include in their tax treaties provisions dealing with treaty shopping to ensure a minimum level of protection against treaty abuse. However, the optionality that was introduced to implement this Action is contained in the MLI (see Action 15). The options include (i) a treaty preamble including an express statement on non-taxation and (ii) one of three methods to prevent treaty abuse (being either PPT, PPT and SLOB or a detailed LOB provision).

³² OECD (2015), Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241176-en> at 11.

2.8. Action 7 - Preventing the Artificial Avoidance of Permanent Establishment Status

Action 7 concerned certain methods used to circumvent the PE requirements in tax treaties. A number of recommendations to amend the PE definition in tax treaties were made, being:

1. changes to ensure that where the activities that an intermediary exercises in a jurisdiction are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, that enterprise will be considered to have a taxable presence in that jurisdiction unless the intermediary is performing these activities in the course of an independent business.
2. changes to restrict the application of a number of exceptions to the definition of permanent establishment to activities that are preparatory or auxiliary nature and will ensure that it is not possible to take advantage of these exceptions by the fragmentation of a cohesive operating business into several small operations;
3. changes to address situations where the exception applicable to construction sites is circumvented through the splitting-up contracts between closely related enterprises.

These were introduced in the 2017 OECD Model as well as Articles 12-15 of the MLI (see Action 15 below).

2.9. Actions 8-10 - Aligning Transfer Pricing Outcomes with Value Creation

In an effort to align transfer pricing outcomes with value creation, three Actions govern particular changes to the OECD Transfer Pricing Guidelines to address these issues. Action 8 concerns hard to value intangibles; Action 9 addresses the level of returns for funders of capital (based on risk and activity) and Action 10 focusses on high-risk (generally transactions between associated companies that do not appear commercially rational) transactions.

It should be pointed out that as the Actions required changes to the OECD Transfer Pricing Guidelines,³³ there are no specific actions to be undertaken by countries. Various additional guidance documents have been released by the OECD in relation to these actions.

2.10. Action 11 - Measuring and Monitoring BEPS

The collection and analysis of quality data to measure and monitor BEPS was considered particularly important. In this regard, the OECD gathers data from the IF in terms of the Corporate Tax Statistics Database. Various regional initiatives have also been launched to gather the information at a regional level. Within Africa, ATAF participations in gathering the

³³ Kenya (as at 1 September 2020) does not specifically recognise the OECD Transfer Pricing Guidelines, but has replicated its contents (see G. Maina, Kenya - Transfer Pricing, Country Tax Guides IBFD). Equally, Ghana (as at 1 October 2020) applies the OECD Transfer Pricing Guidelines, but not the UN Manual (see A. Ali-Nakyeya, Ghana - Transfer Pricing, Country Tax Guides IBFD). Tanzania requires compliance with OECD and UN guidance (see H.B. Kiunsi, Curbing Transfer Pricing in Tanzania: A Critical Evaluation of the Income Tax Act, 27 Intl. Transfer Pricing J. 1 (2020), Journal Articles & Papers IBFD). Malawi refers to the OECD Transfer Pricing Guidelines (see Malawi - Transfer Pricing Regulations 2017 – issued (27 July 2017), News IBFD). Zambia's transfer pricing regulations refer to both the OECD and the UN Guidelines (see Zambia - Transfer Pricing (Amendment) Regulations 2018 gazetted (12 Apr. 2018), News IBFD). Ethiopia's transfer pricing directive closely follows the OECD Guidelines (see J.L. Cooper & M. Volpato, Comprehensive Directive on Transfer Pricing Adopted, 24 Intl. Transfer Pricing J. 1 (2017), Journal Articles & Papers IBFD).

data for its publication, the African Tax Outlook, and supplies the data to the OECD for its publication Revenue Statistics in Africa.³⁴

The data published by the OECD now also contains some data arising from the CbC reports in Action 13.

2.11. Action 12 - Mandatory Disclosure Rules

Action 12 is implementable more at a domestic level. The report on this Action recommended model mandatory disclosure rules for countries. Further, the action links to exchange of information in terms of exchanges of the information obtained using these mandatory disclosure rules.

The model design provided flexibility taking into account different legal regimes and requirements.

2.12. Action 13 - Transfer Pricing Documentation and Country-by-Country Reporting – minimum standard

Action 13 pertains mainly to the exchange of information concerning MNEs through the means of Country-by-Country Reporting (CbCR). Any of (i) the Multilateral Competent Authority Agreement on the Exchange of CbC Reports (CbC MCAA); (ii) Model Competent Authority Agreements for Double Tax Conventions; or, (iii) Model Competent Authority Agreements for Tax Information Exchange Agreements could be used for the purpose of such exchange.

As a minimum standard, the Action is subject to peer review. As a further action requiring exchange of information, like earlier actions, developing countries are required to have the necessary structure in place to facilitate such exchanges. This is evaluated through the peer review.

2.13. Action 14 - Making Dispute Resolution Mechanisms More Effective – minimum standard

Action 14 was split between minimum standards and best practice recommendations.

Box 5: Action 14 minimum standards

Minimum standards³⁵
<i>(1) Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner.</i>
1.1. Countries should include paragraphs 1 through 3 of Article 25 in their tax treaties, as interpreted in the Commentary and subject to the variations in these

³⁴ OECD/AUC/ATAF (2020), Revenue Statistics in Africa 2020, OECD Publishing, Paris, <https://doi.org/10.1787/14e1edb1-en-fr>.

³⁵ Extracted from OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241633-en>

<p>paragraphs provided for under elements 3.1 and 3.3 of the minimum standard; they should provide access to MAP in transfer pricing cases and should implement the resulting mutual agreements (e.g. by making appropriate adjustments to the tax assessed).</p>
<p>1.2. Countries should provide MAP access in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.</p>
<p>1.3. Countries should commit to a timely resolution of MAP cases: Countries commit to seek to resolve MAP cases within an average timeframe of 24 months. Countries' progress toward meeting that target will be periodically reviewed on the basis of the statistics prepared in accordance with the agreed reporting framework referred to in element 1.5.</p>
<p>1.4. Countries should enhance their competent authority relationships and work collectively to improve the effectiveness of the MAP by becoming members of the Forum on Tax Administration MAP Forum (FTA MAP Forum).</p>
<p>1.5. Countries should provide timely and complete reporting of MAP statistics, pursuant to an agreed reporting framework to be developed in co-ordination with the FTA MAP Forum.</p>
<p>1.6. Countries should commit to have their compliance with the minimum standard reviewed by their peers in the context of the FTA MAP Forum.</p>
<p>1.7. Countries should provide transparency with respect to their positions on MAP arbitration.</p>
<p><i>(2) Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes</i></p>
<p>2.1. Countries should publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers. Countries should ensure that their MAP guidance is clear and easily accessible to the public.</p>
<p>2.2. Countries should publish their country MAP profiles on a shared public platform (pursuant to an agreed template to be developed in co-ordination with the FTA MAP Forum).</p>
<p>2.3. Countries should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the country would like to see reflected in future amendments to the treaty.</p>
<p>2.4. Countries should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.</p>
<p>2.5. Countries should ensure that adequate resources are provided to the MAP function.</p>
<p>2.6. Countries should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If countries have an</p>

<p>administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, countries may limit access to the MAP with respect to the matters resolved through that process. Countries should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.</p>
<p>2.7. Countries with bilateral advance pricing arrangement (APA) programmes should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.</p>
<p><i>(3) Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure</i></p>
<p>3.1. Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected. In order to achieve this, countries should either:</p> <ul style="list-style-type: none"> • amend paragraph 1 of Article 25 to permit a request for MAP assistance to be made to the competent authority of either Contracting State, or • where a treaty does not permit a MAP request to be made to either Contracting State, implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer’s objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case).
<p>3.2. Countries’ published MAP guidance should identify the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance. Countries should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information.</p>
<p>3.3. Countries should include in their tax treaties the second sentence of paragraph 2 of Article 25 (“Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States”). Countries that cannot include the second sentence of paragraph 2 of Article 25 in their tax treaties should be willing to accept alternative treaty provisions that limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.</p>

Optionality is provided in 2.6, 3.1 and 3.3. above.

Box 6: Action 14 best practices

Best Practices³⁶

³⁶ Extracted from OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264241633-en>

(1) Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner.

Best practice 1: Countries should include paragraph 2 of Article 9 in their tax treaties.

(2) Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes

Best practice 2: Countries should have appropriate procedures in place to publish agreements reached pursuant to the authority provided by the first sentence of paragraph 3 of Article 25 “to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention” that affect the application of a treaty to all taxpayers or to a category of taxpayers (rather than to a specific taxpayer’s MAP case) where such agreements provide guidance that would be useful to prevent future disputes and where the competent authorities agree that such publication is consistent with principles of sound tax administration.

Best practice 3: Countries should develop the “global awareness” of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration’s “Global Awareness Training Module” to appropriate personnel.

Best practice 4: Countries should implement bilateral APA programmes.

Best practice 5: Countries should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, taxpayer requests for the multiyear resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit. Such procedures would remain subject to the requirements of paragraph 1 of Article 25: a request to resolve an issue with respect to a particular taxable year would only be allowed where the case has been presented within three years of the first notification of the action resulting in taxation not in accordance with the Convention with respect to that taxable year.

(3) Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure

Best practice 6: Countries should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

Best practice 7: Countries should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognizing the general principle that the choice of remedies should remain with the taxpayer.

Best practice 8: Countries should include in their published MAP guidance an explanation of the relationship between the MAP and domestic law administrative and judicial remedies. Such public guidance should address, in particular, whether the competent authority considers itself to be legally bound to follow a domestic

<p>court decision in the MAP or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice.</p>
<p>Best practice 9: Countries' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments – i.e. taxpayer-initiated adjustments permitted under the domestic laws of a treaty partner which allow a taxpayer under appropriate circumstances to amend a previously-filed tax return to adjust (i) the price for a transaction between associated enterprises or (ii) the profits attributable to a permanent establishment, with a view to reporting a result that is, in the view of the taxpayer, in accordance with the arm's length principle. For such purposes, a taxpayer-initiated foreign adjustment should be considered bona fide where it reflects the good faith effort of the taxpayer to report correctly the taxable income from a controlled transaction or the profits attributable to a permanent establishment and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the tax laws of the two Contracting States.</p>
<p>Best practice 10: Countries' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.</p>
<p>Best practice 11: Countries' published MAP guidance should provide guidance on multilateral MAPs and advance pricing arrangements (APAs).</p>

Naturally, there is optionality in adopting the best practices.

2.14. Action 15 - Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

The MLI³⁷ was designed as the instrument to rapidly deploy a number of changes to the treaty network without necessitating bilateral negotiations for all tax treaties. The focus of the MLI is on the comprehensive DTC, and not other instruments (such as TIEAs).

The MLI provisions reflect the optionality under each Action and had to take account of the potential difficulty some countries may have to implement the provisions. Further, as this is not a minimum standard, countries are free to also bilaterally renegotiate the treaties taken account of the contents of the MLI. It is evident that some countries will be adopting such an approach.

The optionality has the further effect that unless the elections under the MLI match, the option will not be applied to the treaty. Thus the MLI is described as a treaty to be read “alongside” the bilateral treaty.

³⁷ The text of the MLI can be found at: <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf> and its Explanatory Memorandum at: <https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>

Box 7: Substantive articles addressing the BEPS Actions

MLI Article	BEPS Action addressed	OECD Model article reference
Article 3 – Transparent Entities	Action 2	Article 1
Article 4 – Dual Resident Entities	Action 2	Article 4
Article 5 – Application of Methods for Elimination of Double Taxation	Action 2	Article 23A & 23B
Article 6 – Purpose of a Covered Tax Agreement	Action 6	Treaty Preamble
Article 7 – Prevention of Treaty Abuse	Action 6	Article 29
Article 8 – Dividend Transfer Transactions	Action 6	Article 10
Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property	Action 6	Article 13
Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions	Action 6	Article 5
Article 11 – Application of Tax Agreements to Restrict a Party’s Right to Tax its Own Residents	Action 6	Article 5
Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies	Action 7	Article 5
Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions	Action 7	Article 5
Article 14 – Splitting-up of Contracts	Action 7	Article 5
Article 15 – Definition of a Person Closely Related to an Enterprise	Action 7	Article 5
Article 16 – Mutual Agreement Procedure	Action 14	Article 25
Article 17 – Corresponding Adjustments	Action 14	
Article 18 – Choice to Apply Part VI	Action 14	
Article 19 – Mandatory Binding Arbitration	Action 14	
Article 20 – Appointment of Arbitrators	Action 14	
Article 21 – Confidentiality of Arbitration Proceedings	Action 14	
Article 22 – Resolution of a Case Prior to the Conclusion of the Arbitration	Action 14	
Article 23 – Type of Arbitration Process	Action 14	
Article 24 – Agreement on a Different Resolution	Action 14	
Article 25 – Costs of Arbitration Proceedings	Action 14	
Article 26 – Compatibility	Action 14	

Much variation and options exist within the article that are too extensive to discuss in this limited report, but as can be seen from the table above are integral to the BEPS project.

3. BEPS concerns of the (sample) sub-Saharan African countries

3.1. Introduction

As early as 2014, at an “ATAF Consultative Conference on New Rules of the Global Tax Agenda”, the initial response to the OECD/G20 BEPS Actions were discussed. This conference followed the release of the interim reports on the 15 BEPS Actions. While the conference preceded the final BEPS reports, the participants debated the issues (especially in relation to BEPS) that were of concern for the African continent. These were identified as:

1. *The Digital Economy – a new form of economy which requires new rules and greater understanding of the transfer pricing and the implementation of new legislation;*
2. *Transfer Pricing – While African countries are at various levels in this area, developing the legislation and skills in Transfer Pricing remains crucial in understanding the behaviour of MNEs;*
3. *Taxation of the Extractive Industry – this industry carries large amounts of potential revenue and it is dogged by unsustainable tax incentives and exemptions;*
4. *Tax Instruments & Information – the lack of Treaties, Agreements and accessible databases that enhance the understanding of the operations of MNEs for audit purposes;*
5. *The Informal Sector – remains a large portion of potential tax.*³⁸

By December 2014, these had been mapped against the BEPS Action Plans as follows:³⁹

Box 8: African Tax Priorities mapped against BEPS Actions

African Priority	BEPS Action numbers
Digital Economy	Action 1
Base eroding payments: interest, royalties, management fees, technical fees	Action 4 and 10
Treaty abuse	Action 6
Permanent establishment	Action 7
Transfer Pricing issues relating to intangibles, risk and capital allocations	Actions 8 and 9
Access to information for transfer pricing purposes	Action 13
Arbitration	Action 14

The other non-OECD BEPS issues for Africa were identified as:

1. Transfer pricing comparability data
2. Taxation of the extractive industry
3. Tax incentives
4. Indirect transfers of assets.

In addition, the ATAF document referred to:

- Inadequate taxation of high net worth individuals (HNWI).
- Insufficient tax mix and overreliance on single source taxation.

³⁸ ATAF, *Outcomes Document, ATAF Consultative Conference on New Rules of the Global Tax Agenda*, 14 April 2014.

³⁹ ATAF, *Cross Border Taxation: Implications for Africa – African Priorities on Base Erosion and Profit Shifting (BEPS)*, ATAF Policy Brief, December 2014.

- Lack of automated systems in tax administration.
- Disconnect between tax policy and tax administration leading to weak policies and legislations and under-resourced tax administrations, such that international policies and actions have no effect.
- Illicit financial flows in the form of trade mis-pricing.
- The informal sector.
- Failure of regional coordination.

Much of the above mirrors the findings in the G20 DWG, which mapped the general developing country concerns.⁴⁰ This report had classified the BEPS Action priorities for developing countries as:

Box 9: G20 DWG perception of BEPS priorities among developing countries

Low	Medium	High
Action 2	Action 1	Action 4
Action 3	Action 5	Action 6
Action 15	Action 8	Action 7
	Action 9	Action 10
	Action 12	Action 11
	Action 14	Action 13

As can be seen comparing this table to the African priorities early, while there is much overlap, there is some variation too.

In support of the above, in a 2015 survey conducted among developing countries (of which Ghana and Zambia in the current sample participated), the following additional BEPS issues / needs were identified:

- encouraging developing countries to adopt a GAAR as well as specific anti-avoidance rules in their domestic law;
- pursuing work on the taxation of capital gains under domestic law and under tax treaties;
- rebalancing source versus residence taxation, especially in relation to tax treaties;
- the treatment of branch profits;
- the cash economy; and
- the adverse consequences of the use of tax incentives.⁴¹

3.2. Regional body initiatives and developments

ATAF has played a significant role in assisting to shape the Africa position as regards the BEPS Actions. ATAF is an observer to both the IF and the Global Forum.

⁴⁰ OECD/G20 Development Working Group, *TWO-PART REPORT TO G20 DEVELOPING WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES*, Part 1 (July 2014) and Part 2 (August 2014) (available at: <https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf>)

⁴¹ C. Peters, *Developing Countries' Reactions to the G20/OECD Action Plan on Base Erosion and Profit Shifting*, 69 Bull. Intl. Taxn. 6/7 (2015), Journal Articles & Papers IBFD

By 2016, ATAF reformulated the African position with respect to BEPS.⁴² The list from 2014 dropped the Digital Economy and Arbitration from the key concerns for Africa. Further to the above actions mapped, ATAF articulated further BEPS priorities for African not contained in the BEPS Action Plan. These were listed as (these also having been identified in 2014):

- *Lack of transfer pricing comparability data*
- *The granting of wasteful tax incentives*
- *The taxation of natural resources*
- *The indirect transfer of assets*
- *The fraudulent misinvoicing of trade transactions, the largest component of Illicit Financial Flows (IFFs) from developing countries which accounted for 77.8% of all illicit flows during the period 2003-2012 (Global Financial Integrity, 2014b; AU/ECA, 2015).*
- *Informal sector.*

As can be seen from the above list, the extractive industry and the informal sector remained as key priorities.

The high risk to the tax base of African countries where MNEs are engaging in BEPS was presented with reference to Burundi, Nigeria and Rwanda.⁴³ In particular, the link was made between MNEs and the extractive industry.

The lack of capacity, reluctance to enter into new tax treaties, mistrust in the existing treaty framework,⁴⁴ led to the development of the ATAF Model in 2016 (updated in 2019). This sought to provide African countries with a reference point for the negotiation of tax treaties. Much work was focussed on capacity development.

The ATAF Cross Border Taxation Technical Committee (CBT TC) was created representing nine ATAF member jurisdictions, of which four are included in the current sample of countries. The committee participated in the following OECD Committees:

- Working Party 1 – Tax Conventions and Related Questions
- Working Party 6 – Taxation of MNEs
- Working Party 11 – Aggressive Tax Planning
- Observer to the OECD Committee on Fiscal Affairs (CFA) as regards BEPS.

Recommendations as to the African position and influence over the implementation was exerted through those fora.⁴⁵ These are mapping in section 4. against the relevant Action.

Subsequent ATAF reports continue to emphasise the need to resolve many domestic tax administration and collection issues before the global tax agenda can be successfully implemented. Specifically identified is the need for African countries to broaden the tax base; craft an appropriate mix of taxes; remove over-reliance on large taxpayers (it being noted that Africa wide 6% of the taxpayers generate 76.2% of the tax revenue – this even

⁴² ATAF, *ATAF in the International Tax Landscape: An ATAF Briefing Paper*, April 2016.

⁴³ The report indicates that the tax base attributed to MNEs is 70% in Rwanda and 88% in Nigeria with a single MNE representing 20% of the Burundi tax base.

⁴⁴ ATAF, *Is Africa getting its fair share of the tax?*, n.d.

⁴⁵ Christensen, R. C., Hearson, M. and Randriamanalina, T. (2020) *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations*, ICTD Working Paper 115, Brighton: Institute of Development Studies.

being despite continued BEPS); non-compliance and the need to modernise tax administrations.⁴⁶

ATAF developed tools and provided training on a multitude of issues to assist African countries to develop the necessary capacity and develop legislation necessary to address BEPS issues as identified. Some of these are discussed in section 4. below.

2019 and 2020 has seen a greater interest in the issues around the digital economy. These are considered in section 4. below.

3.3. Evidence of further BEPS concerns in the sample countries

In seeking further inputs regarding the BEPS concerns of the sample countries, some additional observations could be made. These are addressed under specific country headings:

3.3.1. Ethiopia

In an interview with a government official for a masters thesis, it was noted that Ethiopia has no immediate plans to join the BEPS initiative in the near future.⁴⁷ This was cited as being due, mainly, to a lack of knowledge at an institutional level and in terms of research on the BEPS implications for Ethiopia.⁴⁸ There is thus no impetus to act on the BEPS Actions formally or political will to do so. Further, the tax administration is insufficiently developed to adopt and engage with the BEPS requirements.

It is noted that five of Ethiopia's trading partners (being Ireland, Netherlands, Korean Republic, Romania and Singapore) have all requested renegotiation of their treaties with Ethiopia (in line with the BEPS requirements). A concern was expressed that should Ethiopia sign the MLI, for example, it would limit its flexibility in treaty negotiations. However, it should be noted that the MLI articles 6-11 and 16 all reflect elements of the minimum standards and it may be that signatories to the MLI may insist on the inclusion of such provisions when negotiating with a non-signatory country such as Ethiopia. However, in Ethiopia's latest treaty with Malta (signed in 2018), there was no evidence of BEPS MLI inspired provisions yet.⁴⁹

Ethiopia's absence from regional bodies also plays a role in limiting its access to research concerning the BEPS Actions.

3.3.2. Ghana

⁴⁶ ATAF, *African Tax Outlook 2019*, ISBN: 978-0-9584218-4-3 (pdf)

⁴⁷ M. G/M. Abamecha (2020), *Income Taxation of the Digital Economy: BEPS and Ethiopian Tax Administration in Focus*, Masters Thesis (LLM), Addis Ababa University, Ethiopia.

⁴⁸ See also: Corporate Tax 2020: Ethiopia (contribution by Kumlachew Dagne and Associates Law Office, available at: <https://practiceguides.chambers.com/practice-guides/comparison/463/4613-3535-3490/6563-6568-6578-6584-6591-6599-6607-6609-6610>).

⁴⁹ Convention between the Government of the Republic of Malta and the Government of the Federal Democratic Republic of Ethiopia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (12 April 2018), Treaties & Models IBFD [hereinafter Eth.-Malta Income Tax Treaty].

In 2017, a presentation by Eric Mensah (Ghanian Revenue Authority) to the G24 indicated significant skepticism over the BEPS project and the beneficiaries under that project.⁵⁰ Little action seemed to be directly taken in response to the BEPS Actions. Some domestic actions have been taken, mainly around limited tax incentives and improving transfer pricing, implying indirect effects of the BEPS Actions.

KPMG report that: “Ghana’s transfer pricing rules were first published in 2012 and are likely to be revised in the near future. Ghana is expected to align its approach with the OECD’s recommendations, but it has not yet implemented country-by-country reporting or three-tiered transfer pricing documentation requirements”.⁵¹

BEPS is mentioned in the 2020 Budget Statement where it is indicated that Ghana will make domestic legislative changes to require disclosure of aggressive tax planning arrangements.⁵² Further initiatives related to the update to Transfer Pricing regulations and the possible taxation of e-services.

Finally with respect to treaties and implementation of MLI-type provisions related to minimum standards, it is evident that not all are being accepted by Ghana. In the recently signed (but not in force) tax treaty between Ghana and Norway, no principle purpose test or limitation of benefits provision is evident. While the preamble to the treaty as proposed for Action 6 is included, the anti-avoidance provisions are not.

3.3.3. Kenya

As a member of the IF, Kenya is partly bound to take up some of the BEPS Actions (at least the minimum standards). Joining the IF is some recognition that many of the BEPS concerns are shared in Kenya.

In a paper in 2018,⁵³ an author indicates that some of the difficulty in implementing BEPS Actions stems from the lack of data to measure the extent of BEPS (i.e. find the key areas to target).

While having not yet signed the MLI, Kenya has introduced a domestic provision for the denial of treaty benefits.

KPMG report that:

“Kenya’s draft income tax bill for 2018 expanded the scope of the country’s transfer pricing rules to cover transactions with parties in beneficial tax regimes as well as both associated and unrelated parties in preferential tax regimes offered by foreign countries. Transactions

⁵⁰ E. Mensah, *Mobilizing Domestic Resources for Development & International cooperation: GHANA's Perspective*, G24 TGM ADDIS ABABA 27-28 February 2017 (available at: <https://www.g24.org/wp-content/uploads/2017/04/3.-Ghana-Mobilizing-Domestic-Resources-for-Development-International-cooperation.pdf>)

⁵¹ See at: <https://home.kpmg/xx/en/home/insights/2020/04/transfer-pricing-in-africa.html>

⁵² Ghana, The Budget Statement and Economic Policy of the Government of Ghana for the 2020 Financial Year, 13 November 2019 at p. 86 (available at: https://www.mofep.gov.gh/sites/default/files/news/2020-Budget-Statement-and-Economic-Policy_v3.pdf).

⁵³ M.M. Mbithi, *The Herculean Task of Adding One Plus One: Monitoring and Measuring Base Erosion and Profit Shifting in Kenya*, ATAF’s ATRN Working Paper Series and Policy Briefs, ISBN (electronic): 978-0-9584218-1-2

with non-resident persons that lack economic substance will also be considered for transfer pricing adjustments.

Other new rules require annual contemporaneous documentation, use of a prescribed method for commodity transactions, rejection of negative transfer pricing adjustments and acceptance of secondary transfer pricing adjustments. A penalty for failing to maintain documentation may be imposed of 2 percent of the controlled transaction's value.

As Kenya increasingly becomes a preferred investment destination for multinational entities looking to set up in Africa, transfer pricing has become a point of focus of the Kenya Revenue Authority (KRA). Recognizing the central role played by international companies in the country's tax system, the KRA recently formed a specialized international tax and transfer pricing unit within the Large Taxpayers Office (LTO), which is responsible for pursuing and handling transfer pricing issues".

According to Chambers and Partners (2020), Kenya has implemented a number of the BEPS Actions. They confirm the introduction of the domestic provision for the denial of treaty benefits stipulated above. With reference to transfer pricing, Kenya has legislated changes to accommodate greater substance analysis and also to include country-by-country reporting (addressing actions 8-10 and 13). For Action 6, recent DTAs have provided evidence of the Chambers and Partners statement that recent tax treaties include:

- A clear statement that the contracting states, when entering into a treaty, wish to prevent tax avoidance and, in particular, intend to avoid creating opportunities for treaty shopping – the Kenya-India DTA and the Kenya-Singapore DTA contain a provision that the agreement is for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income.
- Limitation of benefits provisions – the Kenya-India DTA gives the contracting parties the right to use domestic legislation to address tax avoidance and evasion issues. In Kenya, this is limited through a 2014 amendment of the ITA allowing only companies whose underlying ownership satisfies the 50% test to benefit from the DTA.
- Principal purposes of transactions test (PPT) – the Kenya-India DTA provides that a resident of a contracting state shall not be entitled to the benefits of the DTA if its affairs were arranged in such a manner that the main purpose or one of the main purposes was to take the benefits of this agreement.
- Active Conduct of Business (ACB Rule) – treaty benefits are not only accorded to qualified treaty residents but also to residents involved in the active conduct of a business. The Kenya-India DTA provides that any person, including a legal entity, that has no bona fide business activities shall not be entitled to the benefits of the DTA.⁵⁴

Changes have also been made to recent tax treaties in respect of artificial avoidance of permanent establishments.

3.3.4. Rwanda

KPMG indicate that: "Rwanda's tax authority is expected to release detailed guidance on the country's new rules for country-by-country reports, annual transfer pricing filing requirements and transactions with parties in beneficial tax regimes". However, the Mr. Pascal Bizimana Ruganintwali, Commissioner General, Rwanda Revenue Authority, MINECOFIN, Rwanda, indicated in a panel discussion hosted by the World Bank in October 2020, that the

⁵⁴ See: Corporate Tax 2020: Kenya (contribution by Anjarwalla & Khanna LLP, available at: <https://practiceguides.chambers.com/practice-guides/corporate-tax-2020/kenya>.

opportunity cost to participate outweighs the revenue benefit to be obtained. The minimum standards were considered cumbersome for a developing country such as Rwanda considering its capacity.⁵⁵ This would explain the absence of Rwanda from the Inclusive Framework.

3.3.5. Uganda

The OECD reports that:

“in Uganda a bilateral technical assistance programme began in 2016, in close collaboration with ATAF. Following a review of Uganda’s transfer pricing legislation and interest deductibility rules, revised transfer pricing and interest deductibility legislation (based on the Action 4 recommended approach) were drafted and the latter was enacted in 2018. New transfer pricing penalties were introduced in June 2017.

The TIWB programme has further assisted Uganda with the deployment of a South African transfer pricing expert”.⁵⁶

3.3.6. Zambia

It is certainly evident that Zambia has taken some action around the BEPS Actions. Mostly notable is in the area of transfer pricing (with domestic change to the transfer pricing regulations made in 2018).⁵⁷ It has been actively engaging with ATAF. A first transfer pricing case heard by the Supreme Court in Zambia⁵⁸ and decided in favour of the tax authority demonstrates the improved abilities of the audit teams.

The OECD further reports that since “2015, the Zambian Revenue Authority has achieved significant results on their transfer pricing audit work, including:

– USD 133 million of assessed tax

⁵⁵ 7th WGB/IMF TaxSunday Conference, *International Tax Avoidance – What Has BEPS Accomplished for Developing Countries?*, 18 October 2020 in the Panel titled: Panel 1: Where we are with BEPS? A stock-take of progress from developing countries’ point of view, available at: <https://worldbank.scene7.com/s7viewers/html5/VideoViewer.html?asset=worldbankprod/101820-Tax%20Sunday-Panel1-v1-AVS&config=worldbankprod/WBG-Standard-Player&serverUrl=https://worldbank.scene7.com/is/image/&contenturl=https://worldbank.scene7.com/is/content/&posterimage=worldbankprod/101820-Tax%20Sunday-Panel1-v1-AVS&videoseverurl=https://worldbank.scene7.com/is/content>

⁵⁶ OECD, *Tax Co-operation for Development Progress Report*, available at: <https://www.oecd.org/tax/global-tax-co-operation-for-development-progress-report-2019.pdf> at 15.

⁵⁷ See also: Corporate Tax 2020: Zambia (contribution by Mulenga Mundashi Legal Practitioners, available at: <https://practiceguides.chambers.com/practice-guides/comparison/463/4613-3535-3490/6563-6568-6578-6584-6591-6599-6607-6609-6610>, where it is confirmed that:

“The recommended BEPS changes that have already been implemented are as follows:

- capacity enhancement through the creation of a transfer pricing unit, and capacity building of staff in international taxation;
- setting out the following five transfer pricing methods through regulations; a taxpayer is required to choose only one of the methods to determine the “arm’s length” basis for a given transaction:
 - a comparable uncontrolled price method;
 - a resale price method;
 - a cost plus method;
 - a transactional net margin method; or
 - a transactional profit split method;
- strengthening domestic anti-abuse legislation; and
- rationalising tax treaty incentives and scaling down on tax holidays”.

⁵⁸ See judgment at: <https://www.judiciaryzambia.com/wp-content/uploads/2020/05/App-024-2017-Mopani-Copper-Mines-Plc-Vs-Zambia-Revenue-Authority-20th-May-2020-Mambilima-Cj-Malila-And-Mutuna-JJS.pdf>

– USD 111 million of collected tax”.⁵⁹

The Zambian Ministry of Finance confirmed that: “To address revenue leakages through BEPS, the Government will fully implement the BEPS minimum standards and sign the Multilateral Instrument to curtail BEPS inducing provisions in tax treaties that Zambia has signed. Furthermore, the Government will augment transfer pricing audits following the revision of transfer pricing regulations and issuance of documentation rules in 2018”.⁶⁰

3.4. Barriers to adoption of international norms

Numerous barriers to the successful application of OECD proposed solutions to BEPS exist for developing countries. These are frequently cited as, for example, a lack of capacity (with cost of implementation and system development a significant barrier within the capacity constraint); complexity of the solutions; the economic structure of the countries (including the tax mix (or reliance on certain taxes)); political will to implement the solutions; historical disadvantage in the design of international tax norms and, possible restriction to tax policy initiatives.⁶¹

Developing countries are particularly pressured to implement these initiatives (in which most have had no input in the design). Many of the BEPS initiatives over the last few years have been supported by coercive measures to enforce compliance with the proposed solutions (e.g. EU black lists etc.).⁶²

It is noted in chapter 1 that few of the sample of developing countries are members of the IF. This is perhaps unsurprising in that membership comes with the burden of agreeing to implementation of the minimum standards, etc., which may not always be in the interests of these developing countries.⁶³

While there has been greater participation in the Global Forum by the sample countries, positive interaction there may prompt greater participation in the other initiatives. However, there have been calls for the BEPS initiatives to be reviewed in light of developing country needs and further to reexamine the allocation of tax rights under the current international tax norms.⁶⁴

⁵⁹ See at: <https://oecd-development-matters.org/2020/11/12/landmark-supreme-court-victory-in-zambia-collecting-millions-in-tax-revenues-and-sending-a-message-across-borders/>

⁶⁰ Zambia, Ministry of Finance, Questions & Answers following Zambia’s presentation to Investors (29 September 2020), available at: https://www.mof.gov.zm/?wpfb_dl=286

⁶¹ M. Hearson, J.W. Ndubai and T. Randriamanalina, *The Appropriateness of International Tax Norms to Developing Country Contexts*, FACTI Background Paper 3, 20 July 2020.

⁶² M. Collin, *Does the threat of being blacklisted change behavior? Regression discontinuity evidence from the EU’s tax haven listing process*, Global Development and Economy, Working Paper 139, June 2020, available at: https://www.brookings.edu/wp-content/uploads/2020/06/EU_working_paper_139_mcollin.pdf and further at M. Hearson, J.W. Ndubai and T. Randriamanalina, *The Appropriateness of International Tax Norms to Developing Country Contexts*, FACTI Background Paper 3, 20 July 2020.

⁶³ M. Hearson, J.W. Ndubai and T. Randriamanalina, *The Appropriateness of International Tax Norms to Developing Country Contexts*, FACTI Background Paper 3, 20 July 2020.

⁶⁴ 7th WGB/IMF TaxSunday Conference, *International Tax Avoidance – What Has BEPS Accomplished for Developing Countries?*, 18 October 2020 in the Panel titled: “A conversation on the experience of BEPS in developing countries”, available at: <https://www.worldbank.org/en/events/2020/10/08/tax-Sunday-conference-2020#2>

3.5. Conclusions

The African Continent has unique challenges with respect to BEPS. Many domestic issues must first be overcome, infrastructure and capacity developed before implementation of the BEPS Actions will be able to meet their objectives.

In the sample and more broadly among developing countries, the BEPS Actions have been addressed in a reactionary fashion rather than a more proactive step to advancing the developing country interest in the global tax agenda.⁶⁵

While there is broad support for BEPS in general, implementation of the BEPS Actions assumes a developed world resourced country and does not take account of the constraints faced by developing economies (such as a lack of capacity to implement the BEPS Actions⁶⁶). Insufficient participation in the development of the agenda also disadvantages the developing countries.⁶⁷

In a World Bank panel discussion, it was indicated that there has been low-take up of country-by-country reporting by low-income countries (a minimum standard), yet high take up on the limitation of interest deductions (not a minimum standard). Pointing to issues for developing countries going forward, the panel point to further capacity building, a review of the allocation of taxing rights more generally and ensuring that the developing countries have a voice in the development of future standards (on which point, much literature points to the failure of the BEPS Action Plan development to do so).⁶⁸

⁶⁵ See for example the ATAF 2019 Outcomes Statement, ATAF High-Level Tax Policy Dialogue: Ensuring Africa's Place In The Taxation Of The Digital Economy, 1 August 2019 in which it was stated that: "Most of the global proposals on taxing the digital economy reduce taxing rights for African countries, therefore, if African countries do not technically articulate their positions in the Inclusive Framework working groups and through the UN Committee on Tax, then African will lose once the global rules are developed" and the ATAF 2018 Outcomes Statement, ATAF High-Level Tax Policy Dialogue: Reinforcing Africa's Position To Benefit From The Global Tax Agenda, 31 July 2018 in which it was stated that: "Africa needs to move from being reactive to changes in the global tax agenda to a more proactive role where Africa is setting not following the global tax agenda".

⁶⁶ 7th WGB/IMF TaxSunday Conference, *International Tax Avoidance – What Has BEPS Accomplished for Developing Countries?*, 18 October 2020 in the Panel titled: Panel 1: Where we are with BEPS? A stock-take of progress from developing countries' point of view, available at: <https://worldbank.scene7.com/s7viewers/html5/VideoViewer.html?asset=worldbankprod/101820-Tax%20Sunday-Panel1-v1-AVS&config=worldbankprod/WBG-Standard-Player&serverUrl=https://worldbank.scene7.com/is/image/&contenturl=https://worldbank.scene7.com/is/content/&posterimage=worldbankprod/101820-Tax%20Sunday-Panel1-v1-AVS&videoseverurl=https://worldbank.scene7.com/is/content>

⁶⁷ M. Hearson, J.W. Ndubai and T. Randriamanalina, The Appropriateness of International Tax Norms to Developing Country Contexts, FACTI Background Paper 3, 20 July 2020. See also OECD, Tax Co-operation for Development Progress Report 2019, available at: <https://www.oecd.org/tax/tax-global/tax-co-operation-for-development-progress-report-2019.pdf>.

⁶⁸ 7th WGB/IMF TaxSunday Conference, *International Tax Avoidance – What Has BEPS Accomplished for Developing Countries?*, 18 October 2020 in the Panel titled: Panel 2: Future Directions, available at: <https://worldbank.scene7.com/s7viewers/html5/VideoViewer.html?asset=worldbankprod/101820-Tax%20Sunday-Panel2-v1-AVS&config=worldbankprod/WBG-Standard-Player&serverUrl=https://worldbank.scene7.com/is/image/&contenturl=https://worldbank.scene7.com/is/content/&posterimage=worldbankprod/101820-Tax%20Sunday-Panel2-v1-AVS&videoseverurl=https://worldbank.scene7.com/is/content>. This was further supported in OECD, Tax Co-operation for Development Progress Report 2019, available at: <https://www.oecd.org/tax/tax-global/tax-co-operation-for-development-progress-report-2019.pdf>

4. Mapping the BEPS recommendations against the identified BEPS concerns of the sample countries

4.1. Introduction

Some of the BEPS Actions are monitored by the OECD as to the state of their implementation. As indicated in section 1.3, of the sample countries, only Kenya, Liberia and Zambia are members of the IF and so subject to any form of OECD monitoring. To the extent that peer reviews are conducted by the Global Forum that include BEPS Action issues, the implementation for Ghana, Rwanda, Tanzania and Uganda may also be evaluated. Limited data is available as to the implementation of the recommendations from the BEPS Actions in the remaining countries.

The OECD report that through support and initiatives, the following occurred in the period 2012 – 2019 in the sample countries:⁶⁹

Box 10: Cumulative Impact (2012-2019) of OECD Bilateral Support on BEPS to Developing Countries as at 31st December 2019

Country	Legislative changes made or in process	Organisational restructuring	Skills built	Additional tax collected	Signed Convention on Mutual Administrative Assistance in Tax Matters	Joined Inclusive Framework	Requested TIWB support
Ethiopia	Yes	No	Yes	No	No	No	Yes
Ghana	Yes	Yes	Yes	N/A	Yes	No	Yes
Kenya	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Liberia	Yes	No	Yes	N/A	Yes	Yes	Yes
Malawi	Yes	Yes	Yes	N/A	No	No	Yes
Rwanda	Yes	No	Yes	N/A	No	No	Yes
Uganda	Yes	No	Yes	Yes	Yes	No	Yes
Zambia	Yes	No	Yes	Yes	No	No	Yes

4.2. OECD/G20 BEPS Action Monitoring

4.2.1. Actions 1 and 2

Action 1 remains in progress and is therefore excluded from the discussion. Action 2 has no specific monitoring mechanism. The information available pertains more to the implementation by developed countries (see section 5 below).

4.2.2. Actions 3 and 4

Action 3 is evaluated within the OECDs Corporate Tax Statistics database.⁷⁰ However, the results for the sample of sub-Saharan African countries (those within the IF only) reveal that

⁶⁹ Data extracted from OECD, Tax Co-operation for Development Progress Report 2019, available at: <https://www.oecd.org/tax/tax-global/tax-co-operation-for-development-progress-report-2019.pdf> at 14.

⁷⁰ OECD, Corporate Tax Statistics Database, available at: <https://www.oecd.org/tax/beps/corporate-tax-statistics-database.htm> (last accessed 24 November 2020)

none have CFC rules currently in place. There has therefore been no implementation of the CFC recommendations from Action 3.

Similar to Action 3, the implementation of the interest deduction limitation rules within Action 4 are captured in the OECD Corporate Tax Statistics Database. The data (correct up to 2019) reflects that Kenya and Zambia have thin capitalization rules in place. Liberia has not implemented any interest deduction limitation rules. Kenya and Zambia apply the same “safe-harbour” debt-to-equity ratio of 3:1. While Zambia only applies the limitation to related parties, Kenya applies the rule to both related and unrelated parties. Zambia, however, permits a carry forward/back approach to the interest limited whereas Kenya does not. Neither apply any de minimus thresholds, targeted rules, group ratios or recharacterization rules. These rules do not appear to have been put in place as a response to Action 4 specifically.

4.2.3. Action 5 – A minimum standard

As a minimum standard, Action 5 required firstly an assessment as to the existence of any harmful preferential regimes existed in the countries. None of Kenya,⁷¹ Liberia or Zambia were considered to have harmful preferential tax regimes.

Secondly, the compulsory spontaneous exchange of information on specific taxpayer rulings was to be monitored by means of a peer review. The third monitoring pertained to no or low nominal tax rate jurisdictions and is therefore not applicable to the current sample. Peer reviews have been reported for 2016,⁷² 2017⁷³ and 2018.⁷⁴ None of the sample IF countries were included in the 2016 peer review, only Liberia was included in the 2017 peer review and Kenya, Liberia and Zambia were all included in the 2018 peer review. Despite their inclusion, it was evident from the 2018 report, that both Liberia and Zambia do not issue rulings and therefore no peer review evaluation could be made. While Zambia had no legal basis to issue rulings, no such impediment was found in Liberia. Further it was indicated that Liberia had recently introduced transfer pricing legislation and would be looking to adopt an APA system in future. Once implemented, the APAs would come within the scope of future peer reviews. The Kenyan report indicated that while four types of rulings were possible, Kenya had made and exchanged no rulings and therefore could not receive peer review input.⁷⁵

⁷¹ A.R. Masuku-Chimbombi, Chapter 12: The Possibility of BEPS through SEZs: A Critique of the South African and Kenyan SEZ Regimes Based on BEPS Action 5 in Special Tax Zones in the Era of International Tax Coordination (A. Laukkanen, P. Pistone & J.J.P. de Goede eds., IBFD 2019), Books IBFD indicates that the Kenyan regime is *potentially* harmful.

⁷² OECD (2017), Harmful Tax Practices - Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264285675-en>

⁷³ OECD (2018), Harmful Tax Practices – 2017 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <https://doi.org/10.1787/9789264309586-en>

⁷⁴ OECD (2019), Harmful Tax Practices – 2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/7cc5b1a2-en>.

⁷⁵ OECD (2019), Harmful Tax Practices – 2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/7cc5b1a2-en> at 238.

Recognising the deficiencies in tax transparency (including exchange of information) in Africa, the Global Forum partnered with the AU to provide assistance to African countries to improve tax transparency.⁷⁶

As a minimum standard, those countries that are members of the IF must implement it. However, as could be seen from the evaluation of BEPS concerns of developing countries, Action 5 was not a high priority. Many African countries lacked the capacity to necessarily make rulings.

4.2.4. Action 6 – A minimum standard

As a minimum standard, all three of the IF countries in the sample were subject to the peer review mechanism.⁷⁷ The choices made under this action are contained in the discussion under Action 15 – the MLI. Naturally, as of three countries only Kenya has recently signed the MLI (on 26 November 2019), the peer review process is inconclusive as none of the treaties these countries have comply with this minimum standard. While Liberia and Zambia are included in the review it simply confirms that they do not yet participate in this minimum standard.

The choices made with respect to the inclusion in the treaty of an express statement on prevention of non-taxation (see the discussion on the preamble to the treaty under Action 15) and one of three methods of addressing treaty shopping (being either PPT, PPT + SLOB or detailed LOB), are discussed under the heading of Action 15.

4.2.5. Action 7

The BEPS Action 7 and optionality was inserted in the 2017 OECD Model and the MLI (see Action 15). While not a minimum standard, as could be seen for Action 6, only Kenya (from the sub-Saharan African country selection) has signed the MLI. The options selected will be addressed under Action 15.

4.2.6. Actions 8-10

These actions were implemented mainly through amendments to the OECD Transfer Pricing Guidelines. Some links to Action 7 were made concerning the attribution of profits. However, application of these changes does depend on the extent of the reliance on the OECD Transfer Pricing Guidelines and further whether the countries even have transfer pricing legislation in place. As seen in section 3., this has been an area of development for Africa.

4.2.7. Action 11

⁷⁶ OECD et al, *Tax Transparency in Africa 2020: Africa Initiative Progress Report: 2019*, available at: <https://www.oecd.org/tax/transparency/documents/Tax-Transparency-in-Africa-2020.pdf> (last accessed 24 November 2020).

⁷⁷ The most recent review being the 2019 review. See OECD (2020), *Prevention of Treaty Abuse – Second Peer Review Report on Treaty Shopping*, OECD, Paris. <https://www.oecd.org/tax/beps/prevention-of-treaty-abuse-second-peer-review-report-on-treaty-shopping.pdf>

As the Action referring to the measuring and monitoring of the implementation of the BEPS measures, this Action is also key to this report. However, the limitation to the IF members, limits the sample as well. The key output under this Action is the OECD Corporate Tax Statistics Database (see also under the other Actions where used to monitor those actions). This is being expanded. Regional bodies have also undertaken regional initiatives along similar lines. In the context of this sample, see the work of ATAF with its African Tax Outlook report.⁷⁸

The OECD Corporate Tax Statistics Database also incorporates information derived from the Country-by-Country Reports (see Action 13 below).

4.2.8. Action 12

As a mainly domestic legislative action, little is available to assess the state of implementation in the sample countries. The OECD published a Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures in 2018 to assist countries with the implementation of Action 12, but there is no indication as to whether the sample countries have done so.

This is a low priority item in Africa.

4.2.9. Action 13 – A minimum standard

Action 13 pertains mainly to the exchange of information concerning MNEs through the means of Country-by-Country Reporting (CbCR). Referring again only to the sample countries that are IF members, the most recent peer review report on this action⁷⁹ reveals that Kenya, Liberia and Zambia do not yet have the legislation in place to facilitate CbCR.⁸⁰ None of these countries have signed any of (i) the Multilateral Competent Authority Agreement on the Exchange of CbC Reports (CbC MCAA);⁸¹ (ii) Model Competent Authority Agreements for Double Tax Conventions; or, (iii) Model Competent Authority Agreements for Tax Information Exchange Agreements. There is therefore no domestic legislation or signed treaties to facilitate the automatic exchange of CbCR by these countries as required by Action 13 (which is a minimum standard).

The lack of legal infrastructure to facilitate the exchange of information restricts the participation of developing countries in the information being made available under this action.⁸² There have been calls for the public disclosure of CbC reports to overcome this hurdle.⁸³

⁷⁸ ATAF, *African Tax Outlook 2019*, ISBN: 978-0-9584218-4-3 (pdf)

⁷⁹ OECD (2020), Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 3) : Inclusive Framework on BEPS: Action 13 , OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/fa6d31d7-en>

⁸⁰ See also <https://www.oecd.org/tax/automatic-exchange/country-specific-information-on-country-by-country-reporting-implementation.htm#cbcrequirements>

⁸¹ See the agreement at: <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf> and the signatories at: <https://www.oecd.org/ctp/exchange-of-tax-information/CbC-MCAA-Signatories.pdf>.

⁸² OECD et al, Tax Transparency in Africa 2020: Africa Initiative Progress Report: 2019, available at: <https://www.oecd.org/tax/transparency/documents/Tax-Transparency-in-Africa-2020.pdf>

⁸³ See for example: P. Draper, H Krogman, *Fighting BEPS in Africa: a review of Country-By-Country Reporting*, Global Economic Governance Africa (GEGAfrica), Jan 2017, available at:

4.2.10. Action 14 – A minimum standard

All three of the sub-Saharan African countries in the sample that are members of the IF, report on their MAP cases. Based on the information reported to the OECD: (i) Liberia had no MAP cases;⁸⁴ (ii) Kenya⁸⁵ seven and (iii) Zambia⁸⁶ four at the end of 2019. The position of Liberia is unsurprising in light of it having only one comprehensive double tax convention in force (with Germany). Liberia's remaining agreements in force all pertain to tax information exchange. Between 1 January 2017 and 1 January 2019, Kenya had 3 non-TP MAP cases. In the 2019 reporting period, it started 4 TP cases and 1 non-TP case. The surge in TP cases refers, in part, to the work in this area by regional tax bodies to support TP units in tax administrations.

KPMG made the following observation with respect to TP in Kenya in 2015:

“Although the introduction of transfer pricing rules in Kenya is fairly recent, the Kenya Revenue Authority (KRA) has since started to conduct transfer pricing audits. The KRA currently chairs the Africa Tax Administrators Forum Transfer Pricing roundtable and assists other African tax authorities in performing transfer pricing audits. The KRA has so far issued assessments (deficiency notices) of up to USD50 million to taxpayers and it is expected that this focus on transfer pricing will continue since all ongoing tax audits must incorporate a report of findings on taxpayer transfer pricing activities.

As a recent trend, KPMG in Kenya notes that there has been increased cooperation between Kenya and other competent authorities around the world for both information sharing and settling transfer pricing disputes through mutual agreement procedures (MAPs).⁸⁷

In the case of Zambia, one case (for TP) predates 1 January 2017. The remained three arose in 2019 and no cases have been closed. It should be noted, in relation to TP, only recently (2014) were documentation requirements legislated.

It is observed that all three IF countries in the sample are among a small list that have deferred their peer review with respect to Action 14.⁸⁸

An evaluation of this Action is underway with public comments due by 18 December 2020. This evaluation will also consider the continued deferral of those jurisdictions that have

<https://www.eldis.org/document/A101674> and more recently, A.W. Oguttu, Curtailing BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory, 12 *World Tax J.* (2020), *Journal Articles & Papers IBFD*

⁸⁴ OECD, *2019 MAP Statistics Liberia*, available at: <https://www.oecd.org/tax/dispute/2019-map-statistics-liberia.pdf> (last accessed 25 November 2020)

⁸⁵ OECD, *2019 MAP Statistics Kenya*, available at: <https://www.oecd.org/tax/dispute/2019-map-statistics-kenya.pdf> (last accessed 25 November 2020)

⁸⁶ OECD, *2019 MAP Statistics Zambia*, available at: <https://www.oecd.org/tax/dispute/2019-map-statistics-zambia.pdf> (last accessed 25 November 2020)

⁸⁷ P. Kunuthia, *Kenya* in *Global Transfer Pricing Review*, 2015, KPMG available at: <https://assets.kpmg/content/dam/kpmg/pdf/2015/10/tp-review-kenya-v3.pdf> (last accessed 25 November 2020).

⁸⁸ OECD, *OECD/G20 Inclusive Framework on BEPS Progress report July 2019 – July 2020*, available at: <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf> at 30

deferred peer review (including the three IF members in this sample). However, it seems that the evaluation also seeks to build on this Action. The consultation therefore seeks:⁸⁹

- a) Experiences with, and views on, the status of dispute resolution and suggestions for improvements, including experiences with mutual agreement procedures in those jurisdictions that obtained a deferral;
- b) Additional elements to strengthen the Action 14 Minimum Standard; and
- c) Additional elements to strengthen the MAP Statistics Reporting Framework.

Of concern for developing countries may be the expansion of this action under item (b) above before being ready to implement the earlier aspects.

4.2.11. Action 15

While not a minimum standard, Action 15 has been integral to providing the mechanisms to implement many of the earlier actions. However, as indicated in section 2, Action 15 provided much optionality. Of the sample of sub-Saharan African countries, only Kenya has signed the MLI. A full analysis of its choices is therefore of limited value.

It does not make any sense for Liberia to sign the MLI with only one comprehensive double tax treaty in force. In line with Action 15, a country may indicate that it will build the provisions into future treaties.

Many of the MLI requirements were included in the 2017 OECD Model update. None of the sub-Saharan African countries under review record any non-member country positions against the OECD Model, so establishing the manner in which these countries support or not the article terms is not clear. As indicated in section 1, all the sub-Saharan countries in the sample are ATAF members. The 2019 ATAF Model largely follows the 2017 OECD Model (with some variation). Of the sample countries who are members of ATAF: Ghana, Kenya, Rwanda, Uganda and Zambia have all recorded reservations against the 2019 ATAF Model. Burundi, Liberia, Malawi, Tanzania had made reservations against an earlier draft of the 2019 ATAF Model, these were all removed in the final published version and so the position of these countries remains unclear.⁹⁰

Apart from the limited number of countries in the sample that at IF members, there are a number of issues that may prevent signing (and ratification) of the MLI, including the age (and historical context) of the treaty network; the complexity of synthesizing the MLI provisions with the existing treaties and a full understanding of the financial impact the provisions may have on the developing country economy. The last issue should also be understood in the context of the current Action 1 and calls by developing countries to reconsider the allocation of tax rights under the international tax framework.

⁸⁹ See at: <https://www.oecd.org/tax/beps/oecd-secretariat-invites-public-input-on-the-2020-review-of-beps-action-14.htm>

⁹⁰ More on the ATAF Model, its variations and country reservations may be found in: C. West, Emerging Tax Treaty Policy in Africa: Evidence from the ATAF Model, Volume 75, Bull. Intl. Taxn, No. 1, IBFD, 2021, (forthcoming).

For other countries, the BEPS Actions have provided them the opportunity to reconsider their treaty networks with treaties being terminated by Malawi, Rwanda and Zambia (from the sample) and Uganda (from the sample) choosing to conduct a review of its treaty network. It is therefore clear that as capacity develops in the developing countries, more critical focus has been placed on the treaty network and the extent to which the treaty provisions aid that country or not.

It should be noted that developing countries generally did not opt for compulsory arbitration under Part IV of the MLI (see Articles 18-26 of the MLI). The perception is that such proceedings will be unfair on developing countries that do not have the resources or experience to manage such proceedings.⁹¹

⁹¹ A.W. Oguttu. 2018. *Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?*, CGD Policy Paper. Washington, DC: Center for Global Development. <https://www.cgdev.org/publication/shoulddeveloping-countries-sign-oecd-multilateral-instrument-address-treaty-related>

5. Implementation of the various BEPS measures by the sample developed countries

5.1. Introduction

The implementation of BEPS Actions by developing countries are contrasted with the positions of selected developed countries, being Australia, Canada, Netherlands and United Kingdom. This sample provides with a geographically diverse group of developed countries.

Reflecting their participation in the BEPS process, all of the sample are members of the Global Forum and all have ratified the MLI and have all signed the MCAA. Finally, all in the sample are OECD members.

Box 11 summarises the current position of the sample countries based on the Global Forum analysis and peer reviews.

However, a few broader observations are first necessary. Firstly, the BEPS project followed revenue losses by many nations after the financial crisis in 2008/2009. This, coupled with the globalisation of many MNEs left identifiable gaps in revenue collection. Secondly, the BEPS project acts as a patchwork to an aging international architecture. Thirdly, the BEPS project was developed under the old OECD Model of the OECD Member Countries establishing the agenda and its development and further that the conclusions are achieved by consensus from those member countries. Therefore, the BEPS project largely represents the consensus from the OECD member countries as to the areas of concern for their own tax systems. It would therefore be expected that all such countries would prioritise and adopt the consensus measures under the BEPS Actions. In many cases, these countries had often already taken unilateral actions under domestic law. The benefit of the OECD BEPS project was achieving consensus, co-ordination and co-operation as to the manner of implementation.⁹²

A very brief overview of implementation of the BEPS Actions is provided for the developed country sample.

⁹² See for example: Y. Brauner, What the BEPS, 16 Fla. Tax Rev. 55 (2014), available at <http://scholarship.law.ufl.edu/facultypub/642>

Box 11: Global Forum comparison of status of sample countries

	Australia	Canada	Netherlands	United Kingdom
Exchange of information on request (EOIR)				
Global Forum membership	yes	yes	yes	yes
EOIR rating round 1	compliant	compliant	largely compliant	largely compliant
EOIR rating round 2	largely compliant	largely compliant	largely compliant	largely compliant
Mutual Administrative Assistance Convention	in force	in force	in force	in force
Automatic exchange of information (AEOI)				
Commitment to AEOI (CRS)	2018	2018	2017	2017

	Australia	Canada	Netherlands	United Kingdom
CRS MCAA signed	yes	yes	yes	yes
Legal frameworks' assessment	in place but needs improvement	in place but needs improvement	in place but needs improvement	in place
Mutual Administrative Assistance Convention	in force	in force	in force	in force
BEPS				
Inclusive Framework on BEPS membership	yes	yes	yes	yes
Existence of harmful tax regimes (BEPS Action 5)	in the process of being amended/eliminated	not harmful (no harmful regime exists)	not harmful (no harmful regime exists)	not harmful (no harmful regime exists)
Exchange of information on tax rulings (Action 5)	reviewed/no recommendations	reviewed/no recommendations	reviewed/no recommendations	reviewed/no recommendations

	Australia	Canada	Netherlands	United Kingdom
Preventing treaty abuse (Action 6)	Reviewed in 2018 and 2019, no recommendation. 2020 review ongoing.	Reviewed in 2018 and 2019, no recommendation. 2020 review ongoing.	Reviewed in 2018 and 2019, no recommendation. 2020 review ongoing.	Reviewed in 2018 and 2019, no recommendation. 2020 review ongoing.
CbC – Domestic law (Action 13)	legal framework in place	legal framework in place	legal framework in place	legal framework in place
CbC – Information exchange network (Action 13)	activated	activated	activated	activated
Effective dispute resolution (Action 14)	stage 1 reviewed & recommendations made	stage 2 reviewed & recommendations made	stage 2 reviewed & recommendations made	stage 2 reviewed & recommendations made
Multilateral Instrument (Action 15)	in force	in force	in force	in force

5.2. Australian implementation

The Australian Tax Office (ATO) has provided a number of publications on its website concerning BEPS and its implementation. The ATO indicates that Australia has already implemented Actions 2, 5, 8-10, 13, 14 and 15 (with the MLI in Action 15 also addressing Actions 6 and 7).⁹³

Action 3 concerns the CFC regimes. Australia already has, since 1990, had a CFC regime in place.⁹⁴ Action 4 concerns interest deduction limitation rules. Based on the OECD data, Australia has the necessary rules in place.⁹⁵ Thus no implementation was specifically necessary for Actions 3 and 4. Finally, Action 11 concerns the analysis of the data arising from the BEPS Actions. Australia participates fully in supplying the relevant monitoring information to the OECD and to the Global Forum. It also fully participates in the peer review processes (see Box 11).

With respect to the MLI, Australia has accepted all the minimum standards within the MLI and made various selections from the optionality provided.⁹⁶ Notably (and generally unlike developing countries) Australia accepted the MLI provisions concerning mandatory arbitration.

Further domestic actions have been put in place beyond that required by the BEPS Actions.⁹⁷

5.3. Canadian implementation

Canada took up many of the final BEPS Action recommendations in its domestic law (beyond that required by BEPS and, in some cases, before the BEPS Action implementation).⁹⁸

Like Australia, in signing the MLI, Canada accepted the mandatory arbitration provisions in addition to other optional provisions and the minimum standards within the MLI.

5.3. Netherlands implementation

Based on its participation in the EU, some of the EU directives put the BEPS Actions into effect. For example, Council Directive (EU) 2017/952 requires hybrid and branch mismatch rules to be effective in member states no later than the beginning of 2020 addresses Action

⁹³ Further detail available at: <https://www.ato.gov.au/business/international-tax-for-business/in-detail/base-erosion-and-profit-shifting/>

⁹⁴ CFC data for the sample available at:

<http://qdd.oecd.org.ezproxy.uct.ac.za/data/CFC/AUS%2bCAN%2bNLD%2bGBR.ALL>

⁹⁵ Interest deduction limitation data available at:

<http://qdd.oecd.org.ezproxy.uct.ac.za/data/ILR/AUS%2bCAN%2bNLD%2bGBR.ALL>

⁹⁶ Full detail is available at: <https://www.ato.gov.au/General/International-tax-agreements/In-detail/Multilateral-Instrument/>

⁹⁷ See further at: <https://www.ato.gov.au/General/Tax-and-Corporate-Australia/A-strong-domestic-tax-regime/>

⁹⁸ J.S. Wilkie, Canada and BEPS: A Progress Report, 23 Intl. Transfer Pricing J. 1 (2016), Journal Articles & Papers IBFD

2 and Council Directive (EU) 2018/822 addressed the mandatory disclosure under Action 12.

Further, it is clear from Government resources that the Netherlands actively participated in the BEPS project.⁹⁹ In this document it is stated that:

“The new [BEPS] standards are aligned with the principles which underpin the Dutch system. Our system has always taken account of companies that operate internationally, and ensures that national and multinational companies are treated equally. The participation exemption, the absence of withholding tax on interest and royalties, our extensive treaty network and providing certainty in advance are therefore not in themselves up for discussion. The proposed measures also clearly illustrate that the Netherlands is playing a pioneering role when it comes to exchanging information and including anti-abuse provisions in treaties”.

It was further indicated that the areas below required changes in legislation in the Netherlands:

- Transfer pricing rules
- Country-by-country reporting
-
- Treaties with developing countries and doubling of technical assistance
-
- Exchange of information on rulings

As with all the sample developed countries, there was acceptance of mandatory arbitration in the MLI.

Most recently, the 2020 Dutch Treaty Policy confirms:

The new treaty policy also provides that the Netherlands will not enter into a new a treaty without including minimum standards. This also applies to protocols to tax treaties that the Netherlands agree on with their treaty partner. The minimum standards consist of the following parts:

1. A preamble stating the relevant treaty is not meant to facilitate double non-taxation or provide with a lower taxation due to tax evasion or tax-avoidance;
2. Anti-abuse rules in tax treaties. In this case the preference of the Netherlands is to include a Principle Purpose Test (hereafter ‘PPT’). Via the PPT the intention of the structure is tested by an objective analysis. If one of the main purposes of the structure or transaction is to obtain treaty benefits, the treaty benefits could be denied. The PPT contains open standards whereby also the intention of the structure or transaction is taken into consideration. Consequently, structures with sufficient economic nexus should generally not be targeted by the PPT.
3. Effective litigation via Mutual Agreement Procedure.

[...]

Besides the minimum standards, the Netherlands also indicated to be in favor of implementing several additional measures of the BEPS-project. These additional measures consist of:

⁹⁹ NL: Letter of 5 October 2015 from the State Secretary for Finance, Eric Wiebes, to the House of Representatives presenting an assessment of the outcome of the BEPS Project and the outlook for the Dutch tax climate for businesses, available at: <https://www.government.nl/binaries/government/documents/letters/2015/10/19/letter-presenting-an-assessment-of-the-outcome-of-the-beps-project-and-the-outlook-for-the-dutch-tax-climate-for-businesses/beps.pdf>

- A measure that contains the application of the treaty in case income or an advantage is received by or via a hybrid entity;
- A general saving clause;
- A measure that contains the treaty position of dual resident entities;
- Measures to avoid artificial evasion of the qualification of a permanent establishment;
- Minimum holding period to avoid dividend transfer transactions;
- Claw back period for immovable-property-entities;
- Using the credit method instead of exemption method for specific cases;
- A measure to prevent restriction of entitlement of the source country for income that is attributed to third jurisdictions where this income is taxed at a low tariff;
- Aligning corrections in transfer price;
- an obligated and binding arbitration.¹⁰⁰

As is evidence from the above, the Netherlands is in favour of and has applied all the BEPS Actions.

5.4. United Kingdom implementation

Partly demonstrating the divide between developed and developing countries in the design of the BEPS Actions, the United Kingdom had already in March 2014 published its priority actions in terms of the BEPS Action Plan.¹⁰¹ The extracts below against each of the BEPS Actions is illustrative of a developed country approach.

Box 12: United Kingdom response to the BEPS Actions

Action	UK Comment
2	The UK supports the current work around Action 2 to develop new international tax rules to prevent companies avoiding tax through the use of certain business structures or finance transactions, ensuring that these do not create an unfair advantage. However, the exercise needs to consider whether there could be special rules for intra-group hybrid regulatory capital instruments that are a direct consequence of regulatory requirements.
3	The UK has recently reformed its Control Foreign Company (CFC) rules to protect the UK tax base from tax avoidance and aggressive tax planning. Importantly, the new CFC rules reflect the UK's move to a more territorial corporate tax system, an approach adopted by most developed countries which is well adapted to a more open economy and to globalisation. The BEPS project should encourage more countries to adopt and enforce workable CFC rules. This will make it more difficult for MNEs based outside the UK to divert profits to low-tax countries, helping to level the playing field between MNEs and UK domestic businesses.
4	The UK already has a number of defences against excessive interest deductions, and looks forward to the output from the BEPS work on limiting the

¹⁰⁰ See at: <https://www.rsm.global/netherlands/en/news/dutch-tax-treaty-policy-2020>

¹⁰¹ UK: HMRC, *Tackling aggressive tax planning in the global economy: UK priorities for the G20-OECD project for countering Base Erosion and Profit Shifting*, March 2014, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/293742/PU16_51_BEPS_AA_-_FINAL_v2.pdf

	use of interest deductibility as a means for shifting profits, especially the identification of best practice.
5	The UK supports the current work around Action 5 to ensure a better understanding of what constitutes economic substance when businesses carry out R&D activities, so as to effectively address those instances where preferential tax regimes might present an opportunity to shift profits. However, the exercise needs to be mindful of compatibility with existing international law and support fair competition, as well as to acknowledge legitimate commercial decisions on R&D within the framework of globalised markets and operations.
6	The UK fully supports the objective of preventing treaty abuse and includes provisions in its treaties to deny benefits to persons whose main purpose is to access tax benefits through those treaties. The OECD is examining the most effective way of preventing treaty abuse and has published draft recommendations.
7	The UK fully supports the work to re-examine and update the international rules governing the threshold at which a company becomes taxable in a foreign country, and work to prevent businesses from artificially fragmenting their operations to avoid breaching this threshold. This work needs to take into account technological advances, modern business practices and the particular needs of small businesses.
8- 10	The work around Actions 8, 9 and 10 will consider whether special measures are required to override the arm's length principle in certain circumstances and if so what the rule would look like and the circumstances in which they would apply. The UK fully supports this work to develop approaches and solutions which produce a fair and equitable allocation of taxing rights between countries and prevent aggressive tax planning
11	The OECD is developing economic analysis to determine the scale and impact of aggressive tax planning by multinationals, including on the spillover effects into other countries. The UK supports this work and will aim to ensure that information collected from businesses to develop the evidence base will be minimally burdensome.
12	The UK introduced a mandatory disclosure scheme in 2004, which provided a model that a number of other countries have since followed. The UK model strikes the right balance between getting timely information on avoidance on a wide range of taxes and duties to counteract avoidance whilst not imposing excessive compliance burdens on business. It is one of the models being considered by the OECD in developing its recommendations
13	Through its Presidency of the G8 last year, the UK played a leading role in initiating the proposal for a country-by-country reporting template, which will give tax authorities worldwide a clear picture of multinational's profit and tax. We believe that this important initiative will enhance transparency between business and tax authorities, including those of developing countries, by providing tax authorities with high-level information to help them efficiently identify and assess risks.
14	Effective dispute resolution mechanisms are needed to prevent double taxation and to provide greater transparency and certainty. The UK therefore fully supports binding arbitration where tax authorities cannot come to agreement or

	tax disputes have exceeded a certain length of time. This is a major step which should lead to lower compliance burdens for businesses and tax authorities alike.
15	Through analysing international tax and public law, a multilateral instrument will be designed which will enable participating jurisdictions to implement BEPS measures and enhance bilateral tax treaties. The UK is committed to this process and is working with others to devise effective solutions that reflect the rapidly evolving nature of the global economy, and the need to adapt quickly to this evolution.

As can be seen from the above table, for a number of Actions, the UK either had in place or had recently implemented domestic changes similar to those developed by the BEPS Actions. This has a number of implications when compared to developed countries including: (i) that developed countries were already underway with the changes implies that little further adjustment was needed for their already developed systems to implement the BEPS Actions; (ii) that the BEPS Actions themselves reflected the developed countries current practices. The implementation timeline for BEPS was therefore already in favour of such countries with existing systems in place relative to the developing countries.

It was further indicated that:

“The UK has played a leading role in the OECD’s BEPS project. Both HMRC and HM Treasury have committed considerable resources and expertise to make it a success, and the UK has already begun to implement the OECD’s recommendations. HMRC is also working with other tax administrations to improve information exchange, including as part of the expanding Joint International Tax Shelter Information Collaboration network. HMRC will monitor the implementation and effectiveness of BEPS outcomes, where there is still work to do, both at a domestic and international level. The UK supports the proposed further work by the OECD, including the development of a multilateral instrument to implement BEPS treaty measures”.¹⁰²

¹⁰² J. Harra, 2015, *BEPS and HMRC*, Tax Journal, Issue 1283, available at: <https://www.taxjournal.com/articles/beps-and-hmrc-29102015>

6. Conclusions

This report set out to answer the following questions:

1. RQ1: What are the 15 OECD BEPS recommendations and which implementation options are available for participating countries?
2. RQ2: To what extent are the 15 OECD BEPS-recommendations and implementation options considered in line with the priorities of developing countries on BEPS and why?
3. RQ3: To what extent is the implementation of the 15 OECD-BEPS recommendations by participating countries in line with the priorities of developing countries?

RQ 1 was addressed in section 2, providing a summary of the BEPS Actions and optionality.

RQ 2 was addressed in section 3 of this report. It outlines the importance of selected BEPS actions in the sample of developing countries.

RQ3 addressed the implementation of the BEPS Actions as regards the developing country sample (see section 4) and the developed country sample (see section 5).

It was evident that the participation from the embryonic stages of the BEPS initiative led the developed country sample to adopt all the BEPS Actions and much of the additional optional provisions (in this regard and exact mapping of the options finally selected is not provided for this sample). Further, that the BEPS Actions and implementation plan was developed by the OECD member countries and the G20 demonstrated that many of the actions were either underway in the developed countries or could be fairly easily implemented. The same is not true of the developing countries that were excluded from the design and due to capacity constraints could not always participate in the discussions concerning implementation. As the Inclusive Framework was developed after the BEPS Actions, the developing countries were not on an equal footing with the developed countries.

Lack of capacity and resources has left developing countries having difficulties to implement many of the BEPS Actions. In some instances, the OECD and regional bodies have provided training and support to enable implementation of the BEPS Actions. For some developing countries, consideration of the BEPS Actions represents too high an opportunity cost when domestic issues dominate.

Finally, many of the fundamental flaws to the current international tax regime were not (nor were intended) to be addressed by the BEPS project. What the BEPS project has achieved, is greater global consensus, cooperation and coordination of international tax developments going forward. The ongoing developments with respect to the digital economy will be more telling as to the inclusion of the developing countries.

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