Tax Design and Administration in a Post - BEPS Era: A Study of Key Reform Measures in 18 Countries

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Abstract

The OECD's Base erosion and Profit Shifting (BEPS) initiative is undergoing what may be the most challenging phase, namely ratification and implementation by countries and jurisdictions. In this paper we provide a preliminary overview of the approaches being taken in 18 jurisdictions, namely: Australia, Canada, China, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, the Netherlands, New Zealand, Nigeria, Singapore, South Africa, Thailand, the United Kingdom, the United States and Vietnam. When the larger project is complete in early 2019, it will enable the global accounting profession to be apprised of the effect of the enhanced tax reporting and compliance requirements under the G20/OECD BEPS program). The paper provides some background on each of the jurisdictions, prior to reviewing their position on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), the BEPS Inclusive Framework and the adoption of the four minimum standards of Actions 5, 6, 13 and 14. The paper then reviews the responses to the remaining BEPS Action items, as well as outlining unilateral measures across these jurisdictions.

1. INTRODUCTION

In an increasingly global tax world it is essential that the profession understands first, the global implementation of international tax reform and second, and the way in which key market countries have incorporated this reform into their domestic tax policy. The initial stage of the G20/OECD Base Erosion and Profit Shifting (BEPS) program is complete, with 15 recommendations released in October 2015.[1] However, OECD recommendations require national jurisdictions to implement each action item and this is not necessarily occurring

* The authors wish to acknowledge the funding provided by CPA Australia for the larger project to investigate the adoption of BEPS and BEPS related measures by 18 countries. This paper states the position of our research as at 31 July 2018.
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[1] See further at the OECD's website: http://www.oecd.org/tax/beps/.

consistently. The proposed design of international tax law reforms by the OECD is intended to assist countries in implementing a cohesive global approach, but each country uses their tax system to influence taxpayer behaviour to achieve their own social and economic goals. This is a grand challenge facing the implementation of the BEPS proposals.

The objective of our larger project is to consider the implementation of both G20/OECD BEPS initiatives and unilateral reforms in 18 countries/jurisdictions to advance the knowledge of the profession and the global community. The jurisdictions of Australia, Canada, China, Hong Kong,[2] India, Indonesia, Japan, Korea, Malaysia, the Netherlands, New Zealand (NZ), Nigeria, Singapore, South Africa (SA), Thailand, the United Kingdom (UK), the United States (US) and Vietnam, are being investigated for inclusion in the study. It was hoped to include the Philippines in the list of jurisdictions (especially given their current decision not to engage with BEPS) but we have been unable to secure a country/jurisdiction chapter author. The project, once completed by early 2019, will enable the global accounting profession to be apprised of the effect of the enhanced tax reporting and compliance requirements, which are an outcome of the G20/OECD BEPS program, as well as unilateral measures across these jurisdictions. This paper provides the results of a preliminary survey and draft chapters of the 18 countries/jurisdictions.

2. RESEARCH APPROACH AND OVERVIEW OF THE PAPER

A qualitative approach is undertaken in this study alongside an overarching interdisciplinary socio-legal and accounting-transparency position which involves an analysis of theoretical, legal and policy concepts within both a social and current legal and accounting context. We take a positivist approach, allowing the comments of our country chapter authors to tell the story, while resisting the opportunity to develop our own normative recommendations.

The research questions are addressed within the legal and accounting frameworks of the aforementioned jurisdictions, using current policy discussions to assess domestic developments of the OECD's global BEPS recommendations. In particular, an investigation of each jurisdiction to ascertain the response to the G20/OECD BEPS program of tax reform, their position on the BEPS inclusive framework, responses to BEPS in terms of transparency and administrative reforms are considered.

Our research questions, which have been directed at each country chapter author, are as follows:

1. What has been the response of your country's government to the G20/OECD BEPS program of tax reform?
2. Has your country signed up to the BEPS inclusive framework (4 minimum standards) and what does this mean for your country?

[2] Hong Kong is a Special Administrative Region of China and as such is not a separate country. As such this is referred to as a jurisdiction.

3. How has your country adopted/responded to the other BEPS Actions?
4. Has your country adopted any unilateral BEPS measures?
5. How has your tax administration responded in relation to international tax reform in your country?
6. What do you believe is the future of international tax reform for your country?

A project that embarks on a comparison between countries[3] can necessarily make underlying assumptions which are erroneous, the most grievous of these being that each country operates from the same policies and principles due to the desire for the same outcomes. No doubt, all countries in the study wish to raise revenue from taxes; however, not all countries face the same degree of base erosion and profit shifting at a domestic level and each is aware of the dichotomy of tax competition versus tax cooperation. Further, countries do not operate in similar political, social and economic climates and each varies according to the level of involvement in global tax policies and sophistication in their ability to implement global recommendations.[4]

In the first part of the paper, we investigate and analyse economic, political and social aspects of the relevant jurisdictions. In particular, we discuss OECD and G20 member status, region, level of development, financial complexity, and import versus export status of each country. Overall, we believe that the 18 countries surveyed provide a diverse group of nations which are representative of the larger population of countries facing base erosion and profit shifting issues and questions around the reform of their tax regime either via the adoption of the various OECD BEPS Actions or unilateral measures. Throughout the remainder of the paper we draw on these background findings to ascertain whether there is a correlation between these and the adoption of the relevant tax reform measures.

Once the background data is analysed, the second part of the paper investigates each country's position on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), the BEPS Inclusive Framework and the adoption of the four minimum standards of Actions 5, 6, 13 and 14. Announced on 23 February 2016,[5] the BEPS Inclusive Framework is designed to allow those who join the ability to work on an equal footing with OECD and G20 members on the reform agenda moving forward. Part of the stated rationale for expanding country involvement was the impact on of revenue losses from base erosion and profit shifting on developing nations which is stated to be 'particularly damaging' due to their reliance on corporate income tax revenues.[6] The mandate of the Inclusive Framework is the focus on the implementation of what are known as the four BEPS minimum standards. These four standards

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[3] We use 'countries" and 'jurisdictions' interchangeably throughout this paper.
[4] For a comprehensive discussion on the issues facing developing countries see: http://www.ictd.ac/publication/2-working-papers/188-assisting-developing-countries-taxation-oecd-beps-approach-for-donors. See also the impact on developing countries in the area of automatic exchange of information (AEOI): Kerrie Sadiq and Adrian Sawyer, "Developing Countries and the Automatic Exchange of Information Standard – A 'One Size Fits All' Solution?", (2016) 31(1) *Australian Tax Forum*, 99-129.
[5] https://www.oecd.org/tax/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm.
[6] https://www.oecd.org/tax/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm.

address harmful tax practices, tax treaty abuse, Country-by-Country Reporting (CbCR) requirements for transfer pricing and improvements in cross-border tax dispute resolution. Of the 18 countries/jurisdictions included in this survey, 15 countries have signed the MLI and all are members of the BEPS Inclusive Framework. However, the approach to the minimum standards varies and is analysed in this part of the paper.

The third part of the paper provides an analysis of the adoption of the remaining BEPS Action items. While the BEPS Inclusive Framework has a dominant focus on transparency measures, the broader G20/OECD BEPS project is based on the three pillars of coherence, substance and transparency within the international tax system and across the global community. The broader analysis in this paper investigates the responses of the 18 countries/jurisdictions surveyed to the full range of issues such as the tax challenges of the digital economy, neutralizing the effects of hybrid mismatch arrangements, CFC rules, excessive debt loading, the artificial avoidance of permanent establishment status, aligning transfer pricing outcomes with value creation, and mandatory disclosure rules.

The fourth part of the paper considers unilateral responses to address base erosion and profit shifting. Despite the reach and efficiency of the OECDs agenda and recommendations, some countries have adopted unilateral measures. This has raised concerns around the potential for any separate approaches adopted by countries to undermine the consensus based framework of the OECD project and also for countries to adopt measures more aligned to their individual interests. Of the jurisdictions surveyed, only Australia, China, Netherlands, NZ, Nigeria, UK, and US have adopted unilateral measures to address tax avoidance. Five (5) of these jurisdictions are developed and two (2) are developing.[7] The unilateral measures which have been adopted to date can be categorized as administrative, transparency and anti-avoidance measures, and are discussed separately.

The final part of the paper provides a summary of the position of each of the 18 countries/jurisdictions surveyed. It reports the engagement of each surveyed country with the four (4) minimum standards (Actions 5, 6, 12 and 13), the eleven (11) ‘other’ BEPS Actions (Actions 1, 2, 3, 4, 7, 8-10, 11, 12 and 15), and the three unilateral measures: administrative, transparency and anti-avoidance.

3. ECONOMIC, POLITICAL AND SOCIAL ASPECTS OF THE JURISDICTIONS REVIEWED

In the current survey of countries, we investigate the status of eight (8) OECD Member countries, four (4) OECD Key Partner countries and six (6) non-Member countries. Member countries are Australia, Canada, Japan, Korea, the Netherlands, New Zealand (NZ), the United Kingdom (UK), and the United States of America (US). OECD Key Partner countries are India, Indonesia, China and South Africa, while non-Member countries/jurisdictions are Hong Kong (HK), Malaysia, Nigeria, Singapore, Thailand and Vietnam. As at the time of writing, this

[7] The United Nations’ classification for developed and developing is used in the analysis in this paper.

represents 42 percent Member countries, 21 percent Key Partner countries and 33 percent non-Member countries.

The initial involvement by G20 members significantly expanded the global reach of the BEPS program. In contrast with the relevant OECD figures, G20 member countries account for 86 per cent of the world economy, 78 per cent of global trade, and two-thirds of the world's population, including more than half of the world's poor.[8] In the current survey of countries, we investigate the status of ten (10) G20 Member countries and eight (8) non-Member countries. This represents 52 percent G20 member countries and 44 percent non-Member countries. Of significance in this study is the inclusion of China, India, Indonesia, and South Africa, all of which are OECD Key Partner countries but do not have full Member status. Although, it is interesting to note that both NZ and the Netherlands[9] are OECD Members but do not have G20 Member status.

An investigation into whether there are differing regional approaches to the adoption of BEPS initiatives and/or unilateral initiatives to address tax base erosion is also considered in this study. To this extent, we have attempted to include countries from the continents of Australia/Oceania, America, Africa, Asia, and Europe.[10] However, due to external funding provided and CPA Australia regions of focus, the scope of the study is predominantly that of Australasia and Asia. Other countries provide valuable insights into variations from the themes ascertained in these regions.

It is well known that the OECD is generally viewed as an organisation with membership made up of developed countries, while the G20 is broader including significant developing nations, albeit at differing levels of development. There is no universally accepted definition or agreed-upon criteria to determine whether a country is developing or developed. Furthermore, in 2016, the World Bank determined to no longer distinguish between the two categories in its world development indicators. The United Nations (UN) continues, however, to use these designations for statistical convenience and bases the classification on statistical indexes such as income per capita, GDP, and life expectancy.[11] While it is recognized that these distinctions are elementary, this study does attempt to assess the BEPS initiatives of a range of developing and developed countries. According to the UN classification, the current study includes seven (7) developed countries and eleven (11) developing countries.[12]

While each of the jurisdictions has its own particular nuances, several are worth drawing attention to. One jurisdiction that has changed its overall tax policy significantly is China. It was one of the largest capital importers in the world but since 2014, it has become a net capital exporter. As such China is changing the basis of its international tax policy from a source state

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[8] http://dfat.gov.au/international-relations/international-organisations/g20/pages/the-g20.aspx.
[9] The Netherlands is part of the European Union which is a member of the G20.
[10] The authors note there are several ways of distinguishing continents with a range from four to seven continents recognised. We have grouped North America and South America into one and Antarctica is not represented.
[11] http://unctadstat.unctad.org/EN/Classifications.html.
[12] http://unctadstat.unctad.org/EN/Classifications/DimCountries_DevelopmentStatus_Hierarchy.pdf.

to a residence and source state. India has a unique tax system which allows 94 percent of the population (1.3 billion people) to 'fall outside of the income tax net'. Income tax is required to be paid when and if 'real' income exceeds the threshold. Agricultural income, however, is tax exempt, so as a primarily agrarian economy, this limits (by approximately 50 percent) the direct tax collected. In late 2017 the US enacted a far-reaching income tax law that made a landmark change to the taxation of multinational domestic corporations – the Tax Cuts and Jobs Act of 2017 (TCJA). This enactment is in line with the implementation of BEPS worldwide and in an attempt to make US corporations more attractive and competitive. The TCJA permanently reduced the federal domestic corporate tax rate from the highest statutory tax rate of 35 per cent to a flat 21 per cent tax. It also changed the corporate income tax from a progressive tax system, especially for small business, to a flat tax rate.

Overall, we believe that the 18 countries/jurisdictions surveyed provide a diverse group of nations which are representative of the larger population of countries facing BEPS issues and questions around the reform of their tax regime (either via the adoption of the various OECD BEPS actions or unilateral measures). Throughout the remainder of this paper we draw on these background findings to ascertain the relationship between these and the adoption of the relevant tax reform measures.

4. COUNTRY POSITIONS ON THE MLI, THE BEPS INCLUSIVE FRAMEWORK AND THE ADOPTION OF THE FOUR MINIMUM STANDARDS

An initial criticism of the G20/OECD BEPS program was its focus on developed nations and certain assumptions around what would be appropriate reform on a global level. Concern has been expressed that this focus does not take into account the views of developing nations and those who were neither members of the G20 nor the OECD. In response to this criticism, several years after commencing its BEPS Program, the OECD agreed to a new framework to allow all interested countries to join the process of international tax reform.

4.1 The BEPS inclusive framework

The BEPS Inclusive Framework is designed to allow those who join the ability to work on an equal footing with OECD and G20 members on the reform agenda moving forward. [13] Part of the stated rationale for expanding country involvement was the impact of revenue losses from base erosion and profit shifting on developing nations, which is stated to be 'particularly damaging' due to their reliance on corporate income tax revenues.[14] The mandate of the Inclusive Framework is the focus on the implementation of what are known as the four BEPS minimum standards. These four standards address: harmful tax practices, tax treaty abuse, CbCR requirements for transfer pricing and improvements in cross-border tax dispute

[13] https://www.oecd.org/tax/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm.
[14] https://www.oecd.org/tax/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm.

resolution. Each of the four BEPS minimum standards is subject to peer review to ensure timely and accurate implementation.

The Inclusive Framework proposal was endorsed by the G20 at the Finance Ministers meeting in Shanghai, China, on 26-27 February 2016 and the new framework held its first meeting in Kyoto, Japan, on 30 June – 1 July 2016. As at that date, there were 82 members, which has increased currently[15] to 116 members as of May 2018. Of the 18 countries included in this survey, all are members/signatories, with HK joining as an associate. The four minimum standards that these jurisdictions have agreed to were identified as key priority measures where action was urgent due to the potential negative spillovers if no action was taken. A peer review process is being undertaken over the period 2016 to 2020, based on individual terms of reference and methodology for each country. This is aimed at ensuring that Inclusive Framework members meet their commitment to implement the four BEPS minimum standards. Prior to a discussion of the four minimum standards we consider the position of each of the 18 countries in relation to the MLI, which allows signatories to efficiently implement measures for certain BEPS Actions automatically within their treaty network.

In terms of some specific jurisdiction experiences, overall experience has bene positive in embracing the BEPS requirements, although not all jurisdictions started that way. For example, BEPS has been a concern for India long before the start of the G20 OECD BEPS project. India has consistently raised BEPS concerns arising out of outdated and problematic international tax rules specifically on transfer pricing, permanent establishments, royalty payments, thin capitalisation, treaty abuse and digital services. India initially criticised the OECD's Model, standards and guidelines, on the basis that genuinely international standards can only be prepared with the participation of all countries, not devised solely by OECD members to protect their own interests. Only after acquiescence of the OECD and the acceptance of India (and other developing countries) as an Associate, which enabled them to participate in finalising BEPS deliverables on an equal footing with other OECD members, did India commit to the implementation of the BEPS program.

Several non-OECD member countries have played a significant role in BEPS. China, despite not being an OECD member, has been actively involved in the BEPS project. Its involvement is predicated on long-term issues stemming from tax avoidance arrangements that led to corporate income tax revenue losses in the billions (RMB 10.637 billion in 2011 – China country chapter). Since BEPS, China has attended various meetings/conferences and enacted new tax measures. It has also instructed and supervised local tax authorities in China in undertaking anti-tax avoidance measures, and added new anti-treaty abuse provisions to tax treaties when negotiating bilateral tax treaties and multilateral agreements. China has also been duly nominated as an associate of the OECD.

Prior to the OECD/G20 initiatives on combating tax avoidance, BEPS was not a substantial concern for HK with little legislation enacted to protect it. Post-BEPS, the HK government has

[15] As at May 2018, see: http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

made a concerted effort to comply with the minimum standards, whilst aiming to maintain HK's simple and low tax regime, via the enactment of new legislation. This provides the necessary legal framework for implementing the automatic exchange of information (AEOI), CbCR, transfer pricing provisions and participation in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAATM).

4.2 The MLI

As at 29 June 2018, there were 80 signatories covering 82 countries which have signed the MLI. In total some 2,500 treaties have been listed and matching has resulted in this covering a network of more than 1,200 treaties. The MLI entered into force on 1 July 2018 and, as any country is welcome to sign, the number of signatories and countries is continuing to increase. Countries can choose which treaties it lists as being part of the MLI and measures include significant reforms such as (discussed in more detail below) hybrid mismatch arrangements (Action 2), treaty abuse (Action 6), strengthening the definition of permanent establishment (Action 7), and measures to make the mutual agreement procedure more effective (Action 14).[16]

Fifteen (15) of the countries surveyed have signed the multilateral convention. The three (3) non-signatories are: Thailand, US and Vietnam[17]. As at July 2018 there is no indication if or when these nations may become signatories. Most countries signed on the 7 June, 2017 at the signing ceremony hosted by the OECD in Paris. However, of those in our group of 18 jurisdictions that were not part of the original group of signatories, Nigeria signed later on the 17 August, 2017 and Malaysia signed on the 24 January 2018.

4.3 The four minimum standards

4.3.1 Action 5: Harmful tax practices

The results of country engagement with Action 5 from the preliminary survey and country chapters demonstrate that a majority, twelve (12) countries, 50 percent of which are developed countries, have either initiated or taken actions to address this standard, whilst seven (7) countries, 86 percent of which are developing countries, have remained idle. Specifically, while most of the 18 jurisdictions included in this study have been declared to have no harmful tax practices, Thailand has a number of harmful practices. These include: the International Headquarters regime (IHQ), Treasury Centre regime (TC), International Trading Centre regime (ITC), Regional Operating Headquarters regimes (ROHs) and International Banking Facilities regime (IBF). These regimes were reviewed by the OECD's Forum on Harmful Tax Practices (FHTP), and have been scheduled to be amended or abolished, creating challenges for the Thai

[16] http://www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf.
[17] Signatories to the Multilateral Convention are available from the OECD as at 29 June 2018 at: http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

Government. Thailand has progressed the abolition (IBF) and amendment (IHQ) of some regimes, with remaining regimes under public consultation.

4.3.2 *Action 6: Tax treaty abuse*

The results of country engagement with Action 6 from the preliminary survey and country chapters demonstrate that fifteen (15) of the eighteen ~~nineteen~~ (18~~9~~) countries/jurisdictions have taken some form of action to remedy treaty abuse. This level of response may be pre-emptive due to the OECD peer reviews on preventing treaty abuse that are expected to be conducted in 2018. Within the 18 jurisdictions examined, there is considerable activity to make changes to comply with Action 6. Most jurisdictions will be making changes to a number of their DTAs to ensure they are compliant. For example, treaty-shopping issues exist in both inbound and outbound investment in China. In order to counter treaty abuse, the State Administration of Taxation (SAT) has issued circulars narrowing down the scope of eligible “beneficial ownership” and has also extended the list of the documentation which taxpayers must provide for the purpose of benefiting from treaty entitlement. Multiple anti-avoidance/abuse provisions including a principal purpose test (PPT), a limitation on benefits (LOB) and a double non-taxation provision have been added to newly completed bilateral treaties. India has begun renegotiating treaties with certain jurisdictions seen as tax havens to close loopholes in its DTAs. Indonesia has also stipulated conditions which do not constitute treaty abuse.

Thailand currently has 61 DTAs, but none of them have anti-abuse provisions consistent with Action 6 (the exception is the US-Thailand treaty has a LOB test). The inclusion of these provisions through bilateral negotiation or the MLI is yet to be decided, but the former is preferred due to flexibility. This indicates there is considerable work ahead for the Thai government.

4.3.3 *Action 13: Country by Country reporting*

The results of country engagement with Action 13 from the preliminary survey and country chapters, and updated by the specific country materials, indicate that the vast majority of jurisdictions in the sample have signed up for the multilateral competent authority agreement. The exceptions are: HK (which has been joined under the authority of China), Thailand, ~~and~~ the US and Vietnam. While most countries that have signed have enacted (or at least introduced) legislation, the SAT introduced the CbCR regime into China in July 2016 by administrative decree (through issuing Bulletin [2016] No. 42 – China country chapter). This sets out certain requirements for taxpayers to maintain and submit contemporaneous transfer pricing documentation (including a master file, local file and special issues file), despite concerns from MNEs regarding the cost and ultimate use of such reports. Overall, for those jurisdictions that have signed this agreement, they are currently in varied states of preparedness and active involvement in CbCR.

4.3.4 Action 14: Cross-border tax dispute resolution

Adoption of Action 14 by the surveyed countries is moderate, with 63 percent of the sample taking some form of action. OECD assessments in this Action are also mixed with nine (9) reviews of the surveyed countries scheduled, three (3) reviews deferred due to the country's status as developing economy and six (6) reviews conducted.[18] Largely it is the developing countries that have the most work to do. The SAT in China is experiencing a greater number of tax disputes. This is particularly challenging as China's DTAs all provide for mutual agreement procedures (MAPs) without any mediation or arbitration options, and China has refused to adopt the arbitration option under the MLI. China's approach to dispute resolution is to enhance/detail the MAP process for taxpayers when filing applications involving treaty-related disputes or transfer pricing related disputes.

As of mid-2018, Indonesia had not yet enacted any specific measures in response to Action 14. Thailand has yet to amend all of its 61 DTAs with respect to the MPA to meet the minimum requirements of Action 14. However, procedures to resolve disputes through MAPs and to prevent disputes through advance price agreements (APAs) have been included in almost all of Indonesia's 67 DTAs. Both the Netherlands and Singapore have been peer reviewed for Stage 1 of Action 14; both have some improvements to be made but are considered to be largely compliant.

5. ANALYSIS OF THE ADOPTION OF THE REMAINING BEPS ACTION ITEMS

5.1 Action 1

In relation to the 18 countries/jurisdictions surveyed, the level of engagement with Action 1 is moderate and divergent. Twelve (12) of the eighteen (18) surveyed countries have taken some form of action to address the challenges of the digital economy, with one (1) country, the Netherlands, indicating that legislation has "already (been) implemented into domestic law" (Netherlands country chapter). Other countries, such as Australia, have reformed laws in relation of the GST on supplies of digital products and other imported services by non-residents to Australian customers. NZ has a policy proposals under consideration at present largely following Australia's lead.

Those countries/jurisdictions that have not acted indicate that there are no specific legislative changes or proposals required in response to Action 1, or that due consideration is being given. For example, as at the end of May 2018, the Chinese government had not enacted any new income tax measures in this area or legislated a source rule with regard to the digital economy. China accepts that it will need to reform its tax system and/or tax treaties to deal with digital economy (China country chapter). Similarly, Indonesia has not enacted specific legislation to address the recommendations on Action 1, yet it is considered to be "the fastest growing

[18] A review of the Philippines was part of the preliminary country survey, but has not been included as it is not an inclusive member of the BEPS program and no country chapter author has been secured to provide further input.

internet market in the world" (Indonesia country chapter). Thailand faces similar challenges, being the third largest e-commerce market (Thai country chapter).

5.2 Action 2

In relation to the 18 countries/jurisdictions surveyed, the level country engagement with Action 2 is moderate, with nine (9) countries taking some form of action and nine (9) reserving their response. Country response can be tied to the level of development with 86 percent of developed countries taking action and 55 percent of developing countries remaining silent. This is none area where considerable work remains to be done. A focus area for reform concerns fiscally transparent entities, namely legal entities where their income "flows through" to investors or owners, being treated as the income of the investors or owners. The US, while not fully committed to BEPS, is taking a slightly different approach. Specifically, new legislation provides that a US interest or royalty tax deduction will be denied if the recipient is a related foreign hybrid entity, to the extent that such amounts are not included in the counterparty's taxable income.

5.3 Action 3

Interestingly, given the low number of countries/jurisdictions which have CFC regimes in place, surveyed country engagement with Action 3 is strong. A total of 72 percent of countries indicate compliance (9 countries) or proactivity (4 countries) in CFC legislation. Notably, however, this response is being driven by developed economies with the remaining 28 percent of countries that have not engaged with Action 3 representing developing economies. For example, when the CFC rules were introduced in China in 2008 as part of the Enterprise Income Tax Law, these rules may appear to have been drafted in a very limited and ambiguous way when compared with the suggestions in Action 3 (China country chapter). As HK applies the territorial source principle and dividends are not subject to tax, the CFC company rules do not exist in the tax statutes in HK, and as such Action 3 has no real relevance to the jurisdiction.

Singapore does not have a CFC regime, and thus Action 3's recommendations in relation to the strengthening of CFC rules are not relevant. The US applies the Global Intangible Low-Taxed Income (GILTI) provisions, with the stated intention to discourage US corporations from operating abroad in low tax countries (US country chapter). Overall, the CFC rules is an area that many developing jurisdictions are grappling with.

5.4 Action 4

Engagement with Action 4 in the 18 countries/jurisdictions surveyed is moderate, with twelve (12) of the eighteen (18) countries indicating compliance (7 countries) or proactivity (5 countries). Consistent with the results reported for Action 3, this result appears to be driven by developed countries, with 80 percent of non-adopters being developing countries. Limited reasoning has been proffered to explain this inaction, but references are made to the suitability of existing income tax legislation (Australia, Canada, South Africa country chapters).

Interestingly, HK does not have thin capitalisation rules. Rather, it has in place specific anti-avoidance provisions that limit interest deductions in certain circumstances, in particular those relating to interest paid to non-residents. The HK Inland Revenue Department (HKIRD) may review the interest deduction rules in HK, but this is not considered a matter of urgency (HK jurisdiction chapter). A number of jurisdictions are in the process on introducing interest deduction limitations.

In NZ, its reportable tax position (RTP) approach differs to the usual international approach, and as such is expected to cause a number of problems, including (as per the NZ country chapter):

- Capturing more MNEs due to extended definition of an associated person;
- Only applying to inbound debt, with IRD still expecting outbound debt to be priced under OECD principles; and
- Will result in double taxation.

5.5 Action 7

Eleven (11) surveyed countries/jurisdictions report proactive engagement with Action 7 on the basis of revisions suggested by the multilateral instrument (MLI) (Australia, China, India, NZ, Singapore and the UK), although some jurisdictions indicate reservations on adopting all recommendations. Engagement with this Action does not appear to be driven by the level of country development. China and Singapore, for example, have reserved their rights in the MLI not to apply the permanent establishment (PE) provisions in whole or in part. HK introduced an amendment to its Income Tax Ordinance in 2018 which completely adopts Action 7 on PE thresholds – guidance from the HKIRD will follow (HK jurisdiction chapter).

Most jurisdictions have made some reservations against the new PE requirements with respect to their adoption of the MLI. For example, the NZ approach has been to introduce statutory amendments to update the source rules, expanding the PE concept. There remains some concern over the statutory language that will be used as to their exact meaning and coverage (NZ country chapter). The amendments provide that (NZ country chapter):

- The PE rules specifically targets situation such as direct sales facilitated locally (this is the same as the Australian Multinational Anti-Avoidance Law (MAAL));
- It overrides DTAs (a protective measure if the counterparty did not sign up to the MLI); and
- It only applies to large MNEs.

5.6 Actions 8-10

In the context of surveyed countries, engagement with Actions 8-10 is moderate, with twelve (12) of the eighteen (18) countries surveyed responding to recommendations. Two (2) countries (India and the Netherlands), have suggested that existing transfer pricing policy is consistent with BEPS guidance and as such are unlikely to make changes. Indeed, the Indian government has pointed out that it is in fact the OECD that has corrected itself and brought itself around to the Indian position (Indian country chapter). Other jurisdictions, such as NZ and Nigeria, have endorsed and are implementing the "*strengthened*" OECD guidelines (NZ will specifically adopt the OECD's TP guidelines - NZ country chapter).

The HK government recently codified the arm's length principle, generally following the OECD TP Guidelines. The amendment to the IT Ordinance that introduced the regulatory transfer pricing framework is very comprehensive (162 pages), takes a strict approach to determining the arm's length price (HK country chapter). This follows a common theme in other jurisdictions where TP approaches were not seen as aligning with the OECD's TP Guidelines.

5.7 Action 12

Within the surveyed countries, engagement with Action 12 is limited, with only six (6) jurisdictions responding to recommendations. One (1) country, the US, has indicated that "*Existing US law has statutory and regulatory disclosure rules for aggressive tax planning. Therefore there are no active proposals for change*" (US country survey). The novelty of this Action, along with the difficulty of convincing corporations to accept and implement recommendations could be primarily responsible for inactivity here. South Africa introduced a disclosure requirement on taxpayers in 2005, and has subsequently been incorporated into its Tax Administration Act. This approach was used as a benchmark for the final BEPS Action 12 recommendations (SA country chapter).

5.8 Action 15

Engagement with Action 15 among surveyed countries is strong, with only one developing countries remaining inactive, namely Vietnam. The US, consistent with its response to Action 12, has "*not indicated any intention to modify the US model convention to conform to the multilateral instrument released by the OECD.*" Indeed, the US believes that its current DTAs are sufficient, although it is leased that the MLI includes mandatory binding arbitration which the US has long been a strong proponent of (US country survey and chapter). Most other proactive jurisdictions (China, HK, Korea, Malaysia, the Netherlands, NZ, Nigeria and SA) have expressed their intention to "*adopt as many MLI provisions as possible*" (specific comment made for NZ – see preliminary country survey).

The Netherlands government has noted that not all countries are willing to take such action, opting for the four BEPS Minimum Standards only to be covered as per their commitment under the MLI. This means that other provisions will only be included depending on the approach of the various countries in question, and may create an inconsistent application of the MLI and the mismatching of choices made by countries may result in multiple mini-treaty negotiations (Netherlands country chapter).

6. UNILATERAL RESPONSES BY JURISDICTIONS

Of the countries surveyed, only Australia, China, the Netherlands, NZ, Nigeria, UK and US have adopted specific unilateral measures to address tax avoidance. Five (5) of these jurisdictions are developed and two (2) are developing countries. That is, 63 percent of developed nations have adopted unilateral measures, whilst 18 percent of developing jurisdictions have adopted unilateral measures. The unilateral measures which have been adopted to date can be categorised as administrative, transparency and anti-avoidance measures and are discussed separately in the following sections.

6.1 Administrative measures

Administrative measures involve legislation that has been enacted to address the operation of a corporation. Only one surveyed countries has clearly adopted administrative measures to combat BEPS: Indonesia's unilateral measures include (Indonesia country chapter):

- consideration of a withholding tax for e-commerce transactions; and
- emphasis of the 'special relationship' concept which allows the Director General of Taxation (DGT) to determine the 'fair' taxable income derived from transactions between related parties; and tightening thin capitalization and CFC rules.

Overall, the measures adopted include: regulation regarding dividends and tax treaties; dedicated transfer pricing and exchange of information units; and amendments to municipal legislation.

6.2 Transparency measures

Transparency measures are policies that have been designed/adopted to enhance the transparency of a corporation. Only three (3) surveyed countries have adopted transparency measures to combat BEPS: Australia, China and Indonesia. Australia has introduced tax transparency laws that require the Australian Tax Office (ATO) to publicly disclose tax information of public and private companies and a tax transparency code that encourages the disclosure of tax and accounting information of businesses.

China has adopted new general anti-avoidance rules (GAAR) and guidance. Furthermore, in the SAT's opinion, the capital gains derived from such offshore share transfers should be taxed in China if the transfer of shares equates to selling an equity interest. Another notable measure (commencing September 2018) involves financial institutions in Mainland China checking and collecting tax-related information from financial accounts owned by non-residents and then submitting them to Chinese tax authorities for information exchange in compliance with the Common Reporting Standard (CRS) (China country chapter). Thailand is in the process of making numerous changes, including improving reporting accuracy and providing extended powers to collect third party information.

6.3 Anti-avoidance measures

Anti-avoidance measures involve legislation that has been enacted to combat tax avoidant corporate behaviour. Anti-avoidance measures have been instituted by approximately half (47 percent) of the countries surveyed. Australia has enacted the multi-national anti-avoidance law (MAAL) and the diverted profits tax (DPT) to ensure multinational companies pay a fair share of tax on profits earned in Australia. New Zealand is considering the possibility of a DPT. China is monitoring off-shore payments (see discussion in 6.2).

India has implemented a number of rules, many of them being anti-avoidance in nature (India country chapter):

- Place of Effective Management Rules (POEM) contain a tie breaker rule for determining company residence;
- Black Money Act penalises the concealment of foreign income with the assistance of a special investigative team (this is a major political issue in India);
- Taxation Laws Act enables taxation on undisclosed income;
- Prevention of Money Laundering Act (PMLA) facilitates the recovery of proceeds of crime taken out of the country;
- Fugitive Economic Offenders Bill seeks to prevent the escape of indebted businesspersons and allows the government to confiscate their properties; and
- the development of an architecture (common transmission system) for secure and rapid AEOI under the guidance of the Forum on Tax Administration (FTA).

Indonesia is focused on base erosion through debt, while the Netherlands is implementing anti-abuse clauses into new and existing treaties. Nigeria is developing personal and company anti-avoidance rules, and the UK has implemented a diverted profits tax (DPT) like Australia. SA has implemented a number of anti-avoidance measures, including legislation that counters structures used to convert taxable dividends into returns of capital or amendments to claw back certain participation exemption benefits where a person ceases to be a tax resident in SA. The US has enacted the base erosion anti-abuse tax (BEAT) provision and increased penalties.

6.4 Tax administration

Looking at a few of the significant changes to tax administration generally, the Chinese government decided in March 2018 to cease China’s 24-year experiment with dual central and provincial tax administrations, and to mandate the absorption of provincial tax administrations into the SAT. The bifurcated tax administrative structure involving incompatible data systems has been detrimental to effective tax administration and combating tax avoidance (China country chapter). Indonesia has undertaken a number of initiatives, including introducing a tax amnesty programme, which offers both tax incentives and immunity from prosecution (it is aimed to make it attractive for non-compliant taxpayers to declare their offshore and/or domestic assets to the Indonesian tax authorities).

The Malaysian Inland Revenue Board (Malaysia IRB) established a special audit unit, known as the Aggressive Tax Planning Unit, to focus on local and cross-border tax planning measures adopted by corporations operating in Malaysia. NZ is undergoing a significant overall of its entire tax information system, through the Business Transformation programme.[19] Business Transformation is intended to make the tax system more certain, at least with respect to administration functions. From an international tax perspective, MNEs will need utilise the new systems and platforms just like other business taxpayers (NZ country chapter). Thailand acknowledges that it needs major changes to its tax administration so as to facilitate the effective operation of the BEPS Action Plan.

6.5 Summary of country/jurisdiction analysis

When examining the relative positions of the jurisdictions, they fall into two main groups. The first contains those fully engaged in the BEPS process that have put in place all, or almost all, of the legislative and administrative changes to give effect to the BEPS Action Plan. The second group are the remaining jurisdictions that have some way to go as they seek to 'rise to the challenges' involved. In many respects, the developed countries/jurisdictions fall predominately into the former category, and the developing countries in the latter. Exceptions include the US which has not formally adopted the BEPS Action Plan, with the future is hard to predict, especially with the wild swings that have been occurring under the current administration and the composition of the two branches of the US Congress.

Where a jurisdiction has met the BEPS Action Plan's expectations, this does not mean that their work is over. Jurisdictions need to ensure they meet the ongoing requirements, such as exchanging of information, ratifying and implementing the MLI (which will take a number of years) through negotiating changes to their DTAs, as well as engaging with other jurisdictions' approaches to BEPS. There will be challenges in reconciling conflicts between domestic legislation and international expectations under BEPS. For example, with China changing from a pure source state to a mixed role of being both a source state and a residence state, conflicts of interest are arising in China's domestic tax policy as well as in its treaty policies (China country chapter).

Singapore is concerned with the prospect of uneven implementation of the BEPS Action Plan across jurisdictions. For instance, if opportunities for regulatory arbitrage were to arise from

[19] See further: Simon James and Adrian Sawyer, "Digitalization of Tax: Comparing New Zealand and United Kingdom Approaches", *Paper presented at the Thirteenth International Tax Administration Conference*, Sydney, 5-6 April 2018, NSW, Australia.

poor execution or weak enforcement, then the ‘remedy may prove to be worse than the disease’. In this respect, Singapore has suggested that international bodies such as the OECD and G20 may wish to consider possible enforcement or sanction measures that could guard against any perverse incentive that may arise from the competitive advantage secured by non-participation, incompatible unilateral measures or deliberate. Separately, the influence of MNEs and their lobby groups should not be underestimated. In this regard, Singapore suggests that there may be merit in introducing appropriate sanctions or penalties against MNEs that repeatedly flout the rules generated by the BEPS Action Plan (Singapore country chapter).

8.0 OVERALL CONCLUSIONS

In summary, the intent of the paper is to provide a high level summary of our preliminary analysis of key BEPS reforms, supplemented by the in-depth country/jurisdiction reports authored by experts within each of the jurisdictions. As the project is not expected to be completed until early 2019, our findings, as provided in the paper, will be provisional. Furthermore, it is not possible to capture all of the key country/jurisdictions’ responses in this paper – this will be left to the future book publication. We are very much looking for the comments and perspectives of conference attendees as we work to finalise the larger project. This input from attendees will assist us in ensuring that the project provides relevant and insightful information, and its outputs will be a frequent source of reference for anyone interested in tax design and administration in a post-BEPS environment.

In relation to our six research questions, the analysis in the preceding sections summarises the responses from the country authors for the 18 jurisdictions. What can be seen is considerable diversity in preparedness for implementation of BEPS, as well as a variety of responses to several of the BEP Actions. Our attempt a providing an overall country score is designed to indicate the extent to which each jurisdiction has responded to and implemented the BEPS Actions (along with implemented any unilateral responses).

Even when the larger work is complete, this research comes with a number of limitations. We have based our analysis on experts in the countries/jurisdictions surveyed. Their contributions provide a picture at a fixed point in time, and as such may not capture fully the most recent developments. We have also selected a limited number of jurisdictions. While we hoped to have a few more, including the Philippines by way of contrasts as a country that has not engaged with BEPS at all, the combination of developed and developing nations from most areas around the globe offers valuable insights. There is a deliberate focus on South East Asia as this is the area our funders are keen to see represented. This part of the world in many respects is seeing the fastest growth, and outside of Africa, is facing some of the greatest challenges to implement the BEPS Action Plan.

Future research could include a review in two to three years’ time once the 18 jurisdictions have all completed their ratification and implementation processes for the BEPS Action Plan, and a preliminary assessment of their effectiveness can be undertaken. This will also enable a preliminary review of the countries/jurisdictions use of the MLI to amend their DTAs.