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Jurisdictional responses to base erosion and profit shifting: a study of 19 key domestic tax systems

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Abstract

The initial stage of the G20/OECD BEPS program is complete, with 15 recommendations released in October 2015. However, OECD recommendations require national jurisdictions to implement each Action item and this is not necessarily occurring consistently. The objective of this article is to consider the implementation of both G20/OECD BEPS initiatives and unilateral reforms in 19 jurisdictions to advance the knowledge of the profession and the global community. This article provides the preliminary results of a study into these 19 jurisdictions. It analyses the status of each jurisdiction in terms of region, developing or developed economy status, and whether it is a net exporter or importer. It then considers each jurisdiction's position on the BEPS inclusive framework and the extent of the adoption by each of the four minimum standards of Actions 5, 6, 13 and 14 as well as the adoption of the remaining BEPS Action items. Unilateral responses to address base erosion and profit shifting are then analysed and a summary of the current position of the 19 jurisdictions surveyed along with a BEPS adoption ranking is provided.

Key words: tax design, tax reform, BEPS, BEPS Inclusive Framework

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1. INTRODUCTION

In an increasingly global tax world it is essential that the profession understands first the global program of international tax reform and second the way in which key market jurisdictions have incorporated this reform into their domestic tax policy. The initial stage of the G20/OECD BEPS program is complete, with 15 recommendations released in October 2015. However, recommendations of the Organisation for Economic Co-operation and Development (OECD) require national jurisdictions to implement each Action item and this is not necessarily occurring 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 this study is to consider the implementation of both G20/OECD BEPS initiatives and unilateral reforms in 19 jurisdictions, to advance the knowledge of the accounting profession and the global community in terms of enhanced tax reporting and compliance requirements, which are an outcome of the G20/OECD BEPS program. The jurisdictions examined are Australia, Canada, China, Hong Kong SAR, India, Indonesia, Japan, Korea, Malaysia, the Netherlands, New Zealand, Nigeria, Philippines, Singapore, South Africa, Thailand, the United Kingdom, the United States and Vietnam. The rationale for selecting these 19 jurisdictions was to ensure a diverse group of nations were covered and this is evidenced in section 2 of this article which describes the jurisdictions and their global positioning. As such, this article reports the results of a jurisdictional survey completed using information available in the public domain on these 19 jurisdictions as well as information provided by contributors to the larger project which was developed into a book and published in January 2019.

A qualitative approach is undertaken in this study alongside an overarching interdisciplinary socio-legal and accounting-transparency position. This position involves an analysis of theoretical, legal and policy concepts within both a social and current legal and accounting context. The research questions are addressed within the legal and accounting frameworks of the abovementioned jurisdictions, using current policy discussions to assess domestic developments of the OECD's global BEPS recommendations. In particular, the article investigates the response of each jurisdiction to the G20/OECD BEPS program of tax reform, and considers their position on the BEPS inclusive framework and their response to BEPS in terms of unilateral administrative, transparency and anti-avoidance reforms.

The remainder of the article is structured as follows. Section 2 provides a summary and analysis of relevant background information such as whether each country is a member of the OECD and/or G20. It also discusses the status of each jurisdiction in terms of region, developing or developed economy status, whether it is a net exporter or importer and adds any other relevant comments. Section 3 then considers each jurisdiction's position on the BEPS inclusive framework and the extent of the adoption by each of the four minimum standards of Actions 5, 6, 13 and 14. Section 4 goes on to expand section 3 by providing an analysis of the adoption of the remaining BEPS Action items. Unilateral responses to address base erosion and profit shifting are analysed in section 5. Finally, section 6 provides a summary of the current position of the 19 jurisdictions surveyed along with a BEPS adoption ranking. This ranking is based on public information available to determine the categorisation of each jurisdiction's adoption of

the BEPS initiatives as at July 2018. To this extent, a certain degree of judgement was required by the authors.

2. JURISDICTIONS AND THEIR GLOBAL POSITIONING

A project that embarks on a comparison between jurisdictions can inevitably make underlying assumptions which are erroneous, the most grievous of which are that each jurisdiction operates using the same policies and principles due to the desire for the same outcomes. No doubt, all jurisdictions considered in this study wish to raise revenue from taxes, but not all of them face the same degree of base erosion and profit shifting at a domestic level, and each is aware of the dichotomy between tax competition and tax cooperation. Further, jurisdictions 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.[1] In this part of the article, 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 jurisdiction.

2.1 OECD membership

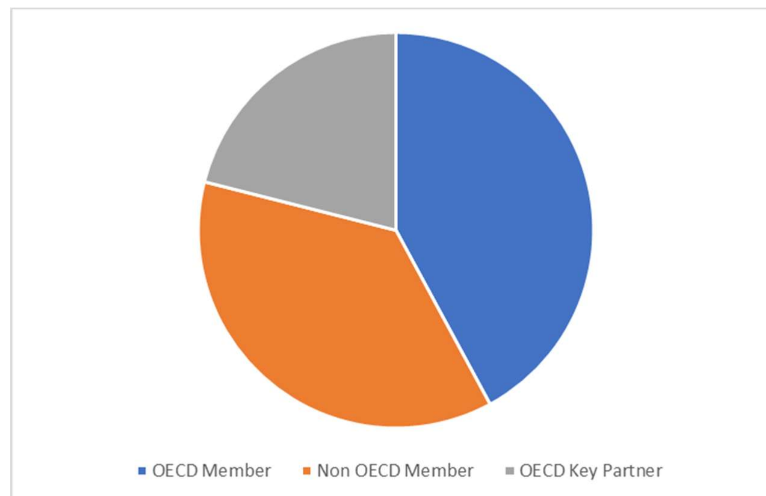
The Organisation for Economic Co-operation and Development (OECD), founded in 1961 with the aim of promoting policies that improve the economic and social well-being of people around the world, is an intergovernmental economic organisation made up of 36 countries and five key partners.[2] Key partners are those countries which are not full member countries but do have an elevated status and contribute to the OECD's work in a 'sustained and comprehensive manner'.[3] The relevance of OECD membership to this project is the role that it has played in the development of the base erosion and profit shifting (BEPS) program which the OECD commenced in 2012 at the request of the G20. 'Base erosion and profit shifting' refers to tax avoidance strategies that exploit *gaps and mismatches* in the tax rules to artificially shift profits to low or no tax jurisdictions where there is little or no economic activity.'[4]

The BEPS package provides 15 Action items which are designed to equip governments with both domestic and international instruments to tackle the problem of BEPS. Perhaps the biggest criticism of the initial investigations by the OECD into BEPS was their lack of inclusion of developing nations due to the OECD's developed nation status. This criticism stems from the narrowness of its membership which is limited to what are perceived as wealthy countries. Notably, 'OECD member countries account for 63 percent of world GDP, three-quarters of world trade, 95 percent of world official development assistance, over half of the world's energy consumption, and 18 percent of the world's population'.[5]

[1] For a comprehensive discussion on the issues facing developing countries, see Durst (2017).
[2] OECD, 'About the OECD', http://www.oecd.org/about/.
[3] OECD, 'Members and partners', http://www.oecd.org/about/membersandpartners/.
[4] OECD, 'About the Inclusive Framework on BEPS', http://www.oecd.org/tax/beps/beps-about.htm (emphasis in original).
[5] See US Mission to the Organization for Economic Cooperation and Development, https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd/.

In the current survey of jurisdictions, we investigate the status of eight (8) OECD member countries, four (4) OECD key partner countries and seven (7) non-member countries. Member countries are Australia, Canada, Japan, Korea, the Netherlands, New Zealand, the United Kingdom, and the United States. OECD key partner countries are India, Indonesia, China and South Africa, while non-member countries are Hong Kong SAR,[6] Malaysia, Nigeria, the Philippines, Singapore, Thailand and Vietnam. In terms of the jurisdiction composition of the study, this represents 42% member countries, 21% key partner countries and 37% non-member countries. Figure 1 diagrammatically depicts the percentage of OECD member countries, key partner countries and non-member countries.

Fig. 1: Percentage of OECD Member, Non-Member and Key Partner Countries



2.2 G20 membership

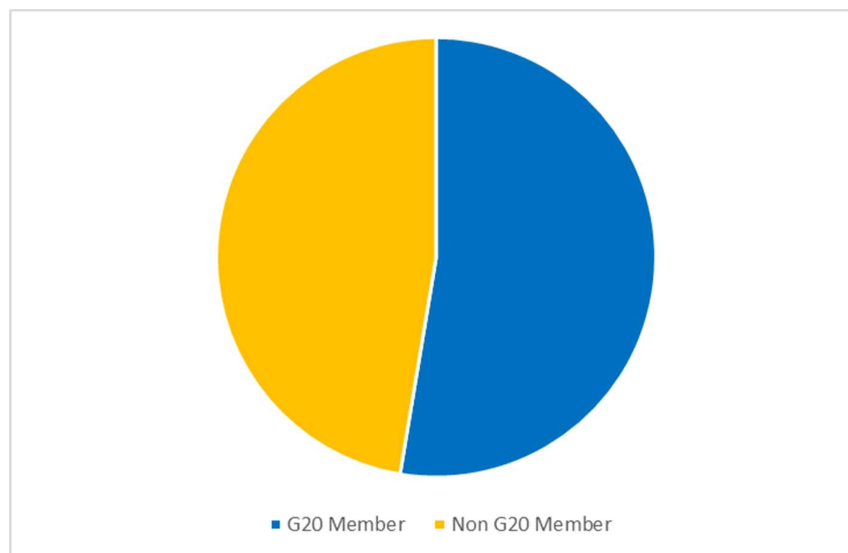
While the OECD took the lead in the BEPS program of tax reform, it did so at the request of the G20. The G20 began discussing the need for tax cooperation in 2008, after the Global Financial Crisis, and in 2012 it initiated the BEPS project. The 2012 G20 summit referred to the need to prevent base erosion and profit shifting and asked the OECD to develop an action plan. That plan, which outlined 15 actions to be investigated, provided the core areas which the OECD saw as needing to be addressed to curb the practices being adopted by taxpayers to avoid paying taxes in the locations of genuine economic activity. Consequently, the initial countries involved in the BEPS program comprised a broader group than the category of OECD members and extended to a limited number of developing countries.

The initial involvement by G20 members significantly expanded the global reach of the BEPS program. In contrast with the relevant OECD figures, 'G20 members account for 86 per cent of the world economy, 78 per cent of global trade, and two-thirds of the

[6] The authors recognise and acknowledge the status of Hong Kong SAR as a special administrative region of China and, as such is not a separate country.

world's population, including more than half of the world's poor'.[7] In the current survey of jurisdictions, we investigate the status of ten (10) G20 members and nine (9) non-members. This represents 52% G20 members and 47% non-members. 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. It is however interesting to note that both New Zealand and the Netherlands[8] are OECD members but do not have G20 member status. Figure 2 diagrammatically depicts the percentage of G20 members versus non-members.

Fig. 2: Percentage of G20 Members and Non-Members



2.3 Regional representation

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, the authors have attempted to include jurisdictions from the continents of Australia/Oceania, America, Africa, Asia, and Europe.[9] 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 jurisdictions provide valuable insights into variations from the themes ascertained in these regions. Figure 3 diagrammatically depicts the geographical representation of the jurisdictions included in this study.

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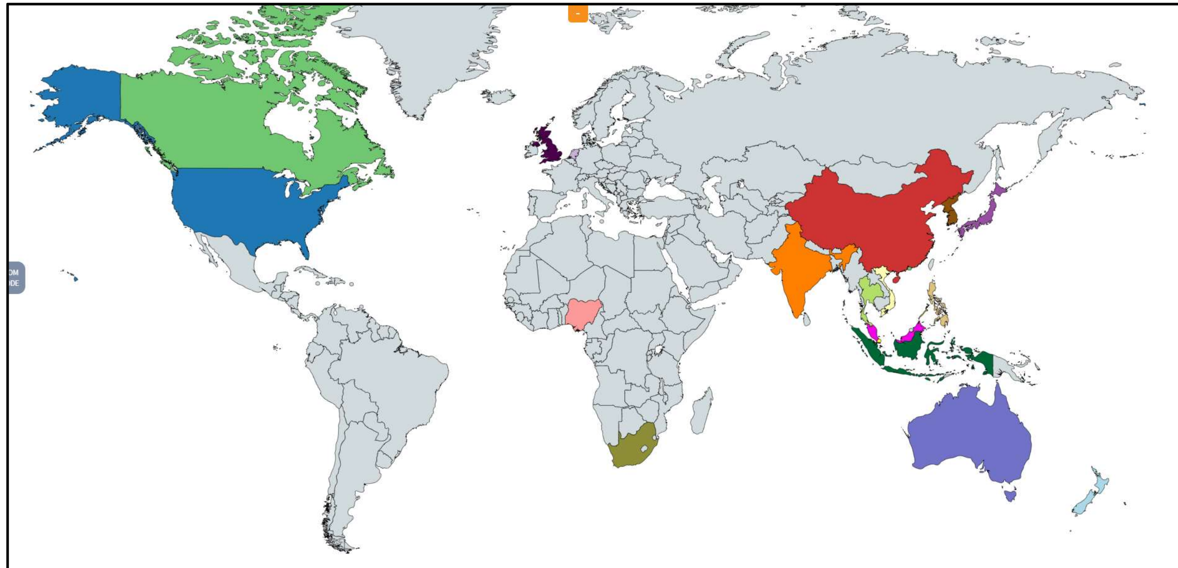
[7] Australian Government, Department of Foreign Affairs and Trade, 'The G20', http://dfat.gov.au/international-relations/international-organisations/g20/pages/the-g20.aspx.
[8] The Netherlands is part of the European Union which is a member of the G20.
[9] The authors note there are several ways of distinguishing continents with from four to seven continents recognised. We have grouped North America and South America into one and Antarctica is not represented.

Fig. 3: Geographical Representation in the Study



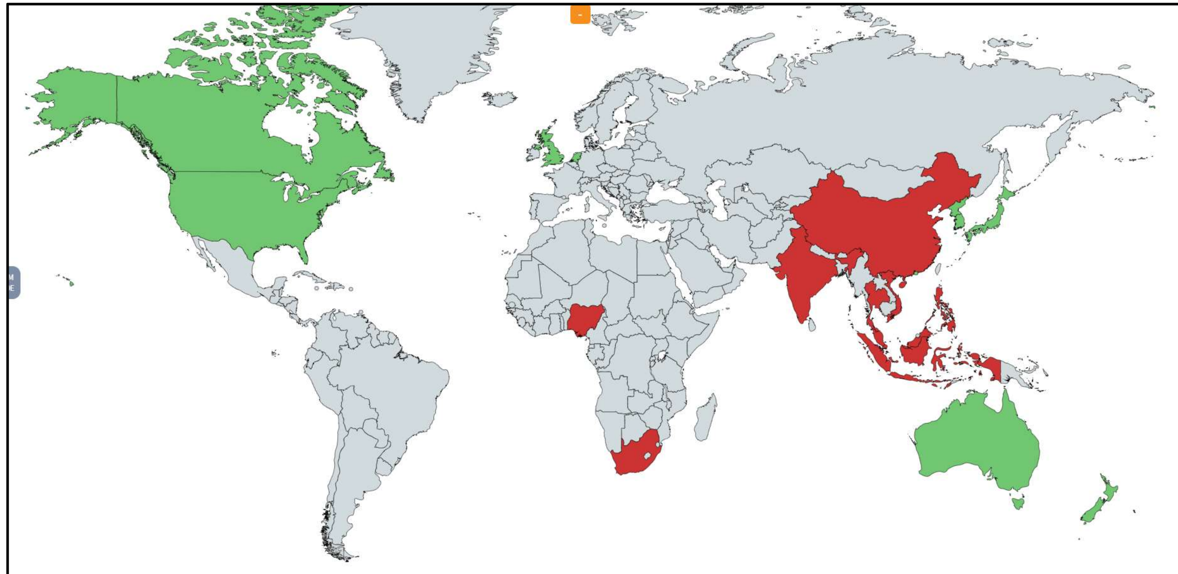
Source: Generated by authors from https://mapchart.net/world.html.

2.4 Developing versus developed jurisdiction status

As noted in sections 2.1 and 2.2 above, 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 jurisdiction is developing or developed and in 2016 the World Bank determined to no longer distinguish between the two categories in its world development indicators. The United Nations 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.[10] While it is recognised that these distinctions are rudimentary at best, this study does attempt to assess the BEPS initiatives of a range of developing and developed jurisdictions. According to the United Nations classification, the current study includes seven (7) developed jurisdictions and twelve (12) developing jurisdictions (UNCTAD, 2017). Figure 4 diagrammatically depicts the developing/developed jurisdictional status of the nations included in this study.

[10] United Nations Conference on Trade and Development (UNCTAD), 'Country classification', http://unctadstat.unctad.org/EN/Classifications.html.

Fig. 4: Developing and Developed Jurisdictional Status

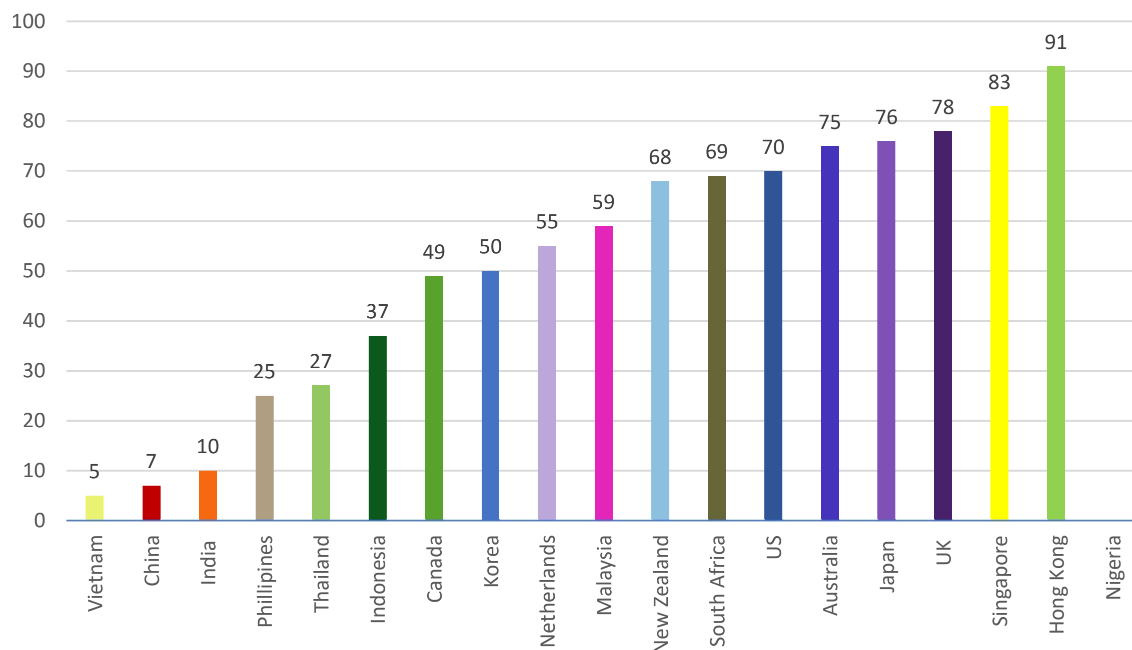


Key: green - Developed, red – Developing
Source: Generated by authors from https://mapchart.net/world.html.

2.5 Financial complexity

Taxpayers face varying degrees of complexity in accounting and tax compliance, especially when operating globally. Complexity can be measured in numerous ways but, for the purposes of comparison in this study, the TMF Group Financial Complexity Index 2017 (TMF, 2017) is used. The study ranks 94 jurisdictions according to four weighted complexity parameters: compliance (cross-border transactions, corporate representation, data storage requirements and methods); reporting (legal regulations, local reporting process and fiscal representation); bookkeeping (accounting regulations, corporate representation and technology); and tax (tax registration, compliance regulation and types of taxes). With a ranking of 1 being the highest level of complexity and 94 being the lowest, the sample of 19 jurisdictions represented in the current study ranges from a complexity level of 5 (Vietnam) to 91 (Hong Kong SAR). Nigeria was not included in the TMF Group Index and hence does not have a ranking. Figure 5 diagrammatically depicts the complexity ranking of the relevant jurisdictions.

Fig. 5: Financial Complexity Ranking



An analysis of the developing versus developed jurisdiction status in combination with the complexity rankings indicate that developing jurisdictions have a greater financial complexity (average 39/94[11]) for accounting and tax compliance[12] than developed jurisdictions (67/94). This difference was also found to be statistically significant (*t*-stat 2.30, *p*-value 0.03).

2.6 Import versus export status

Whether a jurisdiction is a net importer or net exporter may also affect their fiscal policy as well as their prioritisation of reform measures to address base erosion and profit shifting. The status of each of the surveyed jurisdictions as a net exporter or net importer was determined by comparing the dollar value of the jurisdiction's net imports and exports. The data was ascertained from the Observatory of Economic Complexity using 2016 figures.[13] Nine (9) of the jurisdictions were determined to be net exporters and ten (10) net importers, although at times the categorisation occurred due to small differences between imports and exports. China, Indonesia, Japan, Korea, Malaysia, the Netherlands, Singapore, Thailand and Vietnam are all considered net exporting jurisdictions while Australia, Canada, Hong Kong SAR, India, New Zealand, Nigeria,

[11] The higher the Financial Complexity Index ranking, the lower the financial complexity, i.e., the most complex jurisdiction is ranked 1.

[12] Financial complexity for accounting and tax compliance, as suggested by the TMF Group (TMF Group, 2017), is related to the ability of a person to stay financially compliant in the jurisdiction the person is operating in. They suggest that the level of complexity is determined by issues with language, the number of tax articles and legislation changes, the layers of government (e.g., federal, state and municipal), the categories of tax (income, property and consumption) and the frequency of audits.

[13] Observatory of Economic Complexity, https://atlas.media.mit.edu/en/.

the Philippines, South Africa, the United Kingdom and the United States are considered net importing jurisdictions. Neither OECD membership nor G20 membership is aligned with these trading positions. Taking into account the complexity rankings discussed in section 2.5, net exporting jurisdictions on average have higher financial complexity (44 out of 94) than net importing jurisdictions (59 out of 94).

2.7 Observations on global positioning of surveyed countries

Overall, we believe that the 19 jurisdictions 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 this article we draw on these background findings to ascertain whether there is a correlation between these and the adoption of the relevant tax reform measures.

3. BEPS Inclusive Framework

As discussed in section 2.1, 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 without taking 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.

Announced on 23 February 2016, 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 (OECD, 2016). 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 the reliance of these countries on corporate income tax revenues (OECD, 2016). The mandate of the Inclusive Framework is a focus on the implementation of what are known as the four BEPS minimum standards. These four standards address harmful tax practices, tax treaty abuse, Country-by-Country Reporting requirements for transfer pricing and improvements in cross-border tax dispute 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 group held its first meeting in Kyoto, Japan, on 30 June-1 July 2016. As at that date, there were 82 members, which had increased to 113 members by March 2018 and to 115 by May 2018 (OECD, 2018c). Of the 19 jurisdictions included in this survey, all except the Philippines are members. 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 will be undertaken from 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. Before discussing the four minimum standards, we first consider below the position of each of the 19 jurisdictions in relation to the Multilateral Convention to Implement Tax Treaty Related

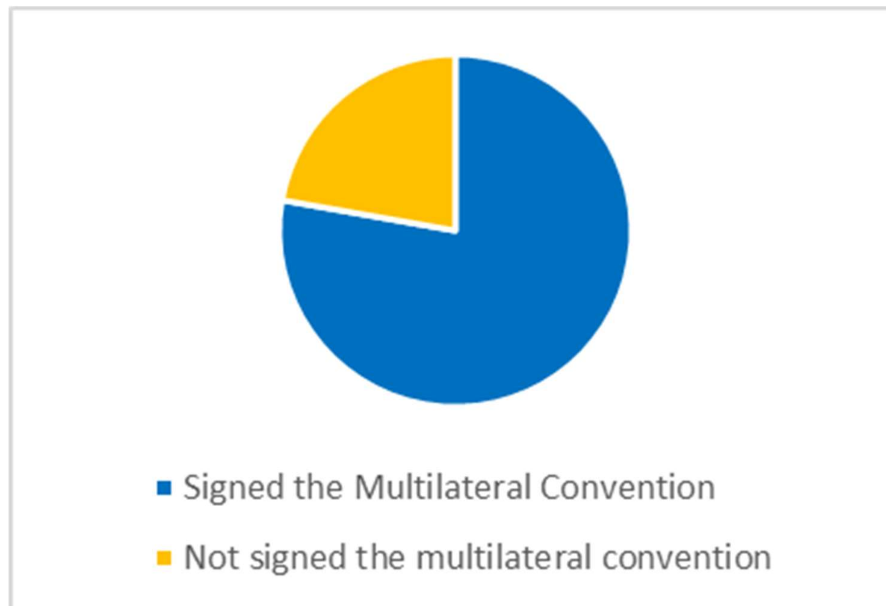
Measures to Prevent BEPS (MLI), which allows signatories to efficiently implement measures for certain BEPS Actions automatically within their treaty network.

3.1 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI)

As at 27 September 2018, there are 84 signatories covering 86 countries which have signed the MLI. Two thousand-five hundred treaties have been listed and matching has resulted in this covering a network of more than 1,200 treaties. The MLI is due to enter into force on 1 July 2018 and, as any country is welcome to sign, the number of signatories and countries is increasing. Countries can choose which treaties it lists as being part of the MLI and measures include significant reforms such as (discussed in more detail in section 4 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) (OECD, 2018a).

Fifteen (15) of the jurisdictions surveyed have signed the Multilateral Convention. The four (4) non-signatories are the Philippines, Thailand, US and Vietnam.[14] This distribution is depicted in Figure 6. Most jurisdictions signed on 7 June 2017 at the signing ceremony hosted by the OECD in Paris. However, Nigeria signed later, on 17 August 2017, and Malaysia signed on 24 January 2018.

Fig. 6: Signatories to the MLI



[14] Signatories to the Multilateral Convention are available from the OECD as at 22 March 2018 as listed in OECD (2018b).

3.2 Harmful tax practices (HTP)

The first of the minimum standards, Action 5 entitled 'countering harmful tax practices more effectively, taking into account transparency and substance', revamps the work of the OECD on harmful tax practices. The key priority under this Action is improving transparency with an emphasis on compulsory spontaneous exchange on rulings related to preferential regimes. Action 5 contains two elements: first, the identification through peer review of preferential tax regimes which can facilitate base erosion and profit shifting and, second, compulsory spontaneous exchange of relevant information on taxpayer-specific rulings which may give rise to BEPS concerns. The first element is aimed at addressing issues around ensuring the location of taxation is the same as the location of the underlying economic activity. This is reflected in the minimum standard requiring that regimes meet a substantial activity test. The common example used is that of intellectual property where regimes (for example, patent boxes) comply with the nexus approach thereby limiting tax benefits to the proportion of underlying research and development activities (OECD, 2017). The second element of spontaneous exchange of rulings is designed to provide transparency in situations where there may be possible BEPS mismatches in relevant jurisdictions. This includes taxpayer-specific rulings related to preferential regimes, cross-border unilateral advance pricing agreements (APAs) and transfer pricing rulings, and permanent establishment rulings to name a few (OECD, 2017).

In 2017, as part of the process of ensuring compliance with the first element of Action 5, the OECD reviewed the regimes of Inclusive Framework members to determine whether they contained harmful features and their economic effects. In that review, Nigeria, the Philippines and Vietnam were placed 'under review', whilst all other surveyed jurisdictions were found to have no harmful features or effects. A second review, to determine the progress of Inclusive Framework members in implementing Action 5's transparency framework, was also conducted in 2017. Whilst no performance ratings were given, the review proposed possible areas of improvement, where appropriate. China, India, Korea, the Netherlands and the United Kingdom were reviewed and provided with possible areas of improvement, whilst Australia, Canada, Indonesia, Japan, New Zealand, South Africa and the United States were reviewed with no comment. Hong Kong SAR, Malaysia, Nigeria, the Philippines, Singapore, Thailand and Vietnam are yet to be reviewed.

The results of jurisdiction engagement with Action 5 from the preliminary survey are provided in Table 1 below.

Table 1: Engagement with Action 5

Action 5	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	1	7	5	3	3
Developed	0	6	1	0	0
Developing	1	1	4	3	3

These results demonstrate that a majority, thirteen (13) jurisdictions, 54% of which are developed jurisdictions, have either initiated or taken actions to address this standard,

whilst six (6) jurisdictions, 100% of which are developing jurisdictions, have remained idle.

3.3 Tax treaty abuse

The second minimum standard is Action 6 aimed at preventing treaty abuse and, in particular, what is known as treaty shopping or the use of a treaty by a non-resident to gain resident status benefits. The aim of the Action was to develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. Countries which have agreed to the minimum standards will be required to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. They will also be required to include anti-abuse provisions in their tax treaties to counter treaty shopping. There are two ways in which a country can do this: through joining the MLI or by updating their bilateral tax treaties.

The results of jurisdictional engagement with Action 6 from the preliminary survey are provided in Table 2 below.

Table 2: Engagement with Action 6

Action 6	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	8	7	2	2
Developed	0	6	1	0	0
Developing	0	2	6	2	2

These results demonstrate that fifteen (15) of the nineteen (19) jurisdictions have taken some form of action to remedy treaty abuse. This level of response may be preemptive due to the OECD peer reviews on preventing treaty abuse that are expected to be conducted in 2018.

3.4 Country-by-Country Reporting

The third minimum standard is Action 13 which re-examined transfer pricing documentation. Specifically, the Action developed rules regarding transfer pricing documentation to enhance transparency for tax administration. The rules developed are known as Country-by-Country Reporting (CbCR) and, in fact, contain recommendations for three separate categories of documentation: a master file, local file and template for CbCR. CbCRs will be filed by multinational enterprises (MNEs) with annual consolidated group revenue equal to or more than EUR 750 million and delivered to tax administrations based on a common template. Domestic law can then require a master file containing key information regarding the MNE's global business operations and transfer pricing policies, and a local file containing information on material related party transactions in the relevant jurisdiction. The aim of these three documents is to allow tax authorities to see the big picture of an MNE's operations and conduct more effective high-level transfer pricing risk assessments (OECD, 2017).

Overall, the level of engagement with Action 13 is high with seventeen (17) jurisdictions initiating or taking action to enhance transparency (see Table 3). The only jurisdictions to remain idle are the Philippines and Thailand. Fifteen (15) of the surveyed jurisdictions signed the multilateral competent authority agreement (MCAA) for the automatic exchange of CbC reports (6 developed, 9 developing) (OECD, 2018d). The Philippines, Thailand, the United States and Vietnam are yet to determine whether they will sign.

The OECD has also conducted reviews on country compliance with Action 13. First, country laws were examined to determine whether the ultimate parent of an MNE is required to file CbC reports with the tax administrator. Two of the surveyed countries were not compliant: the Philippines and Thailand. Thailand however is in the process of finalising their legal framework. Second, the status of competent authority agreements (CAA) in each country was reviewed. These agreements are designed to permit the automatic exchange of taxpayer information. Of the jurisdictions surveyed, four (4) did not have a CbC information exchange network established, namely Nigeria, the Philippines, Thailand and Vietnam.

The results of jurisdiction engagement with Action 13 from the preliminary survey are provided in Table 3 below.

Table 3: Engagement with Action 13

Action 13	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	14	3	0	2
Developed	0	7	0	0	0
Developing	0	7	3	0	2

3.5 Dispute resolution

The fourth minimum standard is Action 14 which is designed to provide solutions to obstacles that prevent countries from solving treaty-related disputes under the mutual agreement procedures (MAP). As with Action 6 (the prevention of treaty abuse) much of this will be achieved through joining the MLI. Some countries have gone so far as to introduce mandatory binding arbitration requiring tax authorities to move to an arbitration process if the dispute is not resolved in a certain period of time (OECD, 2017). It is recognised that Action 14 is the most controversial in terms of developing countries and their ability to meet the requirements imposed. Mandatory binding arbitration may be agreed to under the MLI; however only a limited number of countries have done so, and those who have tend to be in the category of developed countries.

Adoption of Action 14 by the surveyed jurisdictions is moderate, with 58% of the sample taking some form of action. OECD assessments in this Action are also mixed with nine (9) reviews of the surveyed jurisdictions scheduled, one (1) review to be scheduled, two (2) reviews deferred due to the jurisdiction's status as a developing

economy and six (6) reviews conducted.[15] The results of jurisdictional engagement with Action 14 from the preliminary survey are provided in Table 4 below.

Table 4: Engagement with Action 14

Action 14	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	1	5	5	6	2
Developed	0	4	3	0	0
Developing	1	1	2	6	2

4. Implementation of other elements of the BEPS package

While the global drive for the implementation of BEPS Actions has been aimed at the minimum standards contained in the Inclusive Framework, the remaining 11 Actions also contain significant reform measures.

4.1 Addressing the tax challenges of the digital economy

The aim of Action 1 was to identify the main difficulties that the digital economy poses for the application of existing international tax rules and to develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation (OECD, 2013). The types of issues examined under Action 1 included:

> "the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services" (OECD, 2013, p. 35, Table A.2).

On the basis that the digital economy is effectively the economy itself, the OECD elected not to treat the digital economy as being 'ring-fenced' in the reform process. Rather, the position adopted was that many of the matters that arose would be dealt with under the other BEPS Action items. In particular, this applied to the modification of permanent establishment status under Action 7 and recommendations around the collection of VAT/GST.

In relation to the 19 jurisdictions surveyed, the level of engagement with Action 1 is moderate and tangential (see Table 5). Twelve (12) of the nineteen (19) surveyed jurisdictions have taken some form of action to address the challenges of the digital economy. Some jurisdictions, such as Australia, have reformed laws in relation to GST on supplies of digital products and other imported services by non-residents to resident customers. Those countries that have not acted indicate that there are no specific legislative changes or proposals required in response to Action 1, or that due

[15] A review of the Philippines has not been included as it is not an inclusive member of the BEPS program.

consideration is being given, for example, '*government agencies are studying ways to tax the digital economy*' (China survey). The results of jurisdictional engagement with Action 1 from the preliminary survey are provided in Table 5 below.

Table 5: Engagement with Action 1

Action 1	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	7	5	5	2
Developed	0	4	1	2	0
Developing	0	3	4	3	2

4.2 Neutralising the effects of hybrid mismatch arrangements

The aim of Action 2 was to develop model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effect of hybrid instruments and entities (OECD, 2013). Hybrid mismatch arrangements exploit differences in the tax treatment of an entity under the laws of two or more jurisdictions resulting in double non-taxation, a double deduction, or long-term deferral. The resulting recommendations were divided into two parts. First, there are recommendations for changes in domestic law and, second, there are recommended changes to the OECD Model Tax Convention.

Part 1, which provides recommendations for reform to domestic legislation, proposes what are known as linking rules that align the tax treatment of an instrument or entity with the tax treatment in the counterparty jurisdiction, but do not disturb the commercial outcomes (OECD, 2015). The rules are designed to apply automatically with a primary rule and a secondary or defensive rule. The recommended primary rule for countries to implement is that they deny the taxpayer's deduction for a payment to the extent that it is not included in the taxable income of the recipient in the counterparty jurisdiction or it is also deductible in the counterparty jurisdiction. Then, if the primary rule is not applied, the counterparty jurisdiction can generally apply a defensive rule, requiring the deductible payment to be included in income or denying the duplicate deduction depending on the nature of the mismatch (OECD, 2015). Part 2 is aimed at ensuring that hybrid instruments and entities, as well as dual resident entities, are not used to obtain unduly the benefits of tax treaties and that tax treaties do not prevent the application of the changes to domestic law (OECD, 2015).

In relation to the 19 jurisdictions surveyed, the level of jurisdictional engagement with Action 2 is moderate, with ten (10) jurisdictions taking some form of action and nine (9) reserving their response. As highlighted in Table 6, country response can be tied to the level of development with 100% of developed jurisdictions taking action and 75% of developing jurisdictions remaining silent. The results of jurisdictional engagement with Action 2 from the preliminary survey are provided in Table 6 below.

Table 6: Engagement with Action 2

Action 2	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	5	5	4	5
Developed	0	3	4	0	0
Developing	0	2	1	4	5

4.3 Designing effective controlled foreign company (CFC) rules

Action 3 focused on developing recommendations regarding the design of controlled foreign company rules. These rules target foreign companies that are owned by residents of a jurisdiction. The risk is that by holding an interest in a foreign company, the resident is able to strip the tax base of their country of residence. The rules are designed to limit the deferral of tax by deeming certain income of the foreign subsidiary as being repatriated back to the parent company thereby including it in the assessable income of that parent company. While 30 countries participating in the BEPS project have CFC rules, these rules have not kept pace with changes in the international business environment (OECD, 2015). CFC rules are not mandatory for BEPS participating countries; however, if they choose to adopt the rules, the resulting recommendations provide guidelines for their implementation. The report describes six building blocks for the effective design of CFC rules: the definition of a CFC; CFC exemptions and threshold requirements; a definition of income; computation of income; attribution of income; and prevention and elimination of double taxation (OECD, 2015).

Interestingly, given the low number of countries which have CFC regimes in place, surveyed jurisdictional engagement with Action 3 is strong. Fifty-eight per cent of jurisdictions indicate compliance (5 jurisdictions) or proactivity (6 jurisdictions) in CFC legislation. Notably, however, this response is being driven by developed economies with the remaining 42% of jurisdictions that have not engaged with Action 3 representing developing economies. The results of jurisdictional engagement with Action 3 from the preliminary survey are provided in Table 7 below.

Table 7: Engagement with Action 3

Action 3	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	5	4	2	1	7
Developed	4	2	1	0	0
Developing	1	2	1	1	7

4.4 Limiting base erosion involving interest deductions and other financial payments

Action 4 focused on developing recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense and other financial payments that are economically equivalent to interest payments (OECD, 2013). Such base erosion could occur, for example, through the use of related-party and third-party debt to achieve excessive interest deductions or to finance the production of exempt or deferred income. The final report analyses several best practices and recommends an approach which directly addresses the risks associated with debt. The recommended

approach is based on a fixed ratio rule which limits an entity's net deductions for interest and payments economically equivalent to interest as a percentage of its earnings before interest, taxes, depreciation and amortisation (EBITDA). At a minimum this should apply to entities in multinational groups. To ensure that countries apply a fixed ratio that is low enough to tackle BEPS, while recognising that not all countries are in the same position, the recommended approach includes a corridor of possible ratios of between 10% and 30%. The report also includes factors which countries should take into account in setting their fixed ratio within this corridor. The approach can be supplemented by a worldwide group ratio rule which allows an entity to exceed this limit in certain circumstances (OECD, 2015).

Engagement with Action 4 in the 19 jurisdictions surveyed is moderate to high, with fourteen (14) of the nineteen (19) jurisdictions indicating compliance (1 jurisdiction) or proactivity (13 jurisdictions). Consistent with the results reported for Action 3, this result appears to be driven by developed jurisdictions, with 100% 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 survey). The results of jurisdictional engagement with Action 4 from the preliminary survey are provided in Table 8 below.

Table 8: Engagement with Action 4

Action 4	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	1	8	5	3	2
Developed	1	4	2	0	0
Developing	0	4	3	3	2

4.5 Preventing the artificial avoidance of permanent establishment (PE) status

The focus of Action 7 is on the prevention of artificial avoidance of PE status in relation to BEPS. The definition of a PE is crucial from a tax treaty perspective in determining where tax is paid. This is because treaties generally provide that the business profits of a foreign enterprise are taxable in a State only to the extent that the enterprise in that State has a PE to which the profits are attributable. The ensuing report includes changes to the definition of PE in Article 5 of the OECD Model Tax Convention. In particular, it is recommended that the definition be widened and that the definition of independent agent not extend to agents acting mainly or only for one group of companies.

Nine (9) surveyed jurisdictions report proactive engagement with Action 7 on the basis of revisions suggested by the Multilateral Instrument (MLI) (Australia, China, India, New Zealand, Singapore and the UK), although some jurisdictions indicate reservations on adopting all recommendations. Engagement with this Action does not appear to be driven by jurisdictional development. The results of jurisdictional engagement with Action 7 from the preliminary survey are provided in Table 9 below.

Table 9: Engagement with Action 7

Action 7	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	4	5	5	5
Developed	0	3	1	2	1
Developing	0	1	4	3	4

4.6 Aligning transfer pricing outcomes with value creation

Actions 8, 9 and 10 are generally grouped together as all three are designed to ensure that transfer pricing outcomes are in line with value creation. Transfer pricing practices are used by MNEs to separate income from the economic activities that produce it and to shift it to low-tax jurisdictions. Action 8 specifically deals with intangibles, Action 9 deals with risk and capital, and Action 10 deals with other high-risk transactions. The overarching aim of the recommendations is one of ensuring that transfer pricing outcomes align with value creation. Despite this, the arm's length standard was maintained as the OECD views it as the 'cornerstone of transfer pricing rules' (OECD, 2015). The final report contains revised guidelines designed to ensure that operational profits are allocated to the economic activities which generate them. The OECD argues that the work under Actions 8-10 ensures that 'transfer pricing outcomes better align with value creation of the MNE group' (OECD, 2015).

In the context of surveyed jurisdictions, engagement with Actions 8-10 is high, with fifteen (15) of the nineteen (19) jurisdictions surveyed responding to recommendations (see Table 10). One (1) jurisdiction, India, has suggested that existing transfer pricing policy is consistent with BEPS guidance and as such is unlikely to make changes. Other jurisdictions, such as New Zealand and Nigeria, have endorsed and are implementing the 'strengthened' OECD guidelines. Survey responses provide no specific reason to explain disengagement. The results of jurisdictional engagement with Actions 8-10 from the preliminary survey are provided in Table 10 below.

Table 10: Engagement with Actions 8-10

Actions 8-10	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	1	6	8	1	3
Developed	0	3	3	1	0
Developing	1	3	5	0	3

4.7 Mandatory disclosure rules

The focus of Action 12 was to develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules (OECD, 2013). Early access to this information provides the opportunity to quickly respond to tax risks through informed risk assessment, audits, or changes to

legislation or regulations (OECD, 2015). The ensuing report also adopted a modular framework that can be adopted by countries to design a regime which is suitable. Design features outlined by the OECD include: who reports, what information to report, when the information has to be reported, and the consequences of non-reporting (OECD, 2015).

Within the surveyed jurisdictions, engagement with Action 12 is limited, with only six (6) jurisdictions responding to recommendations. Two (2) jurisdictions, Canada and the United States, have indicated that '[e]xisting law has statutory and regulatory disclosure rules for aggressive tax planning. There[fore there] are no active proposals for change' (US 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. The results of jurisdictional engagement with Action 12 from the preliminary survey are provided in Table 11 below.

Table 11: Engagement with Action 12

Action 12	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	2	2	2	4	9
Developed	2	1	2	2	0
Developing	0	1	0	2	9

4.8 Developing a multilateral instrument to modify bilateral tax treaties

The establishment of a multilateral instrument, to amend bilateral tax treaties *en masse*, is the task of Action 15. This will facilitate timely amendments derived from other actions in the BEPS framework; for example: the introduction of anti-abuse provisions (Action 6), changes to the definition of permanent establishment (Action 7), transfer pricing rules (Actions 8-10), interest deductions and other financial payments (Action 4), disclosures (Actions 5, 12 and 13) and hybrid mismatch arrangements (Action 2). The purpose of an MLI was also discussed above in section 3.1.

Whilst most jurisdictions surveyed are signatories to the MLI (with the US as the most notable exception), actual engagement with Action 15 among surveyed jurisdictions is only moderate, with 58% of countries remaining inactive. Notably, 90% of these inactive jurisdictions are developing jurisdictions. The United States, 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*'. Most other jurisdictions (China, Hong Kong SAR, Korea, Malaysia, the Netherlands, New Zealand, Nigeria and South Africa) have expressed their intention to '*adopt as many MLI provisions as possible*' (New Zealand survey). The results of jurisdictional engagement with Action 15 from the preliminary survey are provided in Table 12 below.

Table 12: Engagement with Action 15

Action 15	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	1	2	5	9	2
Developed	1	1	4	1	0
Developing	0	1	1	8	2

5. UNILATERAL RESPONSES TO BASE EROSION AND PROFIT SHIFTING

The 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. Initially this project was limited in its participation; however the Inclusive Framework ensured that it had global reach. Despite the reach and efficiency of the OECD's 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 Korea, the Netherlands, the Philippines, Thailand and the US have not adopted unilateral measures to address tax avoidance in response to the BEPS program. Two (2) of these jurisdictions are developed and three (3) are developing. That is, 71% of developed nations and 75% of developing jurisdictions have adopted unilateral measures. When the sample was partitioned by trading position, net exporters and net importers, six (6) out of nine (9) or 67% of net exporters have adopted unilateral measures, as opposed to eight (8) out of ten (10) or 80% of net importers. 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.

5.1 Administrative measures

Administrative measures involve legislation that has been enacted to address the operation of a corporation. Twelve (12) of the surveyed jurisdictions have adopted administrative measures to combat BEPS (see Table 13). Measures adopted include: increased staffing, resources and dedicated transfer pricing and exchange of information (EoI) units; regulation regarding dividends and tax treaties; and amendments to municipal legislation. The results of jurisdictional adoption of administrative measures from the preliminary survey are provided in Table 13 below.

Table 13: Adoption of Administrative Measures

Administrative measures	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	12	1	3	3
Developed	0	5	0	1	1
Developing	0	7	1	2	2

5.2 Transparency measures

Transparency measures are policies that have been designed/adopted to enhance the transparency of a corporation. Seven (7) surveyed jurisdictions have adopted transparency measures to combat BEPS: Australia, China, Hong Kong SAR, India, Indonesia, Japan and the UK. Australia has introduced tax transparency laws that require the Australian Taxation Office 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 (GAARs) and guidance, Hong Kong SAR and Japan have enacted provisions for the automatic exchange of financial account information (AEOI) in tax matters; India has instituted the Black Money Act and architecture for secure and rapid AEOI; Indonesia has converted tax law number 9 to provide a legal basis to access local and foreign customer data; and the UK has facilitated international collaboration on the AEOI, tax administration and avoidance. The results of jurisdictional adoption of transparency measures from the preliminary survey are provided in Table 14 below.

Table 14: Adoption of Transparency Measures

Transparency measures	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	6	1	2	10
Developed	0	2	1	0	4
Developing	0	4	0	2	6

5.3 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%) of the jurisdictions surveyed. Australia has enacted the multinational 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. China is monitoring offshore payments; Indonesia is focused on base erosion through debt; Nigeria is developing personal and company anti-avoidance rules and the UK has implemented a diverted profits tax (DPT). The results of jurisdictional adoption of anti-avoidance measures from the preliminary survey are provided in Table 15 below.

Table 15: Adoption of Anti-Avoidance Measures

Anti-avoidance measures	Existing legislation deemed sufficient	Actions taken	Actions in progress	Concern expressed / commitment given	No action
Total	0	7	2	2	8
Developed	0	3	1	1	2
Developing	0	4	1	1	6

6. SUMMARY

Table 16 below provides a summary of the position of each of the 19 jurisdictions surveyed. It reports the engagement of each surveyed jurisdiction 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.

Table 16: Country Summary of Engagement with BEPS Framework

Country	D/UD	Minimum Standards				All other actions									Unilateral measures		
		Action 5	Action 6	Action 13	Action 14	Action 1	Action 2	Action 3	Action 4	Action 7	Action 8-10	Action 11	Action 12	Action 15	Administrative	Transparency	Anti-avoidance
Australia	Developed	No HTP															
Canada	Developed	No HTP															
China	Developing	No HTP															
Hong Kong SAR	Developing	No HTP															
India	Developing	No HTP															
Indonesia	Developing	No HTP															
Japan	Developed	No HTP															
Korea	Developing	No HTP															
Malaysia	Developing	No HTP															
Netherlands	Developed	No HTP															
New Zealand	Developed	No HTP															
Nigeria	Developing	Under review															
Philippines	Developing	Under review															
Singapore	Developing	No HTP															
South Africa	Developing	No HTP															
Thailand	Developing	No HTP															
UK	Developed	No HTP															
US	Developed	No HTP															
Vietnam	Developing	Under review															

- Existing legislation deemed sufficient
- Actions taken
- Actions in progress
- Concern expressed / commitment given
- No action
- OECD action only

To quantify and compare overall jurisdictional response to these actions and measures, a rank score was determined based on the level of engagement. A score of 4 was given for each action/measure where the jurisdiction's existing legislation was deemed sufficient. A score of 3 was given where jurisdictions had taken action, 2 where actions were in progress, 1 where commitment was given or concern expressed and 0 if no action was undertaken at all. The results of this ranking exercise are reported in Table 17.

Table 17: Jurisdictional Rank of Engagement with BEPS Program

Country	Rank
Philippines	0
Thailand	11
Nigeria	16
Malaysia	19
Singapore	20
Vietnam	22
Korea	23
Hong Kong SAR	25
Netherlands	25
China	28
Indonesia	28
South Africa	31
Canada	32
India	34
US	35
Japan	38
New Zealand	39
UK	42
Australia	43

The results suggest that from the jurisdictions surveyed, Australia is the most engaged with the BEPS program and the Philippines is the least engaged. They also demonstrate that the level of engagement is dependent on the level of development, with developing nations scoring on average 21 and developed nations 36. This difference is also statistically significant (*t*-stat 3.73, *p*-value, 0.00) which means that there is a statistically significant difference in the level of engagement with the BEPS program between developed and developing jurisdictions; that is, developed jurisdictions are more engaged. This could be the result of the lack of involvement of developing jurisdictions in the initial design of the BEPS program. It could also be due to the potential lack of sophistication in the tax regimes of developing jurisdictions. In either case, the OECD has much work to do to facilitate the cohesive global adoption of the BEPS program.

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