What’s Up: BEPS and the New International Tax Order

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Date : July 5, 2017

Allison Christians, *BEPS and the New International Tax Order*, 6 **BYU L. Rev.** (forthcoming, 2017), available at SSRN.

It’s easy to underestimate the value of a good “what’s up” article. If you’ve been doing that, then you should take a look at “BEPS and the New International Tax Order” for a reminder of their value.

“What’s up” articles are the salve of the academy. They take a rapidly changing field of inquiry or policy space or legal doctrine and they encapsulate the state of play in a way that brings out and makes assessable the highlights.

This line of scholarly work is helpful to folks who have drifted from the area of inquiry and to those who are deeply lost in its weeds. Good what’s up scholarship should be evaluated on three criteria: (1) does the article provide an orienting matrix to the work in the particular area; (2) does it appropriately highlight the aspects of that rapidly changing area in ways that emphasizes what matters and de-emphasizes or ignores matters of little importance (put another way, does it respect the fact that not all developments are of equal importance); and (3) is it a pleasure to read.

“BEPS and the New International Tax Order” satisfies these criteria. Christians takes on the rapidly changing world of international tax as shaped by the Organisation for Economic Co-operation and Development (OECD). The OECD has served as the front player in shaping the policy space for governments responding to multinational company tax strategies that result in a reduction of tax bases and that shift profits from high to low-tax jurisdictions, hence the name of the OECD response – the “base erosion and profit shifting” (BEPS) project.

That project has been moving with support from the G20 over the last several years. The aim of Christians’s article is three-fold. She explains the role of the OECD as a “tax policy consensus-building network.” (P. 1609.) That claim builds on her earlier work, where she explores the role of the OECD as a policy-setter and the complexity of that role in the face of the OECD’s inability to regulate using formal (hard) law. In this part of the article, she reveals the complex interaction of legal instruments, model treaties and guidance, and peer review and monitoring as mechanisms for shifting the policy space in the international tax arena. Most interesting is her discussion of the peer review and monitoring process. The use of peer countries to assist as pressure-points for domestic legal and administrative change in the tax field is an under-explored area and Christians’s work should spur colleagues to develop research agendas that help us better understand the function of peer monitoring.

Christians’s second aim is to identify the OECD’s BEPS tax policy priorities. She identifies country-by-country reporting of how much tax is paid in each country in which the multinational operates, practices to reduce harmful tax competition, fixes for tax treaty abuse, and treaty-based dispute resolution as the four major priorities to which we should attend. For each of these priorities, Christians lays out the OECD’s minimum standards and speculates about the extent to which these standards are moving targets, likely to be adjusted in the near or medium-term. There’s lots to be attentive to in this part of the paper: Is there any base-building advantage of the use of a nexus approach for allocating income from intellectual property? Will the exchange of tax rulings be helpful for tax administrations seeking to better enforce domestic law? How will peer monitoring effect the use of arbitration to resolve treaty disputes? How does the OECD plan to support capacity building for non-member states willing to sign on to its articulated priorities?

Finally, Christians’s third aim is to connect the priorities with implementation plans. The OECD has taken a multifaceted approach, with changes proposed to domestic legislation, new bilateral treaties, a new multilateral tax treaty, the adaptation and adoption of OECD models and guidance, and peer review.

By dividing the article in this way, Christians offers us hope for making sense of the voluminous materials produced out of the BEPS project. We can hang on to the four key priorities and make sense of how the OECD intends to advance those priorities, given its inability to enact binding rules.

Even more fun, and stepping out from the benefits of what's up scholarship, Christians carries on in her signature way about the interaction between the rich OECD countries and the "others" – those countries who have been excluded from the OECD's international tax agenda setting. Perhaps less characteristic of Christians's work is a hint of optimism in the conclusion: "The Inclusive Framework thus introduces a potential avenue for non-OECD countries to have a meaningful say in norm building exercises undertaken by the OECD, but with a great deal of agenda-setting directed mainly by OECD member states, the outcome is not yet certain." (P. 1645.)

Cite as: Kim Brooks, *What's Up: BEPS and the New International Tax Order*, JOTWELL (July 5, 2017) (reviewing Allison Christians, *BEPS and the New International Tax Order*, 6 **BYU L. Rev.** (forthcoming, 2017), available at SSRN), http://tax.jotwell.com/whats-up-beps-and-the-new-international-tax-order/.