



Mindy Herzfeld authors "The Case Against BEPS"

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International Tax

Tax Controversies

TaxProf Blog

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Ivins attorney and law professor, Mindy Herzfeld, authored "The Case Against BEPS: Lessons for Coordination" which was posted on the *TaxProf Blog* by Paul Caron.

Abstract:

In 2013 the OECD, at the behest of the G20, embarked upon an ambitious project of coordinating and harmonizing countries' international tax rules under the guise of curtailing multinational companies' cross-border tax planning, generally referred to as base erosion and profit shifting, or BEPS. The project was finalized with great fanfare in October 2015. But the proclamations of success masked real underlying differences between participant countries. I argue that the project suffered from a number of flaws that largely precluded effective coordination, as a result of which the project's recommendations largely gloss over key differences in participants' goals and commitments while doing nothing to solve the systemic problems it was seeking to address. For example, while a key stated goal of the project was to align the taxation of profits with value creation, there was no attempt made to define the location of value creation, nor to address the fact that this principle is fundamentally at odds with the arm's length principle that serves as the backbone of transfer pricing rules.

The project left in its wake a system even more broken than before, but one papered over with rhetoric suggesting the illusion of consensus and general agreement on new rules. Broadly worded anti-abuse rules allow different countries to go off in their own, preferred directions in interpretation, implementation and enforcement. They thus open the door to



| 2 | Mindy Herzfeld authors "The Case Against BEPS"

unprincipled and aggressive tax agents and an increase in multilateral tax disputes with no clearer path to resolution. Poor outcomes were largely predictable from the project's premises, which merely sought to reinforce the existing rules, but never questioned whether those rules needed updating to adjust for global economic changes and to lead to a fairer allocation of taxing rights. Furthermore, the project failed to acknowledge the bias in the existing system that meant that the outcomes were likely to benefit more powerful countries at the expense of smaller and weaker ones. While the project may have succeeded in its overt goal of limiting multinationals' international tax avoidance, it never addressed the more systemic failures of the system that underpinned the broad consensus it achieved in obtaining initial agreement on its action plan.

The BEPS project thus has important lessons for the future of international coordination efforts, as efforts to fix a broken international tax system, restore public confidence in multinational corporations, and achieve real agreement on the underlying principles of the rules must continue, if only to minimize the flood of disputes expecting to result from the recent changes in law and policy. More broadly, the role that international tax rules can play in addressing inequality and economic stagnation remains an important topic.

Link to "The Case Against BEPS: Lessons for Coordination" (June 13, 2017)