# Combatting tax avoidance, the OECD way? The impact of the BEPS Project on developing and emerging countries' approach to international tax avoidance

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# Acronyms

| | |
|---|---|
| AAR | Authority for Advance Rulings (India) |
| AOA | Authorized OECD Approach |
| APA | Advance Pricing Agreement |
| ATAF | African Tax Administration Forum |
| BEPS | Base Erosion and Profit Shifting |
| CA | Competent Authority |
| CbCR | Country by Country Report(ing) |
| CBDT | Central Board for Direct Taxes (Indian direct tax policy making authority) |
| CDIS | Coordinated Direct Investment Survey |
| CFC | Controlled Foreign Company |
| CIAT | Centro Interamericano de Administración Tributaria (Inter-American Tax Administration Center) |
| CIT | Corporate Income Tax |
| DGID | Direction Général des Impôts et Domaines (Senegalese tax administration) |
| DIAN | Dirección de Impuestos y Aduanas Nacionales (Colombian tax administration) |
| EITI | Extractive Industries Transparency Initiative |
| EU | European Union |
| FHTP | Forum for Harmful Tax Practices |
| FIRS | Federal Inland Revenue Service (Federal tax authority of Nigeria) |
| G20 | Group of 20 |
| GAAR | General Anti-Avoidance Rule |
| GDP | Gross Domestic Product |
| GloBE | Global Anti-Base Erosion |
| GNI | Gross National Income |
| IBFD | International Bureau for Fiscal Documentation |
| ICDT | Instituto Colombiano de Derecho Tributario (Colombian Tax Law Institute) |
| ICRICT | Independent Commission for the Reform of International Corporate Taxation |
| ICTD | International Centre for Tax and Development |
| IFA | International Fiscal Association |
| IGF | Inter-Governmental Forum on Mining |
| IMF | International Monetary Fund |
| LOB | Limitation on Benefits clause |

| | |
|---|---|
| MAP | Mutual Agreement Procedure |
| MCAA | Multilateral Competent Authority Agreement |
| MFN | Most-Favored Nation |
| MLI | Multilateral Instrument |
| MNE | Multinational Enterprise |
| MoF | Ministry of Finance |
| NGO | Non-Governmental Organization |
| OECD | Organisation for Economic Cooperation and Development |
| PE | Permanent Establishment |
| PPT | Principal Purpose Test |
| SAAR | Specific Anti-Avoidance Rule |
| SPE | Special Purpose Entity |
| TIEA | Tax Information Exchange Agreement |
| TP | Transfer Pricing |
| TPG | Transfer Pricing Guidelines |
| UK | United Kingdom |
| US | United States |
| USD | United States Dollar |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| UNCTC | United Nations Centre on Transnational Corporations |
| VAT | Value Added Tax |
| WTO | World Trade Organization |

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# 1 Introduction

## 1.1 Motivation, theoretical approach, and research questions

When the Organization for Economic Cooperation and Development (OECD) and the Group of 20 (G20) launched the Base Erosion and Profit Shifting (BEPS) Project in 2013, this marked a moment of intensification in global governance in the area of taxation of multinational enterprises.[1] Although international organizations had been involved in promulgating policy standards on the taxation of cross-border income since the 1920s, the BEPS Project represented a step-up in ambition. It was initiated at a time when "aggressive tax planning" strategies by companies such as Google, Apple, and Starbucks, and reports of tax planning structures like the "Double Irish with a Dutch Sandwich," made the headlines.[2] Its purpose was to perform an overhaul of the "international tax system" to reduce the opportunities for multinational enterprises to engage in such practices. The increase in ambition concerns both the substance and the geographical scope of the project:

First, while previously international institutions had presented the outcomes of their deliberations as mere recommendations or models, the BEPS Project introduced a number of minimum standards subject to peer review and presented recommendations on a greater range of topics. Second, although initially only OECD and G20 members participated its development phase, the geographical scope has been significantly increased after the creation of the BEPS Inclusive Framework in 2016. By July 2023, 143 jurisdictions worldwide including many developing and emerging economies had become part of the framework. The combination of both features thus has the potential to significantly increase convergence of tax rules across countries.

1 Christensen and Hearson, "The New Politics of Global Tax Governance: Taking Stock a Decade after the Financial Crisis."

2 Goodley and Milmo, "Dutch Masters of Tax Avoidance"; Syal, "Amazon, Google and Starbucks Accused of Diverting UK Profits."

At the outset of the BEPS Project, many commentators qualified it as the most important attempt of international cooperation in tax policy so far, dividing recent tax history into a "pre-BEPS" and a "post-BEPS" era,[3] although in hindsight the consensus seems to be that the ambition was small compared to the follow-up "BEPS 2.0" project.[4] However, it also generated controversy, particularly regarding the association of developing countries to the project.[5] The fact that countries were invited only after the main outcomes had already been produced coupled with a widespread perception in academic and policy circles that the policies developed in the BEPS Project may be counter to the interests of developing countries culminated in slogans propagated by tax activists that developing countries were not "at the table, but on the menu."[6]

This type of controversy is not limited to the realm of taxation. Global governance institutions in different policy areas have been intensively debated among scholars, policymakers, activists, and other stakeholders. In international relations theory, the liberal institutionalist perspective sees global governance as a means for participating actors to overcome cooperation problems.[7] In contrast, other approaches such as realism and critical theories argue that global governance is often just a tool that powerful actors use to impose their policy preferences on less powerful actors and emphasize that global governance creates winners and losers.[8]

These conflicting perspectives are reflected in debates about the global governance of international taxation.[9] In line with the liberal institutionalist tradition, the first OECD report on BEPS emphasizes the role of global governance in fostering cooperation: "Collaboration and co-ordination will not only facilitate and reinforce domestic actions to protect tax bases, but will also be key to provide comprehensive international solutions that may

3 Christians, "BEPS and the New International Tax Order"; de Graaf and Visser, "BEPS: Will the Current Commitments and Peer Review Model Prove Effective?"; Tavares and Owens, "Global Tax Policy Post-BEPS and the Perils of the Silk Road"; Tell, "Interest Limitation Rules in the Post-BEPS Era"; Lankhorst and van Dam, "Post-BEPS Tax Advisory and Tax Structuring from a Tax Practitioner's View"; Kingma, *Inclusive Global Tax Governance in the Post-BEPS Era*; Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups"; Sawyer, Sadiq, and McCredie, *Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 16 Countries*.

4 Arnold, "The Ordering of Residence and Source Country Taxes and the OECD Pillar Two Global Minimum Tax," 2. See also section 4.5.

5 Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," 2015.

6 According to Pascal Saint-Amans, the slogan was first used by tax activists at the Addis Ababa Financing for Development Conference in 2015. See: Saint-Amans, *Paradis Fiscaux*. See also Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations."

7 Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," 407.

8 Drezner, *All Politics Is Global*; Hurd, "The Case against International Cooperation."

9 For an application of these differing interpretations of global tax governance, specifically on the issue of tax havens, see Sharman, *Havens in a Storm*.

satisfactorily respond to the issue."[10] Here, the OECD portrays the issue as a struggle for governments to work together to regain control over the actions of private actors that have moved beyond the regulatory reach of the state in a globalized world. Pascal Saint-Amans, the former head of the OECD Center for Tax Policy and Administration, explained in an interview that the BEPS Project should be seen as "tax regulation for globalization – to reconcile in particular the middle class with globalization."[11]

The critical view rejects the interpretation of the BEPS Project as collaboration among public actors to regulate private actors but rather emphasizes a confrontation between different public actors -governments of OECD Member States vs. governments of developing countries.[12] At first sight, the rejection seems somewhat paradoxical, since according to several empirical studies, developing countries are particularly affected by international tax avoidance due to, among other reasons, a greater reliance on the corporate income tax for overall tax revenue generation.[13]

This apparent contradiction is the first motivation of this research project: How would developing countries engage with policy standards that pretend dealing with a problem they are affected with but that are judged as not adequate for them? By joining the Inclusive Framework, countries committed to the BEPS Project and therefore the baseline expectation should be that they implement it. However, the critical view sheds some doubt on this expectation.

In other policy fields, the empirical record of global governance institutions in spurring policy change at the domestic level is mixed, in particular when it comes to developing and emerging countries. While proponents of the globalization hypothesis point to increasing cross-national convergence across all areas of society and to a growing role of international and supranational organizations in shaping peoples' lives,[14] others remain more cautious and highlight the limits of globalizing forces.[15] Research in

10 OECD, *Addressing Base Erosion and Profit Shifting*, 51.

11 „In den vergangenen Jahren haben wir eine Art Steuerregulierung für die Globalisierung gebaut – um vor allem die Mittelschicht mit der Globalisierung zu versöhnen." Saint-Amans, Der Kern des Systems ist das Steuerschlupfloch.

12 The governments of non-OECD G20 members (such as for example, China, India, Indonesia, Argentina, or South Africa) have a somewhat ambiguous position in this narrative. On the one hand, they could be considered as developing countries by considering their income level and other economic characteristics. On the other hand, they have more geopolitical power and were able to fully participate in the development of the BEPS Project.

13 Johannesen, Tørsløv, and Wier, "Are Less Developed Countries More Exposed to Multinational Tax Avoidance? Method and Evidence from Micro-Data."; Cobham and Janský, "Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-estimation and Country Results"; Tørsløv, Wier, and Zucman, "The Missing Profits of Nations"; Fuest, Hebous, and Riedel, "International Debt Shifting and Multinational Firms in Developing Economies."

14 Meyer et al., "World Society and the Nation-State."

15 For a review of both sides' arguments as well as on the mixed empirical evidence, see Drezner, "Globalization and Policy Convergence."

other fields – for example on the implementation of trade agreements[16] or bankruptcy standards[17] in developing countries, or even on EU directives,[18] – has shown that there is not necessarily a relation between the enactment of an agreement or standards at an international or supranational level and the actual social practices that the agreement intends to change, even in the case of a legally binding treaty.

Recent contributions in political science use the BEPS Project, among other international tax initiatives (such as the Common Reporting Standard[19]), as an indicator that an impactful layer of global governance in taxation has emerged and that the freedom of countries to design their tax rules independently from external influences may be receding. Rixen and Unger, for example, assert that "national tax systems are increasingly couched in international rules promulgated by transgovernmental and transnational networks"[20] and that "the notion of taxation as a purely national affair is obsolete."[21]

Yet, the empirical foundation for these assertions is still incomplete. While the impact of international initiatives dealing with information exchange to combat tax evasion is well documented,[22] this is less so for the case of corporate tax rules. Several authors hypothesized that the impact of the BEPS Project might be less.[23] Azam, for example, wrote in 2017: "I do not expect the BEPS project to substantially impact the international tax regime. The main challenges of tax competition and corporate tax avoidance will continue to prevail and will require different solutions."[24] Taxation of multinational companies' profits – and substantive aspects of tax laws more generally – is considered as "hard case" for policy coordination, since states have traditionally considered tax policy as an essential part of their sovereignty.[25]

16 Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*.
17 Halliday and Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis*.
18 Falkner et al., "Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?"
19 OECD, "Standard for Automatic Exchange of Financial Information in Tax Matters. The CRS Implementation Handbook."
20 Rixen and Unger, "Taxation: A Regulatory Multilevel Governance Perspective," 2.
21 Rixen and Unger, 5.
22 Ahrens and Rixen, "Transcending Tax Competition: How Financial Transparency Enables Governments to Tax Portfolio Capital."
23 See for example Ring, "When International Tax Agreements Fail at Home: A US Example"; Woodward, "A Strange Revolution: Mock Compliance and the Failure of the OECD's International Tax Transparency Regime"; Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," 2015.
24 Azam, "Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS," 523.
25 See for example Van Apeldoorn, "BEPS, Tax Sovereignty and Global Justice."

Several years into the implementation phase of the BEPS Project, the OECD wrote in its progress reports that "the BEPS project has resulted in tangible progress, irrefutably moving the needle in the direction of a world less susceptible to tax avoidance."[26] Nevertheless, other OECD documents acknowledge that open issues persist. For example, the proposal for Global Anti-Base Erosion (GloBE) rules of the current "Pillar 2" project is usually justified with reference to "remaining BEPS challenges".[27] Another OECD report on the BEPS Project in developing countries notes that "in many cases they are yet to fully benefit from the advances made in countering BEPS".[28] Most strikingly, an empirical study of foreign affiliate data finds that profit shifting did not decrease over the period of 2015-2018, after the initial roll-out of the BEPS Project.[29] This suggests that it is still unclear to what extent it has had an impact on the policies of developing countries and whether it has been effective in addressing the problem of international tax avoidance.

In sum, three different interpretations of the BEPS Project can be observed: The first sees it as collaboration to end tax avoidance, a second as an imposition of powerful actors' preferences on those less powerful, and a third sees it as not impactful at all. Evaluating the accuracy of either interpretation subsequently depends on how countries act in practice: Whether policy standards should indeed be seen as devices by which powerful countries impose their preferences on less powerful ones depends on how they affect actors in practice. Likewise, it would be difficult to claim that there is cooperation when commitments to adopt certain policies are not adhered to in practice. Observing activity at the international level is therefore only the starting point of the analysis. The second step implies considering what the recipients of policy standards actually do with them.[30] This dissertation focusses on the second step by asking:

To what extent has the BEPS Project impacted developing countries' approach to international tax avoidance?

This requires addressing a number of sub-questions:

- How does the BEPS Project address the issue of international tax avoidance?
- How have individual countries' approaches to international tax avoidance changed from before the introduction of the BEPS Project to afterwards?
- How many of these changes can be attributed to the BEPS Project?

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26 OECD, "OECD/G20 Inclusive Framework on BEPS: Progress Report July 2020 - September 2021," 6.

27 OECD, "Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint," 14.

28 OECD, "Developing Countries and the OECD/G20 Inclusive Framework on BEPS," 23.

29 Tørsløv, Wier, and Zucman, "The Missing Profits of Nations: 2018 Figures."

30 Raustiala, "Compliance & (and) Effectiveness in International Regulatory Cooperation."

There is no dearth of studies that address these questions in one or another way. Shortly after the publication of the BEPS Project many scholars authored pieces in which they assessed how "its individual elements could be implemented in their home country's tax systems.[31] While very useful for practical purposes (and as sources for writing this dissertation), these assessments do not necessarily allow for insights on the impact more broadly defined. On the other side of the spectrum, there are annual Progress Reports published by the OECD.[32] These, however, focus more on output indicators such as counts of countries that have adopted certain policies without giving much weight to the meaning of these policy changes for the BEPS Project's overall goals.

In this research project, I attempt to build a bridge between both approaches, by studying four countries in detail (India, Colombia, Nigeria, and Senegal), at times supplemented with more superficial data available for a larger sample of countries, and by focussing on two overarching policy problems addressed by the BEPS Project: transfer pricing and treaty shopping. The purpose is to find a compromise between a more general perspective and a sufficient attention to details.[33] In the four countries I conducted interviews with international tax policy stakeholders, attempting to better conceptualize how the BEPS Project impacts policy decisions, on the one hand, and how international taxation is practiced by the tax administration, companies, and tax advisors.

This focus on practice is motivated by previous research on the impact of international norms: Halliday and Carruthers for example wrote in their study on the implementation of bankruptcy standards in Asia that "Not only is everyday legal practice largely invisible to official eyes but local businesses, creditors and debtors, lawyers, and judges are adept at exploiting their local knowledge to frustrate powerful international agents of change."[34] Studies on the impact of the Basel standards for banking have highlighted the importance of the domestic political economy in moderating the impact of international standards on domestic practice.[35] This body of literature encourages to engageing in detailed studies of domestic institutions and consider at institutional change as outcomes of the inter-

31 See for example the following edited volumes and articles: Sawyer, Sadiq, and McCredie, *Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 16 Countries*; Shay and Christians, "Assessing BEPS: Origins, Standards, and Responses"; Montoya, "Análisis de Las Acciones BEPS, Su Aplicación En Colombia y Su Inclusión al Sistema Tributario"; Kumar, Palwe, and Jhaveri, "Treaty Shopping and BEPS Action 6: An Indian Perspective."

32 OECD, "OECD/G20 Inclusive Framework on BEPS: Progress Report July 2020 - September 2021"; OECD, "OECD/G20 Inclusive Framework on BEPS. Progress Report July 2018 - May 2019."

33 Although some loss of nuance is inevitable.

34 Halliday and Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis*, 408.

35 Jones, *The Political Economy of Bank Regulation in Developing Countries*.

play of actors with diverging interests, whereby international institutions and the policy standards developed by them are only one of many factors. Therefore, "policies" should be understood in a wide sense in this research project, i.e., encompassing the actual behaviour of states, including administrative (in-)action and not only "written law".

Within the larger group of countries in the Global South, the countries that were comprehensively researched offer variance in terms of factors that could explain a different engagement with the BEPS Project: variance in inclusion in the policymaking process at the international level; variance in market power; variance in economic development and, by extension, administrative capacity; variance in specific aspects of their legal systems, such as the importance of the judiciary. However, it needs to be mentioned that these cases were selected at the very beginning of the GLOBTAXGOV research project (hence, prior to the development of concrete hypotheses) and not because they should necessarily be considered as representative of all countries in the Global South. Nevertheless, comparing approaches taken by these four countries was useful for captureing more of the diversity of impact.

Once we know more about whether the BEPS Project is impactful or not (or to a varying degree in different countries), the next question I address is: How to explain differing levels of impact?

This question has inspired a growing field in international political economy. Often, this literature uses the case of the regulation of the financial sector for theory building.[36] However, several authors have theorized and empirically assessed the impact of global soft law on tax policies, which I will refer to throughout the text.[37] The most comprehensive work on that topic has been undertaken by Hearson who has researched the impact of policy standards embedded into the OECD Model Tax Convention on tax treaties negotiated between developing and developed countries.[38] He has done so more with a focus on the division of taxing rights between capital importing and capital exporting countries than on tax avoidance. The topics overlap and interact with each other but at times trade-offs for addressing tax avoidance are different than those concerning the allocation of taxing rights. For example, the conflict of interest between capital importing and capital exporting countries may be less apparent, since both could lose revenues to tax avoidance strategies. Moreover, MNEs may be indifferent as to whether they pay tax in a source or residence country if both have a

36 Jones, 49–50.

37 Azam, "Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS"; Hearson, "Transnational Expertise and the Expansion of the International Tax Regime: Imposing 'Acceptable' Standards"; Hearson, *Imposing Standards*; Baistrocchi, "The International Tax Regime and the BRIC World: Elements for a Theory"; Vet, "Diffusion of OECD Transfer Pricing Regulations in Eastern Africa."

38 Hearson, "Transnational Expertise and the Expansion of the International Tax Regime: Imposing 'Acceptable' Standards"; Hearson, *Imposing Standards*; Hearson, "The Challenges for Developing Countries in International Tax Justice."

comparable tax rate, but they are a priori not indifferent to the availability of tax avoidance strategies. However, these research agendas are closely related to the extent that the allocation of taxing rights affects the degree to which countries are exposed to certain tax avoidance strategies. This research therefore builds on previous work on the political economy of international taxation for developing initial elements of a political economy theory of combatting tax avoidance.

## 1.2 Structure and main findings

After describing my methodology in chapter 2, chapter 3 addresses the question of how to analyze policies that deal with international tax policies. I introduce two types of typologies that are useful heuristics for analyzing what is proposed in the BEPS Project and international tax policies more generally. The first typology shows that international tax norms can be distinguished based on what type of country role in international tax planning they address. I distinguish three of them: a defensive, a facilitating, and a supportive role. The second typology argues that with regards to the defensive dimension, which is the one in which international norms have the greatest direct impact on developing countries, different combinations of relevant policy features result in essentially five policy directions that can be adopted by governments or promoted by international organizations: finely delineating responses, blunt responses, giving-up, no response, or international harmonization.

In chapter 4, I ask what the BEPS Project seeks to attain, and through which means. I find that, in terms of the heuristic developed in chapter 3, the BEPS Project mainly encourages finely delineating responses and discourages countries from addressing the problem in a too sweeping way, even though an evolution can be observed compared to earlier recommendations issued by the OECD, as a somewhat higher acceptance of blunt solutions is visible. Nevertheless, the important implication remains that the BEPS Project's approach is not the only response to international tax avoidance and not necessarily the most effective.

In chapter 5, I discuss different features of countries that could explain why they adopt a certain approach to international tax avoidance at a certain moment in time. I first emphasize the importance of carefully analyzing the status-quo ante of the legal and administrative system, by arguing that how a country previously addressed international tax avoidance is likely to have an important impact on future approaches. Then I discuss the relevance of limits of structural features of developing countries, such as their position in the market for MNE investment, and a lack of administrative capacity, in explaining policy choices. Subsequently, I turn to the preferences and the influence of different governmental and non-governmental actors in the policy process. Here I use the typology developed in chapter 3 as a heuristic to distinguish different policy preferences. I find that since

often the status-quo ante in terms of anti-tax avoidance policy was judged as worse, businesses will support the introduction of anti-tax avoidance rules proposed by the OECD. However, the actual influence of businesses and other non-state stakeholders in the process should not be overstated. Instead, the struggle over which approach to take is more often fought within government itself, opposing actors that favor ease of tax collection and those more concerned about the impact of tax rules and administrative practices on investment. It seems that the former prevail more often, and that the BEPS Project may have strengthened their position, even if the policy ultimately adopted is not necessarily the preferred response suggested by the BEPS Project.

In chapters 6 and 7, I compare how the approach to international tax avoidance has evolved in Colombia, India, Nigeria, and Senegal as a response to the BEPS Project (or not) with respect to two important policy problems: transfer pricing and treaty shopping. These issues are most affected by the four BEPS minimum standards, as Action 6 addresses treaty shopping, and Actions 13 and 14 mainly relate to transfer pricing. Focussing on these two issues disregards a number of other international tax problems for example, indirect transfers, taxing digital enterprises, deferral of taxation of foreign earnings, or hybrid mismatches. These may be more important in terms of revenue losses in certain contexts or not. However, ranking them is a challenge. Even dividing policy problems of international taxation is somewhat arbitrary, since strategies employed by MNEs may combine various strategies, and different policies can impact the issues in complex ways. Nevertheless, by focusing on two issues, I hope to provide blueprints for extending similar analyses to these other topics.

Broadly, the case studies show that the BEPS Project has left its mark on how countries approach the topic, although it is more worth highlighting where it has failed to do so and where countries have chosen to diverge. First, when addressing transfer pricing, the countries studied have taken steps to bring their regulations more in line with the BEPS Project's approach, although important delays can be observed with for specific items. The second observation relates to the differences in approaches across countries: Whereas Nigeria and India diverge more in terms of policy than Senegal and Colombia, practice is probably most aligned in India, which can mainly be explained by the strength of India's court system. Finally, although in all countries, there is evidence that transfer pricing was a policy issue before, its extent is uncertain, since some kind of transfer pricing enforcement existed before the adoption of detailed rules, and other features of the broader tax and regulatory system of countries prevented certain forms of transfer mispricing. In sum, the impact of the BEPS Project is ambiguous.

In terms of treaty shopping, countries have adopted different approaches, as well: Although the BEPS Project seems to have contributed to the fact that in those cases where treaty shopping caused important revenue losses – India and Senegal –, governments adopted some responses to

stop it after years of piecemeal enforcement or outright tolerance, they not only rely on the BEPS Project's preferred solution but take decidedly stricter measures.

In the final part (chapter 8), I review the normative debate on the BEPS Project and developing countries and explain where the analysis carried out in the preceding chapters can contribute to the debate (and where not). I propose that, when considering what countries do in practice, some of the critiques can be mitigated, as countries do not seem to blindly follow what the BEPS Project suggests. Nevertheless, it is important to keep in mind that the countries researched might lack representativeness. Finally, I remain critical of attempts to grant the BEPS Project more coercive force, such as the inclusion of the BEPS minimum standards in the EU list of non-cooperative jurisdictions.

Chapter 9 concludes the study by summarizing the main findings and by highlighting some of the limitations and open questions for further research.

## 1.3 Contribution to literature

How does this research fit into the broader research agenda on international tax standards? Before the question of their impact the question of how international tax standards are actually produced. This question has gained importance in both public and academic debates in recent years.

There is a an increasing amount of literature that analyses the formation of tax policy at the international level from different perspectives. Some authors adopt state-centric perspectives that explain outcomes of international tax policy processes through the (clash of) policy preferences by the United States, [39] the European Union,[40] and emerging powers such as China and India.[41] Other contributions focus on the sociology of international tax policy making and study the interactions between different types of tax policy professionals, civil society organizations, international bureaucrats, and country representatives.[42] In their study on the degrees of participation and influence of lower income countries in international policy making

39 Hakelberg, *The Hypocritical Hegemon*.

40 Lips, "Great Powers in Global Tax Governance: A Comparison of the US Role in the CRS and BEPS."

41 Hearson and Prichard, "China's Challenge to International Tax Rules and the Implications for Global Economic Governance"; Christensen and Hearson, "The Rise of China and Contestation in Global Tax Governance."

42 Christensen, "Elite Professionals in Transnational Tax Governance"; Büttner and Thiemann, "Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation"; Seabrooke and Wigan, "Powering Ideas through Expertise: Professionals in Global Tax Battles"; Dallyn, "An Examination of the Political Salience of Corporate Tax Avoidance: A Case Study of the Tax Justice Network," 2017.

processes Hearson, Christensen and Randriamanalina combine state centric and sociological perspectives.[43] The international tax policy making process also plays an important role in contributions from a normative perspective. The lack of influence of lower income countries in the process is often criticized,[44] and has motivated proposals for institutional reform.[45] The respective arguments and findings of this research agenda with regard to the BEPS process will be reviewed in section 8.1.

Studying the impact of these global processes on local practice means assessing to what extent the former matter in practice. This may serve as feedback for the next round of international policymaking. Knowledge about the reasons for adapting a policy or not may help improve the design of policies at the international level. Potentially, it may also attenuate the relevance of policy processes at the international level.

Another important question beyond the scope of this dissertation is that of the impact of international tax policies on the behaviour of private actors. These questions are mainly explored by economists. Research focusses on either quantifying tax avoidance univariately, i.e., without assessing the impact of different policies on the extent of tax avoidance, or on the relationship between policies and other variables such as investment and tax revenue. Although important methodological advances have been made, reliable data on the scale of tax avoidance (at a global level and even more so at the level of individual countries) is scarce and absent for a longer period than a few consecutive years.[46] This makes a straightforward comparison of current levels of tax avoidance with past levels impossible. It is indeed unclear to what extent these estimates capture the effects of reforms already undertaken or not (and sometimes to what extent they would be visible within the data, see the side note in section 0). If the impact of reforms on country policies is not incorporated, better knowledge on the level of certain tax avoidance indicators may not help for knowing what to do about it. Therefore, the kind of study undertaken in this dissertation is necessary for better contextualizing the indicators used in quantitative studies.

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43 Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations."

44 Brauner, "What the BEPS"; Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," 2015; Christians and Van Apeldoorn, "The OECD Inclusive Framework"; Fung, "The Questionable Legitimacy of the OECD/G20 BEPS Project"; Kingma, *Inclusive Global Tax Governance in the Post-BEPS Era*.

45 Rixen, "Institutional Reform of Global Tax Governance: A Proposal"; Rosenbloom, Noked, and Helal, "The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum"; Tanzi, "Is There a Need for a World Tax Organization?"

46 Important studies are Crivelli, De Mooij, and Keen, *Base Erosion, Profit Shifting and Developing Countries*; Cobham and Janský, "Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-estimation and Country Results"; Tørsløv, Wier, and Zucman, "The Missing Profits of Nations"; Bolwijn, Casella, and Rigo, "An FDI-Driven Approach to Measuring the Scale and Economic Impact of BEPS." For an overview, see Bradbury, Hanappi, and Moore, "Estimating the Fiscal Effects of Base Erosion and Profit Shifting: Data Availability and Analytical Issues," 101–4.

Other papers investigate the impact of international tax provisions on investment.[47] Some research focusses on the relationship of policy with tax revenue.[48] All three variables (tax avoidance, investment, and tax revenue) are eventually important for assessing the success of the BEPS Project.

Especially in a developing country context, much research uses tax revenue as dependent variable to assess the impact of administrative variables or basic features of the tax system (such as the relative importance of direct vs. indirect taxes) on tax revenue but does not integrate differences in international tax policy in its models, highlighting a lack of comparable data on policies.[49] With my research, I attempt at making tax policy somewhat more comparable by generating new data and generating theory that allows for "categorizing" – i.e., giving meaning to – international tax policies.

However, this dissertation has been written too early for a general assessment about the effects of policy standards proposed at the international level on the behaviour of private actors, since as will be shown in sections 6 and 7, implementation in countries' legislation and administrative practice is yet incomplete as of 2023. Nevertheless, this dissertation may allow for an improved modelling of the mechanisms through which policies could affect behaviour or not and may therefore allow for more fine-grained assessments and better construction of empirical strategies (e.g., what type of control variables to include) to test whether the BEPS Project had an influence on the behaviour it sought to modify. Nonetheless, in interviews that I carry out with tax practitioners, the question of taxpayer behaviour is relevant, in the sense that expectations about the impact of policies may reveal something about how a specific policy is applied in practice.

47 For example, the increasing amount literature that assesses the impact of tax treaties and their various features on foreign direct investment flows. Petkova, Stasio, and Zagler, "On the Relevance of Double Tax Treaties"; Davies, Norbäck, and Tekin-Koru, "The Effect of Tax Treaties on Multinational Firms: New Evidence from Microdata"; Azémar and Dharmapala, "Tax Sparing Agreements, Territorial Tax Reforms, and Foreign Direct Investment."

48 Janský and Šedivý, "Estimating the Revenue Costs of Tax Treaties in Developing Countries"; Beer and Loeprick, "Too High a Price? Tax Treaties with Investment Hubs in Sub-Saharan Africa."

49 Jeppesen, "What We Hoped for and What We Achieved: Tax Performance of Semi-Autonomous Revenue Authorities in Sub-Saharan Africa"; Sarr, "Assessing Revenue Authority Performance in Developing Countries: A Synthetic Control Approach." There are exceptions, however: See for example Londoño-Vélez and Ávila-Mahecha, "Can Wealth Taxation Work in Developing Countries? Quasi-Experimental Evidence from Colombia"; Beer et al., "The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa."

# 2 Methodology

Chronologically, my study can be divided into three steps that build on each other: I started by studying legal documents as well as literature on the BEPS Project in the Global South, and particularly on Colombia, India, Nigeria and Senegal. The second part was in-depth fieldwork in Colombia, India, Nigeria, and Senegal involving semi-structured interviews. A third part involved studying some of the hypotheses that I formed during this process in larger samples of countries to produce some more general statements. In this section I provide a description of the methods employed.

## 2.1 Cases studied

The case studies were conducted in four emerging and developing countries: Colombia, India, Nigeria, and Senegal. These countries were selected because one could suppose that, among the wider subset of developing and emerging economies, they offer a wide range of potentially relevant features due to their differences in legal and political systems, size, level of development and structure of the economy. In particular, they represent different combinations of key variables that are a priori important for the degree of uptake of international standards: market power, exposure to the OECD processes, and capacity.

However, the selection was not made with the purpose of testing specific hypotheses formed prior to the research project. Therefore, the general approach adopted in this study could be described as inductive, since at the start of the research not much knowledge was readily available that would have allowed to form hypotheses and purposefully select cases to test the hypotheses. For instance, given the complexity of the BEPS Project and the lack of a full analysis of its goals (see Chapter 4) it was hard to predict what country characteristics would be relevant for its impact on domestic policies. The hope was rather that the cases would display a good level of divergence to gain more insights in the breadth of possible phenomena.

They should not be seen as strictly representative of the whole universe of developing countries, either. For example, the sample neither includes small island jurisdictions, nor low income countries (according to the World Bank classification), nor countries that are not members of the inclusive framework. Moreover, no developing country that has attempted to establish itself as international financial centre has been included. Hence, the study of the "defensive dimension" of international tax policies is given more weight than the "facilitating dimension" of international tax policies (see section 3.3).

On the other hand, one of the main distinctions in international tax literature is between "residence countries" or "capital exporting countries", which are those that host many headquarters of MNEs, and "source countries" or "capital importing countries", which are those that mainly receive investment for purposes of production and/or sales in the domestic market. Almost all countries on the world import foreign direct investment, but only a few countries export FDI to a significant degree. Both lower income and emerging countries (with the exception of China) are primarily capital importing countries. The same is true for Colombia, India, Senegal, and Nigeria, therefore they are somewhat representative of non-financial centre developing countries.

Throughout the remaining text (like to some extent already in the preceding paragraphs), the country case studies are used essentially for three purposes:

1) Country practices are referred to as examples in the conceptual framework (section 3)
2) Comparisons of approaches to deal with the problems of transfer pricing and treaty shopping
3) Informing the analysis of the political economy of combatting tax avoidance

Information was gathered mainly through document analysis and semi-structured interviews conducted with relevant tax policy stakeholders. "Semi-structured" means that the topics that interviews addressed as well as the selection of interview participants was informed by the existing literature, but that at the same time sufficient space was provided for interview participants to raise own topics so that new variables can be identified, and new theories can be generated.

## 2.2 Fieldwork in countries

### 2.2.1 Documentary analysis

The desk studies aimed at understanding three fundamental issues: What interpretations of the BEPS minimum standards are made by legal scholars? How did the four countries selected as case studies enact the BEPS minimum standards in their national laws and regulations? What kind of deviations can be identified from the standard as formulated in the OECD documents? What was the status-quo ante in terms of international tax policy in these countries? What are the relevant stakeholders that need to be included in the in-depth case studies and what are their policy preferences?

The main documentary sources used were original texts of domestic laws, regulations, and double tax treaties, as well as peer-review reports published by the OECD, choices made by countries in the Multilateral Instrument, databases on BEPS implementation, maintained by OECD,

IBFD or accounting firms, as well as literature written by authors from these countries. The process was carried out in an iterative manner: Documents were consulted to prepare before country visits and afterwards to confirm and expand on findings from interviews.

### 2.2.2 Selection of interviewees and interview procedure

The selection of the interviewees was informed by the review of literature on the tax policy in each country as well as government and press documents. Data sources include responses to public consultations that were held by the OECD in the process of drafting the BEPS Action plans, press reports in the countries of research as well as internet research. Additionally, informants in the four countries of research with whom contact had already been established at international conferences or through the project team's professional network were consulted. Finally, I relied mainly on the "snowball" method, which means that already existing contacts, reached through my own and my supervisor's professional network, were asked to help identify additional respondents. Sometimes, these people simply recommended names, in other cases they directly established the contact through an introductory email. In a few instances, respondents brought colleagues to the scheduled interview. The "snowball" method is frequently used in research involving "hard-to-access populations",[1] which professionals in taxation and government officials belong to. Nevertheless, I took care to use more than one "entry point" into a country's tax policy sphere to not depend on one person's network only and to reduce the risk of only speaking to people with similar opinions, which may happen when using the snowball method.[2]

In most cases, people were contacted via email or the social network LinkedIn. Since this proved to be the more common way of communication in Senegal, I also used WhatsApp to contact potential interviewees there. In case of non-response, I usually sent one reminder.

However, based on my perception of the relevance of the person's knowledge and experience for the overall research project, I varied the efforts to make an interview happen. To reach some people, for example, other people were asked for an introduction. In some cases, short phone calls were done in advance of the interview upon request of the participant, where I explained the research project and the modalities of the interview with more detail. In one of the countries studied – India – conferences on international taxation took place during my stay, namely the Foundation for International Taxation Conference in Mumbai (December 5 to December 7, 2019), which is the biggest annual tax conference in India reuniting

1 Atkinson and Flint, "Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies."

2 Atkinson and Flint, 4.

professionals from the private and the public sector, and a conference on international tax cooperation organized by the South Centre in Delhi which was attended by many officials of the Indian government as well as by government representatives from African, Asian and Latin American countries (December 9 to December 10, 2019). These events were used to contact further interview participants and gather information through the presentations given and informal interaction with participants.

*Table 1: Number of interviewees per country and category*

| Category | Colombia | India | Nigeria | Senegal |
|---|---|---|---|---|
| 1 – Public Sector | 5 | 3 | 5 | 6 |
| 2 – Business | 6 | 3 | 2 | 4 |
| 3 – Advisory | 17 | 13 | 7 | 6 |
| 4 – Interest groups | 4 | 2 | - | 2 |
| 5 – Academic | 7 | 5 | 3 | - |
| 7 – Other | - | 1 | - | - |

*Source: the author*

Almost all interviews in Colombia, India, and Senegal were conducted during face-to-face meetings in the country itself at places determined by the interview participants. Most of the interviews took place in the participants' workplaces and in some cases in public places such as cafés or restaurants. In a few cases, follow-up meetings took place, when all relevant topics could not be covered during the time available for the first interview. In two cases, where the interviewee was not available during the period I stayed in the country, the interview was conducted via Skype/Microsoft Teams. Due to the COVID19 pandemic, all interviews with participants from Nigeria were conducted remotely via Microsoft Teams.

As far as permitted by the participants, the interviews were tape recorded, to provide for a more accurate transcription in the aftermath. In all cases, I took handwritten notes during the interview. Where the interviewee did not agree to a recording, I extended the notes taken during the meeting as quickly as possible after the interview with the memory of the conversation still fresh.

To ensure that participants were aware of the implications of their participation in the study, they were sent an information sheet in advance, and at the meeting they were asked to sign an informed consent where they could indicate, among others, whether they would agree with the recording of the interview.[3] For the online interviews in Nigeria, an online version of this form was used.[4]

3 The information sheet and consent form in different languages are available here: https://globtaxgov.weblog.leidenuniv.nl/participate/

4 https://web.archive.org/web/20230222104613/https://fd24.formdesk.com/universiteitleiden/consent_form_Nigeria

Some interviewees did not agree to sign a consent form. This happened during this research with government officials from India and with a few participants from Senegal. These officials explained that in their function, it is not allowed to them to sign consent forms. They nevertheless agreed to have a conversation. In writing up my results, I used the information obtained from these interviews but where possible tried to quote as much as possible from other sources to provide as little cues as possible about their identity.

In general, I did not share topic lists with the participants beforehand, except where this was requested by the interviewee. A problem with sharing topic lists beforehand could be that the participant may prepare answers based on literature rather than speak more from personal experience.

It should be noted that interviewees in government positions usually stated that they were speaking in personal capacity. Any attributions made to them in this thesis should therefore be understood as statements in personal capacity, and not as official positions of the government of the country in question. For participants from other organizations the same applies, even though the organizations are not identified.

### 2.2.3 Questionnaire design

Based on the desk study on the BEPS minimum standards, a questionnaire with around 20 general topics was designed.[5] Within these topics, around 100 precise questions were formulated to ask participants for specific information that could not readily obtained via documents.

The topic lists were designed with the objective of assessing how and to what extent the BEPS project has influenced policy and practice. They included both general open-ended questions about tax practice such as "What have been the most important changes in the relationship between taxpayers and tax administrations in the last 10 years?", as well as precise questions about specific policies, such as for example "Some of Colombia's amended tax treaties contain the phrase 'Desiring further to develop economic relationships…' in the preamble (Mexico, Japan, UK), others not. In your opinion, would this have an impact on the application of the treaty?".

A few questions were common to all countries and almost all interviewees. Other questions were specific to the country, specific to the type of interviewee (e.g., tax advisors, government official, etc.) or to the individual. The precise questions asked to each person were adapted according to the person's background and new follow-up questions were asked spontaneously based on responses received. No interview participant was asked the full list of questions. I usually asked an entry question on the participant's professional experience and the topic he or she was most engaged with, and

5 See Annex 1 for the topic list.

subsequently focussed the interview on the topics that the participant most likely had the greatest experience with. This approach was chosen since the goal of the interviews was not only to obtain opinions on specific issues but rather to learn about the issues that the interviewees would raise and their perspective on the topic.

Over time questions evolved, as insights from previous interviews were incorporated in subsequent interviews. Due to the COVID-19 pandemic interviews in Nigeria and Senegal were conducted more than two years later than most interviews in Colombia and India. Finally, during the field visit in the country, the questionnaire was modified based on responses: For example, on some topics and questions, sufficient information was already obtained after a few interviews. In turn, the responses obtained in interviews generated interesting new questions that were subsequently incorporated into the questionnaire.

Due to the highly specialized nature of the topic, most of the interviews that were conducted can be classified as so-called "expert interviews". Some of them were at the same time "elite interviews", as some interviewees occupied prestigious positions in government and law firms, which justifies the use of rather open-ended questions.[6]

Especially towards the end of a research stay, I tried to signal that I had already obtained a decent amount of knowledge, so that participants were encouraged to go more into detail and not waste time explaining fundamentals that were already understood. I did this, for example, by using some (anonymous) quotes from previous interviews and asking the participant's opinion thereon.

### 2.2.4 Generating data from interviews

Given the large amount of recorded interview hours (around 100 hours), I used a pragmatic strategy to generate data from the conversations. For about half of the interviews, which were considered key, I prepared a full transcript. For the other half, I listened to each interview at least once and with the help of the hand-written notes from the interview wrote a protocol of the conversation, focused on the information delivered without always retaining the original sentence structure.[7]

Afterwards, an English summary of roughly one page was written based on the protocol. This method represented a significant time gain in contrast to the preparation of a full transcript, while still capturing enough information for the subsequent analysis.

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6 Harvey defined elites as people who "occupy senior management and Board level positions within organizations" Harvey, "Strategies for Conducting Elite Interviews," 433.

7 In some cases, particularly illustrative quotes were fully transcribed, and interviews

When preparing full transcripts – where permitted by the interviewee and where the sound quality was sufficient – the automatic online transcription service "AmberScript" or the offline transcription library "Vosk" were used to generate automatic transcripts that were manually corrected subsequently.[8] This allowed to save some time compared to the procedure where a full transcript was generated from scratch. For some interviews, research assistants helped with the transcription (subject to a confidentiality agreement).[9] Anonymized summaries and/or protocols can be consulted upon request.[10]

## 2.3 Qualitative analysis and information reduction

Within the overall research project, I used the interviews in several ways: First, to inform the theoretical framework laid out in section 3. Second, to collect information on the evolution of international taxation in the four countries studied. And third, to understand the political context, the preferences of different types of stakeholders and the ways in which they may influence the evolution of international taxation or not. Which of the goals I was focussing on in the respective interview depended on the individual and the moment within the research project that the interview took place at. For example, policymakers closely involved with drafting of legislation were better positioned to talk about the political contexts, whereas tax advisors were able to provide a better account of how the system actually "works" in practice. Moreover, during my first field work stay in Colombia, informing the general theoretical framework was still more important than in the last field work stay in Senegal, where much of the general knowledge I had acquired was simply confirmed.

To analyse the information from the interview, I collected quotes from the interviews on the same topic in one document and synthesized the different opinions. Where possible, I triangulated factual information either through quantitative data analysis or consultation of laws, regulations, and academic articles. Spanish and French quotes were translated by me. After the fieldwork, one report was written for each country, combining analysis from the desk study with analysis from the interviews and follow-up research done after the conduct of the interviews.

8 https://www.amberscript.com/; https://alphacephei.com/vosk/

9 I am grateful to Marius von Frankenhorst, Philippe Gaulard, and Céleste Ricci

10 The data is deposited at *DANS Data Station Social Sciences and Humanities* under the following DOI: https://doi.org/10.17026/SS/5U8XDM. Under the link, options and conditions to request access are specified.

## 2.4 Quantitative data on legal regimes

### 2.4.1 Data sources

To analyze aspects on the evolution of countries' tax systems and the impact of the BEPS Project thereon beyond the four countries studied (mainly in chapters 6, and 7), I assembled specific datasets relying on three main public data sources:

1) BEPS peer review reports and other documents published by the OECD;
2) Ernst & Young's (EY) Global Corporate Tax Guides;[11]
3) The ICTD Tax Treaty Dataset assembled by Hearson and colleagues.[12]

In the context of the BEPS Project, the OECD has started collecting and disseminating information about certain international features of countries tax systems, such as CFC rules, interest deduction rules, and countries' domestic laws relating to country-by-country reporting. These datasets are usually machine-readable and can be directly analysed. In addition, the OECD publishes country-level information that is collected through longer country questionnaires, among them the Transfer Pricing Country Profiles and Dispute Resolution Profiles. Finally, peer review reports contain detailed information about countries' compliance with all aspects of the four BEPS minimum standards.

Therefore, the EY Corporate Tax Guides are used as additional data source for longitudinal information on withholding taxes. The Corporate Tax Guides are available as pdfs for the period 2004-2022 in a relatively consistent format, which facilitates the construction of dataset. Moreover, the coverage is relatively large. However, since the 2022 report appeared after the main data collection phase, it has not been considered anymore.

The pdf data has been transformed into analysable datasets using automatic pdf extraction libraries in the R programming language, extended by further "manual" transformations and corrections. The scripts are reproducible, and all transformations are documented in the technical annex (raw data files from other sources are not included though for copyright reasons).[13]

The EY Corporate Tax Guides do not always present information in a way that allows for directly comparing tax regimes across countries. For example, countries often apply different withholding rates depending on the circumstances of the transaction (e.g., whether payment is made to a related party, made to a tax haven country, made to residents or non-residents, etc.). In general, I have assumed based on reading of a sub-sample of

11 https://www.ey.com/en_gl/tax-guides/worldwide-corporate-tax-guide, https://www.ey.com/en_gl/tax-guides/tax-guide-library-archive
12 https://www.treaties.tax/
13 https://doi.org/10.5281/zenodo.10253245

the data points, whether the highest or lowest rate is the adequate one for the purposes of the analysis. Except for dividends, where the lowest rate displayed was assumed to be the correct one, for all other types of payments, the highest rate was retained.[14] For cross-checking the information in case of doubts, I either directly searched the national law, consulted IBFD's Tax Research Platform or PwC's Worldwide Tax Summaries.[15] Additional data sources used for individual parts of the analysis are presented in these specific parts. All the figures and tables that are based on quantitative data can be reproduced with the R code in the technical annex, where links to original datasets are provided as well.[16]

### 2.4.2 Countries included in the analysis

The number of jurisdictions analyzed varies across the different parts of the analysis for data availability reasons. As explained above, much of the analysis is based on only four countries. However, where available with a reasonable effort, I also analyzed data on larger samples. The analysis in section 6.4, for example, includes all members of the Inclusive Framework. As can be seen in Table 2, this however excludes most low income countries, as well as half of all lower middle income countries. Note that the baseline for this table is not the 193 UN Member States, but 230 independent tax jurisdictions, including for example British Overseas Territories such as Cayman Islands, Bermuda, and the British Virgin Islands, etc., which are not members of the UN, but have large discretion to determine their tax system, can sign tax treaties and become members of the BEPS Inclusive Framework in their own right.[17]

14 For dividends paid to related entities abroad, I have done a more extensive manual analysis, and attempted to code the correct rate applicable to such payments for all countries/years.

15 https://taxsummaries.pwc.com/, https://research.ibfd.org

16 https://surfdrive.surf.nl/files/index.php/s/Qw4PRiBn0ksI7ar (not yet public, permanent version will be stored at zenodo once completed)

17 For some cases it is difficult to decide whether they should be considered as independent jurisdictions. For example, the island Labuan can be considered as an Offshore Financial Center with its own tax regime. There are indications, however, that it is under relatively close control of the Malaysian government and that it should therefore rather be considered as a free trade zone with preferential tax regime of Malaysia rather than a jurisdiction/country with independent tax system in its own right. See https://www.pl.gov.my/home, where the local authority presents itself as "Agency under Ministry of Federal Territory" and https://www.labuanibfc.com/about-labuan-ibfc/the-midshore-jurisdiction, where it is explained that the tax treaties of Malaysia apply to Labuan.

*Table 2: Jurisdictions in the Inclusive Framework and BEPS Process*

| *Group* | *Inclusive Frame-work member (as of 2023)* | *Part of BEPS development process* | *Total* |
|---|---|---|---|
| High income | 59 | 35 | 77 |
| Upper middle income | 37 | 7 | 57 |
| Lower middle income | 27 | 2 | 54 |
| Low income | 5 | 0 | 26 |
| Low tax | 13 | 0 | 16 |

*Source: the author, based on OECD.*[18]

In sections 6 and 7, when I analyse the evolution of tax regimes on a global basis, regimes are usually compared across categories of countries. The main classification I use is the four-tier World Bank classification into "Low income", "Lower middle income", "Upper middle income" and "High income" in 2020.[19] However, I merge the "Low income" and "Lower middle income" country categories together in one "Lower income" group, since in most datasets I use, there are only very few "Low income" countries. In contrast, I add the category of "Low tax jurisdictions", which I define as jurisdictions with a statutory corporate tax rate equal to or under 5% in any year since 2012. Most low tax jurisdictions qualify as "High income" countries based on their Gross National Income (GNI) with a few being in the "Upper middle income" category. However, since their tax policy choices are a priori very different from those of other countries, it makes sense to present them separately. For a few jurisdictions, the World Bank has not provided a classification. In these cases, I classified them manually, using information about GNI and GDP from other sources.

18 https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf

19 https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups

# 3 Analyzing approaches to tackle international tax avoidance

## 3.1 Introduction

This chapter's purpose is to develop a heuristic device to compare different tax policies across countries and time, to discuss differences between the law and its application in practice, as well as between what is recommended or mandated at the international level and what is done at the national level. There is no obvious measure of "international tax policies" adopted by states (unlike for other phenomena such as for example tax revenue or foreign direct investment or maybe even tax avoidance). Moreover, expecting that there are inevitable differences in wordings of legal provisions, or ways in which these are interpreted, it is necessary to find a way to distinguish important differences from unimportant ones. In essence, making an argument about the extent to which a policy standard had an impact requires some kind of "scale" on which to compare the standard with the policy adopted. However, there is no readily available "scale" on which to compare international tax policies, for example it is not possible to assign a monetary value to them. In this chapter, I propose two kinds of categorizations that I think are useful for that purpose.

I proceed as follows: First, I discuss more generally what the term "international tax avoidance" means. Then I distinguish three different roles that countries can adopt with regards to tax avoidance structures. I argue that in many structures, there is one or more countries that lose revenue, as well as one or more countries whose laws or practices facilitate the structure. In addition, countries in which an MNE is headquartered have a specific role through their choice of enacting policies that could help prevent MNEs from avoiding taxation in third countries or not.

Finally, I turn to the different policy choices that countries can adopt on the defensive dimension, i.e., I discuss what main themes of responses countries that lose revenue due to international tax avoidance can adopt. This categorization can be used to assess policies that deal with specific problems such as treaty shopping, excessive interest deductions, or transfer mispricing of specific services or goods, but also the overall policy direction of a country that results from the interaction of different policies.

## 3.2 What is international tax avoidance?

### 3.2.1 Tax avoidance and tax abuse

Different authors use the term "tax avoidance" to describe different types of behaviour. For the purposes of this dissertation, I generally use "tax avoidance" to refer to behaviour of companies or individuals that attempt to obtain benefits relative to the "normal tax regime" which were not intended for their situation by the legislator or that obtain such benefits using arrangements or transactions that lack economic substance. In contrast to behaviour qualified as "tax evasion", taxpayers that engage in tax avoidance comply with all disclosure obligations towards tax authorities.[1] Combatting tax avoidance is from the point of view of the state not only a question of obtaining information – even though disposing of relevant information is important – but also of having the appropriate legal and analytical tools and the capacity to successfully argue that a certain behaviour constitutes indeed tax avoidance. Many types of behaviour that are sometimes called tax avoidance are unproblematic such as the often-cited avoidance of excise taxes for cigarettes by quitting smoking or taking advantage of tax incentives intended for a specific economic activity by engaging in precisely that activity.[2] Such behaviour could be called "tax mitigation".

However, delineating tax avoidance from behaviour that is unproblematic is often challenging. Attempts to define tax avoidance often make reference to the intention of both the taxpayer and the legislator, i.e., tax avoidance occurs when the taxpayer makes a transaction with the intention of reducing its tax burden in a way that was not intended by the legislator. The problem is, of course, that intentions of taxpayers are difficult to verify objectively. Therefore, rules that attempt to directly prohibit tax avoidance try to objectify avoidant behaviour, often through references to the "substance" of a transaction.

What the intention of the legislator was may be debatable, as well. Some difficult cases are for example those where taxpayers use a particular structure to avoid being caught by an anti-avoidance provision that they would be subjected to even though they were not avoiding any underlying tax. In my study of Nigeria, interviewees pointed out that a principal reason for companies to "round-trip" payments through companies incorporated in low tax jurisdictions was to avoid paying an "excess dividend tax". The provision applied where companies distribute dividends in excess of taxable profits made during a given year, supposing that this may indicate that the true profit could have been higher than what is shown in the company's accounts. However, the provision also applies in cases where companies

1 De Broe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties, and EC Law in Relation to Conduit and Base Companies*, v.

2 Picciotto, *International Business Taxation*, 92.

established domestic holding companies, which would normally distribute more dividends than profits, but which are unlikely to be useful for purposes of avoiding Nigerian corporate tax on profits.[3] Assuming that there were no other important reasons, the incorporation of a holding company abroad by Nigerian groups or foreign MNEs setting up several different businesses in Nigeria thus mainly served the purpose of avoiding the excess dividend tax. However, the corporate income tax on corporate profit earned in Nigeria would still have been paid in such situations. Qualifying this behaviour as tax avoidance or not may therefore be problematic.

This is merely one example to show the difficulty in defining the term. Comparative legal research has shown that in the past, legislatures and courts in different countries have defined or interpreted "avoidance" in many different ways, leading to the conclusion that there is no internationally harmonized definition of the term.[4]

My aim in this research is not to change this situation and better define the term "tax avoidance" or "tax abuse" than previous authors, international organizations, or other legal documents or to find a compromise between divergent interpretations. As I will explain in section 3.4, improving the definition and more precisely delineating which behaviour should be labelled as tax avoidance and which not, is one of the policy approaches that governments and international organizations have adopted to fight the phenomenon. It is also the dominant approach pursued in the BEPS Project. However, as I will explain in more detail, as well, it is not the only possible approach. My analysis rather consists in analyzing when and why governments privilege one approach over the other. Finally, for some people or in some contexts, the term "tax avoidance" may have an inherently negative connotation, while for others it is a value-free term describing a certain behaviour. Notwithstanding my personal views about specific types of behaviour, I intend to use the term in a neutral fashion.

Instead of tax avoidance, the term "tax abuse" is sometimes used by authors or legislators. In the opinion of some, the term should be interpreted differently than "avoidance". For example, the British GAAR Committee, a group of academics, public servants and private sector representatives that was set up to provide recommendations with respect to the introduction of a general anti-avoidance rule in the United Kingdom, recommended that the rule should be called "general anti-abuse rule", which according to Freedman, who participated in the committee, was supposed to convey a narrower meaning than "tax avoidance".[5] However, Freedman also opined

3 NG12, also Okoro, "Nigeria: Finance Act 2019 And The Excess Dividend Tax Rule."
4 Rosenblatt and Tron, "General Report," 5.
5 Freedman, "The UK General Anti-Avoidance Rule: Transplants and Lessons," 332.

that this difference in wording had no practical implications.[6] In addition, analyses of OECD and EU documents have shown that the terms are used rather interchangeably.[7] Therefore, I will not further distinguish both terms.

### 3.2.2 International tax avoidance and aggressive tax planning

While tax avoidance strategies can be implemented in purely domestic situations, the focus in this dissertation lies on international tax avoidance, which encompasses all structures in which a cross-border transaction or entities resident or present in more than one jurisdiction play a role. International tax avoidance schemes come in a great variety. However, the goal of most strategies is to minimize the MNE group's tax burden in high tax countries so that it is liable to taxes on only a small share of the total profits in high tax jurisdictions and on a higher share of profits in low tax locations.[8]

In the years preceding the BEPS Project, OECD documents frequently used the term "aggressive tax planning" to refer to such strategies.[9] Subsequently, the European Commission defined aggressive tax planning in 2012 as "taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability."[10] The term has subsequently been taken up by other official reports and authors, some of whom have debated whether it should be distinguished from tax avoidance or tax abuse.[11] Possibly, the term aggressive tax planning should be understood as broader than tax avoidance since it also encompasses strategies that could not possibly be tackled with a general anti-avoidance rule, but that are nevertheless undesirable from the perspec-

6 Freedman, 332.

7 Piantavigna, "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies."

8 International tax avoidance need not necessarily involve low-tax jurisdiction (for example hybrid mismatches) but in the UNCTAD's classification of most common schemes (i.e. transfer mispricing and financing schemes), low-tax jurisdictions are always relevant. UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 193–97.

9 OECD, "Tackling Aggressive Tax Planning Through Improved Transparency and Disclosure. Report on Disclosure Initiatives"; OECD, *Corporate Loss Utilisation through Aggressive Tax Planning*.

10 European Commission, Commission Recommendation of 6 December 2012 on aggressive tax planning, para. 2.

11 European Commission et al., "Aggressive Tax Planning Indicators"; Mosquera Valderrama, "The OECD-BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead"; Arnold and Wilson, "Aggressive International Tax Planning by Multinational Corporations: The Canadian Context and Possible Responses"; Piantavigna, "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies."

tive of an "international tax system", hence justifying a policy response by countries or international organizations.[12] Piantavigna argues that "While both ATP [short for: aggressive tax planning] and tax abuse connote the idea of obtaining undue tax benefits, ATP implies a reaction that cannot be found in interpretative tools on the intent of the specific relevant rules avoided."[13] One could think of hybrid mismatch arrangements, through which taxpayers do not specifically avoid the tax law of one or the other of both countries involved, but achieve a globally undesirable result (for example using the same expense as deduction in both countries).[14] Piantavigna also provides numerous examples where the use of the terms "avoidance", "abuse" and "aggressive tax planning" is confused within OECD and EU reports. However, the BEPS reports, with the exception of Action 12 on mandatory disclosure rules, do not often refer to the term "aggressive tax planning" anymore.[15] They rather use terms that describe specific tax strategies (manipulation of transfer prices, treaty shopping, earnings stripping), or that describe their consequences (erosion of the tax base). Since neither hybrid mismatch strategies nor mandatory disclosure rules are in the focus of this study, I retain the term "international tax avoidance" for the remainder of the discussion but noting that not all practices described may always fall under a strict definition of "tax avoidance".

Distinctions among international tax avoidance strategies can be made, depending on the type of tax avoided and the type of taxpayer. Typical avoidance structures include thin capitalization (exploiting the fact that interest payments are usually deductible from tax while dividends are not), non-arm's length transfer pricing, treaty shopping, or artificial avoidance of permanent establishment status.[16] Sometimes, several of these techniques are combined, also with the purpose of circumventing existing anti-avoidance rules (see e.g., Google's famous "Double Irish with a Dutch sandwich"[17] or Starbuck's structure)[18]. In sections 5 and 7, I focus on transfer pricing and treaty shopping, which are perhaps the most simple and most classical problems.

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12 Calderón Carrero and Quintas Seara, "The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning," 210.

13 Piantavigna, "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies," 76.

14 Piantavigna, 79–80; OECD, "Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues," 13.

15 Piantavigna, "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies," 56.

16 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*.

17 Kleinbard, "Stateless Income," 707–12.

18 Kleinbard, "Through a Latte, Darkly: Starbucks's Stateless Income Planning."

Many transactions could involve both a transfer pricing and a treaty shopping problem. Consider the case of a subsidiary located in country B that borrows funds from its headquarter company located in country A and pays interest on the amount. In the general case, interest payments are deductible as costs. If the tax rate in country B is higher than in country A, the MNE has an incentive to increase the costs in country B, in that case the amount of interest paid. The pricing of any transaction among subsidiaries, including interest but also transactions of goods, services, or licenses, is a transfer pricing problem. Sometimes, country B also levies a so-called withholding tax rate on outbound payments. The maximum rate it is allowed to levy is, however, constrained when country B has agreed a tax treaty with the country of destination of the payment. If country B has agreed a more favourable tax treaty with a country C than with country A, the MNE has an incentive to route the payment through this country C by setting up a so-called conduit company there. Finally, since most headquarter countries have relatively high taxes, as well, the MNE may try to avoid taxes there as well, and, instead of the headquarter company, use a company located in a low tax jurisdiction D as financing company.

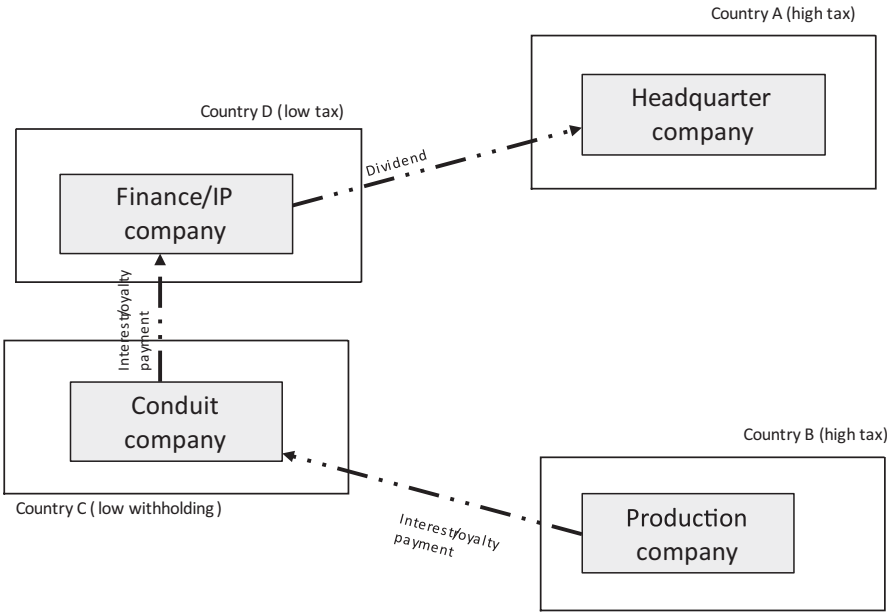
## 3.3 Different country roles in international tax avoidance and the minimum standards

How do countries respond to the issue of international tax avoidance? To start analyzing responses, it is useful to distinguish the different roles that a country can assume with respect to an MNE's international tax avoidance strategy. The structure described above involves four tax regimes A, B, C, and D that fulfil different purposes within the structure.

Country A is the country from which the funds for an investment originate or where the technology of the MNE group is developed, also commonly called "headquarter country" or "home country". In country B, substantial economic activity takes place in form of production or sales activity, commonly called "source country" or "host country". The MNE's presence in country C and D mainly serves the purpose of reducing the MNE's tax burden in country B and/or country A. This includes jurisdictions without a corporate income tax, jurisdictions with specific preferential regimes with a low or zero or corporate tax rate, or jurisdictions in which agreements with the tax authority can be made that allow reduction of taxes or jurisdictions that exempt specific types of income (such as foreign-earned income or income earned by non-residents).[19]

19 Marian, "The State Administration of International Tax Avoidance."

*Figure 1: Country roles in international tax avoidance*




*Source: the author, based on a figure in the OECD's 2013 BEPS report.*[20]

From this framework, one can deduct three different kinds of policy areas that can be usefully distinguished and be subjected to a separate analysis:

1. How countries respond to tax avoidance by which they are themselves affected. This could concern both country B and country A (the source and the residence country) so one could further differentiate between
   a. How countries respond to tax avoidance of outward investors (choices of country A)
   b. How countries respond to tax avoidance of inward investors (choices of country B)
   c. How countries respond to tax avoidance of round-tripping investors (cases in which country A and country B are the same country)
2. How countries enable (or choose not to enable) taxpayers to avoid other countries' taxes (e.g., through preferential tax regimes, low tax rates or low withholding tax rates). This analysis involves the choices of countries C and D.
3. How countries support other countries in their response against tax avoidance (e.g., to what extent country A would support country B, if an MNE headquartered in country A avoids taxation in country B).

20 OECD, *Addressing Base Erosion and Profit Shifting*, 74.

In practice, not all roles are always present with respect to all structures. For example, when the value of transactions is relatively high, an MNE has already an incentive to shift profits through transfer mispricing from one high tax country to another high tax country, provided there is a small difference in tax rates. But what is more important for the purposes of this research is the distinction of international tax policies into policies that have 1) a "defensive", 2) a "facilitating" and 3) a "supportive" character. Action in all three areas is potentially relevant for the overall goal of eliminating international tax avoidance and are interrelated with each other. For example, if all countries that currently have policies that allow companies to make use of them to avoid taxes elsewhere (i.e., play the role of country C or D) abolished these policies, the need for countries A and B to enact defensive policies diminishes. On the other hand, if all countries adopt effective defensive measures, companies may find it more difficult to effectively make use of other countries' regimes that facilitate avoidance.

As I will further explain below, the BEPS project relates to all three aspects. However, the trade-offs for countries are distinct and countries can make different implementation choices with regard to the three areas. Certain countries tend to be more often in one "role" than in others. Developing countries usually have significantly higher inward than outward direct investment and therefore find themselves more often in the role of Country B. The role of country D is most often assumed by countries that have become known has "corporate tax havens".[21] Country C are jurisdictions that often have statutory tax rates in the average range but levy low or no withholding taxes on outbound payments and have signed many tax treaties (more on these in section 7).

Finally, the role of country A is usually fulfilled by those countries which concentrate the headquarters of most MNEs, which are essentially the large OECD countries and China.

A particular policy problem can then be analysed from the three different perspectives: The perspective of the country that loses revenue, the country that facilitates the structure, and the headquarter country. One single country can potentially fulfil different roles in the structures of different multinational enterprises. For example, while many MNEs have used the tax regime of the Netherlands to avoid payment of withholding taxes through treaty shopping,[22] the Netherlands is also a location for investment in substantial activities and many MNE headquarters and might be exposed to MNEs' attempts to reduce their tax burden in the Netherlands on the profits derived from such activities. As a consequence, countries can have an ambiguous position with regard to the phenomenon of international tax avoidance as a whole and take action against tax avoidance of companies

21 Garcia-Bernardo et al., "Uncovering Offshore Financial Centers."

22 Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies."

with substance in the country, but still permit companies that have substance in other countries to use its tax system to avoid taxes in other countries. To continue the example, the Netherlands has for a long time tolerated that foreign MNEs set-up conduit companies to make use of the Dutch tax treaty network to benefit from lower withholding taxes when repatriating income from third countries (country C).[23] Nevertheless, many judicial disputes, for example on transfer pricing topics, show that the Netherlands has usually strived at protecting its own tax base by preventing companies with substantial activities in the Netherlands from shifting profits abroad.[24]

Since all countries studied in this dissertation are countries with relatively high tax rates that have not attempted to establish themselves as tax haven jurisdictions, the remainder of the dissertation mainly discusses the policy decisions on the defensive dimension.

## 3.4 Different approaches to defend a country against tax avoidance

Having separated international tax policies into different policy areas does not yet allow to "measure" and hence compare different policies that countries can adopt within each dimension. For that, we need other dimensions along which policies can vary. The following sections propose ways to classify policies on the "defensive dimension" according to their effect on several key variables. I do not do the same exercise for the "facilitating" and the "supporting" dimension, since these are of less direct relevance for capital importing countries that are not tax havens. Hence, the case studies on which I base my findings do not display enough variation to categorize responses.

How can a country respond to international tax avoidance by which it is itself concerned? I argue that essentially five types of responses adopted by states to defend themselves against international tax avoidance techniques can be distinguished:

1) Finely delineating solutions,
2) "Blunt" responses which eliminate or reduce benefits for both avoiders and non-avoiders,
3) Reducing or eliminating the tax avoided (giving-up),
4) Not responding, and
5) international harmonization of tax base and/or tax rate

23 Weyzig, "Tax Treaty Shopping: Structural Determinants of Foreign Direct Investment Routed through the Netherlands."

24 See for example the numerous cases in the database https://tpcases.com/ in which the Dutch tax authorities disputed transfer prices set by multinational enterprises active in the Netherlands.

The following table compares the different types of responses under five dimensions that are reflected in the BEPS Action reports, as well as critiques thereof: the level of tax avoidance, the tax burden for both non-avoiders and avoiders, the administrative costs related to different solutions, and the degree of international cooperation necessary.

*Table 3: Comparison of ideal-typical ways countries deal with international tax avoidance from the defensive perspective*

| | *Level of tax avoidance* | *Change in tax burden for avoiders* | *Change in tax burden for non-avoiders* | *Administrative resources required* | *Degree of international cooperation required* |
|---|---|---|---|---|---|
| *Finely delineating solutions* | Low | Increase | No change | High | Medium |
| *Giving up* | Low | No change (low) | Decrease | Low | Low |
| *Blunt* | Low | Increase | Increase | Low | Low |
| *Tolerating avoidance / no response* | High | No change (low) | No change or increase | Low | Low |
| *Harmonization based solutions* | Low | Increase | No change | Low | High |

*Source: the author*

The five responses identified above are not the only combinations of the different variables that are theoretically possible. Yet, based on the literature analysed, as well as interviews conducted with practitioners, the five ideal types seem to be those that are practically relevant. They have some similarity with a framework developed by Genschel and Rixen, the "trilemma of international taxation".[25] The authors posit that the three goals of eliminating double taxation, curbing tax competition and preserving national sovereignty cannot be attained simultaneously.

The following sections will describe each type of response in more detail. The case studies then illustrate how they can be used and applied in practice. In general, the ideal types can be used to categorize individual policies and administrative behaviour, for example how a country chooses to design and apply a specific policy such as interest deduction rules or country by country reporting requirements, but also the interaction of different policies (e.g., domestic withholding tax regimes and tax treaties) or the trajectory of corporate tax systems in their entirety.

25 Genschel and Rixen, "Settling and Unsettling the Transnational Legal Order of International Taxation."

### 3.4.1 Finely delineating approaches

Adopting a finely delineating approach to international tax avoidance consists in refining policies with the goal of trying to better delineate what kind of taxpayer behaviour is considered as permitted and which not.[26] Through a more detailed formulation of the law and/or more targeted and detailed audits by the administration leveraging more information, countries attempt to better separate the "wheat from the chaff",[27] i.e., prohibiting unwanted "aggressive" tax planning, while still providing the amplest possible freedom to conduct businesses across borders for non-avoidant MNEs. This type of solution implies detailed legislation that takes many different possible situations into account, or it requires tax administrations to undertake case-by case analyses which consider the details of the taxpayer's situation. They allow taxpayers to demonstrate genuine reasons for obtaining benefits and contain many procedural safeguards against administrative discretion. For example, in a situation where a country is concerned that a treaty is used by companies which are actually residents of third countries and only have little presence in the treaty partner country, a response following this theme would consist in adding language to the treaty describing with more details which kind of taxpayer should really be entitled to the treaty benefits and which not (e.g., not those which established subsidiary in the partner country for the principal motive of obtaining the benefits of the treaty).

Throughout the history of global tax governance, finely delineating solutions have been the preferred solutions of the OECD and its member countries to the issue of international tax avoidance. Moreover, the evolution of tax standards over time can be described as generally making these standards more "finely delineating" (see chapter 4 below).

After its creation in 1961, the OECD took over the work previously started by the League of Nation on designing and updating a model for bilateral double tax treaties among countries.[28] These treaties' purpose was essentially to eliminate double taxation for transactions between two country pairs, as the threat of double taxation was considered a major barrier to international investment. Accordingly, double tax treaties usually do not enable countries to tax but rather require countries to give up on taxing certain types of transactions. Their widespread and often uniform adoption by states is considered a success of this soft law standard. Concerns about international tax avoidance were already present in the beginning of the

26 Picciotto uses the term "case-by-case" to describe a similar concept in his assessment of various legislative approaches to international tax avoidance. Picciotto, *International Business Taxation*.

27 Azaino, "Nationality/Treaty Shopping: Can Host Countries Sift the Wheat from the Chaff?"

28 Picciotto, *International Business Taxation*.

work, as well, but remained subordinated to the liberalizing goal.[29] When spurred by the growth of MNEs in the 1970s and the establishment of more tax haven jurisdictions, these concerns became more pressing and incremental steps to curb international tax avoidance were taken by the OECD and its member countries, through the establishment of the transfer pricing guidelines and guidance on controlled foreign company rules.[30]

The response to the issue of transfer mispricing exemplifies well the idea of tackling tax avoidance through more detailed rules that distinguish between avoidance and non-avoidance situations in a more fine-grained manner. Most bilateral tax treaties already contained a paragraph which spelled out the "arm's-length standard", requiring companies of a same MNE group to price intra-company services and goods exchanged as if they were sold among unrelated companies. Faced with the problem that this requirement was not clear for many situations (e.g., where no comparable goods or services were exchanged among unrelated parties), the OECD started working on better descriptions what "dealing at arm's-length" would mean for different types of transactions (e.g., sale of goods, rendering intra-group services, financing and benefitting from research and development, etc.). The first step was a still relatively general report on transfer pricing in 1979,[31] followed by the transfer pricing guidelines initially released in 1995 and continuously enhanced with more details.[32]

The OECD has not been the only driver of the finely delineating approach: Another example is the European Court of Justice, which has ruled with regard to anti abuse rules of member states that only those that that finely delineate between abusive and non-abusive solutions should be permissible.[33]

### 3.4.2 Blunt responses: Eliminating/reducing the benefit for both avoiders and for genuine businesses

The approach of finely delineating situations that should be qualified as avoidance from those that are genuine, which I described in the preceding section, is not the only possible approach to address tax avoidance. A second type of solutions consists in denying or reducing the benefit in question

29 Rixen, "From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance."

30 Picciotto, "Technocracy in the Era of Twitter: Between Intergovernmentalism and Supranational Technocratic Politics in Global Tax Governance"; Rixen, "From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance."

31 OECD, *Transfer Pricing and Multinational Enterprises*.

32 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.

33 Lenaerts, "The Concept of 'Abuse of Law'in the Case Law of the European Court of Justice on Direct Taxation."

not only for avoiders but also for those for whom it was intended. Such solutions are effective at tackling tax avoidance and require little administrative effort. However, they increase the tax burden for genuine businesses, as well, and hence discourage cross-border investment compared to domestic investment. I therefore call them "blunt" solutions.

Examples of blunt solutions are rules that deny or limit certain deductions where it is difficult to verify if the deductions are justified. Other examples of blunt responses could be fixed margins in transfer pricing, high withholding taxes on gross outbound payments, low thresholds for a taxable presence of non-residents in a country, or simply aggressively enforcing existing rules by the tax authority (i.e., enforcement practices where the benefit of the doubt is not given to the taxpayer) with few perspectives for the taxpayer to dispute decisions.[34]

Possible outcomes of blunt solutions could be that taxpayers are subject to double taxation or taxed on gross income instead of net income. If that is the case, the tax may adopt more the character of a sales tax and no longer be akin to a tax on net income with the disadvantage that taxation may no longer correspond to the ability to pay principle.

To understand why blunt responses may lead to a reduction in tax avoidance, one can imagine the different parts of countries' corporate tax systems as protective layers staggered upon one another. The first layer is the corporate income tax (CIT)[35]: Each enterprise resident in the country (or foreign enterprise with a branch) pays CIT on its net income, i.e., revenue minus related expenses. The CIT is vulnerable to "primary" international tax avoidance devices, such as transfer mispricing of fees for services or license payments paid to foreign residents, as well as excessive interest deductions (due to thin capitalization strategies for example). However, the negative impact on a country's tax revenue – and at the same time the incentive for firms to engage in such strategies – is mitigated if the country also taxes the foreign recipients of these outbound payments by means of withholding taxes or it deductions are denied.[36]

If a country sets its withholding taxes for typical base-eroding payments at the same rate (or nearly the same rate) as its statutory tax rate, the tax avoidance risk stemming from such payments can be significantly mitigated, since a deduction from the tax base for one taxpayer is compensated by a proportionate increase in the tax burden for the foreign recipient of the payment. Experts sometimes recommend developing countries to set

34 Interviewees from the corporate and advisory sectors in India feared that the implementation of rules from the BEPS Project would increase the tax burden for non-avoiding firms, due to the tax authority's propensity to use any rule as a means to simply "collect revenue", e.g., IN18

35 CIT can also be considered as a second layer, which protects personal income taxation of shareholders of family businesses.

36 Balabushko et al., *The Direct and Indirect Costs of Tax Treaty Policy: Evidence from Ukraine*, 4.

withholding rates in this fashion: For example, in 2003, Echavarría and Zodrow recommended in a World Bank report that Colombia increase its interest withholding rate from 7% to 20% to bring it closer to the statutory rate in force at the time (35%) and alleviate concerns due to tax planning with foreign entities.[37]

Depending on how high the withholding rate is, however, such a policy is a rather blunt tool against tax avoidance, since withholding taxes are levied on gross payments and do not allow the foreign taxpayer to deduct costs. A part of the tax might therefore economically be passed on to the buyer or prevent the transaction altogether, regardless of whether there was an intention to shift profits out of the source country or not.

The purpose of "secondary" tax avoidance is to avoid these withholding taxes or denials of deduction, for example by claiming the benefits of a tax treaty. The stated aim of tax treaties is to ensure that the same income is not taxed twice (either only by one country, or with a shared taxing right).[38] However, sometimes treaties may produce the result that no country taxes the transactions, usually when the right to tax a payment is allocated exclusively to the residence country but this country refrains from actually levying a tax. To achieve this result in situations where there is no tax treaty, a company sometimes engages in "treaty shopping" structures, routing income through conduit countries.[39] A "blunt" response towards "secondary" tax avoidance would be a termination or a renegotiation of a treaty, for example to include higher withholding taxes or otherwise extend source taxation (i.e., making the treaty less beneficial compared to domestic law).

It is important to mention that "blunt" responses do not have to be "responses" in the sense of being a reaction to an event that occurred before. As we will see in section 5, the chronological order is often different. Countries operated closed economies, in which many international tax avoidance schemes were unlikely because of multiple tax and non-tax restrictions on cross-border flows. These restrictions could be considered as "blunt" in the sense that they did not discriminate between avoidant and non-avoidant taxpayers (indeed, avoidance may not have been their focus at all), but they are not really "responses". Rather, they are features that (within limits) prevented the issue from arising in the first place.

One might also wonder what the difference is between blunt responses and policies that simply reallocate taxing rights among countries and per extension, whether they always increase the burden for non-avoidant taxpayers. Tsilly Dagan observed that, since most countries provide credits or exemptions for foreign earned income through their domestic laws, tax treaties that reduce country's rights to levy withholding taxes on outbound

37 Echavarría and Zodrow, "Foreign Direct Investment and Tax Structure in Colombia," 26.
38 See the preamble to the OECD Model Tax Convention
39 Arel-Bundock, "The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy."

payments essentially shift the burden of alleviating double taxation from capital exporting to capital importing countries.[40]

To what extent this argument holds up depends on a number of factors, some of which have evolved over the last decades. First, if a capital exporting country exempts foreign income altogether, levies a lower standard corporate tax rate than the withholding tax of the capital importing country, (part of) the withholding tax may not be credited and therefore signify a higher tax burden compared to a situation where no withholding tax is levied. If the capital exporting country exempts foreign income for the type of payment in question, levying source-based taxes does not lead to double taxation, but it leads to a higher effective tax burden for the MNE compared to the situation where no source-based tax is levied. Over the last decades, more countries have introduced exemption systems with respect to dividends and capital gains.[41]

For other payments, such as royalties, interest, and service payments, most capital exporting countries apply the credit method. In these cases, relatively low source-based taxes should not lead to a higher total tax burden for the company. However, they could lead to a higher burden if the profits on which residence-based taxation is levied are lower than the gross receipts of the foreign payment, for example when costs have been incurred to generate the income (for example for rendering a service, or for developing intellectual property). In such cases, even source withholding taxes that are lower than the resident country's statutory rate could lead to a higher tax burden.

Finally, not all countries provide credits or exempt foreign income. Some only permit a deduction of foreign taxes paid for cases when no double tax treaty was signed with the other country.[42]

Whether withholding taxes should always be characterized as blunt response is therefore not clear and likely dependent on the specific circumstances. One of the primary critiques of the BEPS Project was, however, that the reports do not sufficiently explore source-based solutions, although they may be easier to administer without necessarily leading to higher tax burdens for non-avoidant taxpayers.[43]

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40 Dagan, "The Tax Treaties Myth."

41 Shin, "Why Do Countries Change the Taxation of Foreign-Source Income of Multinational Firms?"

42 This is the case of Switzerland, for example.

43 Oguttu, "A Critique of International Tax Measures and the OECD BEPS Project in Addressing Fair Treaty Allocation of Taxing Rights between Residence and Source Countries: The Case of Tax Base Eroding Interest, Royalties and Service Fees from an African Perspective"; The BEPS Monitoring Group, "Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project."

### 3.4.3 Giving up: Eliminating or reducing the tax avoided

A third possible response is to remove (or reduce) the incentive for taxpayers to engage in tax avoidance through eliminating or reducing the tax avoided or providing a legislated tax exemption to those companies which were avoiding the tax. Giving up is frequently advocated by tax advisors or other policy experts.[44] An Indian tax advisor, for example, explained with regard to India's reduction of the statutory corporate tax rate in 2019 that "that also in some sense reduces the need for planning."[45] The United States, faced with the issue that many outward investing multinationals circumvented the country's worldwide tax system by deferring the repatriation of dividend endlessly (while still using funds as collateral for raising debt),[46] gave up on taxing on a worldwide basis and switched to a (partial) territorial system in 2018.[47] As a consequence, companies repatriated large amounts of dividends back to the United States, which then however were no longer taxable.[48] A 2003 paper on international tax policies in Colombia suggested lowering corporate tax rates as a way to reduce the incidence of tax avoidance by multinational enterprises.[49]

"Giving-up" is an effective (probably the most effective) solution against tax avoidance. Put simply: If there's no tax, there's nothing to avoid. However, as already pointed out in section 3.4.2, tax systems can be imagined as layers on top of each other and certain taxes often have a function of disincentivizing the avoidance of other taxes. For example, withholding taxes on interest and royalties prevent the avoidance of the tax on business income by making income shifting strategies that increase costs (and hence reduce profits) in the country in question less attractive.[50] Capital gains taxes disincentivize strategies that aim at avoiding taxes on dividends by deferring the distribution of profits.[51] Corporate income taxation also functions as protective layer for personal income taxation, by reducing the incentive for an individual to transform salaries into business income.[52]

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44 Neidle, "Pointless Taxes That Should Be Abolished #3: Withholding Tax."
45 IN17
46 Kleinbard, "Stateless Income."
47 Avi-Yonah, "The International Provisions of the TCJA: Six Results after Six Months."
48 Avi-Yonah.
49 "These results strongly suggest that many multinationals engage in international tax avoidance activity, and that multinationals in Colombia are no exception to this general rule. Thus, a major advantage of relatively low corporate income tax rates in Colombia is protection of the revenue base from such manipulations." Echavarría and Zodrow, "Foreign Direct Investment and Tax Structure in Colombia," 25.
50 Balabushko et al., *The Direct and Indirect Costs of Tax Treaty Policy: Evidence from Ukraine*, 4.
51 Cui, "Taxation of Non-Residents' Capital Gains," 134.
52 Ganghof and Genschel, "Taxation and Democracy in the EU."

Therefore, if the corporate income tax is given up, this may increase avoidance of the personal income tax.[53] Giving-up one tax can therefore mean giving-up other taxes as well.

Rixen and Genschel summarized the dilemmas of the "giving up" response as follows: "Taxpayer arbitrage can, in turn, trigger an interactive spiral of tax cuts by governments trying to attract inflows or prevent outflows of mobile capital. This limits the ability to generate revenue from capital taxation, creates inequities in relation to immobile tax bases, and accelerates international economic integration".[54]

Nonetheless, reducing a very high rate, or aligning tax rates for different types of income may be a sensible strategy if a high rate or the divergence of rates creates too many enforcement problems. In addition, when the tax avoided can itself be characterized as anti-avoidance provision and only fulfils its purpose in an inefficient way, it may be sensible to give up on levying this tax. The Nigerian excess dividend tax mentioned in section 3.2.1 arguably is such a case, and the Nigerian government's decision to amend the provision in 2020 was probably sensible.[55]

More generally, one can assume that avoidance opportunities are lower if there are little differences in the tax treatment of different types of taxpayers or transactions.[56] This idea is present in political debates. For example, the Nigerian "National Tax Policy", a high-level policy document, recommended that "The tax system should gradually seek a convergence of the highest marginal rate of personal income tax, capital gains tax rates and the general companies income tax rates to reduce opportunities for tax avoidance."[57]

### 3.4.4 No response (tolerating avoidance)

For the purpose of completeness, it is important to mention the zero category, i.e. no response at all. It captures when a country that can be considered as affected by international tax avoidance does not change its policy. Previous studies have provided rational explanations for why a country may want to tolerate some degree of tax avoidance. Here, two rationales can be distinguished: First, tolerance may achieve a concrete policy aim. Economists have pointed out that a government might be willing to provide a favourable tax treatment to foreign investors but may not be able to do so

53 Although this may be a bit less accurate in the context of developing countries, where a large share of CIT is collected from foreign owned businesses and state-owned enterprises.
54 Genschel and Rixen, "Settling and Unsettling the Transnational Legal Order of International Taxation," 157.
55 Okoro, "Nigeria: Finance Act 2019 And The Excess Dividend Tax Rule."
56 Picciotto, *International Business Taxation*, 84–85.
57 Federal Ministry of Finance (Nigeria), "National Tax Policy," 4.

in a transparent way for legal or political reasons. Tolerating tax avoidance by foreign investors might then be a way to achieve the desired level of tax for foreign investors without formally providing for preferential treatment.[58] It may also be a way to implement a short-term policy response that can easily be revoked without fundamental policy debates. In the 1970s, structures entered into with the objective of avoiding US withholding taxes on interest payments were tolerated by means of official rulings by the US tax administrations for a period of a few years.[59]

Second, tolerance may be a rational choice under limited policy and administrative capacity, when a certain international tax avoidance problem is not considered salient enough in terms of revenue loss. A government's action can be categorized as "no response" if no rule is implemented or if a rule is implemented but not applied in practice and it is sufficiently clear to taxpayers that they do not need to comply with the rule. A former Colombian government official said that that after the introduction of a new legal or administrative tool by the tax administration, one could sense more cautious behaviour from the private sector but that sooner or later it would become aware of the administration's lack of capacity to apply the tools.[60] If a country introduces a rule that "on paper" would correspond to the "finely delineating" logic, the challenge for the researcher is to find out whether the way it is applied by the administration in practice actually corresponds to the "finely delineating" way, the blunt way or the "no-response" way.

For example, whether a tax administration interprets a treaty anti-abuse rule in a narrow or broad way can significantly affect the tax burden of investing foreign companies since it affects whether multinational groups can still channel investment through conduit companies how costly the use of such companies might be.[61] Therefore, not enforcing the rule or enforcing it to a lesser extent than other countries do may affect the tax competitiveness of a country. It should be noted, however, that this could occur because of a deliberate plan of the government or rather unintendedly – for example because a judge interprets the rule in a certain way and creates a binding precedent that administration and taxpayers need to respect.[62]

58 Hong and Smart, "In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment."

59 Irish, "Tax Havens," 468.

60 CO01

61 A more stringent interpretation may require the multinational enterprise to "put more substance" into its conduit company, e.g., in the sense of hiring more employees, renting office space or directors flying to the country in question to take decisions there.

62 Correctly making these distinctions is one of the main reasons why the analysis of legal provisions needs to be complemented by interviews with practitioners.

### 3.4.5 International harmonization

Harmonizing tax laws among countries represents a fifth way of dealing with the issue of *international* tax avoidance. Proposals based on some degree of harmonization among countries have been proposed in the literature,[63] and have been put forward by advocacy organizations such as the ICRICT,[64] academics,[65] and supranational bodies such as the European Union.[66] The underlying idea of these proposals is that, if international tax avoidance is facilitated through divergences among tax systems, divergences should be reduced. Two main variants can be distinguished: In one variant, divergences in tax rates persist but an MNE's subsidiaries are no longer treated as separate entities. Instead the global profit of the entire MNE is taxed by apportioning the tax base among different countries according to a cooperatively agreed formula (which could be based on objective factors such as the number of employees or sales in a given country).[67] International tax avoidance strategies exploit the fact that a multinational enterprise is generally not taxed as one unit, but that each entity is a separate taxpayer in the country, in which it is incorporated. However, since the different entities are part of a group and control each other's decisions, and what matters to shareholders is the overall profitability of the MNE and not of the individual entities that constitute the group, MNEs have an incentive to allocate profits and structure transactions among the entities in a way that reduces the group's overall tax burden. If instead the consolidated income of the whole MNE group was taxed, allocations would not matter so much anymore.

In the other variant, countries harmonize tax rates and tax bases, thereby completely eliminating the incentive for companies to shift profits. Already in 1986 Irish wrote: "If there were a globally uniform income tax rate, tax avoidance through transfer pricing would decline since there would be no tax reason to shift profits from one jurisdiction to another. With a globally uniform tax rate, profits would be subjected to the same tax rate wherever they are realized."[68] These solutions have in common that they would most likely not raise the overall burden for non-aggressive businesses (and in the long run probably result in reduced compliance costs), if

63 Brauner, "An International Tax Regime in Crystallization."
64 Faccio and Fitzgerald, "Sharing the Corporate Tax Base: Equitable Taxing of Multinationals and the Choice of Formulary Apportionment."
65 Avi-Yonah, "A Proposal for Unitary Taxation and Formulary Appointment (UT+FA) to Tax Multinational Enterprises"; Picciotto, *International Business Taxation*.
66 European Commission, "Proposal for a COUNCIL DIRECTIVE on a Common Consolidated Corporate Tax Base (CCCTB)."
67 Rixen, "From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance," 206.
68 Irish, "Transfer Pricing Abuses and Less Developed Countries," 101.

adopted in a multilaterally co-ordinated way among countries.[69] However, initiatives advocating such advanced forms of cooperation have so far not overcome countries' willingness to safeguard tax sovereignty.[70] Unilateral adoption of formulary apportionment by only few countries however could lead to double taxation (or in some cases double non taxation) of income and might thus more resemble a "blunt" response.[71]

### 3.4.6 GAARs vs. SAARs

International tax literature often opposes General Anti-Avoidance Rules (GAARs) and Specific Anti-Avoidance Rules (SAARs), investigating whether adopting one or the other is preferable with respect to their effect on tax avoidance, legal certainty or administrative resources.

The categorization introduced above does not use this differentiation. In fact, both types of rules could *a priori* belong to the category of finely delineating approaches.[72] The difference is that in the case of SAARs, the task of separating avoidant from non-avoidant transactions is undertaken by the legislator, whereas in the case of GAARs, the task of separating is primarily undertaken by the tax inspector in charge of auditing the transaction and possibly other instances that confirm or invalidate the tax inspector's assessment. Therefore, the debate "SAARs vs. GAARs" is less relevant for the current investigation, as it arguably takes place within one of the paradigms that are opposed here.[73]

It is important to mention, as well, that the fact that a GAAR or SAAR is introduced does not necessarily mean that a country is pursuing a finely delineating approach. If for example, a GAAR is introduced but never applied, one could rather argue that the government is pursuing a "no response" approach. In Colombia, for example, tax advisors interviewed in

69 It should be noted that a formulary apportionment of the tax base without harmonization of tax rates would work without the participation of small countries with low tax regimes, whereas a harmonization of tax rates without formulary apportionment would require the collaboration (and hence elimination) of low-tax regimes, unless home countries of MNEs include the profits reported in tax havens within the income of the headquarter, such as proposed (subject to certain carve outs and reservations) in the current proposal for a minimum tax.

70 The treaty of the West African Monetary Union prescribes some degree of harmonization of tax rates. However, the significance of this is limited since tax rates were already relatively harmonized before this was legally prescribed by supranational law. See Mansour and Rota-Graziosi, "Tax Coordination, Tax Competition, and Revenue Mobilization in the West African Economic and Monetary Union."

71 Irish, "Transfer Pricing Abuses and Less Developed Countries," 121.

72 The fact that I put both rules together in one category does not mean either that I consider the choice irrelevant.

73 That is not to say that the debate is not relevant for policymakers.

2019 said that the GAAR which had first been introduced in 2012 had never been applied.[74]

If in contrast a GAAR is applied to many cases, without much analysis of whether the respective transactions really constituted tax avoidance, the policy could rather be qualified as "blunt approach". Moreover, SAARs can be designed in more or less blunt ways, for example including "rebuttable presumptions" or not, or using thresholds that are likely to capture genuine transactions or not. For example, whether an interest deduction rule follows the finely delineating logic or not depends on how well the rate of interest expenses divided by Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA) above which deductions for interests are denied reflects the practices of non-avoidant businesses.

What ultimately matters for assessing the policy approach taken by a country is how rules are applied in practice. Interpretations can vary between countries or over time. In that sense, administrations can interpret provisions in ways that resemble more a blunt approach or more a "tolerance" approach. In Senegal, for example, a tax inspector explained that the tax administration would sometimes apply the so-called "Sixth Method" in transfer pricing (which can be considered as blunter than the transfer pricing regime embodied in OECD guidelines) even though this may not directly be foreseen by domestic legislation.[75]

## 3.5 Preliminary conclusions

After explaining the term of international tax avoidance (and its somewhat contested use), this chapter asked in a general manner what international tax avoidance is, and what categories can policies countries could be adopted to it. It shows that there are many ways to deal with the issue.

First, policy standards developed by international organizations can target rather the jurisdictions that are on the (potentially) revenue-losing side of the problem, they can target those jurisdictions the regimes of which are used to avoid taxes in other countries, or they can rather target headquarter countries.

Second, zooming in on the different ways that countries on the defensive side can deal with the issue, one can further identify a multitude of options: A country can adopt a finely delineating response which consists in analyzing a taxpayer's behaviour as closely as possible to distinguish good from bad behaviour, or it can adopt responses that go more to the

74 CO30, CO28

75 SN09. The "Sixth Method" is a rule whereby transfer prices are calculated with reference to public prices for certain commodities. Gómez Serrano, Bolado Muñoz, and Arias Esteban, "Cocktail of Measures for the Control of Harmful Transfer Pricing Manipulation, Focused within the Context of Low Income and Developing Countries," 35.

"root" of the problem by either eliminating benefits that taxpayers may try to obtain artificially (blunt response) or by eliminating taxes. For the sake of completeness, I also discussed the possibility and rationales of not adopting any response, and discussed ideas that attempt to tackle international tax avoidance through international harmonization. Each response comes with trade-offs with respect to administrability, tax revenues, effects on non-avoidant taxpayers or the degree of international cooperation required. These broad categories will be used to analyze the evolution of policies that countries have adopted with respect to specific policy issues, such as transfer mispricing, and treaty shopping, as well as for distinguishing the preferences voiced by different stakeholders. However, before that, it is useful to describe how the BEPS Project fits into the framework outlined. This is the purpose of the next section.

# 4 The BEPS Project and what it encourages countries to do

## 4.1 Introduction

To analyze the impact of the BEPS Project on a country's approach, it is necessary to consider what the BEPS Project is aiming at. Since the publication of the 15 Action reports in 2015, a lot has been written about it by researchers around the world and many good summaries and explanations of its content are available.[1] The purpose of this section is therefore not to provide a summary action by action (relevant technical details are discussed in sections 6 and 7). Instead, I will ask several general questions about the BEPS Project that are relevant for understanding the legal and political nature of the Project. I apply the typologies developed in chapter 3 to analyze what approach the BEPS Project takes towards international tax avoidance, among the different approaches that are possible. I also ask how binding the BEPS Project is conceived to be and through which concrete legal mechanisms it aims at achieving its goals. Finally, I ask about the BEPS Project's competition, i.e., what alternative sources of policy ideas are available to policymakers.

The main argument of the section is that while the BEPS Project proposes a number of new tools against tax avoidance and shows some acceptance for stronger (or "blunter") approaches, it still aims at promoting specific legal and procedural limits to anti-tax avoidance efforts, with the objective of safeguarding certainty for presumably non-avoiding businesses. With a few caveats, the philosophy of the BEPS Project is therefore to promote finely delineating approaches to tax avoidance, following in the footsteps of earlier OECD initiatives that deal with international tax avoidance.

## 4.2 The high-level goals

The BEPS Project was kicked-off when the OECD published in 2013, at the request of the G20, a report with the title "Addressing Base Erosion and Profit Shifting", which described the problem and recommended the development of a "comprehensive action plan".[2] After two years during which interim reports were released for public consultation, the core outcome of

1 Shay and Christians, "Assessing BEPS: Origins, Standards, and Responses."
2 OECD, *Addressing Base Erosion and Profit Shifting*.

the BEPS Project was published in 2015. It consisted in fifteen reports, which contain minimum standards, recommendations, best practices, and describe changes to pre-existing OECD soft law such as the OECD Model Convention, its Commentary, and the OECD Transfer Pricing Guidelines.

Although different political actors who contributed to the project's outcome (such as individual countries, the OECD Secretariat, and private stakeholders) may have pursued different goals through their participation, an analysis of the stated goals in official communications and statements by persons in leadership roles can be instructive.

Public-oriented communications present the project's goal in a very simple manner: For example, the landing page of the BEPS Project on the OECD website uses the phrase "International collaboration to end tax avoidance" as header.[3] However, a slightly different picture emerges when reading the technical reports. Already the 2013 report that kicked-off the BEPS Project's emphasized that: "[…] collaboration to address BEPS concerns will enhance and support individual governments' domestic policy efforts to protect their tax base while protecting multinationals from uncertainty or double taxation."[4] This statement contains, in fact, a dual goal: eliminate or, at least, reduce what is termed as "base erosion and profit shifting" without increasing the occurrence of double taxation.

This implies that if base erosion and profit shifting were to be eliminated, but in a way that also increases double taxation of business income, the BEPS Project's objectives would have arguably not been attained. In a recent contribution, OECD officials Saint-Amans, Pross, and Peterson wrote with respect to the follow-up BEPS 2.0 project that "the overall timeline for the project was driven in large part by the increasing proliferation of digital service taxes and other unilateral measures (including aggressive audits), further resulting in increased trade tensions".[5] The role of the OECD in international tax projects can therefore more generally be thought of as that of a mediator between different stakeholders' interest rather than as an unconditional promotor of measures that could reduce tax avoidance.

This should be read as a high-level endorsement of the "finely delineating" logic of anti-tax avoidance efforts (see section 3.4.1). Reading further through the 2013 report, a wariness towards solutions of the "blunt" type (see section 3.4.2) and a desire to prevent countries from adopting these is apparent: "[…] Unilateral and uncoordinated actions by governments responding in isolation could result in the risk of double – and possibly multiple – taxation for business. This would have a negative impact on investment, and thus on growth and employment globally."[6] This desire

3 https://www.oecd.org/tax/beps/, last consulted on 16 January 2023.
4 OECD, *Addressing Base Erosion and Profit Shifting*, 48.
5 Saint-Amans, Pross, and Peterson, "Special Commentary: Let's Use Balance to Help Make Pillar Two Work."
6 OECD, *Addressing Base Erosion and Profit Shifting*, 8.

to balance can be observed throughout the different action items, as I will further show below, but also in the composition of the different items that make up the action plan.

Giving-up on taxing corporations altogether (see section 3.4.3) is technically not inconsistent with the Project (as long as a country abstains from facilitating tax avoidance elsewhere, e.g., by ensuring that no corporations without substance take advantage of the low tax rate), but it is not actively promoted. Indeed, it would be difficult to justify detailed proposals for amendments of corporate income tax rules while at the same time encouraging countries to not tax corporations altogether. Instead, the BEPS Action reports express the goal of safeguarding the "integrity of the corporate income tax."[7]

## 4.3 The degree of bindingness and the consequences of non-compliance

Different parts of the BEPS Action items have a different legal status and imply different mechanisms through which they could have an effect on the practices of different countries.

It is important to note that the BEPS Project seen as a whole is not an international treaty (although some of its elements need to be implemented through treaties). Accordingly, non-implementation by countries in any area should a priori not have any consequences for countries under international law. Arguments about whether certain policy recommendations should be considered as "customary international law", i.e., rules that are binding despite the absence of a treaty, are highly controversial.[8] They could, however, gain more or less traction based on what countries are actually doing in the implementation phase, i.e., whether they are acting under a sense of legal obligation.[9]

Some action items change existing OECD guidance that can be qualified as "soft law".[10] Soft law can directly govern the behaviour of taxpayers and tax administration without further action by domestic legislators. The main soft law items are the changes to the OECD Transfer Pricing Guidelines mandated in Actions 8 to 10 and implemented in 2017, and changes to the Commentary of the OECD Model Convention (also implemented in 2017), for example regarding the definition of a permanent establishment (Action 7).

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7 OECD, 50.

8 Braumann, "Taxes and Custom: Tax Treaties as Evidence for Customary International Law"; Mosquera Valderrama, "BEPS Principal Purpose Test and Customary International Law"; Galán and García Antón, "Principal Purpose Test and Customary International Law: A Note of Caution."

9 Mosquera Valderrama, "BEPS Principal Purpose Test and Customary International Law."

10 Christians, "Hard Law, Soft Law, and International Taxation."

To have an effect, these changes do not require explicit legal changes by the country, under the condition that the underlying soft law documents are granted legal value by domestic law, tax treaties or court decisions.

Other action items are policy standards and recommendations that need to be implemented into domestic law and practice by individual countries to have an effect: This applies to the work on interest deductions (Action 4), controlled foreign company (CFC) rules (Action 3), transfer pricing documentation (Action 13), mandatory disclosure rules (Action 12), abolishment of harmful tax practices (Action 5), and domestic aspects of the changes to dispute resolution mechanisms (Action 14).

Finally, some action items need to be symmetrically implemented by more than one country to have an effect. This includes all action items that require changes to bilateral tax conventions, such as the rules against treaty abuse and the change in the treaty preamble (Action 6), amendments to the permanent establishment (PE) definition (Action 7), anti-hybrid rules (Action 2), and changes to the dispute resolution article (Action 14). To reduce the time and effort that it would take to bilaterally renegotiate all these treaties to introduce more or less the same changes, a multilateral convention (MLI) was introduced, that would modify all bilateral treaties that exist between countries that are party to the multilateral convention.[11]

Other items which require action by more than one country are those related to the exchange of information, such as sharing of rulings (Action 5) and sharing of country-by-country reports (Action 13). For these to have an effect, one country needs to send them, another needs to use them.

Despite the non-binding status, participating in the BEPS Inclusive Framework implies a commitment to the "comprehensive BEPS package" and to agree to be reviewed on the implementation of those elements labelled as "minimum standards".[12] The minimum standards are contained in Actions 5, 6, 13, and 14. However, not the whole content of each of these reports is the minimum standards, but rather the adoption or non-adoption of certain policies described therein.[13]

Non-compliance with the minimum standards could lead to negative reputational consequences, because it is monitored through a peer review mechanism. Further, the European Union exercises symbolic and economic pressure by adding jurisdictions that do not implement the minimum standards to a list of non-cooperative jurisdictions in tax matters,[14] which, as some analysis suggests, may have driven some countries to commit

11 OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report*.

12 OECD, "Background Brief. Inclusive Framework on BEPS," 11.

13 For example, the Action 6 report describes the anti-avoidance clauses and the preamble text which need to be included in tax treaties to comply with the minimum standard, but the report also describes changes to the Commentary of the OECD Model Convention, which retains a non-binding character.

14 Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries."

to implementing the minimum standards.[15] It is not yet clear, however, whether the threat of "blacklisting" would also drive effective implementation. It is noteworthy, though, that this is the first time that substantive international tax policy standards (other than in the domain of exchange of information) have been defined for a large group of countries (larger than a regional bloc for instance).

The other parts of the project are labelled as recommendations or best practices. There should not be any consequences connected to a failure to follow them. Some observers, nevertheless, ascribe significant power to the parts of the reports that are merely labelled as "recommendations" or "best practices". De Lima Carvalho, for example, provides evidence for the fact that countries often refer to "international best practices" when proposing international tax policies in the domestic legislating process.[16]

Despite their purpose of harmonizing tax rules internationally, the standards and recommendations have some in-built flexibility, meaning that they often suggest several policy options, among which countries can choose, and which are all considered as compliant with the standard. Further, the notion of *minimum* standards suggest that countries also have the choice to go beyond what is formally required without being considered as non-compliant. The first report released in 2013 notes that "Of course, jurisdictions may also provide more stringent unilateral actions to prevent BEPS than those in the co-ordinated approach."[17] Nevertheless, as shown in the next section, some elements of the minimum standards rather strive at ensuring a minimum protection of taxpayers, thereby potentially limiting tax administration' actions against tax avoidance.

## 4.4 The goals in detail

How does the BEPS Project attempt to achieve the high-level goals outlines above? First, it is important to point out that different parts are addressed at different country roles (see section 3.3). Compliance with the minimum standards of Actions 5 and 6 aims at the facilitating dimension, since they require action mainly by countries that have enabled tax avoidance schemes. Action 14 on the other hand aims at the defensive side, since it can impact how countries can defend themselves against tax avoidance. The Action 13 minimum standard concerns both the supporting and defensive dimension: countries where MNEs are headquartered are obliged to share country by country reports with the countries where MNEs operate. This relates to the supporting dimension because country by country reports contain information on resident multinationals that are relevant for other

15 Mosquera Valderrama; Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership."

16 De Lima Carvalho, "The Cognitive Bias of 'Best Practices' in International Tax Policy."

17 OECD, *Addressing Base Erosion and Profit Shifting*, 9.

countries so that they can enforce international tax avoidance strategies of the MNE, but that not necessarily involve making use of the headquarter country's tax provisions. However, it also relates to the defensive side in the sense that countries that could use country by country reports to address tax avoidance by which they are themselves affected only under certain conditions.

In this context, it makes sense to ask what the "minimum" in the minimum standard refers to with respect to the potential reduction of tax avoidance. While in Actions 5, 6, and in those aspects of Action 13 that relate to the headquarter country, the minimum is a minimum level of effort against tax avoidance, the inverse is true for the aspects of Action 13 that ask something from the receiving country and Action 14.

In other words, if countries go beyond the minimum required in Actions 5, 6, and 13 (headquarter), this could make it even more difficult for taxpayers to engage in tax avoidance. For example, countries that previously offered low tax regimes could instead of simply introducing substance requirements (the minimum required under Action 5) abolish the low tax regime altogether. Substance requirement may already prevent tax avoidance, but if the regime was not available at all, there would be no way anymore in which it could be used for tax avoidance. However, if countries go beyond the minimum with respect to Actions 13 (receiving country) and Action 14, it means that more limits are imposed on the tax authority.

Most other parts of the BEPS Project (which have the value of recommendation or best practice) such as Actions 3, 4, 7, 8-10, 12, the recommendations in the Action 13 report, (i.e., local file and master file) are addressed at the "defensive" side, in the sense that they recommend ways to phrase provisions and mechanisms that can be used by a tax administration to defend the domestic revenue against tax avoidance. However, governments are free to adopt them or not, or to adopt them in a stricter or laxer form.

*Table 4: Main dimensions of international tax policies that the BEPS minimum standards are directed at*

| *Minimum standard* | *Direct impact on* | *Minimum level with regards to…* |
|---|---|---|
| Action 5 (eliminating harmful tax practices) | Facilitating dimension | Preventing tax avoidance |
| Action 5 (sending rulings) | Facilitating dimension | Preventing tax avoidance |
| Action 6 (agreeing to modify tax treaty if requested by other country) | Facilitating dimension | Preventing tax avoidance |
| Action 13 (requesting CbCRs from headquartered MNEs and sending them to other jurisdictions) | Supporting dimension | Preventing tax avoidance |
| Action 13 (implementing appropriate use and confidentiality criteria, limitation on local filing) | Defensive dimension | Taxpayer protection |
| Action 14 | Defensive dimension | Taxpayer protection |

*Source: the author*

An important implication of this is that, while through its recommendations the BEPS Project may encourage countries to defend themselves more against tax avoidance, it does not require countries to do so, since none of the minimum standards requires a minimum level of defence. Those minimum standards that directly relate to the defensive dimension only impose limits on the defence.

Most striking is the inclusion of BEPS Action 14, which is about enhancing dispute resolution mechanisms among states, but which does not provide any tools to fight tax avoidance. Pires de Oliveira commented that Action 14 "piggybacked" on the BEPS initiative.[18] The important implication of this is that whether the BEPS Project is therefore a driver or a limit in countries' fight against tax avoidance is an empirical question, depending on what countries would have done in the absence of such a project.

Moreover, there is nothing in the BEPS Project that prevents countries from not defending themselves against international tax avoidance. If for example Action 5 on sending rulings is complied with by a country that emits rulings, this can improve the receiving country's ability to audit transactions and hence, there is a possible impact on the defensive dimension. However, whether a country actually makes use of the rulings it receives is not part of the minimum standard. The same holds true for whether countries make use of anti-abuse clauses in tax treaties to deny treaty benefits or whether they use country-by-country reports in transfer pricing audits.

It needs to be pointed out that defensive measures may matter less if all countries effectively abolish those tax regimes that facilitate tax avoidance. It is, however, reasonable to suppose that currently policies in neither of the three areas are sufficiently strong so that one area becomes redundant. These interactions might become stronger in the future: If the income inclusion rule of pillar are implemented widely by residence countries, this could have strong effects on MNE's incentives to shift profits from source countries to low tax jurisdictions and make defensive rules as well standards that relate to the facilitating dimension (in part) redundant (see also section 4.5).[19]

Within the BEPS reports published in 2015, however, the technical design mainly corresponds to the high-level goals discussed in section 4.2 and encourages countries to defend themselves against international tax avoidance by finely delineating avoidant from non-avoidant situations.

Overall this is not surprising, since most policies that are part of the BEPS Project can be said to have originated in long-standing OECD member countries.[20] For example, the principal purpose test clause that is proposed in the BEPS Action 6 report was inspired from a part of the Commentary to the

18 Pires de Oliveira, "Action 14 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Making Dispute Resolution More Effective – Did Action 14 'Piggyback' on the Initiative?"

19 Becker and Englisch, "International Effective Minimum Taxation–the GLOBE Proposal," 6.

20 Avi-Yonah and Xu, "Evaluating BEPS," 6–7.

2003 OECD Model Convention,[21] and, as argued by Freedman, influenced by discussions in the United Kingdom.[22] In addition, significant parts of the Commentary to the principal purpose test clause, in particular a number of illustrating the examples have been taken over from a protocol to the tax treaty between the United Kingdom and the United States.[23] The suggested alternative clause, the limitation on benefit article, was primarily developed by the United States.[24] Controlled Foreign Company rules were first introduced in the United States in 1962[25]. The suggested rules on Interest deduction limitation in BEPS Action 4 were based on an approach developed by Germany and other European countries.[26] The saving clause introduced in the MLI comes from U.S. Treaty Practice and was already referenced in the OECD's 1999 Partnership Report.[27] The Action 5 report on Harmful Tax Practices is a direct continuation of earlier work undertaken by the OECD in 1998.[28] Finally, the treatment of intellectual property regimes (nexus approach) was influenced by an agreement between Germany and the UK.[29] In addition, BEPS Action reports generally recognized EU law and past interpretations of the EU's "fundamental freedoms" made by the European Court of Justice as boundaries which the BEPS Project needs to respect.[30]

There are some exceptions, however. BEPS Action 10 on transfer pricing of commodities has been inspired by the approach developed in Argentina and used by other countries, including lower income countries, although it has not fully been adopted in the final report.[31] This approach, also called "Sixth Method" could be qualified as "blunter" than previously endorsed methods for tackling transfer mispricing. Finally, the proposal for incorporating a country-by-country report into transfer pricing documentation does not originate from the practice of any particular country but can be attributed in its origins to civil society activists, albeit in a different version than finally adopted.[32]

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21 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 54–55; van Weeghel, "A Deconstruction of the Principal Purposes Test."

22 Freedman, "The UK General Anti-Avoidance Rule: Transplants and Lessons."

23 Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups," 49.

24 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 18.

25 Durst, *Taxing Multinational Business in Lower-Income Countries: Economics, Politics and Social Responsibility*, 70.

26 Durst, 76.

27 Parada, "Tax Treaty Entitlement and Fiscally Transparent Entities: Improvements or Unnecessary Complications?," 4.

28 OECD, *Harmful Tax Competition: An Emerging Global Issue*.

29 OECD, "Action 5: Agreement on Modified Nexus Approach for IP Regimes."

30 Faulhaber, "The Luxembourg Effect: Patent Boxes and the Limits of International Cooperation," 1682.

31 Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations," 19.

32 Christensen, Hearson, and Randriamanalina, 21.

## 4.5 Drawing the boundaries of the BEPS Project

As described in the previous section, the core of the BEPS Project are fifteen reports published in 2015. However, when referring to the impact of the BEPS Project, authors and most stakeholders interviewed for this project do not only refer to the fact that these fifteen reports were published and to their content. Indeed, there is more to it.

First, the minimum standards are accompanied by a peer review mechanism, which consists in questionnaires sent out to jurisdictions, analysis of legal provisions carried out by the OECD Secretariat, decisions taken by the participating states, and periodical reports that contain the state of play of compliance in participating jurisdictions. Second, some of the reports recommended the creation of international conventions such as the Multilateral Instrument or the Multilateral Competent Authority Agreement for the Exchange of Country-by-Country Reports, and technical standards such as the XML scheme for exchanging country by country reports among tax authorities. These documents can be considered as part of the BEPS Project as well.

Other relevant elements are the public communication (for example, the website of the BEPS Project; interviews given by key stakeholders; explanatory videos published on YouTube or the OECD "Tax Talks") and progress reports published by the OECD. One could also count statistics collected and made public by OECD as part of the BEPS Project, which could have an impact through the research they might allow on the BEPS phenomenon, or technical assistance activities carried out by the OECD with respect to the BEPS Project. Beyond the technical content of the reports and related publications, the political commitment by the participating countries to the goals of the BEPS Project (i.e., "fighting tax avoidance") could be counted as significant part of the BEPS Project itself.

Finally, when asked about the BEPS Project, interviewees in this project often talked about issues that were indicators of a general adaption of the tax system towards an OECD-style tax system, but not strictly part of BEPS. For example, interviewees frequently talked about the effect that the introduction of transfer pricing regulations had in the country,[33] even though this is strictly not part of the BEPS recommendations, since BEPS Action 8 to 10 and 13 only amend the existing transfer pricing guidelines are amended, but there is no general recommendation to countries that have not yet introduced any transfer pricing regulations to do so.

In general, my investigation departed from the technical content but I did not strictly limit it to these aspects, but also researched the wider question as to how the BEPS Project transforms a country's approach to international tax (or not).

33 E.g., NG14

With the creation of the BEPS Inclusive Framework in 2016, the BEPS Project has gained the quality of a more permanent process. Next to questions of implementation such as revisions to the peer review mechanisms, this has led to the development of follow-up policy projects. Writing in early 2023, the 15 BEPS Actions are already receiving less public attention, since the next standard setting project is already under way: Pillar 1 and Pillar 2, which commentators often refer to as "BEPS 2.0". While Pillar 1 is still under negotiation, the implementation phase of Pillar 2 started in 2022, when a few countries have published concrete plans to implement the rules of the project.[34] This dissertation's scope is limited to the "BEPS 1.0" project, although references are made to the negotiation dynamics of the "BEPS 2.0" follow-up project where appropriate.

An interesting side note that can be made with reference to Pillar 2 is that, more than any previous international tax standard, it aims at the "supporting" dimension. The inclusion of the supporting dimension (i.e., a special role for headquarter countries) was arguably an innovation of the BEPS Project but was not yet fully explored, since the only Action that foresees a specific role for the headquarter country is Action 13.

However, rules that tax a headquarter company on the income earned by its subsidiaries can have a supportive character, as well, because they can reduce the economic incentives of the whole MNE group to try avoiding other countries' taxes. However, this is a policy choice. Controlled foreign company (CFC) rules, the predecessors of Pillar 2's income inclusion rules, often explicitly excluded a supporting dimension and were only about protecting the headquarter country's tax base. As argued by Arnold, "in most countries, the use of CFCs to reduce tax in other countries is acceptable tax planning and, in fact, some countries explicitly facilitate this type of tax planning."[35] Before the 2017 tax reform, the United States had CFC rules designed so that they did not support other countries' tax avoidance efforts, i.e., they only applied when the MNE was eroding the United States tax base, while largely permitting "foreign-to-foreign" stripping.[36] Similarly, the South African "Davis Tax Committee report" on possible reforms of the South African tax system mentioned that the outcome of discussions on the country's CFC regime was that South Africa was not supposed to be a "world tax police" due to competitiveness concerns.[37] The income inclusion rule of Pillar 2 clearly departs from that conception and is designed in a way

34 The Netherlands, for example, was one of the first countries to publish a draft legislation implementing pillar 2 on 24 October 2022. See: https://www2.deloitte.com/nl/nl/pages/tax/articles/netherlands-publishes-draft-legislation-implementation-global-minimum-tax-under-pillar-two.html

35 Arnold, "The Evolution of Controlled Foreign Corporation Rules and Beyond," 638.

36 Blum, "Controlled Foreign Companies: Selected Policy Issues–or the Missing Elements of BEPS Action 3 and the Anti-Tax Avoidance Directive," 303.

37 The Davis Tax Committee, "Summary of DTC Report on Action 3: Strengthening Controlled Foreign Company Rules," 13–14.

that a policy implemented by the headquarter country would discourage an MNE from shifting profits from a third country to a low tax jurisdiction. Hence it has a clearly supporting character.[38]

## 4.6 The BEPS Project among other international tax policy standards

A last important remark is that the BEPS Project is not alone on the stage of worldwide tax policy standard setting. Rather it can be understood as part of an international regime complex on international corporate taxation.[39] Other international organizations that are active in the production of policy standards are the United Nations, the European Union, and to some extent the International Monetary Fund and regional tax organizations for collaboration among tax administrations such as the Centro Interamericano de Administraciones Tributarias (CIAT) and the African Tax Administration Forum (ATAF).[40]

The relationship among the different organizations should not necessarily be described as competitive since their membership overlaps. As a result, the United Nations Model Convention or the ATAF Model Convention are not radically different from the OECD Model Convention.[41] Moreover, the organizations collaborate in the elaboration of policies. For example, OECD, UN, IMF and World Bank produce toolkits and reports containing policy recommendations together as "Platform for Collaboration on Tax",[42] and regional tax organizations have roles as observer in the relevant OECD bodies. The Platform for Collaboration on Tax has developed recommendations in areas that have been left out by the BEPS Project but that are relevant for the general topic of combatting international tax avoidance. Important outcomes in that regard are the Toolkit on the Taxation of Offshore Indirect

38 Another potential policy areas that could have a supportive character, but which is not further explored in the BEPS Project (nor in this study), is the governance of state-owned entities (i.e., to what extent states discourage entities owned by them from avoiding tax in other countries).

39 Raustiala and Victor, "The Regime Complex for Plant Genetic Resources."

40 These are not the only two organizations. The Network of Tax Organizations (NTO) reunites nine regional tax organizations: https://www.nto.tax/nto-members However, CIAT and ATAF are by far the most vocal in international organizations. Why cooperation is more intense in Africa and (to a more limited extent) in Latin America than, for example, Asia is an interesting research question but beyond the scope of this project.

41 West, "Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models."

42 https://www.tax-platform.org/

Transfers,[43] the Toolkit on Tax Treaty Negotiation,[44] as well as toolkits supporting the implementation of transfer pricing rules.[45]

Despite the many instances of collaboration, recommendations issued by the different organizations are not always aligned. Although the United Nations Tax Committee is lacking backing by a secretariat as strong as the OECD's Tax Policy Center (representatives are acting "in personal capacity" and there are overlaps in membership between OECD and UN bodies, there are instances, in which the Committee has proposed policies that are markedly distinct from those proposed by the OECD.[46] For example, the UN Model Convention suggests of the imposition of higher withholding taxes at source for different types of transactions and economic activity, where the OECD Model Convention assigns taxing rights exclusively to the residence jurisdiction. Since 2017, the UN Model Convention also suggests that income from technical services could be taxed by means of withholding in the source state, which the OECD convention discourages.[47] Developing countries are typically in the position of the source jurisdiction due to the lack of balance in global flows of capital and payments for services.

The International Monetary Fund is also active in the development of policy recommendations, although the language its reports use convey that these are not intended as standards. They should be rather understood as explorations of policy options.[48] To the extent that the options that are explored may not be consistent with those suggested by the OECD, they could nevertheless be understood as a potential counterweight.

The Inter-Governmental Forum on Mining (IGF) develops policy recommendations for developing countries specific to the taxation of multinational enterprises in the natural resources sector, often in collaboration with OECD, IMF, and World Bank.[49]

Regional tax organizations, such as CIAT and ATAF, work in close collaboration with the OECD but they have at times proposed distinct policy standards as well. The CIAT Transfer Pricing Cocktail is a case in point, as it discusses at length the transfer pricing norms adopted by different Latin

43 Platform for Collaboration on Tax, "The Taxation of Offshore Indirect Transfers— A Toolkit."

44 Platform for Collaboration on Tax, "Toolkit on Tax Treaty Negotiations."

45 Platform for Collaboration on Tax, "A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses"; Platform for Collaboration on Tax, "Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements."

46 Hearson, "What Is the UN Tax Committee for, Anyway?"

47 United Nations, Model Double Taxation Convention between Developed and Developing Countries 2017, art. 12A.

48 IMF, "Corporate Taxation in the Global Economy."

49 IGF and OECD, "Limiting the Impact of Excessive Interest Deductions on Mining Revenues. Consultation Draft"; Readhead, "Toolkit for Transfer Pricing Risk Assessment in the African Mining Industry"; Readhead and Taquiri, "Protecting the Right to Tax Mining Income: Tax Treaty Practice in Mining Countries - Public Consultation Draft."

American countries.[50] The ATAF "Suggested Approach to Drafting Digital Services Tax Legislation" is another example since it recommends African countries to introduce a turnover-based digital services tax while no consensus solution on taxing the digital economy is agreed on in the OECD/G20 Inclusive Framework.[51] However, it also recommends countries to consider adopting such taxes only as interim solution until a global agreement is found, thereby keeping some consistency with the OECD approach.[52]

The European Union mainly translates work undertaken by the OECD into common obligation among member states,[53] and thereby fulfils with regard to corporate taxation akin to other economic governance areas the role of a "hardening agent".[54] This role is exercised both inwards and outwards.[55] Although it remains in terms of contents closely aligned with the OECD (unsurprisingly due to large overlaps in membership), it nevertheless uses its discretion at times to promote slightly different policy solutions among its member states.[56] Towards the outside, it mainly relies on OECD standards. In the area of harmful tax competition, the Council of the EU undertakes its own assessment, which at times diverges from those of the OECD Forum on Harmful Tax Competition (FHTP) due to interpretational differences, but the criteria are nevertheless closely aligned.[57]

To conclude, the OECD is not the only organization involved in creating international standards in the area of international corporate taxation. However, currently it is the one with the highest capacity and the one with the strongest claim to bindingness of its rules, which is why the focus of this dissertation is on the impact of the OECD's work. Whether this will always be like this (or more important whether it should) is an altogether different question.

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50 CIAT, "Cóctel de Medidas Para El Control de La Manipulación Abusiva de Precios de Transferencia, Con Enfoque En El Contexto de Países de Bajos Ingresos y En Vías de Desarrollo."

51 African Tax Administration Forum, "ATAF Suggested Approach to Drafting Digital Services Tax Legislation."

52 African Tax Administration Forum, 2.

53 For example, the Anti-Tax Avoidance Directives (ATAD I & II) contain many of the recommendations of the BEPS Project.

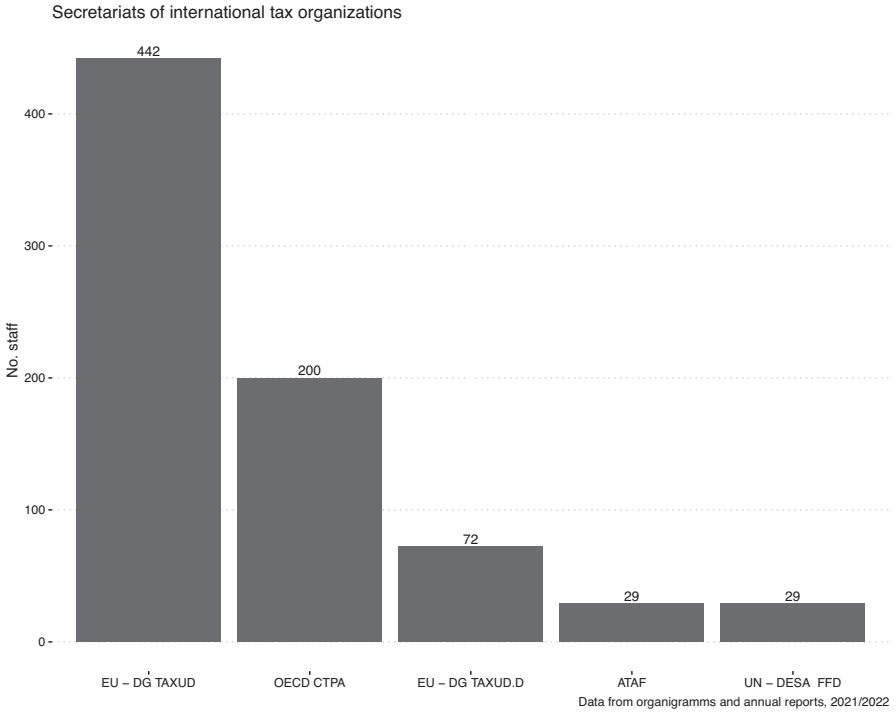
54 Newman and Bach, "The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation."

55 Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries."

56 For example, the ATAD directives also included other measures such as an exit tax. See: Popa, "An Overview of ATAD Implementation in EU Member States."

57 Heitmüller and Mosquera, "Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future."

*Figure 2: Staff counts at secretariats of different international tax organizations*




*Source: compiled by the author from organizations' websites and reports.*[58] *Note: The scope of topics that the different units plotted here deal with is not necessarily the same. DG TAXUD also deals with customs policies and VAT. Therefore, the size of the direct tax division is plotted as well. The OECD CTPA also deals with other policies than direct tax, but direct tax is the core of the work.*

## 4.7 Preliminary conclusions

The purpose of this chapter was to provide a qualification of the BEPS Project. What goals does it pursue and how does it try to achieve this? I argued that the BEPS Project, in coherence with the history of OECD norms, principally encourages countries to adopt a finely delineating approach in which cases of tax avoidance are finely delineated from non-avoidant cases. As shown in chapter 3, this is not the only possible response, and not necessarily the strongest or most effective one. Rather, it is a compromise that attempts to address avoidance while safeguarding the widest possible freedom for cross-border transactions, however, at the cost

58 OECD, "OECD Work on Taxation"; European Parliamentary Research Service, "Number of Staff by Directorate-General"; European Commission, "EU Whoiswho. Direct Taxation, Tax Coordination, Economic Analysis and Evaluation (TAXUD.D)"; ATAF, "ATAF Secretariat"; United Nations, "About Financing for Sustainable Development Office."

of higher administrative resources necessary for its enforcement. It should be noted that some features of the BEPS Project express more acceptance of what I termed as "blunt" solutions, compromising to some extent with preferences that emerging economies and civil society organizations managed to bring into the process. But the finely delineating philosophy is arguably still dominant. Finally, it is important to mention that nowhere does the BEPS Project require countries to actually defend themselves against tax avoidance.

In sum, whether the BEPS Project is therefore a driver or a limit or not impactful at all in countries' fight against tax avoidance is an open question. It should depend on what solutions countries had in place beforehand or which they might have adopted in the absence. Knowing the latter is of course not possible to know with certainty. Nevertheless, case studies on the evolution of countries' policies in specific policy areas could improve our ability to assess where the BEPS Project had an impact and where it did not.

# 5 The domestic political economy of tackling international tax avoidance

## 5.1 Introduction

Having charted the different possible approaches that countries can take with respect to the issue of international tax avoidance, as well as the preferred approach embedded in the outcomes of the BEPS Project, the purpose of this chapter is now to analyse under what conditions countries are likely to adopt one approach or the other, which can subsequently help understanding the impact of the BEPS Project in a given context. What are obstacles and what are facilitating factors?

I will first discuss the importance of the status-quo ante: A country's response is likely to be influenced by the way the issue has been addressed in the past and by the extent and nature of the issue, which is a function of taxpayers' behaviour and the legal framework. Then, I discuss a number of structural variables and institutional variables that I consider influential or that have been mentioned in related literature. By structural variables, I refer to variables that only change over the long term, such as the position in the market for international investment and administrative capacity. Institutional variables refer to the constellation of different stakeholders that weigh on the policy, and their interests and power with respect to the issue. None of the factors discussed should be understood as deterministic. In addition, due to the breadth and multidimensionality of the phenomena under discussion, it is hard to derive concrete predictions about whether and when a given policy will be adopted by a country. However, they should be able to shed light on the general policy directions taken.

## 5.2 Status-quo ante

Accounts of international policy convergence and institutional change often start by emphasizing the concept of "path dependency" which states that the best predictor of how an institution looks like at a given point in time is how it used to look like in the past. Such theories do not deny that institutions can change but change should be thought of as more of an exception than a rule, since sunk costs into development of the existing policy, the power of actors that became vested in the policy, and specific designs of past policies that make changes difficult create a preference by policymakers for the status quo.[1]

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1 Cerna, "The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches."

### 5.2.1 Pre-existing regulation

The status-quo ante of a country's tax policies should be relevant for the impact of the BEPS Project in a specific country for the following reasons: First, as explained in chapter 4, the BEPS Project is not a radical departure from previous standards. The degree to which a country had already incorporated standards into their legislation and practice should matter for the degree of uptake. Convergence with the BEPS Project's approach should probably be highest where alignment with OECD recommendations was already high before. The impact of the BEPS Project could be important where the specific issue has not yet been regulated in the past, i.e., where the BEPS Project can "write on a blank page". The impact should be lowest where a country has previously regulated the issue but in a way that diverges from OECD practice, since specific actions need to be taken to adjust previous regulation.

For some elements of the BEPS Project to have an impact, some degree of previous alignment is a prerequisite. As shown in chapter 66, BEPS Actions 8-10 only modify the OECD Transfer Pricing Guidelines. However, it does not require a country to implement transfer pricing legislation or to incorporate the practice of using the transfer pricing guidelines in the first place. Therefore, BEPS Action 8-10 can only have a direct impact where transfer pricing legislation (or a referral to the guidelines) is already in place. Similarly, for the BEPS Project's standard on treaty shopping to have a direct impact, a country needs to have signed tax treaties or be in the process of negotiating tax treaties.

Second, the status-quo ante is likely to influence the attitude that different actors will take towards the response suggested in the BEPS Project. For example, with regards to the general anti-avoidance rule introduced in Colombia (which is not a direct outcome of the BEPS Project but follows a similar approach), a tax advisor said that: "For me, the anti-abuse clause is a muzzle. […] Because what I am going to do to you is that the power that you have to interpret and classify abusive behaviour, I give you a way and an order. You cannot do, when you want and how you want, but you have to follow this procedure."[2] In the view of this advisor, the status-quo ante was such that practice was "blunter", as the tax administration was free to argue that a situation constituted abuse, which is why was favourable to the introduction of an anti-abuse clause, which would make the approach more "finely delineating". Hence, depending on whether the status-quo ante was a blunter or a more tolerant approach, stakeholders are likely to take opposite views on the introduction of a finely delineating approach to inter-

2 CO15. Translated by the author. Original quote: "Para mi la clausula antiabuso, es un bozal. […] Porque lo que yo le voy a hacer es que la potestad que usted tiene de interpretación y de clasificación de conductas abusivas, le doy un camino y un orden. Usted no puede hacer, cuando lo quiere y como quiere sino que tiene que seguir este procedimiento."

national tax avoidance. Whether they are likely to consider the outcomes of the BEPS Project as an improvement of their situation or not therefore depends then on their evaluation of the "bluntness" of past rules.

### 5.2.2 Salience of the policy issue

A second aspect of the status-quo is whether a country has been affected by the specific tax avoidance issue. This can vary significantly across countries. For example, as further detailed in section 7, in the case of treaty shopping it depends on whether a country has signed double tax treaties with countries that have a regime that is amenable to the establishment of conduit companies and on the difference in treatment that these treaties offer with respect to domestic law and other treaties. For transfer pricing, it depends on whether other aspects of the tax and customs system cancel out tax savings that an MNE would obtain through overpricing imports. As already mentioned in section 3.4.2, withholding taxes on interest, royalty, and service payments may disincentivize transfer mispricing, since lower corporate tax payments by the resident taxpayer would result in more taxes withheld from transactions that erode the tax base.

In this respect, both policy issues are likely to interact: More tax treaties mean probably less problems of treaty shopping (because the treatment for investors from different jurisdictions is likely to be more similar), but possibly more problems of transfer pricing due to lower withholding rates for outward payments. It also means that more taxpayers will be granted access to the MAP procedure, which is likely to result in more pressure on the tax administration to not deviate from international standards when auditing transfer prices.

More generally, the salience of international tax avoidance depends on whether there is a lot of cross-border activity in the first place (which in turn depends on economic and regulatory characteristics of the country). As shown in section 6.4.4, many countries in the Global South only recently (and often only partially) abolished regulations that restricted cross-border investment and other types of cross-border transaction.

Finally, whether a country is affected by the tax avoidance issue depends on whether taxpayers have decided to effectively make use of the opportunities for avoiding tax through the respective strategy. Empirical research has observed important differences in "tax aggressiveness" of MNEs based on different characteristics, such as sector, home country, management factors, etc.[3] Hence, to explain the approach taken by a country it is

3 Gaertner, "CEO After-tax Compensation Incentives and Corporate Tax Avoidance"; Huang and Zhang, "Financial Expertise and Corporate Tax Avoidance"; Dyreng, Hanlon, and Maydew, "The Effects of Executives on Corporate Tax Avoidance"; Kanagaretnam et al., "Societal Trust and Corporate Tax Avoidance."

necessary to analyse taxpayers' behaviour, in addition to the opportunities granted by the pre-existing legal and policy framework.

Nevertheless, for two reasons the salience of an issue may not perfectly determine the response: First, it may not be easy for a government to know the extent of international tax avoidance, as such activity is not easy to observe. Available economic indicators are usually imperfect, as further discussed in the respective chapters, and a government may only start collecting relevant information (such as for example on transfer prices practices by companies or on the use of specific tax treaties) after it decided to regulate the issue. Hence, a mere perception that the issue exists (including based on discussions at the international level, without particular reference to the country in question) may be sufficient to trigger a response. Second, even though a specific issue does not exist – for example, there are no instances of treaty shopping because no treaty with a conduit jurisdiction is signed – a government may decide to introduce an anti-avoidance rule since it may not create any disadvantage either. In such situations it is likely that the rule will be closely modelled on the international standard, since there is no urgency to create a rule that better fits the local context.

## 5.3 The position in the market for MNE investment

### 5.3.1 Attracting and raising revenue: A question of balance

On a more abstract level, the main characteristic that should influence international tax policies is the position of a country in global foreign direct investment flows. In contrast to industrialized countries, developing countries can generally be qualified as "capital importing" countries: They receive important amounts investment from foreign MNEs, but their own residents invest relatively little abroad. This means that developing countries will host a low number of MNE headquarters, but potentially a large number of subsidiaries of foreign MNEs. This is relevant because, as already alluded to in section 3.3, international tax policies are usually designed along the axis of residence/source allocating greater taxing rights to one or the other, and anti-avoidance rules can be designed to protect taxation at residence or taxation at source.

However, what international tax policy a capital importing country (a source country) will likely adopt is not obvious. In fact, two opposing ideas can be distinguished: One the one hand, there is the tax competition discourse and on the other hand, there is a discourse that emphasizes that capital importing countries should make sure that foreign investors pay sufficient taxes on their income derived from the country.[4]

4 Hearson, *Imposing Standards*, 53–61.

The concept of tax competition can be traced back to an article by economist Charles Tiebout.[5] It refers to a strategy adopted by a state or another territorial entity with the power to autonomously enact tax rules to attract or retain economic activity within its territory through offering a relatively more favourable tax treatment than elsewhere. The literature often suggests that developing countries should engage in tax competition. Margalioth, for example, writes that developing countries should minimize taxes on foreign direct investment, as the gains for the country from additional investment that could be attracted by low taxes would be higher than the tax revenues that could be generated.[6] As discussed in section 3.3, how a country chooses to address tax avoidance can affect the tax burden for foreign investors in different ways. If the approach is of the blunter type, the burden may increase even for non-avoidant taxpayers. Finely delineating or "giving-up" approaches are more competitive. And if the government decides to tolerate avoidance, the burden may be lower than even foreseen by the laws. Previous literature has often found competition for investment to be relevant in explaining different tax policy outcomes.[7]

Addressing competition for real investment was carved out from the 2015 BEPS Action plan (as opposed to harmful tax competition under action 5, which addressed competition to attract companies without substance that only serve the purpose of facilitating tax avoidance). Hence, scholars hypothesized that tax competition may shape the way countries are responding to the BEPS Project.[8]

The opinion that policymakers should be mindful of the effect on competitiveness of policies chosen was uttered by interviewees from all countries studied. An Indian advisor said that: "I have seen in prime of my career and in lifetime what the country was in 1990 and what the country is today […]. And that has happened because businesses have grown, economy has grown, foreign direct investment is up."[9] A Colombian tax advisor said that: "I have always said that we have to be competitive. And the only way to be competitive to attract investment is by lowering taxes."[10] There is also some evidence that competitiveness arguments have played a role in debates about the approach to avoidance: A tax director of the Colombian branch of an MNE reported that the business association to which his MNE

5 Tiebout, "A Pure Theory of Local Expenditures."

6 Margalioth, "Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries."

7 Genschel and Schwarz, "Tax Competition: A Literature Review"; Swank, "Tax Policy in an Era of Internationalization: Explaining the Spread of Neoliberalism"; Shin, "Why Do Countries Change the Taxation of Foreign-Source Income of Multinational Firms?"

8 Durst, *Taxing Multinational Business in Lower-Income Countries: Economics, Politics and Social Responsibility*, 94.

9 IN18

10 CO25. "Siempre he dicho que tenemos que ser competitivos. Y la única forma de ser competitivos para atraer inversión es bajando impuestos."

belonged had lobbied the tax authority directly to make the application of the Colombian thin capitalization rule more business friendly, mobilizing tax competition arguments.[11]

On the other hand, a former Indian tax policy official said that "You are very well aware that India is a big country and there are a lot of problems and it needs resources, constant resources. When people found that there were certain loopholes which were creating problems, then they started taking cognizance of it."[12] In Nigeria, judicial doctrine even instructs an interpretation of tax laws that favours raising revenues. In the *Saipem vs. FIRS* case, the tax administration stated that "A revenue-based statute must be construed liberally in favour of revenue or in favour of deriving revenue by government unless there a clear provision to the contrary."[13] The Court sided with the tax administration in that case citing an earlier judgment in which the doctrine was established.[14] Indeed, short-term revenue needs can be less easily fulfilled in developing countries by incurring additional debt due to higher interests rates, which is why raising revenues from MNEs could be more important.

In addition, interviewees often express dissatisfaction with the deal that is struck with foreign investors. A Senegalese tax advisor commented: "I agree that we should be open to investments, but only if they are profitable for our country. [...] First, we must create jobs, we must create infrastructures and then we must pay taxes. What is often done in our countries, foreign investors, they come, they set up their company and all positions of responsibility, we do not take Senegalese or few Senegalese. What makes, it is that they bring back ex-pats. These expats often do not pay taxes in Senegal because there is either a convention which means that they are not domiciled in that country."[15] Sometimes, the scepticism towards the contribution of MNEs towards the country's development seems to be reinforced by ideas about the country's colonial history. In various occasions in India for example, interviewees used the injustices that India incurred in the past to explain their motivation to work on tax policy in India. One tax academic explained that her motivation to work on the taxation of

11 CO31

12 IN03

13 Ogakwu, Saipem Contracting Nigeria Limited & Others v. Federal Inland Revenue Service & Others (2018).

14 Ogakwu.

15 SN02. Translated by the author. Original quote: « Moi, je suis d'accord à ce qu'on soit ouvert aux investissements, mais à la condition que ces investissements soient rentable pour notre pays. […] Premièrement, il faut créer des emplois, il faut créer des infrastructures et ensuite il faut payer les impôts. Ce qui se fait souvent dans nos pays, les investisseurs étrangers, ils viennent, ils montent leur boite et tous les postes de responsabilité, on ne prend pas de sénégalais ou bien peu de sénégalais. Ce qui font, c'est qu'ils ramènent des expats. Ces expats, souvent ils ne payent pas d'impôts au Sénégal parce que soit il y a une convention qui fait que bon, voilà, on s'organise à ce qu'on ne soit pas domicilié dans ce pays-là. »

the digital economy comes from the injustice in the distribution of taxing rights that she also considered as a colonial legacy.[16] One tax advisor said that "The ghost of the East India Company is still there" to explain India's resistance towards arbitration in tax matters.[17] Nevertheless, these sentiments generally seem to play a role mainly among intellectuals and some tax advisors but are not generalized across the Indian tax profession or the wider population. Asked on the general reputation of foreign companies, one participant confirmed that it was generally very good and better than the reputation of Indian companies.[18] According to a tax lawyer, "A political mandate that politicians successively in the last 20, 25 years felt [is that] by and large […] India is a liberal country and we should liberalize, we should encourage more business, we should encourage more FDI. That message has not changed in the last 25 years."[19]

To sum up, there is no consensus on whether a capital importing country should strive to enforce taxation on foreign investors or not. Rather, one could say that capital importing countries face a balancing act: On the one hand, increased FDI could be beneficial for the economy, on the other hand countries want to reap sufficient benefits from FDI.[20] What factors could further influence where the balance tilts?

### 5.3.2 Market power

One could argue that the pressure of tax competition may be felt more strongly in countries with less market power and that therefore only larger countries can impose blunter anti-avoidance measures with ease. This would resonate with Drezner's model of international standards' propagation, which states that whether a country can resist the imposition of standards depends on the country's market power.[21]

Power in the market for foreign investment could be translated to the availability of non-tax factors that are attractive for foreign investors such as natural resources, large consumer markets or fast-growing economies (a sign of large and growing markets in general, whether to final consumers or local businesses). These factors could affect to what extent a government feels the pressures of tax competition. If MNEs can earn economic rents in a country, which is the case if natural resources or large markets are present, a country is usually considered to be able to impose high taxes without having to fear of driving investors away.

16 IN14
17 IN13
18 IN08
19 IN18
20 Sumner, "Is Foreign Direct Investment Good for the Poor? A Review and Stocktake," 281.
21 Drezner, *All Politics Is Global*.

In the case studies, there is evidence that this indeed plays a role for international tax policy. First, interviewees perceive market power to be relevant: "So for a Nigerian, politician, they will say that the population enough is enough to attract investment. If you have consumer goods, you have to be in Nigeria."[22] Second some pieces of evidence from the case studies speak in favour of such a hypothesis. For example, while the Senegalese tax administration respects double tax conventions which do not allow the source country to tax the total income of such contracts when a part of the activities is carried out abroad,[23] this seems to be the less the case in Nigeria, as illustrated by the *Saipem* case mentioned in section 0. In the case of transfer pricing rules, Nigeria and India more often resorted to "blunter" regulations than Senegal and Colombia.

But the case studies also highlighted mechanisms that seem to contradict the effect of market power on a country's approach to international tax avoidance. The case of Nigeria is illustrative in that regard. One aspect of Nigeria's attractiveness for foreign investors are the country's large petroleum reserves. Like many oil exporting countries, Nigeria's tax rate on profits from the sale of Nigerian crude oil is high (up to 85%). But at the same time, if the revenues from these sales are so high or increasing at such a fast pace as it has been the case historically, issues related to the details of the enforcement of the corporate tax might be neglected all together. Interviewees from Nigeria noted that tax policy in general received little attention during the era of high oil prices and explained an uptake in enforcement activities by the tax administration with a decline in revenues from petroleum extraction activities: "Generally when it comes to tax, I do not think that [politics] in any way affects tax legislation because of the resource curse, when you have a lot of oil, free money. But with the dwindling of prices of crude oil globally, the government has started taxing. There's an aggressive tax regime, to enforce the tax right now in Nigeria, unlike before. We've never experienced."[24] In contrast, in India where oil royalties or non-tax revenues are less important, the tax system has been a more important policy variable for a longer time.[25]

The second contradicting factor is that from the perspective of the MNE, bigger countries are likely to be more important for the MNE's overall tax payment. In contrast, if higher taxes are imposed in smaller countries, this does not necessarily result in a large increase in the tax costs of the MNE as a whole because the amount may not be high compared to the overall profits and costs of the MNE across all countries. Hence, the pressures to conform with global tax standards may be stronger on countries with bigger markets than those with smaller markets, all else equal. A tax director

22 NG03
23 Niang, "Sénégal : Nouveautés Fiscales et Juridiques de l'année 2022."
24 NG11, also NG14
25 IN18

from Senegal reported about a case where an independent company based in the US was selling services remotely to Senegal, and it was uncertain whether the recipients had to withhold tax on the payments. According to the interviewee, the independent supplier refused to deal with the question and simply negotiated contracts in which the recipient of the service had to assume all withholding taxes.[26] According to a blogpost written by another tax advisor, this seems to be common practice in Senegal.[27] The consequence is that the MNE would likely never engage in international dispute resolution mechanisms to relieve double taxation, since obtaining relief was never attempted in the first place. If, however, these costs are high compared to the total global tax costs, the picture is likely to look different. Thus, the pressures may be higher on countries that represent relatively large shares of MNE's transactions, such as those that have large markets. This could explain why India received many MAP demands and much interest by peer countries to comment on India's MAP practices in the Action 14 peer review process (see section 6.3.1).

In sum, the position of a country in the market for foreign investment only unsatisfactorily explains policies adopted by countries. Beliefs that tax policy should be competitive are present but not absolute and pressures to raise revenue often have a greater force. Differences in market power can partly explain differences in the approach, but it may not be necessary for a country to resist tax competition when it comes to enforcing tax avoidance. Paradoxically, where market power results in such an important inflow of investment, the focus on avoidance could actually be smaller since tax revenues are organically increasing (even though perhaps to an extent that is less than appropriate).

## 5.4 Capacity

Another structural factor is capacity. Since one can assume that the budget of a tax administration is likely to be a function of the country's level of development and size, developing countries can be said to have a lower level of capacity than industrialized countries.[28] One can distinguish between administrative capacity, which in the context of tax could be defined as the capacity to apply tax rules to taxpayers, and policymaking capacity, which could be defined as the capacity to analyse policy options and write consistent laws and regulations.

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26 SN04

27 Niang, "Tax Us, Do Not Kill Us!"

28 A bigger country can compensate for level of development, because critical thresholds can be reached more easily, but a big and less developed country is likely to have less administrative capacity than a smaller but economically more developed country. Nevertheless, across similar levels of development if measured by GDP per capita, one can observe divergent levels of administrative capacity.

### 5.4.1 Administrative capacity

The administrative capacity is likely to influence a country's choice with regard to international tax policy. As further discussed in sections 6 and 7, the lack of enforcement of international tax avoidance issues can usually (apart from exceptions such as treaty shopping in India in the 2000s or possibly transfer pricing in Nigeria before 2012), be attributed to the scarcity of administrative resources.

Countries with higher capacity can operate rules that require more finely delineating analysis. Since OECD standards are generally of this kind, a country with lower administrative capacity may opt for rules of the blunter type or rules that give up on maximizing revenue in exchange for simplicity. Interviewees often explained policy preferences with reference to their perception about the level of administrative capacity that specific approaches require compared. A former Colombian government official, for example, mentioned that Colombia wanted to introduce the LOB rule in its tax treaties since it would be easier to apply than the PPT in a context of low tax administration capacity.[29] In Nigeria, an official of the tax administration explained that the decision to introduce a cap on deductions for royalties in the transfer pricing regulation (deviating from the OECD Transfer Pricing Guidelines) resulted from the fact that intangibles were considered a more complex area of transfer pricing and given a lack of administrative capacity, the erosion of the tax base could more easily be prevented through a deduction limitation.[30]

However, as shown in the case studies, there is no uniform preference for simpler rules among policymakers, since they may consider them as technically inferior and rather try to invest in building up more capacity. The reluctance of Senegalese policymakers to introduce the "Sixth Method" in its transfer pricing rules is telling in that regard (see section 6.3.3).

A country might also adopt more complex rules even though the lack of administrative capacity may simply mean that the policy will not be enforced, hoping for voluntary compliance by taxpayers. There is some evidence that this might work when conforming with international standards. In Colombia, tax directors of various multinational companies reported that their parent companies (located in the USA and Spain) had produced guidelines based on the implementation of BEPS rules in their home country that would also apply for foreign subsidiaries.[31] However, many interviews disagreed that such a mechanism could work more generally. One Colombian interviewee explained that: "I remember that, for example, in the past the financial services companies [...] that trade in derivatives. [...] They had their global transfer pricing agreements with everybody except with Colombia, because in Colombia you could do a lot of things that you

29 CO07
30 NG17
31 interviews with three tax directors of foreign-based multinationals, CO36, CO31, CO32

couldn't do elsewhere."[32] A Nigerian advisor said that: "So most of [the multinational companies investing in Nigeria] would get their tax advice from the Big Four and they would advise them, of course, based on the principle that exists within the group. But the only thing is that […] for certain avoidance schemes, where perhaps the law has caught up with that scheme in the UK […] but not in Nigeria. Of course, the multinational is still going to continue to implement that avoidance scheme in Nigeria because there's nothing in Nigerian law to say it's not allowed."[33]

In sum, it is likely that countries with lower administrative capacity will adopt rules that are simpler (blunter or giving up on enforcing tax avoidance), but there are reasons why policymakers may prefer more complex rules.

### 5.4.2 Policy-making capacity

While most developing countries' ministries of finance and/or tax administrations have at least a few individuals with high expertise in international tax matters, capacity to draft and introduce legislation may be constrained.

When the BEPS reports were published, the countries researched tasked committees with evaluating what parts of the reports should be implemented. These Committees recognized that introducing all reforms at once might be to challenging time wise. A Nigerian policymaker explained: "What Nigeria did was to set up a BEPS implementation committee […which] looked at all the reports and of course most of them are good to implement. However, we can't implement all at once. So what the committee did was to prioritize implementation and to also look at the one that is fit for purpose because it's not all the reports that has much impact for Nigeria, so to look at those that have impacts for us in Nigeria and to prioritize how to implement."[34] In Colombia, as well, there was a tax reform commission that recommended implementation of the BEPS Project, but at Colombia's own pace and according to their own priorities.[35]

The prioritization undertaken by these committees reflects the country's overall position in the world market for MNE investment. A Nigerian policymaker, for example, explained that when the BEPS reports were published, a BEPS Implementing Committee established a hierarchy of the different action points' relevance for Nigeria, which was mainly based on their relevance for inward investment, as opposed to outward investment.[36] Hence, whether a country primarily imports or exports capital affects whether the focus of policymakers is on avoidance by foreign owned or

32 CO24
33 NG02
34 NG13
35 CO18
36 NG13

by domestic MNEs and hence on norms that relate more to the one or the other. However, as pointed out earlier, the position in capital market cannot sufficiently explain which direction policy would take.

In sum, a lower policymaking capacity means that in developing countries, not all issues are addressed at the same time and that international standards setting projects that require a lot of legislative and regulatory changes, such as the BEPS Project does, are implemented over a longer period of time than in countries with a high policymaking capacity.

## 5.5 Influence and interests of different stakeholders

### 5.5.1 Introduction to the international tax policy making process

While path dependencies and structural factors impose constraints on the different policy options that may be considered as viable and as priorities for a country, it is reasonable to assume that within these constraints there will be disagreement between different stakeholders as to what policy should be taken. Therefore, it makes sense to take a closer look at what the interests of different stakeholders within a country are and how they compete for influencing the policy direction. Hence, in this subsection, I discuss based on literature and interviews carried out in Senegal, Nigeria, India, and Colombia which groups of actors have an interest in international tax policy making, what kind of policy preferences they express, the factors that can affect their preferences, and their influence.

In democracies, actor-centric policy analyses often distinguish the following groups and analyze their respective preferences and avenues of influence: bureaucrats, political parties, voters, special interest groups, and experts. These groups can have a moderating effect on the impact of international norms by preventing or modifying their implementation. However, international norms can also impact the constitution of these groups themselves, for example by strengthening the agenda of interest groups that want to change the status quo.[37]

Depending on the regime type, the concrete composition of the policy arena may vary. For example, one can suppose that in autocracies, political parties (and by extension voters) may play a less important role. However, even in democracies the degree of involvement of parties and voters depends on the degree of politicization of the issue at hand. International tax avoidance has gained public attention in most Western countries over the last decades, but that is not generally true anywhere. International tax law is a policy area characterized by a high degree of technical language and is fragmented into many sub-issues, the significance of which and interactions among each other are not easy to grasp for non-specialists.

37 Knill and Lehmkuhl, "The National Impact of European Union Regulatory Policy: Three Europeanization Mechanisms."

Therefore, previous analyses often emphasize the degree of executive discretion in international tax policy making, in particular in developing countries. In 1996, Gordon and Thuronyi (who has been involved in many tax reform processes on behalf of the IMF) wrote that "[In contrast to industrialized countries], the tax legislative process is much simpler in most developing and transition countries, and has not had the opportunity to become established in many of these countries. Far fewer people are involved."[38] In his analysis on the determinants of tax treaty policy in developing countries, Hearson argued that commonly only few individuals are involved in the process of treaty policy, meaning that the beliefs of bureaucrats and high-level politicians play an important role in the determination of tax treaty policy.[39] But how does it look like in the case of international tax policy making more generally?

### 5.5.2 Primacy of the bureaucrats and a limited role for parliaments and political parties

In most countries, the international tax law-making process is not different from any other law-making processes, with parliaments discussing and approving laws proposed by the executive, although there can be some variation as to what type of rules require approval from parliament. For example, in most countries many parts of BEPS Action 14 are at the discretion of the executive and can be passed by regulations. Some issues are even at the discretion of the tax administration, for example making use of OECD guidelines in the application of policies or not.

Nevertheless, even where parliamentary approval is required, the influence of parliaments and the political sphere more generally is likely to be limited when it comes to the precise direction of policy. Compared to statutory tax rates, where the influence of voters has been documented in empirical studies,[40] anti-tax avoidance regulation is significantly more complex. Hence, while the wider universe of citizens may exercise more influence on the former topic through elections,[41] this is less likely for the latter.

Although I was not able to directly interview parliamentarians, interviewees from all countries pointed out that substantive discussions on international tax issues were very limited in the parliaments of their

38 Gordon and Thuronyi, "Tax Legislative Process," 1.

39 Hearson, *Imposing Standards*.

40 Plümper, Troeger, and Winner, "Why Is There No Race to the Bottom in Capital Taxation?"; Basinger and Hallerberg, "Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom."

41 Basinger and Hallerberg, "Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom"; Plümper, Troeger, and Winner, "Why Is There No Race to the Bottom in Capital Taxation?"

respective countries. A Colombian tax lawyer commented on the dynamics of international tax policymaking in his country: "The young people who work at DIAN are a generation of well-prepared young people who have been elsewhere, they understand this. [...] They push, push, push and influence and as the Congress does not understand anything, they put it in the norms. And the Congress asks questions but does not expect any answers. […] One day in the Congress of the Republic I was asked to speak for five minutes on that subject. I did it very superficially because I considered that if I did it judiciously it would be more demanding for me but the others would not understand anything at all. So I spoke in generalities."[42] The only instance where an international tax proposal was stopped in the Colombian parliament was the government's attempt to introduce mandatory disclosure rules in the 2016/2017 tax reform. The rules were included in the bill that was sent to the Congress for approval, but were absent of the final text of the law that was approved.[43] An academic attributed this to lobbying activities of Colombian tax lawyers,[44] while a tax lawyer claimed these rules would have been unconstitutional due to a violation of the attorney-client privilege prevailing in Colombia.[45]

Despite the general lack of active parliamentary involvement, parliaments can cause important delays in the process of adoption of international tax policies, since the topics are not accorded a high priority. One example is the delay in ratifying international treaties such as the Multilateral Instrument in Nigeria (see also section 0). In India the MLI took only about 2 years to be ratified, precisely because treaties are ratified by the cabinet of ministers without parliamentary approval.[46]

However, even parliaments' ability to cause delays should not be understood as veto power. Rather it requires governments to use strategies to creatively circumvent parliaments. In Nigeria, amendments to the transfer pricing regulations and the adoption of country by country reporting were

42 CO18, translated by the author. Original quote: ""Los jóvenes que trabajan en la DIAN, ya una generación de jóvenes bien preparados que fueron a otras partes, lo entiende. […] Un grupo de muchachos jóvenes competentes que empujan, empujan, empujan y influyen y como el Congreso no entiende nada, lo meten en las normas y el Congreso de golpe pregunta pero no espera que le respondan nada. […] A mí un día en el Congreso de la República sí me pidieron hablar cinco minutos sobre ese tema. Yo lo hice muy superficial porque yo consideraba que si lo hacía juiciosamente era más exigente para mí pero los otros no iban a entender absolutamente nada. Entonces yo hablaba generalidades."

43 Gaceta del Congreso, Proyecto de Ley Numéro 178 de 2016 Cámara por medio de la cual se adopta una Reforma Tributaria Estructural, se fortalecen los mecanismos para la lucha contra la evasión y la elusión fiscal, y se dictan otras disposiciones., arts. 882–890; Diario Oficial, Ley 1819 de 2016 por medio de la cual se adopta una reforma tributaria estructural, se fortalecen los mecanismos para la lucha contra la evasión y la elusión fiscal, y se dictan otras disposiciones.

44 CO05

45 CO20, see also Rodelo Arnedo, "La Obligación de Revelar Esquemas de Planeación Fiscal Agresiva o Abusiva En El Ordenamiento Colombiano"; Quiñones, "Colombia."

46 Ranjan, "India Needs Parliamentary Supervision of Trade Pacts."

directly implemented as executive regulation rather than as law,[47] and a tax treaty signed with Singapore was notified as being in force without ratification by the parliament.[48] According to a tax advisor: "Anything that's not political or budgeting takes forever to go through the parliament and so it it's in the interest of efficient tax administration in Nigeria for the authorities to be able to pass swift legislation to move alongside the OECD."[49]

These examples illustrate that governmental actors can find ways to overcome institutional inertia. It should be noted that the phenomenon of "workarounds" is not new and not limited to the Global South or to the area of tax policies.[50] In the United States, for example, international instruments are frequently ratified by executive order rather than parliamentary approval due to the frequent occurrence of "divided governments".[51] The FATCA Intergovernmental Agreements are a case in point.[52]

For the executive that means making effective policy, however, at the risk of lawsuits by dissatisfied parties. In the case of a tax treaty, it is unlikely that the private sector will complain since a tax treaty usually brings a favourable tax treatment. However, public interest groups might complain such as happened in a similar scenario in Kenya. In Kenya, the Supreme Court sided with a public interest group which demanded the invalidation of the ratification of a tax treaty with Mauritius which had not properly been discussed in parliament.[53] In Nigeria, a tax lawyer raised the prospect of litigating against the Nigerian transfer pricing rules based on the lack of parliamentary approval, since they contain certain provisions that are stricter than provisions of the OECD transfer pricing guidelines, such as a deduction limitation for royalty payments, and since they impose relatively high penalties.[54] One advisor said, "Strictly speaking, I think if a taxpayer really, really wanted to take them up on the legitimacy of the legislation, they probably would win."[55] So far, however, nothing has been done in that regard. In sum, while parliaments (and by extension political parties) are unlikely to have an influence on the concrete policies adopted, they may impact the modalities through which government actors can enact policies and can impose constraints in terms of timing.

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47 NG06
48 NG10
49 NG08
50 Verdier and Versteeg, "Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey."
51 Situations in which the current executive does not have a majority in one or both chambers of parliament.
52 Rather than signing tax information exchange treaties that would have required approval by the Senate difficult to obtain, the US government chose the tool of the intergovernmental agreement. Christians, "Interpretation or Override? Introducing the Hybrid Tax Agreement"; Ring, "When International Tax Agreements Fail at Home: A US Example."
53 Tax Justice Network Africa, "Court Declares the Kenya-Mauritius DTA Unconstitutional."
54 NG06
55 NG08

Of course, the influence of politics on international tax policy making need not only manifest itself through debates and negotiations in the parliament but could be visible through policy changes that correspond to changes in the political majority in power. To systematically investigate this channel, larger samples of countries and larger time spans would need to be looked at to investigate correlations between policies adopted and political parties in power. However, in the countries investigated the evidence that party politics play a large role in the approach to international tax avoidance is scarce and is mainly limited to very general aspects of international tax policy such as the overall strategy with respect to tax treaties. For example, a Senegalese interviewee attributed the fact that the lead in the negotiation of the treaty with Mauritius was confined to the investment promotion agency to a recently elected president's desire to shift power away from the finance ministry in which he still feared loyalty to his predecessor.[56] In Colombia, interviewees reported political pressure to conclude many tax treaties when Alvaro Uribe was president, who followed an ideology of quickly liberalizing the economy. Several interviewees attributed the fact that a treaty was negotiated with Spain without much preparation from the Colombia side to this generalized pressure to negotiate quickly.[57]

Nonetheless, one can suppose that apart from a few instances, bureaucrats can implement their preferred policy relatively unencumbered by the wider political environment.

It should be noted that these general remarks about the politicization of international tax proposals seem already less applicable to the case of the proposed Pillar 1 reform of the taxation of the digital economy. While beyond the scope of this study, a few observations can be made. Pillar 1 is arguably more restrictive on countries' tax policy choices, since it restricts the use of digital services taxes, even in situations where there is no tax treaty between countries. As a reaction, the political fronts have become clearer. In Colombia, for example, the newly elected left-wing government had included a digital services tax in their campaign program and introduced in the 2022/2023 shortly after coming into power, potentially to set a counterpoint to the pillar 1 proposal.[58]

### 5.5.3 Intra-executive politics

While the executive can thus generally implement international tax policies without having to preoccupy itself a lot about challenges by political parties, the preferences *within* the executive are not necessarily aligned. Among the different governmental branches of different countries, one can usually find

56 SN01. Abdoulaye Wade succeeded Abdou Diouf in 2000 as President of Senegal, the treaty with Mauritius was signed in 2002

57 CO01, CO15, CO07

58 Portafolio, "Entérese Cuáles Son Los Servicios Digitales Que Pagarán Impuestos."

some that pursue more the objective of raising tax revenue whereas others care more about other policy objectives such as providing a more favourable investment climate for (domestic or foreign) businesses or improving diplomatic relations with other countries. These frictions and disagreements can also occur between a ministry of finance and a tax administration, in particular where there is a higher degree of independence of the tax administration from the ministry of finance, or within the tax administration itself.

First, there are instances of conflicts between the tax administration and ministries of finance, where the former prefers solutions that can raise revenue without too much effort and the latter may worry about a detrimental impact on investment attraction. A Nigerian tax administration official explained that: "From [the] tax administration we look at collection of revenue from taxes, but the policymakers look beyond [that]. […] They want to balance collecting taxes with being able to provide a good comfort for investors so that they bring their investment, they also need to look at ease of doing business, what will be the effect of the proposal we are bringing to ease of doing business and so many things they look at. So […] we've had some instances where we are able to push through some policy perspective, […] however there are instances where the policymakers believe that then the proposal will hinder the flow of foreign direct investment."[59] While the authority to sign decrees or propose bills to the parliament rests with the ministries of finance in the countries researched, expertise is generally more concentrated within the tax authorities (except for India, where there is no real separation of tax authority and ministry), which give the latter a potentially more influential position. While in Colombia, the tax policy making function is officially exercised jointly by the ministry of finance and the tax administration, the tax administration is most of the time mentioned as initiator of policies.[60]

In tax treaty policy, government bodies, such as foreign ministries, presidential offices, or investment promotion agencies, can play a role as well. Generally, these other agencies prefer signing more treaties in a shorter time, in the hope of attracting investment or improving diplomatic relations with other countries. For example, one former treaty negotiator of the Colombian tax administration highlighted the necessity to educate these other agencies about the potential negative effects on tax revenue of tax treaties.[61] Due to the greater involvement of these agencies with different agendas, it may be more difficult for a tax administration to adopt blunt approaches with respect to treaty shopping (concretely terminating a treaty) than for instance with respect to transfer pricing.

Nevertheless, even within the tax administration interests and positions are not necessarily aligned. When experienced outsiders are interviewed about their relationship with the tax administration, they often differentiate

59 NG13
60 See for example Velasco Kerguelen, "Colombia," 241.
61 CO01

between those branches that are dealing more with legal and policy issues and those that are tasked with auditing.[62] While the latter are often labelled as having a "fiscalist" approach, companies and business associations across all countries researched generally consider the former as good interlocutors and display respect for the individuals that occupy these positions.[63] The individuals occupying these higher level positions are sometimes recruited from with the private sector (in Colombia, the director of the tax administration from 2018-2021 was recruited from an advisory firm) and they have generally more interactions both with the private sector (for example through conferences) and with other governments at international meetings.

Whether within the tax authority itself or in the ministry of finance, the officials tasked with proposing and implementing policy can be thought of as influential due to their expertise. However, the lower echelons can influence the direction taken due to the fact that they are in a more direct relation with the taxpayer and are the first level to decide which approach to take with respect to a given case. There are often clear incentives for them to prefer rules that are both easily applicable and that permit to collect more revenue. On the one hand, tax inspectors are often evaluated based on meeting certain performance targets, which are often related to revenue collection or adjustments made in audits.[64] On the other hand, for capacity reasons tax inspectors are often given a time constraint when auditing a taxpayer (in Senegal, three to four months, according to a tax official), which makes it challenging to apply complex rules.[65]

Policymakers need to take this into account or accept that there may be a disconnect between policy that is legislated and its application in practice, when they implement solutions that are more "finely delineating" like, but tax auditors apply them in a "blunt" way. Beyond their position as the first instance that applies a policy, tax auditors may also directly influence the policymaking process. In Senegal, one tax administration official highlighted that the initiative to terminate the treaty with Mauritius came originally from tax inspectors which were involved in many disputes with companies that had established intermediary companies. "So this is the effort of the control services that bring to light difficulties, that push people to legislate, to denounce. This came from below."[66] Moreover, the Syndicate

62 In India, the Central Board for Direct Taxes directly overseas the activities of the tax administration while being an integral part of the Ministry of Finance. In Colombia, the Oficina de Asuntos Internacionales of the tax administration; in Senegal, la Direction de la Législation; in Nigeria, the … of the Federal Inland Revenue Service, are those offices that are more concerned with policy issues.

63 SN11, CO10

64 IN17

65 SN09

66 SN15, translated by the author. Original quote: « Donc ça c'est l'effort des services de contrôle qui mettent en lumière en fait des difficultés, qui poussent les gens à légiférer, à dénoncer. Ça, c'est venu d'en bas. »

of Revenue Officers, a trade union representing Senegalese tax inspectors, publicly criticized tax policies that might have a revenue reducing effect, such as the ratification of a double tax treaty with Luxembourg,[67] or the granting of tax benefits or amnesties to companies by the higher levels of the tax administration.[68] In India, as well, tax inspectors were at the origin of the legal battle against the policy to tolerate treaty shopping (see section 0).[69]

The higher and more political levels of the tax administration are usually aware of these challenges but are wary of possible detrimental effects on investment, and hence may adopt a mediating role between the audit functions and other agencies (including ministries of finance).

### 5.5.4 The judiciary

While the judiciary does not make tax policy itself, its interpretations and its general importance in the tax system can have an important impact on a country's policy approach. In the EU, the role of the European Court of Justice in putting a brake on EU Member States' anti-avoidance legislation (basically preventing them from adopting any type of blunter measure) is well documented.[70]

In general, the development of the domestic judicial system conditions the discretion that the tax administration can apply. This, however, varies widely across countries. Where taxpayers can easily access the courts and the latter have no issue with ruling in favour of the taxpayers, there should be a greater pressure on policymakers to adapt rules more to the circumstances of the countries needs and the capacity of the tax administrators. In the absence of a reliable judiciary system, tax administrators can more easily apply rules in a "blunter" fashion, regardless of their exact formulation by policymakers.

Ease of access depends largely on the capacity of the judicial system to handle tax cases, the existence of specialized tax benches or tax judges, the (perceived) independence of the judiciary from the government, and the rules governing access. Among access rules, it is particularly relevant whether taxpayers need to deposit the sum or part of the sum under dispute before accessing the system. Specialized tax courts or tax benches are becoming more widespread. Among the countries researched, India and Nigeria have specialized lower tier tax tribunals, but Colombia and Senegal do not.

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67 Pouye, "«Relation Fiscale» Avec Le Grand-Duché de Luxembourg, Une Liaison Dangereuse !"

68 Willane, "Elimane Pouye et Cie Dénoncent Un «pillage" Des Ressources Publiques."

69 Kotha, "The Mauritius Route: The Indian Response."

70 Lenaerts, "The Concept of 'Abuse of Law'in the Case Law of the European Court of Justice on Direct Taxation."

### 5.5.5 Do business preferences make a difference?

To analyze the preferences of taxpayers that are directly affected by a rule change, I start from the premise that for businesses, tax is a cost.[71] Firms operate on a profit basis. Since the main components of profit are revenue and costs, firms want to minimize costs. Therefore, business should be in favour of lower taxes and against a higher administrative burden associated with complying with the tax.[72] Although Rixen and Unger argue that businesses may favour higher taxes since they expect benefits in the form of public goods paid by taxes,[73] this is less likely in the context of emerging and developing economies, where private actors often perceive corruption and consider that funds are less well spent in the hands of the government than in the hands of private actors. Therefore, businesses' preferred response to international tax avoidance should be "giving up" and removing incentives to engage in avoidance by lowering the tax burden. Indeed, interviewees from businesses have generally expressed such preferences. An interviewee working at a foreign MNE's Colombian affiliate said with regard to the Colombian tax rate: "When you compare that tax rate with Europe or other places, you know that you pay taxes, but those taxes are paid, they are invested, they are properly used. But in Colombia there has been a lot of corruption […] and many people say: why am I going to pay taxes if they are going to steal it?"[74]

Taxpayers may be supportive towards harmonization-based solutions,[75] but given the difficulty of achieving international agreement, they are unlikely to push governments to work towards harmonization. Somewhat open is whether taxpayers may prefer blunt responses over finely delineating responses, since the former may sometimes come with less administrative costs and more certainty.

Although submissions by businesses often emphasize that tax certainty is more important than the level of tax and often express dissatisfaction with the complexity introduced by anti-avoidance rules, there are indications that these remarks should be qualified. With regard to the Indian transfer pricing safe harbour provision, a tax advisor commented that "we used to have that issue in transfer pricing a few years back where they brought in […] safe harbour provision and the first reaction from everyone was that your safe harbour is so high that it's of no use."[76] This suggests that the price companies are willing to pay for certainty may be limited. Those

71 Anesa et al., "The Legitimation of Corporate Tax Minimization."
72 Elschner, Hardeck, and Max, "Lobbying on the BEPS Project? Assessing the Influence of Different Interest Groups," 2017, 13.
73 Rixen and Unger, "Taxation: A Regulatory Multilevel Governance Perspective," 11.
74 CO31
75 Weiner, "Practical Aspects of Implementing Formulary Apportionment in the European Union," 630.
76 IN17

taxpayers affected by blunter responses are likely to be in favour of a fine separation of avoidant and non-avoidant situations, both in circumstances where blunter responses are already in place or likely to be put in place in the future. Blunt responses should therefore rank lowest among the preferences of taxpayers, as they likely increase the tax burden.

Whether businesses prefer no response against tax avoidance at all or a finely delineating response is more difficult to predict. Since international tax avoidance is about cross-border investment, there is a potential for diverging interests between MNEs and local businesses, between different sectors, and between big and small business, and finally between businesses with a propensity to take tax risks and more conservative businesses. The OECD motivated the BEPS Project with reference to restoring injustices between different types of businesses, stating that MNEs "have access to sophisticated tax expertise, may profit from BEPS opportunities and therefore have unintended competitive advantages compared with enterprises that operate mostly at the domestic level".[77] One could therefore suppose that domestic businesses would favour the introduction of anti-avoidance rules and MNEs not. However, in the countries studied, bigger companies and their advisors frequently mention that those big firms that have higher compliance standards than domestic companies and are often scrutinized more intensively than those firms that do not comply.[78] Empirical studies seem to confirm that the number of avoidant companies usually represents a small percentage of the universe of companies (although the latter may have a large footprint in terms of economic activities).[79] This could explain why the introduction of country-by-country reporting was mostly welcomed by MNEs. Although one could generally expect that the introduction of CbCRs increase the compliance burden – provided the reports are used by tax auditors – this would increase the tax burden that companies may face in a country, due to reduced possibilities to manipulate transfer prices, the move to more risk-based audits that the additional information could facilitate seems to override these concerns. One tax director of an MNE operating in Nigeria said that with respect to the introduction of the three-tiered transfer pricing documentation: "So at least it provided a lot of information. And then once you have more information, then the discussion is more measured and also more informative. And yes, at times are they happy with the agreement? No, but at least it lowered down the aggression."[80]

77 OECD, *Addressing Base Erosion and Profit Shifting*, 50.
78 CO28, IN18
79 Wier, "Tax-Motivated Transfer Mispricing in South Africa: Direct Evidence Using Transaction Data."
80 NG03

Another aspect is that individuals representing firms on tax matters may sometimes not have strong interests against a higher compliance burden since the latter may grant them higher prestige within the firm.[81] One tax director of the local subsidiary of an MNE in Colombia mentioned that after BEPS issues gained more public coverage, tax issues figured more often on the agenda of the board.[82] In addition, most directors of tax departments that I spoke too had worked in the advisory sector before joining a firm, which could make their preference align more with this sector than with the firm.[83]

In sum, businesses that are out of the scope of anti-avoidance responses of the finely delineating type may even derive benefits if avoidant competitors are caught by the measures or if at least focus of audits would be redirected to other firms.

Businesses often trust that anti-avoidance rules suggested by the OECD rules are able to deliver this. For example, a representative of a Colombian business association said that: "we have always sought that tax regulations be general, be as little rare, exotic and creative as possible, [...] that they comply with OECD standards, especially since we are part of the OECD. And above all, with regulations such as the CFC, there was a big problem before the [last] tax reform. We sought this change precisely by bringing as example into the debate what was happening at the international level."[84]

A Senegalese policymaker commented with respect to the involvement of business in establishing transfer pricing regulations that "They didn't write with us, but we made them aware of it, we held meetings with them, and they understood that these were standards, so it wasn't something complicated."[85] The evidence thus suggests that for most businesses, the finely delineating type can be seen as lowest common denominator.

But do businesses' preferences actually matter? Castañeda argued that in tax policy issues business interest groups usually lobby "reactively", while policymakers are first movers.[86] With respect to international tax

81 Radcliffe et al., "Professional Repositioning during Times of Institutional Change: The Case of Tax Practitioners and Changing Moral Boundaries."

82 CO32

83 It should be noted that I do not have evidence on how widespread this practice is among MNEs

84 CO10, translation by the author. Original quote: "Nosotros siempre hemos buscado que las normativas tributarias sean generales, sean lo menos raras, exóticas y creativas posibles [...] que [...] cumplan con los estándares OCDE, sobre todo ya que somos parte de la OCDE. Y sobre todo esas normativas como por ejemplo lo del CFC, había un gran problema antes de la ley de financiamiento. Ese cambio lo buscamos precisamente trayendo por ejemplo lo que pasaba a nivel internacional." In contrast to OECD recommendations, the Colombian rules did not contain an exemption from the rules if the controlled entity is located in a jurisdiction with a similar tax rate. CO16

85 SN16. Original quote: « Sur les prix de transfert par exemple, ils n'ont pas écrit avec nous, mais on les a sensibilisés, on a fait des réunions avec eux, ils ont compris que c'était des standards, donc ce n'était pas quelque chose de compliqué. »

86 Castañeda, "Business Interest Groups and Tax Policy," 389.

issues at the domestic stage, the evidence seems to confirm this (at the international stage, business associations such as the International Chamber of Commerce or Business At OECD have proactively lobbied the OECD and member governments to advance arbitration in tax matters).[87]

First, tax policy plans are not always openly discussed. One tax advisor for example observed that MLI choices in Colombia were "managed like a state secret".[88] Sometimes policy changes are announced only shortly before they are voted in parliament so that there is limited time for businesses to react to a policy proposal. An interviewee from a multinational company said that the Nigerian tax community "had been taken by surprise" when the Nigerian government announced the repeal of an exemption from capital gains tax for sales of shares in the 2022 Finance Act, and that taking into account the amount of amendments proposed in the same Finance Act, there was not sufficient time to react.[89] Only after the change had already taken place, critical points of view were expressed in articles written by tax advisors.[90]

Even when business is consulted, the instances where they are able to significantly influence legislation are not frequent. A tax manager of a Nigerian MNE said that: "So most times they give opportunity for industry players to make some contributions. But maybe 7 in 10 of the cases are challenged unsuccessful, and maybe three are successful. So in the international space, I am unable to remember one in which industry has been able to successfully influence government or take a stand that would be less anti-business."[91]

In Senegal, business seems to be consulted more often before laws are passed (with respect to a larger reform of the tax code in 2012, some interviewees even said that it was co-authored by the private sector)[92] and there are some examples where business could make a difference (e.g., VAT exemption instead of reimbursement for exporting companies). But with regard to international tax matters, there is no clear evidence that businesses have been able to influence any policy choices.

In India, interviewees often describe a relationship of deference. They do not take the fact that government would consult with businesses in the policymaking process for granted as, in the words of one the interviewees, policymakers could also say "I am a government, I can make law".[93] A Nigerian advisor answered the question on whether there was any resistance when the Nigerian government proposed the introduction of the

87 Hearson and Tucker, "'An Unacceptable Surrender of Fiscal Sovereignty': The Neoliberal Turn to International Tax Arbitration," 12.
88 CO30
89 NG01
90 Filani and Umoh, "Capital Gains Tax On Disposal Of Shares: Possible Consequences On Foreign Direct Investments In Nigeria."
91 NG01
92 SN16
93 IN22

Significant Economic Presence regulation that private sector representatives had opposed the proposal but that "the debate was more of an intellectual debate. Not that anybody is stopping the Nigerian government from taxing."[94]

Finally, influencing international tax policy may not always be worthwhile for businesses when they have more effective means to gain favourable economic outcomes at their disposal. Several interviewees reported that businesses concentrate lobbying more on direct tax incentives or around procedural issues that may have an important incidence on cash flows.[95] These may have more important consequences on their tax burden than international tax rules such as those included in the BEPS Project.

In addition, businesses may be able to influence their tax burden through direct political influence. One former tax inspector of the Senegalese administration spoke with respect to a transfer pricing audit in the mining sector that he was involved in, that "The file has remained all over the place, because it poses political problems as well. When a company has such a large footprint […] they are ready to fight. […] It is above all a political problem. That is to say, they are big multinationals. If the administration attacks them, they put means to curb the administration. And our rulers are not strong enough to maintain the position of the administration."[96] This issue is likely to be more urgent in smaller than in larger countries. According to the same Senegalese interviewee, large companies would often be able to speak to the President directly to ensure a favorable resolution of such disputes.[97] The issue might be smaller as well in countries where the statutes of the tax administration grant it more autonomy.[98]

In sum, businesses are likely to prefer a more laissez-faire approach to international tax avoidance, i.e., "giving up" or a finely delineating approach. However, in the context of developing economies this does not necessarily mean that they will invest a lot of effort in influencing policy in that regard.

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94 NG11

95 NG33304, CO36

96 SN07, translated by the author. Original quote : « Le dossier est resté un peu partout, parce que ca pose des problèmes politiques aussi. Quand une entreprise a un magot aussi important […] ils sont prêts à se battre. […] Je pense qu'il y a des problèmes techniques qui se posent dans nos pays, à trouver de bons comparables, à connaître les transactions de façon approfondie, […] ca c'est d'abord technique. C'est vrai, ca existe. Mais c'est surtout un problème politique. C'est-à-dire que c'est des grosses multinationales. Si l'administration les attaque, ils mettent des moyens pour freiner l'administration. Et nos gouvernants ne sont pas solides pour maintenir la position de l'administration. »

97 SN07

98 Senegal is not one of them, but several African countries have set-up "semi-autonomous" revenue agencies over the last decades. See Dom, "Semi-Autonomous Revenue Authorities in Sub-Saharan Africa: Silver Bullet or White Elephant."

### 5.5.6 Tax advisors: National interest vs. clients' interests?

Given the depth of technical understanding required to formulate ideas on international tax policy, previous research has emphasized the influential position of experts,[99] which in the countries studied are in a majority working as tax advisors or academics. In the countries studies, tax advisors are indeed often associated in tax reform projects, for example in the 2012 reform in Senegal,[100] in the initial drafting of the Nigerian transfer pricing regulations,[101] or in the Colombian expert committee that advised the 2016 tax reform.[102] However, stating that experts wield influence does not allow for a direct prediction of what turn policy would take.

Empirical studies, such as Anesa et al.'s on tax professionals in Australia emphasize the close ideological relationship between advisors and their clients, meaning that both groups tend to favour similar policies.[103] In contrast, not having direct financial interests in a lower tax burden for businesses, one might suppose that lawyers and advisors adopt a mediating role between interests of different sub-groups when it comes to international tax policymaking, as advanced by Elschner and colleagues.[104] An often discussed cliché is that more complexity of tax rules or simply the introduction of new types of tax rules (no matter the content) and reporting requirements (such as those of BEPS Action 13) may be good for the business of tax advisory firms, since this may lead to more business in terms of planning or litigation.[105] Indeed, several interviewees expressed this idea, usually adding, though, that they would prefer better policies rather than pieces of legislation that are difficult to comply with.[106]

Nevertheless, tax advisors often express a preference for rules that follow the finely delineating approach, either because previous practice was perceived to be more uncertain or there is an expectation that it might become less certain in the future. The introduction of the Nigerian transfer pricing regulations in 2012 seemed to be in part driven by the advisory sector's preference for more certainty and in part by comparison with peer countries. One Nigerian advisor explained that even though in his opinion,

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99 Christensen, "Elite Professionals in Transnational Tax Governance"; Picciotto, "Technocracy in the Era of Twitter: Between Intergovernmentalism and Supranational Technocratic Politics in Global Tax Governance"; Seabrooke and Wigan, "Powering Ideas through Expertise: Professionals in Global Tax Battles"; Brugger and Engebretsen, "Defenders of the Status Quo: Making Sense of the International Discourse on Transfer Pricing Methodologies."

100 SN11, SN16

101 NG03

102 CO18

103 Anesa et al., "The Legitimation of Corporate Tax Minimization."

104 Elschner, Hardeck, and Max, "Lobbying on the BEPS Project? Assessing the Influence of Different Interest Groups," 2017.

105 Christensen and Seabrooke, "The Big 4 Under Pressure: Scanning Work in Transnational Fields," 20; Ormeño-Pérez and Oats, "Implementing Problematic Tax Regulation."

106 CO27

the tax administration was gaining more tools to question tax planning through the implementation of country by country reporting and transfer pricing rules, it was "a very good thing that Nigeria is able to implement the OECD rules. I mean, if you ask me, I somewhat like it because it's a development over where we were before, because when we were using general anti avoidance rule you know that's a rule of thumb."[107]

A quote from Colombia can illustrate that, as well. With respect to the introduction of the PPT into tax treaties, a Colombian tax advisor said "I think it would be positive because [...] the rule is for everyone and surely there would be similar or similar lines of interpretation in the different jurisdictions that would mean that one would not think differently from us."[108] This means that often, advisors express views that resonate with business interests, but interpret the introduction of anti-avoidance rules modeled on the OECD approach as favorable to business.

But in practice, in all countries studied, almost the whole spectrum of tax policy ideas was put forward by different experts. I spoke with several advisors who expressed sharp criticism on tax avoidance practices by MNEs or laws and regulations that are perceived to be too lenient. For example, when I prompted one Senegalese tax advisor on whether in his opinion the tax administration would abuse clauses that granted it discretion, he answered that this happened at times but that most of all, companies were engaging in abuse. He considered this as an insult towards the advisors.[109] An Indian advisor highlighted that he considered penalties for failure to comply with the submission of a master file as too low.[110]

It is therefore important to emphasize that the group of advisors is not homogeneous in any of the countries. However, they should not be seen as a force that would hinder the implementation of anti-avoidance rules proposed by the OECD.

An instance of resistance happened only with respect to tax rules that directly affect advisors: In Colombia, the project to introduce mandatory disclosure rules was halted presumably because of pressure from tax advisors: The Colombian tax law institute (ICDT) argued in a letter submitted to Congress that the norms, even though in principle compatible with the BEPS Action 12 report would be too broad since even tax benefits that are potentially and not necessarily realized would give rise to a reporting obligation.[111]

In sum, experts are influential stakeholders when it comes to international tax policy but are unlikely to have a uniform opinion which means that their involvement is unlikely to be decisive for the path taken.

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107 NG14

108 CO14, translated by the author. Original: "Yo creo que sería positivo porque […] la regla es para todos y seguramente habría unas líneas de interpretación parecidas o similares en las diferentes jurisdicciones que harían que uno no pensara diferente a nosotros."

109 SN12

110 IN14

111 Ruiz, "Carta de Comentarios Del Instituto Colombiano de Derecho Tributario (ICDT) al Proyecto de Ley Número 178 de 2016 Cámara."

### 5.5.7 Civil society organizations

Civil society groups have become a relevant actor at the international stage of tax policy making over the last two decades. Some of them are organizations with a long history in advocacy (such as Oxfam or ActionAid) that have included international taxation in their range of topics.[112] In addition, a number of groups such as the Tax Justice Network formed specifically to deal with issues of tax evasion and international tax avoidance.[113]

Most groups advocate for more progressive tax systems, and relate international tax issues to issues of progressivity, inequality, and unfairness to weaker societal groups in general.[114] The influence of civil society groups in the creation phase of the BEPS project has been widely acknowledged.[115] On the one hand, they worked together with journalists to create political salience and propel responses by policymakers.[116] On the other hand, they championed specific policy proposals such as public country-by-country reporting or replacing the arm's-length-principle with a formulary apportionment system at the global level. However, while they have participated in the technical work at the international level through participating in the OECD's public consultations, a study attributes them less influence than other interest groups on how legislative solutions are formulated precisely.[117] Moreover, while the influence of civil society groups in domestic policy processes concerning international tax is well documented in some Western countries,[118] this cannot be taken for granted in other countries. As illustrated well by Cascant-Sempere's case study on ActionAid's tax work in Nigeria, civil society activism on taxation is no new phenomenon in developing countries, but it has usually focused on issues with a direct impact on individuals or small businesses, such as consumption taxes or administrative issues around the taxation of small businesses (see for example the widespread protests in Colombia in 2021 against a proposed increase of VAT on basic products).[119]

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112 The 2000 Oxfam report on tax havens was one of the first important interventions. Oxfam, *Tax Havens: Releasing the Hidden Billions for Poverty Eradication*.

113 Dallyn, "An Examination of the Political Salience of Corporate Tax Avoidance: A Case Study of the Tax Justice Network," 2017; Christians, "Tax Activists and the Global Movement for Development through Transparency," 2013.

114 Christians, "Tax Activists and the Global Movement for Development through Transparency," 2013, 293.

115 Christians, "Tax Activists and the Global Movement for Development through Transparency," 2013.

116 Dallyn, "An Examination of the Political Salience of Corporate Tax Avoidance: A Case Study of the Tax Justice Network," 2017.

117 Elschner, Hardeck, and Max, "Lobbying on the BEPS Project? Assessing the Influence of Different Interest Groups," 2017.

118 Anesa et al., "The Legitimation of Corporate Tax Minimization"; Dallyn, "An Examination of the Political Salience of Corporate Tax Avoidance: A Case Study of the Tax Justice Network," 2017; Vaughan, "Talking about Tax: The Discursive Distance between 38 Degrees and GetUp."

119 Cascant-Sempere, "Grounding ActionAid's Tax Justice Campaigns in Nigeria."

However, many international NGOs such as Oxfam, ActionAid or Transparency International have been present in developing countries for a long time. Therefore, when these started to work on international tax at the international level, they developed strategies to integrate tax advocacy in developing countries as well.

To what degree and in which way they have engaged with the international tax agenda in developing countries or with the implementation of the BEPS Project in particular varies.[120] In India, one organization works on tax and international tax topics, the Center for Budget and Government Accountability (CBGA). CBGA has put forward concrete policy demands concerning the BEPS implementation process, asking the government to reduce the threshold under CbCR reporting.[121] CBGA also wrote a research paper quantifying revenue lost through tax treaties with Mauritius, which however was published after the treaty was amended.[122]

Another way of intervening in international taxation is by making publicity around cases of alleged tax avoidance by MNEs, asking the tax administration to be intransigent, such as in the Barrick Gold case in Senegal. In this case, a the Senegalese tax authority's had claimed capital gains taxes for the sale of a gold mine, whereupon the company challenged the decision under an investment treaty.[123] A representative of Forum Civil, the Senegalese branch of Transparency International, support for the tax administration's action, arguing that "It would be one too many betrayals, […] if the Government ventured to accept crumbs by sacrificing the interests of the people, owners of natural resources".[124] However, when asked about the impact of civil society organizations, a Senegalese government official said that "They don't really influence the debate in terms of the evolution of the legislation, because we are in advance. They follow these questions in an episodic way. So it is not very structured".[125] Also, there is no evidence that civil society organizations are able to mobilize the broader population on the subject of international tax avoidance. A reason could be that since due to the large informal sectors, a significant part of the population does not pay income taxes, making it more difficult to argue that MNEs avoid taxes while the normal citizen pays.

120 In addition, the (international) Tax Justice Network's Corporate Tax Haven Index could be considered as attempt to influence international tax policies at the domestic level through benchmarking. However, most developing countries are not part of the exercise (none of the countries researched). See https://cthi.taxjustice.net/en/

121 IN08

122 Jaiswal, "Foreign Direct Investment in India and Role of Tax Havens."

123 Financial Post, "Barrick Refers Senegalese Tax Dispute to Arbitration."

124 Faye, "408,6 Milliards FCFA Gagnés Par Barrick Gold: Birahime Seck Exige Du Gouvernement Que La Société Paie Les 120 Milliards Taxes Dus à La DGID."

125 SN16, translated by the author. Original quote: « Mais je pense que fondamentalement, s'ils en parlent, c'est plus pour des tribunes quoi, mais pas plus. Ils n'influent pas sur le débat réellement en termes d'évolution de la législation, parce qu'on est même en avance, ils suivent des questions-là de manière épisodique. Donc ce n'est pas très structuré.»

In Nigeria, ActionAid engaged in more technical work by commissioning a paper from a tax expert. In 2012, Nigeria signed a treaty with Mauritius, which as of 2022 awaits ratification. After the signature ActionAid commissioned a research paper from a prominent Nigerian tax lawyer (Taiwo Oyedele), which recommended the government not to ratify the treaty out of concerns for treaty shopping.[126]

In Colombia, there is a very active coalition of academics and civil society organizations that engages on tax topics. However, these groups have rather identified the issue of tax incentives as well as the transparency of the tax administration as main topics of engagement.[127]

There is more evidence of collaboration between government and local civil society groups for influencing international debates. An Indian civil society group's representative mentioned that the group's strategy was to meet with officials of the Indian government before international meetings, and ask the official to bring these policy ideas forward at the international level.[128] Vice versa, the Senegalese government has worked together with Oxfam Senegal so that, through its international network, the NGO could amplify the voice of Senegal and other developing countries at the international level. [129]

In sum, while local civil society organizations may contribute in raising the salience of international tax avoidance at the national level, their influence on concrete policy outcomes is likely to be low, a finding which echoes Cassandra Vet's assessment with respect to civil society's contribution in the adoption of transfer pricing rules in East Africa.[130]

### 5.5.8 The OECD

International organizations can exercise power through socialization, authority or through more direct incentives such as membership conditionality.[131] The OECD being the place where standards are set, it should have an interest in that these are implemented in practice. Of course, the OECD is both a forum where national representatives of the organization's member countries meet and an organization on its own (the Secretariat). National representatives of the member countries mainly exercise influence by

126 Oyedele, "Review of Mauritius-Nigeria Double Taxation Treaty"; ION News, "ActionAid Warns Nigeria That Mauritius Tax Treaty Could 'Hurt' Economy."
127 CO04, CO13
128 IN08
129 SN16
130 Vet, "Diffusion of OECD Transfer Pricing Regulations in Eastern Africa."
131 Goodman and Jinks, *Socializing States: Promoting Human Rights through International Law*; Davis, "More than Just a Rich Country Club: Membership Conditionality and Institutional Reform in the OECD"; Kelley, "International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions."

endorsing policies as international standards and by participating in peer review processes. The Secretariat however may undertake separate actions to enhance the uptake of the standard it endorses.

For example, the "multidimensional examination" on Senegal published by the OECD in 2017 criticizes the restrictions on interest in place in Senegal as stricter than "usually in place" and recommended the adoption of the approach set out in BEPS Action 4,[132] and recommended that Senegal adopts OECD transfer pricing principles for better protection of the tax base but also for more certainty and attractiveness for investors.[133] As explained in section 6.3.4, Senegal seems to have followed the recommendation.

Another avenue of influence could be through technical assistance. Funds and trainers come mainly from OECD countries, either directly through the programs of OECD or other international institutions or bilaterally from OECD countries' technical assistance agencies.[134] Hearson describes that in the past participation at capacity building meetings at the OECD has driven interest in signing tax treaties in Zambia.[135] However, the amount of direct contacts between government officials and the OECD secretariate does not appear to be decisive. In her study on the introduction of transfer pricing laws in East African countries, Vet finds that networks effects (the fact that many countries have previously introduced OECD-based transfer pricing rules) are a better explanation for their adoption than direct intervention by the OECD.[136]

In addition, the OECD as institution does not have a monopoly in technical assistance. Much assistance is done by the IMF or the TIWB program which is run by the OECD in association with UNDP, and these programs do not necessarily endorse the approaches suggested by the OECD. In Senegal, for example, interviewees from the tax administration had participated in a technical assistance workshop by the IMF that focussed on the "Sixth Method" in transfer pricing, which could be seen as a blunter approach than the CUP method (see section 6.2.1).[137]

As already mentioned in the preceding sections, many stakeholders express trust in the expertise of the OECD. But the perception that not all of its outcomes may be suited for the countries is widespread. A Colombian tax professional who was part of the expert committee which made recommendations for Colombia's 2016 tax reform said with respect to the question whether the outcome of the BEPS Project should be implemented that "the truth is that there was no debate here, but if there had been any debate, the three or four people there would have said that this is the right thing

132 OECD, *Examen Multidimensionnel Du Sénégal*, 105.
133 OECD, 106.
134 For an overview of technical assistance projects, see the International Tax Compact's database: https://www.taxcompact.net/projects
135 Hearson, *Imposing Standards*, 126–27.
136 Vet, "Diffusion of OECD Transfer Pricing Regulations in Eastern Africa."
137 SN15

to do. That is what is necessary in today's world. This is a commitment that already exists in the international community. Of course, it has to be done carefully. I myself remember that I said something along these lines, because I myself did not know and I still do not know where we are going. Because I'm not sure that everything has to be done. And I'm not sure at what speed."[138]

A Senegalese tax expert said that "Now, it's true that on a technical level, it's good to know what the OECD thinks. All these theories. It's good, but it's not for us. And so we are not going to close our eyes to apply. […] I know that the tax administration participates in the OECD, but doesn't believe in it too much. We as advisors can be inspired to tell them on the international level this is what they are doing, but they will tell you that we are not on the international level."[139]

The Colombian case is special since Colombia officially became an OECD accession candidate in 2013 and officially joined the organisation in 2020. Its status as accession candidate permitted Colombia to actively participate in the Working Group of the Committee on Fiscal Affairs that elaborated the BEPS reports. However, when a country intends to join the OECD, a roadmap with conditions for accessions is determined, in which various thematic bodies of the OECD make demands with regards to policies.[140] With regards to international taxation, the Committee on Fiscal Affairs demanded from Colombia that it complies with the key substantive conditions underlying the OECD Model Tax Convention; that it adheres to the OECD's Transfer Pricing Guidelines and that it commits "to address base erosion and profit shifting in accordance with the OECD's work in this area."[141] While these demands are relatively unspecific, in the perception of many interviewees, this played a role in the speed and extent in which Colombia tried to comply with the BEPS standards.[142] One interviewee for example attributed the fact that Colombia chose to be peer reviewed

138 CO18, translated by the author. Original quote: "La verdad es que acá no hubo un debate acá, pero, si hubiera habido algo de debate, las tres personas o cuatro acá hubiéramos dicho eso es lo que hay que hacer. Eso es lo que se impone en el mundo de hoy. Ese es un compromiso que existe ya en la comunidad internacional. Claro, hay que hacerlo con cuidado. Yo mismo recuerdo que yo dije algo en estas líneas, porque yo mismo no sabía y todavía no sé en qué vamos. Porque no estoy seguro de que haya que hacer todo. Y no estoy seguro de a qué velocidad."

139 SN07, translated by the author. Original quote: "Maintenant, c'est vrai que sur le plan technique, c'est bien de savoir ce que pense l'OCDE. Toutes ces théories-là. C'est bien, mais ce n'est pas fait pour nous. Et donc on ne va pas fermer les yeux pour appliquer. […] Je sais que l'administration fiscale participe à l'OCDE, mais n'y crois pas trop. Nous, en tant qu'expert, on peut s'inspirer pour leur dire sur le plan international voilà ce qu'ils font et ils vont te dire qu'on n'est pas sur le plan international. »

140 Davis, "More than Just a Rich Country Club: Membership Conditionality and Institutional Reform in the OECD."

141 OECD, "Roadmap for the Accession of Colombia to the OECD Convention (Adopted by Council at Its 1285th Session on 19 September 2013)," 12.

142 CO05

not only with respect to the Action 14 minimum standards, but also the Action 14 best practices, to a desire to show a high commitment to the BEPS Project.[143]

In sum, it is likely that more interactions with the OECD (both current and historical) may lead to closer alignment with the standards promulgated by the organization.

## 5.6 Preliminary conclusions

At this point of the discussion, it is pertinent to summarize what has been advanced so far and how it relates to the overall research question, namely how the BEPS Project impacts policy "on the ground" and how we can explain different levels of impact. In order to elucidate these questions, I took several steps back in the last chapters. I first discussed what approaches countries can generally take towards the issue of international tax avoidance from the defensive perspective, i.e., when they potentially are in the position of losing revenue. I distinguished several dimensions on which these policies can vary and identified five main types of approaches. Then I analysed what approach the norms embedded in the BEPS Project and the Project's general ideas represent among these ideal-typical approaches.

In this chapter I focussed on the different factors that are likely to condition the approach that a country takes with respect to the issue. In the latter part, I discussed what the preferences of different stakeholders are, and to what extent they are likely to actually exercise influence on policy. At the centre is the struggle between different sectors of the government as to whether easy revenue collection or attractiveness for investors should be privileged. Whereas tax administrators, and in particular those that are involved in auditing, prefer blunter approach to tax avoidance that allow them to levy revenues without fact intensive analyses, those tasked with economic policymaking in a broader sense prefer to give up on taxing corporations or at least limit the impact of anti-avoidance rules through requirements for finely delineating analyses. Diplomats, ministries of foreign affairs, or presidential offices may affect the policy choice, as well, as they may want to acquiesce to the preferences of an international organization (such as the OECD) or a partner country to establish closer relations with the organization or the country.

Among extra-governmental actors, civil society organizations are likely to support the former, while businesses and advisory are more likely to support the latter. Whether these organizations are influential in actual policy decisions is however questionable: Civil society organizations may lack technical capacity to effectively engage with concrete proposals and

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may more play a role of diffusely raising the salience of doing "something" about the issue. For businesses, the stakes may be lower than with respect to other aspects of tax policy. For advisory, there is likely to be a great deal of heterogeneity with respect to the preferred policy direction, and there are no direct stakes in most policies either (with the exception of rules that directly target advisors). Therefore, it is hard to predict a common stance of the tax advisory sector on the BEPS Project.

Higher level tax administrators or officials at ministries of finance, who are tasked with proposing and implementing policies, have to navigate these conflicting interests, within the boundaries imposed by more structural factors: Capacity, short-term revenue needs, as well as market power constrain the number of available policy choices, albeit not in a deterministic way.

How can knowledge on general preferences for policy directions be translated into predictions about the way the BEPS Project may be taken up? Here interactions of preferences with the other variables discussed becomes important. First among them, the status-quo ante: it is likely that the position that stakeholders of the same group will take on the BEPS Project will not to be uniform across countries (or even within one country) but depend on whether previous rules are perceived to be weaker or stronger (blunter). As I will further lay out in the following chapters, one should not lightly assume that countries have always been less well protected from international tax avoidance in the past. On the contrary, rules of a "blunter" character could have been in place, which means that directly affected actors such as MNEs may prefer the BEPS Project's approach over the past approach.

In addition, the extent of a particular international tax avoidance issue will affect the pressures to adopt a deviating solution. Where the phenomenon is not important, it is likely that the country does not adopt any change or adopts the international standard per default. However, where it is important, stakeholders interested in raising more revenue may push for "blunter" solutions or those in favour of attracting investment may try to oppose the implementation of a particular item from the BEPS project. As laid out in chapter 4, among the different elements of the BEPS project, some reinforce the finely delineating logic of addressing tax avoidance whereas others are "blunter" than previous standards endorsed by the OECD. Preferences with respect to the BEPS Project may therefore vary from item to item. However, it is important to recall that next to its concrete technical content, the BEPS Project could be understood as carrying the general message that some action against international tax avoidance should be taken. In the absence of an extensive technical discussion, policymakers interested in applying blunter solutions can attempt to build upon this diffuse message to advance their preferences.

Other aspects that are likely to influence the response are market power, as well as administrative capacity. Market power will likely facilitate deviating from an international standard because policymakers have to worry less

about attractiveness for investors, even though a bigger size of a country (which generally goes with market power) also means that MNEs may apply more pressure not to deviate because of the higher importance of the country for the MNE's overall tax burden. Lower administrative capacity generally means that a country will be more likely to adopt blunter solutions, even though policymakers may also opt for policies that, theoretically, require more capacity than currently available, with the perspective of increasing it in the future.

In the next chapter, I will investigate how the policy approaches in two policy areas have been transformed by the BEPS Project, using India, Colombia, Nigeria, and Senegal as case studies. Studying four countries is not sufficient to ascertain the relevance of all the variables discussed in the preceding chapter, as there is likely not be sufficient variation on all of them in the sample, even if one takes into account the evolution over time. Nevertheless, the four countries are a diverse sample among those developing countries that are members of the Inclusive Framework: India and Nigeria are among the countries in the Global South with the highest market power due to the size of their economies. Colombia is a medium sized and Senegal a relatively small country. Politically, the countries have different profiles, as well: Colombia was in the OECD accession process and is now a member of the OECD. India is a member of the G20, and was influential in the development of the BEPS Project, often being the most vocal dissenter. Nigeria and Senegal have only started participating later, whereby Nigeria has gradually taken up a dissenting role as well. Senegal has kept a lower profile despite continuous participation in meetings.

# 6 Tackling transfer mispricing

## 6.1 Introduction

The preceding chapters described the phenomenon of international tax avoidance, as well as potential approaches that countries can adopt to defend themselves against it. I argued that there is not only one approach for a country to deal with international tax avoidance (from the defensive side), but there are at least five major themes. I also discussed the goals of the BEPS Project under that angle, arguing that it embodies a preference for one of these major approaches, the one which finely delineates between avoidant and non-avoidant situations, even though compared to previous standards promulgated by the OECD, a higher acceptance of blunt approaches can be observed. In chapter 5, I laid out the factors that are, in general, likely to shape countries' approaches.

The purpose of this (and the following) chapter is to empirically assess what approaches countries have adopted over time to deal with specific policy problems, and why these approaches have been taken. For that purpose, I first describe the policy issue in detail and discuss how the BEPS Project pretends dealing with it in detail. Then I turn to the countries studied. In the case studies, I first analyse the status-quo ante, i.e., I ask whether the policy problem has been present in the country and how the government chose to deal with it in the past, what changes have been adopted since the BEPS Project and to what extent these changes are reflected in stakeholders' practice. Throughout the analysis I identify how different stakeholders have attempted to influence the approach taken (or not).

The first policy problem I deal with is the manipulation of transfer prices or "transfer mispricing". The term designs a technique which consists in arranging transactions among the different subsidiaries of the MNE in a way that leaves as little profits as possible in high tax countries. On the one hand, the MNE can arrange that subsidiaries in low tax countries export more to high tax subsidiaries or charge higher prices for exports. On the other hand, it can plan for subsidiaries in high tax countries to export at lower prices to low tax subsidiaries.

The pricing of transactions among different subsidiaries has been one of the core tax planning topics debated for many decades, giving rise to the OECD's Transfer Pricing Guidelines, which were already mentioned in section 3.4.1. However, at the start of the BEPS Project, it was diagnosed that the existing rules sometimes produced "undesirable results from a policy

perspective", in particular with respect to businesses that rely heavily on intangible assets (such as technology or pharmaceutical companies).[1]

Different parts of the BEPS Action plan are directly relevant to the topic. Action 8-10 introduce amendments to the substantive parts of the transfer pricing guidelines, which prescribe how transfer prices should be calculated. Action 13 deals with the topic of transfer pricing documentation, i.e., which quantity and which type of information MNEs need to provide to tax authorities. Action 14 addresses two dispute resolution and prevention mechanisms that are relevant for transfer pricing: the Mutual Agreement Procedure (MAP) and Advance Pricing Agreements (APAs).[2]

Finally, the specific issue of excessive interest deductions can also be thought of as transfer pricing problem, since it concerns the pricing and quantity of financial transactions among subsidiaries of MNEs.[3] Therefore, I discuss countries' approaches to excessive interest deductions and BEPS Action 4 in this context, as well. Transfer pricing is also one area where some countries have chosen approaches that markedly differ from the OECD approach in the past.

It should be pointed out that the topic of transfer pricing is not only about international tax avoidance. While historically transfer pricing rules have been thought of primarily as anti-avoidance rules, today they can be thought of as rules that more generally regulate all cross-border transactions, even those that do not have any incidence on the MNE's total tax payment, for example, where the transaction takes place between two countries with the same tax rates.[4] In these cases, the main consequence of different approaches concerns the allocation of tax revenue among the countries involved.

In the remaining sections, I first describe the different actions of the BEPS Project with direct relevance to transfer pricing, and their interplay. Then, I discuss how the approach to transfer pricing has evolved in India, Colombia, Nigeria and Senegal, before and after the BEPS Project. Finally, I compare the cases and discuss to what extent the conclusions reached are likely to be applicable beyond these countries.

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1 OECD, *Addressing Base Erosion and Profit Shifting*, 10.

2 Action 14 is also relevant for other aspects of international taxation, in particular permanent establishment issues. However, since 2016, around 40% of MAP cases started across the world have been transfer pricing cases, with shares in developing countries. Therefore, the topic is discussed in this chapter, as well.

3 Burnett, "Interest Deductibility: Implementation of Action 4 of the OECD/G20 Base Erosion and Profit Shifting Project and the Future of Transfer Pricing of Intra-Group Finance."

4 Tørsløv et al. argue that, paradoxically, tax authorities spend more resources on auditing these transactions, which do not have any effect on the overall tax payments of MNEs. Tørsløv, Wier, and Zucman, "Externalities in International Tax Enforcement: Theory and Evidence."

## 6.2 Transfer mispricing, the arm's-length-principle, guidelines, and the BEPS Project

### 6.2.1 The arm's-length-principle

At the core of the OECD philosophy to deal with the issue of transfer pricing is the so-called "arm's-length-principle", which prescribes that transactions between related subsidiaries should be priced as if they were undertaken between unrelated parties. The arm's-length-principle has been part of the OECD and UN Model Convention since their first editions and has been routinely included in most tax treaties concluded by any country.[5]

The OECD Transfer Pricing Guidelines (TPG), first developed in 1979, provide a detailed commentary about how the arm's-length-price should be calculated.[6] In today's version they describe five different methods, which either consist in directly comparing prices of similar transactions between related parties on the one hand and unrelated parties on the other hand, or comparing profit-level indicators of businesses that engage in related party transactions and companies that engage in unrelated party transactions.[7]

Over time, the OECD TPG grew substantially, as more chapters were included that deal with specific types of transactions (for example cost contribution arrangements or restructurings of MNE groups) or with specific sectors, mainly as a response to the growth in importance of these sectors or transactions. In parallel, many countries have developed domestic legislations, which tend to mirror the TPG or which serve as source of inspiration for additions to the TPG.[8]

However, approaches across countries have not developed uniformly, as some countries have adopted less fact intensive approaches to calculate arm's-length prices. One of the most-cited examples is the so-called "fixed margin" approach used by Brazil (at least until a transition to OECD rules was started recently). Under this approach, instead of comparing each individual transaction or enterprise, acceptable profit levels are fixed by the legislator for entire sectors.[9]

Compared to a situation where the arm's-length-principle is fully enforced by an administration with sufficient resources, these approaches could be qualified as blunter or as tolerant of some degree of avoidance, depending on whether the margins or prices prescribed tend to fall above or below the arm's-length price or margin that might be determined when

5 Baistrocchi, "Transfer Pricing Dispute Resolution: The Global Evolutionary Path (1799–2011)," 837–38.

6 OECD, *Transfer Pricing and Multinational Enterprises*.

7 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*.

8 Baistrocchi, "Transfer Pricing Dispute Resolution: The Global Evolutionary Path (1799–2011)," 838; Radaelli, "Game Theory and Institutional Entrepreneurship: Transfer Pricing and the Search for Coordination International Tax Policy."

9 Picciotto, "Problems of Transfer Pricing and Possibilities for Simplification," 30–34.

more details of the circumstances of the company and the transaction are taken into account. In a given context, it might be that for some MNEs, the simplified approach is stricter than what the arm's-length principle would allow, whereas for others it might be laxer.

In other countries, fixed margins are often structured as so-called "safe harbours", which means that prices or profit margins set below (or above, depending on the perspective) a certain threshold will not be questioned by the tax administration.[10] Since the safe harbour could sometimes be lower than the "true" arm's-length price, these tend to be tolerant of some degree of avoidance.

The inverse of safe harbours are deduction limitation rules, such as the fixed ratio proposed under Action 4 (see below), since they prescribe an upper limit, but tax authorities could still apply an arm's-length analysis if they believe that transactions are not carried out at arm's-length, even though they comply with the fixed ratio.[11]

BEPS Actions 8 to 10, which were published in one single report, make several additions to the TPG. To a large extent, they continue the prior evolution of the Transfer Pricing Guidelines by adding guidance for specific types of transactions, such as cost-contribution arrangements and transactions relating to intangibles.[12] However, the reports also contain a number of simplifications compared to prior editions of the TPG: The chapter on commodity transactions expresses a degree of acceptance for the so-called "Sixth Method" or "Commodity rule", which refers to the use of publicly quoted prices to calculate the arm's-length-prices for commodity transactions. Christensen et al. qualify this as a major concession made to developing countries in the design of the BEPS Project.[13] Remarkable is also the introduction of a so-called "fixed margin" for low-value added intra-group services, which is a clear departure from the finely delineating analysis, as well.

Action 4 on interest deductions follows a similar pattern. The question of how much interest can be deducted can be thought of as a transfer pricing issue, because companies can shift profits by arranging for high interest payments from a high tax subsidiary to a low tax subsidiary, by financing the subsidiary by large amounts of debt and/or by charging high interest rates. A tax administration could invoke the arm's-length-principle to address such kinds of transactions, comparing whether companies would incur similar amounts of debt or pay similar interest rates under

10 Ezenagu, "Safe Harbour Regimes in Transfer Pricing: An African Perspective."

11 Burnett, "Interest Deductibility: Implementation of Action 4 of the OECD/G20 Base Erosion and Profit Shifting Project and the Future of Transfer Pricing of Intra-Group Finance," 329.

12 OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports*.

13 Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations," 16.

market conditions. Action 4, however, goes beyond such an "arm's-length-approach" and provides for a fixed deduction limitation.[14] In situations, where interest deductions are below the threshold, but still too high in the opinion of the tax administration, the latter could still apply a transfer pricing analysis.[15]

All in all, BEPS Actions 4 and 8 to 10, could be interpreted as introducing more acceptance of "blunter" approaches to transfer pricing. But it should be noted that, even when doing so, a commitment to uphold the finely delineating approach as far as possible is present throughout the documents. For example, the group ratio approach contemplated in Action 4 and the suggestion to exempt the financial sector from the application of the rules altogether, are attempts to better accommodate the situations of different taxpayers – at the expense of more simplification.

The proposed approaches also do not go as far as practiced by certain countries. In the BEPS report, the Sixth Method is discussed as one possible approach under the comparable uncontrolled price method, but domestic legislation in some countries goes further in simplifying.[16] With respect to low value-added services, some countries have denied the deductibility of any profit element with respect to these services in the past, rather than allowing for a safe harbour.

It is important to point out though that the outcomes of the BEPS Project discussed above strictly have a value of recommendations. The BEPS Project does not require countries to accept the Transfer Pricing Guidelines as binding, nor does it require countries to introduce transfer pricing rules or interest deduction limitations rules in their domestic law.

### 6.2.2 Transparency and documentation

The fact-intensive approach to calculating the arm's-length price preconised by the OECD requires a significant amount of information. The issue of documentation requirements by companies are therefore at the heart of the issue of transfer pricing compliance.

One of the BEPS project's major innovations, which was pioneered by non-governmental organizations,[17] is the country-by-country report (CbCR) described in BEPS Action 13.[18] A CbCR contains information about a whole

14 OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update*.

15 OECD, 25.

16 Picciotto, "Problems of Transfer Pricing and Possibilities for Simplification," 24–25.

17 Hearson, Christensen, and Randriamanalina, "Developing Influence: The Power of 'the Rest' in Global Tax Governance"; Lesage and Kaçar, "Tax Justice through Country-by-Country Reporting."

18 OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*.

MNE group's revenues, profits, assets, number of employees and taxes paid consolidated on a per-country basis.[19] Previously, a tax administration would usually only be able to obtain such information about an MNE's subsidiaries in its own country.

The Action 13 minimum standard requires countries where large MNEs are headquartered to collect this information and send it to all other countries in which the MNE has a presence, under some conditions. The report needs to be filed for each fiscal year by MNEs which in the year have a higher turnover than 750Mio EUR. Action 13 proposes a template for the information to be included in the country-by-country report and a mechanism to exchange country-by-country reports among countries in which the multinational group operates. In case that a jurisdiction cannot obtain data on a foreign multinational group via information exchange, it can impose a local filing obligation on a local subsidiary or on a "surrogate parent entity".

A tax administration can use the CbCR information to determine which MNEs should be scrutinized more closely.[20] In theory, this information could also be used by countries to apply more formulary approaches, and therefore (in the absence of harmonization with other countries) blunter approaches to determine taxable profits within the country.

However, the minimum standard contains restrictions regarding the use of the information: A country needs to ensure (for example by restricting access to a certain group of people with the tax administration) that data contained within the report is not directly used to propose an adjustment to the transfer prices proposed by the company (based on a formula for example), but only for a high-level risk assessment in the process of selecting taxpayers for in-depth audit. Compliance with this requirement is audited in a peer-review process.[21] In addition, the domestic legal framework must include rules relating to confidentiality. These rules include for example screening of the employees that handle the reports, access control policies, physical security of the data, among others. They must be complemented by a penalty regime for breaches of such data security measures.[22] Finally, a country's legislation must not oblige a subsidiary to file a CbCR locally in case the MNE files the CbCR in the headquarter country but there is no information exchange agreement in force with the headquarter country.[23]

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19 It should be noted that the revenues and taxes paid are allocated to a country based on the residence of the company or the presence in case of permanent establishments. This means that the figures do not show from which country revenues are earned nor to which country taxes are paid. OECD, 33–34.

20 For example, a low profit per employee ratio in high tax countries paired with a high profit per employee ratio in low tax countries might indicate a risk of profit shifting.

21 OECD, "BEPS Action 13 on Country-By-Country Reporting - Peer Review Documents."

22 OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, 57.

23 OECD, "BEPS Action 13 on Country-By-Country Reporting - Peer Review Documents," 13.

BEPS Action 13 also develops recommendations for two additional documents that tax administrations could request from companies for purposes of auditing transfer prices: A master file and a local file. A master file is one document that explains the organizational structure of the multinational group and the group's general transfer pricing policy and business operations.[24] It lists sensitive transfer pricing items such as intangibles, intercompany loans and advanced pricing agreements signed with different tax authorities. In the local file, a company must provide details on intragroup transactions and their pricing carried out by companies of the multinational group which are resident in the country.[25]

Recommendations for transfer pricing documentation are not new. The OECD's 1979 report on "Transfer Pricing and Multinational Enterprises", the predecessor of the Transfer Pricing Guidelines, already stated that MNEs should provide the relevant information to correctly assess compliance with the arm's-length-principle to the respective tax authorities upon their request. However, this was not specified more closely. It also stated that MNEs should publish relevant information such as the names of main affiliates, sales, capital investments, average numbers of employees, and transfer pricing policies, aggregated by geographical area.[26]

The 1995 Transfer Pricing Guidelines included a larger section on documentation, which laid out guidance for countries designing documentation requirements under domestic law. It is noteworthy that the guidance stresses that the documentation submitted with the tax return should be minimized and that countries should take into account that information on foreign entities might not be available to subsidiaries and that no information should be required that is not in possession of the entity.[27] These guidelines have not been significantly modified in the subsequent updates of the Transfer Pricing Guidelines before the BEPS Project. In light of this earlier principle, the introduction of the country-by-country report and the master file can be seen as a clear departure. The local file contains information that is similar to the one that many countries would have already requested previously. However, not all jurisdictions required companies to submit the information systematically, but only reserved the right for the tax authority to request it during an audit procedure.

Some information similar to the one included in the country-by-country report has been included for the extractive sector and for the banking sector in two other initiatives, namely the Extractive Industries Transparency Initiative (EITI) and the EU CRD IV Directive, which applies to banks headquartered in the EU. One interviewee also found that disclosure

24 OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, 14–15.

25 OECD, 15.

26 OECD, *Transfer Pricing and Multinational Enterprises.*, 23–24.

27 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 144–45.

requirements for companies listed on US stock exchanges were already similar to those required under CbCR.[28] As a consequence, most MNEs in the extractive sector, European banks, as well as MNEs listed on American stock exchanges, already disclosed similar information for some time before the implementation phase of the BEPS Project.

Finally, the EU Joint Transfer Pricing Forum has developed the EU Transfer Pricing Documentation, endorsed in 2005, which includes a "Masterfile" which is very similar to the Master File recommended by Action 13. However, the EU initiative posited, as well, that adoption by MNEs should remain voluntary and did not suggest that the information should be filed prior to an audit procedure.

In general, one can assume that countries were already able to obtain similar information to the one included in CbCR, Master File and Local File with respect to MNEs headquartered in their jurisdiction. However, what information tax authorities could dispose of earlier about the operations of foreign-headquartered MNE group with operations in the country most likely varied.

Thus, compared to earlier guidance and practice, BEPS Action 13 represents a significant step forward in terms of access to information by making the information available to tax authorities in advance (and not only upon request), by including information about the entire MNE group, including foreign subsidiaries, by aggregating information per country instead of per geographical area only, and by making it (potentially) available to countries which host an MNE's subsidiaries but not the headquarter. Nevertheless, the restrictions imposed with respect to the use of CbCRs could make it more difficult for a country to effectively use CbCRs in tax assessments.

### 6.2.3 Advance certainty and dispute resolution

Generally, when taxpayers find that the tax administration has not applied the arm's-length principle in a correct way, they can use the standard domestic tax dispute resolution procedure, which often involves a first stage of appeals to the tax administration itself, followed by a second stage of appeals at the level of the courts. However, since the early days of global tax governance, it has been on the agenda of international organizations to provide mechanisms to solve disputes on cross-border issues at a cross-border level. The main device that has been developed for that purpose is the Mutual Agreement Procedure (MAP). The purpose of the MAP is to provide a way for taxpayers to resolve cases of double taxation, that can arise for example when the tax authorities of both countries apply a bilateral tax treaty or ancillary documents such as the transfer pricing guidelines in a different way to the same facts. Article 25 of the OECD and UN Model

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Conventions allows the taxpayers to request one of the tax authorities of the countries involved to reach an agreement with the other tax administration, in which both try to resolve the inconsistency that led to double taxation.

A basic form of the current article was already included in the 1946 London and Mexico Model Conventions (article 16 (Mexico)/18 (London),[29] and ever since a MAP article has routinely been included in bilateral tax treaties. However, the 2013 BEPS report notes businesses' concern that this system has not always worked well.[30] In addition, the OECD assumed that the implementation of other BEPS action items would lead to more disputes, thus exacerbating the situation.[31] Therefore, Action 14 proposes a series of reforms to the tax treaty clauses, to domestic legislation and to administrative practices relating to dispute resolution. Most of them are not new either but were already included in the non-binding Manual On Effective Mutual Agreement Procedures (MEMAP) published in 2007.[32] BEPS Action 14 elevated some of the topics that at that time were called "best practices" to the level of minimum standards.

21 different elements were defined as minimum standards. These elements are divided into four different topics:

1) Preventing disputes
2) Availability and access to MAP
3) Resolution of MAP cases
4) Implementation of MAP agreements

With the exception of the first topic (described below), all elements aim at making it more attractive for taxpayers to invoke a MAP.

Under the availability and access header figure requirements that are intended to improve the effective access of taxpayers to the MAP process: A taxpayer must have at least three years after a notification of the tax administration to start a MAP. Further, regulations must clarify that MAP can also be accessed in transfer pricing cases, in treaty abuse cases and in cases where an audit settlement has already taken place. Contrary to the previous OECD Model Convention, a taxpayer should be allowed to present his/her case to the competent authorities of both jurisdictions involved (and not only his/her jurisdiction of residence), or if this is not permitted, the other jurisdiction must be at least allowed to give a view on the case. Countries must further provide more information to the taxpayer on how to access the MAP and what kind of documents need to be provided to the authority (to reduce the incidence of a tax administration refusing access to MAP because of a failure to provide all relevant documents). This is done

29 League of Nations Fiscal Committee, "London and Mexico Double Tax Conventions. Commentary and Text," 70.

30 OECD, *Addressing Base Erosion and Profit Shifting*, 13.

31 OECD, "Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report," 11.

32 OECD, "Manual On Effective Mutual Agreement Procedures (MEMAP)."

in form of a MAP Guidance and a MAP profile, which is published on the OECD website. Finally, a provision has to be included in the MAP article of tax treaties that a MAP can also be used to reduce double taxation that is not provided for in the treaty.

With respect to the topic of resolving MAP cases, the minimum standard contains several elements that are intended to improve the number and speed of resolution of MAP cases. It further states that the resolution should take place within on average 24 months. Measures need to be applied that ensure sufficient capacity of the competent authority, independence of the persons involved in the MAP, and key performance indicators for the personnel that do not include targets such as maintenance of the adjustment made during an audit. Finally, the minimum standard states that jurisdictions must implement the result of a MAP on a timely basis and that this should be done without having regard to time limits on such payments that might be present in domestic law.

As mentioned above, Action 14 also deals with the issue of dispute prevention. In the realm of transfer pricing, many countries have introduced the possibility for companies to request so-called advance pricing agreements (APAs), in which the tax authority and the taxpayer agree on the correct pricing of a transaction before the transaction is carried out. This gives the taxpayer more certainty in calculating the tax impact of engaging in specific transactions. From the perspective of the tax authority, APAs can be a tool to gain more information. In order to reach an agreement, the tax authority usually requests more information than what the taxpayer is obliged to file under standard documentation requirements. It is therefore essentially an exchange of advance certainty granted by the tax authority vs. greater transparency from the side of the company.

Action 14 does not mandate countries to allow for APAs in the first place (it only recommends doing so). But it requires countries which have put in place an APA regime to allow taxpayers to request bilateral APAs and to allow for the so-called "roll-back" of APAs, which means that an APA would also be valid for 4 years earlier than the year of conclusion if the facts are the same. In a bilateral APA, the pricing of the transaction is agreed between the taxpayer and the tax administrations of both of the countries' that are involved in the transaction.

In sum, BEPS Action 14 does not suggest any response against avoidance. Rather it should be understood as general counterbalance to the other BEPS Actions. While the other parts of the BEPS Action Plan discussed until here give tax administrations potentially more power to challenge tax planning structures of multinational companies than before, Action 14 rather enhances the rights of taxpayers.[33] Rather, it induces countries to

33 Pires de Oliveira, "Action 14 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Making Dispute Resolution More Effective – Did Action 14 'Piggyback' on the Initiative?"

prevent double taxation more effectively. The pressure to resolve cases in consultation with other countries may make it more difficult for a country to deviate from acceptable practice with respect to enforcing transfer pricing, even though such a deviation may better protect the country's tax base. Allowing for bilateral APAs is likely to have the same effect. Moreover, the peer review process on Action 14 enables a peer country to publicly (but anonymously) complain about another country's interpretation of tax treaties. Since the arm's-length-principle is usually included in tax treaties (under article 9), the MAP may therefore be a way to discipline a country's transfer pricing practices. Overall, Action 14 therefore encourages countries to apply the finely delineating logic in practice and to abstain from interpreting anti-avoidance rules in a blunt way where the transaction is subject to a tax treaty.

Non-compliance or incomplete implementation of the requirements, in turn, could be interpreted as a blunt approach to international tax avoidance since the absence of an effective MAP procedure makes it easier for tax inspectors to override a tax treaty or to apply non-standard transfer pricing practices without being challenged. In contrast, implementation of the "best practices" and other suggestions, such as agreeing to mandatory arbitration, would signal a greater commitment to the finely delineating approach to international tax avoidance.

However, it should be pointed out that Action 14 falls short from establishing a comprehensive international dispute resolution system. First, a MAP can only be invoked concerning transactions that are covered by a tax treaty. Therefore, its impact in practice depends to a large extent on whether the country in question has concluded tax treaties with those countries where transactions are usually carried out with. However, Action 14 does not require countries to sign tax treaties.

Second, the standard does not require countries to guarantee that MAP cases will be resolved.[34] For several decades, businesses and a few OECD countries have tried to establish MAP arbitration within the international tax dispute resolution regime.[35] The idea of MAP arbitration is that, in case two countries cannot reach an agreement on a specific case, this case can be subjected to a panel of independent arbitrators that will reach a decision. However, many developing countries have strong reservations against arbitration, as they consider the system as restraining sovereignty in the domain of taxes, and successfully prevented the inclusion of arbitration in the minimum standard. India in particular was a vocal opponent during

34 Picciotto argues that otherwise the risk for the taxpayer to engage in risky transfer pricing strategies will be removed and only benefits of taking such risks would remain. Picciotto, "International Tax Disputes: Between Supranational Administration and Adjudication," 13. One could object that risks still remain if a country's legislation foresees a penalty in cases of sustained transfer pricing adjustment.

35 Hearson and Tucker, "'An Unacceptable Surrender of Fiscal Sovereignty': The Neoliberal Turn to International Tax Arbitration."

the process that led to the BEPS Project.[36] The minimum standard, however, requires countries to indicate their position towards MAP arbitration. The MAP Profile contains three questions related to arbitration:

1) Whether the country has already concluded a treaty with an arbitration clause
2) Whether the country's constitution would prevent introducing an arbitration clause
3) Whether the country's tax treaty policy would allow the inclusion of an arbitration clause

Not surprisingly, support for arbitration is higher among high income and low tax jurisdictions. Nevertheless, the other country income groups are not entirely opposed. In particular, a number of African lower income countries indicated in their MAP Profile that their country's treaty policy would allow them to introduce arbitration into their treaties, among them Benin, Côte d'Ivoire, Cameroon, and Congo (Democratic Republic).

*Table 5: Countries that have introduced an arbitration clause in any treaty or can introduce one as per their treaty policy*

| *Country Group* | *no* | *yes* | *No information* |
|---|---|---|---|
| High income | 8 | 47 | |
| Upper middle income | 11 | 9 | 2 |
| Lower income | 10 | 8 | |
| Low tax | 2 | 7 | |

*Source: Compiled by the author based on OECD MAP Profiles.[37] Note: The position is the one submitted in the latest MAP Profile*

If one takes all the changes to the transfer pricing system introduced by the BEPS Project together, one could argue that the approach is somewhat ambiguous (Navarro even describes it as "erratic")[38]. On the one hand, more acceptance of "blunt" practices is introduced in the guidelines itself, although the changes introduced usually do not go as far as practiced by certain countries. On the other hand, the emphasis on stronger dispute resolution counterbalances this, as it potentially makes it more difficult for countries to deviate from the international standard. Overall, this could attenuate differences between developed and developing countries.

The following sections investigate how the approach of India, Colombia, Senegal, and Nigeria has evolved before and after the BEPS Project, taking into account the interplay of substantive rules, transparency and dispute resolution.

36 IN11283
37 https://www.oecd.org/tax/dispute/country-map-profiles.htm
38 Navarro, "Simplification in Transfer Pricing: A Plea for the Enactment of Rebuttable Predetermined Margins and Methods within Developing Countries," 769.

## 6.3 The evolution of transfer pricing policies in India, Colombia, Senegal and Nigeria

### 6.3.1 India

India introduced comprehensive transfer pricing rules in 2001.[39] Prior to that, a clause similar to the arm's-length-principle had been part of the Indian tax code since the 1920s (under British rule) and there have been judicial disputes from as early as 1958 where it had been invoked to recompute the profit of an Indian entity belonging to an international group (although in relatively obvious cases, for example where no profit at all had been allocated to an Indian subsidiary).[40] However, since foreign investment only started to enter India in significant amounts in the 1990s, one can suppose that the quantities at stake had not been important yet, and even for those MNEs that did invest foreign exchange rules may have prevented certain tax planning schemes, for example those based on interest deductions. An interviewee noted that "Our foreign exchange law has kept a limit to what extent can the Indian company depending on its capital and reserves, to what extent it is permitted to lend. And for every lending, you have to take approvals. Even for a re-borrowing, I need a foreign exchange approval. […] So foreign exchange law adds an interesting dimension to international tax. […] We need to always keep that in mind. And actually we look at that first. […] BEPS comes much later."[41]

Overall, however, it was too challenging to obtain reliable information about whether transfer pricing started to be an issue in the 1990s, and it is not clear whether the government undertook comprehensive studies prior to the introduction of the rules in 2001 on whether problem existed at the time. The accompanying documents justify the reform with the risk for the tax base that could arise due to transfer mispricing, but do so in relatively general terms without citing India-specific evidence.[42] After 2001, literature suggests that the tax administration quickly built up capacity to enforce the rules. Statistics show a steady increase in the value of transfer pricing adjustment by the tax authority between 2004 and 2012.[43] The application of the principles was reportedly not always uniform across the tax authority and a lack of administrative resources led to some procedural shortcuts such as relying on assessments of earlier years without reconsidering changes in the taxpayer's business.[44] However, it is clear that the approach to audit was relatively systematic, in prescribing that all cases beyond a

39 Butani, "Transfer Pricing Disputes in India," 585.
40 Butani, 585.
41 IN13
42 Ministry of Finance, "Memorandum Finance Bill, 2001. Provisions Relating to Direct Taxes," 10.
43 Ministry of Finance, "Black Money," 48.
44 Butani, "Transfer Pricing Disputes in India," 616.

certain amount had to be sent to a tax inspector occupying the position of "Transfer Pricing Officer".[45] According to one advisor: "Nearly every significant multinational went through audits in the first 5/6 years of transfer pricing. And those were very detailed audits."[46]

On the other hand, distinct interpretations from practice in OECD countries were developed that would allocate more profits to the market country or the production country, for example on the question of whether advertising, promotion and marketing expenses incurred in India should be marked up or whether a remuneration for "location savings" should be attributed to India, when an MNE relocates functions from a country with higher production costs to India. Another remarkable divergence was the rejection of allowing any transfer price within the interquartile range of a sample of different comparables.[47] One advisor summed up: "India being a market jurisdiction, the focus has always been on how do we get more allocation of profits to the market jurisdictions. And as a result, they have been enterprising."[48]

This suggests that when it comes to transfer pricing matters, the Indian approach to transfer pricing has not been tolerant on avoidance practices. Interviewees from private and public sector alike agreed that the primary concern of the tax administration was to raise revenue and prevent the erosion of the tax base in its transfer pricing policy.[49] The approach of the tax authority to the transfer pricing issue can therefore be described as "blunter" as it likely was in OECD countries, with the result that India became the jurisdiction with the worldwide highest number of transfer pricing disputes between tax authority and taxpayers.[50]

Nevertheless, the Indian dispute resolution system somewhat qualifies this assessment. First, the trust by the private sector in the dispute resolution system is high, which is why many transfer pricing adjustments proposed by the tax authority were challenged in court.[51] Moreover, jurisprudence has not always accepted all of the distinct interpretations developed by the tax authority and has often relied on OECD guidelines.[52] For example, according to a report by Deloitte and the Confederation of Indian Industries, courts the tax authority's ability to rely on the concept of location savings.[53]

45 Butani, 591.
46 IN20
47 IN20
48 IN21
49 Butani, "Transfer Pricing Disputes in India," 617.
50 Sachit, "Transfer Pricing in India: Overview."
51 Tandon and Damle, *An Analysis of Transfer Pricing Disputes in India*.
52 Butani, "Transfer Pricing Disputes in India," 614–15.
53 Deloitte and Confederation of Indian Industry, "BEPS. An Indian Perspective on Critical Areas," 12.

Accordingly, since around 2010, the Ministry of Finance worked in mitigating the high number of disputes that had arisen. On the one hand, it tried to garner more international support for the distinct interpretations developed. It was influential, for example, in developing the UN Practical Manual on Transfer Pricing, arguing that the OECD Guidelines did not represent a global standard on transfer pricing, since they were only developed by 34 countries. Subsequently some of India's views appeared in a specific section on country practices in the Manual, among others on the concept of location savings and remuneration for marketing activities.[54]

On the other hand, it worked towards reducing disputes domestically. First, it started aligning more towards OECD practices, with changes that allowed the use of multiple year data to benchmark prices and margins and the allowance of a higher range of acceptable prices, apparently taking into account view of tax advisory: "they used to get feedback from us on where is the law not aligned with global standards, what you call the OECD best practice. [… Now,] I would not say it is fully aligned but it is much closer to the OECD standard."[55]

Second, the authority introduced and advertised an APA regime in 2012 and managed to gain a relatively good reputation among companies and advisors. According to one advisor, the APA program "opened a window to frankly and honestly discuss the structures with the competent authorities. […] They gave a lot of assurances that they will not use this information for something else […] and they successfully completed a lot of APAs and that gave a lot more comfort to the companies."[56]

India has also been open towards the Mutual agreement procedure. For example, already in the beginning of the 2000s, India entered into Memoranda of Understanding with a number of countries (among others, USA, UK, Sweden) providing for the suspension of collection of tax during an audit procedure.[57] Out of the 552 MAP cases started over the period 2018 to 2020 that involved lower income countries, 462 involved India. The MAP statistics published by the OECD show that a great majority of the MAP cases in India that were resolved in the relevant period were decided in favor of the taxpayer, i.e., fully eliminating double taxation.[58]

In sum, even before the implementation phase of the BEPS Project began, India had already started converging from a blunter approach towards a more finely delineating approach in matters of transfer pricing.

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54 United Nations, *Practical Manual on Transfer Pricing for Developing Countries*, 394–97.

55 IN20

56 IN21

57 Central Board of Direct Taxes, "Mutual Agreement Procedure (MAP) Guidance," 15; "Memorandum of Understanding Regarding Deferment of Assessment and/or Suspension of Collection of Taxes During Mutual Agreement Procedure"; Government of India, Department of Revenue, "India-UK Double Taxation Avoidance Agreement (DTAA) – Suspension of Collection of Taxes during Mutual Agreement Procedure." Suspension was confirmed in a 2013 case: Bhalla, Motorola Solutions India Pvt. Ltd. v. CIT, IBFD.

58 https://www.oecd.org/tax/dispute/2018-map-statistics-india.pdf

On the other hand, the changes brought to the Transfer Pricing Guidelines made some steps towards compromises, among others on the issues of "Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE)", which broadly goes into the direction of India's approach to the issue of marketing intangibles. Consequently, in the 2017 update to the UN Practical Manual, India included a paragraph in its Country Practices chapter, broadly endorsing Action 8 to 10.[59]

Hence, the substantive changes of the BEPS Project may have not particularly impacted the approach of the tax administration. An Indian tax advisor commented that "Apart from [an articulation that if an entity is just providing cash, and not managing the risks, then the return it deserves is a return for the capital and not the risk return of the business (Action 9)], I do not think there was anything new in action plan which India was already not believing in and to a large extent practicing actually. But obviously it has created more focus for implementing what India's belief was. […] There is a reference point and a recognition that we are not the only ones thinking like this."[60] Interest deduction limitation rules modeled on BEPS Action 4 were introduced in 2017, but as noted above, foreign exchange rules had already been limiting excessive interest deduction to some extent.

What about transparency and documentation requirements? CBCR, Master File, and Local File regulations were incorporated in domestic law in 2016, and are in force since financial year 2017. [61] This was done widely in accordance with OECD standards, with a few exceptions: The Phase 2 peer review report noted that Indian local filing requirements of CBCR go beyond the BEPS minimum standard.[62] With regards to the Master File, India introduced some additional requirements compared to the version recommended by the OECD and introduced additional requirements such as listing the top 10 contributing intangibles, and top 10 unrelated lenders,[63] which means that master files prepared by a foreign parent entity need to be adapted in order to comply with the Indian regulation.[64]

A company tax director however said that he/she felt that the tax administration could already obtain largely the same information before the introduction of CbCR.[65] Another confirmed that the administration has tried to access the information contained in CbCR and Master File before during audits even though he acknowledged that "with lack of experience you do not know what to ask for".[66]

59 United Nations, "Practical Manual on Transfer Pricing for Developing Countries (2017)," 601–2.
60 IN20
61 Income Tax Act, 1961, sec. 286(3)(a). Income Tax Act, 1961, sec. 286(3)(a).
62 OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 2)*, 249. OECD, 249.
63 IN24
64 IN15
65 IN25
66 IN20

In light of this, some interviewees thought that the CbCR would not have a significant impact on MNEs, since many companies had an APA that pre-validated their structure[67], and that taxpayers would use the explanation cell in CbCR report, to explain that last years' assessments were validated with the same facts, therefore they should not be considered wrong either when more information is available to the tax authority.[68] Other interviewees, however, said that companies might have been reticent to enter into an APA because of a fear to hand over too much information to a tax authority, especially with respect to more complex transactions.[69] However, as the extended documentation requirements would now apply anyways because of Action 13, this disincentive for entering into an APA is removed.[70]

At a conference attended by the researcher in 2019, an Indian government official reported that India successfully received reports from other countries and that despite some errors found in the reports they had helped with a risk-based selection.[71] This is generally evaluated as positive by the private sector. Jindal and Majmudar wrote in 2017 that "Recent trends point to a decline in audit adjustments, and with the amendments in TP regulations, the days of routine adjustments are numbered."[72] One advisor also pointed out that CbCR and Master file have brought consistency and predictability on what information companies are expected to provide, thereby increasing overall certainty.[73] Overall, this suggests that with respect to documentation requirements, India largely follows the approach suggested by the OECD. One interviewee summarized this evolution as follows: "transfer pricing is improving through implementation of bilateral APAs, the law is getting updated for trying to align it with global tax practices. Audits are getting a little more reasonable in terms of their scope and approach and we have changes in the law."[74]

To sum up, the Indian approach to transfer pricing has more closely aligned with OECD practice since the BEPS Project, but convergence came from both sides: On the one hand, the BEPS Project embraced some of India's views and India adjusted its practice more in the direction of the OECD approach.

Nevertheless, there is evidence that there are a few limits to the convergence. India's MAP Peer Review report is telling in that regard: With regards to the resolution of MAP procedures, one peer expressed the existence of fundamental differences in interpretation with regards to certain

67 IN21
68 IN16
69 IN23
70 Goel, "India's Advance Pricing Agreement Program: Room for Reform." Goel.
71 Conference notes from South Centre Conference, Delhi, December 2019
72 Jindal and Majmudar, "India," 429.
73 IN20
74 IN20

issues, namely burden of proof in existence of a PE, profit attribution and royalties and included services.[75] Another peer asserted that India would sometimes not come to principled solutions but reiterate the position of the tax inspector. India, however, refuted these claims, and the OECD Secretariat seemed to judge in favor of India, as no area for improvement was highlighted in the summary of the section.[76] At the Foundation for International Taxation Conference in Mumbai in 2019, an Indian government official expressed discontentment with the peer review procedure, pointing out that still on-going bilateral issues were raised by peer countries in the report, supposedly to put pressure on India by making the issue public.[77]

### 6.3.2 Colombia

In Colombia, the introduction of transfer pricing rules happened roughly at the same time as in India, as they were introduced for the first time in 2002 and have been in force from 2004 onwards.[78]

There is also a pre-history of transfer pricing regulation in Colombia since certain transactions used to be regulated by sector-specific commissions long before the implementation of any transfer pricing regulations in the tax code. In fact, one of the first academic studies on strategic transfer pricing by MNEs (published in 1974) was conducted in Colombia, before transfer pricing documentation became mandatory in Europe or North America.[79] Import prices had to be negotiated with regulatory authorities which tried to avoid too high remittances of fees by the importers of capital, goods, or technology. The study, however, used the data obtained from the authority to show that mispricing was taking place, concluding that due to a lack of resources, the regulation could not prevent profit shifting by MNEs altogether.[80] This suggests that transfer pricing had since long been a problem. However, since the major reforms to open up the economy only took place in 1991, the overall impact on tax revenue was likely not very important until then.

In sharp contrast to India, it seems, however, that until around 2011, the arm's-length-principle remained largely unenforced. Interviewees reported that audits only focused on whether companies had filed their

75 OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 1)*, 2019, 52. OECD, 52.

76 OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 1)*, 2019, 69–71. OECD, 69–71.

77 Conference notes International Tax Conference

78 Diario Oficial, Ley 788 de 2002 por la cual se expiden normas en materia tributaria y penal del orden nacional y territorial; y se dictan otras disposiciones., sec. 28.

79 Vaitsos, *Intercountry Income Distribution and Transnational Enterprises*.

80 Vaitsos.

transfer pricing return on time.[81] From around 2011 onwards, however, the tax administration started to receive training by the OECD and from then on, transfer pricing audits moved on to topics of the substance of transfer pricing. Interviewees argued that with the start of the BEPS discussions in which Colombia took part from the beginning on, both the tax administration as well as tax advisors gained greater cognizance that tax planning by MNEs was happening and potentially problematic for tax revenues.[82] According to interviewees, the intensity of transfer pricing audits further increased in the latter half of the 2010s. Before there used to be only one specialized unit in Bogotá, but later the local offices of other cities counted with transfer pricing specialists, as well.[83]

Nevertheless, in contrast to India, jurisprudence has remained sparse, and there has been no similar discourse by the tax authority revindicating its own views on transfer pricing as in India.[84] At a difference with other Latin American countries,[85] Colombia had not introduced a specific transfer pricing method for commodity transactions either, despite the importance of the natural resource sector in the economy (especially the petroleum industry). Instead, it awaited the outcomes of the BEPS discussions on the issue and introduced in the 2016 tax reform a specific paragraph on the application of the comparable uncontrolled price (CUP) method for commodity transactions.[86]

Similarly, reforms to the transfer pricing rules introduced in 2012 and in 2016 were presented as seeking alignment with most recent OECD guidance.[87] The Colombian national report to the 2017 International Fiscal Association (IFA) conference on Transfer Pricing, which was authored by two tax administration officials, strongly expressed the intention to use the outcome of Actions 8-10 in Colombia. The authors write that: "The adoption of the BEPS measures into the Colombian tax law on TP highlights Colombia's interest in making a major advance in terms of the harmonization process with international regulations, guidelines and standards. From the overall TP law, it is seen that Colombia strongly supports the application of the

81 CO21
82 CO24, CO21
83 CO27
84 This has changed in the two Pillar project. Colombia has been influential in producing a discussion document by the G-24 proposing an alternative to the solution for taxing the digital economy contemplated by other OECD countries. G-24 Working Group on tax policy and international tax cooperation, "Proposal for Addressing Tax Challenges Arising from Digitalisation." More recently, the proposal by finance minister Ocampo to organize a regional forum as alternative to the Inclusive Framework discussion goes in a similar direction. Ocampo, "Calling All Latin American and Caribbean Ministers to Rethink Global Taxation."
85 CIAT, "Cóctel de Medidas Para El Control de La Manipulación Abusiva de Precios de Transferencia, Con Enfoque En El Contexto de Países de Bajos Ingresos y En Vías de Desarrollo," 39.
86 Medina Rojas and Mejía Giraldo, "Colombia," 303.
87 Medina Rojas and Mejía Giraldo, 291.

arm's length principle and is committed to the OECD guidelines."[88] There are many indications that Colombia followed through on this commitment and placed a great emphasis on adhering as closely to the outcome of the BEPS Project.

First, Action 13 and 14 were fully implemented, with some features designed to guarantee a closer adherence to the finely delineating logic. For example, with respect to the implementation of Action 14, Colombia voluntarily requested an audit of the implementation of the Action 14 best practices.[89] With respect to the appropriate use requirement for CbCRs, Colombia chose not to let tax auditors access CbCRs (only a risk analysis team), which in the opinion of a former tax official greatly reduced the usefulness of CbCRs, since only tax auditors would have sufficient knowledge to interpret the information contained in the reports.[90] The Guidance on Appropriate Use released by the OECD notes that "[t]here is no restriction under Action 13 to prevent a jurisdiction from allowing tax compliance staff access to CbC Reports, so long as information contained in the reports is used appropriately and kept confidential in accordance with the applicable tax convention or TIEA."[91] However, the Guidance also notes that some countries – such as Colombia – have chosen not to let "tax compliance staff" access CbCRs, i.e., tax auditors who would be responsible for proposing a transfer pricing adjustment, but only centralized risk management teams.[92] Hence, with respect to this aspect, Colombia went beyond what was required by the Action 13 Minimum Standard, to the potential detriment of tax audits.

However, tax lawyers interviewed reported about several elements in the practice that attenuate the approximation to OECD practices. First, there is evidence that audit practice may sometimes be stricter than possibly intended by the legislation. One example provided by an interviewee was that the tax authority had already begun applying the "sixth method" for earlier years than the one in which it was introduced, without using the term to avoid discussions on the retroactive application of the norm.[93] Interviewees reported also that while the transfer pricing team within the tax administration had a good understanding of transfer pricing and was generally open to discussions with companies and their advisors to understand transactions, the ultimate decisions on whether an adjustment would be proposed or not would be taken by a different team, namely the Large Taxpayer Unit. According to these interviewees, the latter had a more mistrustful approach towards transfer pricing due to a lack of training on the

88 Medina Rojas and Mejía Giraldo, 289–90.
89 OECD, "MAP Peer Review Report - Best Practices - Colombia 2021."
90 CO39
91 OECD, "BEPS Action 13 on Country-by-Country Reporting – Guidance on the Appropriate Use of Information Contained in Country-by-Country Reports," 11.
92 OECD, 13.
93 CO23

topic. One mentioned that "saying presumption of bad faith is a bit extreme but it's a bit what happens in the Large Taxpayers Unit".[94]

Second, both domestic and international dispute resolution mechanisms were evaluated by most interviewees as not effective. With respect to the domestic procedure, many highlighted that the duration of disputes would take too long (5 to 10 years), which was mainly attributed to a lack of resources in the court system.[95] With respect to APAs, an interviewee argued that companies would not trust the mechanism and would not want to give all the information openly to the tax administration, even though conceding that the calculus might change with the implementation of Action 13, as the tax administration would obtain more information anyways.[96]

As with APAs, lack of information and a lack of trust in the tax administration was reported as a reason for the absence of MAPs, even though some attributed it more to a lack of audits.[97] A former official of the Colombian tax administration explained that the domestic legal framework of statute of limitations would have prevented agreements reached through the MAP from actually being implemented.[98] In Colombia the statute of limitations used to be two years, which would be less than a MAP would typically take. Accordingly, there was uncertainty among taxpayers and tax professionals whether a MAP agreement could actually be implemented by the tax authority. Other advisors explained that companies had not enough certainty as to whether they could still pursue domestic judicial remedies after they had started a MAP.[99] A former official of the tax administration, however, said that after the publication of a MAP regulation and a MAP profile in 2019 and an information campaign by the tax authority some companies had expressed interest to start a MAP procedure.[100]

Therefore, one can conclude that with the BEPS Project, the Colombian government is moving from a position of tolerating tax avoidance through transfer mispricing to a position that could be qualified as somewhat blunter than the overall approach mandated by the OECD, even though many efforts are made to correspond as close as possible to the OECD's approach. Nevertheless, in terms of tax revenues, this is most likely a net gain. Even though the evidence should be treated with caution, interviewees reported that generally companies were adjusting their transfer pricing

94 CO21, original quote: "Digamos que decir presunción de mala fe es un poco extremo pero es un poco lo que pasa en grandes contribuyentes."
95 For example, in the *Sony Music Entertainment Colombia* case, the company succeeded at the highest court, but the verdict was delivered 10 years after the adjustment had been proposed by the tax authority. See: https://tpcases.com/colombia-vs-sony-music-entertainment-colombia-s-a-july-2021-the-administrative-court-case-no-20641/
96 CO27
97 CO01, CO38, CO28
98 CO39
99 CO24, CO23
100 CO39

strategy to the fact that the tax authority had more information available and was increasing its audit capabilities.[101]

### 6.3.3 Nigeria

In Nigeria, transfer pricing regulations were only introduced in 2012.[102] However, like in Colombia there is a "pre-history" of transfer pricing enforcement. The arm's length principle was already included in Companies Income Tax Decree 1979.[103] In addition, section 30 of the Nigerian Corporate Income Tax Act allows the tax authorities to assess tax based on turnover where "the trade or business produces either no assessable profits or assessable profits which in the opinion of the Board are less than might be expected to arise from that trade or business".[104] For imports, the tax authority could rely on general provisions stating that expenses are only allowable as deduction if they are reasonably incurred."[105] Hence, several broad provisions allowing for an arm's-length-analysis of transactions had already been in the tax code for a long time. According to interviewees, however, enforcement of these provisions was piecemeal. [106] If, for example, different oil exporting firms would report different export prices or different margins, then companies with lower prices would be questioned on that basis.[107] A tax director at an MNE explained that before the introduction of the 2012 transfer pricing regulations "you [had] these audits that were never resolved because if you meet tax inspector A, he will tell you 'oh, you have a cost plus arrangements I think the margin should be 5%.' And then you have another person in the same industry saying 'I think it should be 10%'. So there was no uniformity and everybody was struggling: Ok, what exactly?"[108]

Many types of payments that pose a base erosion risk such as fees for management or consultancy services or royalty payments needed (and still need) to be approved by a regulatory authority, the National Office for Technology Acquisition and Promotion (NOTAP), before deduction, giving the agency the possibility to control the pricing of a transaction.[109] However, in the opinion of an official of the tax administration, NOTAP did not

101 CO27, CO
102 FIRS, "Income Tax (Transfer Pricing) Regulations, No. 1, 2012."
103 Federal Military Government of Nigeria, Companies Income Tax Decree, 1979, art. 18(b).
104 Companies Income Tax Act, 2004 (Nigeria), sec. 30.
105 NG02, Companies Income Tax Act, 2004 (Nigeria), sec. 24.
106 NG01
107 NG02
108 NG03
109 NOTAP has published guidelines about the maximum amount of fees for management and consultancy services, as well as IP license agreements, in relation to profit, net sales, or total costs of the importing company that may be paid. Usually the fees are capped at around maximum 5% of the respective indicator. See: National Office for Technology Acquisition and Promotion, "Requirements for the Registration of Technology Transfer Agreements."

really audit whether the pricing was at arm's-length.[110] Hence, there were instances where the pricing of fees that had been approved by NOTAP was still challenged by the tax authority.[111]

Shifting profits based on interest payments was more difficult in the past as well, since before 1999, according to Ajayi, "intercompany" loans were not deductible at all. Afterwards, they became deductible but only interest rates at a small premium over the London Inter-Bank Offer Rate were allowed.[112] Nevertheless, that meant that "thin capitalization" of Nigerian affiliates would still have been possible (high amounts of debts at "normal" interest rates),[113] and taking up loans through low-tax jurisdictions was, according to an advisor, a common structure, despite the restrictions mentioned above: "There was a lot of structuring with intergroup lending, a lot of loans were routed through Mauritius. And this was even before transfer pricing became a theme."[114]

In sum, while there is no available data to gauge the overall extent of profit shifting, the overall impression is that before 2012 the balance tilted more towards a tolerance of avoidance, which interviewees attributed to the large amount of oil revenues, rendering tax revenues less important.[115] Nevertheless, faced with the previous uncertainty involved in practice, tax advisors were involved in pushing the administration to publish more detailed guidelines on transfer pricing, leveraging on the fact that countries perceived as peers also introduced guidelines: "South Africa and Kenya were already approaching and the Nigerians always like to see themselves as the best people around. So we felt being left behind and that is important that we also get on that bandwagon."[116]

Several passages of the 2012 regulations appear to have been directly copied from the OECD's "suggested approach" for drafting transfer pricing legislation,[117] or directly import the OECD Transfer Pricing guidelines, for example when it comes to definition of the term "connected taxable person".[118]

To what extent companies were substantively complying with these regulations is not easy to say since, according to an advisor, transfer pricing strategies of investing MNEs were usually not developed in Nigeria,

110 NG17
111 Otufale and Olaniyi, "The Safe Harbour Provision in the 2018 TP Regulations: What Can Be Done to Make It Effective?," 2.
112 Ajayi, "Tax Implications of Recent Developments in the Nigerian Oil and Gas Industry," 382.
113 Using "back-to-back" strategies, whereby a non-related financial institution is interposed in the transactions, may have been possible as well.
114 NG08
115 NG11, NG14
116 NG03
117 See for example FIRS, "Income Tax (Transfer Pricing) Regulations, No. 1, 2012," 3(9)(4). and OECD, "Transfer Pricing Legislation - A Suggested Approach," sec. 3(2).
118 FIRS, "Income Tax (Transfer Pricing) Regulations, No. 1, 2012," sec. 4(10).

but rather in the home jurisdiction, whereas local advisors would merely be tasked with fulfilling compliance requirements.[119] It is clear, however, that in the early years of the new transfer pricing regime, enforcement was still relatively lax. A tax director of an MNE explained: "The first [regulation] never had penalties for not filing. So a lot of people never bothered to comply with the requirements because there was no penalty. There was an update subsequently to make sure to include penalty."[120] A study by the European Commission noted that by 2015 the Nigerian tax administration had not proposed any transfer pricing adjustment up to that moment, but that several audits were in progress.[121]

However, interviewees noticed a gradual improvement in the auditing capacity, which was partly attributed to increased pressures to raise tax revenue, as the oil price was declining.[122] In 2020, the first judgment on a transfer pricing case, the *Prime Plastichem* case, was delivered by the tax appeal tribunal, relating to transactions in fiscal years 2013 and 2014.[123]

The next series of fundamental changes occurred in 2018 and 2019, when the transfer pricing regulations were amended, and country-by-country reporting requirements and an interest deduction rule were introduced.[124] All amendments largely adopt the BEPS Project's recommendations and minimum standards in the area.[125] However, until 2022 with respect to country-by-country reporting, Nigeria maintained a status as "non-reciprocal" jurisdiction in order to not be considered as non-compliant for the purposes of the peer review report while measures for the protection of data received had not yet been introduced, which means that Nigeria only collected reports from Nigerian headquartered MNEs but could not obtain reports from other jurisdictions.[126]

With respect to the transfer pricing regulation, three amendments were deemed as most relevant by interviewees: The first is the introduction of a commodity rule, which turns the burden of proof on the taxpayer that the

119 NG07
120 NG03
121 European Commission et al., *Prix de Transfert : Étude Sur La Faisabilité de l'introduction de Régimes de Protection Dans Les Pays de La CEDEAO : Résultats et Analyse Des Questionnaires Envoyés Aux Gouvernements, Aux Entreprises et à La Société Civile*, 28.
122 NG02, NG03, NG01
123 Oparaji, "Nigeria's Tax Appeal Tribunal Decides Prime Plastichem Transfer Pricing Case."
124 FIRS, "Income Tax (Transfer Pricing) Regulations, 2018."
125 Adegite, "A Review of the Nigerian Country-by-Country Reporting Regulations," 2.
126 There was uncertainty with regards to the interpretation whether Nigeria complied with the Action 13 terms of reference. Due to its status as non-reciprocal jurisdiction, Nigeria's domestic legislation was not reviewed with respect to confidentiality and appropriate use provisions, but the local law contained a "local filing" provision, which may have allowed the tax administration to request CbCRs from foreign-owned subsidiaries. This was flagged in peer review reports by the OECD. However, according to interviewee working for a foreign MNE in Nigeria, the provision was not applied. NG03

quoted price on the date of export or import of a commodity is not correct.[127] In that regard, it could be considered as somewhat "blunter" than the rule described in BEPS Action 10, which only states that "depending on the facts and circumstances of each case, quoted prices can be considered as a reference for pricing commodity transactions between associated enterprises."[128]

The second significant amendment was a cap on deductibility of royalty payments of 5% of EBITDAR.[129] An interviewee from the tax administration explained that this decision was driven by considerations of administrative capacity, as intangibles was considered a more complex area of transfer pricing, and many disputes had arisen in that area.[130] Third, several interviewees highlighted the introduction of substantial penalties as most significant element of the amendment, and noted a change in the compliance dynamics.[131] A tax administration official confirmed that after the 2018 amendment, the number of transfer pricing returns received increased significantly.[132]

The 2018 guidelines make a reference to both the UN TP Manual and the OECD TPG, but state that domestic law prevails in case of inconsistencies.[133] According to an advisor, in practice, the guidelines were relied upon but not always accepted in disputes: "But the authorities, they don't consider themselves bound by the OECD literature. Back then, I don't know if the attitude has changed, but back then their approach was if they thought there was a more favorable outcome for them by just disregarding the OECD literature, they would do that. […But], as consultants, we had to rely on something, right? And the most definitive guidance that we could find was the OECD."[134]

Thus, while the 2018 guidelines take over many aspects of the BEPS Project, both legal deviations and the practical application by the tax authority turn the approach into something "blunter". And it seems that due to the lack of attractiveness of dispute resolution mechanisms, there is not much that taxpayers can do about it. One advisor explained that with regards to the definition of intangible assets, the tax authorities had deviated from the approach of the OECD guidelines, but that "[Because of the high penalties],

127 FIRS, "Income Tax (Transfer Pricing) Regulations, 2018," para. 5(9).
128 OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports*, 53.
129 FIRS, "Income Tax (Transfer Pricing) Regulations, 2018," para. 7(5).
130 NG17
131 As one advisor explained: "There were a lot of companies who had not filed a disclosure form at all and they had tons and tons of related party transactions. So what happened was that we saw a lot of companies, that had like 6 years of backlog, five years of backlog. So we were pretty much very busy within that period." NG07
132 NG09
133 FIRS, "Income Tax (Transfer Pricing) Regulations, 2018," 19(1).
134 NG08

companies thought about it and they said it's better for us to comply and challenge it if we feel strongly about it and a few people challenged but only if they already had a running battle with the authorities, so they just added that as an additional grievance. But my recollection is that most companies were not really willing to challenge it in court."[135]

Despite this, some interviewees from the private sector considered the evolution as improvement. One interviewee from an MNE said that with the introduction of the TP regulations, the quality of the discussions would change since the tax authority would appreciate that companies in the same industry could have different margins in Nigeria if risk was allocated differently in their value chains.[136] He evaluated in particular the introduction of increased documentation requirements as positive: "Once you have more information, then the discussion is more measured and also more informative. […] at least it lowered down the aggression. […] So now it's more an issue of negotiation, not an issue of intimidation."[137]

Both MAP and APAs are still underutilized, as well. A provision that unilateral, bilateral, and multilateral APAs can be requested was introduced with the Transfer Pricing Guidelines 2012. However, according to a tax administration official, the APA program has not yet started as the administration's strategy was to first build up sufficient capacity.[138] With respect to MAP, Nigeria made use of the option granted to developing countries to defer peer review. However, the tax administration published MAP guidelines in 2019,[139] and Nigeria started submitting MAP statistics to the OECD, which show that one transfer pricing MAP case was started before 2020 and closed in 2020, and another case was started in 2020.[140]

A tax administration official commented that "We have the guideline on the mutual agreement procedure published, and we have a team dedicated to mutual agreement procedure. We've had instances where jurisdictions, treaty partners have sent an MAP request to us and we work on those requests in conjunction with our treaty partners. So I think the process is OK in Nigeria regarding MAP."[141] In the private sector, however, the perception persisted that "the authorities are not very eager about the MAP process at all, in fact,"[142] which could explain the low demand for the procedure.

Disputes have been and are still mainly resolved in an informal manner, where settlements between the tax inspector and the company are reached. Some issues reach the level of the lower courts and very few go to the court of appeal.[143] Hence, as of 2022, no significant body of jurisprudence has

135 NG08
136 NG03
137 NG03
138 NG09
139 FIRS, "Guidelines on Mutual Administrative Procedure (MAP) in Nigeria."
140 OECD, "Nigeria MAP Statistics."
141 NG13
142 NG08
143 NG03

developed since attempting to reach settlements with the tax authority is still common practice.[144]

Considering these developments together, the transfer pricing regime has moved more towards the OECD approach. However, Nigeria has been more selective than Colombia, and deviated from the OECD approach with respect to more aspects. Similar issues in the dispute resolution system mean that the Nigerian approach could, now that the rules are actually enforced, be qualified as blunter.

### 6.3.4 Senegal

Among the four countries, the development of transfer pricing policy and practice is the most recent in Senegal. Although a general requirement for prices to be set at arm's-length had been part of Senegalese legislation for a long time (according to an interviewee since the 1980s),[145] these were seldom enforced. In 2011, an official of the DGID, Dialigué Ba, published his PhD thesis on the topic of transfer pricing in Senegal. He noted that at that time there were virtually no transfer pricing controls and that those that were undertaken did not have an "impact", because of a lack of technical capacity and juridical foundation.[146]

At the same time, the amount of foreign direct investment compared to GDP was relatively low until around 2005/06 (see Figure 6 below), when the mining industry started growing significantly after discoveries of gold and iron ore. According to an interviewee, before the end of the 2000s, tax inspectors were hesitant to audit transfer pricing matters, because there was a lack of time (generally three to four months were given for an audit). As a consequence, most focused on issues that they had a greater command on than transfer pricing, and whether transfer pricing issues were audited depended on whether the auditor had developed a personal interest in the topic and had made personal efforts to become acquainted with the topic.[147] Many felt that they would not be on par with the arguments put forward by the MNEs that would always come with the support of the Big 4 Accounting companies.[148]

Nevertheless, a tax advisor related a few cases which in fact were transfer pricing disputes, but in which the tax administration argued not based on the arm's-length-principle but based on general anti-avoidance principles of the Senegalese tax code such as the "abuse of law" and "abnormal management act" provisions.[149]

144 NG04
145 SN02
146 Ba, "Le Droit Fiscal à l'épreuve de La Mondialisation : La Règlementation Des Prix de Transfert Au Sénégal.," 294.
147 SN01
148 SN09, also SN01
149 SN07

Around 2012, the issue gained more traction, when a specific team within the tax administration's Large Taxpayers Unit was set-up to deal with issues of the financial sector and international transactions.[150] In addition, the 2012 tax reform added more detail to the arm's-length-principle in the tax code and put a documentation requirement in place that was similar to the requirements of the master file and the local file.[151] However, these documents only needed to be produced in case of an audit. Finally, an interest limitation rule was introduced, consisting in a (comparatively strict) debt-to-equity ratio of 1:1 and a maximum interest rate of the CEDEAO Central Bank rate + 3%, without any possibility to carry-forward deductions that could not be taken in one year.[152]

In 2017, OECD carried out a "Multidimensional examination" of Senegal's tax policies. One of the recommendations of the report was that Senegal should adopt OECD transfer pricing principles for a better protection of the tax base, but also for more certainty and attractiveness for investors.[153] It also criticized the restrictions on interest in place in Senegal as stricter than "usually in place" and recommended the adoption of the approach set out in BEPS Action 4.[154]

These recommendations were followed in the 2018 tax reform, when an interest deduction limitation modeled on BEPS Action 4 was introduced, while keeping the previous version in place with regards to transactions by individuals. The fact that this rule only allows a deduction of interest up to 15% of EBITDA makes it comparatively strict and is in the lower range of the rates suggested by the Action 4 report (10% to 30%). However, according to a tax administration official, the value was chosen based on studies of the previous level of interest deductions by Senegalese entities, and that it could be subject to revision in case it would prevent companies from legitimately incurring debt.[155]

In 2018, the tax administration also elaborated comprehensive transfer pricing guidelines. However, as of 2023, these have not been formally enacted, due to a delay of the implementation procedure in the Ministry of Finance.[156] However, already when the draft was finalized in 2018, the tax administration shared it with tax directors of companies, tax advisors, and civil society representatives with the purpose of obtaining comments, and advisors reported that they had based their advice on this guidance since then.[157]

150 SN01
151 République du Sénégal, Code Général des Impôts (loi n° 2012-31 du 31 décembre 2012), arts. 17; 638–641.
152 République du Sénégal, art. 9(2).
153 OECD, *Examen Multidimensionnel Du Sénégal*, 106.
154 OECD, 105.
155 SN16
156 SN14
157 SN05, SN06

The guidance (on file with the author) is detailed and closely follows the OECD Transfer Pricing Guidelines, without the deviations found for example in the cases of India and Nigeria or other developing countries. For example, values within the whole interquartile range of possible comparables are accepted (and not in a narrower range like in India). There is no specific reference to using quoted prices for assessing the prices of commodity transactions, and no deductibility limitation for royalties. For low-value added intra-group services, it adopts the safe-harbour suggested in the BEPS Project. In particular, the absence of a specific commodity rule is striking, given that mineral exports (in gold and phosphate, among others) dominate the economy. A Senegalese policymaker justified the choice not to introduce the "Sixth Method" in the draft transfer pricing rules as follows: "We said to ourselves, it's true that given our administrative capacity, we could easily have gone to simplified methods but we said to ourselves, we must capacitate our agents first. We do not exclude simplified methods, because if you look closely, […] there are some transactions where we accept simplified methods. For example, on some management fees or services with low added value. […] but we said to ourselves, before accepting something simple, […], we would give ourselves the means to develop an expertise on transfer pricing."[158] This suggests that policymakers do not necessarily choose to implement a policy that corresponds to the current level of administrative capacity, but may consciously adopt a policy that is more difficult to apply and use it as target for the development of the administration's capacity.

Requirements to file country by country reports and a master file were introduced in 2018, as well, and closely follow the OECD template. However, the 2021 peer review report on Action 13 notes that no exchanges of CbCRs had taken place until that date.[159] A tax administration official explained that the technical procedures to ensure confidentiality of the information exchange were still in the process of being implemented, but that nevertheless CbCR was a priority for the administration.[160]

Overall, the 2018 reform thus closely aligns Senegalese transfer pricing policy with OECD recommendations, perhaps to a similar degree as in Colombia.

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158 SN16, translated by the author. Original quote: « On s'est dit, c'est vrai, compte tenu de nos comptes administratif et de notre capacité, on aurait pu facilement aller dans les méthodes simplifiées et on s'est dit, il faut qu'on capacite nos agents d'abord. On n'exclut pas les méthodes simplifiées, parce que si vous regardez bien, […] il y a quelques transactions où on accepte des méthodes simplifiées. Par exemple, sur quelques managements fees ou des services à faible valeur ajoutée, on les accepte. Mais on s'est dit d'abord avant d'accepter quelque chose de simple, surtout qu'on avait commencé à capaciter un peu nos agents sur ces questions-là, on va se donner les moyens de développer une expertise sur les prix de transfert. »

159 OECD, *Country-by-Country Reporting – Compilation of 2021 Peer Review*, 197.

160 SN14

To what extent these reforms are reflected in practice seems less certain, though. In a presentation given in 2019, the Director General of the tax administration at the time, highlighted the difficulties that the administration encountered in auditing transfer pricing due to the absence of reliable databases of comparables and insufficient information exchange with other countries.[161]

Tax auditors interviewed in 2022 reported that capacity development and a generally heightened awareness of the transfer pricing issue had begun to bear fruits: "I think that the level of awareness of auditors has completely changed with the relationship between the OECD and the tax authorities, which means that this perspective and this issue is much more current today, even if these transactions did exist, but it is in fact today that the global dynamic has pushed the authorities to really take ownership of the issues."[162] Among the concrete changes, it appears that the master file has already proven useful in tax audits. According to the same tax auditor, it allowed « to gain a global view on the MNE group and its practices abroad. How homogeneous is the fiscal practice between subsidiaries on the group level? Does the group sign more egalitarian contracts with the subsidiary here than with other subsidiaries? Or is the tax burden optimized in relation to the location of the revenues generated? »[163]

However, interviewees both in the tax administration and in the private sector still highlight the lack of comparables and a lack of capacity as important obstacles to the adequate determination of transfer prices. This leads to the use simplified approaches to audit transfer pricing. For example, one tax auditor reported that trainings offered by the World Bank focussed on using the "Sixth method" for auditing transactions in the natural resource sector,[164] and another mentioned that he had applied the method in the past. The way dispute resolution works in Senegal also makes it unlikely that any deviations from an arm's-length-principle could really be challenged by taxpayers.

At the administrative stage, the taxpayer can either directly negotiate with the respective tax inspector or can appeal to the Minister of Finance or the Director General of the Tax Administration, in which case the Direc-

161 Tidiane Ba, "Le Dispositif Fiscal Sénégalais En Matière de Prix de Transfert."

162 SN15. « je pense que le niveau de conscientisation des vérificateurs a complètement changé avec les relations entre l'OCDE et les administrations fiscales ce qui fait que cette perspective et cette problématique est beaucoup plus actuelle aujourd'hui tant bien même ces transactions existaient mais c'est aujourd'hui en fait la dynamique mondiale a poussé les administrations à s'approprier vraiment les problématiques »

163 SN15 "Ça permet d'avoir une vue globale du groupe et les pratiques qui se font ailleurs. […] Quel est le niveau d'homogénéisation de la pratique fiscale entre les filiales à l'échelle du groupe ? Est-ce que le groupe signe des contrats beaucoup plus égalitaires avec la filiale ici par rapport aux autres filiales ? […] Est-ce que la pratique, elle est uniforme ? Ou est-ce qu'il y a des politiques d'optimisation de la charge fiscale en fonction du niveau de localisation en fait des revenus qui sont créés ? »

164 SN15

tor of the Department for Legislation arbitrates the case in the name of the Minister. According to private sector interviewees, taxpayers hesitate going to courts principally because of three reasons: judgments are perceived to be taking a long time to be delivered; the outcome would be uncertain due to lack of formation of judges on complex tax matters; during judicial procedures, the recovery of the amounts due can only be partially suspended (suspension needs to be approved by a judge and high guarantees, some of them in cash, need to be deposited). [165]

According to interviewees, the amounts raised by tax inspectors in initial adjustments are often very high, with the objective of inciting the taxpayer to come forward with more information.[166] A lack of suspension of collection during a judicial procedure can thus lead to cash flow problems for the company. Some interviewees mentioned that only very large MNEs with bank accounts abroad and companies divesting from Senegal may be able to pursue a longer dispute, since they could simply refuse to pay and they would not be affected if the tax administration was blocking bank accounts within Senegal.[167]

In sum, the connection of rules and practices push taxpayers to negotiate a settlement with the tax administration.[168] Although interviewees both in private sector and tax administration criticized this status quo as being too much in favour of the tax administration,[169] the general practice of negotiating seems to be widely accepted. Independently from each other, three interviewees (both in private sector and at the tax administration) commented on dispute resolution in Senegalese with the proverb "A bad deal is better than a good lawsuit."[170] One tax advisor subsumed: "Going to court is really rare. It's just a few foreign companies that sometimes […] seize the judges. But otherwise the tax administration really has to not agree so that we go to the judge. But each time, we always manage to find an agreement with the DGID."[171]

Like in Nigeria and Colombia, the international dispute resolution mechanisms recommended by the BEPS Project are hardly applied in practice yet: The transfer pricing guidance (not yet in force) contain a chapter which specifies the modalities of both unilateral and bilateral APAs. In practice, however, no interviewee was aware that APAs had already been

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165 « Le recours en justice prévu à l'article 709 n'est pas suspensif de l'exécution. » République du Sénégal, Code Général des Impôts (loi n° 2012-31 du 31 décembre 2012), art. 710.

166 SN17

167 SN02, SN17

168 SN01, SN02, SN17

169 SN02, SN17, SN16

170 « Un mauvais arrangement vaut mieux qu›un bon procès » SN01, SN02, SN16

171 « Se pourvoir en justice, c›est vraiment rare. C›est juste quelques compagnies étrangères qui des fois […] saisissent les juges. Mais sinon il faut vraiment que l'administration fiscale ne soit pas d›accord pour qu›on puisse aller saisir le juge. Mais chaque fois, on parvient toujours à trouver un accord avec la DGID. » SN02

concluded. With regards to the Mutual Agreement Procedure, Senegal opted out of the peer review mechanism.[172] However, detailed guidance was circulated in 2018 and according to a tax administration official, a few MAPs have been concluded over the last decades.[173] But the issues that prevent taxpayers from going to court are likely to prevent them from invoking MAP as well. Under BEPS Action 14, suspending tax collection during a MAP procedure was only introduced as best practice, but not as minimum standard,[174] and the (not yet published) Senegalese MAP guidelines specify that collection can only be suspended under the same conditions as in domestic law.

In sum, when considering all aspects of the Senegalese tax system that are relevant for transfer pricing, the increase in attention of the tax administration towards the issue leads to a blunter approach than advocated by the OECD, despite a manifest willingness of policymakers to adhere more closely to the OECD approach.

## 6.4 Comparing the approaches and considering evidence on other countries

What can we learn from these case studies about the evolution of transfer pricing systems in developing countries more generally, and about the impact that the BEPS Project likely had on the evolution? In this and the following sections, I will highlight several insights from the case studies that I think are important and bring in additional data to gauge to what extent the insights could be applicable to developing countries more broadly.

### 6.4.1 Starting with transfer pricing rules

The first conclusion is that systematically assessing the impact of the BEPS Project on countries' approach to transfer pricing is difficult, since in several of them, the roll-out of the BEPS Project coincides with the substantive implementation of transfer pricing regimes in general. In Colombia, Senegal, and Nigeria, although transfer pricing rules have existed for some time before the BEPS Project, they had not been widely applied in tax audits. In these three countries, it is only since the early or mid-2010s that tax administrations have invested in building up capacity, in setting up dedicated teams and carrying out extensive audits of companies' transfer

172 OECD, "OECD/G20 Inclusive Framework on BEPS: Progress Report July 2020 - September 2021," 13.

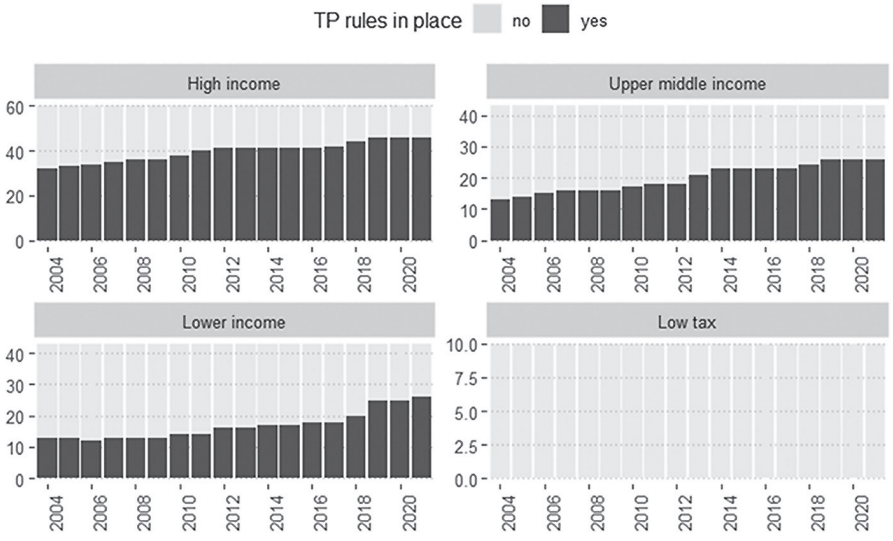
173 SN16

174 OECD, "Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report," 31.

pricing practices. In Senegal, as of 2023, no comprehensive transfer pricing guidance has been published, although a draft is in circulation since 2018. In both Nigeria and Senegal, interviewees noted that enforcement activities by the tax administration have started increasing significantly in the mid-2010s, coinciding with the introduction of changes by the BEPS Project. Accordingly, when asked generally about the impact of the BEPS Project, many interviewees in Colombia, Senegal, and Nigeria rather discussed the impact of the step-up in enforcement of the transfer pricing regime more generally. India is an exception, since after introducing transfer pricing rules in 2001, the system developed very quickly both in law and practice.

Figure 3 shows the evolution of the prevalence of transfer pricing rules for different groups of countries, based on information extracted from the EY Corporate Tax Guides. The number of countries in the sample which have put transfer pricing rules in place has continuously increased in countries across all levels of income (with the exception of low tax jurisdictions), but a lot of countries remain that have not introduced specific rules to control transfer pricing. There is no clearly visible impact of the BEPS Project on the adoption of transfer pricing rules itself since the number of countries introducing transfer pricing rules has not particularly increased after 2015.

*Figure 3: Transfer pricing rules across countries*




*Source: compiled by the author based on EY Corporate Tax Guides.*[175]

175 EY, "Worldwide Corporate Tax Guides."

### 6.4.2 Divergent approaches and dispute resolution

The second conclusion is that, in all the four countries studied, there are divergences between what transfer pricing rules suggest or – in the absence of domestic guidelines – between what the OECD or UN guidelines suggest and how transfer pricing cases are actually audited. However, there is variation in the degree of divergence. Before the BEPS Project, India's rules were probably most divergent, whereas in the cases of Colombia, Nigeria and Senegal, divergence was more a matter of practice. Private sector interviewees mentioned frequently that tax audits were conducted by the tax authorities in which adjustments were proposed without formally invoking the transfer pricing rules, relying merely on general anti-avoidance rules or principles without more detailed analysis. Nevertheless, a lack of training also meant that quite often, transfer pricing issues were probably not audited at all. Divergences between law and application are also noted by observers in other countries.[176]

Post-BEPS, the approach has become more aligned in India with the OECD approach, due to the acceptance of some of India's positions in the BEPS outcomes, but also due to convergence from India's side. In Nigeria, the outcome is ambiguous: On the one hand, more detailed guidelines have been introduced, which broadly take international guidelines. However, they also enshrine specific deviations that make the approach decidedly blunter. In Colombia, there is no sign of divergence in the rules. In Senegal, no conclusion can be made since the rules have not been implemented, but here as well a willingness to introduce as little deviation as possible is visible as well.

Nevertheless, to what extent this convergence "on paper" matters for practice is not clear. In all countries, there is evidence that tax auditors often continue to rely on blunter approaches although capacity building efforts led by international organizations are likely to mitigate this in the future.

In particular, where there are imbalances in the dispute resolution systems in favour of tax administrations taxpayers often do not judge it worthwhile to challenge this in audits. In India, where dispute resolution procedures have been effective for a long time, deviating from the rules in place and the OECD guidance that supplements them works less well for the tax authority. Although according to an advisor "The Indian administrative structure is such that if the tax officer accepts what the taxpayer is filing, then it is deemed that he is not honest or doing his job",[177] the understanding is that when he is "just making an addition, but with really not much substance, [it does] not stand judicial scrutiny."[178] One can hence argue that better access to dispute resolution (in the sense of offering tax-

176 Lounana, "Les Prix de Transfert En Afrique, Si Loin et Si Proches Du Manuel ONU : L'exemple de La Côte d'Ivoire"; Dutia and Lesprit, "Differences in Interpretation in Applying BEPS Changes."

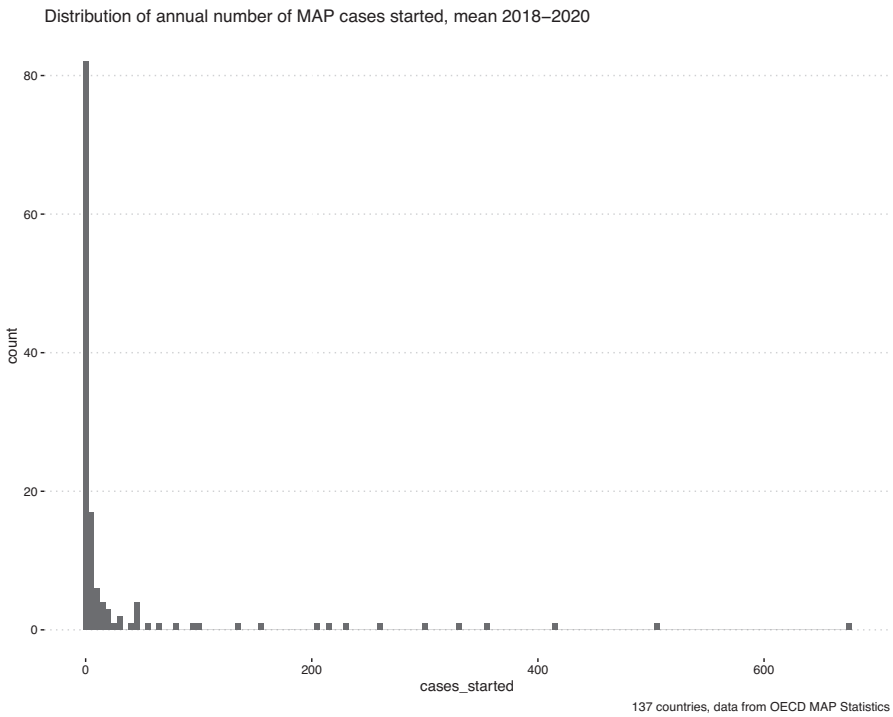
177 IN21

178 IN13

payers the prospective that disputes get resolved favourably in a reasonable timeframe) forces the government to develop its transfer pricing rules in a more detailed fashion, and makes the way how transfer pricing is enforced likely to align more with international standards.

Since BEPS Action 14 is about improving dispute resolution, it could have the effect of making countries align more closely. However, it seems to have been largely ineffective at doing so, since the bindingness has been diluted in two important ways: First, 55 members of the Inclusive Framework have been granted deferral for a review under MAP, among them Senegal and Nigeria, if they are developing countries and if they do not have many MAP cases.[179] The latter criterion is somewhat paradoxical, since the lack of MAP cases could (at least in part) be attributed to the absence of implementation of elements of BEPS Action 14. Indeed, as Figure 4 shows, use of the MAP system is very unequally distributed among Inclusive Framework members. In more than 60 countries (i.e., almost half of IF members), no MAP case was started at all during the years 2018 to 2020, while in a handful of countries, several hundred MAP cases were started each year.

*Figure 4: Distribution of annual number of MAP cases started, mean 2018-2020*




*Source: compiled by the author, based on OECD MAP Statistics.*[180]

179 OECD, "Developing Countries and the OECD/G20 Inclusive Framework on BEPS," 20.
180 OECD, "Mutual Agreement Procedure Statistics."

Further breaking down the numbers, one can see that most MAP cases are started in the group of "High Income" countries. Subject to the reserve that the dataset only includes IF member countries, one can also assume that most MAP cases take place among two high income countries. In 2020, at most 67% of the cases reached the bilateral stage. However, even if a case has not reached the bilateral stage, it is probably included in the statistics of the other country, since there is an obligation to notify the other country.

*Table 6: MAP statistics across income groups*

| *Group* | *Mean of cases started per year/country (2018-2020)* | *Median of mean of cases started per year /country* | *Number of cases started (2018-2020)* | *Total no. of countries* | *No. of countries with at least one MAP case* |
|---|---|---|---|---|---|
| High income | 75.0 | 9.0 | 13269 | 59 | 46 |
| Upper middle income | 4.0 | 0.6 | 433 | 36 | 21 |
| Lower income | 6.5 | 0.0 | 552 | 29 | 10 |
| Low tax | 0.0 | 0.0 | 1 | 13 | 1 |

*Source: the author. Data: OECD MAP statistics.*[181]

The fact that the mean number of cases is higher for lower income countries than for upper middle-income countries is driven by the high number of MAP cases that India (a lower middle income country) is involved in. Out of the 552 MAP cases started over the time span that involved lower income countries, 462 involved India.

The case studies suggested that the principal reasons for a lack of demand of the MAP procedures are a lack of trust that the cases would be resolved favourably and collection practices that push taxpayers to settle cases before engaging in a longer dispute, in short: issues that Action 14 aims to address.

Of course, countries may improve the MAP procedure without being peer reviewed. And in the absence of a peer review report, there is less information available about the extent to which they do. Nevertheless, 25 of the countries that are not reviewed (for example Senegal and Nigeria) have made available their MAP profiles, which contain information regarding the implementation of some elements of the minimum standard, some of the best practices, and other related information. Publishing a MAP profile is one element of the Action 14 minimum standard (B.9). In contrast to the peer review report, though, the information is self-reported and not checked by the OECD Secretariat or peer countries. [182]

MAP profiles contain information about compliance with some of the elements of the minimum standard (8 out of 21), almost all best practices (11

181 OECD.

182 107 countries have made a MAP profile available on the OECD website: https://www.oecd.org/tax/dispute/country-map-profiles.htm

out of 12), as well as other related information about the MAP process.[183] Countries have provided MAP profiles at various moments in time. Some have made one or several updates after the initial publication.[184] Table 7 shows that countries that have not been subject to the peer review process comply with less elements than those that were reviewed. But they do comply to a certain extent. The table also shows that high income countries are generally more compliant than upper middle income and lower middle income countries.

*Table 7: Compliance with Action 14 based on information in MAP profiles*

| *Group* | *Mean year in which latest profile was published* | *Mean minimum standard elements implemented* | *Mean best practices implemented* | *Mean amount of taxpayer friendly practices (all elements contained in MAP profile)* | *Number countries* |
|---|---|---|---|---|---|
| Out of... | | 8.0 | 11.0 | 36.0 | 104 |
| Review not deferred | 2020 | 6.3 | 6.9 | 23.6 | 79 |
| Review deferred | 2019 | 4.2 | 3.9 | 14.4 | 25 |
| High income | 2020 | 6.5 | 7.1 | 23.8 | 55 |
| Upper middle income | 2020 | 4.9 | 5.3 | 17.6 | 22 |
| Lower income | 2019 | 5.1 | 4.6 | 16.9 | 18 |
| Low tax | 2021 | 5.4 | 6.4 | 24.4 | 9 |

*Source: the author. Data source: OECD MAP Profiles.*[185] *Note that data refers to the latest MAP profile published by a country. For some countries, this is 2022, for others an earlier year up to 2017.*

A remaining paradox is that MAP cases cannot only be initiated in the source country, but also in the country that the transaction is carried out with. In cases other than transfer pricing cases, such as for example relating to permanent establishment cases, initiation in the residence country should be the norm. However, interviewees at the Senegalese, Nigerian and Colombian tax administrations were not aware that many demands for mutual agreement procedures were actually received.[186] Two explanations are possible: Either an MNE is able to receive relief from double taxation in the other country, even in case the amount raised in the first country was disputed and taxation may not have been in accordance with a tax treaty or double taxation is simply accepted by the MNE as a price of doing business in the country.

183 For example information about whether taxpayers need to pay a fee to access the MAP process.

184 I analyzed whether information is consistent between MAP profiles and peer review reports for those countries and elements that are included in both data sources for the same year (256 country-year-elements in total) and found that the information was to 92% consistent. Hence, MAP profiles a relatively reliable data source.

185 https://www.oecd.org/tax/dispute/country-map-profiles.htm

186 NG17, CO01, SN16

There is some evidence that the first case sometimes occurs: Oguttu, for example, mentioned the case of South African tax credit rules, which in between 2012 and 2016, allowed taxpayers to obtain a tax credit for withholding taxes on services and management fees incurred abroad, even if such taxes were levied contrary to the provisions of a tax treaty.[187] However, a document by the South African National Treasury states that (at least in 2015), South Africa was the only country that had such a rule in place.[188]

There is more evidence that the second reason may be salient: A tax director of an MNE operating in Senegal mentioned that tax departments had to work towards raising awareness in other company departments on the possibilities to claim tax credits with the help of withholding tax certificates.[189] Another tax director reported about a case where an independent company based in the US was selling services remotely to Senegal, and it was uncertain whether the recipients had to withhold tax on the payments. According to the interviewee, the independent supplier (a big company with a high global market share) refused to deal with the question and simply negotiated contracts in which the recipient of the service had to assume all withholding taxes.[190] According to an article, this seems to be common practice in Senegal.[191] This type of behaviour may be less frequent, though, in cases where the country represents a large market for the MNE as a whole. One could imagine that an MNE group may not be willing to spend resources on initiating dispute resolution procedures to recover amounts that may be small compared to the whole group's turnover.

### 6.4.3 Transparency and documentation

How have the new transfer pricing documentation requirements impacted the approach? The first conclusion is that the process of implementing is often significantly delayed. Countries struggle in particular with receiving country-by-country reports. This should not be attributed to a general unwillingness to receive them, but rather to a challenge in meeting confidentiality requirements that are prerequisites for receiving the information from other countries. Tax administration officials in Nigeria and Senegal reported that installing the systems to comply with the confidentiality requirements was a cumbersome process.[192] In principle, a failure to comply

187 Oguttu, "Resolving Treaty Disputes: The Challenges of Mutual Agreement Procedures with a Special Focus on Issues for Developing Countries in Africa," 737–38; National Treasury (Republic of South Africa), "Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015," 51.

188 National Treasury (Republic of South Africa), "Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015," 51.

189 SN11

190 SN04

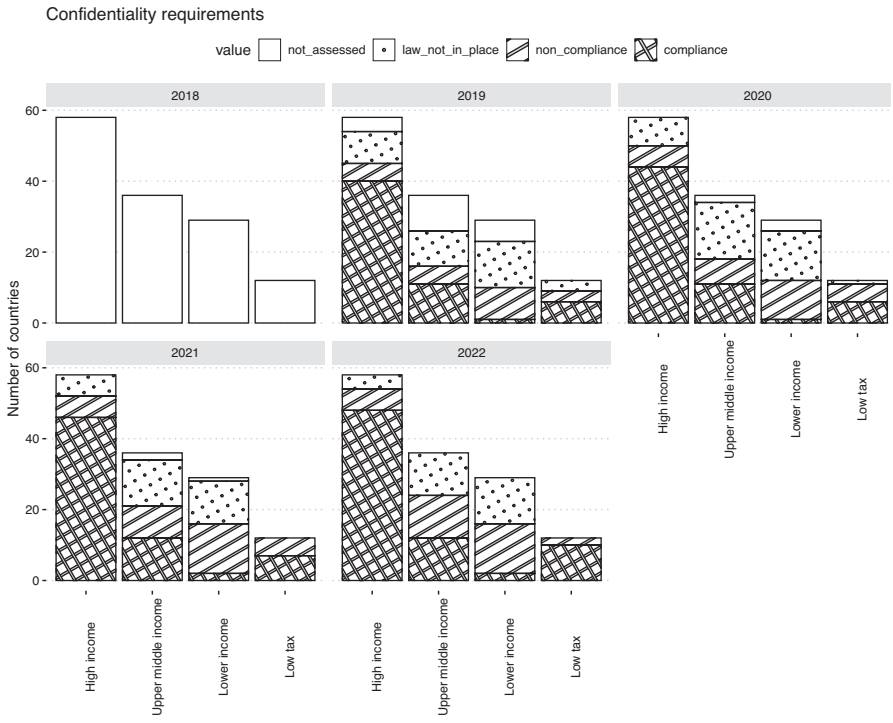
191 Niang, "Tax Us, Do Not Kill Us!"

192 NG17, SN14

with these requirements could be used by the sending country as justification not to exchange information.[193]

How does the situation look like in other countries? From 2018-2022, one annual peer review on the implementation of the Action 13 minimum standard has been conducted.[194] The peer review reports contain for each country a summary table with the recommendations made. I extracted these tables and assembled them into a dataset to analyze countries' implementation choices.[195]

*Figure 5: Compliance with CbCR confidentiality requirements*




*Source: compiled by the author, based on OECD/IF Action 13 Peer Review Reports*[196]

193 However, it is unclear whether countries effectively stop exchanging information once a deficiency has been noted in the peer review process. In practice, many countries have activated exchange relationships with countries that are not compliant with appropriate use and confidentiality requirements.

194 OECD, "Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 1)"; OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 2)*; OECD, *Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 3)*; OECD, *Country-by-Country Reporting – Compilation of 2021 Peer Review*; OECD, *Country-by-Country Reporting – Compilation of 2022 Peer Review Reports*.

195 I assume that when a recommendation is made on a certain topic, the country (so far) does not comply with that element of the minimum standard.

196 https://www.oecd.org/tax/beps/country-by-country-reporting-compilation-of-2022-peer-review-reports-5ea2ba65-en.htm

Figure 5 shows that complying with confidentiality requirements seems to be above all a challenge for lower income countries, although some upper middle income and high income countries appear to experience challenges, as well. The issue has been noted by the OECD in its report on developing countries.[197] Even though in theory countries could try and override this requirement by requesting CbCRs locally, those studied here have refrained from doing so.

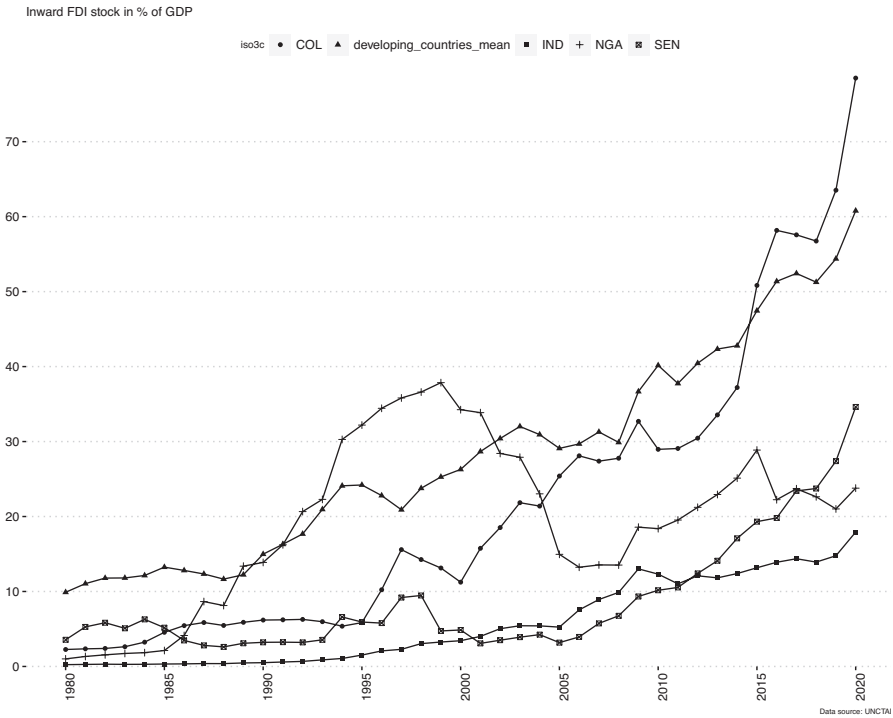
In India, CbCR reporting has been implemented earlier and there is evidence that reports have been received from abroad and used by the tax authority. However, according to interviewees, the impact was not expected to be important, which can be explained by the fact that transfer pricing was already relatively settled. Since most relevant companies already had judgments or APAs that they could rely on, there is not much that additional information at the disposal of the tax administration would change about it. In sum, CbCR did not yet have an important impact in the countries studied – regardless of the status of implementation.

### 6.4.4 Was transfer pricing an issue?

A final insight I draw from the cases studied is that from the absence of transfer pricing rules and enforcement one cannot directly conclude that transfer mispricing was an important issue in terms of revenue loss. On the one hand, foreign investment has only recently taken important dimensions in the countries studied. As can be seen in Figure 6, this seems to be the case for most developing countries, although India, Senegal, and Colombia are below the average. Nigeria is somewhat of an exception since foreign direct investment was more important in the 1990s and has receded in recent years.

197 OECD, "Developing Countries and the OECD/G20 Inclusive Framework on BEPS," 25.

*Figure 6: Evolution of inward FDI stock as % of GDP in countries studied and mean among all countries (except high income and low tax)*



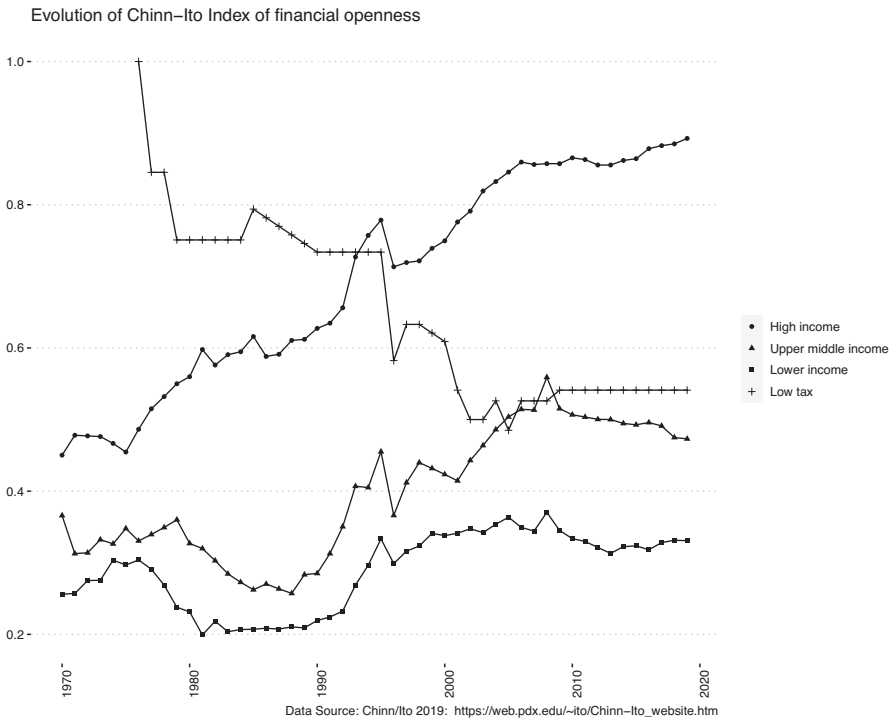

*Source: compiled by the author, based on UNCTAD data.*[198]

On the other hand, even once foreign direct investment has taken more important dimensions, it is important to consider that features of previously "closed" economies operated by the countries research are still present to some degree.

The Chinn-Ito index (see Figure 7) shows that lower income countries and emerging economies have to some degree liberalized their exchange policies in the 1990s and early 2000s but have since then remained at a level that is significantly lower than that of industrialized countries. Therefore, this pattern is likely to be present in other countries as well.

198 UNCTAD, "Foreign Direct Investment: Inward and Outward Flows and Stock, Annual."

*Figure 7: Evolution of Chinn-Ito Index of financial openness*




*Source: compiled by the author based on Chinn/Ito.*[199]

This is relevant because these remnants can affect MNE's incentives to engage in transfer mispricing. In 1992, the "Ruding" report by the European Commission posited that "Transaction costs, lack of information, and other remaining impediments to capital flows might offset the benefits from tax arbitrage."[200] In most of the case studies, interviewees mentioned the relevance of non-tax rules for conditioning the importance of transfer mispricing. Examples are India's foreign exchange rules that prohibit thin capitalization to some degree or Nigeria's approval requirements for royalty payments. Such rules are not limited to the countries studied. In South Africa, for example, before the introduction of BEPS Action 4, foreign exchange regulations already prescribed a debt-equity ratio of at most 3:1 for foreign investors and prescribed maximum interest rates that foreign investors could charge.[201] There is also evidence that this does not only

199 Chinn and Ito, "What Matters for Financial Development? Capital Controls, Institutions, and Interactions."

200 European Commission and DG XV – Internal Market and Financial Services, "Report of the Committee of Independent Experts on Company Taxation," 39–40.

201 Mazansky, "Abolition of 'Loop Structures' in South Africa Makes for Easier International Planning," 137.

affects transfer pricing, but also other types of tax planning. In Colombia, an interviewee explained that there were few MNEs operating through a branch rather than through a subsidiary because there were more reporting requirements.[202] According to Nigerian corporate law, a non-resident is not allowed to conduct business in Nigeria, but instead needs to incorporate a Nigerian subsidiary.[203] While it is unclear to what extent such regulations were enforced (and in the Nigerian case, there is an inconsistency since the tax code contains provisions for taxing non-residents doing business in Nigeria, hence acknowledging their existence), [204] they may have prevented strategies aimed at avoiding permanent establishment status. In a similar vein, a comparative study on the prevalence of tax arbitrage using hybrid mismatches and countervailing legislation in developing countries found that the majority of the strategies would not achieve the desired result for the taxpayer, because certain prerequisites were not fulfilled, for example, because foreign entities would always be treated as opaque entities and not as fiscally transparent.[205]

Other types of rules that can potentially prevent transfer mispricing are customs duties. In transfer pricing schemes, MNEs may try to lower their tax burden in a particular country by inflating the price of imported goods from companies of the same group in countries with a lower tax rate. However, if the country in question levies ad-valorem tariffs on the imported goods, inflating import prices would lead to a higher tariff charge for the company. Tariffs can therefore lower the incentives for companies to engage in transfer mispricing. Blouin, Robinson and Seidman analyzed transaction by US MNEs and found a lower incidence of transfer mispricing in related party imports by affiliates situated in countries where tax and customs duties provide conflicting incentives for the MNE.[206] For that to work, however, tax authorities and customs authorities need to be able to compare data on the same company with each other. Some qualitative evidence suggests that this was not always the case. One interviewee in India suggested

202 CO39: "And in general the branches had many reporting complications. So it was much easier for them to have a subsidiary than a branch. Let's say that to process patents, the branch had limitations. For example, if you were in financial business you could not be a branch, you had to be legally constituted as a subsidiary. There were very few branches. The vast majority were subsidiaries" Translation by the autor. Original quote: "Y en general las sucursales tenían muchas complicaciones de reporte. Entonces era mucho más sencillo para ellos de tener una subsidiaria que una sucursal. Digamos que para tramitar patentes, la sucursal tenía limitaciones. Por ejemplo, si estabas en negocios financieras no podías ser sucursal, tenías que estar constituido jurídicamente como subsidiaria. Había muy pocas sucursales. La gran mayoría eran subsidiarias."

203 Ndajiwo, "The Taxation of the Digitalised Economy: An African Study," 10.

204 Emuwa and Dasun, "Nigeria Corporate Tax 2021 - Law and Practice."

205 Kuzniacki et al., "Preventing Tax Arbitrage via Hybrid Mismatches: BEPS Action 2 and Developing Countries," 10–14.

206 Blouin, Robinson, and Seidman, "Conflicting Transfer Pricing Incentives and the Role of Coordination."

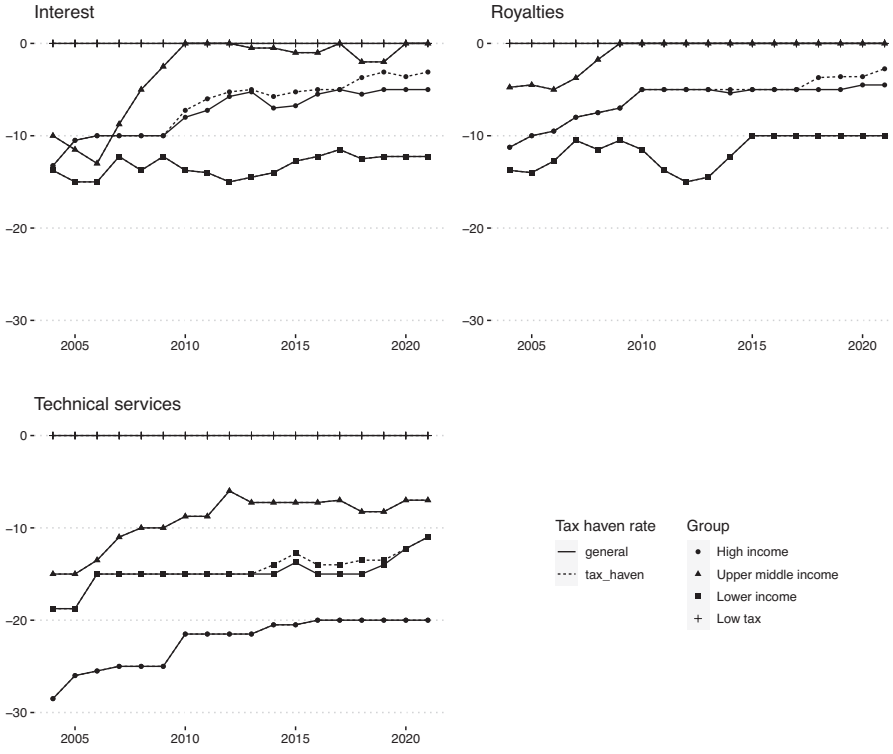
that, at least in the past, some companies used to report different prices on the same transaction to different authorities.[207] One Senegalese tax official, when telling the story of his first transfer pricing audit in 2011, explained that he found inconsistencies between the import prices the company had declared to the tax authority and to the customs authority.[208] He mentioned, however, that at the time such cross-checks were not systematic and that he was only able to find out about the inconsistency because a family member was working in the customs administration. By 2022, however, the tax authority has been granted systematic access to the customs database.

Finally, if a country sets its withholding taxes for typical base-eroding payments at the same rate (or nearly the same rate) as its statutory tax rate, the transfer pricing risk stemming from such payments can be significantly mitigated, since a deduction from the tax base for one taxpayer is compensated by a proportionate increase in the tax burden for the foreign recipient of the payment. Experts sometimes recommend developing countries to set withholding rates in this fashion: For example, in 2003, Echavarría and Zodrow recommended in a World Bank report that Colombia increase its interest withholding rate from 7% to 20% to bring it closer to the statutory rate in force at the time (35%) and alleviate concerns due to tax planning with foreign entities.[209]

None of the four countries studied has adopted a policy of setting withholding tax rates very close to the corporate tax rates. However, as Figure 8 shows, the trend of countries across all income categories goes slightly towards a closer alignment of rates. In 2021, 11 out of 33 upper middle income countries had all withholding rates for deductible payments aligned with their statutory rate. At times, countries impose high rates only on payments to jurisdictions defined by them as "tax havens", usually at the domestic rate or even a higher rate. Countries with such special rules are mainly in the groups of high income and lower income countries. The rates that countries levy with respect to payments to tax havens are on average even closer aligned with statutory rates (see the dashed line in Figure 8).

207 IN23
208 SN13
209 Echavarría and Zodrow, "Foreign Direct Investment and Tax Structure in Colombia," 26.

*Figure 8: Median difference between domestic withholding rates and statutory rates*

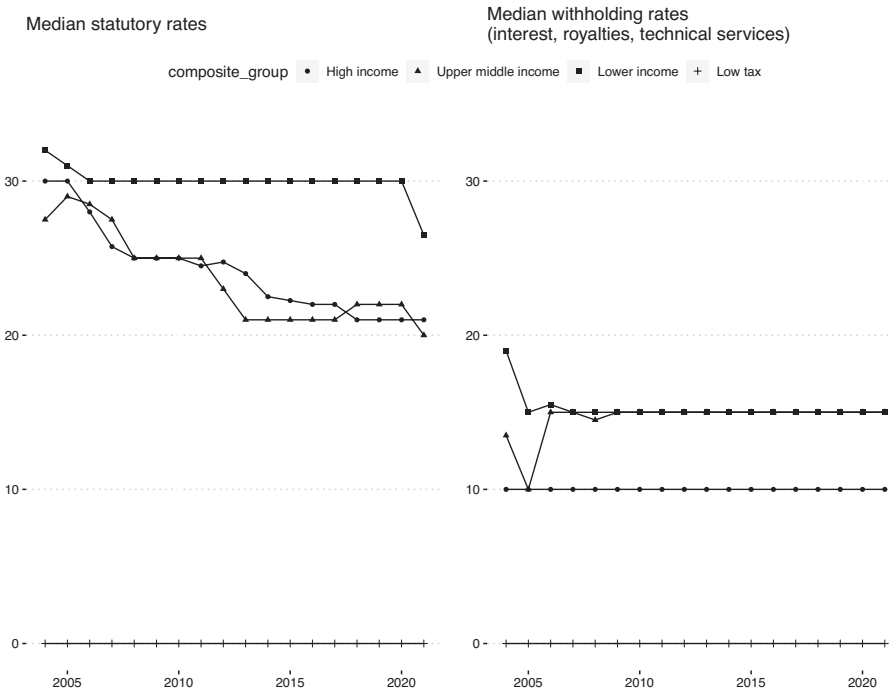



*Source: compiled b y the author, based on EY Corporate Tax Guides, OECD, Tax Foundation, CIAT, KPMG.*[210] *Note: Cases where the withholding rate is higher than the statutory rate were counted as 0. Number of countries per group: High income: 56; Upper middle income: 34; Lower income: 34; Low tax: 9*

It should be pointed out though that the trend seems to be mainly driven by a downward trend in statutory rates in upper middle income and high income countries (see Figure 9).

210 EY, "Worldwide Corporate Tax Guides"; OECD, "Statutory Corporate Income Tax Rates"; Tax Foundation, "1980-2021 Corporate Tax Rates Around the World"; CIAT, "Alícuotas En América Latina"; KPMG, "Corporate Tax Rates Table."

*Figure 9: Median statutory rates and withholding rates for deductible payments*




*Source: Compiled by the author, based on EY Corporate Tax Guides, OECD, Tax Foundation, CIAT, KPMG.*[211]

In addition, the withholding rates that a country can actually impose are frequently lowered by tax treaties. It is therefore necessary to take rates agreed on in tax treaties into account in the analysis. In Figure 10, I plot the evolution of the difference between weighted mean withholding rates and statutory rates and compare it to the evolution of the difference between withholding rates set in domestic law and statutory rates.[212] For most country groups and types of payment, the difference is in the order of two to three percentage points. For most payments in country groups, the difference slightly widens over time (which can be explained by growing treaty networks). Only for lower income countries, it seems that the difference has reduced in recent years for interest and royalty payments. Although the data is missing one can assume that the difference is more important in the case of high income countries, since these tend to have bigger treaty networks, and more often follow the OECD Model Convention in their trea-

211 EY, "Worldwide Corporate Tax Guides"; OECD, "Statutory Corporate Income Tax Rates"; Tax Foundation, "1980-2021 Corporate Tax Rates Around the World"; CIAT, "Alícuotas En América Latina"; KPMG, "Corporate Tax Rates Table."

212 For a detailed explanation of the calculation of these indicators, see section 10.3 (annex).

ties, which only allows for 0% withholding in case of royalties and technical services. In addition, the Interest and Royalty Directive reduces interest and royalty withholding rates to 0 for payments among EU Member States.

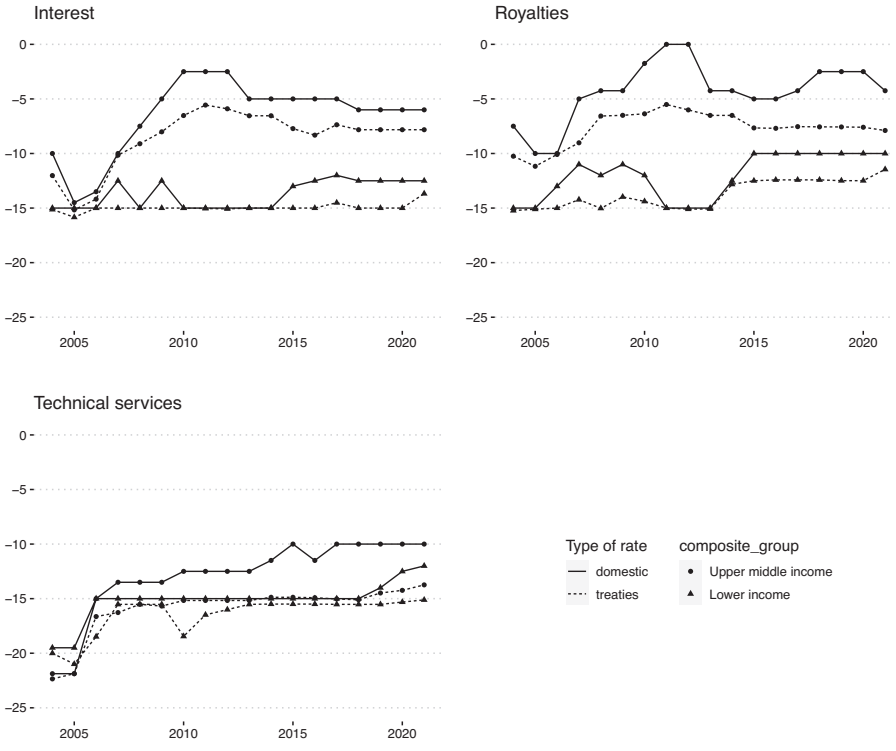
Another insight of the case studies is that the impact of tax treaties could sometimes be ambiguous. In Senegal, interviewees highlighted a peculiar interaction between VAT and corporate tax rules that could also make transfer pricing less of an issue. Until 2022, the ability to deduct VAT charged on payments for service imports (a notion which included interest and royalty payments made abroad)[213] from VAT charged on subsequent sales was dependent on the foreign service provider being liable to tax in Senegal.[214] Hence, VAT could only be deducted if a withholding tax was applied to the payment. In practice, this meant that the benefits of tax treaties were nearly cancelled. Badara Niang wrote that "This mechanism, which subordinates the right to deduct an indirect tax (VAT) to the payment of a direct tax, already unprecedented with regard to the principles of VAT, also ruins all the benefit of international tax treaties."[215] As a consequence, revenue losses due transfer pricing strategies relying on imports of services may not have been very important in Senegal, even where tax treaties reduced the withholding tax on these payments to zero.

213 Niang, "Tax Us, Do Not Kill Us!"

214 République du Sénégal, Code Général des Impôts (loi n° 2012-31 du 31 décembre 2012), art. 383(f).

215 « Ce mécanisme, qui subordonne le droit à déduction d'une taxe indirecte (TVA) au paiement d'un impôt direct (BNC ou IRC), déjà inédit au regard des principes de TVA, ruine par ailleurs tout le bénéfice des conventions fiscales internationales. » Niang, "Tax Us, Do Not Kill Us!"

*Figure 10: Median difference between applicable withholding rates (weighted mean) and statutory rates*




*Source: compiled by author, based on ICTD Tax Treaty Dataset, EY Corporate Tax Guides, OECD, Tax Foundation, CIAT, KPMG.*[216] *Note: One "High Income" country is in the sample: Trinidad & Tobago. For better readability, it was added among the Upper middle income countries, so that this graph contains data on 24 Upper middle/High income countries, 33 Lower income countries, and 2 Low tax jurisdictions.*

In sum, there is some evidence that increasingly withholding taxes on base eroding payments are set in a way that incentives for companies to shift profits out of the country are reduced. Mainly driven by a reduction in CIT rates, the gap between applicable withholding taxes and CIT rates is being reduced over time. However, this is not the case for all countries and less so for lower income countries than countries at other income levels. Moreover, the analysis in this section does not yet take into account the possibility that companies can resort to treaty shopping.

All examples show that, even if a country has not implemented transfer pricing rules or built capacity to enforce them, one should not lightly assume that the country is more vulnerable to international tax avoidance

216 Hearson, "Tax Treaties Explorer [Online Database]"; EY, "Worldwide Corporate Tax Guides"; OECD, "Statutory Corporate Income Tax Rates"; Tax Foundation, "1980-2021 Corporate Tax Rates Around the World"; CIAT, "Alícuotas En América Latina"; KPMG, "Corporate Tax Rates Table."

than another. This also means that whether replacing such rules with rules that more specifically counter tax avoidance results in better protection is uncertain and needs to be ascertained for each country and each phenomenon. Whether maintaining or introducing non-corporate tax rules or high withholding tax rates should be recommended as measures to tackle issues of corporate tax avoidance is questionable. They might impose an unnecessary burden on genuine foreign investment or trade that could be beneficial for economic development. However, it is important to take such measures into account when researching international tax avoidance in developing countries and when assessing the effect of the introduction of international tax standards.

## 6.5 Preliminary conclusions

Transfer pricing is one of the core topics addressed by the BEPS Project, since as shown in the introduction to this chapter, several action points directly deal with the issue. The approach to transfer pricing supported by the OECD prior to the BEPS Project has been emblematic of the finely delineating approach to international tax avoidance. This approach has not been taken up a lot by the countries studied prior to the BEPS Project, and it seems reasonable to extend this conclusion to most of the developing world. However, the OECD's approach has never been the only approach: Within the paradigm of the arm's-length principle itself, alternatives have been developed and used, such as certain aspects of the Indian transfer pricing regulations. In addition, other tax rules such as withholding taxes (and even value added tax) and foreign exchange rules condition to what extent transfer pricing actually is an issue for the erosion of tax bases. As the case studies suggest, these have not fully been able to deal with the problem, but they should not be omitted when assessing the overall trajectories of countries. Finally, in all countries studied, transfer pricing issues were sometimes enforced without relying on a detailed analysis such as suggested by the OECD. In terms of the typology introduced in section 3.4, one could qualify the approach to transfer pricing taken by these countries in the past as a mix between blunt responses and tolerance of avoidance. Hence, the impact of a transition to an "OECD style" approach may be ambiguous with respect to the overall protection against transfer mispricing. If blunt measures are abandoned and more modern anti-avoidance rules are only partially enforced, international tax avoidance may even increase.

However, globally this does not seem to be what countries are doing, especially when considering not only the way regulations are written, but also the way they are implemented in practice. Even though transfer pricing laws adopted by countries gradually introduce more concepts from the OECD guidelines and countries adopt BEPS Actions 4 and 13, the measures from the BEPS Project that would push countries to use more finely delineating approaches, such as a full uptake of Action 14, seem not to have

had an important impact. Hence, the systems could still be described as "blunter" than suggested by the BEPS Project's overall approach to transfer pricing.

The differences that can be observed across countries can be linked to the development of transfer pricing policy and enforcement prior to the BEPS Project, to differences in capacity, and to the accessibility of the dispute resolution system and market power. It is likely no coincidence that the higher market power of Nigeria and India corresponds to the greater divergences in policies adopted. Capacity affects both the ability of countries to apply transfer pricing regulations in the spirit of the OECD in practice, their propensity to deviate from OECD rules (although not in a deterministic way as the Senegalese case shows) and the adoption of CbCR, where a lack of capacity means that the confidentiality measures necessary to receive information abroad are put in place in a delayed fashion.

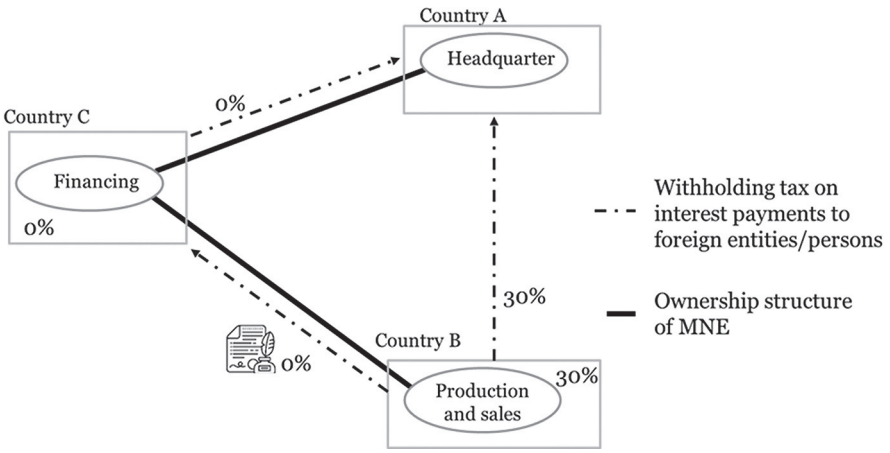
For the implementation of the OECD's transfer pricing approach in practice, the quality of judicial systems seems to matter most. There is more scope for auditors to apply transfer pricing in a blunt way and then negotiate with taxpayers when the latter face important hurdles for invoking the courts, such as in Senegal and Nigeria. Paradoxically, the pre-existence of an easily accessible judicial system also conditions the impact of BEPS Action 14, which is designed for enhancing international dispute resolution. The purpose of the next chapter is now to apply a similar analysis to a second policy problem: treaty shopping.

# 7 Tackling treaty shopping

## 7.1 Introduction

By concluding bilateral or multilateral tax treaties, countries establish rules for the taxation of cross-border income that a resident of one country earns in the other. One of the principal effects of tax treaties is a restriction on the amount of tax that the country in which the income is generated (the "source" country) may levy on a recipient of the income who is resident in the other country ("residence" country). Since most countries' treaty networks are incomplete, covering only a part of the world's more than 200 independent tax jurisdictions, and because treaties sometimes vary in how much benefit they provide to taxpayers relative to the countries' domestic laws, there can be an incentive for investors to "treaty shop". A multinational enterprise (MNE) engages in treaty shopping if it uses a conduit in a state other than the state from which a payment originates and the state of the "true" recipient of the payment and routes the payment through this conduit subsidiary in order to benefit from a (more advantageous) tax treaty. Figure 11 shows a basic diagram of an MNE which attempts to reduce the applicable withholding tax on interest payments.

*Figure 11: Basic treaty shopping structure*




*Source: the author*

In this section, I investigate the different dynamics that cause states to adopt a "finely delineating", a "blunt" or a "tolerance" approach to international tax avoidance in the concrete case of treaty shopping to investigate. While the BEPS Project suggested with the PPT and the LOB two solutions which could both be considered as "finely delineating" approaches, more variation can be observed regarding the approaches taken by different countries: Colombia, India, Senegal and Nigeria adopted markedly different strategies to deal with the phenomenon. Based on these cases, I discuss the relevance of different factors that are theoretically derived or mentioned by interviewees in the four countries and consider the evidence to judge whether they may have played a role affecting the strategies adopted by countries. Afterwards, I explore based on other literature and information from the ICTD Tax Treaties dataset and EY Corporate Tax Guides to what extent these cases could be representative for the wider universe of developing countries.

## 7.2 History of countering treaty shopping and BEPS Action 6

How to adequately deal with the phenomenon of treaty shopping has been discussed for several decades: In the United States tax discussion, for example, treaty shopping has been a recurrent topic at least since the 1980s.[1] Basic provisions against treaty shopping, the beneficial ownership clauses added to articles dealing with passive income, were already part of the 1977 OECD Model Convention and the 1980 UN Model Convention.[2] However, subsequent reports published by the OECD (in 1986) and by the UN (in 1988) acknowledged that these were not sufficient in addressing the issue, because conduit companies could relatively easily fulfil the beneficial ownership requirement, as the term was used in a narrow way.[3]

The reports describe different treaty shopping structures and different solutions adopted by countries that go beyond the beneficial ownership clauses. Among the approaches, one can differentiate between a general anti-avoidance approach, approaches that seek to directly prevent conduit companies from accessing the benefits of a convention – the look-through, exclusion, subject to tax, channel approaches -, and more general approaches in treaty policy, such as developing a treaty network that reduces incentives

1 Avi-Yonah and Panayi, "Rethinking Treaty-Shopping: Lessons for the European Union," 41; Rosenbloom and Langbein, "United States Tax Treaty Policy: An Overview."

2 For an overview of the history see Avi-Yonah and Panayi, "Rethinking Treaty-Shopping: Lessons for the European Union." See also OECD, Model Tax Convention on Income and on Capital 1977, arts. 10–12; United Nations, Model Tax Convention between Developed and Developing Countries, arts. 10–12.

3 United Nations, "Contributions to International Co-Operation in Tax Matters. Treaty Shopping, Thin Capitalization, Co-Operation between Tax Authorities, Resolving International Tax Disputes," 8; OECD, "Double Taxation Conventions and the Use of Conduit Companies."

for treaty shopping. With respect to the last point, the 1986 OECD report recommends not signing treaties with low tax jurisdictions.[4]

Following an additional report in 2002, the Commentary to Article 1 of the OECD Model Convention was updated to include several paragraphs that argued that taxpayer should not be granted the benefits of the treaty where their main purpose was to obtain these benefits, the so-called "Guiding Principle".[5] Other approaches suggested by academics include a reinforcement of residence tests contained in tax treaties,[6] or an approach that combines tests on residence, tax liability, and ownership of income derived.[7]

BEPS Action 6 is built on the premise that previous approaches have not been sufficient in tackling treaty shopping. Whether this is because of a lack of strength of these clauses is, however, unclear. In the Colombian case for example, the persistence of "gaps" in the network and a failure to audit treaty shopping may have been the main causes. Colombia's treaties with Switzerland and Chile already contained anti-avoidance rules in their original version (a subject to tax clause in the Chilean case, and a channel approach rule in the Swiss case, in which benefits are denied if more than 50% of income received by a resident of a contracting state is transferred to an associate in a third country).[8] A Colombian tax lawyer qualified this rule as strong and through they would make treaty shopping structures through Switzerland relatively unlikely.[9] In the knowledge of another Colombian tax advisor, however, there has never been a case where the tax administration had invoked any of these rules in an audit.[10]

Despite the early reports on the phenomenon, countries have continued concluding treaties with potential conduit jurisdictions, often without including anti-avoidance clauses. The Colombian treaty with Spain (signed in 2005) and the Senegalese treaty with Mauritius (signed in 2002) are cases in point (see also section 7.3.1. Moreover, there is extensive qualitative and quantitative evidence on treaty shopping. An edited volume by Eduardo Baistrocchi documents judicial disputes in countries around the world related to treaty shopping.[11]

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4 OECD, "Double Taxation Conventions and the Use of Conduit Companies," para. 17.

5 OECD, Model Tax Convention on Income and on Capital: condensed version 2017., para. Commentary on Article 1, 61; van Weeghel, "A Deconstruction of the Principal Purposes Test"; Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups."

6 Escribano, "Alternative Approaches to Address the (Yet to Be Defined) Treaty Shopping Phenomenon."

7 Wheeler, "The Missing Keystone of Income Tax Treaties."

8 Convenio Entre la República de Colombia y la Confederación Suiza Para Evitar la Doble Imposición en Materia de Impuestos Sobre la Renta y el Patrimonio, 2007, art. 21

9 CO29

10 CO20

11 Baistrocchi, *A Global Analysis of Tax Treaty Disputes*.

Recent research uses "special purpose entity statistics" to demonstrate the extent of the phenomenon. Lejour, Möhlmann, and van 'Riet find that tax savings through treaty shopping are a significant explanatory variable for the origin and destination of income flows passing through Dutch special purpose entities.[12] Moreover, the fact that countries, which have large treaty networks and other conduit jurisdiction features account for a disproportionate amount of global foreign direct investment flows is consistent with a widespread use of treaty shopping structures.[13]

Substantively, BEPS Action 6 extends and refines the approaches considered in previous reports. It proposes the introduction of one of three types of combinations of rules into the treaties, which would enable a tax administration to disallow transactions that were undertaken for the purpose of treaty shopping. The three options among which countries can choose are: 1) a so-called "Principal Purpose Test" (PPT), 2) a simplified "Limitation on Benefits" (LOB)-rule supplemented with the PPT or 3) a detailed LOB rule, supplemented by a rule that could be applied to conduit financing arrangements (e.g., a domestic general anti-avoidance rule or a substance-over-form doctrine). The application of the PPT rule would allow the country from which the income is sourced to deny the benefit of the treaty if "one of the principal purposes" of the way by which a transaction was carried out was for the avoidance of tax.

The LOB rule on the other hand proceeds the other way around by stating that only "qualified persons" are entitled to treaty benefits and by providing a positive list of such persons. Additionally, it includes the possibility for the tax administration to grant discretionary relief in cases not included in the list, where the taxpayer requests obtaining benefits and can demonstrate that obtaining the benefit of the convention was not one of the "principal purposes" of the establishment of the entity.[14] The main difference therefore is that in case an LOB clause is included, there is a "whitelist" of entities which are deemed to have a low treaty shopping risk. However, even if a taxpayer meets the criteria of the LOB, a tax authority can still apply the PPT or an anti-conduit financing rule to deny benefits.

Further, the Action mandates a reformulation of the preambles of tax treaties to clarify that the treaty is "not intended to create opportunities for tax evasion and tax avoidance". In the past, many treaty preambles only included a reference to the avoidance of double taxation. This has led courts to approve situations of treaty shopping, as these did not conflict with the objective of the tax treaty.[15]

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12 Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies."

13 Damgaard, Elkjaer, and Johannesen, *What Is Real and What Is Not in the Global FDI Network?*; Garcia-Bernardo et al., "Uncovering Offshore Financial Centers."

14 OECD, Model Tax Convention on Income and on Capital: Full Version (as it read on 21 November 2017), sec. Commentary on art. 29, paras. 101–110.

15 Union Of India (Uoi) And Anr. vs Azadi Bachao Andolan And Anr.; van Weeghel, "A Deconstruction of the Principal Purposes Test."

While a "one of the principal purposes test" clause would likely be more effective in catching tax avoidance structures than previously enacted clauses referring to "*the* main purpose", it may, depending on tax administrations' interpretations also catch some structures which could still have a certain degree of commercial substance. However, the PPT rule also requires tax administrations to undertake a "reasonableness" test and to consider "all facts and circumstances" before denying a treaty benefit, thereby requiring administrations to not lightly assume tax avoidance.[16] In addition, the PPT was supplemented in the Commentary to the Model Convention by a number of examples of schemes in which it should be applied and not. Danon argued that, according to international law, these examples should be considered as binding and tax administrations should not interpret the PPT in a way that goes beyond them.[17] This suggests that Action 6 attempts to set boundaries on countries' efforts to counter treaty shopping, which indicates adherence to the finely delineating logic of tackling international tax avoidance.

The Action 6 report also prompted that a longer discussion of the conditions under which a country should enter into a tax treaty at all be included in the OECD Model Convention, among them whether there is a significant amount of cross-border trade and investment with the country and whether there are actual risks of double taxation in relation with that country.[18] This could make it easier for countries to refuse a proposal to enter into a negotiation with a conduit jurisdiction. The paragraph also mentions that the decision of terminating a treaty could be taken for similar reasons, but stresses that it should only be considered as measure of last resort.[19] Therefore, similarly to the transfer pricing area, the BEPS Project expresses some acceptance of blunt measures, while still seeking to narrowly circumscribe their use.

Lastly, it is important to point out that BEPS Action 6 does not explicitly require countries to defend themselves against treaty shopping, i.e., it remains agnostic about countries "giving up" or "not responding". For example, the terms of reference of the peer review on BEPS Action 6 state: "If a jurisdiction is not itself concerned by the effect of treaty-shopping on

16 The clause reads as follows: "Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention." OECD, Model Tax Convention on Income and on Capital: condensed version 2017., art. 29(9).

17 Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups."

18 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 94.

19 OECD, 94; Marian, "Unilateral Responses to Tax Treaty Abuse: A Functional Approach," 1161.

its own taxation rights as a State of source, it will not be obliged to apply provisions such as the LOB or the PPT [the two different anti-avoidance rules proposed] as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose."[20] The result is that a country can pass the Action 6 peer review, while not taking any action against treaty shopping or giving up on taxing transactions if it does not obstruct the ability of other countries to take action.[21] "Giving-up" in the context of treaty shopping means that a country starts to sign more and at least equally favourable treaties with all countries from which treaty-shopping investors "really" originate or makes treaties redundant by reducing or eliminating withholding taxes or other source-based taxes from domestic law. Arel-Bundock hypothesized that countries would reduce source taxation in domestic law, if due to the prevalence of treaty shopping, the higher withholding taxes can in practice not be imposed on most transactions and finds some evidence for such an effect in an analysis of countries' domestic withholding regimes and tax treaty networks, albeit only in a cross-sectional analysis of the situation in 2012.[22]

Overall, the approach to treaty shopping advocated by BEPS Action 6 is thus mainly the finely delineating approach, but it does not rule out that other approaches are taken by countries. It is therefore interesting to investigate what approaches countries actually adopt. This is the purpose of the following section.

## 7.3 Policy choices to tackle treaty shopping in India, Colombia, Senegal, and Nigeria

### 7.3.1 The emergence of treaty shopping and responses in Colombia, India, Nigeria and Senegal

*India*

Among the four countries, India is the country with the oldest and today largest treaty network. The India history of treaty shopping started when India negotiated a tax treaty with Mauritius in 1982. Unlike other Indian treaties, it allocated the right to tax capital gains exclusively to the residence country.[23] However, at that time, Mauritius did not have any features use-

20 OECD, "BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents," 12.

21 This is different for EU Members States, where the Anti-Tax Avoidance Directives, which is generally considered as the EU implementation of the BEPS project, creates an obligation for member countries to legislate and enforce against international tax avoidance.

22 Arel-Bundock, "The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy," 352.

23 It can be speculated upon that the Indian government imagined at the time that it would usually be the resident country in bilateral investment flows since India's economy is much bigger in size and Mauritius hosts an important Indian diaspora.

ful for setting-up conduits yet. One could reckon that Indian policymakers were expecting that investment would rather flow from India to Mauritius, making the capital gains clause favorable for the Indian revenue. With the support of Indian tax lawyers, Mauritius introduced in 1992 the "Global Business Company" regime which would allow companies to invest into India without tax liability in Mauritius and – thanks to the treaty – with no capital gains tax liability in India upon divestment (which would have amounted to at least 10% otherwise).[24] That structure became common among companies from all over the world,[25] so that Mauritius quickly accounted for one third of FDI into India.[26] After the Mauritius treaty, India also agreed to two more treaties with a similar pattern, namely Cyprus (in 1994) and Singapore (protocol signed in 2005). Subsequently, the share of investment from Singapore rose as well.[27]

Treaty shopping structures gave soon raise to debates among policymakers and judicial fora in India. For example, in the 1995 NatWest case, the Indian Authority for Advance Rulings (AAR) denied providing a British bank, that had invested in India through two wholly owned subsidiaries in Mauritius whose directors were chartered accountants from Mauritius, with certainty that its Indian operations would not be subject to capital gains tax in India, judging that a UK resident bank could have invested directly in India without passing through Mauritius.[28]

However, a circular issued by the Central Board of Direct Taxes (CBDT) in 1994 confirmed that a mere tax residency certificate from Mauritius would be sufficient for obtaining protection under the India-Mauritius tax treaty.[29] Despite this, tax auditors started questioning the validity of these certificates in notices issued to taxpayers in March 2000, which led to significant value losses in the Indian stock market and reported divestments by foreign investment funds.[30] Subsequently, the CBDT published a new circular clarifying that the notices issued were not valid and the Mauritian tax residency certificated, in turn, remained sufficient proof of residency. [31]

This circular became then subject to a dispute, which culminated in the Azadi Bachao Andolan decision from 2003 by the Indian Supreme Court,

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24 Robertson, "India's Offshore Pivot: The Implications of a Tougher Approach towards Mauritius," 241.

25 Gopalan and Rajan, "India's FDI Flows: Trying to Make Sense of the Numbers."

26 Kotha, "The Mauritius Route: The Indian Response," 204.

27 Although most of these structures were probably less artificial, since many MNEs probably had a real economic presence in Singapore and there was a limitation on benefits clause requiring some degree of substance in Singapore.

28 "Re: Advance Ruling No. P-9 Of ... vs Unknown on 22 December, 1995. 1996 220 ITR 377 AAR." "Re: Advance Ruling No. P-9 Of ... vs Unknown on 22 December, 1995. 1996 220 ITR 377 AAR."

29 Jain, "How Vodafone International Has Overruled Azadi Bachao Andolan Decision," 131. Jain, 131.

30 Vikraman, "In Fact: The Good and Not-so-Good in the Mauritius Tax Treaty." Vikraman.

31 Income Tax Department, Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC).

which has become one of the landmark tax treaty cases worldwide.[32] In this case, the Indian government defended its explicit permission of treaty shopping against the civil society organization Azadi Bachao Andolan and a retired officer of the Indian tax authority, Shiva Kant Jha.[33] The court upheld the validity of the circular, concluding that the permission of treaty shopping was one of the objectives of the conclusion of the treaty with Mauritius and that treaty shopping should be considered as "a tax incentive to attract scarce foreign capital or technology".[34]

In an article analyzing the subsequent jurisprudence, Jain highlighted that the Azadi Bachao decision has had an important impact, as in most cases that involved Mauritian shell companies, the benefit was granted to the taxpayer.[35] He nevertheless highlighted that this was not always the case since the AAR or High Courts have ruled against such schemes from time to time.

The first ten years of the history of treaty shopping in India could be summarized as struggle between some forces in the government (mainly in the political levels of the tax administration) which saw benefits in tolerating treaty shopping and other forces (mainly the field levels of the tax administration), which considered the practice as harmful to India. Other Indian tax experts were divided as to whether this policy was desirable and whether the Supreme Court decision was legally correct.[36] One interviewee, for example, stated that in his/her view, "the supreme court got it completely wrong […] and sanctified treaty shopping. The court got carried away with the thought of foreign investment going away. When the court interprets tax treaties, it should interpret that, and not whether investment is affected".[37]

There is evidence, though, that the Indian government has since 1995 sought to renegotiate the tax treaty with Mauritius at several occasions.[38] However, it was only in 2017 that these attempts culminated in the signature of an amending protocol, which shifts the rights to tax capital gains to

32 Union Of India (Uoi) And Anr. vs Azadi Bachao Andolan And Anr.; Kotha, "The Mauritius Route: The Indian Response"; van Weeghel, "A Deconstruction of the Principal Purposes Test"; Baistrocchi, "The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications," 362.

33 Azadi Bachao Andolan describes itself on its website as "a national movement in India to counter the onslaught of foreign multinationals and the western culture on Indians, their values, and on the Indian economy in general." http://azadibachaoandolan.freedomindia.com/

34 van Weeghel, "A Deconstruction of the Principal Purposes Test," 13; Union Of India (Uoi) And Anr. vs Azadi Bachao Andolan And Anr.

35 Jain, "How Vodafone International Has Overruled Azadi Bachao Andolan Decision," 132–33. Jain, 132–33.

36 IN19, IN12

37 IN03, see also on that point Kumar, "Incoherence in Applying International Tax Law: Hemorrhaging Development." IN03, see also on that point Kumar.

38 Kotha, "The Mauritius Route: The Indian Response," 206.

the source state and includes a specific limitation on benefits clause applicable to the capital gains clause in the treaty.[39] At the same time, the treaties with Singapore and Cyprus were renegotiated, as well. The re-negotiations were not the only measure to address treaty shopping. India also signed the Multilateral Instrument and implemented a general anti-avoidance rule in domestic law. However, both measures occurred at the same time or after the renegotiations. Moreover, Mauritius did not list India among its covered jurisdictions under the MLI.[40] Hence, according to interviewees, these other measures did not matter anymore. Although a beneficial treatment was still potentially left for some types of transactions,[41] one advisor commented: "Anyway, it's irrelevant now because Mauritius is out now. So anyway, long term capital gains are subject to 10% in India. So no one is really caring about it."[42]

India and Mauritius are connected because of the large Indian diaspora that lives in Mauritius.[43] According to interviewees from the Indian tax authority, the political connections may have played a role in preventing India from threatening with a termination in light of Mauritius' refusal to re-negotiate, despite the obvious difference in economic power between the two countries.[44] However, according to a tax treaty negotiator the emergence of an international consensus that double non-taxation is not acceptable anymore contributed to having the Mauritian government agree to the re-negotiation.[45] This interpretation was shared by practitioners, one of whom mentioned that: "Amendments were long overdue. The world at large was frowning upon India and upon liberal jurisdictions. But there was also pressure by the new world order, which is BEPS."[46]

However, Kotha pointed out that the introduction of the GAAR in 2017 (which had been planned for several years beforehand) may have convinced the Mauritian government to agree to the renegotiation since the clause may have created uncertainty anyways as to whether treaty benefits would be granted.[47]

In sum, India transitioned from an approach in which treaty shopping was explicitly tolerated by the government to a relatively blunt response. Since the beginning, the approach was contested, and it seems likely that

39 KPMG, "India and Mauritius Sign a Protocol Amending the India-Mauritius Tax Treaty."
40 Tandon, "The Multilateral Legal Instrument: A Developing Country Perspective."
41 I.e., the fact that the right to tax capital gains tax at source was only attributed to India in case of sales of shares, but not other types of financial instruments. Kotha, "The Mauritius Route: The Indian Response," 214.
42 IN10
43 Betz and Hanif, "The Formation of Preferences in Two-Level Games: An Analysis of India's Domestic and Foreign Energy Policy," 12.
44 IN11288
45 IN11288
46 IN18
47 Kotha, "The Mauritius Route: The Indian Response," 208.

the concurrence of various factors, such as a general step-up in anti-avoidance efforts of the government and a change in the international discourse, contributed to the policy change.

*Colombia*

Colombia started negotiating tax treaties significantly later than India. However, the ratification of Colombia's first OECD/UN-style double tax treaty with Spain (2007) already opened avenues for treaty shopping.[48] In 1995, Spain had introduced a holding company regime, the ETVE regime (Spanish: Empresa de Tenencia de Valores Extranjeros), emulating policies adopted by other European countries such as the Netherlands and Luxembourg.[49] Interviewees reported that a story frequently told in Colombia is that the treaty with Spain was "negotiated in one day" and that the proposed version by Spain was accepted without negotiations.[50] There is evidence that direct pressure was exercised by then-president Álvaro Uribe to conclude as many treaties as quickly as possible, with an unrealistic target set at 25 treaties per year.[51] A tax advisor said that the absence of an anti-abuse clause made the Spanish treaty the most widely applied.[52] Other treaties were negotiated with Switzerland (2008) and Chile (2009). Chile and Switzerland also had regimes that were favourable for conduit activities. However, both treaties already contained anti-avoidance rules. One tax advisor described the anti-avoidance rule in the treaty with Switzerland as particularly strong.[53] Therefore, the treaty with Spain should be considered as the main potential avenue for treaty shopping.

As to whether many companies made use of the treaty with Spain to indirectly invest in Colombia, tax advisors generally confirm that this was the case, but do not cite it among the first issues when asked about the most important tax avoidance strategies that Colombia was exposed to.[54] SPE statistics seem to confirm this picture, although there is some uncertainty the numbers.[55] No interviewee was aware that treaty shopping structures had given rise to disputes with the tax authority and there are no court cases in Colombia which deal with the question. However, this may not be evidence that there is no treaty shopping since a former government official

48 A multilateral tax treaty had been concluded earlier: the Andean community treaty, to which Colombia's neighbouring countries were a party. However, this treaty had a very different structure, providing generally for exclusive taxing rights for the source country. Hence, it is unlikely to have presented any treaty shopping risks.

49 Fundación de Estudios Bursátiles y Financieros, "Presente y Futuro En El Régimen de Las ETVE."

50 CO07, CO05

51 CO01

52 CO30

53 CO29

54 Most rather speak of schemes used by Colombian headquartered companies to defer taxation through the use of controlled foreign companies, or of transfer pricing issues. CO16, CO14

55 For a more detailed discussion, see section 0.

described that only more recently, tax officials started to receive training on how to identify whether entities located in other countries such as Spain had substance.[56]

Nevertheless, officials in the tax administration were so concerned the treaty with Spain that they already tried to re-negotiate the treaty several years before the MLI process started. But due to the close diplomatic relations between the countries, making bold moves such as threatening termination was difficult. Colombian negotiators were not able to secure backing from their Ministry of Foreign Affairs: "We were not able to apply […] pressure, because our Ministry of Foreign Affairs said 'the Spanish are helping us to lift the VISA requirement to enter the Schengen area. The Spanish are supporting the peace process. So we're not going to do it.' Today we are with that old agreement and now the Spanish argument is essentially 'Well, we don't have to renegotiate anything anymore because we are both members of the MLI, so we are going to have a PPT'. In reality, the agreement had many more things to renegotiate than the PPT."[57] Therefore, Colombia did not take steps beyond the suggested approach of the BEPS Project.

As of early 2023, the MLI is still not ratified, which a former government official attributed to the amount of time needed to make an informed decision with respect to clauses that could optionally be amended through the MLI.[58] This suggests a potential drawback of the MLI procedure. While the main aim of the MLI is to allow countries to efficiently introduce the minimum standards of Actions 6 and 14, countries can also opt to introduce other recommendations of the BEPS Project that relate to tax treaties, such as recommendations on the permanent establishment clause (contained in Action 7) and recommendations on rules that deal with hybrid mismatches (Action 2).

In sum, Colombia is therefore essentially sticking to the OECD approach of tackling tax avoidance. Since the implementation has not yet taken place, it is not yet possible to analyze how this is applied in practice.

*Senegal*

Until 2012, Senegal had a liberal treaty policy, where – according to a policymaker – the imperative was to sign treaties without a lot of consideration given to the concrete conditions. Negotiations were usually engaged upon request of the other country or by the Senegalese ministry of foreign

56 CO39

57 CO01. Translated by the author. Original quote: "Nosotros no fuimos capaces a aplicar […] presión, porque nuestro ministerio de relaciones exteriores dijo 'los españoles nos están ayudando a que nos levanten el requisito de VISA Schengen para entrar al espacio Schengen. Los españoles están apoyando el proceso de paz en esto. Entonces no lo vamos a hacer'. Hoy en día estamos con ese convenio antiguo y ahora toda la argumentación española es 'Bueno ya no hay que renegociar nada porque somos los dos miembros del MLI, entonces vamos a tener una PPT'. En realidad, el convenio tenía muchas cosas más que renegociar que el PPT."

58 CO39

affairs.[59] Indeed, Senegal's first tax treaties were concluded in the 1970 and in 2002 Senegal signed a treaty with Mauritius, which allocated very little source taxing rights to Senegal. According to tax administration officials, the investment promotion agency APIX had taken the lead in this negotiation, and there was very little involvement of the tax administration.[60] Interviewees confirm that subsequently many companies established subsidiaries with little substance in Mauritius to invest in Senegal to avail themselves of lower withholding rates or to indirectly transfer Senegalese property when selling the investment with the goal of avoiding capital gains taxation.[61]

Faced with this issue, several steps were undertaken: Senegalese tax administration officials explained that in the past the administration tried to audit cases of treaty shopping based on the beneficial ownership provision in the treaty or based on domestic general anti-avoidance principles.[62] In addition, Senegal signed the MLI in 2017, and ratified it in 2022. However, considering that these measures were insufficient the government adopted a more stringent approach and terminated the Mauritius treaty in 2019. A tax administration official explained that given the quantity of cases which proved to be complicated and substance requirements introduced by Mauritius would have made arguing cases solely based on the anti-abuse provisions too challenging: "With Mauritius, if we had the multilateral instrument, it would be useful, it's true. But there will always be a real problem ...because they have gone so far as to develop elements of substance in the legislation. So they were going to fix the abuse problem."[63]

Domestically, it does not seem as if this type of action was as controversial as in India. On the one hand, there was support from local civil society. One NGO representative mentioned that his organization had carried out activities since 2012 to obtain the termination of the treaty, speaking about it on the radio, on the television, and each time that the organization met with government representatives.[64] On the other hand, while there was resistance by business groups, these do not seem to have had a widespread support by the tax advisory sector, in contrast to the Indian case.[65]

However, diplomatic pressures posed challenges: according to a Senegalese official involved in the process, Mauritian policymakers had approached Senegalese President Macky Sall pleading not to terminate the treaty. However, the tax administration was able to convince the President

59 SN16
60 SN01, SN16
61 SN01
62 SN09, SN16
63 SN16. Translated by the author. Original quote: "Avec Maurice, même si on avait l'instrument multilatéral, ça servait à quelque chose, c'est vrai. Mais il y aura toujours un problème réel de… parce qu'ils sont allés jusqu'à développer dans la législation les éléments de substance. Donc ils allaient régler le problème de l'abus."
64 SN03
65 SN16

about the necessity to terminate given the tax revenue losses.[66] A tax administration official highlighted how the BEPS Project has helped the tax administration to show the Senegalese political authority what the problem with the Mauritius treaty was: "We think that in general, BEPS, nevertheless, helped us a lot. And besides, if there had not been BEPS, we would perhaps not have denounced the agreement with Mauritius. […] The realization that this type of phenomenon is a BEPS phenomenon. It also allows […], if it is said internationally, in a consensual way, it gives more weight to the political authority, because what will it see? I need jobs, I need investment, there is a cost to that. And that's how [the authority] saw it. Now, we tell them "Watch out! It's true that there is that aspect, but people will take more than they should have taken because there are [BEPS] phenomena involved."[67]

It should however be noted that other factors played a role in the timing, as well. One factor was the start of investment in Senegal's nascent oil industry. Historically, the first big wave of foreign investments into Senegal came when the mining sector started growing in Senegal in the 2000s. In recent years, a similar wave took off with the start of the development of the oil and gas industry. This gave the termination of the treaty an urgency since according to a tax official it could be already seen that some oil exploration companies had started structuring their investment through Senegal and that the "bad" experience with the mining industry in terms of treaty shopping risked being repeated.[68]

In sum, Senegal switched from a very loose treaty policy to a blunter approach, not only relying on the MLI but terminating the treaty that was problematic in terms of treaty shopping.

*Nigeria*

The first Nigerian treaty concluded with a potential conduit jurisdiction was with the Netherlands in 1993. Other potential conduit treaties are the ones concluded with the United Kingdom, South Africa, Spain (since 2015), Singapore (since 2019).

Nigeria signed the MLI in 2017, but as of 2023 it remains unratified. Interviewees attributed the delay in ratification to generally slow pro-

66 SN16

67 SN16. Translated by the author. Original quote: « On pense que de manière générale, BEPS, quand même, ça nous a beaucoup aidés. Et d'ailleurs, s'il n'y avait peut-être pas eu BEPS, on n›aurait peut-être pas dénoncé la convention avec Maurice, par exemple. […] La prise de conscience que ce type de phénomène est un phénomène BEPS. Ça permet également […], si c›est dit de manière internationale, de manière consensuelle, ça donne plus de poids à l›autorité politique, parce que et elle va voir quoi? À moi, j›ai besoin d›emplois, j›ai besoin d›investissement, il y a un cout à ça. Et c›est comme ça qu'elle voyait les choses. Là, on leur dit « Attention! C›est vrai qu'il y a ça, mais les gens vont prendre plus qu›il fallait prendre parce qu›il y a des phénomènes qui interviennent. »

68 SN16

cedures in the Nigerian parliament.[69] Since bilateral double tax treaties encounter the same fate in Nigeria (all treaties signed after 2000 have remained pending ratification between 6 and 14 years), it is clear that there is no particular political motivation to this delay. However, the tax administration issued an "Information Circular on the Claim of Tax Treaties Benefits in Nigeria" in December 2019, including a general-anti avoidance clause similar to the PPT that would be introduced in tax treaties once the MLI is implemented.[70] Interviewees were skeptical with regards to the legal effect of this circular. Asked on what the legal value of the circular would be, one interviewee stated that it would be "zero".[71] However, a tax administration official explained that Nigeria's domestic general anti-avoidance rule would provide the necessary legal background to enforce treaty shopping cases even where the principal purpose test clause is not yet introduced.[72]

However, in sum, interviewees did not report about many disputes between tax administration and companies related to treaty shopping. An interviewee from a Big 4 explained that though he had been involved in a cases where a client firm was questioned whether it was eligible for treaty benefits, "once a company, any investor, they meet the condition, they would benefit from the treaty, even though we are aware that there's treaty shopping, even if it is obvious, that if they can defend it, they go away with it."[73]

As shown further below, one of the reasons for the lack of enforcement might be that, at least in the past, many treaties have not been significantly more favorable than domestic law. In fact, Nigeria levies relatively moderate withholding taxes of 10% on dividends, interest, royalties, and technical services under domestic law. Most treaties (except the more recently negotiated ones) also provide for a 10% rate, with the exception of technical services payments which are not subject to withholding at source.[74] Meyer-Nandi argued already in 2018 that this consistent practice made treaty shopping less likely for Nigeria.[75] The benefit for tax treaties mainly stemmed from a unilateral policy, which Nigeria instituted in 1999, according to which the withholding rates would be reduced to 7.5% for recipients in treaties coun-

69 NG10, NG02

70 The clause reads: "A taxpayer, resident or non-resident may be denied treaty benefits if, based on facts and circumstances, it is discovered that its residency of one of the treaty countries was principally for the purpose of accessing that treaty benefit (treaty shopping) or if it is discovered after careful review of the case that one of the principal purposes of the arrangement of a transaction or business is to take advantage of the treaty or abuse its provisions (Principal Purpose Test 'PPT)'. FIRS, "Information Circular on the Claim of Tax Treaties Benefits in Nigeria," sec. 3.3.

71 NG02

72 NG13

73 NG05

74 NG13

75 Meyer-Nandi, "Preventing Tax Treaty Abuse–a Toolbox with Preventive Measures for Ghana, South Africa, and Nigeria," 11.

tries, even if the treaty provided for a higher maximum rate. Accordingly, treaty withholding rates were slightly beneficial compared to domestic law, but this benefit could be repealed by Nigeria at any time (which indeed happened in 2022).[76]

The salience of treaty shopping may have increased recently for other reasons, though, since Nigeria sought to expand its tax base in two significant ways. The first is a digital service tax levied on digital businesses with a significant economic presence (a notion broader than the physical permanent establishment), which was first introduced in 2019 and amended in 2022.[77] Tax treaties would protect companies from the application of the tax. A tax administration official confirmed that with respect to US headquartered digital companies trading with Nigeria, the treaty with the Netherlands was used for treaty shopping purposes, given that there is no treaty in force between Nigeria and the US: "Our tax treaty with Netherlands is a big problem because most of US MNEs who do business in our country just routed through the Netherlands."[78] Second, Nigeria repealed an exemption of sales of shares from capital gains tax in 2022, which had been in place for more than 20 years.[79] Since the treaty with the Netherlands grants the right to tax capital gains from sales of shares to the residence country, the Netherlands does not tax capital gains earned abroad under its participation exemption, and the treaty does not contain an anti-avoidance clause as long as the MLI is not ratified by Nigeria, it would be attractive for MNEs to invest in Nigeria via the Netherlands.

Nevertheless, the recent *Saipem* case sheds other doubts on whether treaty shopping is actually an issue: In Nigeria, another potential benefit of tax treaties vis-à-vis domestic law relates to the attribution of profits to permanent establishment. Through the so-called "single contract doctrine" according to which the whole of profit related to an engineering-procurement-construction (EPC) contract awarded in Nigeria would be taxed in Nigeria, even if the awardee structures the operation in a way that parts of the contract are carried out by related enterprises abroad, the Nigerian tax administration applies a particularly wide approach.[80] EPC contracts are widespread in Nigeria due to the size of the Nigerian Petroleum sector. Tax

76 FIRS, "Information Circular on the Claim of Tax Treaties Benefits and Commonwealth Tax Relief in Nigeria."

77 Ministry of Finance, Budget, and National Planning, Companies Income Tax Act (Significant Economic Presence Order), 2020; Obayemi, "Country Note: Taxing The Income Of Digital Non-Resident Companies Under The 'Significant Economic Presence'(Sep) Rules In Nigeria."

78 NG10

79 According to interviewees, originally the purpose of the exemption was to encourage growth of Nigeria's stock market. However, the tax administration increasingly noted transactions where immovable property was sold through holding companies in order to avoid capital gains tax on immovable property sales. NG10

80 Okanga, "The Single Contract Basis of International Corporate Taxation: A Review of Saipem v Firs."

treaties that are based on the OECD or UN Model would generally prevent the application of such a "single contract doctrine",[81] and some treaties contain protocols that make this explicit.[82] Nevertheless, as *Saipem* case illustrates, the tax administration applies the doctrine to attribute profits to Nigeria, even in transactions with treaty countries (and has successfully defended the approach at the level of the High Court).[83] The case is not about treaty shopping as such, since the company in question was not a conduit company, but the case shows that the tax authority seems to have some leeway to engage in treaty overrides, which makes it more difficult for companies to rely on treaties at all.

The evidence discussed until here suggests that the BEPS Project has had a very limited impact on Nigeria's approach to treaty shopping: Nigeria has not yet adopted the MLI, and at the same time, it is not clear to what extent treaty shopping is an issue at all. Nevertheless, there seems to have been an impact of a more indirect nature with regards to another issue: Nigeria had signed a tax treaty with Mauritius in 2012 but was not yet ratified when the BEPS Project started. As of 2023, the treaty remains unratified. A Nigerian treaty negotiator commented with respect to the ratification process: "So Nigeria was going through all those processes when BEPS issue came in, and from the outcome of BEPS, we know that some substantial amendment has to be made to the Treaty and that's the view of the policymakers."[84] Hence, similarly to the cases of India and Senegal, the BEPS Project may have contributed to a shift to a more cautious overall tax treaty policy in Nigeria.

### 7.3.2 Comparison of specific variables across countries

*Amount of benefit conferred by treaty*

In the countries researched, the first factor likely to have played a role in explaining the response adopted is the extent to which the treaty led to revenue losses, which in turn depends on the amount of benefits for taxpayers compared to other treaties and the country's domestic law and the extent to which the treaty was actually used by investors from third countries.

81 See the discussion in paragraphs 8 – 11 of the Commentary on paragraph 1 of article 7 of the 2021 UN Model Convention.

82 "Agreement between the Government of the French Republic and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains," para. Protocol(3)(b).

83 Ogakwu, Saipem Contracting Nigeria Limited & Others v. Federal Inland Revenue Service & Others (2018); Okanga, "The Single Contract Basis of International Corporate Taxation: A Review of Saipem v Firs."

84 NG13

*Table 8: Advantage conferred by treaties compared to weighted average of direct routes*

| *dyad* | *year* | *treaty in force* | *dividends (direct investment)* | *interest* | *royalties* | *technical services* | *capital gains (land rich companies)* | *capital gains (all shares)* |
|---|---|---|---|---|---|---|---|---|
| COL-ESP | 2012 | yes | 0.0 | 21.9 | 21.9 | 0.0 | 0.0 | 32.1 |
| COL-ESP | 2021 | yes | 9.2 | 8.8 | 8.8 | 8.5 | 0.0 | 9.7 |
| IND-MUS | 2012 | yes | 0.0 | 0.0 | 0.0 | 9.4 | 19.2 | 18.2 |
| IND-MUS | 2021 | yes | 8.6 | 6.5 | 0.0 | 0.0 | 0.0 | 0.0 |
| NGA-MUS | 2012 | no | 2.3 | 2.3 | 2.3 | 8.3 | 0.0 | 0.0 |
| NGA-MUS | 2021 | no | 2.3 | 2.3 | 2.3 | 8.0 | 0.0 | 0.0 |
| NGA-NLD | 2012 | yes | 0.0 | 0.0 | 0.0 | 8.3 | 0.0 | 0.0 |
| NGA-NLD | 2021 | yes | 0.0 | 0.0 | 0.0 | 8.0 | 0.0 | 0.0 |
| SEN-MUS | 2012 | yes | 9.9 | 19.2 | 19.1 | 17.5 | 23.9 | 22.1 |
| SEN-MUS | 2021 | no | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

*Source: Own calculation, based on data by ICTD and EY.*[85] *Weights are based on GDP, GDP per capita and physical distance of country, see section 10.3. The values for Nigeria-Mauritius are hypothetical (as if the treaty had been ratified in 2012).*

Table 8 compares the degree of benefits conferred by the respective treaty through the difference of the tax rate levied at source under the treaty and the average rate that would be levied if the investor chose not to use the conduit country (weighted by the potential importance of the countries as inward investors).[86]

Whereas in the case of India and Mauritius, only a few clauses were making the treaty particularly beneficial compared to other treaties and domestic law,[87] the Senegal-Mauritius treaty provided for a beneficial treatment regarding almost all relevant types of transactions. A Senegalese policymaker explained with respect to the termination: "The first factor is that the convention was not balanced. […] So you look at the agreement we had with Mauritius, 0% interest, 0% royalties and 0% royalties. And the right to tax is practically over there, zero gains. That was a problem."[88] Senegal also

85 Hearson, "Tax Treaties Explorer [Online Database]"; EY, "Worldwide Corporate Tax Guides."

86 For a more detailed explanation of the calculation, see section 10.3 (annex)

87 in the Colombian case, 0% withholding for dividends paid to shareholders that owned more than 20% of the capital of the payor; in the Indian case, an exemption from capital gains levied at source

88 SN16. Translated by the author. Original: "Le premier facteur, c'est que la convention n'était pas équilibrée. […] Donc vous regardez la convention qu'on avait avec Maurice, 0% intérêt, 0% redevances et 0% royalties. Et le droit d'imposition, c'est pratiquement là-bas, les gains zéro. Ça, c'était un problème.

concluded a treaty with Qatar that provides for similarly beneficial rates, but it is questionable whether this treaty could be used for treaty shopping purposes, as Qatar does not have an exemption for foreign earned income and applies a corporate tax rate of 10%.[89] This also shows that from the perspective of the conduit jurisdiction, trying to maximize the benefits in the treaty may not be the best strategy since it could lead to stronger reactions by the other country if the latter's policy direction changes at a later point in time. For example, if the Senegal-Mauritius had been less unequal in terms of allocation of taxing rights, the push for a termination might have been less strong in Senegal. That said, the Senegalese tax administration entered into a renegotiation process before terminating the treaty, so Mauritius had the opportunity to "save" the treaty by conceding Senegal more source taxing rights.[90]

In the Nigerian case, the treaty with the Netherlands used to be not more beneficial than other Nigerian treaties, and only slightly more beneficial than domestic law.[91] However, the data does not capture issues related to permanent establishment clauses and digital services taxes. It also does not capture recent changes such as Nigeria's repeal of the capital gains tax exemption for sales of shares in 2022. In the case of Colombia, the treaty with Spain used to be significantly more beneficial compared to direct transactions with other countries in 2010, but to a lesser degree in 2021. The principal reasons are that since then, Colombia has signed more treaties with potentially important countries from which investment into Colombia originates and has lowered domestic rates for dividends and interests, thus reducing the salience of treaty shopping.

*Actual use in treaty shopping structures*

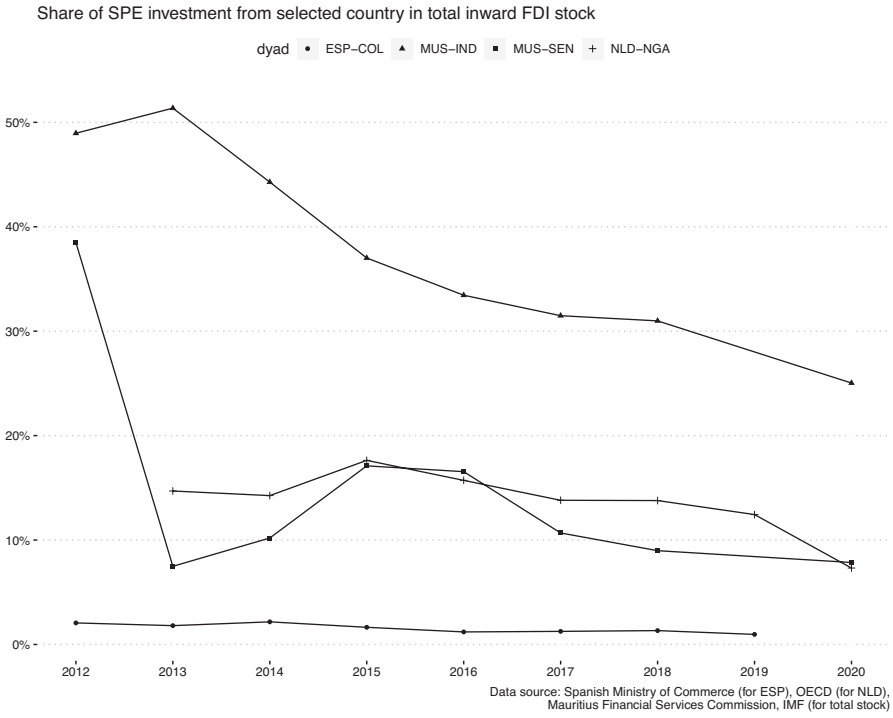
Revenue losses only materialize if taxpayers actually make use of the treaty and claim the preferential treatment. Figure 12 therefore considers data on foreign direct investment (FDI) by special purpose entities into the four countries compared to the total FDI stock into the country. It shows that the treaty signed with a conduit jurisdiction has been most used in the case of India (where in 2013 almost half of the inward FDI stock came from Mauritius), followed by Senegal and Nigeria.

89 https://taxsummaries.pwc.com/qatar/corporate/income-determination

90 SN16

91 Withholding rates are reduced to 7.5% instead of 10% under domestic law, and fees for technical services are exempt from withholding.

*Figure 12: Share of SPE investment from selected country in total inward FDI stock*




*Source: compiled by the author, based on data from Spanish Ministry of Commerce, OECD, Mauritius Financial Services Commission, IMF.*[92]

This approach is inspired from UNCTAD's "Offshore Exposure Matrix", which assesses to what extent investment in and out of a country is structured through intermediate jurisdictions with favorable tax regimes.[93] This may indicate the extent of treaty shopping into a country, although it should be noted that for several reasons it is only an imperfect indicator: SPE investment is not necessarily motivated by tax reasons, and even if saving tax is part of the motivation it does not need to amount tax avoidance, if the MNE has a significant degree of substance in the country through which investment is channeled, for example a regional headquarter. On the other hand, there could be treaty shopping even though there is no investment from SPEs, since although most dividend and interest payments as well as capital gains are usually connected to FDI flows this is not necessarily the case of royalty and service payments or interest payments made to affiliates

92 Ministerio de Industria, Comercio y Turismo (Spain), "DataInvex Estadísticas de Inversión Española En El Exterior"; OECD, "FDI Positions by Partner Country BMD4"; Financial Services Commission (Mauritius), "Global Business Statistics: Value of Investment 2012-2022"; IMF, "Coordinated Direct Investment Statistics."

93 Bolwijn, Casella, and Rigo, "An FDI-Driven Approach to Measuring the Scale and Economic Impact of BEPS."

that are related but that do not own the capital of the company in question. Hence, SPE investment statistics may both understate and overstate the "true" amount of treaty shopping.

In the case of Nigeria, the fact that for the last ten years more than 10% of total inward investment came from Dutch SPEs is somewhat puzzling since until recently the advantages related to treaty shopping have been relatively small. One explanation could be that investors set-up their initial investment through SPEs out of caution should the treatment under domestic law changes to the worse (such as the change to the capital gains tax in 2022 or the introduction of the digital services tax provisions).

For the dyad Colombia – Spain the share of SPE investment is lowest. However, based on the accounts of Colombian tax practitioners, it seems that the treaty nevertheless played a role in MNEs' tax strategies.[94] Moreover, there is evidence that in the Colombian case, a significant part of inward investment can be attributed to round-tripping (using mainly low-tax jurisdictions such as Panama and the Cayman Islands), potentially to a higher degree than in the other cases, since this type of structure was much more frequently mentioned by interviewees in Colombia than in the other countries studied.[95] Consequently, the share of investment from Spanish SPEs in "real" inward investment could be higher than what is shown in the figures.

An important side note can be made with regards to the usefulness of SPE statistics in assessing policy impact in the future. Some of the evidence collected in the case studies suggests that the evolution of inward investment flows may not necessarily reveal whether policy changes had an effect or not. Tax administration practices may for example discourage companies from abandoning companies established in offshore jurisdictions, if doing so would provide tax advantages. An Indian tax advisor, for example, explained that taxpayers would be hesitant to rearrange their structure from Mauritius to the Netherlands (the treaty with which still provided for some benefits, because this could be considered as being incompatible with the Indian GAAR and the principal purpose test: "So even a transition, why are you transitioning from Mauritius to Netherlands? It's a question begging to be answered from a revenue perspective. And what is the most plausible answer you can give it to? Why would you shift from Mauritius to... It's obviously to claim the tax treaty benefit."[96] This could explain why a recent study only found a "mild decline" in FDI routed through conduit jurisdictions after the implementation of the principal purpose test in a treaty with a partner country.[97]

94 CO28, CO15, CO20

95 CO16. On the notion of round-tripping, see Aykut, Apurva Sanghi, and Gina Kosmidou, "What to Do When Foreign Direct Investment Is Not Direct or Foreign: FDI Round Tripping."

96 IN10

97 Hohmann, Merlo, and Riedel, "Multilateral Tax Treaty Revision to Combat Tax Avoidance: On the Merits and Limits of BEPS's Multilateral Instrument," 3.

*Genuine investment flows*

The third factor that plays a role in the policy decision is the amount of genuine investment flows between the countries.[98] Data from the Spanish Ministry of Commerce available for the period 2012 to 2019 shows that in the Colombian case, more investment from non-SPEs than SPE investment is coming from Spain. In the case of Nigeria and the Netherlands, OECD data indicates that over the period 2013 to 2020, between 42% and 70% of total FDI from the Netherlands into Nigeria was attributable to SPEs with a decreasing tendency. For Mauritius-India and Mauritius-Senegal, no reliable analysis can be conducted. Values from the Mauritius Financial Service Commission which reports data on SPE investment from Mauritius into India and Senegal consistently exceed 100% of the value of total FDI from Mauritius into these countries reported by the IMF's Coordinated Direct Investment Survey. This is likely due to some differences in definition applied underlying these datasets. Nevertheless, the high figures seem to indicate that the share of SPE FDI in the total amount of FDI from Mauritius is likely very high. This is also consistent with the accounts provided by interviewees.

In the Senegalese case, interviewees emphasized a complete lack of genuinely Mauritian investment.[99] Allegedly, Mauritian negotiators had at the time of the initial negotiation of the treaty motivated the conclusion with potential investment by Mauritian textile companies in Senegal.[100] According to the interviewees, however, such investment never materialized subsequently. One could therefore argue that Senegal did in fact not adopt a blunt approach. If it is true that no transactions between genuine Mauritian and Senegalese residents took place, then terminating the treaty could be considered as in accordance with the finely delineating approach, as there is no increase in tax burden for non-avoiders.

Even where investment from the partner country is mainly undertaken for treaty shopping purposes, one can discuss whether acceptance of treaty shopping could be considered as tax incentive for foreign investors in the specific country, as it was debated in the case of the India-Mauritius treaty.[101] For tax incentives that attract foreign investment, the revenue impact is ambiguous, since the tax losses incurred may be offset by investments that would not have been undertaken but for the incentive – in this case, the provisions of the treaty. Especially if the investment contributes to the creation of additional employment and technology transfer, tolerating

98 Data for the discussion of the following paragraph was compiled by the author, based on data from Spanish Ministry of Commerce, OECD, Mauritius Financial Services Commission, IMF: Ministerio de Industria, Comercio y Turismo (Spain), "DataInvex Estadísticas de Inversión Española En El Exterior"; OECD, "FDI Positions by Partner Country BMD4"; Financial Services Commission (Mauritius), "Global Business Statistics: Value of Investment 2012-2022"; IMF, "Coordinated Direct Investment Statistics."

99 SN13, SN16

100 SN13, SN16

101 Cooper, "Chapter VI: Preventing Tax Treaty Abuse."

treaty shopping could be beneficial, even for the country's tax revenues. In the Senegalese case, according to a tax administration official, most investors that used the Mauritius treaty invested in the mining sector,[102] so that from the start these considerations were less persuasive. Since extractive industries often earn location specific rents, they are usually considered not to be in need of tax incentives.[103] In addition, policymakers highlighted that the mining sector already benefited from other tax incentives.[104]

In the Indian case, the treaty seems to have been used by a broader range of investors, including funds that invested in the Indian stock market.[105] Whether the tolerance of treaty shopping was indeed a net revenue gain or loss is difficult to say, since no useful counterfactual data is available. As one interviewee put it, this debate was more of a "philosophical" question.[106] However, with time the Indian economy became more dynamic, so this argument became less persuasive. As Indian tax advisors explained in interviews: "when India opened up the economy to foreign investors in 1991, the government was under great pressure since there was only so much of foreign exchange to pay for 15 days of import bill."[107] Tolerating treaty shopping as tax incentives might therefore have contributed to attracting additional FDI flows. Later, however, after the economy had grown substantially, these arguments lost salience tilting the balance more towards those in favor of a re-negotiation.[108]

### 7.3.3 Summary

In India, Mauritius accounted for a large amount of inward investment, and several disputes had arisen in connection with the use of the treaty. In Senegal, the treaty with Mauritius posed problems, as well, whereas in Colombia, the treaty with Spain was used for indirect investment. In Nigeria, the treaty with the Netherlands was susceptible to be used for indirect investment, as well, although the benefits compared to other "direct routes" were less important than in the case of the other countries.

All four countries researched signed the MLI, but not all have ratified it yet. Among the four countries researched the delay was shortest in India (ratified in 2019), followed by Senegal (ratified in 2022). As of February 2023, the MLI has not yet been ratified in Colombia and Nigeria. However, signing the MLI was not the only response adopted. On one end of the

102 SN16
103 Mansour and Świstak, "Tax Competition and Coordination in Extractive Industries."
104 SN16
105 Many cases on the applicability of the India-Mauritius treaty have been decided by different judicial authorities in India involving companies from several different sectors.
106 IN18
107 IN22
108 Robertson, "India's Offshore Pivot: The Implications of a Tougher Approach towards Mauritius."

spectrum of responses taken is Senegal, which took the most sweeping step by terminating its treaty with Mauritius in 2019. On the other end of the spectrum are Colombia and Nigeria, which merely included their treaties with Spain and the Netherlands respectively as covered treaties under the MLI, so that an anti-abuse clause would be introduced after ratification of the MLI. Somewhat in the middle is India, which re-negotiated the treaty with Mauritius in 2017, changing the clause that was most favorable compared to other treaties, but providing for a "grandfathering" period during which investors could still make use of the provision.[109]

Applying the typology of responses to international tax avoidance, Colombia and Nigeria plan to adopt the finely delineating approach suggested by the OECD whereas Senegal and India adopted blunter responses, although, as pointed out above, one could debate in the case of Senegal whether terminating the treaty really was a "blunt" solution given that almost all investment from Mauritius was likely to be treaty shopping.

Why are countries choosing different approaches? These four cases can illustrate how different combinations of several causal factors lead to different outcomes. They highlight the importance of economic considerations such as the amount of revenue losses, which is a function of the degree of benefit the treaty provides vis-à-vis domestic law and other treaties and the extent to which it was used by indirect investors. Among these four countries, the cumulative amount of tax lost compared to potential tax gains can sufficiently explain the choice of the response.

What the loss of tax revenue can only partially explain is timing, which is where political factors come in. Hearson writes that "domestic and international politics make it tough to alter their historically negotiated treaties, even as the economic context changes around them."[110] Termination of a treaty implies a diplomatic procedure in which considerations relating to the protection of the tax base and investment may not be the only ones. For the other decision-making entities such as a Ministry of Foreign Affairs or the Head of State, the diplomatic ties that otherwise exist between the country and the treaty partner may affect to what extent a treaty termination or renegotiation project would be considered as viable. The case studies illustrate that both in Senegal and India, some government actors wanted to address the treaty shopping issue for a long time. In both cases (though to a larger extent in the Indian case), disagreements among different governmental actors may have prevented an earlier solution to the issue.

The evidence allows for some cautious support of the hypothesis that the BEPS Project may have facilitated convincing other domestic actors of

109 "Protocol Amending the Convention Between the Government of Mauritius and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, and for the Encouragement of Mutual Trade and Investment, Signed at Port Louis on 24th August 1982," sec. 4.

110 Hearson, *Imposing Standards*, 168.

the necessity of these policy changes, even though renegotiation or termination are not the preferred policy response of the BEPS Project. The case studies hence show how the BEPS Project can be reinterpreted by actors in a strategic way. In the Colombian case, however, the BEPS Project may have rather contributed to strengthening the argument of the treaty partner that no broader renegotiation is necessary. The overall effect is therefore ambiguous.

*Table 9: Factors influencing strategies to deal with treaty shopping*

| *Factor* | *Senegal* | *India* | *Colombia* | *Nigeria* |
|---|---|---|---|---|
| Relevant treaty partner | Mauritius | Mauritius | Spain | Netherlands |
| Outcome | Termination | Renegotiation + notification under MLI | Notification under MLI | Notification under MLI |
| Year of ratification | 2004 | 1982 | 2008 | 1992 |
| Year of termination / modification / re-negotiation | 2019 | 2017 | ? | ? |
| Degree of advantage conferred by the treaty | High | Medium | Medium | Low |
| Extent to which treaty was used by indirect investors | High | High | Low | Medium |
| Extent to which treaty was used by genuine investors | Low | Low | High | Medium |
| Role as tax incentive for productive investment | Low | Medium | Unclear | Low |
| Diplomatic ties | Low | Medium | High | Low |
| Pressure to terminate by domestic groups | High | High | Low | Low |

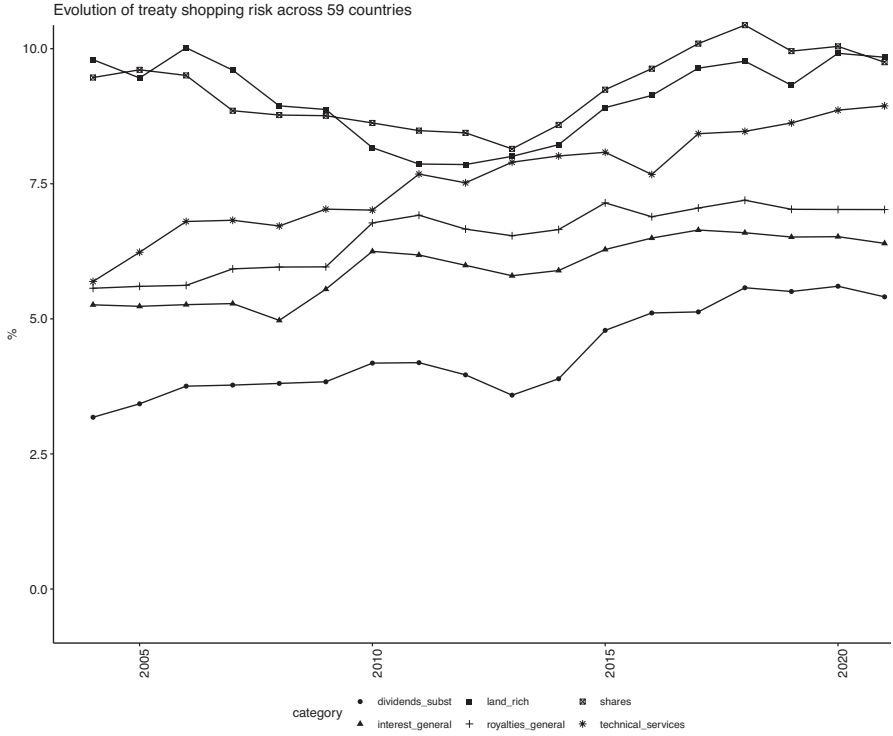
*Source: the author*

## 7.4 Beyond the four countries

### 7.4.1 Evolution of treaty shopping risk

How representative are the trajectories of the four countries for the wider universe of developing countries? At first, I will look at the evolution of the treaty shopping issue across countries, using the summary measure introduced above. Figure 13 displays the evolution of the treaty shopping risk indicator introduced above across the 59 developing countries. For royalties and interest payments, risk has remained about stable over time: Across all countries, companies are able to reduce their withholding tax on interest by on average 5 percentage points if they choose to route the payments through a conduit country (for royalties, the value is about 6 percentage points).

*Figure 13: Evolution of treaty shopping risk in developing countries*




*Source: compiled by the author, based on ICTD Tax Treaty Dataset and EY Corporate Tax Guides.*[111]

For payments for technical services and dividends, the risk has steadily increased over time. Finally, for capital gains levied on sales of shares by non-residents (for all types of shares or shares of land-rich companies only), risk has decreased until about 2012 but increased since then again. It is striking to note that over the whole period, risk has been consistently higher for capital gains and technical service payments than for the other types of passive income flows. Previous studies which focus solely on the latter may therefore underestimate the incidence of the treaty shopping phenomenon. For capital gains, this can be explained by the fact that they are often taxed at the domestic rate instead of a lower withholding rate, while treaties often grant a full exemption. For technical services, as well, most treaties grant a full exemption. The UN Model Convention only features an article granting the right to tax technical services to the source country since the 2017 update.[112]

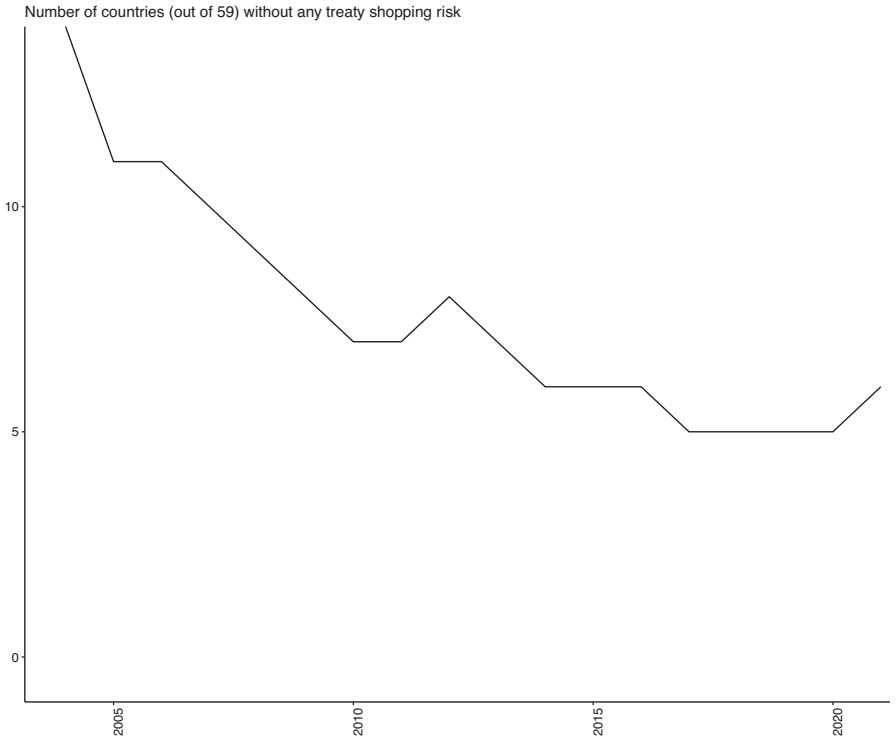
111 Hearson, "Tax Treaties Explorer [Online Database]"; EY, "Worldwide Corporate Tax Guides."

112 Báez Moreno, "The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed–Yet Appropriate–Proposal for (Developing) Countries?"; United Nations, Model Double Taxation Convention between Developed and Developing Countries 2017, sec. 12A.

However, the average displayed above hides significant heterogeneity across countries. For some countries, such as Angola, treaty shopping risk has remained zero over the whole period, because they have not concluded any treaties with conduit jurisdictions. For other countries, risk has increased after the imposition of higher taxes under domestic law. For example, Uganda introduced new provisions to tax capital gains derived by non-residents in 2016, while still having treaties, which restrict capital gains taxation at source, with several potential conduit jurisdictions for these types of payments in place (Netherlands, Mauritius, South Africa, United Kingdom, Denmark).

Over time, the number of countries without any treaty shopping risk (for no type of payment) has dropped from 13 to 5 and only started to increase again in 2021.

*Figure 14: Number of developing countries without any treaty shopping risk*




*Source: compiled by the author, based on ICTD Tax Treaty Dataset and EY Corporate Tax Guides.*[113]

113 Hearson, "Tax Treaties Explorer [Online Database]"; EY, "Worldwide Corporate Tax Guides."

### 7.4.2 Implementation of BEPS Action 6

To what extent have developing countries implemented the anti-abuse rules from BEPS Action 6? Data is available in four peer review reports have been published on Action 6 since 2018. The review proceeds via a questionnaire, in which countries are asked to list all their double tax treaties in force, whether they are already compliant with the minimum standards, if compliant, which alternative of the different combinations of anti-abuse clauses has been chosen, and if not yet compliant whether a complying instrument (such as the MLI or a protocol) has been signed. The "Multilateral Instrument" (MLI) is a procedural innovation of the BEPS Project's. It is essentially a mechanism through which countries can amend their bilateral tax treaties without going through individual re-negotiation procedures. By the numbers, the MLI was a success: A press release by the OECD issued in October 2022 claims that 1850 bilateral tax treaties are covered by the MLI, 910 of them being already modified due to the ratification by both treaty partners.[114]

The lists of treaties in the peer review reports also include treaties concluded with countries which are not members of the inclusive framework. However, if these treaties are not compliant, this does not affect the overall compliance rating of the country since the Action 6 minimum standard only applies to treaties among inclusive framework members.[115] Even among inclusive framework members, not introducing the minimum standard into the treaty would not be considered as non-compliance if both jurisdictions consider that the treaty does not represent any particular risk for treaty shopping. But the peer review mechanism allows for countries to complain if another country is refusing to amend the treaty.

As can be seen in Figure 15, in 2018 and 2019, no country had a fully compliant treaty network, except those countries that do not have a treaty network at all. The MLI as principal mechanism to comply with Action 6 was signed by the first jurisdictions in 2017, which explains that there were not yet many countries with compliant treaties.

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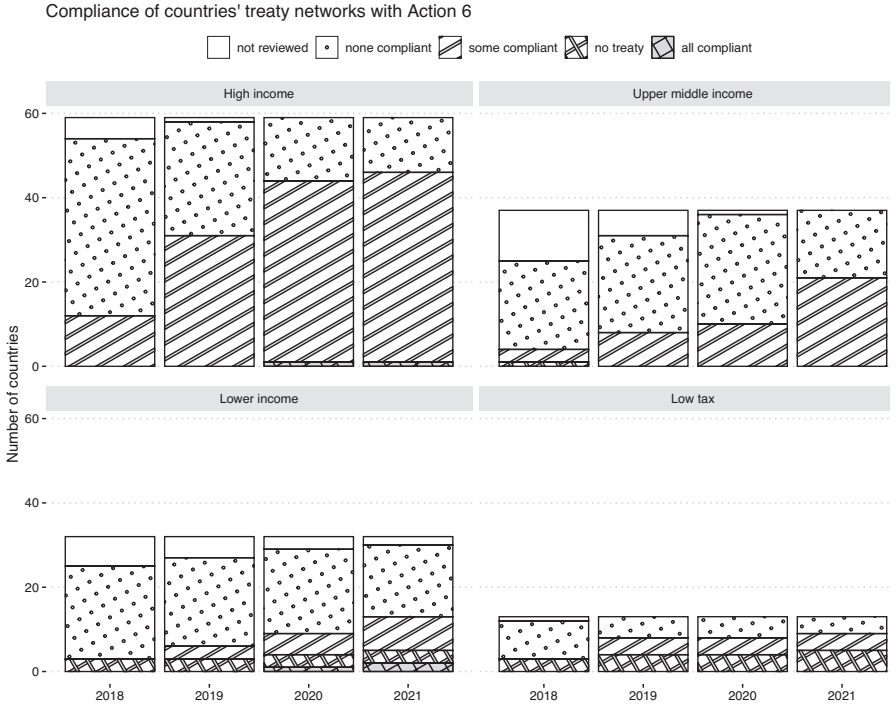
114 https://www.oecd.org/tax/treaties/mongolia-signs-landmark-agreement-to-strengthen-its-tax-treaties-and-south-africa-deposits-an-instrument-for-the-ratification-of-the-multilateral-beps-convention.htm. See also: Vergouwen, Broekhuijsen, and Reijnen, "The Effectiveness of the MLI in Amending the Bilateral Tax Treaty Network."

115 As of 2021, very few of these treaties are compliant. Most of the compliant ones are treaties with Cyprus, which signed the MLI but could not join the Inclusive Framework due to opposition by Turkey. Some other compliant treaties are new treaties signed since the Action 6 minimum standards have been included in the OECD and UN Model Conventions.

*Figure 15: Compliance of countries' treaty networks with Action 6*



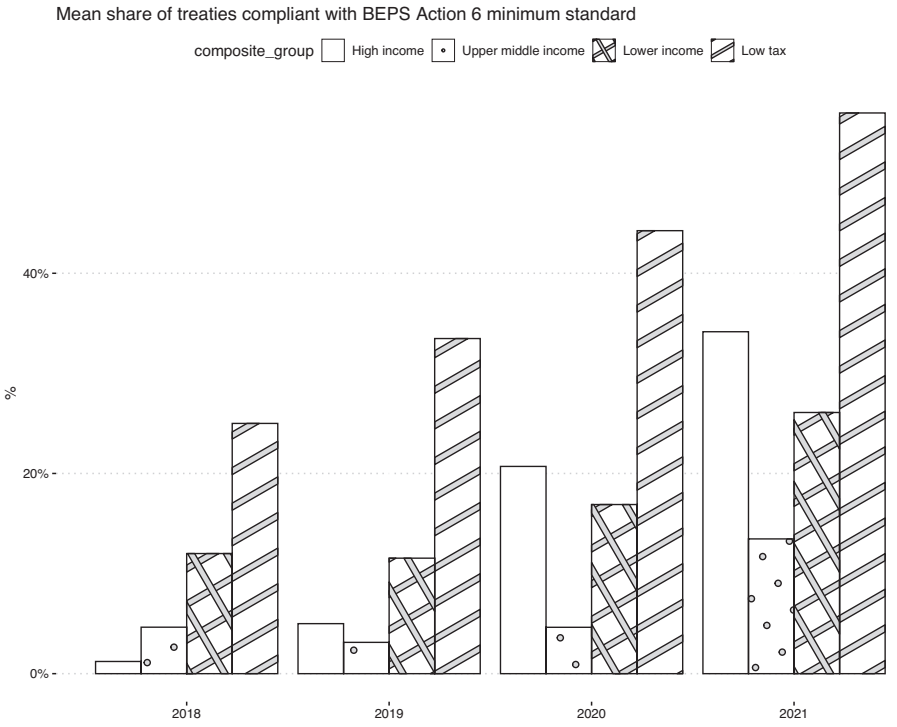

*Source: compiled by the author, based on OECD/IF Action 6 Peer review reports.*[116]

In 2020, the average number of compliant treaties increased significantly among high income countries (see Figure 16). Throughout the period, low tax jurisdictions have on average displayed the highest level of compliance, which can be explained by the small treaty networks these countries have. But some lower income jurisdictions started to have fully compliant treaty networks as well. This is for specific reasons, however. One of these countries is Angola, which ratified its first two tax treaties in 2019 and 2021. In that sense compliance was easier to achieve because no existing treaties had to be amended.

Overall, the evidence thus shows that the process of including anti-abuse rules in treaties is relatively slow and cumbersome, especially for developing countries (although this is somewhat mitigated for countries that have not signed many treaties in the first place.

116 https://www.oecd.org/tax/beps/prevention-of-tax-treaty-abuse-fourth-peer-review-report-on-treaty-shopping-3dc05e6a-en.htm

*Figure 16: Mean share of treaties compliant with the BEPS Action 6 minimum standard*




*Source: compiled by the author, based on OECD/IF Action 6 Peer review reports and IBFD Tax Research Platform (for number of treaties).*[117]

### 7.4.3 Adoption of other responses

What about other approaches to treaty shopping then? Senegal and India are not the only countries that have taken re-negotiated or terminated treaties. Efforts to renegotiate treaties with conduit countries have also been undertaken by South Africa and Argentina (even though in the Argentinian case, the re-negotiations have mainly focused on introducing anti-avoidance rules).[118] Mongolia and Russia are two examples of countries that have terminated tax treaties considered as conducive to treaty shopping.[119] The Mongolian case sheds some doubt on the hypothesis that the BEPS Project was primarily responsible for encouraging terminations. Mongolia terminated treaties with the Netherlands, United Arab Emirates, Kuwait, and Luxembourg in 2013 and 2014, after consultants from the

117 https://www.oecd.org/tax/beps/prevention-of-tax-treaty-abuse-fourth-peer-review-report-on-treaty-shopping-3dc05e6a-en.htm
118 Hearson, *Imposing Standards*, 7.
119 Wheeler, "Tax Treaties: What Are We Going to Do with Them?"

International Monetary Fund had carried out an analysis of the Mongolian treaty network on behalf of the tax authority, highlighting the weaknesses of the treaties. However, termination should not necessarily be attributed to the suggestions by the IMF, as the report rather recommended Mongolia to re-negotiate the treaties containing weaknesses instead of terminating.[120] In other cases, treaties already signed have been stopped in domestic ratification procedures. In Peru, the ratification of a tax treaty with Spain was stopped in parliament.[121] Finally, in Kenya, a treaty with Mauritius was prevented from being ratified by the Supreme Court in a public interest litigation launched by civil society groups.[122]

## 7.5 Preliminary conclusions

The BEPS Project's recommendations to deal with treaty shopping are largely in the spirit of the finely delineating approach although they do not explicitly rule out that states adopt other responses. Indeed, the approaches taken by countries vary. While the process to insert anti-abuse clauses seems to encounter an obstacle in the ratification procedures of the MLI (although not necessarily due to an opposition in substance), countries have at times resorted to other measures such as renegotiating or terminating treaties. The variation seems first of all due to a variation in the urgency of the issue: Like in the case of transfer pricing, the extent to which treaty shopping has actually been a policy problem varies among countries, depending on factors such as whether treaties have been signed with potential conduit jurisdictions and the degree of benefits these treaties confer compared to domestic law and other treaties concluded. Where the issue is more sizeable in terms of revenue loss, additional responses to the insertion of an anti-avoidance clause such as renegotiating or terminating are taken.

The fact that the BEPS Action 6 minimum standard only seems to be slowly making its way into countries' treaty networks concurs with the anecdotical evidence on other countries' renegotiations and terminations, even though the case studies also show that alternative responses are not adopted as alternative to BEPS Action 6 but rather as complement. Another important observation though is that data beyond the four countries studied also shows that the phenomenon of treaty shopping is unequally distributed among countries, with some countries not being affected at all.

The case studies also suggest that which approach should be taken is usually a controversial question among different stakeholders within the country that is affected by treaty shopping, and even where the revenue loss is sizeable, it can take a long time until an action is taken. Considerations

120 Michielse, "Mongolia: Technical Assistance Report—Safeguarding Domestic Revenue—A Mongolian DTA Model," 5.

121 CO15

122 Tax Justice Network Africa, "Court Declares the Kenya-Mauritius DTA Unconstitutional."

about investment attraction (i.e., the idea that even investors that are treaty shopping are bringing in welcome additional funds) and diplomacy are powerful counterweights. Other agencies (such as foreign affairs ministries, investment promotion agencies, or even the political level of the finance ministry) thereby act as international veto players towards a blunter approach, whereas the tax administration pushes for a more stringent response. Market power may play a role as the change in Indian policy over time illustrates. Fundamentally, even though the BEPS Project puts an emphasis on a finely delineating approach, it may also have facilitated the adoption of blunter responses due to the propagation of the higher-level message that international tax avoidance is internationally unwanted.

What can we learn from contrasting these results with the results from the preceding chapter on transfer pricing?

The case studies of transfer pricing and treaty shopping showed that countries can vary when it comes to the approach chosen to the respective policy problem at different moments in time and the extent to which they take up the standards and recommendations from the BEPS Projects: In India, for example, tolerating treaty shopping was vigorously defended at the same time when transfer pricing rules started to be enforced in an equally vigorous way in the early 2000s.[123] A potential explanation for this divergence could be that the enforcement of the transfer pricing regime is less easy to control from the ministerial level, whereas on the issue of treaty application, the ministry could settle the issue with one circular. In Senegal, in contrast, tax treaty policy has recently shifted to become very stringent, whereas with respect to transfer pricing a convergence towards the OECD approach is favoured by tax policymakers. The difference here could be that the enforcement transfer pricing regime can be adjusted more easily to the capacity of the tax administration, as auditors can make use of their powers to force companies to negotiate, when the detailed application of the rules becomes too challenging. In contrast, treaty shopping is more difficult to handle with pre-existing existing tools, such as presumptive taxation, which is why a more stringent response at the legislative level may have been necessary. In Colombia, the policy direction seems more aligned across areas where a willingness to adhere closely to a finely delineating approach is present both with respect to transfer pricing and treaty shopping, which could be due to the overriding force of the OECD accession process.

123 A potential explanation could be that tolerance of treaty shopping was mainly limited to capital gains taxation and in that sense did apply more to portfolio investment, generally considered more mobile and more reactive to competitive incentives. With regards to direct investment by MNEs the revenue losses stemming from the tolerance of the Mauritius route most likely did not yet materialize at that moment, whereas transfer pricing was a more pressing issue, since it affected the annual tax bill.

# 8 The normative debate around the BEPS Project

What should we make of the findings? Is it a good thing that the countries studied in this research project go to some lengths to implement the BEPS Project? Or is it positive that they do not adopt everything too closely? What does it mean for the interpretation of the BEPS Project as a whole? Should one view the association of developing countries to the project as positive? The purpose of the following section is to review the normative debate on the BEPS Project, and assess where the findings of the preceding chapters could feed into the debate.

Scholars and organizations concerned with tax policy in developing countries have voiced scepticism about the BEPS Project from the onset.[1] Critics question the narrative of cooperation that is used by political leaders to advertise the BEPS Project. Hearson, for example, says that "If the North-South dimension is not surfaced as an important axis of conflict between states, the tools of tax cooperation will continue to deprive lower-income countries of revenue, even though they are being recast as weapons to help all states in the fight against tax avoidance and evasion."[2]

Critiques are formulated with different levels of vigour, though, and are rooted in different conceptions about how alternatives could have looked like. This section reviews and classifies the different critiques and explains when and how knowledge about the way countries deal with the BEPS Project in practice, such as the findings from this study, matters to the concerns expressed and where more research still needs to be carried out.

## 8.1 Inclusion in the decision-making process

The starting point in the critical literature on the BEPS Project is the lack of participation of developing countries in the process that produced the policy outcomes.[3] Authors highlight that only very few countries beyond the OECD Member States participated: the non-OECD G20 members (India, Indonesia, Russia, China, Argentina, Brazil, South Africa, Saudi Arabia), as

1 For a summary of criticisms, see also Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership," 9–10.

2 Hearson, *Imposing Standards*, 30.

3 Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," 2015; Oguttu, "Tax Base Erosion and Profit Shifting in Africa-Part 1: What Should Africa's Response Be to the OECD BEPS Action Plan?"

well as accession candidates Colombia and Latvia.[4] Only in June 2016, several months after the final reports were published, all other countries were invited to implement the outcome and join the Inclusive Framework to discuss remaining issues and monitor implementation.[5] This procedure was heavily criticized and led campaigners in developing countries to popularize the slogan that developing countries were "not at the table, but on the menu".[6] As discussed in section 4, most parts of the BEPS Project originated indeed in the tax policies of OECD member countries, with the exception, however, of some transfer pricing policies inspired by India and Argentina, and the country-by-country reporting proposal (see also section 5).

A possible objection to the critique could be that participation and occasional influence from countries from the Global South represents an improvement compared to how tax policy norms were developed in the past, when there was no involvement at all from developing countries. Shay and Christians state that the decision to invite developing countries to the BEPS Project was partly driven by a desire to respond to past criticism.[7] Moreover, it is not self-evident what OECD members would gain from the fact that non-member countries (except maybe from other countries with MNE headquarters such as China, India, Brazil, and countries that facilitate profit shifting) implement BEPS standards. Most developing countries do not act as locations that facilitate profit shifting out of OECD member countries, and whether other countries defend themselves against tax avoidance should be primarily their concern. Consequently, one could view the Inclusive Framework more as an open offer to non-OECD members which they are free to accept or reject.

However, a contradiction of this interpretation is the fact that developed countries (although not through the OECD) appear to have coerced some developing countries to committing to the BEPS Project by including commitment to implement the BEPS minimum standards as one of the criteria of the EU list of non-cooperative jurisdictions.[8] The force of the critique also depends somewhat on the actual burden that committing and implementing the BEPS minimum standards would represent for developing countries. The relation between the EU list of non-cooperative jurisdictions and the BEPS minimum standards is further discussed in section 8.3.

4 Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," 2015, 4.

5 OECD, "About the Inclusive Framework on BEPS."

6 Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations."

7 Shay and Christians, "Assessing BEPS: Origins, Standards, and Responses," 38.

8 Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership"; Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries"; Dourado, "The EU Black List of Third-Country Jurisdictions."

In sum, the analysis of the process of standard production seems to speak in favour of the BEPS Project's interpretation as "imposition" of policy preferences by some countries on others. However, the process is only one side of the argument. The fact that most developing countries did not participate is not sufficient on its own to argue that the BEPS Project is "bad" for developing countries. Usually, commentators do not go as far as suggesting that the non-inclusive decision-making process would be a sufficient reason to reject the outcome altogether.[9] With hindsight, the BEPS Inclusive Framework, which since 2016 reunites all countries that have committed to implement the BEPS Project and that participate in the monitoring process, has become the platform to discuss further reforms, especially concerning the taxation of the digital economy and the global minimum tax proposal (BEPS 2.0). In these discussions, even if fundamental obstacles to meaningful participation and representation remain,[10] a formal possibility to influence the outcomes exists for developing countries.

Finally, it is important to distinguish whether the outcome of the BEPS Project was just not "good enough" for developing countries or whether it actually makes things worse. For that it is necessary to consider the critiques regarding the content of the Project's outcome.

## 8.2 Critiques about the content

Critiques regarding the BEPS Project's content from the perspective of developing countries are raised from different standpoints, some of which acknowledge that international tax avoidance by MNEs is a policy problem for developing countries, whereas others negate this. Some critiques even suggest that international tax avoidance may be an opportunity for developing countries.

### 8.2.1 Administrative resource intensity

The main strand of critiques generally acknowledges that international tax avoidance may indeed be a policy issue that developing countries would have an interest in addressing. However, critics argue that the way advocated by the BEPS Project is not adequate due to the expected amount of administrative resources required to implement the solutions. Most developing countries' tax administrations and ministries face a relative

9 Mosquera Valderrama, "Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative"; Oguttu, "Tax Base Erosion and Profit Shifting in Africa–Part 1: Africa's Response to the OECD BEPS Action Plan."

10 Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations."

scarcity of resources. Lennard, chief of the UN Tax Committee, explained with regard to developing countries' assessment of solutions to deal with the digital economy: "They feel that when things get really complicated, they are the ones who bear the cost of the complications because of their limited resources and limited information."[11] Brauner argues that "The post-BEPS discourse focuses on anti-abuse. This focus will never be in favour of the source country. Poor countries obviously have less ability to use their enforcement powers than richer countries."[12] With regard to BEPS Action 6, for example, the BEPS Monitoring Group, a consortium of civil society activists and academics, criticized that countries need to engage in exchange of information procedures if they want to enforce the suggested treaty anti-abuse clause and that transfer pricing rules have been made more complex.[13]

How authors further develop their critiques varies depending on the assumptions that are made regarding how countries would deal with that situation. In essence, if countries simply do not use the standards (i.e., they do not implement them or they implement but do not enforce them), then they would remain with the problem of tax avoidance. If countries choose to fully implement the standards and build up resources for enforcing them, then this may crowd out policymaking and administrative activity in other areas that are more important. If, however, countries choose to adopt different solutions for the issue of international tax avoidance, critiques fear that this could have negative consequences, for example double taxation (because the other state does not recognize the legitimacy of the solution adopted and does not provide a credit for the tax levied) and consequently less genuine foreign investment, disputes with other countries, or a negative reputation, or diplomatic issues that could lead to problems in other policy areas because the solution is not recognized as "internationally acceptable" practice.

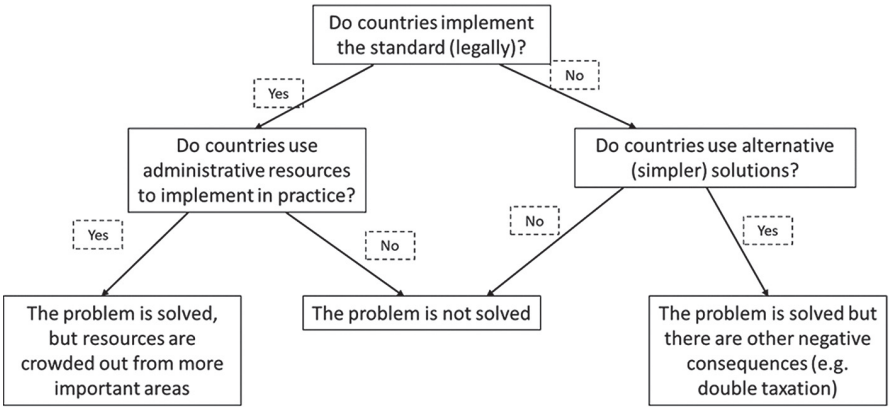
Figure 17 summarizes these arguments. The next sub-sections explore them in more detail.

11 Lennard quoted in Finley and Smith, "Article 12B Doesn't Create a New Taxing Right, U.N. Official Says."

12 Brauner, "International Tax Policy: Between Competition and Cooperation."

13 The BEPS Monitoring Group, "Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project."

*Figure 17: Critiques derived from the administrative resource intensity of the BEPS Project's solutions, dependent on countries' decisions*




*Source: the author*

### 8.2.2 Crowding out action in other areas

The "crowding out" critique goes that if developing countries attempt to implement the outcome of the BEPS Project, scarce resources of policymakers and administrators may be diverted from other issues where these may be more productive in terms of tax revenue generation or improvement of the tax system more generally. Consequently, engaging with the BEPS Project could even lead to less tax revenue generation.

There are different versions of this critique: Authors diverge for example with respect to whether attention should instead be directed to different types of international tax avoidance by MNEs than the types addressed in the BEPS Project or on other tax policy issues altogether. Some suggest that developing countries should direct more resources to other tax issues such as redundant tax incentives, evasion of personal income tax, bringing the informal economy into the tax net, or reducing corruption in the tax authority.[14] Hongler, for example, states that: "[…] the BEPS Project should have, for instance, contained a specific action on BEPS in the poorest states on this planet, i.e., how to mobilize domestic resources in these states."[15] He references levying taxes on commodity extraction or improving tax administrations as potential areas that the BEPS project could have addressed.

14 Mosquera Valderrama, "Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative"; Hongler, *Justice in International Tax Law – A Normative Review of the International Tax Regime*.

15 Hongler, *Justice in International Tax Law – A Normative Review of the International Tax Regime*, 465–66.

Monkam et al. wrote in 2018 that some countries were neglecting the implementation of exchange of information of taxpayer information since staff was focused on BEPS.[16]

In all the four countries studied, interviewees mentioned other issues that were not addressed in the BEPS Project as important priorities for the government, such as the taxation of indirect transfers of assets, issues related to legal certainty in domestic dispute resolution procedures, tax incentives, evasion in the informal sector or improving policy in other taxes than corporate tax. However, over the last years, all countries introduced measures that also related to these issues. Colombia and Senegal, for example, introduced a provision to tax indirect transfers.[17] India had already done so in 2012.[18] Colombia commissioned a report in 2021 to evaluate its tax incentives.[19] In addition, the relative importance of the issues addressed in the BEPS reports vs. other issues is difficult if not impossible to quantify with current methods and data available. Other issues may not necessarily be easier to solve.[20] However, it remains a possibility that scarce resources are distracted from other potentially more productive work. This could be even more the case in countries with less developed administrations than in the countries studied.

A potential reply to the crowding out argument would be that administrative capacity does not necessarily need to remain static. The OECD offers specific capacity building programs through its "Knowledge Sharing Alliance"[21], the "BEPS twinning programme" whereby one developed country tax administration works together with a developing country tax administration,[22] and the "Tax Inspectors Without Borders" program, which is implemented jointly with the United Nations Development Program.[23] A concern raised by the critiques towards capacity building programs, though, is that these may not be sustainable, if highly educated tax administrators are subsequently recruited by private sector law and accounting firms that are able to offer higher salaries.[24] In all countries (except Nigeria),

16 Monkam et al., "Tax Transparency and Exchange of Information (EOI): Priorities for Africa," 7.

17 Cabrera, "Taxing the Indirect Transfer of Colombian Assets"; République du Sénégal, Loi n°2019-13 du 8 juillet 2019 portant loi de finances rectificative pour l'année 2019, pt. Titre II, 65.

18 Vasudevan and Nagappan, "Indirect Transfer Taxation in India: From Vodafone to Cairn."

19 Comisión de Expertos en Beneficios Tributarios, "Informe de La Comisión de Expertos En Beneficios Tributarios."

20 Scholars argue, for example, that not too much revenue should be expected from efforts that aim at reducing the size of the informal economy in developing countries: Gallien, Rogan, and Van den Boogaard, "The World Bank and IMF Are Using Flawed Logic in Their Quest to Do Away with the Informal Sector."

21 https://www.oecd.org/knowledge-sharing-alliance/ksa-pilot-project-beps.htm

22 OECD, "Background Brief. Inclusive Framework on BEPS," 15.

23 http://www.tiwb.org/

24 Sheppard, "De-FANGed International Taxation, Part 3," 395.

I interacted with former tax administration officials that had started a career in the private sector. In particular in Colombia, interviewees from both public and private sector criticized the lack of independence of the tax administration in designing career paths that would allow it to better retain talents.[25]

Other versions of the "crowding out" critique explicitly negate the significance of the phenomenon of base erosion and profit shifting for tax revenues in developing countries.[26] This is generally contradicted by empirical studies.[27] These studies are not free of problems, however, and generally suffer from a lack of fine-grained data. The results from this research show that in BEPS is a problem for developing countries. But how big it is and how it looks like is highly context specific. It depends for example on the degree to which a country has already adopted policies akin to OECD countries, whether it has signed many tax treaties, and to what extent it has dismantled foreign exchange regulations. In particular in countries that still have stricter protectionist policies in place, it is likely that international tax avoidance is a lesser issue or manifests itself differently.

In short, whether the "crowding-out" critique applies is highly context-specific. Countries should certainly evaluate carefully whether they should implement recommendations from the BEPS Project, but the evidence from this study suggests that they generally do so – and do not blindly implement policies while neglecting other important areas.

### 8.2.3 Not endorsing simpler solutions

Criticizing the resource intensity of the solutions proposed by the BEPS Project begs the question whether fighting international tax avoidance could be achieved through simpler ways. Critics claim that this is indeed the case. Oguttu for example argued that "This one-sided approach of addressing BEPS by patching up (or strengthening) current anti-avoidance legislation (that some capital-importing countries do not have or do not have the capacity to implement) is not the only solution to addressing global BEPS concerns."[28]

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25 CO15, CO01

26 Rocha, "The Other Side of BEPS: 'Imperial Taxation' and 'International Tax Imperialism,'" 194.

27 Johannesen, Tørsløv, and Wier, "Are Less Developed Countries More Exposed to Multinational Tax Avoidance? Method and Evidence from Micro-Data."; Cobham and Janský, "Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-estimation and Country Results."

28 Oguttu, "A Critique of International Tax Measures and the OECD BEPS Project in Addressing Fair Treaty Allocation of Taxing Rights between Residence and Source Countries: The Case of Tax Base Eroding Interest, Royalties and Service Fees from an African Perspective," 327.

For Oguttu, the failure to strengthen taxing rights for source countries was the central problem of the BEPS Project. She regretted that "certain practical measures (such as withholding taxes) that may be more suitable for African countries in addressing BEPS" were not given more attention.[29] Echoing this critique, some scholars advance that profit shifting due to transfer mispricing of imports, as well as concerns about excessive interest deductions, can be mitigated in a simple way if a country imposes higher withholding taxes on royalties, interest, and technical and management services.[30] With regard to treaty shopping, only relying on the principal purpose test to combat treaty shopping may not be sufficient if the test is too difficult to apply. Instead, terminating or re-negotiating individual treaties to reduce the beneficial character that incentivizes MNEs to "treaty shop" may be more effective. However, the BEPS Action 6 report stresses that treaty termination should only be considered as measure of last resort.[31]

A common criticism of BEPS Action 13 on country-by-country reporting is that the same aim could have been achieved with less resources if companies had simply been obliged to make the report public, instead of building a system to exchange reports among tax authorities accompanied with the obligation to introduce procedures to ensure the confidentiality of the information.[32] In sum, many authors point out that potentially simpler methods to deal with international tax avoidance issues than those endorsed in the BEPS Project are available. The BEPS Monitoring Group regret that better and more effective alternatives of two kinds have not been explored, namely formulary apportionment and "full inclusion" CFCs (an idea which in principle resembles the Pillar 2 minimum tax proposal).[33] Brauner argued with respect to the work on CFC rules that it may create a distraction if it forestalls broader discussions about business income apportionment.[34] Arguably, these broader discussions have been postponed, but have not been entirely prevented, since the discussion about Pillar 1 and Pillar 2 is exactly about these topics.

The discussion of countries' responses to transfer pricing and treaty shopping show indeed that other solutions are available, from withholding taxes over simpler transfer pricing methods to discretionary enforcement

29 Oguttu, "Tax Base Erosion and Profit Shifting in Africa–Part 1: Africa's Response to the OECD BEPS Action Plan," 27.

30 Balabushko et al., *The Direct and Indirect Costs of Tax Treaty Policy: Evidence from Ukraine*; Beer and Loeprick, "Too High a Price? Tax Treaties with Investment Hubs in Sub-Saharan Africa," 114.

31 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 94; Marian, "Unilateral Responses to Tax Treaty Abuse: A Functional Approach," 1161.

32 Knobel and Cobham, "Country-by-Country Reporting: How Restricted Access Exacerbates Global Inequalities in Taxing Rights."

33 The BEPS Monitoring Group, "Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project."

34 Brauner, "BEPS: An Interim Evaluation," 23.

practices. But does the BEPS Project really prevent countries from adopting them?

*Minimum standards or maximum standards?*

One might object to the criticisms mentioned above that countries are always free to introduce those simpler alternatives if they consider them as more suited to their needs. The first BEPS report released in 2013 notes that "Of course, jurisdictions may also provide more stringent unilateral actions to prevent BEPS than those in the co-ordinated approach."[35] Moreover, knowledge about alternatives is generally available: The UN, for example, publishes the UN Model Tax Convention, which suggests higher withholding taxes at source,[36] or the UN Practical Manual on Transfer Pricing for Developing Countries, which includes discussions of the practices by India, Brazil, China, and Kenya, among others, which do not necessarily follow the OECD approach.[37] Regional organizations such as CIAT and ATAF have published guidelines, as well, that include non-standard practices used by countries.[38]

One might also object that what the BEPS Project offers is better than what previous standards promoted by the OECD offered. After all, it recommends stronger and sometimes simpler measures in certain areas than previously. For example, BEPS Action 10 can be read as a certain acceptance of the so-called "Sixth Method" to calculate transfer prices in commodity transactions.[39] This method, which calculates arm's-length-prices in commodity transactions based on prices publicly quoted on international exchanges was first developed by Argentina, and then gradually adopted by other Latin American countries.[40]

Everything else being equal, having an anti-treaty-shopping clause in a tax treaty may potentially protect source taxing rights better than nothing at all. And even if tax authorities did not have the resources to use the

35 OECD, *Addressing Base Erosion and Profit Shifting*, 9.

36 United Nations, Model Double Taxation Convention between Developed and Developing Countries 2017.

37 United Nations, "Practical Manual on Transfer Pricing for Developing Countries (2017)"; Hearson, "UN Transfer Pricing Manual: What Brazil, India and China Do Differently."

38 CIAT, "Cóctel de Medidas Para El Control de La Manipulación Abusiva de Precios de Transferencia, Con Enfoque En El Contexto de Países de Bajos Ingresos y En Vías de Desarrollo"; African Tax Administration Forum, "Suggested Approach to Drafting Transfer Pricing Legislation"; African Tax Administration Forum, "Suggested Approach to Drafting Transfer Pricing Practice Notes."

39 Christensen, Hearson, and Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations," 16–17; CIAT, "Cóctel de Medidas Para El Control de La Manipulación Abusiva de Precios de Transferencia, Con Enfoque En El Contexto de Países de Bajos Ingresos y En Vías de Desarrollo," 40.

40 CIAT, "Cóctel de Medidas Para El Control de La Manipulación Abusiva de Precios de Transferencia, Con Enfoque En El Contexto de Países de Bajos Ingresos y En Vías de Desarrollo," 39.

anti-treaty shopping clause in tax audits, it could have a deterrent effect on private actors. Finally, even though accessing country-by-country reporting data was made difficult for developing country tax administrations, prior to BEPS it would probably have been difficult for most of them to obtain similar information on MNEs headquartered in foreign countries at all.[41]

As a consequence, the critique would be stronger if it could be shown that the BEPS Project not only failed to recommend simpler (and in the context of limited resources more effective) solutions to the issue at hand, but if it actively prevented more effective actions that developing countries could realistically undertake. There are indeed a number of arguments to support such a view.

First, the purpose of the BEPS minimum standard related to dispute resolution (Action 14) has the purpose of limiting countries' ability to interpret treaties in a manner that would be too "creative", i.e., too different from what is considered internationally acceptable practice and it does not provide a country with resources to better enforce international tax avoidance.[42] India's Action 14 Peer Review Report features complaints by peer countries about the Indian tax authority's approach regarding the burden of proof in permanent establishment disputes.[43] Tørsløv et al. criticize policies that ease dispute resolution processes on grounds that they increase time administrations spend with correcting simple errors that redistribute income among high tax countries but do not affect MNE's tax burden globally. They claim that "by making it easier to correct transactions with other high-tax countries, mutual agreement procedures increase the opportunity cost of correcting transactions with low-tax countries. This allows tax-planning firms to shift more income to tax havens".[44] They conclude that there would be large savings of administrative resources if they just adopted a simpler approach (such as a formula) for allocating income and concentrating efforts on evasion. However, the evidence in section 6 suggests that beyond India Action 14 might have until now not been very effective in facilitating mutual agreement procedures.

Second, not elevating simpler rules as global standards makes it more costly for countries to enact them because frictions with other countries tax systems are higher. For example, formulary apportionment or alternative transfer pricing systems may more effectively prevent profit shifting strategies, even if adopted unilaterally. At the same time, however, they would likely increase possibilities of double taxation if other countries do not

41 Brauner, "Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument," 19.

42 Pires de Oliveira, "Action 14 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Making Dispute Resolution More Effective – Did Action 14 'Piggyback' on the Initiative?"

43 OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 1)*, 2019, 52.

44 Tørsløv, Wier, and Zucman, "Externalities in International Tax Enforcement: Theory and Evidence," 24.

adopt the same approach and do not grant tax credits if taxes were imposed in another jurisdiction based on such simpler rules.[45] Moreover, since tax treaties constrain countries to the arm's-length-principle, countries may be forced to run two parallel systems (one for investors from treaty countries and one for investors from other countries) with correspondingly high administrative costs for countries and investors.[46] In practice, the fact that countries do adopt simplified approaches, especially when considering how audits are actually conducted, could be seen as evidence that developing countries are not too concerned about these negative effects. Nevertheless, satisfactorily evaluating the argument would involve research that focusses on the countries from which investment originates. To what extent residence countries grant tax credits in cases where countries adopt such alternative solutions is an intriguing research question that could not be answered in the context of this study but that may be crucial for evaluating policy options for developing countries.

Third, a policy recommendation that is recognized as standard (even though strictly non-binding) may have the effect of legitimizing specific policies while delegitimizing alternatives, making it politically more costly for a government to use an alternative than in the absence of a standard. Political costs of using alternatives may increase both in the relation with other countries (e.g., in tax treaties) and in the domestic arena. Even though the revised version of the OECD Model Convention does not fundamentally change the allocation of taxing rights, countries are free to deviate from the Model Convention in their bilateral negotiations. Moreover, developing countries can argue that the UN Model Convention, which provides for more source taxing rights, should be used as basis for the negotiation. However, given that the BEPS Project endorsed a PPT (but a re-negotiation of source taxing rights only under specific conditions), it may be more difficult politically to undertake a more general re-negotiation with the partner country. By delegitimizing a shift to more source taxing rights, the political resources necessary to obtain such a deviation may increase for countries. The case of the attempted renegotiation of the Colombia – Spain double tax treaty could be interpreted in such a way (see section 0).

Implementing alternative solutions in the presence of a policy which is labelled as "standard" or "best practice" may also be associated with higher political costs in the domestic arena. A government might be in need to explain to other constituencies why it would not stick with an internationally agreed best practice and political adversaries might use the deviation to obtain other concessions. For example, domestic constituencies that benefit from less enforcement of international tax avoidance may find in the international standard an additional argument to convince the government

45 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, 36.

46 Dagan, *International Tax Policy : Between Competition and Cooperation*, 176.

to abstain from blunter solutions as the evidence reviewed in section 5.5.5 suggests.

A common point among the critiques introduced until now is that they generally do not negate that international tax avoidance is an issue that developing countries should potentially address (if administrative resources permit it). The two other types of critiques of the BEPS project that are introduced in the following sections depart from that assumption.

*Forcing developing countries to do something about BEPS although they may want to tolerate it for purposes of foreign investment attraction*

One critique points out that the adoption of anti-avoidance measures by developing countries could lead to less investment because the tolerance of international tax avoidance may fulfil a similar function as tax incentives targeted at foreign investors. Rocha, for example, argued that some developing countries tolerated treaty shopping to enlarge their treaty network without negotiating treaties with all countries and may therefore not want to police treaty shopping.[47]

One may object that if countries are worried about a loss of competitiveness due to the introduction of anti-avoidance measures, they could simply provide statutory tax incentives for foreign investors or reduce statutory rates. Indeed, several authors and international organizations have hypothesized an inverse relationship between the fight against BEPS on the one hand and tax competition for real investment on the other.[48] However, proponents of the hypothesis acknowledge that "the substitutability between the statutory tax rate and instruments affecting avoidance opportunists that are constrained in BEPS-type fashion is likely to be less than perfect."[49] For example, a government might not be able to grant statutory incentives or tax reductions to foreign investors because of opposition in the parliament. Tolerance of avoidance would then achieve the desired result by circumventing this opposition. While such a strategy may at times be rational from the point of view of advancing specific economic goals, it should be pointed out that this is problematic from the point of view of democratic theory, since arguably a matter (granting a tax benefit) that would require parliamentary approval is decided without such approval.

An objection to this type of critique is that, as shown in section 3, the minimum standards of the BEPS Project do not even require countries to enforce international tax avoidance more than previously in order be considered as compliant. The architecture of the BEPS Project is rather geared towards ensuring that countries do not facilitate the erosion of

47 Rocha, "The Other Side of BEPS: 'Imperial Taxation' and 'International Tax Imperialism,'" 196.

48 Cui, "What Is Unilateralism in International Taxation?," 263; Keen, "Competition, Coordination and Avoidance in International Taxation," 220; Hong and Smart, "In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment."

49 Keen, "Competition, Coordination and Avoidance in International Taxation," 223.

other countries' tax bases and that countries do not adopt too stringent approaches. For example, the standard on treaty shopping only requires countries to introduce an anti-avoidance rule if the other party requests it.[50] Since conduit jurisdiction would most likely not actively request this from a developing country source country, a developing source country without a regime for conduit companies would probably not be obliged to introduce a principal purpose test in any treaty that it has signed with a conduit jurisdiction. Moreover, the peer review of Action 6 does not aim at assessing whether a country is actively enforcing treaty shopping once an anti-avoidance clause has been introduced.[51] In a similar fashion, the minimum standard in Action 13 aims at ensuring that countries where large MNE's headquarters are located are supplying the countries where "their" MNEs operate with country by country reports (CbCRs). However, whether a country that received a report actually uses the information obtained is not assessed.[52]

Often the original argument charted above take their inspiration from India's policy with respect to the Mauritius treaty.[53] As discussed in more detail in section 0, tolerance of treaty shopping was a strategy that the Indian government ran for more than a decade and that at least a part of the Indian tax policy community considered as successful. However, this case study also showed that within India this policy was very controversial and that there is no clear evidence whether it was beneficial or not. The BEPS Project may have contributed towards shifting the balance in favour of a policy change, but the case study also showed that this was likely not the only factor.

Tolerating tax avoidance for the purpose of investment attraction may no longer be possible if because of the BEPS Project, all countries that are currently facilitating different forms of international tax avoidance had to close down the enabling tax regimes. However, this does not seem to be the case. The Netherlands, which was frequently used in treaty shopping

50 "Countries commit to adopt in their bilateral treaties measures that implement the minimum standard described in the preceding paragraph if requested to do so by other countries that have made the same commitment and that will request the inclusion of these measures." OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 19.

51 On the contrary, the terms of reference for the peer review contain the express statement: "If a jurisdiction is not itself concerned by the effect of treaty-shopping on its own taxation rights as a State of source, it will not be obliged to apply provisions such as the LOB or the PPT as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose." (OECD, "BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents," 12.)

52 On the contrary, the standard contains safeguards regarding the confidentiality of information received and regarding the use of the information.

53 van Weeghel, "A Deconstruction of the Principal Purposes Test"; Rocha, "The Other Side of BEPS: 'Imperial Taxation' and 'International Tax Imperialism'"; Baistrocchi, "The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications."

structures,[54] has communicated that it would notify a treaty partner country about the lack of substance of a conduit company but would leave it up to the partner country to enforce the case.[55]

In sum, the arguments exposed in this section only hold if countries do more than what is strictly required to implement the minimum standards, since none of the more binding instruments of the BEPS Project requires countries to effectively enforce anti-avoidance measures or effectively levy more tax revenue. There is evidence that many countries do indeed more, but whether this should strictly be considered as effect of the BEPS Project is less clear.

*Preventing developing countries from using tax haven features to develop themselves*
Some (typically small) developing countries, such as Mauritius, Cayman Islands, etc. have developed offshore financial centres with laws that – among others – facilitated international tax avoidance strategies by MNEs as part of a strategy to develop their economy. For these countries, often labelled as "tax havens", the facilitation of tax avoidance or tax evasion elsewhere may be an important source of tax revenue.[56]

By agreeing to reforms through committing to the BEPS Project, such as introducing and monitoring substance requirements for companies that benefit from low tax rates, and agreeing to the insertion of anti-avoidance rules in tax treaties, these countries may lose economic activity and tax revenues. Particularly in light of the fact that developing offshore financial centres was sometimes among the development recommendations by international institutions such as the World Bank,[57] demands to reduce the offshore industry can be criticized from a development angle. Irish wrote in 1982 that "[Haven activities give the tax havens a measure of economic self-sufficiency they might not otherwise attain."[58] In addition, countries without corporate income tax need to spend administrative resources on monitoring substance requirements, although countries may have legiti-

54 Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies"; Weyzig, "Tax Treaty Shopping: Structural Determinants of Foreign Direct Investment Routed through the Netherlands."

55 Gerritsen and Kuipers explain: "The policy of the Netherlands is rather straightforward, however. When submitting a corporate income tax return, Dutch conduit companies that have invoked a tax treaty should indicate whether they fulfil the list of minimum substance requirements. If this is not the case, the Dutch Ministry of Finance will actively notify the treaty partner that the Dutch company has indicated that not all substance requirements were met in a particular year. It is then up to the source country to decide if and how this information is used. The Dutch Ministry of Finance believes it is not up to them to deny treaty benefits." Gerritsen and Kuipers, "The Post-BEPS Advantages of the Netherlands," 30–31.

56 Irish, "Tax Havens," 490–91.

57 Sharman, *Havens in a Storm*, 24.

58 Irish, "Tax Havens," 481.

mate reasons not to have a corporate income tax.[59] Most of the countries that are affected by these rules have a high GDP per capita today and thus no longer count as "developing countries", but whether their economies would survive a closing down of the tax avoidance business depends on how much the country has succeeded in diversifying its economy. In addition, by agreeing to the BEPS Project's standards, other developing countries may be prevented from attempting the same development path that offshore financial centres have taken in the future. Since this research focused on countries that have not tried to adopt such paths, this study can neither confirm nor refute this type of argument.

### 8.2.4 General objections to the critiques

*Leeway provided by standards*

When one considers only the strictly binding parts of the BEPS Project, i.e., the actions that countries need to undertake to be in compliance with the minimum standards and which are monitored by a peer review process, the strong concerns about the BEPS Project's content voiced by the critiques surveyed in the preceding section may not be valid. Adopting arbitration clauses in tax treaties, for example, is not part of the Action 14 minimum standard. Countries are not forced to adopt transfer pricing rules in domestic legislation, nor are they forced to sign (more) tax treaties with other countries, which may oblige countries to use the arm's-length-standard. Countries are not even forced to include a principal purpose test in their treaties with offshore jurisdictions, i.e., they do not need to effectively protect themselves from treaty shopping if they do not want to. While the lack of bindingness of the measures built into the process may affect the effectiveness of the BEPS Project in achieving its objectives, this flexibility may actually alleviate some of the concerns that were noted above.

Next to the flexibility in terms of the bindingness of the standards, there is flexibility in the timing of implementation. The case studies show that there have been important delays in compliance with some of the BEPS minimum standards, for example with respect to the introduction of country-by-country reporting or the ratification of the MLI. One interviewee from the Nigerian tax administration explained when comparing the 2015 BEPS Action plan with the more recent BEPS 2.0 Project: "Previous work has also been complex, however more of it could be managed because most of those you are allowed to develop your capacity and implement those you want to implement. That's the difference."[60]

59 E.g., if revenue needs can be covered through other taxes.
60 NG13

*Simple solutions not necessarily better policy*

Another objection could be that administratively simple solutions are not necessarily better policy and that the recommendations by the OECD are technically good in achieving desirable policy objectives, such as equitable treatment of different taxpayers, levying taxes on bases that best represent concepts such as "net income", or achieving capital import- or export neutrality. Many of the quotes in section 5 suggest that stakeholders in both private and public sector often consider approaches to tax avoidance that follow a finely delineating logic as good policy, and that only the timing of adaptation to these approaches is an issue.

*Developing countries as residence countries*

Finally, the critiques raised view developing countries mainly in their role as source countries, i.e., as recipients of investment, and criticize the BEPS Project's policies with regard to how they could affect developing countries' ability to tax or to forgo taxing foreign-owned multinational companies.

This makes sense since low-income countries are predominantly importers of foreign direct investment. Emerging economies such as India, Brazil, South Africa, but also smaller middle-income countries such as Colombia or Vietnam, are predominantly capital-importing countries, as well, but the imbalance is slowly reducing. Often, these countries already register a significant amount of outward investment primarily directed towards countries of the same or lesser level of development, and often undertaken by state-owned companies. In China, the probably most advanced among the group of emerging economies, the outward investment stock has started exceeding the inward investment stock in 2016,[61] it therefore already shares more characteristics with Western European countries or the United States, with consequences for its international tax policies.[62] All the developing and emerging economies that are in the focus of this dissertation, however, still have a significantly higher level of inward compared to outward investment.[63]

Nevertheless, even though the level of inward investment is higher than the level of outward investment, issues related to the taxation of outward investment are not necessarily irrelevant for developing countries. If it is accurate that the measures proposed in the BEPS Project strengthen taxation by residence countries, implementing them could still be beneficial for developing countries. While it is a debated question whether taxing foreign

61 UNCTAD Foreign direct investment: Inward and outward flows and stock, annual: https://unctadstat.unctad.org/wds , accessed on 02/09/2021

62 Hearson and Prichard, "China's Challenge to International Tax Rules and the Implications for Global Economic Governance."

63 Colombia, India, Nigeria, and Senegal had ratios of inward/outward FDI stock of 3.2, 2.5, 14.9, and 8.0 respectively in 2020. This means that in Colombia, for example, inward FDI stock was more than three times as important as outward FDI stock.

MNEs at high or low rates is beneficial from the capital importing country perspective,[64] the case for preventing avoidance by wealthy residents is clearer. For example, there is evidence that wealthy residents of Colombia and India made use of round-tripping structures to, for example, avoid capital gains tax upon sale of their business and defer personal income taxation.[65] According to a Colombian tax advisor, the CFC rules introduced in 2019 would contribute to reduce incentives to engage in this type of avoidance structure.[66]

### 8.2.5 The possibility to cherry pick

Overall, when it comes to policy recommendations, scholars do not suggest developing countries to abstain altogether from participation in the BEPS Project. Instead, they recommend participation, while cherry-picking the elements that are adequate. Oguttu notes that "there is a need for African countries to be associated with the OECD BEPS project, as it has the potential to put an end to tax avoidance by MNEs and so help to raise corporate tax revenues."[67] Rocha's overall advice is that: "Countries that have a sufficiently strong international tax policy can "cherry-pick" what is interesting for them in the Project and discard whatever recommendations seem inappropriate. Thus, the BEPS Project is an opportunity to participate in and engage in a high-level international taxation debate that is happening worldwide. However, for countries that are exposed to pressures from developed countries and do not have a well-formed international tax policy, it seems that the BEPS Project also poses a threat." If developing countries are indeed able to cherry pick, then a part of the criticism is less valid.

The evidence collected here suggests that countries indeed do not uncritically take over the results. To solve problems, they do not only rely on what the BEPS Project suggests. This is illustrated by the responses adopted to treaty shopping, which go beyond what was suggested by the BEPS Project in those countries where treaty shopping was a bigger problem.

On the contrary, developing countries may be able to free ride to a certain extent on the work financed by OECD member countries, as production of standards and policy recommendations is not costless.[68] Developing

64 Wallerstein and Przeworski, "Capital Taxation with Open Borders"; Margalioth, "Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries."

65 CO14, CO16, Jaiswal, "Foreign Direct Investment in India and Role of Tax Havens."

66 CO16

67 Oguttu, "Tax Base Erosion and Profit Shifting in Africa-Part 1: What Should Africa's Response Be to the OECD BEPS Action Plan?," 526.

68 Participation in the IF is connected to a fee, but the fee has not been set to recover the costs of the initial policy work.

countries could make use of the BEPS Project's policies but in a simpler and stricter way. They may help policymakers in pushing stricter measures through against domestic interests that do not want stronger measures.

One could object though that only non-OECD countries with market power are able to effectively cherry-pick. Based on the evidence of the case studies one could cautiously conclude that this is indeed the case, since in their approaches to transfer pricing, the legislated deviations from OECD practice have been somewhat more important in India and Nigeria than in Colombia and Senegal. Colombia, which faced the additional pressure of being an OECD accession candidate, probably went furthest in adhering to the OECD approach. However, when considering how rules are applied in practice, one could conclude that deviating from the ability to deviate from international standards is not limited to big and powerful developing countries. Because of its size and importance for MNEs, India may even have disadvantages since MNEs might exercise more pressure on the tax administration to conform.

Nevertheless, all countries studied in detail seem to have a relatively high policymaking capacity allowing them to evaluate which responses are in the national interests and which not. This may not be given for any country, in particular not for least developed countries.

## 8.3 The EU list of non-cooperative jurisdictions and the BEPS minimum standards

One of the main weaknesses of the critiques suggested until here is thus that the BEPS Project generally does not create many obligations for developing countries. However, as mentioned above, the fact that the BEPS Project elevates certain rules as standards has inspired the European Union to back them with strong incentives.

One of the goals of the EU is to coordinate policy of its Member States, both internally and externally, i.e., policies concerning the relation of Member States among each other and with third countries. With regard to the relations of Member States with third countries in the field of direct taxes, the EU's key documents are the 2012 "Recommendation to Parliament and Council on measures to encourage third countries to apply minimum standards of tax good governance" and the 2016 "External Strategy for Effective Taxation".[69] They lay out the general strategy of promoting "good tax

69 European Commission, "Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation"; Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries"; European Commission, "COMMISSION RECOMMENDATION Regarding Measures Intended to Encourage Third Countries to Apply Minimum Standards of Good Governance in Tax Matters."

governance" in other countries with the purpose of ensuring a global level playing field. The most important tool that gives this goal political force is the list of non-cooperative jurisdictions in tax matters, maintained by the Council's Code of Conduct Group and the defensive measures that member states apply against jurisdictions on the list.[70] The main criteria that affect whether a country will be considered as non-cooperative are adoption of three types of policy standards: Exchange of tax information, fair taxation (similar to the OECD's definition of "harmful tax competition"), and the minimum standards of the Base Erosion and Profit Shifting (BEPS) project.[71]

The list of non-cooperative jurisdictions has been criticized by academics, civil society groups, as well as by those countries that have been placed or could be placed on the list. Critiques raise different arguments: Too high administrative burden of complying with the criteria, lack of transparency of the process, political influence on the process, as well as hypocrisy (arguing that EU Member States should be on the list).[72] Quantitative studies argue based on the timing, a few countries may have joined the Inclusive Framework and committed to implement the BEPS Minimum Standards mainly because of the threat of being included on the list.[73]

The investigation of this dissertation can neither support nor refute these claims since all countries studied decided to adopt the BEPS project before any pressure was exercised by the EU. Nevertheless, the theoretical analysis of sections 3 and 4 suggests another argument: there is a lack of consistency between the Code of Conduct's objectives, the criteria that assess whether a third country's policy run counter these objectives, and the defensive measures that Member States are encouraged to apply against non-compliant third jurisdictions.

The stated aim of the list of non-cooperative jurisdictions is to "tackle tax fraud, evasion and avoidance" and to address "external challenges to EU countries' tax base".[74] The criteria for jurisdictions to be part of the list of non-cooperative jurisdictions is largely based on compliance with policies that are originally developed within the working parties of the OECD.

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70 Council of the European Union, "COUNCIL CONCLUSIONS on the Criteria for and Process Leading to the Establishment of the EU List of Non-Cooperative Jurisdictions for Tax Purposes."

71 Council of the European Union.

72 Yearwood and Nicholls, "The European Union's Economic Substance Rules in Commonwealth Caribbean Jurisdictions: What Is the Purpose?"; Koutsouva, "The European Union's List of Non-Cooperative Jurisdictions for Tax Purposes"; Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries"; Fowler, "Will the EU Really Blacklist the United States?"; Langerock, "Off the Hook: How the EU Is about to Whitewash the World's Worst Tax Havens."

73 Collin, "Does the Threat of Being Blacklisted Change Behavior? Regression Discontinuity Evidence from the EU's Tax Haven Listing Process"; Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership."

74 https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/

This is not surprising, given the large overlap of membership between OECD and EU. However, while the OECD does not attempt to enforce its policies upon third countries beyond persuading them that these constitute good policies and peer reviewing their efforts once they have signed up to them, the EU encourages its member states to adopt defensive measures and exercises pressure by publishing a list of non-compliant countries.

Defensive measures may be appropriate to the extent that non-compliance by third countries could lead to tax losses for EU Member States and to the extent these measures prevent such losses. In fact, many countries both within and outside the EU have for a long time maintained national tax haven lists and applied less favourable tax rules to transactions with taxpayers that are resident in jurisdictions on the respective lists (for example France, Italy, and Spain).

If another country offers a low-tax regime (without appropriate substance requirements) or fails to exchange information on potentially non-compliant taxpayers of another jurisdictions, defensive measures such as withholding taxes or limitations on deductions to limit potential tax losses for EU countries that could arise when EU residents make use of such third countries' tax provisions make sense: If appropriately designed, such measures can adequately disincentivize businesses and individuals from taking advantage of foreign tax regimes with the purpose of avoiding tax in the EU and restore the tax revenue lost to the EU. However, the Code of Conduct should not uncritically take over criteria, where non-compliance poses threats of a different nature. This is the case of most of the BEPS minimum standards.

As argued in section 3.3, some of the BEPS Minimum Standards are aimed at states that facilitate the erosion of tax bases elsewhere (mainly Action 5 and Action 6), but Action 13 (appropriate use and confidentiality criteria) and Action 14 are rather about ensuring that countries' responses to tax avoidance do not lead to double taxation or "over-taxation". The EU may have an interest in these objectives (for example avoiding competitive disadvantages for EU businesses), but the type of defensive measures contemplated may not be appropriate and not even effective in reaching these objectives.

Moreover, there is a mismatch between rhetoric about the list and its content. While the list of non-cooperative jurisdictions is presented as tool to fight tax avoidance and tax evasion,[75] its mechanism only partly aims at that goal, since some aspects of the BEPS Minimum standards arguably aim at ensuring that other countries do not levy too much tax in an inappropriate way on multinationals.

75 Council of the European Union, "COUNCIL CONCLUSIONS on the Criteria for and Process Leading to the Establishment of the EU List of Non-Cooperative Jurisdictions for Tax Purposes."

With regards to Action 6, even though if a third country fails to comply there could be a legitimate concern for the EU, the defensive measures proposed by the EU list are not appropriate. If a country refuses to introduce an anti-abuse rule in a treaty with an EU member state, the treaty itself would likely prohibit the application of the defensive measures. The power to apply withholding taxes, for example, is usually permitted only up to a certain level by the treaty and specific deduction limitations may be contrary to the non-discrimination article.

Finally, compliance with the Action 13 minimum standard on country-by-country reporting may become redundant for the EU when MNEs operating in the EU are required to publish them. Before that, the EU should take the fact into account that for the purpose of combatting tax avoidance compliance is much more relevant by those jurisdictions that host many MNE headquarters. Outside the EU this concerns mainly USA, China, Japan, India, and Canada.

It needs to be acknowledged that no country is or was listed on the EU blacklist only because of a failure to commit to implement the BEPS Minimum Standards. Countries on the list all have different shortcomings as well.[76] Indeed, as shown in section 3, for developing countries, peer reviews on actions other than Action 5 have often been postponed, and where reviews have been conducted these typically refrain from stating in clear terms if a country is non-compliant. It should also be noted that most countries on the UN's list of least developed countries are by definition excluded from the EU's listing exercise.[77]

Nevertheless, a failure to commit to BEPS is specifically mentioned in the Code of Conduct's reports, and the EU Council requested this commitment in letters sent out to third jurisdictions.[78] In addition, far-reaching reforms are planned for the future (although these seem to be currently blocked by Hungary and Estonia).[79] Since 2019, the Code of Conduct has sought commitment by member states to give more "teeth" to the Standard, by emphasizing that member states should apply a minimum amount of defensive measures. A resolution adopted by the European Parliament in January 2021 "Stresses the importance of BEPS minimum standards in the screening of third countries, in particular Actions 5, 6, 13 and 14; stresses the importance of identifying other BEPS standards to be included as listing criteria;"[80]

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76 Council of the European Union, "The EU List of Non-Cooperative Jurisdictions for Tax Purposes – Letters Seeking Commitment on the Replacement by Some Jurisdictions of Harmful Preferential Tax Regimes with Measures of Similar Effect."

77 European Commission, "Scoreboard of Indicators: Methodology," 2.

78 Council of the European Union, "The EU List of Non-Cooperative Jurisdictions for Tax Purposes. Compilation of Commitment Letters Received from Jurisdictions."

79 Van Gaal, "Hungary and Estonia Blocking EU Tax Reform."

80 European Parliament, "Reforming the EU List of Tax Havens: European Parliament Resolution of 21 January 2021 on Reforming the EU List of Tax Havens (2020/2863(RSP))," para. 16.

Before the Code of Conduct Group starts seriously assessing compliance with the BEPS Minimum Standards, the EU Council and the European Parliament should reconsider whether and to what extent BEPS standards should indeed remain part of the exercise. Similarly, before including new tax policy standards such as those currently developed in the Inclusive Framework under the "Two Pillar" framework,[81] a similar analysis like the one in the preceding paragraphs should be carried out.

81 In the 2021 Global Tax Symposium, Benjamin Angel, the Director General of EU TAXUD, mentioned that this might be considered. See https://www.youtube.com/watch?v=Cw-12dsGec8&list=PLrARaVLmTNT9oxSqNGubUZ92_k8YGUFBq at 4:18:00

# 9 Conclusions and the way forward

## 9.1 Summary of findings

How can we explain different responses by countries to the BEPS Project? The purpose of this thesis was to provide a general framework for analyzing international standards that deal with international tax avoidance, such as the BEPS Project, for categorizing preferences by different actors and for making sense of the trajectory of countries in specific policy areas. The analytical tool I used was introduced in chapter 3. I first divided policies into a defensive, a facilitating, and a supportive dimension with respect to international tax avoidance phenomena. Put short, a country needs to decide 1) whether and how it defends itself against international tax avoidance; 2) whether and how it facilitates taxpayers' international strategies aimed at avoiding tax in other countries; and 3) whether and how it would support other countries in their efforts to defend themselves against tax avoidance. This division mainly serves to explain a focus on specific outcomes of the BEPS Project and less on others. For developing countries without financial centres, the defensive dimension is clearly the most relevant – and the one where we should see the greatest variation in terms of policy. Hence, I further delved into this dimension and proposed a typology of policies based on relevant characteristics such as their effectiveness in reducing tax avoidance, their administrative resource intensity, their effect on non-avoidant taxpayers, their effect on tax revenue and the degree of international cooperation required for their adoption.

In chapter 4, I used this typology to contrast the propositions of the BEPS Project with previous OECD standards, and to evaluate the overall goals embedded in the BEPS Project. Here, I developed the overall argument that in the past OECD standards generally tackled international tax avoidance in a way that delineates as finely as possible between avoidant and non-avoidant situations, with the objective of safeguarding the amplest freedom possible for cross-border transactions and not jeopardize the overarching objective of the international tax regime, namely facilitating cross-border investment and trade. Compared to the past, the BEPS Project sometimes shows more acceptance of what can be called "blunt" solutions: responses to tax avoidance that do not require a lot of administrative resources but that are less precise in the sense that they may also catch non-avoidant taxpayers. Nevertheless, the departure from the past is only very incremental. Compared to the practice of some non-OECD countries or compared to what different stakeholders have called for, the BEPS Project's

approach is still very much "finely delineating". When reading them closely, this also becomes apparent in the high-level public communications. In sum, rather than fighting tax avoidance at all costs, the BEPS Project is about fighting tax avoidance, but in a way that still rests aligned with the liberalizing goal of the international tax regime.

In the following chapters, I then turned to concrete evidence from four developing and emerging economies collected through fieldwork: Colombia, India, Senegal, and Nigeria. At the start of the research project in 2018, these were all non-OECD economies. Meanwhile, Colombia has acceded to the OECD. Nevertheless, the history of engaging with international standard setting projects at the OECD is more or less short for all these countries, with some variation. While Colombia and India were associated in the development phase of the BEPS Project (India as G20 country and Colombia as accession candidate), Senegal and Nigeria only joined the Inclusive Framework in 2016. Thus, all countries belong to a group in between the core and the periphery. This means that in contrast to those countries that remain completely outside, they are adequate to study the adaptation process of the standards developed, while still sharing the characteristic of developing/capital importing countries, which is at the heart of many contemporary debates about the adequacy of "global" standards. Otherwise, the countries present variation among themselves that allowed some explanatory factors for different approaches with respect to BEPS implementation and international tax avoidance more generally to become apparent – factors that can be subject to a quantitative analysis in a greater sample of countries in the future.

In chapter 5, I reviewed the factors that influence the approach that a country takes towards international tax avoidance. I found that in the context of developing countries once the executive branch of government has formed an opinion, it is likely that there are relatively little challenges by other actors. This is because actors that could potentially be influential (such as parliaments, civil society actors, and organized businesses) are lacking the expertise to constructively engage in the process, do not display strong preferences against the implementation of this type of policies, or choose to focus engagement on other policies which they judge more important for their interest. Nevertheless, within the executive a significant degree of disagreement about the policy to be adopted can sometimes be found. Whereas the tax administration, and more specifically those departments tasked with audit, are more likely to favour a blunt approach (and, if conditions allow, may apply it regardless of what the actual legal provision prescribe), other agencies factor in other considerations such as investment attraction and diplomatic relations with other countries. The policymaking level of the tax administration or the ministry of finance, depending on where the ultimate authority is actually located, needs to balance these different preferences. What approach they will choose depends also on a number of other factors: First, the status-quo ante in terms of rules and practices. Is a specific international tax avoidance issue actually an important problem in terms

of revenue loss? To what extent has a "finely delineating" approach been incorporated in previous law and practice? Finally, structural factors such as administrative capacity and the country's market power may play into policy preferences, whereby a lack of administrative capacity and more market power may both favour the adoption of blunter approaches. Nevertheless, as explained as well these factors are not deterministic. For example, even where administrative capacity is low, countries may adapt finely delineating solutions with the objective of increasing capacity in the future.

In sections 6 and 7, I investigated how the approach to international tax avoidance of the four countries studies evolved and was influenced by the BEPS Project in two specific policy areas: transfer pricing and treaty shopping. With respect to transfer pricing, while all countries have evolved more in a direction of the OECD's approach, there are some important differences in the details of policies implemented and the timing of their adoption, as well as with regards to their application in practice. Complexity of applying the rules, lack of time, and lack of databases, creates high incentives for applying rules in a simplified way and negotiating with taxpayers on a price instead, which may lead to significant differences between the idea of the transfer pricing guidelines as written in the books and their application in practice. The accessibility of dispute resolution procedures plays an important role here: In India, dispute resolution is the most developed, which has led to a gradual convergence of policy to the OECD's approach. In the context of its OECD accession process, Colombia has invested in building up trust with taxpayers to access MAP and APA procedures. The results are not really visible yet, but one can expect this to change in the future. In Nigeria, the decline of oil revenue has spurred the development of more transfer pricing audit capacity. Nigeria has adopted most parts of the BEPS project that relate to transfer pricing, but has adopted a few "blunter" measures within the system. Nevertheless, taxpayers evaluate these changes as positive, which may indicate that the approach is still more "finely delineating" than the previous practice of sporadic audits with subsequent negotiations. Negotiating still seems to be common practice in Senegal, where dispute resolution practices are probably least developed. In addition, most aspects of the BEPS Project are still pending ratification.

With respect to treaty shopping, policy has evolved in markedly different ways in the four countries. While in the Colombian and Nigerian case a full adherence to the BEPS Project's approach can explained by the lack of salience of the phenomenon (until recently), and in the Colombian case bilateral diplomacy. Driven by more important revenue losses, India and Senegal adopted blunt responses that go beyond those primarily endorsed in the BEPS Project, namely a renegotiation and termination of the problematic treaty respectively. Nevertheless, the BEPS Project appears to have played a more diffuse role through its impact on the relevant stakeholders' general ideas about tax avoidance, which those actors in favour of blunter responses could use to convince others of the necessity of change.

In section 8, finally, I reviewed the normative debate on developing countries within the BEPS Project, the implications of which will be further discussed in the following section.

## 9.2 Implications

In the introduction, I framed this research in terms of three competing views about the BEPS Project: Is it a cooperative endeavour that solves a prisoner's dilemma or an imposition of policy preferences by rich on poor countries? Does it have an impact at all? Which view is an accurate description of reality? Based on this research, the short answer would be: none of them. First, it sheds some doubts on the affirmation that international cooperation is needed to combat international tax avoidance, and that the BEPS Project would necessarily signify a net increase in countries' defences against tax avoidance. Rather, it shows that the BEPS Project suggests combatting tax avoidance in a specific way. This model requires some degree of international cooperation. It might even be the "best" way. But it is not the only one: Even without cooperation, emerging and developing countries are not powerless against tax base erosion and have not been powerless in the past, both in terms of legal provisions and administrative practices. The content of the BEPS Project is based on a model of countries with very limited tax impediments on cross border flows of income and capital and it is based on the idea of tackling tax avoidance within the parameters of safeguarding the largest possible freedom for these cross-border flows. In the reality of developing countries, where the latter is not given to the same extent as in industrialized countries, implementation of BEPS does (generally) not weaken the defences, but does not necessarily improve it either, depending, of course, on how the status-ante exactly looked like. Implementing BEPS in developing countries could then be understood as adopting an approach to fight tax avoidance that leaves the amplest space for businesses that do not avoid.[1]

However, whether the BEPS Project should be considered as an imposition of such a model on developing countries' policies is unclear. Across the countries researched, we can note a general movement towards the introduction of more and more sophisticated anti-avoidance rules similar to those suggested by the OECD as well as investment in capacity to enforce them. There are certainly pressures weighing on policymakers to adhere to the BEPS Project, both from the outside (e.g., the OECD) and from the

1 This interpretation has become more obvious in the debate on Pillar 1, which has been met with a lot of criticism by countries that have adopted alternative measures to tax the digital economy, which would need to be abandoned to comply with Pillar 1. However, the BEPS "1.0" Project is still often perceived as a project that is only about fighting tax avoidance.

inside. Relevant domestic actors such as MNEs and their advisors often prefer OECD style approaches to tax avoidance. But there are not many signs that these actors have had an excessive amount of influence on the policy-making process. The fact that even countries like India and Nigeria that have criticized the OECD and (unlike Colombia) were not in the process of becoming an OECD member do so may indicate that countries generally consider the project as useful. Where uptake is delayed that does not seem to be due to fundamental disagreement but rather to procedural difficulties. However, the devil lies in the detail: To what extent countries are really converging depends on how narrow or how wide we define "impact" of the BEPS Project. If we consider that there is an impact if a country undertakes any measure to increase its protection from international tax avoidance, the impact is indeed high. If we only consider it as impact when a country protects itself against tax avoidance in the "OECD way", i.e., in a way that finely delineates taxpayer behaviour, the impact is not nil but significantly lower. The case studies show that emerging and developing countries apply rules in a simplified fashion or take blunter measures.

It should be pointed out that this does not necessarily mean that countries are not complying with the BEPS minimum standards in the respective area, since the latter have a lot of flexibility embedded in them. Think about the possibility to opt out of the Action 14 peer review process if there are only few disputes, the possibility to introduce a lighter version of the CbCR regulations if there are no headquarters of large MNEs in the country, or the possibility not to modify treaties in accordance with BEPS Action 6 if not request to do so by another country.

This suggests that there might be some scope for another interpretation, which has perhaps been the traditional view that used to be the predominant interpretation of global tax governance for a long time:[2] In this traditional view, policy standards developed by international organizations are merely considered as public goods in the form of the development and dissemination of technical knowledge.[3] In this interpretation, countries do not solve cooperation dilemmas through global institutions but they do not attempt to impose policy preference on other countries, either. Global governance simply means developing policy solutions which countries can use if considered in their interest, or discard if they do not find them useful. To some extent this seems to be what is going on. At times, this role of the mere technical advisor is still present in the OECD's descriptions of its own role: "There is no magic recipe to address BEPS issues, but the OECD is ideally positioned to support countries' efforts to ensure effectiveness and

2 Picciotto, "Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation."

3 Berg and Horrall, "Networks of Regulatory Agencies as Regional Public Goods: Improving Infrastructure Performance," 184.

fairness of tax rules and, at the same time, provide a certain and predictable environment for business."[4]

At this point, it is important to repeat though that the analysis was limited to countries that are members of the Inclusive Framework and that have thus opted into the process. That decision was likely influenced by preconditions that made adaptation feasible. No part of the analysis can therefore be extrapolated to the around 80 jurisdictions that have not yet chosen to become part of the Inclusive Framework. It is likely that making use of the BEPS Project to their advantage may be more difficult for them, since most of them are low-income countries. Addressing BEPS may also be less relevant because it is likely that some of the causes of the tax planning schemes discussed here, such as tax treaties and the absence of foreign exchange regulations, may be even less prevalent in those countries that have chosen not to be part.

Nevertheless, the BEPS Project can have an impact on these countries, as well. If OECD Inclusive Framework members converge towards an OECD model of addressing tax avoidance, going a different way may become more difficult for non-IF countries in the future. In sum, all the different interpretations of the BEPS Project carry some element of truth. Emphasizing the one over the other is then a matter of individual perspective.

What lessons does this carry for the future of international tax cooperation? It seems that during the BEPS 1.0 project, there was still a broad agreement on the basic ideas, namely combatting international tax avoidance. As the international standard setting process touches more upon the core of the allocation of taxing rights, such as in the Pillar 1 project, which seeks to redistribute taxing rights for profits earned through digital means, the same can no longer be taken for granted. Moreover, while the idea of preventing countries from adapting "blunter" measures was already present in the BEPS 1.0 project, Pillar 1 has made this an explicit part of the deal: participating countries are required to roll back their digital services taxes. Therefore, we can reasonably expect that the implementation phase may be more conflictual.

What about Pillar 2, the global minimum tax? Largely, the objectives of the BEPS 1.0 project and Pillar 2 overlap since Pillar 2 aims at reducing international tax avoidance opportunities with the additional aim of reducing (while not eliminating) competition for real investment. Pillar 2 is different in the sense that it reduces the role of the country that is itself affected and foresees a more important role for the headquarter country (see also section 3.3).

On Pillar 2, one possible implication emerges from the material analyzed in this dissertation: In the past, countries still showed a bigger appetite for competing by means of tolerating tax avoidance (consider for example the Indian approach to treaty shopping before 2017). However,

4 OECD, *Addressing Base Erosion and Profit Shifting*, 48.

at least for the type of countries studied, the BEPS 1.0 Project already contributed to bringing about a cultural change that has reduced this type of competition. Therefore, a mechanism through which countries police each other in the fashion of pillar 2's "diabolic machinery"[5] may no longer be as necessary as it used to be.

## 9.3 Limitations and calls for more research

There are several important limitations to this research. The first is timing: Global tax governance is a dynamic process. This means that events that have not yet happened (such as the introduction of a certain policy by a country) could still happen in the near future. Some findings of this research might need to be revised. Nevertheless, I hope that the more conceptual analysis of international tax policies will be useful to analyze future tax policy developments, as well.

Second, one implication of the inductive method employed in this study is that, rather than conclusive evidence, the findings presented here should be seen as research agenda to more systematically test why developing countries adopt specific policies. Most of the time, the time and resources available for conducting this research did not allow me to study these hypotheses in more systematic ways. The sections on treaty shopping and transfer pricing present some data that can be used in larger studies. Moreover, similar follow-up studies could be made to systematically compare countries' approach to other policy issues such as capital gains taxation, or the use of tax havens by developing countries' outward investors over time.

The research also suggested that more perspectives from MNE headquarters might need to be included to fully grasp what happens in developing countries. To fully understand the puzzle of the lack of MAPs in many developing countries, it might be fruitful to investigate in the countries of origin of the investment why such procedures are not engaged – and for whom the lack of dispute resolution represents a problem: For the host country, the home country, or for the MNE?

During this project, I assembled a number of datasets that contain information about institutions and norms relevant for international taxation on a country-year basis or dyad-year-basis. These datasets have allowed to answer a number of research questions, such as gauging to what extent BEPS measures have been implemented and how international tax policies have evolved over time. However, there are many more questions that could be answered using these datasets, including by researchers using quantitative methods to investigate the impact of international tax provisions on firms and individuals.

5 Mason, "A Wrench in the GLOBE's Diabolical Machinery."

Finally, let us assume economic studies find in a few years that international tax avoidance has receded (or not). Because of lack of data that is comparable over time, such an assertion can probably never be made with sufficient certainty. But assuming that at one moment it is found that the issue of international tax avoidance has not been solved, then, an important question will be: why? Is it because the policies do not work? Or is it because they have never been seriously applied? And if so, why do they not work? Or why have they not been seriously tried by countries? Different answers to these questions imply different policy responses. The findings and additional data generated in this dissertation may help to construct a crucial control variable: the degree to which countries have actually transposed the BEPS Project into their tax systems.

## 9.4 Beyond tax

In addition to the debates about the particular case of the global governance in international taxation and its relationship with developing countries, the findings matter for debates about the architecture of global governance institutions more generally and future investigations could more systematically compare global governance of international taxation with global governance in other areas.

The BEPS Project is representative of a peculiar form of governance: It is not a treaty through which countries have signed up to specific obligations. There is a discrepancy between those countries that participated in the development of its content and those that implement it. There is an important degree of flexibility (and sometimes vagueness) in the requirements. Accordingly, the BEPS Project and accompanying processes (such as the Inclusive Framework) could be thought of as what Abbott and Faude have termed a "low-cost institution", referring to the reduced cost of achieving agreement.[6] Recently, it has been suggested that this type of governance may inspire governance in areas where more "high-cost" institutions such as investment and trade policies have been used.[7] If this happens, it may be fruitful to try to translate what the experience of the BEPS Project could mean for these areas. One possible finding of the BEPS Project is that change (even though incomplete and inexact) can be triggered even through such low-cost institutions, if there is a clear public message that is associated with these institutions (such as "combatting international tax avoidance").

On a more general level, the BEPS project can be considered as attempt to mitigate negative effects of globalization (or reply to the globalization critiques) and preventing backlashes from actors negatively affected by

6 Abbott and Faude, "Choosing Low-Cost Institutions in Global Governance."

7 Alschner, "Shifting Design Paradigms: Why Tomorrow's International Economic Law May Look More Like the Tax Regime than the WTO."

globalisation, while at the same time not threatening the overall openness of countries (as opposed to, for example, national responses aimed at scaling back globalization more generally).[8] It has some similarities of the last decades' reforms of the global trade regime (where several exceptions to the general rule of trade liberalization have been introduced), the global investment regime (which now emphasizes the "right to regulate" more strongly) and the financial regulation regimes (which after efforts at liberalizing capital flows put its emphasis on the stability of domestic banking systems). It can therefore be thought of as initiative that ranges among "new" types of global governance, which seek to strike a balance among liberalizing aims and safeguarding for jobs, financial stability, and tax revenue. The case of the BEPS Project might be interesting in the sense that it could provide insights about the conditions under which this new type of governance works.

A first insight could be the following: In a piece written in 2020, Rodrik, an economist, contends that very few of the policies that are regulated by global governance are truly beggar-thy-neighbour policies and that global governance might not always be the best solution as it could also be subject to special interests and disregard second-best institutions that might be more appropriate for specific countries.[9] Interestingly he specifically mentioned the issue of "perfect tax havens" where paper profits are booked as one exception to this general idea, the results of this study suggests that even for this issue this is not the case, since second-best institutions, such as "blunter" approaches to tackle international tax avoidance may be more appropriate in certain contexts.

8 Pascal Saint-Amans, head of the OECD's Center for Tax Policy and Administration, stated that "In recent years, we have built a kind of tax regulation for globalisation - to reconcile the middle class in particular with globalisation." Saint-Amans, Der Kern des Systems ist das Steuerschlupfloch. (translation by the author). Also Avi-Yonah and Xu, "Evaluating BEPS."

9 Rodrik, "Putting Global Governance in Its Place."

# 10 Annex

## 10.1 Topic list used in interviews

- Your general professional activities and how they have changed during the last years (as result of BEPS project or not)
- The tax administration's strategy towards tax collection
- Tax planning schemes used by foreign and domestic MNEs
- Notable international tax cases
- Process for achieving tax certainty from the tax administration (through tax rulings or other procedures)
- Exchange of rulings
- Tax incentives in country (and how they could be impacted by the BEPS project)
- Tax incentives: effective in attracting investors? Used to shift profits? Attracting mobile activities?
- Tax treaty policy: considerations in selecting treaty partners, articles, interplay domestic law and treaty
- Treaty shopping by inward investors and policy / administrative responses
- Effectiveness of anti-abuse rules in tax treaties of country
- MLI choices and implementation
- Obstacles to treaty ratification (DTAs and MLI)
- Disclosure requirements of multinational companies before BEPS
- Use by tax administration of country-by-country reports
- Data protection in country and trust in tax administration
- Transfer pricing: Use of transfer pricing guidelines and issues thereof
- Penalties for non-compliance with tax reporting requirements in India
- Litigation practices of tax administration before and after BEPS
- Dispute settlement before and after BEPS
- Evolution of objectives of international tax policies
- Public debates in country around tax avoidance / evasion
- Tax policy making process: What are the sources of international tax policy changes? Who participates in debates? Influence of industry, international advisors, political stakeholders

## 10.2 Table of interview participants

| *ID* | *Country* | *Category* | *Number of people present* | *Date* |
|---|---|---|---|---|
| CO01 | Colombia | Public Sector | 1 | 2019 |
| CO02 | Colombia | Academic | 1 | 2019 |
| CO03 | Colombia | Academic | 3 | 2019 |
| CO04 | Colombia | Academic | 1 | 2019 |
| CO05 | Colombia | Academic | 1 | 2019 |
| CO06 | Colombia | Academic | 1 | 2019 |
| CO07 | Colombia | Academic | 1 | 2019 |
| CO08 | Colombia | Academic | 1 | 2019 |
| CO09 | Colombia | Academic | 1 | 2019 |
| CO10 | Colombia | Interest groups | 1 | 2019 |
| CO11 | Colombia | Interest groups | 1 | 2019 |
| CO12 | Colombia | Interest groups | 1 | 2019 |
| CO13 | Colombia | Interest groups | 1 | 2019 |
| CO14 | Colombia | Advisory | 1 | 2019 |
| CO15 | Colombia | Advisory | 1 | 2019 |
| CO16 | Colombia | Advisory | 1 | 2019 |
| CO17 | Colombia | Advisory | 1 | 2019 |
| CO18 | Colombia | Advisory | 1 | 2019 |
| CO19 | Colombia | Advisory | 1 | 2019 |
| CO20 | Colombia | Advisory | 1 | 2019 |
| CO21 | Colombia | Advisory | 2 | 2019 |
| CO22 | Colombia | Advisory | 1 | 2019 |
| CO23 | Colombia | Advisory | 1 | 2019 |
| CO24 | Colombia | Advisory | 1 | 2019 |
| CO25 | Colombia | Advisory | 1 | 2019 |
| CO26 | Colombia | Advisory | 1 | 2019 |
| CO27 | Colombia | Advisory | 1 | 2019 |
| CO28 | Colombia | Advisory | 1 | 2019 |
| CO29 | Colombia | Advisory | 1 | 2019 |
| CO30 | Colombia | Advisory | 3 | 2019 |
| CO31 | Colombia | Business | 1 | 2019 |
| CO32 | Colombia | Business | 1 | 2019 |
| CO33 | Colombia | Business | 1 | 2019 |
| CO34 | Colombia | Business | 1 | 2019 |
| CO35 | Colombia | Business | 2 | 2019 |
| CO36 | Colombia | Business | 2 | 2019 |

| *ID* | *Country* | *Category* | *Number of people present* | *Date* |
|---|---|---|---|---|
| CO37 | Colombia | Public Sector | 2 | 2019 |
| CO38 | Colombia | Public Sector | 1 | 2019 |
| CO39 | Colombia | Public Sector | 1 | 2020 |
| IN01 | India | Other | 1 | 2019 |
| IN02 | India | Academic | 1 | 2019 |
| IN03 | India | Academic | 1 | 2019 |
| IN04 | India | Academic | 2 | 2019 |
| IN05 | India | Academic | 1 | 2019 |
| IN06 | India | Academic | 1 | 2019 |
| IN07 | India | Academic | 1 | 2019 |
| IN08 | India | Interest groups | 1 | 2019 |
| IN09 | India | Interest groups | 1 | 2019 |
| IN10 | India | Advisory | 1 | 2019 |
| IN11 | India | Advisory | 1 | 2019 |
| IN12 | India | Advisory | 1 | 2019 |
| IN13 | India | Advisory | 2 | 2019 |
| IN14 | India | Advisory | 1 | 2019 |
| IN15 | India | Advisory | 2 | 2019 |
| IN16 | India | Advisory | 1 | 2019 |
| IN17 | India | Advisory | 2 | 2019 |
| IN18 | India | Advisory | 3 | 2019 |
| IN19 | India | Advisory | 2 | 2019 |
| IN20 | India | Advisory | 2 | 2019 |
| IN21 | India | Advisory | 1 | 2019 |
| IN22 | India | Advisory | 2 | 2019 |
| IN23 | India | Business | 1 | 2019 |
| IN24 | India | Business | 1 | 2019 |
| IN25 | India | Business | 1 | 2019 |
| IN26 | India | Public Sector | 1 | 2019 |
| IN27 | India | Public Sector | 1 | 2019 |
| NG01 | Nigeria | Business | 1 | 2022 |
| NG02 | Nigeria | Advisory | 1 | 2022 |
| NG03 | Nigeria | Business | 1 | 2022 |
| NG04 | Nigeria | Academic | 1 | 2022 |
| NG05 | Nigeria | Advisory | 1 | 2022 |
| NG06 | Nigeria | Academic | 1 | 2022 |
| NG07 | Nigeria | Advisory | 1 | 2022 |
| NG08 | Nigeria | Advisory | 1 | 2022 |

| *ID* | *Country* | *Category* | *Number of people present* | *Date* |
|---|---|---|---|---|
| NG09 | Nigeria | Public Sector | 1 | 2022 |
| NG10 | Nigeria | Public Sector | 1 | 2022 |
| NG11 | Nigeria | Advisory | 1 | 2022 |
| NG12 | Nigeria | Advisory | 1 | 2022 |
| NG13 | Nigeria | Public Sector | 1 | 2022 |
| NG14 | Nigeria | Advisory | 1 | 2022 |
| NG15 | Nigeria | Public Sector | 1 | 2022 |
| NG16 | Nigeria | Academic | 1 | 2022 |
| NG17 | Nigeria | Public Sector | 1 | 2022 |
| SN01 | Senegal | Public Sector | 1 | 2022 |
| SN02 | Senegal | Advisory | 1 | 2022 |
| SN03 | Senegal | Interest groups | 1 | 2022 |
| SN04 | Senegal | Business | 1 | 2022 |
| SN05 | Senegal | Advisory | 3 | 2022 |
| SN06 | Senegal | Advisory | 3 | 2022 |
| SN07 | Senegal | Advisory | 3 | 2022 |
| SN08 | Senegal | Interest groups | 1 | 2022 |
| SN09 | Senegal | Public Sector | 1 | 2022 |
| SN10 | Senegal | Business | 1 | 2022 |
| SN11 | Senegal | Business | 1 | 2022 |
| SN12 | Senegal | Advisory | 1 | 2022 |
| SN13 | Senegal | Public Sector | 1 | 2022 |
| SN14 | Senegal | Public Sector | 1 | 2022 |
| SN15 | Senegal | Public Sector | 1 | 2022 |
| SN16 | Senegal | Public Sector | 1 | 2022 |
| SN17 | Senegal | Advisory | 1 | 2022 |
| SN18 | Senegal | Business | 1 | 2022 |

## 10.3 Method to calculate treaty shopping risk

To summarize countries' policy approach with respect to treaty shopping, I calculate a treaty shopping risk indicator for each country-year-payment type, which I define as the difference between the weighted mean withholding rate and the minimum rate concluded with a potential conduit jurisdiction in the network. This indicator should show how the incentive to engage in treaty shopping has evolved in a country over time. Due to data limitations, I am only able to calculate this indicator for a sample of 59 developing countries for the time span 2004 to 2021. This limitation does not permit any comparison between developing and developed countries.

### 10.3.1 Data sources

Data on tax treaties concluded by developing countries is available from a dataset collected and published by Hearson and colleagues at the ICTD.[1] I extend this dataset by adding dates of treaty terminations sourced from IBFD's Tax Research Platform and other internet sources, in order to be able to reconstruct how each country's treaty network looked like in a given year. Finally, I use data on domestic withholding regimes and tax treatment of capital gains derived by non-residents from sales of shares for the years 2004 to 2021 from Ernst & Young's Global Corporate Tax Guides. I collected this data using a semi-automatic pdf extraction method.

As opposed to previous literature on treaty shopping,[2] I do not only consider the treatment of the three passive income flows (dividends, royalties, interest), but also the treatment of technical service payments, and taxation of capital gains at source. Evidence on specific countries shows that in particular the treatment of capital gains taxes can be more problematic in terms of base erosion. For example, many investors used Mauritius as conduit country to invest in India mainly due to the opportunity to avoid capital gains taxes.[3] Thanks to the ICTD Tax Treaties Database, comprehensive data in a machine-readable format is available for the treatment of these types of payments in tax treaties concluded by developing countries.

### 10.3.2 Calculation of treaty shopping risk

For each host country-year and each type of payment, I first calculate the mean withholding rate, weighted by the potential importance of a home country in inward investment flows. This indicator shows what withholding rate foreign investors would have to pay on average if they do not engage in treaty shopping. A weighted mean is used instead of the arithmetic mean, since not all home countries (and hence not all tax treaties) are equally relevant for each host country in terms of potential investment flows. "Potential importance" is a composite indicator consisting in the home country's GDP expressed as the share of all possible home coun-

1 The dataset is available at www.treaties.tax/ The version of the dataset used here is Version: 2.0.3. of 5 March 2021. According to the website, this version includes "treaties signed prior to 1 January 2020, status correct as of 29 August 2020, MLI positions correct as of 23 February 2021".

2 Petkova, Stasio, and Zagler, "On the Relevance of Double Tax Treaties"; Janský and Šedivý, "Estimating the Revenue Costs of Tax Treaties in Developing Countries"; Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies"; Van't Riet and Lejour, "Optimal Tax Routing: Network Analysis of FDI Diversion"; Arel-Bundock, "The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy."

3 Kotha, "The Mauritius Route: The Indian Response"; Robertson, "India's Offshore Pivot: The Implications of a Tougher Approach towards Mauritius."

tries' GDPs, the home country's GDP per capita and the physical distance between both countries.[4] This follows the intuition that any host country is more likely to receive FDI from a country, if it is 1) big, 2) wealthy, and 3) a neighbour. Hence, if for example, a country changes its bilateral outbound withholding rate with the USA, this is considered a more relevant change for relevant variables (such as tax revenue and investment) than if it changes its withholding rate with a country with a smaller economy such as for example Belgium. An alternative would be to use actual bilateral FDI flows or global FDI outflows from home countries as weights, but both indicators suffer from the distortions induced by treaty shopping. Actual bilateral FDI is difficult to observe due to the important role of conduit jurisdictions (and can only be estimated, based for example on data on conduit companies).[5] Therefore, I prefer the approach explained previously.

The second indicator I calculate for each country-year-payment type is the difference between the weighted mean withholding rate and the minimum rate concluded with a potential conduit jurisdiction in the network. A large difference between mean and minimum conduit rate indicates a high risk for treaty shopping, a small difference indicates a low risk. It may for example be observed that a treaty shopping risk indicator increases or declines, meaning that treaty shopping risk is increased or reduced. However, there are different ways how, for example, a decline in risk could come about: 1) The weighted mean rate declines, (e.g., if new treaties are signed or domestic rates are reduced) 2) the minimum conduit rate increases (e.g., if a treaty with a conduit jurisdiction is re-negotiated or terminated) 3) or a combination of both. These different causes for a change in treaty shopping risk may account of different overall strategies towards tax avoidance. If a country pursues 1), it essentially "gives up" to the pressures of treaty shopping and possibly tax competition with other countries. 2) is a strategy that seeks more to protect domestic resources. Of course, since treaties are bilateral (or in some cases multilateral) policies, a change in treaty shopping risk may not always be brought about by the country analyzed itself, but could also result from a policy change of the partner country, for example if the latter changed the law in a way that would make it more or less likely to be used as a conduit jurisdiction.

An alternative option would be to calculate indirect routes as other researchers have done.[6] However, the ICTD treaty dataset does not yet include treaties concluded among developed countries. For calculating indirect routes, however, a complete dataset of all tax treaties would be necessary. This should be done in future research.

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4 GDP data comes from the World Bank and geographical distance from CEPII.

5 Damgaard, Elkjaer, and Johannesen, *What Is Real and What Is Not in the Global FDI Network?*

6 Arel-Bundock, "The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy"; Van't Riet and Lejour, "Optimal Tax Routing: Network Analysis of FDI Diversion."

### 10.3.3 Defining conduit jurisdictions

A challenging question is how to define which countries can be used as conduits in a given year. A conduit company has been defined by the OECD as "company situated in a treaty country [that] is acting as a conduit for channelling income economically accruing to a person in another State who is thereby able to take advantage 'improperly' of the benefits provided by a tax treaty."[7] Not all countries' legislations are suitable to set up conduit companies and channel income. Those that are could be identified using an empirical approach or using legal analysis.

Garcia-Bernardo et al. adopt an empirical approach, analysing which countries act frequently as intermediate jurisdiction in MNE's ownership chains and therefore potentially as conduit jurisdictions.[8] Through this method they identified the Netherlands, the United Kingdom, Switzerland, Singapore, and Ireland. The shortcoming of the empirical approach is that it may not be successful in uncovering smaller conduit jurisdictions, which at the global scale are not important but which could be relevant for individual jurisdictions. For example, while Spain might not be used as frequently as the jurisdictions mentioned above, its role as conduit jurisdiction for some Latin American countries is highlighted by practitioners and legal literature.[9] The empirical approach does not allow either to identify jurisdictions that may be suitable, but that have in practice not been used, for example because of a lack of promotion of the tax regime among practitioners. Finally, firm-level data is known for having incomplete jurisdictional coverage,[10] and firms might not react quickly to policy changes that might facilitate or hinder the use of a country as conduit jurisdiction. Therefore, I rely primarily on an analysis of the legal system to identify conduit jurisdictions.

The main characteristic of a conduit country is that it allows the MNE to pass through the flows with less costs than through a direct route, whereas typically no or little taxes are levied by the conduit country itself. Which countries can be used as conduit is analysed by types of income flow.

7 OECD, "Double Taxation Conventions and the Use of Conduit Companies," 2.
8 Garcia-Bernardo et al., "Uncovering Offshore Financial Centers."
9 CO01, CO07, CO28. See also Jiménez, "Las Entidades de Tenencia de Valores Extranjeros Como Instrumento de Planificación Fiscal."
10 Tørsløv, Wier, and Zucman, "The Missing Profits of Nations," 5–7.

*Table 10: Characteristics of conduit jurisdictions*

| Type of flow from country or of origin | Characteristics of conduit jurisdiction |
|---|---|
| Dividend (above participation threshold) | • 0% corporate tax rate or<br>• Participation exemption/territorial regime and 0% withholding tax for dividend or interest |
| Capital gains (shares / land-rich) | • 0% corporate tax rate or<br>• Participation exemption/territorial regime and 0% withholding tax for dividend or interest or capital gains derived by non-residents |
| Interest | • 0% corporate tax rate or<br>• 0% interest withholding or<br>• 0% tax on interest income received from abroad and 0% withholding tax for dividend or interest |
| Royalties | • 0% corporate tax rate or<br>• 0% royalties or interest withholding or<br>• 0% tax on royalties received from abroad and 0% withholding tax for dividend |
| Technical services | • 0% corporate tax rate or<br>• 0% services withholding |

*Source: the author*

For each category, I assessed if the country has a special tax regime with the features mentioned above, if the features are not available in the normal tax regime (e.g., holding or headquarter regimes, IP or financing regimes, or services centre regimes).

For payments which are usually deductible as costs (such as interest, royalties, and technical services), it is generally not a requirement that a 0% corporate tax rate be levied on such foreign income, since income can be matched with costs incurred from another jurisdiction.[11]

One can also assume that companies can switch the nature of the flow when passing it through a conduit.[12] Lejour et al. empirically investigated to what extent companies switch the character of flows by comparing yearly cross-border in- and outflows of Dutch SPEs, using firm-level data on dividend, interest and royalty flows.[13] They estimate that companies do indeed switch between dividend, interest, and royalty. However, they find that in practice the figures for changes between royalty and interest

11 Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies."

12 Avi-Yonah and Panayi, "Rethinking Treaty-Shopping: Lessons for the European Union," 24; United Nations, "Contributions to International Co-Operation in Tax Matters. Treaty Shopping, Thin Capitalization, Co-Operation between Tax Authorities, Resolving International Tax Disputes," 5.

13 Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies."

flows are low.[14] Indeed, this type of change may not matter a lot since the tax treatment of interest and royalty is often the same. In addition, it seems conceptually more difficult to transform a financial flow into a royalty for services flow. Therefore, in addition to investigating treaty shopping strategies where the same type of payments flows through the conduit country, I assume that all kinds of flow can be transformed into a financial flow (i.e., dividend or interest).

This approach is restrictive in the sense that it only considers situations where companies can pass the income completely free of tax through the conduit, hence excluding those countries where a small amount of tax would be levied, which might still result in an advantage for the MNE.

On the other hand, the approach may be too wide, since not all countries with a tax regime suitable for setting up conduit companies might be effectively usable as such, for example because there is too much uncertainty around the applicability of the tax regime or because there are other business risks, such as expropriation or exchange controls. To address this issue at least partially, I excluded countries with heavy exchange restrictions, which I define as having a normalized Chinn-Ito index of 0.4 or less.[15] However, I do not apply this exclusion to countries with special regimes such as holding or headquarter regimes, since it is likely that the regular exchange restrictions would not apply to these special regimes.

Another potential limit to the suitability of a country for conduit activities could be anti-avoidance rules. Even if a country levies 0% withholding tax on interest payments abroad, the country might not be suitable as a conduit if it imposes a rule restricting the deductibility of interest to related parties. However, earnings-stripping rules such as proposed in BEPS Action 4 should not hinder conduit companies, since they typically apply only to the difference between interest deducted and interest received,[16] that is they do not apply where the payments made are matched by payments received, which would be the case in the conduit scenario. CFC rules should have no impact since the companies involved in the typical treaty shopping scheme are either engaged in an active business or do not make profits. Finally, BEPS Action 5 mandates countries to introduce substance requirements for their low-tax regimes. However, with respect to holding company regimes, the Action 5 report is relatively imprecise concerning the necessary substance requirement, and with respect to regimes that only provide for low taxation of income from dividends and capital gains, it assumes that

14 Lejour, Möhlmann, and van 't Riet, 14.

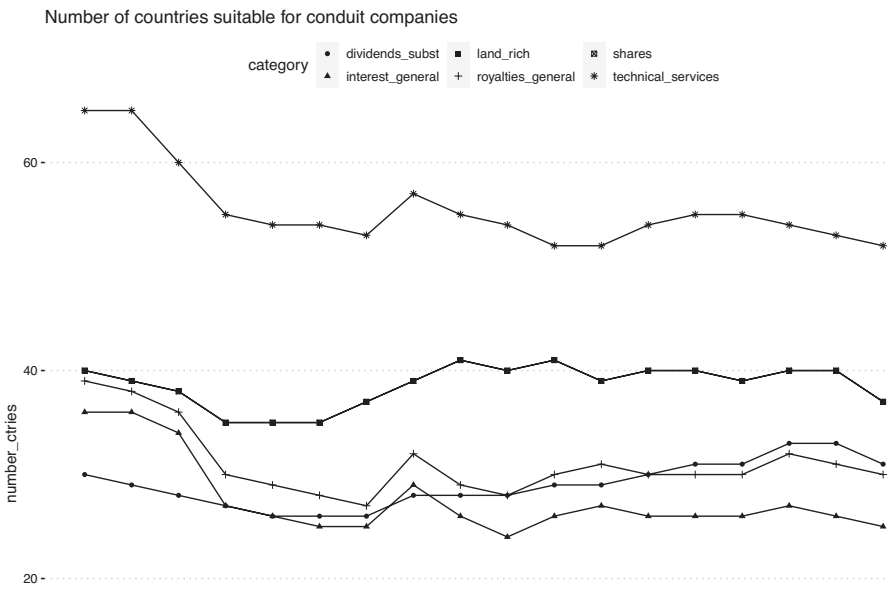
15 Chinn and Ito, "What Matters for Financial Development? Capital Controls, Institutions, and Interactions."

16 OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update*, 41–42.

the work under other Action items may be sufficient.[17] In general, however, substance requirements requiring heavy investment in tangible capital and employment requirement, such as often found in free trade zone regimes would likely make the use of the regime as a conduit too costly. For IP regimes with nexus requirements in place, it can be assumed that these are less likely to be useful in treaty shopping structures. Therefore, I take nexus requirements into account in the analysis of whether a country can be used as a conduit country and I do not include special low tax regimes, where the description conveys that the regime is only available for companies with significant substance.

Figure 18 shows the evolution of the number of countries that have tax regimes that are suitable for serving as conduit for the different types of payments. On average the number has not significantly changed since 2004. For dividends, it has slightly increased, presumably due to the fact that more countries have introduced participation exemption regimes.[18] For royalties, technical service payments, and interest, the number has somewhat decreased.

*Figure 18: Number of countries suitable for conduit companies*




*Source: compiled by the author, based on ICTD Tax Treaty Dataset and EY Corporate Tax Guides.*[19]

17 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 39–40.

18 Shin, "Why Do Countries Change the Taxation of Foreign-Source Income of Multinational Firms?"

19 Hearson, "Tax Treaties Explorer [Online Database]"; EY, "Worldwide Corporate Tax Guides."

### 10.3.4 Using conduits for service payments

Do companies treaty shop for reduced withholding tax on payments for technical services? Most studies on treaty shopping only study passive income flows.[20] However, for developing countries which levy withholding taxes on payments for technical services (or sometimes other services), and where a treaty provides for a reduction or elimination of such withholding tax, the question might arise.

One could assume that providing services always requires some substance (e.g., employees who perform the services) and that therefore companies cannot route service payments through conduit companies. Nevertheless, even if a company in a country B may enter into a contract for the provision of such services to residents of a country B, the company could probably subcontract a company in a third country C for the totality of the contract, thus effectively routing an income flow from country A to country C through country B, possibly taking advantage of a treaty between country A and country B. This may be even easier for services that can be automated to some extent, for example financial services or payments for software which are not classified as royalties. For example, so-called "software as a service" is classified as technical service in Brazil.[21] Harris asserts that "services are commonly provided by foreigners into a source State through tax havens."[22]

The empirical evidence on the phenomenon is scarce, however. Johannesen et al. found, using data from German companies that service payments to affiliates are made disproportionately to companies in low tax jurisdictions. However, they do not assess whether the services are effectively rendered from these jurisdictions (i.e., whether companies engaged in treaty shopping or not).[23]

Through BEPS Action 6, an example was added to the Commentary to the OECD Model Convention ("Example G"), which deals with the provision of management, legal, and financing services to group subsidiaries established in different countries from a location that has been chosen, among others, for its tax advantages. The example suggests that such a situation should not lead to a denial of benefits, if the services "constitute a real business through which [the company] exercises substantive economic functions, using real assets and assuming real risks, and that business is carried on by [the company] through its own personnel located in [the country]".[24]

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20 Lejour, Möhlmann, and van 't Riet, "The Immeasurable Tax Gains by Dutch Shell Companies"; Petkova, Stasio, and Zagler, "On the Relevance of Double Tax Treaties"; Janský and Šedivý, "Estimating the Revenue Costs of Tax Treaties in Developing Countries."

21 Kjærsgaard, "Allocation of the Taxing Right to Payments for Cloud Computing-as-a-Service," 400.

22 Harris, "Chapter V: Neutralizing Effects of Hybrid Mismatch Arrangements," 294.

23 Hebous and Johannesen, "At Your Service! The Role of Tax Havens in International Trade with Services."

24 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, 62.

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# 12 Summaries

## 12.1 English

*Introduction*

The Base Erosion and Profit Shifting (BEPS) Project, launched by the Organization for Economic Cooperation and Development (OECD) and the Group of 20 (G20) in 2013 marked a moment of intensification in global governance in the area of taxation of multinational enterprises. Previously international institutions had presented the outcomes of their deliberations as mere recommendations or models for domestic legislation or bilateral treaties. In contrast, the BEPS Project introduced a number of minimum standards subject to peer review and presented recommendations on a greater range of topics. Moreover, although initially only OECD and G20 members participated in the development phase of the BEPS Project, the geographical scope has been significantly increased after the creation of the BEPS Inclusive Framework in 2016. Whether to interpret these developments as positive has become subject to a significant amount of debate among academics, policymakers, and other observers.

Some see it as collaboration to end tax avoidance, others consider it as an imposition of powerful actors' preferences on less powerful ones, and a third group regards it as not impactful at all. Evaluating the accuracy of either interpretation subsequently depends on how countries act in practice: Whether policy standards should indeed be seen as devices by which powerful countries impose their preferences on less powerful ones depends on how they affect actors in practice. Likewise, it would be difficult to claim that there is cooperation when commitments to adopt certain policies are not followed in practice. Observing activity at the international level is therefore only the starting point of the analysis. The second step implies considering what the recipients of policy standards actually do with them. This dissertation focusses on the second step by asking:

To what extent has the BEPS Project impacted developing countries' approach to international tax avoidance?

To answer this question, I develop two typologies to that allow categorizing different international tax avoidance policies, which can then serve to evaluate the consistency between international standards and local implementation. Further, I conduct empirical case studies of the policy response by four countries with respect to two international tax problems.

The case studies were conducted in four emerging and developing countries: Colombia, India, Nigeria, and Senegal. They were selected

because it could be supposed that, among the wider subset of developing and emerging economies, they offer a wide range of potentially relevant features due to their differences in legal and political systems, size, level of development and structure of the economy. In particular, they represent different combinations of key variables that are a priori important for the degree of uptake of international standards: market power, exposure to the OECD processes, and capacity. In the four countries I conducted interviews with international tax policy stakeholders, to attempt to better conceptualize how the BEPS Project impacts policy decisions, on the one hand, and how international taxation is practiced by the tax administration, companies, and tax advisors on the other hand. The two policy areas I focus on are treaty shopping and transfer pricing. Both are among those that are considered as most relevant to capital importing countries.

*Two heuristics to analyze the BEPS Project and international tax policies more generally*

The first step I undertake in the analysis is introducing two types of typologies that are useful heuristics for analyzing what is proposed in the BEPS Project and international tax policies more generally. This is the focus of chapter 3. The first typology shows that international tax norms can be distinguished based on what type of country role in international tax planning they address. I distinguish three roles: a defensive, a facilitating, and a supportive role: policy standards developed by international organizations can target the jurisdictions that are on the (potentially) revenue-losing side of the problem (defensive dimension), they can target those jurisdictions the regimes of which are used to avoid taxes in other countries (facilitating dimension), or they can rather target headquarter countries (supportive dimension).

Second, examining in on the ways that countries on the defensive side can deal with the issue, one can further identify a multitude of options: A country can adopt a finely delineating response which consists in analyzing a taxpayer's behaviour as closely as possible to distinguish good from bad behaviour. Alternatively it can adopt responses that go more to the "root" of the problem by either eliminating benefits that taxpayers may attempt to obtain artificially (blunt response) or by eliminating taxes. For the sake of completeness, I also discussed the possibility and rationales of not adopting any response, and discussed ideas that attempt to address international tax avoidance through international harmonization. Each response comes with trade-offs with respect to administrability, tax revenues, effects on non-avoidant taxpayers or the required degree of international cooperation.

In chapter 4, I ask what the BEPS Project seeks to attain, and through which means. I find that, in terms of the heuristic developed in chapter 3, the BEPS Project mainly encourages finely delineating responses and discourages countries from addressing the problem in an overly indiscriminate manner. It should be noted that some features of the BEPS Project express more acceptance of what I termed as "blunt" solutions, compromising to

some extent with preferences that emerging economies and civil society organizations managed to bring into the process. However, the finely delineating philosophy is arguably still dominant. Finally, it is important to mention that nowhere does the BEPS Project require countries to actually defend themselves against tax avoidance.

In sum, whether the BEPS Project is therefore a driver, a limit, or not impactful... at all in countries' fight against tax avoidance is an open question. It should depend on what solutions they had in place beforehand or those they might have adopted in its absence. Knowing the latter is of course not possible with certainty. Nevertheless, case studies on the evolution of countries' policies in specific policy areas could improve our ability to assess where the BEPS Project had an impact and where it did not.

*Domestic political economy of implementing international standards*

In chapter 5, I discuss different features of countries that could explain why they adopt a certain approach to international tax avoidance at a certain moment in time. I first highlight the importance of carefully analyzing the status-quo ante of the legal and administrative system, arguing that how a country previously addressed international tax avoidance is likely to have an important impact on future approaches. Then I discuss the relevance of limits of structural features of developing countries, such as their position in the market for MNE investment, and a lack of administrative capacity, in explaining policy choices. Subsequently, I turn to the preferences and the influence of different governmental and non-governmental actors in the policy process. Here I use the typology developed in chapter 3 a heuristic to distinguish different policy preferences. I find that since the status-quo ante in terms of anti-tax avoidance policy was often judged as worse, businesses will support the introduction of anti-tax avoidance rules proposed by the OECD. However, the actual influence of businesses and other non-state stakeholders, in the process should not be overstated. Instead, the struggle over the approach to take is more often fought within government itself, opposing actors that favor ease of tax collection and those more concerned about the impact of tax rules on investment. It seems that the former prevails more often, and that the BEPS Project may have strengthened their position, even if the policy ultimately adopted is not necessarily the preferred response suggested by the BEPS Project.

*Impact of the BEPS Project on transfer pricing policies and practice and approaches to treaty shopping*

In chapters 6 and 7, I compare how the approach to international tax avoidance has evolved in Colombia, India, Nigeria, and Senegal as a response to the BEPS Project (or not) with respect to two important policy problems: transfer pricing and treaty shopping.

Broadly, the case studies show that the BEPS Project has left its mark on how countries approach the topic, although it is more worth highlighting where it has failed to do so and where countries have chosen to

diverge. First, when addressing transfer pricing, the countries studied have taken steps to bring their regulations more in line with the BEPS Project's approach, although important delays can be observed with respect to specific items. The approach to transfer pricing supported by the OECD prior to the BEPS Project has been emblematic of the finely delineating approach to international tax avoidance. Prior to the BEPS Project this approach was not accepted much by the countries studied, and it seems reasonable to extend this conclusion to most of the developing world. However, the OECD's approach has never been the only approach: Within the paradigm of the arm's-length principle itself, alternatives have been developed and used, such as certain aspects of the Indian transfer pricing regulations. In addition, other tax rules such as withholding taxes (and even value added tax) and foreign exchange rules condition to what extent transfer pricing actually is an issue for the erosion of tax bases. As the case studies suggest, these have not fully been able to deal with the problem, but they should not be omitted when assessing the overall trajectories of countries.

Whereas Nigeria and India diverge more in their policies than Senegal and Colombia, practice is most aligned in India, which can mainly be explained by the strength of India's court system, which imposes a greater discipline on the tax administration. The differences that can be observed across countries can be linked to the development of transfer pricing policy and enforcement prior to the BEPS Project, to differences in capacity, and to the accessibility of the dispute resolution system and market power. It is likely no coincidence that the higher market power of Nigeria and India corresponds to the greater divergences in the policies that are adopted. Capacity affects both the ability of countries to apply transfer pricing regulations in the spirit of the OECD in practice, their propensity to deviate from OECD rules (although not in a deterministic way as the Senegalese case shows) and the adoption of CbCR, where a lack of capacity means that the confidentiality measures necessary to receive information abroad are put in place in a delayed fashion. For the implementation of the OECD's transfer pricing approach in practice, the quality of judicial systems seems to matter most. There is more scope for auditors to apply transfer pricing in a blunt way and then negotiate with taxpayers when the latter face important hurdles for invoking the courts, such as in Senegal and Nigeria. Paradoxically, the pre-existence of an easily accessible judicial system also conditions the impact of BEPS Action 14, that is designed for enhancing international dispute resolution.

In terms of treaty shopping, countries have adopted different approaches, as well: Although the BEPS Project seems to have contributed to the fact that in those cases where treaty shopping caused important revenue losses – India and Senegal –, governments adopted some responses to stop treaty shopping after years of piecemeal enforcement or outright tolerance, they do not only rely on the BEPS Project's preferred solution but take decidedly stricter measures. The BEPS Project's recommendations to deal with it are largely in the spirit of the finely delineating approach although

they do not explicitly rule out that states adopt other responses. While the process to insert anti-abuse clauses seems to encounter an obstacle in the ratification procedures of the Multilateral Instrument (MLI) developed by the OECD (although not necessarily due to an opposition in substance), countries have resorted at times to other measures such as renegotiating or terminating treaties. The variation seems first of all due to a variation in the urgency of the issue: As in the case of transfer pricing, the extent to which treaty shopping has actually been a policy problem varies among countries. This depends on factors such as whether treaties have been signed with potential conduit jurisdictions and the degree of benefits these treaties confer compared to domestic law and other concluded treaties. Where the issue is more sizeable in terms of revenue loss, additional responses to the insertion of an anti-avoidance clause such as renegotiating or terminating are taken.

The fact that the BEPS Action 6 minimum standard only seems to be slowly making its way into countries' treaty networks concurs with the anecdotical evidence on other countries' renegotiations and terminations, even though the case studies also show that alternative responses are not adopted as alternative to BEPS Action 6 but rather as a complement. Another important observation though is that data beyond the four countries studied also shows that the phenomenon of treaty shopping is unequally distributed among countries, with some of them not being affected at all.

The case studies also suggest that which approach should be taken is usually a controversial question among different stakeholders within the country that is affected by treaty shopping, and even when the revenue loss is sizeable, it can take a long time until an action is taken. Considerations about investment attraction (i.e., the idea that even investors that are treaty shopping are bringing in welcome additional funds) and diplomacy are powerful counterweights. Other agencies (such as foreign affairs ministries, investment promotion agencies, or even the political level of the finance ministry) thereby act as domestic veto players towards a blunter approach, whereas the tax administration pushes for a more stringent response. Market power may play a role as the change in Indian policy over time illustrates. Fundamentally, even though the BEPS Project places an emphasis on a finely delineating approach, it may also have facilitated the adoption of blunter responses due to the propagation of the message that international tax avoidance is unwanted by the international community.

*What to make of the findings? Contributions to the normative debate*

In the final part (chapter 8), I review the normative debate on the BEPS Project and developing countries and explain where the analysis carried out in the preceding chapters can contribute to the debate (and where not). I propose that, when considering what countries do in practice, some of the critiques can be mitigated, as countries do not seem to unquestioningly adhere to what the BEPS Project suggests. Nevertheless, it is important to keep in mind that the countries researched might lack representativeness.

Finally, I remain critical of attempts to give the BEPS Project more coercive force, such as the inclusion of the BEPS minimum standards in the EU list of non-cooperative jurisdictions. This list, which is maintained by the Council's Code of Conduct Group, and the defensive measures that Member States apply against jurisdictions on the list are the EU's most important tools to promote its ideals of good tax governance abroad. The main criteria that affect whether a country will be considered as non-cooperative are the adoption of three types of policy standards: Exchange of tax information, fair taxation (similar to the OECD's definition of "harmful tax competition"), and the minimum standards of the BEPS Project. In accordance with the typology developed in chapter 3, I argue that the EU list should only include criteria that relate to the "facilitating dimension", i.e., discouraging other countries from adopting or keeping policies that facilitate international tax avoidance. However, only part of the BEPS minimum standards relate to that dimension. Others, such as BEPS Action 14, and parts of Action 6 and Action 13 should not be part of the listing exercise.

## 12.2 Nederlands

Belastingontwijking bestrijden, op de OESO-manier?

De invloed van het BEPS Project op de aanpak van internationale belastingontwijking door ontwikkelingslanden en opkomende landen

*Inleiding*

Het Base Erosion and Profit Shifting (BEPS) project, gelanceerd door de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO) en de Groep van 20 (G20) in 2013, markeerde een moment van intensivering in wereldwijde samenwerking op het gebied van belastingheffing voor multinationale ondernemingen. Eerder hadden internationale instituties de uitkomsten van hun onderhandelingen slechts gepresenteerd als aanbevelingen of modellen voor nationale wetgeving of bilaterale verdragen. Het BEPS-project wijkt hiervan af door het introduceren van een aantal minimumnormen die onderhevig zijn aan peer review en aanbevelingen op een breder scala van onderwerpen. Hoewel in het begin alleen de OESO- en G20-leden deelnamen aan de ontwikkeling van het BEPS-project, is de geografische reikwijdte aanzienlijk vergroot na de oprichting van het BEPS Inclusive Framework in 2016. Of deze ontwikkelingen als positief moeten worden geïnterpreteerd, is onderwerp geworden van veel debat onder academici, beleidsmakers en andere belangengroepen. Sommigen zien het als samenwerking om belastingontwijking te beëindigen, anderen als manier van machtige actoren om hun voorkeuren aan minder machtige op te leggen, en een derde groep ziet het als helemaal niet impactvol. De geldigheid van elke interpretatie hangt op zijn beurt af van hoe landen in de praktijk handelen: of beleidsnormen inderdaad moeten worden gezien als instrumenten waarmee machtige landen hun voorkeuren opleggen aan

minder machtige, hangt af van hoe ze beleidsmakers en andere belanghebbenden in de praktijk beïnvloeden. Op dezelfde manier is het moeilijk om te beweren dat er samenwerking plaatsvindt wanneer toezeggingen om bepaalde beleidsmaatregelen aan te nemen in de praktijk niet plaats vindt. Het observeren van activiteiten op internationaal niveau is daarom slechts het beginpunt van de analyse. Stap twee is het uitzoeken van wat de landen er daadwerkelijk mee doen. Dit proefschrift richt zich op de tweede stap door de vraag te stellen:

In hoeverre heeft het BEPS-project invloed gehad op de aanpak van ontwikkelingslanden ten aanzien van internationale belastingontwijking?

Om deze vraag te beantwoorden, ontwikkel ik twee typologieën die verschillende beleidsmaatregelen voor internationale belastingontwijking kunnen categoriseren. Deze kunnen vervolgens dienen om de coherentie tussen internationale normen en lokale uitvoering te beoordelen. Bovendien onderzoek ik in empirische casestudies hoe vier verschillende landen met betrekking tot twee internationale belastingproblemen internationale normen overnemen (of juist niet). De casestudies werden uitgevoerd in vier ontwikkelingslanden: Colombia, India, Nigeria en Senegal. Deze landen werden geselecteerd omdat beargumenteerd kan worden dat zij, onder de bredere groep van ontwikkelingslanden en opkomende economieën, een breed scala aan potentieel relevante kenmerken bieden vanwege hun verschillen in juridische en politieke systemen, grootte, ontwikkelingsniveau en economische structuur. In het bijzonder vertegenwoordigen zij verschillende combinaties van belangrijke variabelen die van invloed zijn gebleken op de mate van overname van internationale normen: marktmacht, eerdere deelname aan de OESO-processen en capaciteit. In de vier landen heb ik interviews afgenomen met belanghebbenden op het gebied van internationaal belastingbeleid, enerzijds in een poging om beter te conceptualiseren hoe het BEPS-project beleidsbeslissingen beïnvloedt, en anderzijds hoe de belastingdienst, bedrijven en belastingadviseurs het internationale belastingrecht omgaan. De twee beleidsterreinen waarop ik me richt, zijn treaty shopping en verrekenprijzen. Beide beleidsterreinen worden als het meest relevant voor kapitaal importerende landen beschouwd.

*Twee typologieën om het BEPS-project (en internationale belastingbeleid in het algemeen) te analyseren*

De eerste stap die ik onderneem in de analyse, is het introduceren van twee soorten typologieën die nuttige heuristieken vormen voor het analyseren van internationaal belastingbeleid in het algemeen en het BEPS-project in het bijzonder. Dit is het onderwerp van hoofdstuk 3. De eerste typologie laat zien dat internationale belastingnormen kunnen worden gecategoriseerd op basis van de rol van een land in internationale belastingplanning dat zij behandelen. Ik onderscheid drie rollen: een defensieve, een faciliterende en een ondersteunende rol: beleidsnormen ontwikkeld door internationale organisaties kunnen zich voornamelijk richten op de landen die aan de (mogelijk) inkomsten verliezende zijde van het probleem liggen (defensieve

dimensie), zij kunnen zich richten op die landen waarvan de wetgeving wordt gebruikt om belastingen in andere landen te ontwijken (faciliterende dimensie), of zij kunnen voornamelijk gericht zijn op hoofdkantoorlanden (ondersteunende dimensie). Ten tweede, als men nader beschouwt hoe landen aan de defensieve zijde met het probleem kunnen omgaan, kan een veelheid aan opties worden geïdentificeerd: een land kan een zeer gerichte reactie geven, waarbij het gedrag van een belastingplichtige zo nauwkeurig mogelijk geanalyseerd wordt om goed gedrag te onderscheiden van slecht gedrag, of het kan reacties aannemen die meer naar de "wortel" van het probleem gaan door voordelen te elimineren die belastingbetalers mogelijk kunstmatig proberen te verkrijgen (botte reactie) of door belastingen helemaal te elimineren. Voor de volledigheid besprek ik ook de mogelijkheid en argumenten om helemaal geen reactie te geven, en ideeën die proberen belastingontwijking door internationale harmonisatie aan te pakken. Elke reactie brengt compromissen met zich mee met betrekking tot beheerbaarheid, belastinginkomsten, effecten op niet-ontwijkende belastingplichtige of de mate van internationale samenwerking die vereist is. In hoofdstuk 4 vraag ik wat het BEPS-project wil bereiken en met welke middelen. Ik constateer dat, in termen van de heuristiek ontwikkeld in hoofdstuk 3, het BEPS-project voornamelijk gerichte reacties aanmoedigt en landen ontmoedigt om het probleem op een te brede manier aan te pakken. Het moet worden opgemerkt dat sommige kenmerken van het BEPS-project meer in de richting gaan van wat ik "botte" oplossingen noem, voornamelijk om compromissen te sluiten met voorkeuren van sommige opkomende economieën en NGO's. Maar de filosofie van de gerichte aanpak is nog steeds dominant. Ten slotte is het belangrijk op te merken dat het BEPS-project nergens vereist dat landen zich daadwerkelijk te verdedigen tegen belastingontwijking. Samenvattend is het dus een open vraag of het BEPS-project een drijvende kracht, een beperking of helemaal niet impactvol is in de strijd van landen tegen belastingontwijking. Dit is afhankelijk van welke oplossingen landen voorafgaand aan de implementatie hadden of welke zij in afwezigheid daarvan zouden hebben aangenomen. Het kennen van het laatste is natuurlijk niet met zekerheid mogelijk. Toch kunnen casestudies over de ontwikkeling van het beleid van landen op specifieke beleidsterreinen onze capaciteit verbeteren om te beoordelen waar het BEPS-project invloed heeft gehad en waar niet.

*Politieke economie van de implementatie van internationale normen*

In hoofdstuk 5 bespreek ik verschillende kenmerken van landen die kunnen verklaren waarom zij op een bepaald moment een bepaalde benadering kiezen om internationale belastingontwijking aan te pakken. Ik benadruk eerst het belang van een zorgvuldige analyse van de status-quo van het wettelijke en administratieve systeem, waarbij ik betoog dat de manier waarop een land eerder internationale belastingontwijking heeft aangepakt waarschijnlijk een belangrijke invloed zal hebben op toekomstige benaderingen. Vervolgens bespreek ik de beperkte relevantie van structurele kenmerken

van ontwikkelingslanden, zoals hun positie in de markt voor investeringen door multinationals en een gebrek aan administratieve capaciteit, om beleidskeuzes te verklaren. Daaropvolgend ga ik in op de voorkeuren en invloed van verschillende overheidsinstanties, bedrijven en NGO's in het beleidsproces. Hier gebruik ik de typologie uit hoofdstuk 3 om beleidsvoorkeuren te onderscheiden. Ik constateer dat bedrijven de invoering van anti-belastingontwijkingsregels voorgesteld door de OESO zullen steunen omdat het status quo op het gebied van anti-belastingontwijkingsbeleid vaak als nadeliger voor hen werd beoordeeld. De werkelijke invloed van bedrijven, evenals van NGO's, in het proces mag echter niet worden overschat. In plaats daarvan wordt de strijd over de te volgen benadering vaak binnen de regering zelf uitgevochten, voornamelijk tussen voorstanders van gemakkelijke belastinginning en degenen die zich meer zorgen maken over de impact van belastingregels op investeringen. Het lijkt erop dat de eerste groep vaker de overhand heeft, en dat het BEPS-project hun positie heeft versterkt, zelfs als het uiteindelijke beleid niet noodzakelijkerwijs overeenstemt met het beleid dat door het BEPS-project wordt voorgesteld.

*Impact van het BEPS-project op het beleid en de praktijk van verrekenprijzen en het tegengaan van treaty shopping*

In hoofdstuk 6 en 7 vergelijk ik hoe het beleid over internationale belastingontwijking zich heeft ontwikkeld in Colombia, India, Nigeria en Senegal als reactie op het BEPS-project (of niet), met betrekking tot twee belangrijke beleidsproblemen: verrekenprijzen en treaty shopping. Over het algemeen tonen de casestudies aan dat het BEPS-project zijn stempel heeft gedrukt op hoe landen deze onderwerpen benaderen, hoewel het belangrijker is om te benadrukken waar dit niet is gelukt en waar landen hebben gekozen om af te wijken. Wat verrekenprijzen betreft hebben de onderzochte landen stappen genomen om hun voorschriften meer in lijn te brengen met de aanpak van het BEPS-project, hoewel er belangrijke vertragingen zijn ontstaan met betrekking tot specifieke punten. De aanpak van verrekenprijzen die vóór het BEPS-project door de OESO werd ondersteund, is kenmerkend voor de fijnmazige aanpak van internationale belastingontwijking. Deze aanpak is nooit de enige aanpak geweest: binnen het paradigma van het 'arm's-length'-beginsel zelf zijn alternatieven ontwikkeld en veel overgenomen door de onderzochte landen, zoals bepaalde aspecten van de Indiase voorschriften, en het lijkt redelijk om deze conclusie uit te breiden naar de meeste ontwikkelingslanden. Dus, de aanpak van de OESO is nooit de enige aanpak geweest. Bovendien beïnvloeden andere belastingregels zoals bronbelastingen (en zelfs BTW) en douanebepalingen de mate waarin verrekenprijzen daadwerkelijk een kwestie vormen voor de uitholling van belastinggrondslagen. Zoals de casestudies aangeven, zijn deze maatregelen er niet volledig in geslaagd het probleem aan te pakken, maar ze mogen niet over het hoofd worden gezien bij de beoordeling van de algemene trajecten van landen. Hoewel Nigeria en India meer uiteenlopen wat het beleid betreft dan Senegal en Colombia, is de praktijk waarschijnlijk het

meest in lijn met OESO-normen in India, wat voornamelijk kan worden verklaard door de kracht van het Indiase rechtssysteem, dat een hogere discipline oplegt aan de belastingdienst. De verschillen die kunnen worden waargenomen tussen landen kunnen worden toegeschreven aan de ontwikkeling van het beleid en de handhaving van verrekenprijzen vóór het BEPS-project, aan verschillen in capaciteit en aan de toegankelijkheid van het geschillenbeslechtingssysteem en de marktmacht. Het is waarschijnlijk geen toeval dat de grotere marktmacht van Nigeria en India overeenkomt met de grotere verschillen in aangenomen beleid. Capaciteit beïnvloedt zowel de mogelijkheid van landen om de voorschriften voor verrekenprijzen in de geest van de OESO in de praktijk toe te passen, hun neiging om af te wijken van de OESO-regels (hoewel niet op een deterministische manier zoals blijkt uit het geval van ontwikkelingen Senegal) en de adoptie van country-by-country reporting voorschriften, waarbij een gebrek aan capaciteit betekent dat de noodzakelijke vertrouwelijkheidsmaatregelen om informatie uit het buitenland te ontvangen met vertraging worden ingevoerd. Voor de implementatie van de aanpak van de OESO voor transfer pricing in de praktijk lijkt de kwaliteit van de juridische systemen het belangrijkst te zijn. Belastinginspecteurs hebben meer ruimte om verrekenprijzen op een botte manier toe te passen en vervolgens met belastingbetalers te onderhandelen wanneer deze belangrijke obstakels ondervinden om de rechtbanken in te schakelen, zoals in Senegal en Nigeria. Paradoxaal genoeg beïnvloedt het vooraf bestaande gemakkelijk toegankelijke juridische systeem ook de impact van BEPS Actie 14, die is ontworpen om de internationale geschillenbeslechting te verbeteren.

Wat betreft treaty shopping hebben landen ook verschillende benaderingen aangenomen. Het BEPS-project heeft bijgedragen aan het feit dat in landen zoals India en Senegal waarin treaty shopping belangrijke inkomstenverliezen veroorzaakte, na jaren van gefragmenteerde handhaving of openlijke tolerantie uiteindelijk maatregelen worden genomen om treaty shopping te stoppen. Niettemin vertrouwen ze niet alleen op de voorkeursoplossing van het BEPS-project, maar nemen ze beslist strengere maatregelen. De aanbevelingen van het BEPS-project om treaty shopping aan te pakken, sluiten grotendeels aan bij de fijnmazige aanpak, hoewel ze andere maatregelen door staten niet expliciet uitsluiten. Hoewel het proces om anti-misbruikclausules te implementeren hinder lijkt te ondervinden in de ratificatieprocedures van het Multilateraal Instrument (MLI) ontwikkeld door de OESO (hoewel niet noodzakelijkerwijs vanwege een inhoudelijk bezwaar), hebben landen soms hun toevlucht genomen tot andere maatregelen zoals heronderhandeling of beëindiging van verdragen. De variatie lijkt in de eerste plaats te wijten aan de urgentie van het probleem: zoals in het geval van verrekenprijzen varieert de mate waarin treaty shopping daadwerkelijk een beleidsprobleem is onder landen, afhankelijk van factoren zoals of verdragen zijn gesloten met potentiële doorsluislanden en de mate van voordelen die deze verdragen bieden in vergelijking met nationale wetgeving en andere gesloten verdragen. Waar het probleem

aanzienlijker is wat betreft inkomstenverlies, worden aanvullende maatregelen genomen om anti-ontwijkingsclausules te implementeren, zoals heronderhandeling of beëindiging. Het feit dat de minimumnorm van BEPS Actie 6 slechts langzaam doordringt in de verdragsnetwerken van landen, komt overeen met anekdotisch bewijs van heronderhandelingen en beëindigingen in andere landen. Hoewel de casestudies ook laten zien dat alternatieve maatregelen niet worden aangenomen als alternatief voor BEPS Actie 6, maar eerder als aanvulling. Een andere belangrijke observatie is dat gegevens buiten de vier onderzochte landen ook laten zien dat het fenomeen van treaty shopping ongelijk is verdeeld over landen, waarbij sommige landen helemaal niet worden getroffen. De casestudies suggereren ook dat welke benadering moet worden gekozen meestal een controversiele kwestie is onder verschillende belanghebbenden binnen het land dat wordt getroffen door treaty shopping, en zelfs waar het inkomstenverlies aanzienlijk is, kan het lang duren voordat er actie wordt ondernomen. Overwegingen over investeringsaantrekking (bijvoorbeeld het idee dat zelfs investeerders die aan treaty shopping doen, welkome aanvullende middelen binnenbrengen) en diplomatische overwegingen zijn tegenkrachten. Andere instanties (zoals ministeries van buitenlandse zaken, instanties voor investeringsbevordering, of zelfs het politieke niveau van het ministerie van financiën) treden op als veto-spelers tegen een bottere aanpak, terwijl de belastingdienst aandringt op een strengere reactie. Marktmacht kan een rol spelen, zoals blijkt uit de verandering in het beleid van India in de loop der tijd. Fundamenteel gezien, hoewel het BEPS-project de nadruk legt op een fijnmazige aanpak, heeft het ook de overname van bottere reacties vergemakkelijkt door de verspreiding van de boodschap dat internationale belastingontwijking ongewenst is.

*Bijdragen aan het normatieve debat*

Wat te maken van de bevindingen? In het laatste deel (hoofdstuk 8) evalueer ik het normatieve debat over het BEPS-project en ontwikkelingslanden en leg ik uit waar de analyse van de voorgaande hoofdstukken kan bijdragen aan het debat (en waar niet). Ik stel voor dat bij het overwegen van wat landen in de praktijk doen, sommige van de kritieken kunnen worden verzacht, omdat landen niet lijken te doen wat het BEPS-project suggereert zonder kritische evaluatie. Het is echter belangrijk om in gedachten te houden dat de onderzochte landen mogelijk niet representatief zijn. Ik trek de meest directe beleidsaanbeveling uit hoofdstuk 3 en 4, en deze is gericht op de Europese Unie. De lijst van niet-coöperatieve jurisdicties in belastingaangelegenheden van de EU, onderhouden door de Code of Conduct Group van de Raad van de EU, en de defensieve maatregelen die lidstaten toepassen tegen jurisdicties op de lijst, zijn de belangrijkste instrumenten van de EU om haar idealen van goed fiscaal bestuur in het buitenland te bevorderen. De belangrijkste criteria die bepalen of een land als niet-coöperatief wordt beschouwd zijn drie soorten beleidsnormen: uitwisseling van belastinginformatie, eerlijke belastingheffing (vergelijkbaar met de definitie van

"schadelijke belastingconcurrentie" van de OESO) en de minimumnormen van het Base Erosion and Profit Shifting (BEPS)-project. Overeenkomstig de typologie ontwikkeld in hoofdstuk 3, betoog ik dat de EU-lijst alleen criteria moet bevatten die betrekking hebben op de "faciliterende dimensie", dat wil zeggen het ontmoedigen van andere landen om beleid aan te nemen dat internationale belastingontwijking vergemakkelijkt. Alleen BEPS Actie 5 past ondubbelzinnig in deze dimensie. De naleving van andere delen van de minimumnormen, zoals BEPS Actie 14, en bepaalde delen van Actie 6 en Actie 13, zouden geen deel moeten uitmaken van de beoordeling.

## 12.3 Français

*Introduction*

Le projet Base Erosion and Profit Shifting (BEPS), lancé par l'Organisation de coopération et de développement économiques (OCDE) et le Groupe des vingt (G20) en 2013, a marqué un moment d'intensification de la gouvernance mondiale dans le domaine de la fiscalité des entreprises multinationales. Auparavant, les institutions internationales avaient présenté les résultats de leurs délibérations comme de simples recommandations ou modèles pour la législation nationale et les conventions bilatérales. En revanche, le projet BEPS a introduit un certain nombre de normes minimales soumises à un examen par les pairs et a présenté des recommandations sur un plus grand nombre de sujets. En outre, bien qu'initialement seuls les membres de l'OCDE et du G20 aient participé à la phase de développement du projet BEPS, la portée géographique a été considérablement élargie après la création du Cadre Inclusif en 2016. La question de savoir s'il faut interpréter cette évolution comme positive fait l'objet de nombreux débats parmi les universitaires, les décideurs politiques et d'autres observateurs.

Certains y voient une collaboration pour mettre fin à l'évasion fiscale, d'autres l'imposition des préférences d'acteurs puissants à des acteurs moins puissants, et un troisième groupe considère qu'il n'y a pas d'impact du tout. L'évaluation de l'exactitude de l'une ou l'autre interprétation dépend à son tour de la manière dont les pays agissent dans la pratique : La question de savoir si les normes politiques doivent effectivement être considérées comme des dispositifs permettant aux pays puissants d'imposer leurs préférences aux pays moins puissants dépend de la manière dont elles affectent les acteurs dans la pratique. De même, il serait difficile de parler de « coopération » lorsque les engagements d'adopter certaines politiques ne sont pas respectés dans la pratique. L'observation de l'activité au niveau international ne peut donc être que le point de départ de l'analyse. La deuxième étape consiste à examiner ce que les destinataires des normes politiques en font réellement. Cette thèse doctorale se concentre sur cette deuxième étape en posant la question suivante :

Dans quelle mesure le projet BEPS a-t-il eu un impact sur l'approche des pays en développement en matière d'évasion fiscale internationale ?

Pour répondre à cette question, je développe deux typologies qui permettent de catégoriser les différentes politiques de lutte contre l'évasion fiscal international, qui peuvent ensuite servir à évaluer la cohérence entre les normes internationales et la mise en œuvre locale. En outre, je mène des études de cas empiriques sur la réponse politique de quatre pays à deux problématiques spécifiques de fiscalité internationale.

Les études de cas ont été menées dans quatre pays émergents et en voie de développement : La Colombie, l'Inde, le Nigeria et le Sénégal. Ces pays ont été sélectionnés parce que l'on peut supposer que, parmi le sous-ensemble plus large des économies en développement et émergentes, ils offrent un large éventail de caractéristiques potentiellement pertinentes en raison de leurs différences de systèmes juridiques et politiques, de taille, de niveau de développement et de structure de l'économie. En particulier, elles représentent différentes combinaisons de variables clés qui sont a priori importantes pour le degré d'adoption des normes internationales : le pouvoir de marché, l'exposition aux processus de l'OCDE et la capacité administrative. Dans les quatre pays, j'ai mené des entretiens avec des acteurs de la politique fiscale internationale, en essayant de mieux conceptualiser l'impact du projet BEPS sur d'une part les décisions politiques et d'autre part sur la manière dont la fiscalité internationale est pratiquée par l'administration fiscale, les entreprises et les conseillers fiscaux. Les deux domaines d'action sur lesquels je me concentre sont le chalandage fiscal (« treaty shopping ») et les prix de transfert. Ces deux domaines font partie de ceux qui sont considérés comme les plus pertinents pour les pays importateurs de capitaux.

*Deux heuristiques pour analyser le projet BEPS*

La première étape de l'analyse consiste à présenter deux types de typologies qui constituent une heuristique utile pour analyser ce qui est proposé dans le cadre du projet BEPS ainsi que les politiques fiscales internationales de manière plus générale. C'est l'objet du chapitre 3. La première typologie montre que les normes fiscales internationales peuvent être distinguées en fonction du type de rôle joué par le pays dans la planification fiscale internationale. Je distingue trois rôles : un rôle défensif, un rôle de facilitation et un rôle de soutien : les normes politiques élaborées par les organisations internationales peuvent cibler plutôt les juridictions qui potentiellement perdent des recettes fiscales à cause de la planification fiscale (dimension défensive), elles peuvent cibler les juridictions dont les régimes sont utilisés pour éviter les impôts dans d'autres pays (dimension de facilitation), ou elles peuvent plutôt cibler les pays sièges (dimension de soutien).

Deuxièmement, en se concentrant sur les différentes façons dont les pays sur la défensive peuvent traiter le problème, on peut identifier une multitude d'options : Un pays peut adopter une réponse finement ciblée qui consiste à analyser le comportement d'un contribuable aussi étroitement que possible pour distinguer les bons des mauvais comportements, ou il peut adopter des réponses qui vont plus à la «racine» du problème, soit

en éliminant les avantages que les contribuables peuvent essayer d'obtenir artificiellement (réponse brute), soit en supprimant l'impôt évité. Dans un souci d'exhaustivité, j'ai également abordé la possibilité et les raisons de n'adopter aucune réponse, ainsi que les idées qui tentent de s'attaquer à l'évasion fiscale internationale par le biais de l'harmonisation internationale. Chaque réponse s'accompagne de compromis en ce qui concerne les ressources administratives nécessaires, les recettes fiscales potentiellement obtenues, les effets sur les contribuables non évitants ou le degré de coopération internationale requis.

Dans le chapitre 4, je me demande ce que le projet BEPS cherche à atteindre et par quels moyens. Je constate que, selon l'heuristique développée au chapitre 3, le projet BEPS encourage principalement les réponses finement ciblées et décourage les pays d'aborder le problème de manière trop générale. Il convient de noter que certaines caractéristiques du projet BEPS expriment une plus grande acceptation de ce que j'ai appelé les solutions «brutes», en faisant quelques compromis avec les économies émergentes et les organisations de la société civile. Mais on peut dire que la philosophie de délimitation fine reste dominante. Enfin, il est important de mentionner que le projet BEPS n'exige nulle part que les pays se défendent contre l'évasion fiscale.

En résumé, la question de savoir si le projet BEPS est un moteur ou une limite dans la lutte des pays contre l'évasion fiscale ou s'il n'a pas d'impact reste ouverte. Cela devrait dépendre des solutions que les pays avaient déjà mises en place ou qu'ils auraient pu adopter en l'absence du projet. Cela n'est bien sûr pas possible de savoir avec certitude. Néanmoins, des études de cas sur l'évolution des politiques des pays dans des domaines spécifiques peuvent améliorer notre capacité à évaluer où le projet BEPS a eu un impact et où il n'en a pas eu.

*Économie politique de la mise en œuvre des normes internationales*

Dans le chapitre 5, j'examine différentes caractéristiques des pays qui pourraient expliquer pourquoi ils adoptent une certaine approche de l'évasion fiscale internationale à un moment donné. Je souligne tout d'abord l'importance d'une analyse du statu quo du système juridique et administratif, en faisant valoir que la manière dont un pays a précédemment traité l'évasion fiscale internationale est susceptible d'avoir un impact important sur les approches futures. Je discute ensuite de la pertinence des limites des caractéristiques structurelles des pays en développement, telles que leur position sur le marché des investissements des multinationales et le manque de capacité administrative, pour expliquer les choix politiques. Ensuite, je me penche sur les préférences et l'influence des différents acteurs gouvernementaux et non gouvernementaux dans le processus politique. J'utilise ici la typologie développée au chapitre 3 comme heuristique pour distinguer les différentes préférences politiques. Je constate que, dans la mesure où le statu quo en termes de politique de lutte contre l'évasion fiscale a souvent été jugé moins bon, les entreprises soutiendront l'introduction des règles de

lutte contre l'évasion fiscale proposées par l'OCDE. Toutefois, il ne faut pas surestimer l'influence réelle des entreprises ainsi que d'autres acteurs non gouvernementaux dans le processus. Au contraire, la lutte pour l'approche à adopter est plus souvent menée au sein même du gouvernement, opposant les acteurs qui favorisent la facilité de recouvrement de l'impôt et ceux qui sont plus préoccupés par l'impact des règles fiscales sur l'investissement. Il semble que les premiers l'emportent le plus souvent et que le projet BEPS ait pu renforcer leur position, même si la politique finalement adoptée n'est pas nécessairement la réponse préférée suggérée par le projet BEPS.

*Impact du projet BEPS sur les politiques et pratiques en matière de prix de transfert et sur les approches du chalandage fiscal*

Dans les chapitres 6 et 7, je compare la manière dont l'approche de l'évasion fiscale internationale a évolué en Colombie, en Inde, au Nigéria et au Sénégal en réponse au projet BEPS (ou non) en ce qui concerne deux problèmes politiques importants : les prix de transfert et le chalandage fiscal.

D'une manière générale, les études de cas montrent que le projet BEPS a laissé son empreinte sur la manière dont les pays abordent ces sujets, même s'il faut souligner les domaines dans lesquels il n'a pas réussi à le faire et ceux dans lesquels les pays ont choisi de diverger. Premièrement, en ce qui concerne les prix de transfert, les pays étudiés ont pris des mesures pour aligner leurs réglementations sur l'approche du projet BEPS, mais des retards importants peuvent être observés sur des points spécifiques. L'approche des prix de transfert soutenue par l'OCDE avant le projet BEPS a été emblématique de l'approche finement ciblée sur l'évasion fiscale internationale. Avant le projet BEPS, cette approche n'a pas été beaucoup adoptée par les pays étudiés, et il semble raisonnable d'étendre cette conclusion à la plupart des pays en développement. Toutefois, l'approche de l'OCDE n'a jamais été la seule approche possible : Dans le cadre même du principe de pleine concurrence, des alternatives ont été développées et utilisées, comme certains aspects de la réglementation indienne en matière de prix de transfert. En outre, d'autres règles fiscales telles que les retenues à la source (et même la taxe sur la valeur ajoutée) et les règles de change conditionnent la mesure dans laquelle les prix de transfert constituent réellement un problème pour l'érosion de la base imponible. Comme le suggèrent les études de cas, ces règles n'ont pas permis de résoudre entièrement le problème, mais elles ne doivent pas être négligées lors de l'évaluation des trajectoires globales des pays.

Alors que le Nigeria et l'Inde divergent davantage de l'approche de l'OCDE en matière de réglementation que le Sénégal et la Colombie, la pratique administrative est probablement plus alignée en Inde, ce qui peut s'expliquer principalement par la force du système judiciaire indien, qui impose une plus grande discipline à l'administration fiscale. Les différences observées entre les pays peuvent être liées à l'élaboration de la politique de prix de transfert et à son application avant le projet BEPS, aux différences de capacité, à l'accessibilité du système de règlement des différends et à la

puissance du marché du pays. Ce n'est probablement pas une coïncidence si le pouvoir de marché plus élevé du Nigeria et de l'Inde correspond aux plus grandes divergences dans les politiques adoptées. La capacité administrative influe à la fois sur l'aptitude des pays à appliquer les réglementations en matière de prix de transfert dans l'esprit de l'OCDE, sur leur propension à s'écarter des règles de l'OCDE (même si ce n'est pas de manière déterministe, comme le montre le cas du Sénégal) et sur l'adoption du rapport pays par pays, où un manque de capacité signifie que les mesures de confidentialité nécessaires pour recevoir des informations à l'étranger sont mises en place tardivement. Pour la mise en œuvre de l'approche de l'OCDE en matière de prix de transfert dans la pratique, la qualité des systèmes judiciaires semble être le facteur le plus important. Les auditeurs ont davantage de possibilités d'appliquer les prix de transfert de manière brute et de négocier ensuite avec les contribuables lorsque ces derniers se heurtent à des obstacles importants pour saisir les tribunaux, comme c'est le cas au Sénégal et au Nigéria. Paradoxalement, la préexistence d'un système judiciaire facilement accessible conditionne également l'impact de l'action 14 du BEPS, qui vise à améliorer le règlement des différends internationaux.

En ce qui concerne le chalandage fiscal, les pays ont également adopté des approches différentes : Bien que le projet BEPS semble avoir contribué au fait que dans les pays où le chalandage fiscal a entraîné d'importantes pertes de recettes (Inde et Sénégal) ces derniers ont adopté des mesures pour mettre un terme au chalandage fiscal après des années de tolérance du problème, ils ne se contentent pas de la solution privilégiée par le projet BEPS, mais prennent des mesures résolument plus strictes. Les recommandations du projet BEPS pour traiter le chalandage fiscal sont largement dans l'esprit de l'approche finement ciblée, bien qu'elles n'excluent pas que les États adoptent d'autres réponses. Alors que le processus d'insertion de clauses anti-abus semble rencontrer un obstacle dans les procédures de ratification de l'Instrument multilatéral (IML) développé par l'OCDE (mais pas nécessairement en raison d'une opposition de fond), les pays ont parfois eu recours à d'autres mesures telles que la renégociation ou la dénonciation des traités. Cette variation semble tout d'abord due à une variation de l'urgence de la question : Comme dans le cas des prix de transfert, la mesure dans laquelle le chalandage fiscal a effectivement constitué un problème politique varie d'un pays à l'autre, en fonction de facteurs tels que la signature ou non de conventions avec des juridictions dont la législation peut faciliter le chalandage et le degré d'avantages que ces conventions confèrent par rapport au droit national et à d'autres conventions conclues. Lorsque le problème est plus important en termes de perte de revenus, des réponses supplémentaires à l'insertion d'une clause anti-évasion, telles que la renégociation ou la dénonciation, sont prises.

Le fait que la norme minimale de l'action 6 du projet BEPS ne semble que lentement faire son chemin dans les réseaux conventionnels des pays concorde avec les preuves anecdotiques sur les renégociations et les dénonciations d'autres pays, même si les études de cas montrent également que

ces réponses ne sont pas adoptées comme alternative à l'action 6 du projet BEPS, mais plutôt comme complément. Une autre observation importante est que les données au-delà des quatre pays étudiés montrent que le phénomène du chalandage fiscal est inégalement réparti entre les pays, certains pays n'étant pas du tout affectés.

Les études de cas suggèrent également que le choix de l'approche à adopter est généralement une question controversée parmi les différents acteurs du pays touché par le chalandage fiscal, et même lorsque la perte de revenus est importante, il peut s'écouler beaucoup de temps avant qu'une contremesure ne soit prise. Les considérations relatives à l'attraction des investissements (c'est-à-dire l'idée que même les investisseurs qui font du chalandage fiscal apportent des fonds supplémentaires bienvenus) et la diplomatie sont des contrepoids puissants. D'autres agences (telles que les ministères des affaires étrangères, les agences de promotion des investissements, ou même le niveau politique du ministère des finances) souvent agissent en faveur d'une approche plus souple, tandis que l'administration fiscale fait pression pour une réponse plus stricte. Le pouvoir de marché du pays peut jouer un rôle, comme l'illustre l'évolution de la politique indienne au fil du temps. Fondamentalement, même si le projet BEPS met l'accent sur une approche finement ciblée, il a également facilité l'adoption de réponses plus « brutes » en raison de la propagation du message de haut niveau selon lequel l'évasion fiscale internationale n'est plus considérée comme acceptable par la communauté internationale.

*Contributions au débat normatif*

Dans la dernière partie (chapitre 8), je passe en revue le débat normatif sur le projet BEPS et les pays en développement et j'explique en quoi l'analyse effectuée dans les chapitres précédents peut contribuer au débat (et en quoi elle ne le peut pas). Je propose que, si l'on considère ce que font les pays dans la pratique, certaines des critiques doivent être atténuées, car les pays ne semblent pas suivre aveuglément ce que suggère le projet BEPS. Néanmoins, il faut mentionner que les pays étudiés peuvent manquer de représentativité.

Enfin, je reste critique à l'égard des tentatives visant à donner au projet BEPS une plus grande force coercitive, comme l'inclusion des normes minimales BEPS dans la liste des juridictions non coopératives de l'Union Européenne (UE). La liste des juridictions non coopératives en matière fiscale, tenue à jour par le groupe «Code de conduite» du Conseil de l'UE, et les mesures défensives que les États membres appliquent à l'encontre des juridictions figurant sur cette liste sont les outils les plus importants dont dispose l'UE pour promouvoir ses idéaux de bonne gouvernance fiscale à l'étranger. Les principaux critères qui déterminent si un pays sera considéré comme non coopératif sont l'adoption de trois types de normes politiques : L'échange d'informations fiscales, l'imposition équitable (similaire à la définition de la «concurrence fiscale dommageable» de l'OCDE), et les normes minimales du projet BEPS. Conformément à la typologie développée au

chapitre 3, je soutiens que la liste de l'UE ne devrait inclure que des critères liés à la «dimension de facilitation», c'est-à-dire décourager d'autres pays d'adopter ou de maintenir des politiques qui facilitent l'évasion fiscale internationale. Cependant, seule une partie des normes minimales de BEPS se rapporte à cette dimension. D'autres, telles que l'action 14 de BEPS et certaines parties des actions 6 et 13, ne devraient pas faire partie de l'exercice d'établissement de la liste.

## 12.4 Español

*Introducción*

El proyecto sobre la erosión de la base imponible y el traslado de beneficios (BEPS), puesto en marcha por la Organización para la Cooperación y el Desarrollo Económico (OCDE) y el Grupo de los Veinte (G20) en 2013, marcó un momento de intensificación de la gobernanza mundial en el ámbito de la fiscalidad de las empresas multinacionales. Anteriormente, las instituciones internacionales solían presentar los resultados de sus deliberaciones como recomendaciones o modelos para la legislación nacional o los tratados bilaterales. En cambio, el Proyecto BEPS introdujo una serie de normas mínimas sujetas a un examen de pares y presentó recomendaciones sobre una gama más amplia de temas.

Además, aunque inicialmente solo los miembros de la OCDE y del G20 participaron en la fase de desarrollo del Proyecto BEPS, el ámbito geográfico se ha ampliado considerablemente dado a la creación del Marco Inclusivo BEPS en 2016. Si esta evolución se puede interpretar como algo positivo ha sido debatido entre académicos, responsables políticos y otros observadores. Algunos lo ven como una colaboración internacional para acabar con la elusión fiscal, otros como una imposición de las preferencias de los estados poderosos sobre los menos poderosos, y un tercer grupo no le ve ningún impacto.

Evaluar la exactitud de una u otra interpretación depende, a su vez, de como actúen los países en la práctica. El hecho de que las normas políticas deban considerarse dispositivos mediante los cuales los países poderosos imponen sus preferencias a los menos poderosos depende de cómo afecten a los actores en la práctica. Del mismo modo, sería difícil afirmar que existe cooperación cuando los compromisos de adoptar determinadas políticas no se cumplen en la práctica.

Observar la actividad a nivel internacional es, por tanto, sólo una parte del análisis. El segundo paso implica considerar lo que los destinatarios de las normas políticas hacen realmente con ellas. Esta disertación se centra en el segundo paso investigando la siguiente pregunta: ¿En qué medida ha influido el Proyecto BEPS en el planteamiento de los países en desarrollo sobre la elusión fiscal internacional?

Para responder a esta pregunta, desarrollo dos tipologías que permiten categorizar las diferentes políticas de elusión fiscal internacional, que luego

pueden servir para evaluar la coherencia entre las normas internacionales y la aplicación local. Además, realizo estudios de casos empíricos sobre la respuesta política de cuatro países con respecto a dos problemas fiscales internacionales.

Los estudios de caso se realizaron en Colombia, India, Nigeria y Senegal. Se seleccionaron estos países porque cabe suponer que, entre las economías en desarrollo y emergentes, ofrecen una amplia gama de características potencialmente relevantes debido a sus diferencias en cuanto a sistemas jurídicos y políticos, tamaño, nivel de desarrollo y estructura de la economía. En concreto, representan distintas combinaciones de variables cuya observación permite determinar cuál es el grado de asimilación de las normas internacionales. Entre estas variables he considerado: el poder de mercado, la exposición a los procesos de la OCDE y la capacidad administrativa.

En los cuatro países realicé entrevistas con los actores de la política fiscal internacional. Con estas entrevistas cubrí dos objetivos, el primero, hacer un intento de conceptualizar la influencia del Proyecto BEPS en las decisiones políticas. Y como segundo, responder a la pregunta por ¿Cómo la administración tributaria, las empresas y los asesores fiscales practican la fiscalidad internacional? Los dos ámbitos de actuación en los que centro el análisis son el "treaty shopping" y los precios de transferencia. Ambos temas se encuentran entre los problemas que se consideran más relevantes para los países importadores de capital.

*Dos tipologías para analizar el proyecto BEPS y las políticas fiscales internacionales en general*

En el capítulo 3, introduzco dos tipologías que son heurísticas útiles para analizar lo que se propone en el Proyecto BEPS, así como las políticas fiscales internacionales en general. La primera tipología muestra que las normas fiscales internacionales pueden distinguirse en función del papel que juega el país dentro del esquema de planificación fiscal que se toma como base. Al respecto, distingo tres funciones: una defensiva, una facilitadora y una de apoyo. La primera hace referencia a que las normas desarrolladas por las organizaciones internacionales están especialmente dirigidas a las jurisdicciones que tiene mayor potencial de sufrir una pérdida de ingresos a causa del problema identificado. La segunda da cuenta de que las normas desarrolladas se dirigen a las jurisdicciones cuyos regímenes se utilizan para eludir impuestos en otros países. Y la tercera, toma en cuenta la situación de los países donde residen las casas matrices de las multinacionales.

Como segunda tipología, centro el análisis en las distintas formas de respuesta que tienen los países que se sitúan en el lado defensivo, aquí podemos identificar varias opciones, por ejemplo, un país puede adoptar una respuesta finamente delimitadora que consiste en analizar el comportamiento de un contribuyente lo más de cerca posible para distinguir el comportamiento aceptado del no aceptado; o puede adoptar respuestas que vayan más a la "raíz" del problema, ya sea eliminando los beneficios

que los contribuyentes pueden intentar obtener artificialmente (respuesta contundente) o eliminando impuestos. En aras de la exhaustividad, también he analizado la posibilidad y las razones de no adoptar ninguna respuesta, y he debatido ideas que intentan atajar la elusión fiscal internacional mediante la armonización internacional. Cada respuesta conlleva contrapartidas con respecto a la administrabilidad, los ingresos fiscales, los efectos sobre los contribuyentes no evasores o el grado de cooperación internacional necesario.

En el capítulo 4, analizo ¿Qué pretende conseguir el Proyecto BEPS? y ¿A través de qué medios? Encuentro que, en términos de las tipologías desarrolladas en el capítulo 3, el Proyecto BEPS fomenta principalmente respuestas finamente delineadas y desaconseja que los países aborden el problema de una manera demasiado amplia. Cabe señalar que algunas características del Proyecto BEPS expresan una mayor aceptación de lo que he denominado soluciones "contundentes", comprometiéndose en cierta medida con las preferencias que las economías emergentes y las organizaciones de la sociedad civil consiguieron introducir en el proceso. Pero la filosofía de la delineación fina sigue siendo dominante. Por último, es importante mencionar que en ninguna parte del Proyecto BEPS se exige de forma vinculante a los países que se defiendan contra la elusión fiscal.

En resumen, la pregunta por el rol que juega el Proyecto BEPS como impulsor o limitante de la lucha contra la elusión fiscal continúa siendo una cuestión abierta. Toda vez, que depende de las soluciones que los países tuvieran establecidas de antemano o de aquellas que hubieran podido adoptar en su ausencia. Por supuesto, esto no es posible saberlo con certeza. No obstante, los estudios de casos sobre la evolución de las políticas de los países en áreas políticas específicas podrían mejorar nuestra capacidad para evaluar dónde tuvo impacto el Proyecto BEPS y dónde no.

*Economía política de la aplicación de las normas internacionales*

En el capítulo 5, analizo distintas características de los países que podrían explicar por qué adoptan un determinado enfoque de la elusión fiscal internacional en un determinado momento. En primer lugar, subrayo la importancia de analizar el status-quo del sistema jurídico y administrativo, argumentando que la forma en que un país abordó anteriormente la elusión fiscal internacional tendrá un impacto importante en los enfoques futuros. A continuación, discuto la relevancia limitada de las características estructurales de los países en desarrollo, como su posición en el mercado para la inversión de las empresas multinacionales y la falta de capacidad administrativa, en explicar las políticas adoptadas.

Posteriormente, me ocupo de las preferencias y la influencia de los distintos actores gubernamentales y no gubernamentales en el proceso político. Aquí utilizo la tipología desarrollada en el capítulo 3 para distinguir las diferentes preferencias políticas. Concluyo que generalmente las empresas apoyarán la introducción de normas contra la elusión fiscal propuestas por la OCDE, dado que a menudo el statu-quo en términos de política contra la

elusión fiscal se consideraba peor que las políticas discutidas a nivel global. Sin embargo, no debe exagerarse la influencia de las empresas, así como de otros actores no gubernamentales, en el proceso. En cambio, la lucha sobre el enfoque a adoptar es librada a menudo dentro del propio gobierno oponiendo, por un lado, a los actores que favorecen la facilidad de recaudación de impuestos, contra aquellos preocupados por el impacto de las normas fiscales en la inversión. Parece que los primeros prevalecen más a menudo, y que el Proyecto BEPS ha reforzado su posición, aún sin importar que la política finalmente adoptada no sea necesariamente la respuesta sugerida por el Proyecto BEPS.

*Impacto del proyecto BEPS en las políticas y prácticas de precios de transferencia y en los enfoques del treaty shopping*

En los capítulos 6 y 7, comparo cómo ha evolucionado el enfoque de la elusión fiscal internacional en Colombia, India, Nigeria y Senegal como respuesta al Proyecto BEPS con respecto a dos importantes problemas políticos: los precios de transferencia y el treaty shopping. En líneas generales, los estudios de caso muestran que el Proyecto BEPS ha dejado su impronta en la forma en que los países abordan el tema, aunque merece más la pena destacar dónde ha fracasado y dónde los países han optado por divergir.

En primer lugar, cuando se trata de abordar los precios de transferencia, los países estudiados han tomado medidas para ajustar más sus normativas al enfoque del Proyecto BEPS, pero se observan retrasos importantes con respecto a puntos concretos. El enfoque de los precios de transferencia apoyado por la OCDE antes del Proyecto BEPS ha sido emblemático del enfoque finamente delineado de la elusión fiscal internacional. Antes del Proyecto BEPS, este enfoque no ha sido muy adoptado por los países estudiados, y parece razonable extender esta conclusión a la mayor parte del mundo en desarrollo. Sin embargo, el enfoque de la OCDE nunca ha sido el único: Dentro del propio paradigma del principio de plena competencia, se han desarrollado y utilizado alternativas, como ciertos aspectos de la normativa india sobre precios de transferencia. Además, otras normas fiscales, como las retenciones en la fuente e incluso el impuesto sobre el valor agregado, y las normas sobre divisas, condicionan hasta qué punto los precios de transferencia constituyen realmente un problema de erosión de las bases imponibles. Como sugieren los estudios de casos, éstos no han podido atajar totalmente el problema, pero no deben omitirse al evaluar las trayectorias generales de los países.

Mientras que Nigeria e India divergen más en cuanto a políticas que Senegal y Colombia, la práctica está más alineada en India, lo que puede explicarse principalmente por la fortaleza del sistema judicial indio, que impone una mayor disciplina a la administración fiscal. Las diferencias que se observan entre países pueden vincularse al desarrollo de la política de precios de transferencia y su aplicación antes del Proyecto BEPS, a las diferencias de capacidad y a la accesibilidad del sistema de resolución de litigios y el poder de mercado. Probablemente no sea una coincidencia

que el mayor poder de mercado de Nigeria y la India se corresponda con las mayores divergencias en las políticas adoptadas. La capacidad afecta tanto a la aptitud de los países para aplicar en la práctica una normativa sobre precios de transferencia acorde con el espíritu de la OCDE, como a su propensión a desviarse de las normas de la OCDE (aunque no de forma determinista, como demuestra el caso senegalés) y a la adopción del informe país por país, donde la falta de capacidad hace que se apliquen con retraso las medidas de confidencialidad necesarias para recibir información en el extranjero. Para la aplicación en la práctica del enfoque de la OCDE en materia de precios de transferencia, la calidad de los sistemas judiciales parece ser lo más importante. Hay más posibilidades de que los auditores de las administraciones fiscales apliquen los precios de transferencia de forma "contundente" y luego negocien con los contribuyentes cuando éstos se enfrentan a obstáculos importantes para recurrir a los tribunales, como ocurre en Senegal y Nigeria. Paradójicamente, la preexistencia de un sistema judicial de fácil acceso también condiciona el impacto de la Acción 14 de BEPS, destinada a mejorar la resolución de litigios internacionales.

En términos de treaty shopping, los países también han adoptado diferentes enfoques: Aunque el Proyecto BEPS parece haber contribuido a que India y Senegal, donde el treaty shopping causó importantes pérdidas de recaudo, adoptaran algunas respuestas para poner fin al fenómeno tras años de aplicación poco sistemática o tolerancia absoluta, estos países no solo se basan en la solución preferida del Proyecto BEPS, sino que adoptan medidas decididamente más estrictas. Las recomendaciones del Proyecto BEPS para hacer frente al treaty shopping siguen en gran medida el espíritu del enfoque finamente delineado, aunque no descartan explícitamente que los Estados adopten otras respuestas. Mientras que el proceso para insertar cláusulas antiabuso parece encontrar un obstáculo en los procedimientos de ratificación del Instrumento Multilateral (MLI) desarrollado por la OCDE – aunque no necesariamente debido a una oposición de fondo – algunos países han recurrido a otras medidas como renegociar o rescindir tratados. La variación se debe en primer lugar a una variación en la urgencia de la cuestión.

Al igual que en el caso de los precios de transferencia, la medida en que el treaty shopping ha constituido realmente un problema político varía de un país a otro, dependiendo de factores tales como si se han firmado tratados con jurisdicciones potencialmente canalizadoras de inversión y el grado de beneficios que confieren estos tratados en comparación con la legislación nacional y otros tratados celebrados. Cuando el problema es más importante en términos de pérdida de ingresos, se adoptan respuestas adicionales a la inserción de una cláusula antiabuso, como la renegociación o la rescisión.

El hecho de que la norma mínima de la Acción 6 de BEPS solo está abriéndose paso lentamente en las redes de tratados de los países coincide con los datos anecdóticos sobre las renegociaciones y rescisiones de otros países, aunque los estudios de casos también muestran que las respuestas

alternativas no se adoptan como alternativa a la Acción 6 de BEPS, sino más bien como complemento. Sin embargo, otra observación importante es que los datos más allá de los cuatro países estudiados también muestran que el fenómeno del treaty shopping se distribuye de forma desigual entre los países, ya que algunos no se ven afectados.

Los estudios de caso también sugieren que el enfoque que debe adoptarse suele ser una cuestión controvertida entre las diferentes partes interesadas del país afectado por el treaty shopping, e incluso cuando la pérdida de ingresos es considerable, puede pasar mucho tiempo hasta que se adopte una medida. Las consideraciones sobre la atracción de inversiones, es decir, la idea de que incluso los inversores que están haciendo "treaty shopping" están aportando fondos adicionales bienvenidos hy la diplomacia son poderosos contrapesos. Otros organismos como los ministerios de asuntos exteriores, las agencias de promoción de la inversión o incluso el nivel político del ministerio de finanzas actúan así como agentes de veto internos hacia un enfoque más estricto. Mientras que la administración fiscal presiona para que se adopte una respuesta más estricta. El poder del mercado puede desempeñar un papel, como ilustra el cambio de la política india a lo largo del tiempo. Fundamentalmente, aunque el Proyecto BEPS hace hincapié en un enfoque más preciso, también puede haber facilitado la adopción de respuestas más blandas debido a la propagación del mensaje de que la elusión fiscal internacional ya no es deseada por la comunidad internacional.

*Aportaciones al debate normativo*

En el capítulo 8, reviso el debate normativo sobre el Proyecto BEPS y los países en desarrollo para explicar en qué aspectos el análisis realizado en los capítulos anteriores puede contribuir al debate. Propongo que, al considerar lo que hacen los países en la práctica, algunas de las críticas pueden mitigarse, ya que los países no parecen seguir ciegamente lo que sugiere el Proyecto BEPS. No obstante, es importante tener en cuenta que los países investigados podrían carecer de representatividad.

Por último, sigo siendo crítico con los intentos de dotar al Proyecto BEPS de una mayor fuerza coercitiva, como la inclusión de las normas mínimas de BEPS en la lista de jurisdicciones no cooperativas de la UE. La lista de jurisdicciones no cooperativas en materia fiscal, mantenida por el Grupo del Código de Conducta del Consejo de la Unión Europea, y las medidas defensivas que los Estados miembros aplican contra las jurisdicciones incluidas en la lista son las herramientas más importantes de la UE para promover sus ideales de buena gobernanza fiscal en el extranjero. Los principales criterios que influyen en que un país sea considerado no cooperador son la adopción de tres tipos de normas políticas: Intercambio de información fiscal, fiscalidad justa, la cual es similar a la definición de la OCDE de "competencia fiscal perniciosa"), así que las normas mínimas del proyecto BEPS. De acuerdo con la tipología desarrollada en el capítulo 3, sostengo que la lista de la UE sólo debería incluir criterios relacionados con la "dimensión facilitadora", es decir, disuadir a otros países de adoptar o

mantener políticas que faciliten la elusión fiscal internacional. Sin embargo, sólo una parte de las normas mínimas de BEPS se refieren a esa dimensión. Otras, como la Acción 14 de BEPS, así como partes de la Acción 6 y la Acción 13 no deberían formar parte del ejercicio de inclusión en la lista.

# 13 Curriculum Vitae

Frederik Heitmüller (1993) grew up in Mülheim an der Ruhr, Germany, and passed his „Abitur" (secondary school exam) in 2012. From 2012 to 2017, he studied social sciences in a double degree program by Science Po Bordeaux, France, and the University of Stuttgart, Germany, with a short stay at the Middlebury Institute for International Studies at Monterey, USA. He wrote his master's thesis on the politics of international tax cooperation. Afterwards, he completed an internship at the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and worked for a few months as researcher at the Tax Justice Network. In 2018, he started his PhD research at the Institute for Tax Law and Economics at Leiden Law School of Leiden University, as part of the GLOBTAXGOV project.Since March 2023, he teaches in international and comparative tax law courses at Leiden University and works as research associate at the International Centre for Tax and Development, Brighton.

In de boekenreeks van het E.M. Meijers Instituut van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2023 en 2024 verschenen:

MI-395 A.H.A. Mohammad, *De normering van academisch ondernemerschap. Perspectieven vanuit het onderwijs(bekostigings)recht, het Europees staatssteunrecht en de academische vrijheid & wetenschappelijke integriteit*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023

MI-396 T.L. Masson-Zwaan, *Widening the Horizons of Outer Space Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023, ISBN 978 94 6421 977 7

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MI-400 W. Ruijs, *Pandbelening*, (diss. Leiden), Den Haag: Boom juridisch 2023, ISBN 978 94 6212 819 4, ISBN 978 94 0011 288 9 (e-book)

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