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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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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.

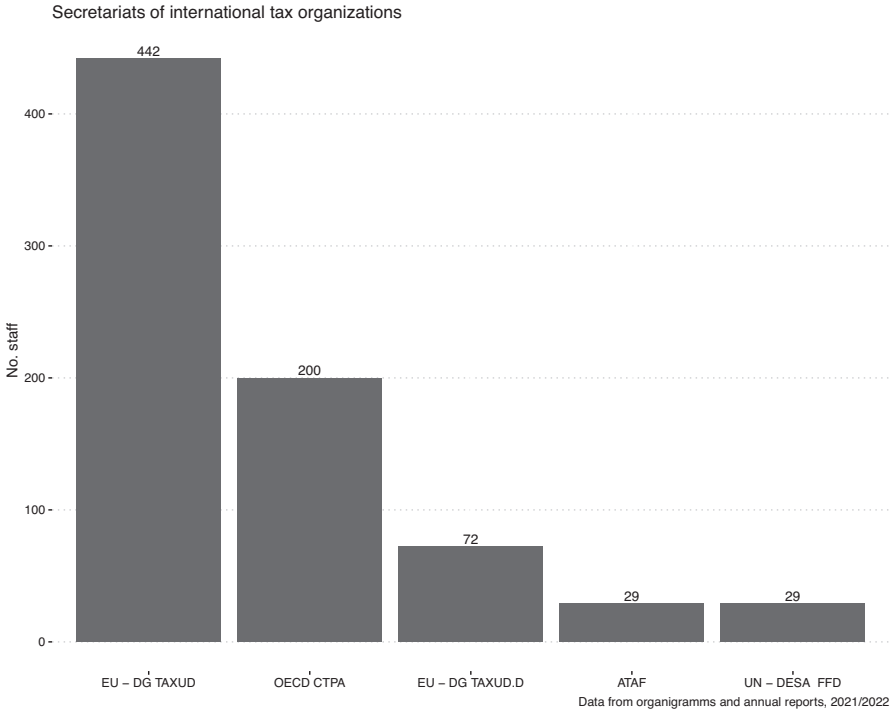
54 Newman and Bach, "The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation."

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.