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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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.

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

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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

28 CO34

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]

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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],

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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.

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

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.

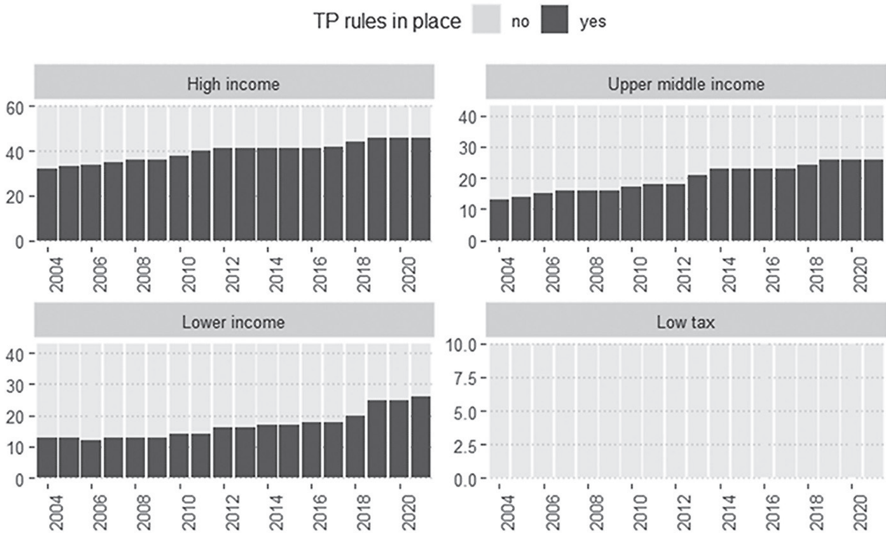
173 SN16

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."

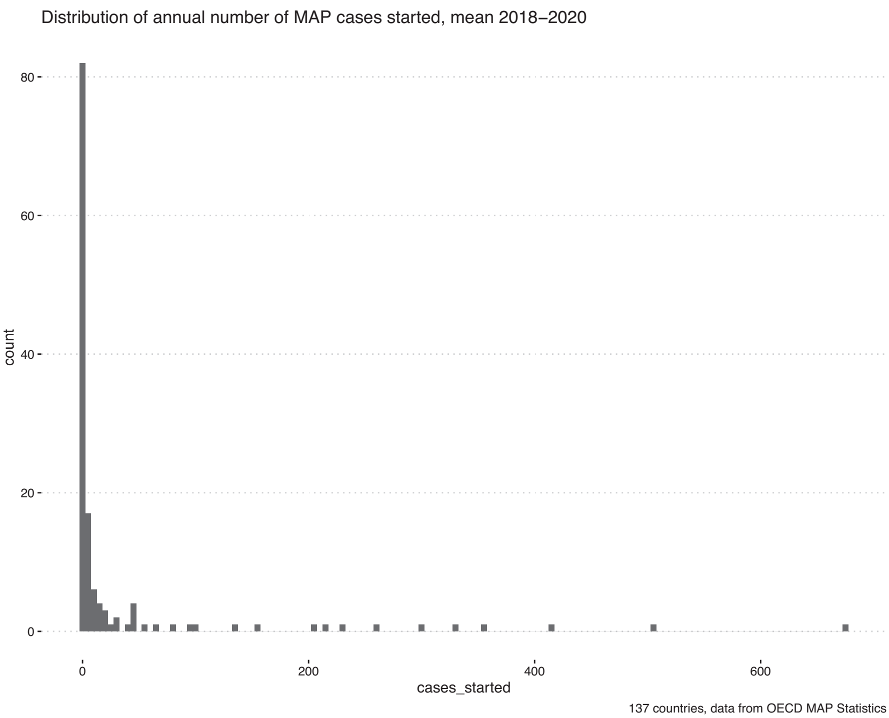
177 IN21

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

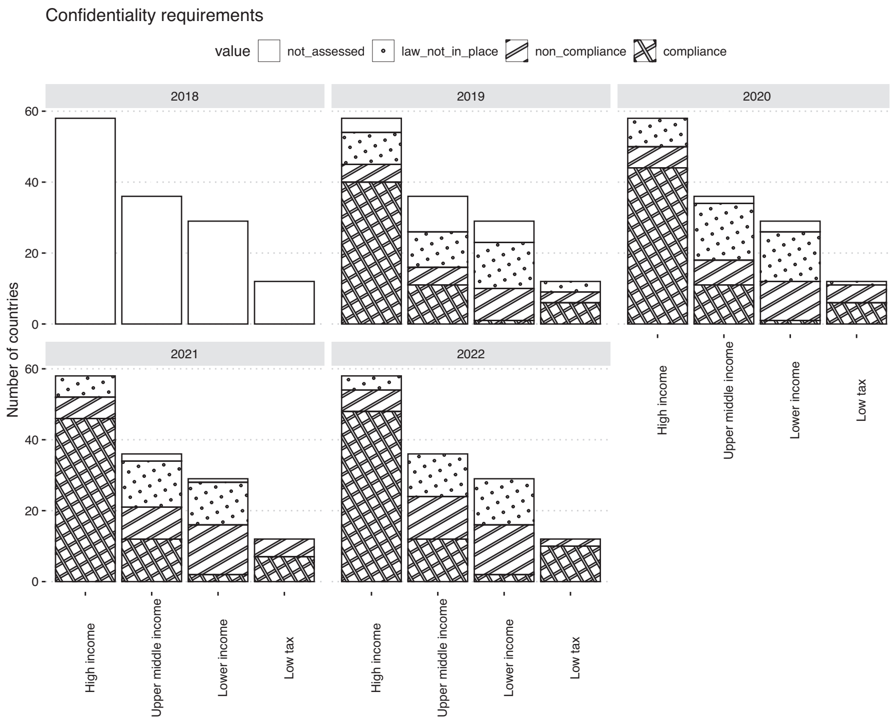
191 Niang, "Tax Us, Do Not Kill Us!"

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.

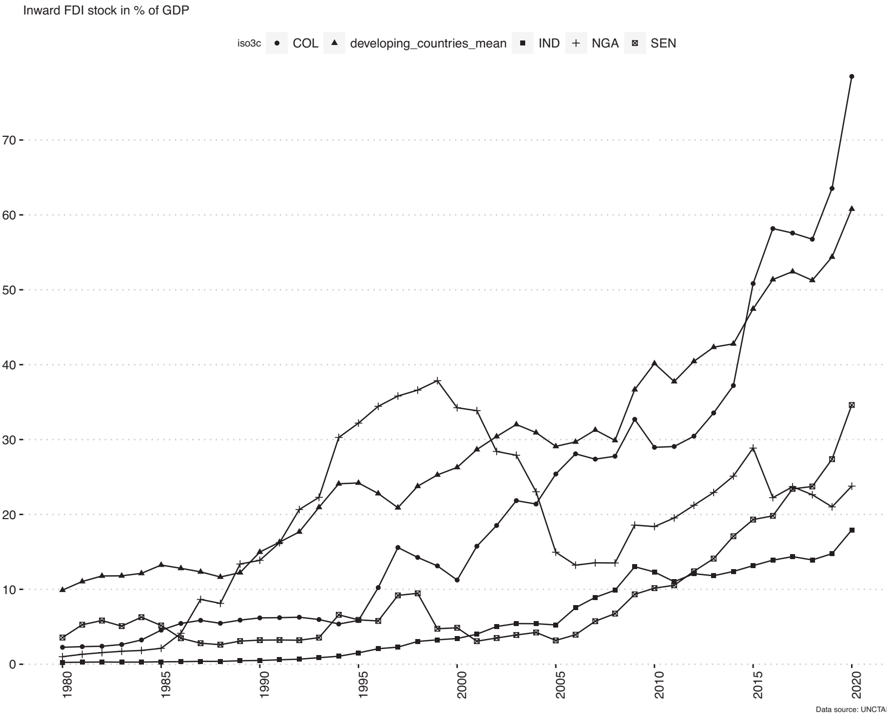
In India, CbCR reporting has been implemented earlier and there is evidence that reports have been received from abroad and used by the tax authority. However, according to interviewees, the impact was not expected to be important, which can be explained by the fact that transfer pricing was already 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)



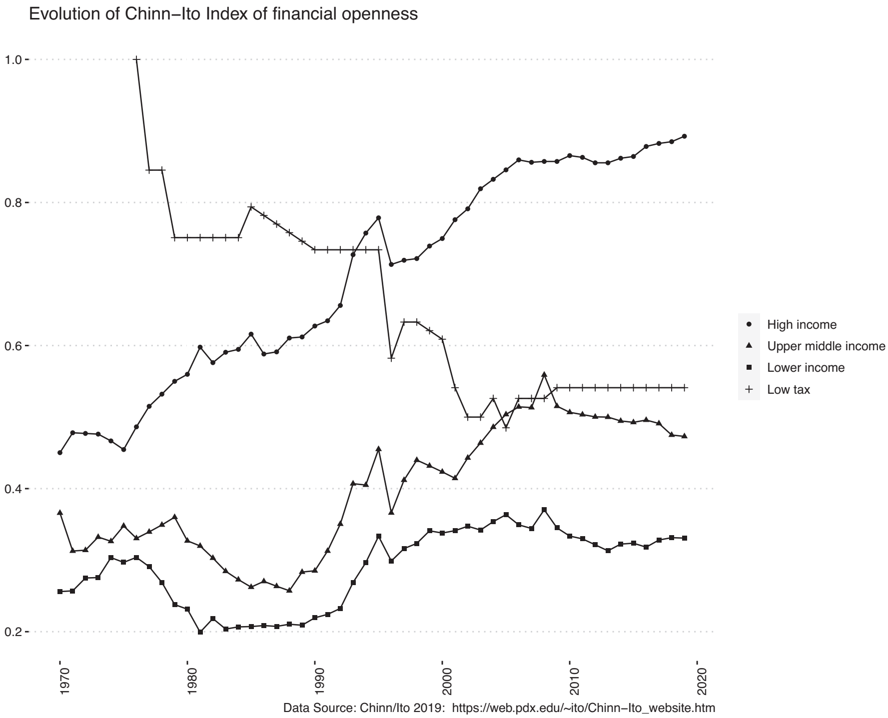
Source: compiled by the author, based on UNCTAD data.[198]

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

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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."

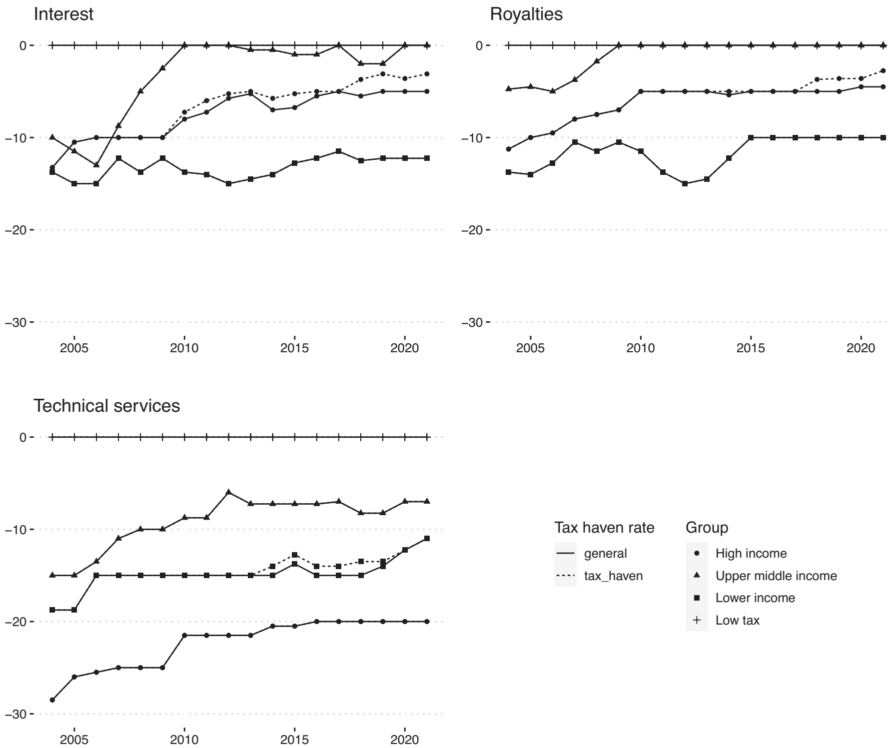
that, at least in the past, some companies used to report different prices on the same transaction to different authorities.[207] One Senegalese tax official, when telling the story of his first transfer pricing audit in 2011, explained that he found inconsistencies between the import prices the company 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

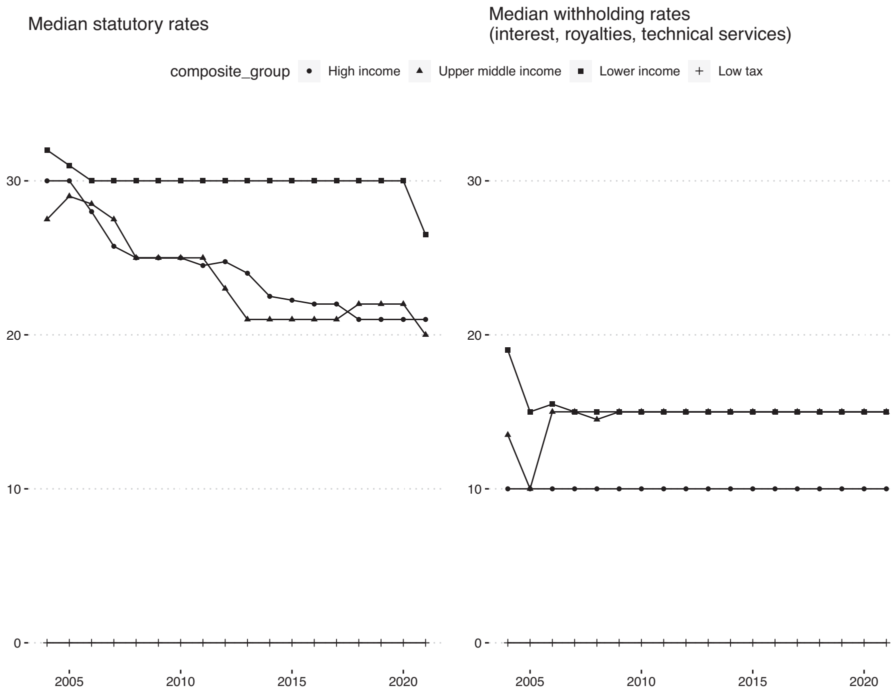


Source: compiled b y the author, based on EY Corporate Tax Guides, OECD, Tax Foundation, CIAT, KPMG.[210] *Note: Cases where the withholding rate is higher than the statutory rate were counted as 0. Number of countries per group: High income: 56; Upper middle income: 34; Lower income: 34; Low tax: 9*

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.

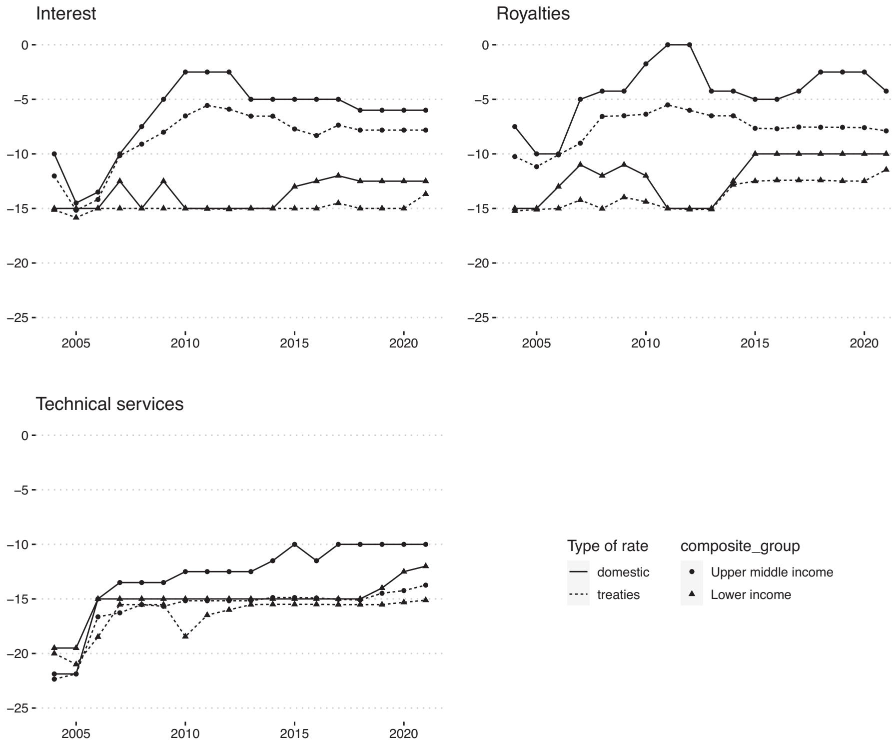
Another insight of the case studies is that the impact of tax treaties could sometimes be ambiguous. In Senegal, interviewees highlighted a peculiar interaction between VAT and corporate tax rules that could also make transfer pricing less of an issue. Until 2022, the ability to deduct VAT charged on 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.