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

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9 Conclusions and the way forward

9.1 Summary of findings

How can we explain different responses by countries to the BEPS Project? The purpose of this thesis was to provide a general framework for analyzing international standards that deal with international tax avoidance, such as the BEPS Project, for categorizing preferences by different actors and for making sense of the trajectory of countries in specific policy areas. The analytical tool I used was introduced in chapter 3. I first divided policies into a defensive, a facilitating, and a supportive dimension with respect to international tax avoidance phenomena. Put short, a country needs to decide 1) whether and how it defends itself against international tax avoidance; 2) whether and how it facilitates taxpayers' international strategies aimed at avoiding tax in other countries; and 3) whether and how it would support other countries in their efforts to defend themselves against tax avoidance. This division mainly serves to explain a focus on specific outcomes of the BEPS Project and less on others. For developing countries without financial centres, the defensive dimension is clearly the most relevant – and the one where we should see the greatest variation in terms of policy. Hence, I further delved into this dimension and proposed a typology of policies based on relevant characteristics such as their effectiveness in reducing tax avoidance, their administrative resource intensity, their effect on non-avoidant taxpayers, their effect on tax revenue and the degree of international cooperation required for their adoption.

In chapter 4, I used this typology to contrast the propositions of the BEPS Project with previous OECD standards, and to evaluate the overall goals embedded in the BEPS Project. Here, I developed the overall argument that in the past OECD standards generally tackled international tax avoidance in a way that delineates as finely as possible between avoidant and non-avoidant situations, with the objective of safeguarding the amplest freedom possible for cross-border transactions and not jeopardize the overarching objective of the international tax regime, namely facilitating cross-border investment and trade. Compared to the past, the BEPS Project sometimes shows more acceptance of what can be called "blunt" solutions: responses to tax avoidance that do not require a lot of administrative resources but that are less precise in the sense that they may also catch non-avoidant taxpayers. Nevertheless, the departure from the past is only very incremental. Compared to the practice of some non-OECD countries or compared to what different stakeholders have called for, the BEPS Project's

approach is still very much “finely delineating”. When reading them closely, this also becomes apparent in the high-level public communications. In sum, rather than fighting tax avoidance at all costs, the BEPS Project is about fighting tax avoidance, but in a way that still rests aligned with the liberalizing goal of the international tax regime.

In the following chapters, I then turned to concrete evidence from four developing and emerging economies collected through fieldwork: Colombia, India, Senegal, and Nigeria. At the start of the research project in 2018, these were all non-OECD economies. Meanwhile, Colombia has acceded to the OECD. Nevertheless, the history of engaging with international standard setting projects at the OECD is more or less short for all these countries, with some variation. While Colombia and India were associated in the development phase of the BEPS Project (India as G20 country and Colombia as accession candidate), Senegal and Nigeria only joined the Inclusive Framework in 2016. Thus, all countries belong to a group in between the core and the periphery. This means that in contrast to those countries that remain completely outside, they are adequate to study the adaptation process of the standards developed, while still sharing the characteristic of developing/capital importing countries, which is at the heart of many contemporary debates about the adequacy of “global” standards. Otherwise, the countries present variation among themselves that allowed some explanatory factors for different approaches with respect to BEPS implementation and international tax avoidance more generally to become apparent – factors that can be subject to a quantitative analysis in a greater sample of countries in the future.

In chapter 5, I reviewed the factors that influence the approach that a country takes towards international tax avoidance. I found that in the context of developing countries once the executive branch of government has formed an opinion, it is likely that there are relatively little challenges by other actors. This is because actors that could potentially be influential (such as parliaments, civil society actors, and organized businesses) are lacking the expertise to constructively engage in the process, do not display strong preferences against the implementation of this type of policies, or choose to focus engagement on other policies which they judge more important for their interest. Nevertheless, within the executive a significant degree of disagreement about the policy to be adopted can sometimes be found. Whereas the tax administration, and more specifically those departments tasked with audit, are more likely to favour a blunt approach (and, if conditions allow, may apply it regardless of what the actual legal provision prescribe), other agencies factor in other considerations such as investment attraction and diplomatic relations with other countries. The policymaking level of the tax administration or the ministry of finance, depending on where the ultimate authority is actually located, needs to balance these different preferences. What approach they will choose depends also on a number of other factors: First, the status-quo ante in terms of rules and practices. Is a specific international tax avoidance issue actually an important problem in terms

of revenue loss? To what extent has a “finely delineating” approach been incorporated in previous law and practice? Finally, structural factors such as administrative capacity and the country’s market power may play into policy preferences, whereby a lack of administrative capacity and more market power may both favour the adoption of blunter approaches. Nevertheless, as explained as well these factors are not deterministic. For example, even where administrative capacity is low, countries may adapt finely delineating solutions with the objective of increasing capacity in the future.

In sections 6 and 7, I investigated how the approach to international tax avoidance of the four countries studies evolved and was influenced by the BEPS Project in two specific policy areas: transfer pricing and treaty shopping. With respect to transfer pricing, while all countries have evolved more in a direction of the OECD’s approach, there are some important differences in the details of policies implemented and the timing of their adoption, as well as with regards to their application in practice. Complexity of applying the rules, lack of time, and lack of databases, creates high incentives for applying rules in a simplified way and negotiating with taxpayers on a price instead, which may lead to significant differences between the idea of the transfer pricing guidelines as written in the books and their application in practice. The accessibility of dispute resolution procedures plays an important role here: In India, dispute resolution is the most developed, which has led to a gradual convergence of policy to the OECD’s approach. In the context of its OECD accession process, Colombia has invested in building up trust with taxpayers to access MAP and APA procedures. The results are not really visible yet, but one can expect this to change in the future. In Nigeria, the decline of oil revenue has spurred the development of more transfer pricing audit capacity. Nigeria has adopted most parts of the BEPS project that relate to transfer pricing, but has adopted a few “blunter” measures within the system. Nevertheless, taxpayers evaluate these changes as positive, which may indicate that the approach is still more “finely delineating” than the previous practice of sporadic audits with subsequent negotiations. Negotiating still seems to be common practice in Senegal, where dispute resolution practices are probably least developed. In addition, most aspects of the BEPS Project are still pending ratification.

With respect to treaty shopping, policy has evolved in markedly different ways in the four countries. While in the Colombian and Nigerian case a full adherence to the BEPS Project’s approach can explained by the lack of salience of the phenomenon (until recently), and in the Colombian case bilateral diplomacy. Driven by more important revenue losses, India and Senegal adopted blunt responses that go beyond those primarily endorsed in the BEPS Project, namely a renegotiation and termination of the problematic treaty respectively. Nevertheless, the BEPS Project appears to have played a more diffuse role through its impact on the relevant stakeholders’ general ideas about tax avoidance, which those actors in favour of blunter responses could use to convince others of the necessity of change.

In section 8, finally, I reviewed the normative debate on developing countries within the BEPS Project, the implications of which will be further discussed in the following section.

9.2 Implications

In the introduction, I framed this research in terms of three competing views about the BEPS Project: Is it a cooperative endeavour that solves a prisoner's dilemma or an imposition of policy preferences by rich on poor countries? Does it have an impact at all? Which view is an accurate description of reality? Based on this research, the short answer would be: none of them. First, it sheds some doubts on the affirmation that international cooperation is needed to combat international tax avoidance, and that the BEPS Project would necessarily signify a net increase in countries' defences against tax avoidance. Rather, it shows that the BEPS Project suggests combatting tax avoidance in a specific way. This model requires some degree of international cooperation. It might even be the "best" way. But it is not the only one: Even without cooperation, emerging and developing countries are not powerless against tax base erosion and have not been powerless in the past, both in terms of legal provisions and administrative practices. The content of the BEPS Project is based on a model of countries with very limited tax impediments on cross border flows of income and capital and it is based on the idea of tackling tax avoidance within the parameters of safeguarding the largest possible freedom for these cross-border flows. In the reality of developing countries, where the latter is not given to the same extent as in industrialized countries, implementation of BEPS does (generally) not weaken the defences, but does not necessarily improve it either, depending, of course, on how the status-ante exactly looked like. Implementing BEPS in developing countries could then be understood as adopting an approach to fight tax avoidance that leaves the amplest space for businesses that do not avoid.[1]

However, whether the BEPS Project should be considered as an imposition of such a model on developing countries' policies is unclear. Across the countries researched, we can note a general movement towards the introduction of more and more sophisticated anti-avoidance rules similar to those suggested by the OECD as well as investment in capacity to enforce them. There are certainly pressures weighing on policymakers to adhere to the BEPS Project, both from the outside (e.g., the OECD) and from the

1 This interpretation has become more obvious in the debate on Pillar 1, which has been met with a lot of criticism by countries that have adopted alternative measures to tax the digital economy, which would need to be abandoned to comply with Pillar 1. However, the BEPS "1.0" Project is still often perceived as a project that is only about fighting tax avoidance.

inside. Relevant domestic actors such as MNEs and their advisors often prefer OECD style approaches to tax avoidance. But there are not many signs that these actors have had an excessive amount of influence on the policy-making process. The fact that even countries like India and Nigeria that have criticized the OECD and (unlike Colombia) were not in the process of becoming an OECD member do so may indicate that countries generally consider the project as useful. Where uptake is delayed that does not seem to be due to fundamental disagreement but rather to procedural difficulties. However, the devil lies in the detail: To what extent countries are really converging depends on how narrow or how wide we define "impact" of the BEPS Project. If we consider that there is an impact if a country undertakes any measure to increase its protection from international tax avoidance, the impact is indeed high. If we only consider it as impact when a country protects itself against tax avoidance in the "OECD way", i.e., in a way that finely delineates taxpayer behaviour, the impact is not nil but significantly lower. The case studies show that emerging and developing countries apply rules in a simplified fashion or take blunter measures.

It should be pointed out that this does not necessarily mean that countries are not complying with the BEPS minimum standards in the respective area, since the latter have a lot of flexibility embedded in them. Think about the possibility to opt out of the Action 14 peer review process if there are only few disputes, the possibility to introduce a lighter version of the CbCR regulations if there are no headquarters of large MNEs in the country, or the possibility not to modify treaties in accordance with BEPS Action 6 if not request to do so by another country.

This suggests that there might be some scope for another interpretation, which has perhaps been the traditional view that used to be the predominant interpretation of global tax governance for a long time:[2] In this traditional view, policy standards developed by international organizations are merely considered as public goods in the form of the development and dissemination of technical knowledge.[3] In this interpretation, countries do not solve cooperation dilemmas through global institutions but they do not attempt to impose policy preference on other countries, either. Global governance simply means developing policy solutions which countries can use if considered in their interest, or discard if they do not find them useful. To some extent this seems to be what is going on. At times, this role of the mere technical advisor is still present in the OECD's descriptions of its own role: "There is no magic recipe to address BEPS issues, but the OECD is ideally positioned to support countries' efforts to ensure effectiveness and

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2 Picciotto, "Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation."

3 Berg and Horrall, "Networks of Regulatory Agencies as Regional Public Goods: Improving Infrastructure Performance," 184.

fairness of tax rules and, at the same time, provide a certain and predictable environment for business."[4]

At this point, it is important to repeat though that the analysis was limited to countries that are members of the Inclusive Framework and that have thus opted into the process. That decision was likely influenced by preconditions that made adaptation feasible. No part of the analysis can therefore be extrapolated to the around 80 jurisdictions that have not yet chosen to become part of the Inclusive Framework. It is likely that making use of the BEPS Project to their advantage may be more difficult for them, since most of them are low-income countries. Addressing BEPS may also be less relevant because it is likely that some of the causes of the tax planning schemes discussed here, such as tax treaties and the absence of foreign exchange regulations, may be even less prevalent in those countries that have chosen not to be part.

Nevertheless, the BEPS Project can have an impact on these countries, as well. If OECD Inclusive Framework members converge towards an OECD model of addressing tax avoidance, going a different way may become more difficult for non-IF countries in the future. In sum, all the different interpretations of the BEPS Project carry some element of truth. Emphasizing the one over the other is then a matter of individual perspective.

What lessons does this carry for the future of international tax cooperation? It seems that during the BEPS 1.0 project, there was still a broad agreement on the basic ideas, namely combatting international tax avoidance. As the international standard setting process touches more upon the core of the allocation of taxing rights, such as in the Pillar 1 project, which seeks to redistribute taxing rights for profits earned through digital means, the same can no longer be taken for granted. Moreover, while the idea of preventing countries from adapting "blunter" measures was already present in the BEPS 1.0 project, Pillar 1 has made this an explicit part of the deal: participating countries are required to roll back their digital services taxes. Therefore, we can reasonably expect that the implementation phase may be more conflictual.

What about Pillar 2, the global minimum tax? Largely, the objectives of the BEPS 1.0 project and Pillar 2 overlap since Pillar 2 aims at reducing international tax avoidance opportunities with the additional aim of reducing (while not eliminating) competition for real investment. Pillar 2 is different in the sense that it reduces the role of the country that is itself affected and foresees a more important role for the headquarter country (see also section 3.3).

On Pillar 2, one possible implication emerges from the material analyzed in this dissertation: In the past, countries still showed a bigger appetite for competing by means of tolerating tax avoidance (consider for example the Indian approach to treaty shopping before 2017). However,

4 OECD, *Addressing Base Erosion and Profit Shifting*, 48.

at least for the type of countries studied, the BEPS 1.0 Project already contributed to bringing about a cultural change that has reduced this type of competition. Therefore, a mechanism through which countries police each other in the fashion of pillar 2's "diabolic machinery"[5] may no longer be as necessary as it used to be.

9.3 Limitations and calls for more research

There are several important limitations to this research. The first is timing: Global tax governance is a dynamic process. This means that events that have not yet happened (such as the introduction of a certain policy by a country) could still happen in the near future. Some findings of this research might need to be revised. Nevertheless, I hope that the more conceptual analysis of international tax policies will be useful to analyze future tax policy developments, as well.

Second, one implication of the inductive method employed in this study is that, rather than conclusive evidence, the findings presented here should be seen as research agenda to more systematically test why developing countries adopt specific policies. Most of the time, the time and resources available for conducting this research did not allow me to study these hypotheses in more systematic ways. The sections on treaty shopping and transfer pricing present some data that can be used in larger studies. Moreover, similar follow-up studies could be made to systematically compare countries' approach to other policy issues such as capital gains taxation, or the use of tax havens by developing countries' outward investors over time.

The research also suggested that more perspectives from MNE headquarters might need to be included to fully grasp what happens in developing countries. To fully understand the puzzle of the lack of MAPs in many developing countries, it might be fruitful to investigate in the countries of origin of the investment why such procedures are not engaged – and for whom the lack of dispute resolution represents a problem: For the host country, the home country, or for the MNE?

During this project, I assembled a number of datasets that contain information about institutions and norms relevant for international taxation on a country-year basis or dyad-year-basis. These datasets have allowed to answer a number of research questions, such as gauging to what extent BEPS measures have been implemented and how international tax policies have evolved over time. However, there are many more questions that could be answered using these datasets, including by researchers using quantitative methods to investigate the impact of international tax provisions on firms and individuals.

5 Mason, "A Wrench in the GLOBE's Diabolical Machinery."

Finally, let us assume economic studies find in a few years that international tax avoidance has receded (or not). Because of lack of data that is comparable over time, such an assertion can probably never be made with sufficient certainty. But assuming that at one moment it is found that the issue of international tax avoidance has not been solved, then, an important question will be: why? Is it because the policies do not work? Or is it because they have never been seriously applied? And if so, why do they not work? Or why have they not been seriously tried by countries? Different answers to these questions imply different policy responses. The findings and additional data generated in this dissertation may help to construct a crucial control variable: the degree to which countries have actually transposed the BEPS Project into their tax systems.

9.4 Beyond tax

In addition to the debates about the particular case of the global governance in international taxation and its relationship with developing countries, the findings matter for debates about the architecture of global governance institutions more generally and future investigations could more systematically compare global governance of international taxation with global governance in other areas.

The BEPS Project is representative of a peculiar form of governance: It is not a treaty through which countries have signed up to specific obligations. There is a discrepancy between those countries that participated in the development of its content and those that implement it. There is an important degree of flexibility (and sometimes vagueness) in the requirements. Accordingly, the BEPS Project and accompanying processes (such as the Inclusive Framework) could be thought of as what Abbott and Faude have termed a “low-cost institution”, referring to the reduced cost of achieving agreement.[6] Recently, it has been suggested that this type of governance may inspire governance in areas where more “high-cost” institutions such as investment and trade policies have been used.[7] If this happens, it may be fruitful to try to translate what the experience of the BEPS Project could mean for these areas. One possible finding of the BEPS Project is that change (even though incomplete and inexact) can be triggered even through such low-cost institutions, if there is a clear public message that is associated with these institutions (such as “combatting international tax avoidance”).

On a more general level, the BEPS project can be considered as attempt to mitigate negative effects of globalization (or reply to the globalization critiques) and preventing backlashes from actors negatively affected by

6 Abbott and Faude, “Choosing Low-Cost Institutions in Global Governance.”

7 Alschner, “Shifting Design Paradigms: Why Tomorrow’s International Economic Law May Look More Like the Tax Regime than the WTO.”

globalisation, while at the same time not threatening the overall openness of countries (as opposed to, for example, national responses aimed at scaling back globalization more generally).[8] It has some similarities of the last decades' reforms of the global trade regime (where several exceptions to the general rule of trade liberalization have been introduced), the global investment regime (which now emphasizes the "right to regulate" more strongly) and the financial regulation regimes (which after efforts at liberalizing capital flows put its emphasis on the stability of domestic banking systems). It can therefore be thought of as initiative that ranges among "new" types of global governance, which seek to strike a balance among liberalizing aims and safeguarding for jobs, financial stability, and tax revenue. The case of the BEPS Project might be interesting in the sense that it could provide insights about the conditions under which this new type of governance works.

A first insight could be the following: In a piece written in 2020, Rodrik, an economist, contends that very few of the policies that are regulated by global governance are truly beggar-thy-neighbour policies and that global governance might not always be the best solution as it could also be subject to special interests and disregard second-best institutions that might be more appropriate for specific countries.[9] Interestingly he specifically mentioned the issue of "perfect tax havens" where paper profits are booked as one exception to this general idea, the results of this study suggests that even for this issue this is not the case, since second-best institutions, such as "blunter" approaches to tackle international tax avoidance may be more appropriate in certain contexts.

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8 Pascal Saint-Amans, head of the OECD's Center for Tax Policy and Administration, stated that "In recent years, we have built a kind of tax regulation for globalisation - to reconcile the middle class in particular with globalisation." Saint-Amans, Der Kern des Systems ist das Steuerschlupfloch. (translation by the author). Also Avi-Yonah and Xu, "Evaluating BEPS."

9 Rodrik, "Putting Global Governance in Its Place."