

REPORT ON THE BEPS INCLUSIVE FRAMEWORK OF THE OECD

August 2021

SOMO

Adinda Wisse, Myrthe Bekkers, Johanna Krebs and Thijmen Reinalda

Contents

Executive Summary	2
Introduction	3
Aim of the Report	4
Methodology	6
Structure of the Inclusive Framework	8
Results	10
Input legitimacy	10
Capacity building	10
Agenda setting	15
Output legitimacy	18
Optimists	19
Pragmatists	21
Pessimists	24
Recommendations	25
1. A more representative Secretariat	25
2. Developing country meetings and regional collaboration	26
3. A call for transparency	28
4. Civil Society in the Global North	30
Conclusion	32
Literature	35

Executive Summary

This report investigates the legitimacy of the Inclusive Framework (IF), particularly for developing countries, and gives recommendations aimed at its improvement. The IF, part of the OECD-led programme against Base-Erosion and Profit Shifting (BEPS), was created to involve non-OECD and non-G20 members in negotiations on international taxation governance. However, this report raises the alarm about a lack of equal participation and highlights the limited extent to which the BEPS agreements might benefit developing countries.

The first section introduces the BEPS project and the structure of the IF itself, followed by a section outlining the contribution this report makes to existing research and the methodology that was used. The research logically splits into the input and output legitimacy of the IF. Two major factors are said to hamper input legitimacy. On the one hand, a group of experts, mainly from the Global North, argue that developing countries lack the capacity, whether financial, technical, or administrative, to meaningfully influence the course of negotiations. On the other hand, there are those who believe the OECD Secretariat has a disproportionate sway over the negotiation process and a bias in favour of OECD members. Output legitimacy is intricately linked to input legitimacy, although its evaluation diverges even more among experts. So-called “optimists”, similar to the OECD itself, argue that the IF delivers tangible benefits for developing countries. Moreover, they deny that the extent to which developing countries can influence negotiations is limited by structures of the OECD. “Pragmatists” admit that the negotiations are skewed and that developing countries will encounter challenges when implementing the BEPS agreements. However, they are confident the negotiated outcomes will result in a net positive, for example by countering tax avoidance and aggressive competition. Finally, “pessimists” view the OECD as an illegitimate forum for global tax negotiations due to its inherent bias against developing countries. As a result, they argue agreements reached do not meet the needs of developing countries and are also near impossible for them to implement.

On the basis of this highly mixed assessment, this report proposes several recommendations. Firstly, to combat the bias identified in the Secretariat and to increase the IF’s legitimacy generally, the staffing of the Secretariat concerned with the BEPS process should be more diverse. Secondly, increased coalition building among developing countries should be facilitated through a meeting of only developing states on BEPS. This could either be realised through the OECD or existing Global South frameworks such as the G77. Thirdly, the BEPS negotiations process, particularly the opaque working parties, should become more transparent, both for the benefit of citizens and marginalised states. Finally, civil society organisations in the Global

North are encouraged to advocate on behalf of developing countries within their own jurisdictions, engaging all stakeholders in innovative ways.

Introduction

“After years of discussion, G7 finance ministers have reached a historic agreement to reform the global tax system to make it fit for the global digital age (...)” (Sunak, 2021).

With these words, the British finance minister Rishi Sunak announced the joint efforts of the G7 nations to pursue policies that would support a global minimum global tax rate of at least 15% for corporations, ending the current race to the bottom. Minister Sunak’s urge emphasises the need to come to a collective response to tackle illicit or immoral tax planning strategies by multinationals globally. Multinational corporations avoiding tax by dissipating revenue to tax havens costs national governments an estimated \$100–240 billion a year according to the OECD, amounting to approximately 4 to 10% of the global corporate income tax revenue (OECD, 2021). The current bilateral tax treaty network allows corporate giants to exploit gaps and mismatches in tax rules and use strategies to shift profits to places with little to no economic activity, a problem referred to as Base Erosion and Profit Shifting (BEPS). The following two additional issues have incentivised the recent effort of the OECD to readdress the international tax system known as BEPS 2.0: the digitised economy requires taxation in jurisdiction where corporations are not physically based but do have a significant economic presence through user-participation, and countries competing for foreign investments require a minimum tax to stop a race-to-the-bottom. By tackling these problems, the joint effort of BEPS through its 15 Action Points should prevent future avoidance of corporate tax and minimise the costs associated with this. While such issues are recognised globally, participation in international tax deliberation processes has historically been the prerogative of developed and higher-income G20 Northern countries at the OECD. Recognising the need for a global response to the increasing problems and the necessity to include developing countries, the Inclusive Framework (IF) was set up in 2016 to continue the talks on global tax avoidance along the North-South division with now over 135 countries. A coordinated global solution is crucial, as it is expected that lack of a coordinated consensus regarding the BEPS 2.0 outcomes will result in more digital services taxes imposed by individual countries. This is expected to lead to an increase in double taxation or circumvention of tax rules. With the recent green light of the US Biden administration, the negotiations have sped up significantly by summer 2021 to seek a global consensus on BEPS 2.0 and its Action Points.

The IF is a 2016 established enhancement of the BEPS project membership. In the IF, more than 135 states and jurisdictions are members and therefore have access to negotiations to develop the BEPS 2.0 project further. The establishment of the IF was a reaction to the observation that the original BEPS project was highly exclusive (only OECD members and G20 states being involved in the process) – but nevertheless created rules that would have an impact on many other countries as well. The establishment of the IF has great symbolic value; it signals that the OECD is willing to take developing countries on board when it comes to the development of international taxation rules. Although work in the OECD is highly specialised and technical, developing countries are claimed to negotiate on “equal footing” (OECD 2020, 2) with OECD members and G20 economies.

The IF is an unprecedented development in tax history. Taxation touches upon the most sovereign principles of nation-states. The BEPS project and the IF are in a way attempts to transcend principles of national sovereignty and formulate a global and cooperative approach to taxation. In theory, such a development may seem beneficial to all parties involved, but there are some critics who claim that the OECD hosts power-imbalances and does not weigh all parties equally. In other words, the OECD might favour its member states over developing countries. This research attempts to contribute to this discussion by analysing whether developing countries are enabled and empowered to contribute to the BEPS project through the IF. Moreover, this research attempts to understand whether the BEPS project is designed based on the principles of inclusivity and equality, thus benefiting developing and developed countries equally.

Aim of the Report

“The key to international tax co-operation is effective exchange of information and the OECD has been at the forefront of international efforts to promote all forms of information exchange - including on request, spontaneous and automatic - since it first established its Working Party on Tax Avoidance and Evasion in 1971. Since then, enormous progress has been made to establish high standards of tax transparency and information sharing so as to improve tax authorities' ability to deter, detect and disrupt tax evasion and avoidance.” (OECD - tax transparency)

For multiple decades, the development of international tax rules has been based on improving transparency and information sharing between tax authorities. While progress has been made

on global tax transparency to disrupt tax evasion and avoidance, the debate between developed and developing countries over the content of such rules takes place in the OECD. As such, there are some political tensions considering that the OECD is historically a Western and pro-developed organisation.

A significant part of academic and policy-oriented writings evaluating the IF can be divided into critiques of input and output legitimacy. Input legitimacy refers to the process of agenda setting and the legitimacy of decision-making procedures. Herein much of the research focuses on the general equality of participation for developing countries in the IF (Christensen et al., 2021). Examples include the ICTD report *At the Table, Off the Menu?*, which has become a much-used expression among those engaged with the IF, as well as sections in Kingma (2019) and ATAF (2019). Moreover, the legitimacy of the BEPS IF as a global forum that endorses the principle of equality of participation has been discussed thoroughly. Important contributions here include Burgers and Mosquera Valderrama (2017), Fung (2017), Christian and van Apeldoorn (2018), and Mosquera Valderrama (2015). Research has also been conducted on the disadvantaged position of developing countries in tax treaty negotiations, often using case studies to flesh out this problem. Some of these, such as Christensen et al. (2020), have also touched upon issues with the IF. In terms of output legitimacy, there is an ongoing discussion about the implementability of the BEPS project in developing countries and the degree to which agreements suit their needs. Discussions of output legitimacy have raised questions about the feasibility of the BEPS standards in lower-income countries that lack resources to implement complex tax rules (Mosquera Valderrama, 2018).

As a response to its lack of input and output legitimacy, the OECD expanded its circle of participating members. Gradually more and more countries were invited to the table and attend standard-setting meetings. In 2015, the G20 endorsed the OECD's plan to establish the IF 'with the involvement of interested non-G20 countries and jurisdictions which commit to implement the BEPS project, including developing economies, on an equal footing' (p. 15; see also Christensen et al., 2021). As of today, more than 135 countries participate in the IF of the OECD, allowing developing countries to give input and voice their concerns about the implementability of international tax standards. This rapid adoption of developing countries in the governance arena of the developed world offers an interesting research angle into the power dynamics between "developed" and "developing" countries.

In particular, this research seeks to contribute to the literature on the IF by drawing attention to specific fault lines. The first is the debate on input legitimacy, particularly the causes of the lack thereof. One camp highlights a lack of capacity as its cause, the other the agenda setting power of a Secretariat that in the end serves the OECD. The second fault line divides experts on the IF with regard to its output legitimacy for developing countries. As a result of this focus on divisions, this report highlights how little agreement there is about whether there is a problem with the OECD's IF and what that problem would be. The goal of this research is to provide an analysis of the way developing countries have navigated the IF and BEPS project. Particular attention is paid to how the states have been able to defend their interests in the input section. Additionally, in the output section, the outcomes of the BEPS process are weighed against the fairness of the negotiation process to determine whether the BEPS process is a net benefit to developing countries. Recommendations are proposed to encourage consideration of the ways the inclusivity and equality of participation of the negotiation process could be improved, along with the legitimacy of its outputs.

Methodology

The methodological approach of the analysis is qualitative, drawing data from a limited number of official documents but primarily from interviews. This use of interviews is crucial due to the limited documentation of BEPS meetings and the rather closed nature of the international tax sphere.

The sampling of interviewees was strategic to provide insights from stakeholders from different perspectives within the tax negotiation process. The sample includes scholars, bureaucrats, civil society activists, and private sector stakeholders in the field of global taxation, including ones involved in tax negotiations. The aim was to interview as many developed as well as developing country experts. To obtain sufficient primary sources, snowball sampling was used, requesting access to some interviewees' networks in order to contact new interviewees. Due to limited resources and the ongoing COVID-19 crisis, the interviews were conducted via video conference. Interviewees were asked whether they wished to speak on the record with titles, on the record anonymously, or off the record and completely confidentially.

The interviews conducted were semi-structured. As a characteristic of this interview method, some core themes were decided ahead of the interview, which were more or less common to all

interviewees. Some prepared questions were tailored to the expertise of the interviewee as well as their role in global taxation. In the course of the interview, the expertise and experiences of the interviewee became more apparent, and thus questions were adapted, skipped, and added in the process. This semi-structured set-up had two advantages. Firstly, the quality of the data was higher, as the interviewee could more fully express themselves. Thus, use could be made of their particular knowledge and nuances could be better probed than in structured interviews. Secondly, the answers could still be compared across interviewees, as the themes touched upon in interviews were almost uniform. This allowed for triangulation.

The research has several limitations. Firstly, it is difficult to corroborate the interviewees' views, due to the secretive nature of much of the IF's operations. The sensitive nature of the views of particularly those directly involved in negotiations have rendered much of the data confidential or derived from anonymous sources. These factors combined make it difficult to demonstrate to readers the reliability of the information presented. Secondly, the use of semi-structured interviews risks manipulating the data by asking different questions to different sources. This has however been cautioned against by sticking to common themes and good interview practices, such as asking for elaboration, repeating answers back for confirmation, and avoiding leading questions. Finally, to make the interview outcomes easier to compare, developing country interviewees were primarily asked about two cases, namely Nigeria and Kenya. These were chosen with the key fault lines in mind. Nigeria and Kenya have not previously been examined in this area with a focus on both input and output legitimacy. They are two large economies, neither of which is a member of the G20 or OECD (or a candidate member), rendering them suitable for analyses of non-member countries' influence. At the same time, the fact that they are among the largest economies of the developing world allows us to use them as most-likely cases. This means that these are among the most-likely non-member states of the OECD and G20 to have significant influence in the IF. As a result, the present research can give insight into whether equality of participation is hindered by country-level factors (small economy, limited capacity and resources) or structural factors. If Nigeria's and Kenya's relatively large economies and competent revenue authorities still meet significant obstacles, this could indicate structural issues. Additionally, African countries were selected because the continent has a self-evident forum for potential regional cooperation, namely the African Tax Administration Forum. However, having focused on countries with relatively large economies and well-equipped tax administrations, the generalisability of the conclusions to less developed countries is limited. The same applies to the fact that both countries are African, which differ in interests, for instance, to Latin American and Asian states. At the same time, a sufficient number

of interviewees spoke primarily or exclusively on developing countries in general. Therefore, there are enough data for general conclusions.

Structure of the Inclusive Framework

It is rather a difficult task to describe the structure of the IF within the OECD, as literature is contradictory and there is no official description by the OECD. As a strong simplification, IF decision-making broadly takes place on two levels. The OECD Committee on Fiscal Affairs (CFA), which is composed of senior officials of IF member states (OECD, 2017, [BBIF]¹¹), is the primary organ of the decision-making process. The CFA has created subordinate working groups that operate at a technical level and are composed of national experts. These working parties are responsible for technical work on international tax standards and guidance. They aim for consensus-based adaptation of standards. Ultimately, the proposals are passed on to the second level, the CFA, which has a more political purpose—it should ensure and guarantee the political commitment of member states. Although decision-making takes place in the CFA and working groups, all meetings are prepared by and carried out under the OECD Secretariat, which therefore arguably exerts substantive influence on the outcome of meetings. The Secretariat is made up of OECD staff that acts independently of nationality but works in the interest of the OECD as an organisation (Kingma, 2019, pp. 206-207). The IF operates with consensus-based decision making to guarantee the “equal footing” (OECD, 2017, p. 12) of its member states. The CFA meets around twice per year (sometimes more often) in Paris, France, while working groups come together two to four times per year (OECD, 2017, p. 12). International organisations such as ATAF, the IMF, the UN, and World Bank have observer status in discussion rounds (OECD, 2017, p. 12).

The primary task of the IF is to implement and monitor the BEPS actions. The road to this goal can be classified into five separate, but interrelated tasks. The first area of tasks is standard setting in regard to a selected number of BEPS issues. These issues include, for example, standards on tax treaties and transfer pricing (OECD, 2017, p. 13). Other actions of the BEPS project were agreed upon and finalised in 2015 by OECD members and G20 economies. These actions are no longer debated in depth, rather the focus lies on their implementation (OECD, 2017, p. 10). The second area of work is reviewing the implementation of the four minimum standards of the IF membership, as well as other BEPS actions. The review process aims to provide members with a chance to analyse their own tax system with regard to BEPS compatibility. In this process, Country-by-Country Reporting plays a central role, aiming for

greater transparency of transactions and taxation flows. Moreover, there is a peer-review procedure in place that aims to offer support to less experienced jurisdictions to implement the programme (OECD, 2017, p. 13). The third area of focus relates to monitoring processes, which are established for the digital economy. Connected to the aforementioned point is the collection of data on implementation aspects, which is the fourth area of focus of the IF. The data are supposed to help with the monitoring of the overall BEPS actions. The fifth strand of work is occupied with the development of support for low-capacity developing countries. The initiative for such a toolbox of aid was initiated by the IMF, UN, OECD, and World Bank and supposedly takes domestic issues of developing countries into account.

Ultimately, it was not literature that helped us to understand the OECD better, but rather one interviewee who is an insider of the OECD. According to them, there are multiple working parties with tax experts and country representatives who discuss policy on a variety of topics. Among others, there are working parties on Tax conventions (WP1), Tax policy analysis (WP2), Taxing multinational enterprises (WP6), aggressive tax planning (WP11), and there are task forces on the digital economy and tax crime. The OECD Secretariat mandates these working parties to take the lead in developing the technicalities of the various topics they have been charged with. For example, issues on aggressive tax planning go to working party 11 and they develop a technical framework to prevent aggressive tax planning networks. The working groups report their work to the steering group of the Inclusive Framework and “the steering group looks at it, sometimes the meetings are technical, other times they are just high level meetings [...] they look at the project, and they decide whether it goes to the inclusive framework plenary” (anonymous). It is thus suggested that the steering group enjoys a high amount of political power and plays an important role in deciding what the agenda of the plenary session will be. Since the BEPS project is run on the wings of the OECD Secretariat, it seems they have the authority to decide the composition of the steering group.

During our research, it remained difficult to properly investigate the role of the BEPS steering group in relation to the working parties and the plenary IF. Despite being frequently mentioned in literature, the website of the OECD does not mention the BEPS steering group except for its composition. While it does teach outsiders that the BEPS steering group consists of 24 country representatives, 10 of which from developing countries, additional information on the group cannot be found. The role of the steering group remains vague to researchers and outsiders to the OECD.

Results

Input legitimacy

This section investigates the issues concerning equality of participation of developing countries in the IF. The first part elaborates on various incommensurable perspectives that disallow consensus on what the main issue for developing countries is. Capacity building has been deemed of utmost importance to developing countries by the OECD and its members. Building capacity refers to two related but separate activities. Firstly, it refers to enhancing the capacity of diplomatic negotiators and country representatives in the IF to understand and contribute to technical issues regarding international tax rules. Secondly, it refers to improving the implementability of such rules by national tax authorities. However, these separate definitions have not been demarcated stringently by the OECD, according to some of our interviewees. The second part scrutinises standard setting procedures within the OECD and the influence of developing countries in this process.

Capacity building

Naturally, in order to start the conversation and overcome the problems encountered by developing countries, it is crucial to reach a consensus on what the biggest issues are that prevent developing countries from meaningful participation. However, the first major issue that can be identified within the G20/BEPS's IF is the lack of consensus about what the main problem actually is that hinders equal participation by all members. Some point to the problem originating on the side of the OECD and the inherent illusion of the framework's inclusivity. They argue that the ways for developing countries to provide their input in meetings and closed sessions are insufficient. By starting off as a framework by the rich and for the rich, it is argued that the main objectives of developing countries have never been and might never be reflected in the IF's meetings. They point to developing countries' lack of agenda setting power, independent of their efforts to increase their own capacity and participation. Although developing countries' lower participation levels are acknowledged by the majority, there are others who do not point to factors inherent to the IF as the main issue. Rather, they point to developing countries and their lack of capacity, resources and expertise which results in an uneven power dynamic within the meetings. While there is agreement on the suboptimality of the status quo, there is disagreement about on which level a solution should be sought. In the end, it is generally agreed that dynamics and participation in the OECD framework should be

more equal to ensure that the expansion into a framework of 137 OECD and non-OECD countries results in an actual *inclusive* framework. However, without a consensus on what the primary issue is, finding a solution becomes a tough grind.

We thus see no consensus in the debate on whether capacity is the main problem or not. A problem closely related to this is the fact that capacity is not differentiated. Capacity in the domain of international tax can be explained on the following various levels with different meanings: on the domestic tax collection level, as equality in international negotiations, and as the capacity to ensure legislation at these levels is commensurate with domestic frameworks. Most Western interviewees seem to be under the assumption that a lack of capacity—in the broadest sense of the word—is one of the main problems for developing countries. Yet, there seems to be no differentiation within the concept or agreement on what this entails. Capacity and the lack thereof are often put forward as a simplification of the multiplicity of reasons why we see an unequal power balance in the IF meetings. Naturally, all types of capacity and capacity building are interrelated. Because there are large gaps in the know-how, power, and capacity between developing and developed countries, it is, however, of crucial importance to point out at which level these gaps are most visible.

As put forward by Paul de Haan, international tax expert and co-founder of a capacity building organisation “[...] the complexity of the BEPS report is mind-boggling.” (P. de Haan, personal communication, 2021, April 13). Irene Burgers, professor of International Tax Law at the University of Groningen, has, amongst others, pointed out that the lack of technical capacity is considered to be the first deficiency. She highlights a general lack of know-how of the complex technicalities of the international tax framework. This also comprises the language barriers encountered during and after the negotiations, as relevant documents are often translated into only a few languages. Furthermore, it is related to the negotiations’ high pace, which is criticised as being difficult to keep abreast with for developing countries with less experience in international negotiations.

Perhaps even more crucial than technical know-how is sufficient financial capacity, comprising the resources to fund task implementation, attend meetings, and hire adequate civil servants. As previously mentioned and confirmed by several interviewees, the inclusivity of the IF has already been called into question by some of the lower developing countries’ inability to pay \$10,000–20,000 to send a negotiator to Paris. Financial capacity is closely related to the

administrative capacity to effectively negotiate the position of the country in the IF, as sufficient administrative staff is needed to implement the outcomes. Having the staff capacity to legitimately enact tax legislation touches upon the international as well as the domestic sphere. In the international sphere, staff with adequate expertise is crucial to ensure successful participation and representation of a country's position in the negotiations. To ensure this, it is important that negotiators remain in their position for a longer period of time, as new negotiators often lack the networks in the organisation and the negotiating experience of OECD members' negotiators. This is especially crucial for developing countries, as they are often not in the financial position to send substantial teams to IF negotiations, if they can afford to send any employees at all. The limited number of skilled negotiators—sometimes only one—are also often irreplaceable in the local revenue authorities. They often do not have the opportunity to inform themselves on the content and anticipate the rapid pace of negotiations to the extent that developed countries' representatives can. In the domestic sphere, having the administrative staff to adequately collect taxes and implement action points is of equal significance. Nigeria has been put forward by, amongst others, Henry Ushie Ekpe and Chinedu Bassey, both active in civil society organisations, as an example of a country that has struggled to develop an adequate framework and the administrative capacity to collect domestic taxes. They point to the emerging gaps between national laws and international taxation. Although staff capacity cannot be seen independently from other types of resources, it is one of the areas where gaps between developed and developing countries are most visible. As mentioned previously, whereas most developed countries have teams of negotiators specifically appointed to go to the IF negotiations on behalf of their country, many less developed countries can only afford a handful of representatives—with all its consequences.

Discussions of capacity have, as mentioned, grouped different kinds of capacity and the capacity at different organisational levels together. This is, however, problematic, when seeking a solution specifically to unequal participation in the IF. There is strong agreement that developing countries have problems with resources and personnel on a domestic level. These result in the inability to collect the tax on all revenue that is by law taxable. Equally in this sphere, problems might be encountered in the implementation of BEPS. This leads countries to be incapable of reaping the potential rewards of the BEPS project. However, while capacity building in this realm is welcomed by virtually all interviewees, it will not actually improve the input legitimacy of the IF, although it might increase the output legitimacy of the BEPS agreements.

According to several interviewees, increasing the expertise of and time available to developing countries' negotiators could improve the participation of developing countries in the IF. Capacity building at this level has been going on to some extent. The OECD itself argues that negotiators learn as they spend more time in the negotiations. Some interviewees corroborated this claim. Non-governmental organizations such as Oxfam Novib have also employed experts on international taxation to prepare negotiators for the debates likely to take place in the meetings. There are, however, two potential problems with these capacity building efforts.

Firstly, training offered to civil servants is never neutral. Training organised by the OECD or developed countries in particular risks implicitly or explicitly conveying the OECD or developed country perspective on the BEPS process. For instance, Dr Gitte Heij, who is active herself in an organisation that assists developing countries in building their technical capabilities to implement the BEPS package, noted that BEPS-centred training assumes that the BEPS process is important to participate in for developing countries; however, she suggests BEPS may not be a priority for them. Professor Burgers (personal communication, March 18, 2021) equally highlighted that "the people in Africa let themselves be trained. And they also believe in our story. So, they believe in this whole [...] the rules recommended by the OECD." Training negotiators, who need to represent a developing countries' interests, is a delicate matter when training is organised by actors from the Global North, especially when their preferences and paradigms are contradictory. Different but related problems arise when developed countries offer training to tax administrators in the Global South. Heij said:

"So [the donor states] set the agenda, what an aid project looks like, and how it's designed. That means that if they go with that, it doesn't mean they end up with more money. It means more often than not that it's a rich country who gets the information they wanted to deal with BEPS and they are just endlessly training BEPS and they rarely can apply it in the way BEPS was intended because they have no comparable material, they have limited resources, and there is no political will." (G. Heij, personal communication, April 29, 2021)

Thus, even capacity building understood as training in BEPS implementation should be weighed carefully against the needs of developing countries.

Within the debate on the role of capacity building, there are two other problems that arise. Firstly, there seems to be a consensus that even though many countries still require

improvement in capacity, they do not have the privilege to wait until they have acquired it before they become involved in the negotiations. This, as previously discussed, leads to some developing countries having to decide whether to not participate in the negotiations because it is not feasible for them or to participate on the mere promise that they will acquire technical capacity or another form of assistance in return, rather than because the country is actually invested in the problem. Secondly, among the interviewees, there seems to be no immediate answer as to who should be responsible for facilitating capacity building amongst developing countries. Whereas there were some interviewees who believed that the OECD should take the lead in improving the shortcomings, others, including Dr Gitte Heij, believe this is an inconceivable option:

“I think you cannot ask for it from the OECD. The OECD is meant to represent the interests of its members, and for that reason alone, it cannot change its agenda, because that is the agenda they serve.” (G. Heij, personal communication, April 29, 2021)

Another anonymous interviewee rather stressed the importance of improving inclusivity for developing countries at multiple levels. Suggestions outlined pointed at the need to make improvements on the OECD Secretariat level, but also the responsibility that should be taken by developing countries themselves to be invested in the process and devote importance to active participation and implementation.

Some have argued, as mentioned previously, that capacity building, at least for top negotiators and revenue authorities, is not the main problem. Capacity, they have argued, is sufficient in many developing countries to send well-trained negotiators to the OECD. Rather, the issue at the country-level (besides the structural level, which will be discussed below) is that of political will. Attiya Waris, Professor of Fiscal Law and Policy at the University of Nairobi, for instance, stated:

“I find it fascinating that people always seem to think that the negotiators are incapable. [...] we don't send the negotiators to the OECD because there's nothing to negotiate. We send our negotiators to the WTO, we send the negotiators for the actual Treaty Negotiations. At the OECD, we have to just make compromises. And so the people who go there, go with a very strict mandate. And what I have seen is the negotiators are extremely well trained; there are no problems with their capacity. The issue is what they are allowed to do or not do.” (A. Waris, personal communication, April 14, 2021)

Dr Alexander Ezenagu, expert in international law, has mentioned the political priority given to the negotiations as well as the implementation of the BEPS agreements as an issue (A. Ezenagu, personal communication, April 8, 2021). An anonymous source has also affirmed that one of Nigeria's great assets in the negotiations is the government's willingness to invest in the process. Of course, prioritisation is related to the total resources and expertise accessible to a government. However, as can be gleaned from Professor Waris' comment, the low political priority placed upon negotiations is also reflective of the benefits states believe they will bring. This is especially pertinent in the case of emerging economies such as those of Kenya and Nigeria. Furthermore, another interviewee, Dr Gitte Heij, mentioned to us that the OECD is a fairly unequal organisation and that developing countries often do not have an equal say in its decision-making procedures:

“I personally take the view much further [than Paul de Haan] but Capabuild believes that you need to present many different views. The Inclusive Framework is largely dominated by the OECD and lip services are paid to other parties who have signed the Inclusive Framework, but ultimately it is by rich countries and for rich countries, and it does not reflect at all the views of those non-OECD countries in the Inclusive Framework. [...] They [developing countries] don't have access to all the relevant information. So, they sit at a table, but they only get a glimpse of a menu, let alone design it[...] there is no political will, and neither should there be. If you were a Minister of Finance in a low income country, would you say BEPS is [priority] number one? No way. [...] You're polite about BEPS [...] but countries are very aware and astute of what's really going on here. It's a negotiation between rich countries and the rest is a gimmick.” (G. Heij, personal communication, April 29, 2021)

This is illustrative of the belief among a number of experts that the IF is ineffective, as developing countries fail to meaningfully influence what is discussed. They attribute this not to their lack of resources, expertise, or personnel, but to the fact that the decisions have already been made before they enter the room. In other words, agenda setting in the BEPS negotiations is their primary concern.

Agenda setting

As mentioned before, the results from our interviews gave a far from coherent picture. The second issue that was heavily emphasised, mainly by interviewees who came from the Global South, is agenda setting. Through our interviews, we obtained a deeper insight into how this

issue undermines the principle of equal participation. As the OECD states in one of its background briefs, “the Members of the framework set standards on remaining BEPS issues, for example, in the area of tax treaties and transfer pricing.” (OECD, 2017, p. 13). The remaining issues were already discussed at the OECD level in 2015 before the creation of the IF, excluding countries that joined only through this framework. As argued by Professor Waris:

“As they continue to go forward, [...] the OECD blocks more and more, there are fewer and fewer actual decisions that anyone can make. The mandate continues to be made at the membership level [...]. So what I started to see once the agenda was set, there were certain things left out. What you're [the OECD] bringing in is, what is of importance to your members, and it's not necessarily what's important to the rest. So then I saw a different thing happening with the developing countries, they wouldn't even turn up. Because if you leave out the extractive sector, then the African states are no longer interested. If you leave out maritime and air, then the Asian states are no longer that interested [...]” (A. Waris, personal communication, April 14, 2021)

This evidently opens up a new explanation as to why developing countries are not actively participating in negotiations, unrelated to their capacity. As Dr Ezenagu argues, it is a cost-benefit analysis (A. Ezenagu, personal communication, April 8, 2021). While developing countries might not necessarily be lacking technical expertise, they most certainly have fewer staff. If the issues discussed at the BEPS negotiations are not of concern to developing countries, there would be few rational reasons to actively engage in the negotiations:

“[...] People would argue that if you've set a menu before and people do not have a choice in changing what the menu is, then it becomes difficult to say that they were part of the design of the project. [...] It is because the OECD sort of agreed on what will be discussed, and developing countries, particularly countries like Nigeria, really had no say in those conversations, they basically were forced to find or have an opinion on this. And that's why out of 54 countries, there were only 25 African countries involved in the BEPS process. This could show that to them, there is no substantial interest in what goes on at the OECD level.” (A. Ezenagu, personal communication, April 8, 2021)

Even the OECD recognises that developing countries feel like they have “little ownership” over the BEPS project and might have other priorities than the BEPS minimum standards and the IF negotiations. (OECD, 2020, p. 12) These issues ultimately create an atmosphere in which

developing countries are rather discouraged from participating in negotiations, despite being ultimately affected by the negotiation outcome.

Despite the aforementioned issues already seriously hampering the participation of developing countries in the BEPS project development process, several of our interviewees indicated that the problem goes further than that. As mentioned in the introduction, the OECD Secretariat plays a vital role in the IF's workings. Despite being an exclusive OECD organ to which the majority of the IF are not members, the Secretariat organises, oversees, and structures meetings. This gives the Secretariat substantive power both in agenda setting and issue framing. All the Global South tax experts that participated in the IF meetings pointed out how this is a serious issue that hampers the participation of developing countries beyond the problem of lacking ownership.

“We have had real life instances where you spend days and nights coming up with technical proposals[...] then you present the technical proposal to the Secretary. And then you only have them mention the proposal in passing, somewhat more like a footnote. And from the beginning, it is clear that no one had sat down to analyse your proposal.[...] Before you know it, they stop mentioning the proposal. And the thing just fizzles out. Compared with proposals from the more developed economies like America, USA, France or Spain or UK or Italy, the difference is very clear; When they come up with a proposal it comes with all the emphasis. [...] The Secretariat puts it up, highlights them, brings issues from them. [They] use those issues to frame other issues. So we don't get similar treatment. Right. I tell you, this has happened in a good number of cases.”
(international taxation expert from the global South, personal communication, April 2021)

While such practices could certainly be defended if it happened anecdotally, the problem seems structural. It becomes clear that there is a strong bias against developing countries' proposals and ideas. One argument that would defend such behaviour on the OECD's side is that developing countries lack technical knowledge. However, such an argument would not defend the lack of consideration with which developing countries perceive to be confronted. Moreover, the problem of issue framing becomes more apparent. If the OECD Secretariat uses developed countries' proposals to further set the agenda and interpret problems, the bias from the beginning replicates and further marginalises developing countries' positions. This bias also stems from the very homogeneous developed-country-staffing of the Secretariat. Not only the

mindset of staff is influenced by this, but staff members from developed countries also have a better network in the Secretariat than their fellow members from developing nations.

While it would be hard to prove that such discrimination is actively pursued by the OECD (a claim that would have heavy political weight), and our method of investigation comes to its limits with regard to that, the perception of such a barrier on the side of developing countries further contributes to an atmosphere of discouragement for developing countries to participate in negotiations. Combined with the fact that developing countries have more pressing issues domestically, this perception is most certainly a factor in explaining some developing countries' reluctance to take part in the BEPS meetings.

The structure of the OECD and the fact that working parties meet behind closed doors make it difficult for researchers to get a foot in the door and investigate these matters beyond conducting interviews. More research therefore has to be conducted to further investigate this issue. What, however, has come out of our investigation is that agenda setting is a significant issue, alongside problem framing and an inherent bias against developing countries.

Output legitimacy

This section weighs the outcomes of the BEPS project and categorises the different stances towards the output legitimacy of the BEPS project that were forwarded by our interviewees. As argued before by Mosquera Valderrama, international tax expert at the University of Leiden, a lack of input legitimacy can be justified if there is at least output legitimacy in the IF on BEPS. In other words, developing countries might still benefit from the BEPS project even though they are not able to provide input. For this, it is important that the solutions and final outcomes of the IF are not only in the interests of the G20 countries that initially started the talks on BEPS, but also address the problems of all 139 participating countries (Mosquera Valderrama, 2018). In this report, we follow Mosquera Valderrama in her description of output legitimacy as the extent to which solutions are relevant for the tax frameworks of developing countries and the extent to which developing countries will be able to successfully implement the outcomes in their own jurisdictions. As argued by her, in both her writings and interview, there are certain action points in the BEPS IF that do not take into account the complexity and technicalities that developing countries might encounter while implementing action points in their domestic tax systems. Furthermore, not all outcomes of the IF will eventually address the specific problems

that developing countries experience. Rather than provide an analysis of the output legitimacy for specific action points and outcomes, this section will address the different stances towards output legitimacy that were held by our interviewees.

Based upon responses from interviewees, there are three broad categories that can be distinguished: optimists, pessimists, and pragmatists. Before continuing, it is important to note the terminology used to distinguish the three groups of experts. As mentioned, the terms optimist, pessimist, and pragmatists are used to refer to the assessment of the functioning of the OECD-led BEPS process for developing countries. It is important to remark that these labels do not contain any moral or other judgement, rather they are used in lack of better titles for these simplified categorisations. Furthermore, they do not incline any judgement about the personality or general character of the interviewees. This means the categorisations refer to the experts' objective analysis of the IF negotiations and their output as presented in our interviews. Consequently, the terms should be dissociated from their positive and negative connotations, where optimism and pragmatism are positive qualities, whereas pessimism is a negative quality. Each perspective is grounded in an evaluation of the BEPS' input and output legitimacy rather than subjective sentiments. There is thus no hierarchy between the different perspectives aligned with their everyday connotations.

In this report, optimists are those who believe the outcomes and process of the BEPS IF are definitely legitimate, whereas pessimists reject the current BEPS IF in its entirety as the right platform for the negotiations. Pragmatists are interviewees who position themselves somewhere in between optimists and pessimists; they acknowledge positive attributes of the project and they share a much more critical evaluation of the overall outcome of the BEPS negotiations than optimists.

Optimists

The interviewees who were distinguished as having an optimistic view were not present in large numbers, but some did stress the importance and value of the OECD and its practices. These people are primarily of the opinion that the BEPS initiative and the (preliminary) outcomes that have emerged are positive for developed countries as well as for developing countries. They argue that implementation of the outcomes will be beneficial for the position and role of developing countries in the global tax negotiations. While complexities may arise from the implementation of the BEPS action points, they agree that the benefits of implementation will exceed these complexities, especially for the two pillars of BEPS 2.0. As argued by Johan Langerock, policy advisor for the Greens/EFA Group in the European Parliament, the act of

being present and having a seat at the table is already very beneficial for developing countries. While acknowledging the problematically fast pace of the negotiations for some lower developed countries and the room to improve in some of the outcomes, Langerock points to the incremental and evolving process which ensures an overall positive balance. His view is supported by Professor Burgers who argues it is definitely profitable for developing countries to participate and implement the objectives of the BEPS IF. Professor Burgers indicates the significance of legal systems, namely their ability to prevent types of tax abuse. In her view, the IF in its current form is working well, and has gone a long way to move away from the long-dominant Western view of the negotiations, successfully ensuring real inclusivity for all participating members.

The interviewees with the most optimistic views align most with the view the OECD holds of the output legitimacy of the IF and its action points. Regarding the process itself, they point to the mere existence of an IF and the fact that non-OECD developing countries now have a seat at the table to justify its legitimacy. Pascal Saint-Amans, Director of Tax Policy and Administration at the OECD, stated a few years ago that “we have now put in place an inclusive framework, so there are 90 countries on an equal footing” (Finance Director Europe, 2017). They do not only point to the framework itself, but also to the significant numerical representation of developing countries in the Steering Group (OECD, 2020). The IF was set up recognising that the timing of implementation for developing countries may differ from other more developed countries. The establishment of the framework was supposed to appropriately address these different circumstances. In order to realise this, the OECD’s Background Brief on the IF (2017) points to the establishment of webinars and workshops prior to and after meetings of Working Parties as well as a Twinning Programme, through which new members can be supported by more experienced members in the implementation of the outcomes. Besides this, the OECD has also set up several tailored programmes to facilitate developing countries’ prospective membership of the IF (OECD, 2020). Furthermore, recognising the practical reality that some countries may struggle to participate in the meetings based in Paris for financial reasons, they recommended increasing the number of regional meetings as an integral part of the IF structure to ensure an equal voice for all countries. However, as some interviewees still call for more regional meetings with only developing countries, as will be touched upon further, it remains a question whether and when word becomes deed.

Interviewees were asked about the role of the OECD Secretariat in the steering group and the IF. Harry Roodbeen, who worked in the IF as a representative of the Netherlands, responded

that the Secretariat holds no political power and only serves as a facilitator of the BEPS negotiations. When asked about the status of developing countries and their opportunities to provide input, he commented that participation in the IF occurs on equal footing, and that there is no discrimination of the Secretariat to developing countries. Furthermore, Roodbeen, as an OECD optimist, emphasised the benefits that developing countries receive from the BEPS project; namely, the reallocation of profits to their jurisdictions and minimum tax that will significantly benefit developing countries. According to Roodbeen, setting up global tax negotiations in a different institution would take years to complete, which will not benefit anyone. It is therefore in the best interest of all countries, developed or developing, to continue formalising international tax rules within the OECD.

Regarding the legitimacy of the outcomes, the OECD points primarily to the increased revenue that countries will receive as a result of successful implementation of the BEPS actions, as they expect the revenue gained as a percentage of tax revenues to be significantly higher for developing countries than for developed countries. (OECD, 2017). First of all, they point out that profit shifting tends to be more prevalent and amounts to higher losses in developing jurisdictions than developed ones (OECD, 2020). And secondly, at this stage, developing countries collect much less tax revenue as a share of GDP compared to their richer counterparts. This is partly because developing countries use a range of tax incentives to attract investment into the country, allowing for reductions and tax holidays. These policy tools are costly, as competition amongst countries rewards generous tax environments. The OECD argues that the new rules under Pillar One and Pillar Two of the BEPS 2.0 process will allow developing countries to move away from these costly policy objectives, as they will strengthen their bargaining positions globally with the emergence of a minimum level tax regardless of where businesses are situated (OECD, 2020).

Pragmatists

Not all our interviewees, however, had such a positive understanding of the BEPS project and its workings for developing countries. It is interesting to note that all our interviewees from the global South were either part of the pragmatic or pessimistic group. We believe that this already shows the Western dominance of the BEPS project and the IF. The more pragmatic group of our interviewees looked much more critically upon the BEPS achievements; while interviewees did not deny that there was any advantage through the project, they were much more cautious when assessing its overall value. As Dr Ezenagu put it:

“I will not be cynical to say that there's been no benefit. That would definitely not be accurate. I suppose when the implicit framework started many of us were pessimistic about its outcome or even its process. [...] But looking at some of the conversations that are ongoing at the moment and seeing some of the policy changes, even within the domestic tax law, then one can actually admit that there's been some benefit.” (A. Ezenagu, personal communication, April 8, 2021)

However, one important point of critique of the “pragmatists” is the problem of CbCr, a part of the system of OECD guidelines and rules on the exchange of tax information between countries. It is the implementation of Action 13 of BEPS. This mechanism forces multinational companies to deliver a yearly report to the tax authority in the country where the parent entity of the multinational is located. The report contains information on the revenue generated by daughter entities in other jurisdictions, and the associated taxes that it has paid. This allows tax authorities to justify taxes paid by the multinational enterprise, or to invoke additional taxes if the multinational failed to complete its tax obligations in other jurisdictions. While theoretically such a mechanism would improve tax transparency, it became clear in our investigation that CbCr does not live up to the expectations of most developing countries. Dr Ezenagu criticised the OECD for excluding most of the African multinationals from the scope of CbCr:

“Are there more pressing issues [than attracting FDI] that would be relevant to African countries and in particular to Nigeria? The answer is yes. Look at tax transparency and exchange of information. The OECD recognises this issue in actions 13, 14 and 15. But the problem with the OECD is to limit the use of those pieces of information that you gather, also the issue of the threshold stipulated by the OECD to come under the CbCr regulations. I am specifically referring to the CbCr and what you can do with CbCr. When you put a threshold on CbCr of only €750 million, which is \$1 billion, there are only 400 companies in all of Africa that actually make such a market turnover, which are not even African companies but Western multinationals that operate in the region. In Uganda alone there are over 800 multinationals entities [that are not in the scope of CbCr], so there are relatively very few companies caught within the bracket of the OECD.” (A. Ezenagu, personal communication, April 8, 2021)

In addition, CbCr is difficult to properly implement for some developing countries. Two of our interviewees work for Capabuild, an organisation that specialises in giving training to improve the technical capabilities of tax authority employees in developing countries. Paul de Haan, one

of the interviewees, mentioned to us that it is difficult for developing countries to exchange information, but nonetheless very important for them to do so:

“BEPS did a number of things to increase and improve the transparency and the exchange of information which is vital for developing countries. But then there is the practice, you really have to pose the right questions to other tax authorities as a developing country. You have to follow up because that other tax authority is also busy with other stuff. So you really could say that it is a work in progress. Exchange of information, again, is very vital for developing countries.” (de Haan, personal communication, 2021)

Implementing action 13 by standardising CbCr in the international tax world is of vital importance to developing countries and tax transparency. However, developing countries often do not have the technical capacity to actually implement CbCr. This relates back to the fact that only 400 multinationals would be applicable to CbCr, which is a very small percentage of all multinational companies in Africa that might be involved in aggressive tax planning or profit shifting.

Tax transparency and exchange of information mechanisms are thus geared towards the desires and needs of OECD countries rather than developing countries. This means that CbCr is inherently flawed to provide tax transparency. The pragmatic group saw this issue very clearly. Even though the OECD might have every intention to establish a coherent and workable tax framework for all countries to use equally, their limited Western scope has ostensibly excluded developing countries from providing input. Furthermore, it seems that the tax rules decided by the working parties and the steering group at least to some extent favour OECD countries and do not account for specific conditions in developing countries. Most of the rules of the OECD are more applicable to the issues that rich and Western countries face.

Connected to this issue, interviewees of this group raised criticism regarding the dependency of the BEPS project and IF on the OECD and OECD structures. This ties back to the issue of agenda setting and the dominance of the Secretariat. Another point criticised is the lack of tangible results. Many of our interviewees stated that developing countries had gained influence in the process, but the outcomes were nearly untouched by this gained influence:

“We have colleagues at the federal revenue service, and at the Ministry of Finance, who are very, very active on those international fora. But the question is, is it just a conversation at that level, or does it come down properly to the agencies and ministries and departments here for practical implementation? And the answer is no. Because these guys go over there to those fancy meetings, drink their tea and come back home. But this is something we actually need to put pen on paper. [We need to] establish offices and give responsibilities to people, to units and to departments. [We need to tell them:] ‘This is what you're meant to do to fix these kinds of issues’. But we haven't quite seen anything like that yet.” (Epke, personal communication, 2021)

While this criticism is not only directed at the BEPS process but also national authorities, the point that the negotiations do not have too much of an actual impact is still valid. Furthermore, interviewees mentioned the uncertainty over the future direction of negotiations. Since negotiation outcomes depend to a large extent on the willingness and interests of the biggest OECD members (such as the US and the EU), the direction of talks changes with a shift in power dynamics in these countries.

Nevertheless, the interviewees in this category did not reject the OECD as a forum for international taxation negotiations. Despite being highly critical, all of them admitted that the OECD was the best forum available. Some interviewees even explicitly stated they did not believe that the UN was a better forum as its tax committee is just as dominated by Western countries as the OECD.

Pessimists

The pessimist group of our interviewees was characterised by a rejection of the OECD as an international tax forum altogether, which was much less represented than the pragmatic category. Interviewees that we categorised as pessimist presented the inherent bias of the OECD as too dominant to be overcome and therefore the outcomes are too much in favour of Western countries. Moreover, one of our interviewees stated that they believed that the rising developing countries would have their own forum in the near future and would no longer need the OECD as a forum. They stated that only a few of the 10 biggest economies in 10–20 years will be OECD members; therefore, the OECD is an organisation of a certain era and certain selection of countries and hardly able to provide a global taxation framework. According to this view, which confirms criticism raised before, the BEPS IF does not offer a satisfactory incentive for developing countries because it is coined by developed countries and therefore replicates

developed countries' needs. Developing countries have other worries and other priorities, and therefore their "lack" of participation is neither a lack of capacity nor ability, but rather a rational choice on their side to dedicate their energy to their priorities.

Overall, it becomes clear that our interview partners did not have a single coherent view. However, based on our findings, it can still be concluded that the vast majority of interviewees believe output legitimacy relative to input legitimacy is net positive, or at least enough to proceed with the negotiations. Nevertheless, whereas some argue that this is a result of the legitimacy regarding the solutions to the problems for developing countries, others are of the opinion that this is mainly the result of a lack of alternatives to address the problems held specifically by developing countries.

Recommendations

1. A more representative Secretariat

As mentioned throughout this report, the lack of agenda setting power on behalf of developing countries is a major barrier to a truly equitable IF. Self-evidently, this is a complex problem to solve, as it resides in the structure of the BEPS negotiations. The outsized influence of the OECD Secretariat, in particular, has been flagged above. Their role in preparing but also coordinating negotiations gives it the ability to set the agenda, frame the issues discussed, and steer the eventual decisions made. This in itself would not obstruct equality of participation; however, the interviewees highlight a bias against developing countries' viewpoints and proposals in this process. As a result, negotiators do not have an equal say in the decision-making process compared to their developed country counterparts. This power imbalance is not necessarily intentional, as the members of the Secretariat are overwhelmingly from developed countries. This might create an unconscious bias, as developing countries' suggestions might defy their expectations and thus be dismissed, or such countries may be perceived as less important, as indeed they often are in the Global North.

Aware of the way our country of origin, education, and residence can colour our perspectives, a change in the Secretariat's composition might be a step towards resolving this inequality in agenda setting and framing. It is understandable, to an extent, that at the moment, employees in the Secretariat are primarily from developed countries. After all, employees are selected from the member states, which are by the OECD's nature developed nations. Thus, we do not suggest

that the composition of the entire OECD Secretariat should be changed. By and large, it remains an organisation for the developed world. However, for the IF to be true to its name, the section of the Secretariat involved in BEPS must be the exception. Ben Dickinson (2019) has certainly been a proponent of a diverse tax Secretariat and defended the OECD against accusations:

“The OECD’s work is informed by increasingly diverse staffing. Contrary to Allison Christians’ speculative suggestion, we have many non-OECD nationals in our OECD Secretariat team: Brazilian, Cameroonian, Chinese, Colombian, Costa Rican, Egyptian, Indian, Kenyan, and Pakistani to name a few, the result of a derogation to the usual OECD rules granted to staff of the Centre for Tax Policy and Administration to bolster inclusion.”

Yet, one of the interviewees emphasised that the inclusion of some developing country nationals to improve optics is not enough:

“Look at the percentage. And [...] I know they employed someone from Kenya, and they have another person from Cameroon. And these people are working in the Secretariat, but they are still doing minor secretarial jobs. You put them, maybe in Exchange of Information, where they’ll just have to implement already developed policies. It doesn’t make any difference. Who from developing countries, who from any African country is at the decision making desk? Who is involved in framing issues? Who is involved in key decision-making, as to what to think, to discuss, and what not to discuss? They need to balance this to make things go right.” (International taxation expert from the Global South, personal communication, May 15, 2021)

In other words, a practical, implementable first step towards increasing equality of participation in the IF would be to prioritise diverse hiring practices. Moreover, nationals of non-OECD countries must be given a meaningful role in determining the Secretariat’s direction in negotiations. This recommendation is already widely implemented in governmental and corporate organisations, as employers seek to diversify their workforce. For the reasons outlined above, it is imperative that the OECD’s Centre for Tax Policy and Administration increase its efforts in this regard. Civil society could join developing countries’ representatives in advocating for such a change.

2. Developing country meetings and regional collaboration

Agenda setting power imbalances between developed and developing economies prevent proper coordination and collaboration between developing countries. Even though this is a difficult

matter to resolve, interviewees recommended that pre-plenary meetings with only developing countries might be a step in the right direction. The problem that developing countries face right now is that their voices remain unheard, or that they simply lack the political power to present their interests within the current framework of the OECD and its IF. From the agenda and output of the BEPS IF public consultations at the OECD premises (now online), it can be observed that the participation of developing countries is limited. For instance, in the consultations of BEPS Pillar One and Pillar Two, representatives of countries, businesses, business associations, and civil society were invited. However, as Mosquera Valderrama (2019) has argued in the past, developing countries' (active and meaningful) participation is small compared to the ones participating from business, business associations and developed countries.

In general, the discussions of the BEPS Project, Pillar One, and Pillar Two among developing countries have taken place either at regional meetings organised by CIAT or ATAF, or in the framework of regional consultations coordinated by the OECD. Only one exception was the G24 meeting that was held at the time when the OECD Pillar One and Pillar Two proposals were discussed (2018–2019). This proposal was introduced in the Public Consultation document published in February 2019. In this G24 meeting, developing countries were discussing the content of the proposals in Paris, and also submitted their own proposal of significant economic presence regarding Pillar One. However, later on in November 2019, the OECD Secretariat submitted a unified approach that did not include this proposal from the G24 countries.

The first-mover advantage that developed nations have is detrimental to developing countries trying to make their concerns noticed. It would therefore be beneficial for developing countries to have BEPS meetings solely for developing countries. Such meetings would allow developing countries to collaborate and decide beforehand what concerns they might want to raise during the BEPS meetings in the OECD, as well as increase their efficiency in the BEPS meetings and challenge the first-mover advantage of more developed economies. The OECD should try to facilitate such meetings and make its position on inclusivity within its organisation known. Civil society organisations could also support such endeavours by hosting regional platform discussions with representatives from developing countries.

While meetings might offer developing countries a platform to openly discuss the issues that they face and plan strategies to protect their interests in the OECD, they also might benefit from

political support from either the G24 or G77. Mosquera Valderrama clearly advocated for this possibility in our interview with her:

“In order to have a voice as a developing country, you need to have this kind of framework like the G24 or G77 which both consist of developing countries. But the G77 is not involved in the BEPS project, and the G24 was only involved with Pillar One. During the tax discussion in 2019 the G24 presented an approach to Pillar One which was later refuted by the OECD and replaced with a unified approach. [...] The G24 is not an alternative to the OECD, but might be a way to allow developing countries to have a voice in the Inclusive Framework of the OECD.” (Mosquera Valderrama, personal communication, March 23, 2021)

This is why Valderrama argues that even though countries might be less restricted to make objections to certain tax clauses in the BEPS steering group or in the working parties, developing countries may have more success by forming coalitions or using political forums to express their concerns. When decisions in the steering group are made anonymously without prior consultations, a developing country participating in the BEPS steering group may no longer act in its own favour. But when interests are presented from an international forum, with political backing of multiple other developing countries, speaking up during a steering group meeting might be more incentivised and successful. For example, the G20 consists mostly of developed nations, but the G24 or the G77 consist mostly of developing nations that might share some interests on pillar one and two of the BEPS project. They would thus be more successful in making their interests heard in the OECD if they presented their common point of view from either the G24 or G77.

3. A call for transparency

The OECD has demarcated the field of legitimate international taxation. An epistemic community of tax experts and politicians works for the OECD Secretariat. Knowledge and capacity on how to implement international taxation therefore stays within the organisation. By extension, power remains vested in the OECD because knowledge and capacity are foremost in the OECD rather than anywhere else. The technical jargon that the OECD uses to confirm its knowledge makes it particularly difficult to challenge the OECD from outside its framework. If a critic would attempt to use different technical language to discuss transfer pricing rules, they would simply not be understood by the international tax community. The knowledge that is present in the OECD and the technical language that it has used to present this knowledge sets the norm on how international tax rules should be discussed. Unfamiliarity with this technical

language prevents some parties from meaningfully discussing tax rules that concern them. It is therefore recommended that the OECD opens up to a more transparent structure that allows the technical language to become more public, and more understandable for outsiders, thus allowing them to engage in the discussions.

A critic would most likely point out that the lack of transparency is justified on account of state sovereignty and the need to reach unanimous agreements. After all, some countries might not share their view if they knew that all information that they brought to the table would become public. In the words of Mosquera Valderrama:

“On the one hand you could say let’s make it [the Inclusive Framework, BEPS steering group and the working parties] transparent, but then you would not reach a decision. On the other hand, you could say that reaching a decision requires some restrictions on transparency, so that the dissenting views of countries can be protected from being disclosed” (Mosquera Valderrama, personal communication, March 23, 2021).

This view resonates with Karl Popper’s paradox of democracy that to reach democratic decisions, some democratic liberties might need to be restricted. Even the most democratic countries struggle with this issue of finding the right balance between transparency and making the best possible choices in governance.

Another point of critique is that there is no parliamentary oversight within the OECD framework. National parliaments can ask questions to country representatives working in the OECD, but cannot hold the OECD Secretariat or other country representatives accountable for their decisions. As indicated by Fung (2018), there is a gap in the legitimacy of democratic governance processes of the OECD and G20 because “they lack the institutional components associated with representative electoral polities” (p. 80). In other words, there are no formalised rules that can keep the organisations in check. Moreover, neither the OECD nor the G20 has accountability mechanisms for reporting to the wider international community. There needs to be a good justification for this lack of transparency. Some pro-OECD commentators would argue that such a justification exists because of the consensus-based structure of the IF. All countries need to agree with proposals in order for them to be implemented. The lack of transparency is therefore justified because otherwise decisions would not be easily made. However, considering that the OECD controls the negotiations and publishes reports on BEPS, therefore controlling

the narrative, it must really be questioned whether the BEPS project can be deemed legitimate. As indicated by one of our interviewees, this lack of transparency is clearly an issue for citizens:

“So I would say, make the meetings very transparent and public. The citizens have a right to know what their country is defending in those international tax meetings because taxes lie at the heart of the social contract of every democracy. As a citizen you have the right to know what your country is defending and what is happening in those [BEPS] meetings.” (J. Langerock, personal communication, April 16, 2021)

The BEPS project is intended to improve global tax cooperation. But cooperation requires trust and goodwill, and thus opposes any form of secrecy. Since there is little to no parliamentary oversight in the BEPS project, there are no mechanisms of accountability present. There are little checks and balances that keep all participating nations on equal footing. Arguably this means that the BEPS project of the OECD is democratically flawed. The best way to move forward is therefore to increase the transparency of the BEPS negotiations in order to ensure that all participating members have the opportunity to make their interests known. Furthermore, increasing transparency will allow citizens to better comprehend the decisions made in the OECD, which is a necessary step towards increasing the legitimacy of the BEPS project, as citizens have a right to know what is happening in the BEPS meetings. A first tentative step towards increasing the BEPS project’s democratic legitimacy is making its operation easier to get a grasp on. This could start small, for instance by creating a clear overview of the negotiation process on the OECD’s website. At the moment, it is not even clear to an outsider which working parties exist and what the steering group does. This is a manageable change and should not disturb the secrecy and thus efficiency of negotiations, while giving researchers and citizens some more insight into the process governing global taxation.

4. Civil Society in the Global North

Even though civil society organisations have little ability to enter the negotiation room, they can still play a meaningful role in improving the equality of participation in the IF. This applies to advocacy groups in the Global North, Global South, and transcontinental networks such as the Tax Justice Network. The best course of action to be taken by civil society is a complex question in itself. NGOs, according to Johan Langerock (personal communication, April 16, 2021), face difficult choices as to what to support in the BEPS negotiations. On the one hand, some rally behind the interests of developing countries, even where these might not align with common principles of fairness in taxation. On the other hand, there are, according to Langerock,

arguments to be made for certain negotiation outcomes that are not preferred by developing countries but would create a beneficial international taxation regime for the world overall. These would also have positive spillover effects for the Global South. Civil society, especially in the Global North, should reflect on such different options and might benefit from dialogue with NGOs in the Global South on these questions. The latter may have a more nuanced picture of what benefits their polities than government negotiators.

Another matter that should be discussed is the types of advocacy strategies that would be most important to improve the IF from within. Interviewees point to a tension between dogmatic and pragmatic approaches to activism. This turns up, amongst others, in debates on cooperation with the private sector: “We need to solve this problem all together, and that includes private industry. And for that, we need to work with the pioneers of change in each sector, and not immediately slam anyone who works in the private sector as morally corrupt” (G. Heij, personal communication, April 29, 2021). Involvement with the OECD calls forth similar dilemmas: “I think Oxfam has been [...] closer to the political dynamics and trying to find solutions within those political dynamics. You might also talk to another NGO who will say, ‘We completely disregard the OECD and we don't even get in touch with them because we don't recognise them [as a legitimate platform for international tax negotiations]’” (J. Langerock, April 16, 2021). Within their own national context, both NGOs in the Global North and South can work towards tax justice. Nigerian NGOs, for instance, ask European and American partners to encourage transparency and respect for human rights and tax law in national multinationals. Conversely, Martin Hearson (personal communications, March 15, 2021) has pointed out that local NGOs can successfully press governments in the Global South to demand more in bilateral tax treaty negotiations. For instance, a court case instigated by civil society resulted in a renegotiation of the treaty between Kenya and Mauritius in Kenya's favour. In short, in neither part of the world should attention be turned exclusively to the OECD-level negotiations. This is not to say that no efforts should be made to demand a more inclusive IF. As developing countries are marginalised during negotiations because of the structure of the negotiations or a lack of capacity, advocacy groups should amplify their voices:

“Sometimes, some [delegates] from developing countries involved in these negotiations are screaming out. [Their] voices are not being heard. And there's no platform to amplify those voices, apart from the Inclusive Framework platform itself, which is a managed platform, and the people you may be protesting against are the people managing the platform. So scream from here to tomorrow, what comes out is what they want to come

out. So, you find out that a kind of strategic partnership with Oxfam [or another civil society organisation], having that kind of interaction, [...] a kind of interaction with some key places could be very, very important because information [you] want to get out, which could help balance the equation, could be streamed using Oxford or any of the advocacy groups.” (international tax expert from the Global South, personal communication, May 15, 2021)

A concrete example of such beneficial interactions between developing countries and civil society is the campaign for public CbCr. This would not only increase transparency but also make it easier for developing countries to access the information, apart from submitting their own reports. NGOs were engaged by developing countries and the subsequent advocacy efforts led to a shift in the discussions during negotiations. Such unofficial partnerships to further common goals should be increased in the future. Finally, civil society should advocate for the aforementioned recommendations. The ultimate goal, after all, is that the developing world does not need support from outside the IF to have its voice heard.

Conclusion

This report investigated the legitimacy of the OECD as the main institution for international taxation. By conducting semi-structured interviews with a wide variety of international tax experts, politicians, NGOs, and academics, this report provides an overview of the issues of developing countries associated with international tax practices in the OECD. In general, a main concern is the lack of transparency of the BEPS/IF project of the OECD. Little information is public about what is actually going on within the working groups and the steering group of the IF. Furthermore, democratic checks and balances of the OECD can only be enforced through national governments, thus indicating the lack of parliamentary oversight required to enforce transparency and accountability of the OECD Secretariat. There is some evidence suggesting that the OECD lacks opportunities for developing countries to give meaningful input in the IF on BEPS. It was mentioned by multiple interviewees that the Secretariat of the OECD has significant political power to steer the direction of discussions and agenda points. The Secretariat has, at least in some cases, exercised this power to ignore or negate concerns forwarded by developing countries. Moreover, there is an enormous gap in knowledge and skills between developed and developing countries. Some countries are simply not familiar with the technical jargon of the OECD, and therefore find themselves in a position that does not allow

them to participate meaningfully. The OECD has therefore attempted to improve the technical capacities in developing regions through capacity building programmes. However, it remains questionable according to some of our interviewees that some developing countries have a lack of capacity. Indeed, it is argued that diplomatic and technical capacity in some of the bigger developing economies are more than capable of participating within the IF and the working parties of the BEPS project. The issue therefore seems to be, at least for some developing countries, that the OECD does not recognise their capacity to contribute to BEPS. In other words, the power imbalance within the OECD has caused the OECD Secretariat to enjoy the ability to determine the agenda, and in some cases deliberately prevent the input of technically capable developing countries. In line with the conclusion of Christensen et al.'s (2020) research, this report concludes that there are some serious flaws in the structure of the OECD that should allow equal participation and partiality. Developing countries are therefore not always able to give meaningful input to protect their interests.

The question remains whether developing countries truly benefit from the outputs of the BEPS project. After all, the G20 and OECD countries constructed a system of international taxation and only invited developing countries to the table afterwards. According to some optimistic interviewees, the OECD and the BEPS project are the best possible ways to mitigate the issues related to tax avoidance by multinational corporations. It should be mentioned that most of the optimists that we interviewed were born in a developed European country. The general consensus in this group was that developing countries will profit from a minimum tax and a reallocation of taxable profits for digital products. Critics refuted this however through arguing that some developing countries will not be able to attract foreign investments by offering favourable tax incentives, because a minimum tax is forced upon them. Furthermore, the CbCr rules that would likely improve the transparency of multinational companies are only applicable after a very high threshold of €750 billion, thus including a marginal amount of 400 African companies located in developing African regions. Some interviewees also mentioned that the OECD prefers giving favourable tax incentives to Western multinationals rather than distributing such rights equitably.

The political pressure of the OECD, the EU, and the US on developing countries to adopt the BEPS package makes the benefits for developing countries questionable. The pessimist group of interviewees sketches a bleak future for international tax cooperation if the OECD continues this way. Some mentioned that the organisation will become obsolete in the near future because of the rise of non-Western economies. Overall, the main argument that they forward is that the

OECD is not a legitimate institution for international tax negotiations because the outputs of the project are not as favourable to developing countries as they are to developed countries, thus not justifying the lack of input legitimacy and preventing a number of developing countries from meaningfully participating in the IF.

There are several aspects that need to change in the OECD, as well as in the broader world of international taxation. This report has formulated four recommendations that should be implemented by the OECD, developing countries, and civil society organisations to improve the current situation. Firstly, the OECD Secretariat should become more inclusive in order to represent the interests of developing countries within the organisation. Secondly, we recommend that developing countries organise pre-plenary meetings for developing countries within the framework of either the G24 or G77 in order to stipulate their interests, find common ground, and effectively deliberate their concerns without the presence of the OECD Secretariat nor developed countries. Thirdly, the OECD should attempt to increase its transparency to such a degree that the lack of parliamentary oversight is justified. Lastly, NGOs have an important role to play in investigating the tax practices of multinational corporations, especially in countries where they decided upon the illegitimacy of the OECD. The BEPS monitoring group should advocate for equality of participation and promote a level playing field.

This research has attempted to provide a glimpse into the issues related to international taxation on OECD level. Our focus has been on larger developing economies, such as Nigeria and Kenya, but further research should shift its scope towards smaller developing nations. The issues related to input and output legitimacy might be confirmed to apply exponentially to smaller nations, as we predicted. But there are some developing nations that refused, and in some cases are still refusing, to participate in the IF, despite significant geopolitical pressure from the developed world, especially the EU and the US. Further research should therefore investigate potential soft power mechanisms to steer developing nations to join the OECD's IF. Moreover, later work should measure the outputs of the BEPS package after its full implementation, and whether the outputs are rightfully justified in relation to the input of developing nations, either small or big, in the negotiation process. During the time of writing of this report, decisions still have to be made on BEPS. Future research should thus investigate the net outputs after decisions and implementation have been finalised.

Literature

BEPS for a better international tax system - Finance Director Europe. (October 27, 2017). The Finance Director. <https://the-financedirector.com/features/featurebeps-for-a-better-international-tax-system-5958696/index.html>

Burgers, I., & Mosquera, I. (2017). Corporate taxation and BEPS: A fair slice for developing countries. *Erasmus Law Review* 10(1), 29-47. <https://doi.org/10.5553/ELR.000077>

Christensen, R. C., Hearson, M., & Randriamanalina, T. (2020). At the Table, Off the Menu?: Assessing the Participation of Lower-income Countries in Global Tax Negotiations (Working Paper 115). International Centre for Tax and Development. <https://www.ictd.ac/publication/at-table-off-menu-assessing-participation-lower-income-countries-global-tax-negotiations/>

Christians, A., & van Apeldoorn, L. (April 15, 2018). The OECD Inclusive Framework. *Bulletin for International Taxation*. <http://dx.doi.org/10.2139/ssrn.3393140>

Dickinson, B. (November 18, 2019). The Inclusive Framework is considering radical proposals, but in the real world... *International Centre for Tax and Development*. <https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/>

Fung, S. (2017). The Questionable Legitimacy of the OECD/G20 BEPS Project. *Erasmus Law Review* 10(2), 76-88. <https://doi.org/10.5553/ELR.000085>.

G20. (November 16, 2015). G20 Leaders Communiqué, Antalya. G20 Research Group. <http://www.g20.utoronto.ca/2015/151116-communication.html>

Kingma, S. (2019). *Inclusive Global Tax Governance in the Post-BEPS Era*. IBFD.

Mosquera Valderrama, I. J. (February 28, 2015). The OECD-BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead, *Intertax, Kluwer Law International* (10), 615-627. <http://dx.doi.org/10.2139/ssrn.2528650>.

Mosquera Valderrama, I. J. (January 31, 2018). Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative. *Bulletin for International Taxation*, 72(3). <https://hdl.handle.net/1887/59348>.

Mosquera Valderrama, I. J. (November 19, 2019). About the BEPS Inclusive Framework and the role of the OECD. <https://globtaxgov.weblog.leidenuniv.nl/2019/11/19/about-the-beps-inclusive-framework-and-the-role-of-the-oecd/>.

OECD. (n.d.). *International collaboration to end tax avoidance*. Retrieved 23 March 2021 from <https://www.oecd.org/tax/beps/>

OECD. (2017). *Background Brief: inclusive framework on BEPS*. <https://www-oecd-org.proxy-ub.rug.nl/tax/beps/background-brief-inclusive-framework-on-beps.pdf>

OECD. (2019). *Addressing the Tax Challenges of the Digitalisation of the Economy*. <https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf>

OECD. (2020). *OECD/G20 Inclusive Framework on BEPS: Progress Report July 2019-July 2020*. <https://www-oecd-org.proxy-ub.rug.nl/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.htm>

OECD. (2020). *Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project*. OECD Publishing. <https://doi.org/10.1787/oe3cc2d4-en>.

Regional Meetings of the Inclusive Framework on BEPS - OECD. (n.d.). OECD.Org. Retrieved 21 July 2021, from <https://www.oecd.org/tax/beps/beps-regional-meetings.htm>.

Sunak, R. [@RishiSunak]. (2021, June 5). *At the @G7 in London today, my finance counterparts and I have come to a historic agreement on global tax* [Tweet]. Twitter. <https://twitter.com/RishiSunak/status/1401133898847948803>.