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Out in the cold: Explaining the inferior position of simplified transfer pricing methods on the world stage

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1. Abstract

In this paper we seek to explain the dominance of the OECD transfer pricing guidelines (TPG) and its accompanying methods on the world stage. In spite of inherent weaknesses in the guidelines and the challenges faced by countries applying them, the guidelines remain widely accepted globally. This even if alternative methods, which could be simpler to apply exist and are being used by some countries. We argue that the dominant discourse coalitions favouring the approaches recommended in the OECD TPGs have managed to form an epistemic community centring around the OECD tax network. This epistemic community has established and successfully defended the OECD TPG as international best practice, whilst side-lining and actively undermining a serious debate over alternative approaches. We use discourse network analysis (DNA), to corroborate our argument. We show how the public discourse has evolved over time, from 1996 to end of 2018, and how the public discourse has in turn translated into effective decisions. By focusing on the politics surrounding the international efforts to deal with abusive transfer pricing by MNE, this article contributes to the still nascent literature seeking to explain the noteworthy persistence of the current international tax regime. Additionally, our article adds to the limited scholarship on simplified transfer pricing methods and the reaction to these methods on the world stage.

2. Introduction

Transfer pricing is frequently stressed as amongst the most challenging of the global tax planning tools employed by multinational enterprises (MNEs).¹ According to the OECD Glossary of Tax Terms, a “transfer price is the price charged by a company for goods, services or intangible property to a subsidiary or other related company”.² This allocates the tax base generated by the profits of MNEs among the national jurisdictions within which

¹ Joel Cooper et al., *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners* (Washington, DC: World Bank, 2016), <https://doi.org/10.1596/978-1-4648-0969-9>; Thomas Rixen, “From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance,” *Review of International Political Economy* 18, no. 2 (2011): 197–227, <https://doi.org/10.1080/09692290.2010.481921>.

² OECD, “Glossary of Tax Terms,” 2018. <http://www.oecd.org/ctp/glossaryoftaxterms.htm>

those enterprises operate. Abusive transfer pricing, on the other hand, “occurs when income and expenses are improperly allocated for the purpose of reducing taxable income.”³

Whilst transfer pricing is a legitimate feature of the commercial activities of MNEs, it is also a major source of tax avoidance that can distort the allocation of profit among the countries in which multinationals operate.⁴ Transfer price manipulation provides a substantial advantage to MNEs in comparison with non-multinational firms because only the former can use this type of international tax planning strategy.⁵ In fact, it is comparable to a subsidy that MNEs get but domestic enterprises do not get. MNEs have been found to use transfer pricing to channel taxable income to relatively low-tax jurisdictions. Drawing on evidence from different industrial sectors for a group of OECD countries, Bartelsman and Beetsma estimate that on the margin, more than 65% of the additional revenue resulting from a unilateral tax increase is lost because of income shifting.⁶ The bulk of profit shifting is done by the largest companies.⁷ In addition to denying a country’s essential tax revenue and putting local businesses at a competitive disadvantage, transfer pricing contributes to harmful competition at a global level among tax jurisdictions, as countries attempt to lower their tax rates to attract MNEs to their own jurisdictions in a *race to the bottom* dynamic.⁸ Moreover, tax avoidance by high-profile corporate taxpayers can have wider implications on countries’ tax system, undermining its legitimacy and credibility and thus discouraging compliance by all taxpayers.⁹

³ Abusive transfer pricing differs from mis-invoicing (i.e. under- and over-invoicing) and from mis-reporting quality or quantity of goods or services.

⁴ Ruud De Mooij and Li Liu, “At A Cost: The Real Effects of Transfer Pricing Regulations,” *IMF Working Paper* (Washington, DC, 2018).

⁵ Eduardo A Baistrocchi, “The International Tax Regime and the BRIC World: Elements for a Theory,” *Oxford Journal of Legal Studies*, 2013, 1–34, <https://doi.org/10.1093/ojls/gqt012>.

⁶ Eric J Bartelsman and Roel M W J Beetsma, “Why Pay More? Corporate Tax Avoidance through Transfer Pricing in OECD Countries,” *Journal of Public Economics* 87 (2003): 2225–52, [https://doi.org/10.1016/S0047-2727\(02\)00018-X](https://doi.org/10.1016/S0047-2727(02)00018-X).

⁷ Ludvig Wier and Hayley Reynolds, “Big and 'Unprofitable' - How 10% of Multinational Firms Do 98% of Profit Shifting,” WIDER Working Paper (Helsinki, 2018).

⁸ Baistrocchi, “The International Tax Regime and the BRIC World: Elements for a Theory.”

⁹ Platform for Collaboration on Tax, “A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses,” 2017.

Developed countries, through the OECD, have over the preceding decades become the authority on how to counter abusive transfer pricing by MNEs.¹⁰ At the heart of the OECD solution stands the arm's length principle (ALP), the idea that cross-border transactions of MNEs are comparable with the price if a transaction was carried out at arm's length between two independent entities.¹¹ National authorities' power to adjust the accounts of related business entities in cases where this created "conditions different from those which would have been made between independent enterprises", was already deliberated by the League of Nations in the 'Carroll Report' of 1933.¹² The independent entity principle, from a tax perspective synonymous with the ALP, became institutionalised in 1963 when it was incorporated, with minor amendments, in the first Model Tax Convention article 9 issued by the OECD.¹³

In 1963, there existed no internationally agreed upon guidance on how the ALP should be applied.¹⁴ The first practical guidance on implementing the ALP was published in 1979 in the form of the OECD Report on Transfer Pricing and Multinational Enterprises. Yet, a uniform set of rules on transfer pricing only arrived over a decade later, encapsulated in the 1995 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPGs). The OECD TPGs contributed to elevate the standing of the ALP, describing it as a "sound in theory since it provides the closest approximation of the workings of the open market".¹⁵ Only in 2013 did the UN Practical Manual on Transfer Pricing for Developing

¹⁰ Cooper et al., *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners*; Rixen, "From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance."

¹¹ Victoria Perry, "NATIONAL TAX ASSOCIATION PRESIDENTIAL SPEECH PHILADELPHIA IS THE PRESENT INTERNATIONAL TAX ARCHITECTURE FIT FOR PURPOSE?," 2017, <https://www.ntanet.org/wp-content/uploads/2017/12/Presidential-Address-Victoria-Perry.pdf>. See also Stanley Langbein and Max Fuss, "The OECD / G20-BEPS-Project and the Value Creation Paradigm : Economic Reality Disemboguing into the Interpretation of the ' Arm ' s Length ' Standard," *The International Lawyer* 51, no. 2 (2016): 259–410.

¹² Named after the report's author Mitchell B. Carroll.

¹³ Stanley Langbein, "The Unitary Method and the Myth of Arm's Length," *Tax Notes* 30 (1986): 625–81.

¹⁴ Sol Picciotto, "Problems of Transfer Pricing and Possibilities for Simplification," ICTD Working Paper (Brighton, 2018), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/14117/ICTD_WP86.pdf?sequence=1&isAllowed=y.

¹⁵ Unlike in the 1979 Report, which indicated that the ALP was "the underlying assumption" of Article 9 of the OECD Model, the 1995 Guidelines state expressly that Article 9(1) is the "authoritative statement of the ALP". Furthermore, a new section was included, discussing global formulary apportionment and the reasons for its rejection. Frances M Horner, "International Cooperation and Understanding What's New About The OECD's Transfer Pricing Guidelines" 50 (1996); OECD, "1995 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (Draft Text of Part II)," no. 95 (1995), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(95\)31&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(95)31&docLanguage=En). Chapter I.B.ii

Countries arrive, published by the UN Tax Committee. The UN Practical Manual sought to provide a more user-friendly guidance on transfer pricing in particular for developing country administrations. Although the UN Practical Manual goes some way in accepting the difficulties of applying the ALP, its approach is largely consistent with the TPGs. Whilst great care was taken to avoid replicating the OECD's work,¹⁶ the Practical Manual re-emphasises the need to analyse transactions based on the arms-length principle, leading some to argue that the document should be seen as a supplement rather than an alternative to the OECD TPGs.¹⁷

Since the TPGs were adopted in 1995 and in the course of several subsequent revisions, the methods that the guidelines recommend for establishing the ALP have continued to dominate global transfer pricing practice. This despite the fact that the relevance of the methods and the ALP itself have remained subject to debate. From the development country perspective, applying the ALP is difficult due to lack of data on comparable independent businesses and uncontrolled transactions. Establishing the ALP is moreover time consuming and expensive for tax authorities, placing high demands on already limited human resources. Awareness of the shortcomings of the global tax regime became particularly pronounced after the global financial crisis of 2008 and subsequent exposés detailing the aggressive international tax planning schemes employed by some of the world's biggest MNEs attracted widespread attention.

Despite bold commitments to simplify the rules¹⁸, the response within the OECD to the criticism of the inadequacy of the TPGs has centred on “incremental rather than radical change”; incrementally modifying the current measures to respond to the most frequent techniques of corporate tax planning whilst still staying true to the ALP.¹⁹ In 2013, G20 and

¹⁶ Stephanie Soong Johnston, “Come Together: A Look at the OECD's Working Parties,” *Tax Notes International* (Falls Church, VA, October 2013).

¹⁷ Joseph Andrus and Richard Collier, *Transfer Pricing and the Arm's Length Principle After BEPS* (Oxford: Oxford University Press, 2017); Martin Hearson, “Developing Countries' Role in International Tax Cooperation” (Washington, DC, 2017), <https://www.g24.org/wp-content/uploads/2017/07/Developing-Countries-Role-in-International-Tax-Cooperation.pdf>.

¹⁸ Commitments at 1st meeting of the 2012 Global Forum on Transfer Pricing by Angel Gurría: (“the time has come to simplify the rules and alleviate the compliance burden for both tax authorities and taxpayers”) and Pascal Saint-Amans: “It is essential to simplify and strengthen the TP rules for the benefit of both developed and developing economies, as well as for businesses.”

(<https://www.oecd.org/newsroom/taxoecdto simplify transfer pricing rules.htm>)

¹⁹ Tim Büttner and Matthias Thiemann, “Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation,” *Accounting, Economics and Law* 7, no. 1 (2017), <https://doi.org/10.1515/acl-2016-0069>; Victoria Perry, “NATIONAL TAX

OECD countries initiated the Base Erosion and Profit Shifting (BEPS) reform project, which sought to revise the rules of the international tax regime so as to ensure greater alignment between taxation and value creation by MNEs. Transfer pricing issues constituted a significant portion of the subject matter of the BEPS project and the final report on BEPS Actions 8–10: Aligning Transfer Pricing Outcomes and Value Creation contained nearly 200 pages of revisions to the OECD Transfer Pricing Guidelines.²⁰ The final report on BEPS Action 13: Transfer Pricing Documentation and Country-by-Country Reporting set out a new approach to transfer pricing documentation and reporting, including a requirement that large multinational enterprises prepare and submit annually a country-by-country report of their income, taxes paid and certain indicators of economic activity. These increased requirements regarding comparability analysis have in turn been blamed for adding to the complexity of following the TPGs.²¹

Whereas BEPS has been declared by its proponents as the “most fundamental changes to international tax rules in almost a century”,²² others have criticized the OECD project for not going far enough. Importantly, the global tax system continues to rely on the ALP not withstanding its limitations.²³ For example, the idea of taxing MNEs as single firms by combining their global profits and then allowing each country where the corporation operates or sells goods to tax only the portion of profits attributable to the corporation’s economic activity there – what is known as formulary apportionment or unitary taxation approach – have so far failed to challenge the dominance of the ALP.²⁴ Even less far reaching proposals to move from the discretionary based ALP approach towards a more rule-based settlement of transfer prices has been met with (fierce) resistance.

In this paper we argue that the dominant discourse coalitions favouring the approaches recommended in the OECD TPGs have managed to form an epistemic community centring

ASSOCIATION PRESIDENTIAL SPEECH PHILADELPHIA IS THE PRESENT INTERNATIONAL TAX ARCHITECTURE FIT FOR PURPOSE?”

²⁰ Joe Andrus and Paul W. Oosterhuis, “Transfer Pricing After BEPS: Where Are We and Where Should We Be Going,” *Taxes - The Tax Magazine* 95, no. 3 (2017): 89–107, file:///Users/erebecca/Downloads/Transfer Pricing AfterBEPSWhereAreWeandWhereShould.pdf.

²¹ Andrus and Collier, *Transfer Pricing and the Arm’s Length Principle After BEPS*.

²² OECD, “OECD Presents Outputs of OECD/G20 BEPS Project for Discussion at G20 Finance Ministers Meeting - OECD,” 2015, <http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm>.

²³ Ifueko M. Omoigui Okauru, “Splitting the Riches,” in *What to Tax?* (KPMG, 2018), 10–13.

²⁴ Gianni de Robertis, “The End of the Arm’s-Length Principle?,” in *What to Tax?* (KPMG, 2018), 14–17, <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2018/10/what-to-tax-web.pdf>.

around the OECD tax network. This epistemic community has established and successfully defended the OECD TPG recommended standard methods as international best practice, whilst side-lining and actively undermining a serious debate over any alternative approaches, which are seen as diverting from what is seen as international best practice. The alternative approaches of interest for the present paper are known as simplified transfer pricing methods.²⁵ These methods seek to simplify the application of transfer pricing rules and their use is motivated by the fact that the standard methods set out by the OECD TPGs for estimating the arm's length principle can be difficult and resource-intensive to apply.

Using discourse network analysis (DNA), we analyse in a dynamic perspective how discourse coalitions evolve over time and interact with opposing coalitions, and how the competitive use of concepts translates into effective decisions. Discourse network analysis combines content and dynamic network analysis, allowing us to trace the debate over time, visualize competing coalitions, and analyse characteristics of these competing coalitions.²⁶ We analyse the period from 1996 to end of 2018, dividing the empirical analysis into four distinct phases.²⁷ For the empirical analysis we draw on a range of primary and secondary documents, including from the OECD and other organizations, private sector stakeholders, accountancy and law firms, civil society organisations and independent experts. To complement our written sources, we conducted a number of semi-structured interviews between September and December 2018 with current and former participants in the network. This helped us to refine the actors, discursive concepts, and the data sources to be considered.

This article contributes to the still nascent literature seeking to explain the noteworthy persistence of the current international tax regime.²⁸ We contribute to this emerging literature by zooming in on the politics that surround the international efforts to deal with the problem of abusive transfer pricing by MNE specifically. As noted by several authors, the technical nature of the scholarly debate on international taxation coupled with the inaccessibility of the policy discourse to those outside OECD policy circles has so far largely discouraged the

²⁵ Simplified transfer pricing methods are sometimes referred to also as alternative methods. We take the two terms to be synonymous.

²⁶ Philip Leifeld, "Discourse Network Analysis: Policy Debates as Dynamic Networks," in *The Oxford Handbook of Political Networks*, ed. Jennifer N. Victor, Alexander H. Montgomery, and Mark N. Lubell (Oxford: Oxford University Press, 2017), 301–25.

²⁷ A list with all versions of the TPG and the sections revised is published in the foreword of the most recent edition of TPGs.

²⁸ Büttner and Thiemann, "Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation."

attention of political scientist in favour of tax specialists.²⁹ This despite the fact that the issue of international taxation remains highly politicized, something that the findings of this paper attests to.

Additionally, our article adds to the limited scholarship on simplified transfer pricing methods and the response to these methods on the world stage. Most literature to date has centred on describing specific country experiences.³⁰ Picciotto offers the only broader overview to date of key simplified transfer pricing methods and its diffusion.³¹ Whilst Picciotto's paper goes some way in trying to explain the persistence of the international tax system and the methods that underpin it, our paper goes further in theorizing the reasons why. Our paper moreover introduces DNA as a new way to studying the consequences that the persistence of the current transfer pricing regime and its accepted methods have on simplified methods. By adding a discursive layer, this paper complements insights from the framework of epistemic communities and sheds light on the dynamics of an increasingly politicized policy-making process.

In addition to the contribution of this research to the existing scholarly literature, it offers important policy lessons. Notably it will demonstrate the entrenchment of the OECD standard method to the detriment of other, alternative methods, which might be more suitable for developing countries. In demonstrating that low uptake of alternative methods is not the result of countries acting rationally but rather the result of an active undermining of these methods by the epistemic tax community which is centered around OECD's trans governmental tax network, we seek to disprove the commonly held view that developing countries are only applying the OECD standard methods because anything else would be bad for business. By pointing to the challenges of diffusing simplified standards which are compatible with the TPGs to developing countries, we aim to inform policy relevant lessons on how to overcome these challenges.

²⁹ Alberto Vega, "International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines," TranState Working Papers (Bremen, 2012), Thomas Rixen, "Politicization and Institutional (Non-) Change in International Taxation," *Discussion Paper SP IV*, 2008, <https://doi.org/10.2139/ssrn.1488058>.

³⁰ Sergio André Rocha, *Brazil's International Tax Policy* (Rio de Janeiro: Editora Lumen Juris, 2017); Alexandra Readhead, "Preventing Tax Base Erosion in Africa: A Regional Study of Transfer Pricing Challenges in the Mining Sector" (New York, 2016),

http://www.resourcegovernance.org/sites/default/files/documents/nrgi_transfer-pricing-study.pdf.

³¹ Picciotto, "Problems of Transfer Pricing and Possibilities for Simplification."

In the next section of the paper we describe the international transfer pricing regime and the main developments that have led to its current form. Section three introduces transfer pricing methods and the issues with these methods, which led to the emergence of simplified transfer pricing methods. In section four we justify the theoretical grounding of this article and present the concept of the epistemic community as a way to make sense of why attempts to present simplified transfer pricing methods as an alternative to the standard transfer pricing methods has not been very successful. This informs our empirical analysis, which investigates the public discourse on transfer pricing matters, tracing it over four time periods. We summarize our findings and conclusion in the last section. As we hypothesises, we find that the epistemic community has been successful in defending their ground and even extending their reach/ influence. This through outright attacks on simplified methods but also through sustaining consent by making the policy process more inclusive very recently and going some way in addressing – some say co-opting – the concerns of what we will later define as the “pro simplified TP methods”-camp. This the epistemic community do, however, without giving up on their core belief in the ALP. The consequence is that the simplified methods have been largely ineffective in establishing itself as a viable option to the standard TP methods.

3. The international transfer pricing regime

The international transfer pricing system forms an essential part of the global tax regime.³² Whilst a detailed account of the international tax regime exceeds the scope of this paper, the focus here is on outlining the main developments relating to the international regulation of transfer pricing and the TPGs, which remain in their updated version the focal point of today’s global transfer pricing regime.

The OECD 1995 TPGs evolved from the 1979 Report on Transfer Pricing and Multinational Enterprises by the Working Party 6, a sub-committee of the Committee on Fiscal Affairs (CFA) at the OECD. The 1979 Report was requested by the OECD Council in response to the growing concern over transfer pricing disputes between MNEs and a number of US states.³³ It was envisioned mainly to describe which methods and practices were acceptable from a tax

³² Rixen, “From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance.” P. 205.

³³ Picciotto, “Problems of Transfer Pricing and Possibilities for Simplification.”

point of view in determining transfer prices rather than to create any extensive set of regulation.³⁴ Being the object of a recommendation by the OECD Council, the 1979 Report was not legally binding for member states.³⁵ Nevertheless, the guidelines that the 1979 Report set out were widely followed, given the high level of authority that resulted from their adoption by the governments of the most influential countries of the world,³⁶ rendering the recommendations “not devoid of legal significance”.³⁷

After having been first published in 1979, the OECD Transfer Pricing Guidelines were only approved by the OECD Council in their original version in 1995. Disagreement over what constituted appropriate methods for applying the ALP had caused significant delay to the process and a compromise on a uniform set of rules on transfer pricing therefore only arrived in 1995. The TPGs were subsequently revised in 2009 and then again in 2010 and finally in 2017.

Around the same time that the TPGs were undergoing revisions, the UN revived its work on taxation, in particular regarding transfer pricing³⁸. In 2009, a Subcommittee on Transfer Pricing was established and began work on the UN Practical Manual on Transfer Pricing for Developing Countries, which was published in 2013 and revised in 2017.³⁹ With its release, the UN asserted its ambition to be more influential in tax matters,

[...] taking again a leadership role, through this Transfer Pricing Manual, in trying to arrive at updated global transfer pricing guidance which can be used by countries all over the world in developing and implementing their transfer pricing regulations.⁴⁰

³⁴ United Nations, “Transfer Pricing History, State of the Art, Perspectives,” *Ad Hoc Group of Experts on International Cooperation in Tax Matters* (Geneva, 2001).

³⁵ According to the Art 5(b) of the Convention on the OECD. OECD, “Convention on the Organisation for Economic Co-Operation and Development - OECD” (Paris, 1960), <https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm>.

³⁶ Judith Clifton and Daniel Díaz-Fuentes, “The OECD and ‘The Rest’: Analyzing the Limits of Policy Transfer,” *Journal of Comparative Policy Analysis: Research and Practice* 16, no. 3 (2014): 249–65, <https://doi.org/10.1080/13876988.2013.877674>.

³⁷ T. W. Vogelaar, “The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and Review,” in *Legal Problems of Codes of Conduct for Multinational Enterprises*, ed. N Horn (Deventer: Kluwer, 1980), 127–39.

³⁸ Earlier attempts of the UN to influence international tax policy and particularly transfer pricing, failed: the 1974 proposed code for MNE that would regulate transfer pricing among others, never found support and negotiations were stopped in 1991 (Haufler 2001); the 2001 call of the UN High-level Panel on Financing for Development to shift towards unitary taxation did not find sufficient support within the UN.

³⁹ United Nations, “Committee of Experts on International Cooperation in Tax Matters: Report on the Seventh Session (24-28 October 2011)” (New York, 2017).

⁴⁰ United Nations, “Coordinator’s Report on Work of the Subcommittee on Transfer Pricing” (Geneva, 2016). P.13

Initial concerns that the Manual would be inconsistent with the OECD TPGs were unfounded, as the Manual was found to be largely consistent with the OECD approach.⁴¹ The approach outlined in the Manual was largely in line with that of the OECD, although it added a chapter on country practices in Brazil, China, India, Mexico and South Africa, some of which are not consistent with the OECD TPGs.⁴² The overlap in the OECD and UN's work on tax issues is moreover reflected in the composition of the UN Committee of Experts.⁴³ There is a significant overlap between the experts serving the two organizations. At one stage, 48% of the members of the UN Committee of Experts were from OECD member countries, including its chairman.⁴⁴ Still the UN Committee is often portrayed as providing a “corrective to the activities of the ‘rich countries’ club”, and an opportunity for developing countries to engage in global tax cooperation on an equal footing.⁴⁵

As it continues to be the key organization shaping the international tax regime, the lack of inclusivity in the OECD process represents a problem in the view of many developing countries, civil society members and academics. This criticism has not fallen on deaf ears. The OECD has made moves towards making its policy making processes more transparent and inclusive, as exemplified by the organization's work on the BEPS project. In 2016, it introduced the so-called “Inclusive Framework on BEPS”, a coalition that grew to more than 115 countries by 2018.⁴⁶ Participating jurisdictions work “on an equal footing to develop standards on BEPS related issues, and to review and monitor the implementation of the whole BEPS package.”⁴⁷ The OECD has furthermore increased the role of observers (i.e. non-member countries) in Committee activities, expanded its network of Multilateral Tax Centres

⁴¹ Andrus and Collier, *Transfer Pricing and the Arm's Length Principle After BEPS*.

⁴² At the outset of the chapter it was therefore emphasized that “this Part of the Manual does not reflect a consistent or consensus view of the Subcommittee” United Nations, “Practical Manual on Transfer Pricing for Developing Countries (2017)” (New York, 2017). P.525.

⁴³ The Committee includes 25 tax administrators from 10 developed and 15 developing countries. While these experts are nominated by their respective governments, they nevertheless act “in their expert capacity”, rather than directly representing their government's interests. Diane M. Ring, “Who Is Making International Tax Policy? International Organizations as Power Players in a High Stakes World,” *Fordham International Law Journal* 33, no. 3 (2010): 649–722. P.671.

⁴⁴ David Spencer and David McNair, “Transfer Pricing: Will the OECD Adjust to Reality?,” *Tax Justice Network* (Chesham, 2012).

⁴⁵ The UN is representative of 193 countries, as compared to the OECD which represents 37 countries only. Rixen, “Politicization and Institutional (Non-) Change in International Taxation.” P. 148; Hearson, “Developing Countries' Role in International Tax Cooperation.”

⁴⁶ OECD, “Members of the Inclusive Framework on BEPS” (Paris, 2018), <https://www.oecd.org/ctp/beps/inclusive-framework-on-beps-composition.pdf>.

⁴⁷ Oecd, “OECD/G20 Inclusive Framework on BEPS” (Paris, 2017), <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2017-june-2018.pdf>.

and played a central role in the establishment of the Global Forum on Taxation, a forum that works under the auspices of the G20 and OECD and is open to all countries.⁴⁸ In 2002, the OECD together with the World Bank, IMF and UN jointly established the International Tax Dialogue to strengthen communication between the organizations and national governments (see Figure 5 in Annex 1 for overview of OECD – Trans-governmental Regulatory Network on Tax Issues).⁴⁹

Still, whilst access has improved, the power to sway the OECD decision making agenda is far from equal amongst different interest groups. Many studies have highlighted the considerable influence of the business sector on the OECD process.⁵⁰ The proximity between the OECD and the business community⁵¹ has in turn been identified as a significant factor contributing to the organization's continued status as global tax policy standard setter.⁵² Of 571 comments received on BEPS discussion drafts related to transfer pricing, only 12 of these comments originated in developing countries.⁵³

4. Unpacking transfer pricing methods

Whilst the debate about the fit of the TPGs has been ongoing, there have also been attempts at taking the current rules which are compatible with the ALP and adopting them to better fit the realities of country practices. There are a number of distinctive measures that fall under

⁴⁸ Hugh J Ault, "Reflections on the Role of the OECD in Developing International Tax Norms," *Brooklyn Journal of International Law* 34, no. 3 (2009): 756–81; Robert T. Kudrle, "The OECD and the International Tax Regime: Persistence Pays Off," *Journal of Comparative Policy Analysis: Research and Practice* 16, no. 3 (2014): 201–15, <https://doi.org/10.1080/13876988.2013.834642>.

⁴⁹ Rixen, "Politicization and Institutional (Non-) Change in International Taxation."

⁵⁰ Open invitations to comment were released on comparability issues in 2003 and on profit methods in 2006. A series of draft issues notes on comparability issues was released for public comment in May 2006 and a series of draft issues notes on transactional profit methods was released for public comment in January 2008. Each of these two series attracted very detailed responses from the business community, which were released by the OECD in December 2006 and May 2008, respectively. A consultation with commentators was held in Paris in November 2008. OECD, "OECD Approves the 2010 Transfer Pricing Guidelines - OECD," 2010, <https://www.oecd.org/tax/treaties/oecdapprovesthe2010transferpricingguidelines.htm>.

⁵¹ The Lobby organization Business and Industry Advisory Council (BIAC) is the officially recognized business voice to the OECD for over 50 years and with privileged access to high-level OECD meetings, forums, and discussions (<http://biac.org/quick-facts/>)

⁵² That this view is shared by the OECD itself, can be seen from the opening remarks of Angel Gurría, OECD Secretary-General, at the Conference on the 50th Anniversary of the OECD Model Tax Convention in 2008 "Three elements have been crucial in building (the OECD Model's) success: the capacity to adapt international tax rules to the changing business environment, the enhanced participation of the business community and the progressive involvement of non-member countries." (OECD 2008).

⁵³ Counting the 12 public consultations that were released specifically in relations with the OECD BEPS project of which 5 were on transfer pricing related matters

the category of simplified transfer pricing methods, making it necessary to discuss what the concept entails and where the focus of this paper lies. First, however, we will briefly clarify what exactly we mean by *standard* transfer pricing methods.

The OCED and UN agree on five accepted methods to determine the ALP.⁵⁴ These are specified in the OECD TPGs and the United Nations Practical Manual. The five agreed upon methods are grouped into three transactional methods, which include the Comparable Uncontrolled Price Method (CUP), the Resale Method and the Cost Plus Method, and the two transactional profit methods, counting the Transactional Net Margin Method and the Profit Split Method.⁵⁵

The OECD 1979 Report described the transactional methods as the ideal method to calculate transfer prices and did not yet include the two profit-based methods. Transactional methods assess the terms and conditions of actual transactions between independent enterprises, comparing these with those of a controlled transaction. The comparison can be made on the basis of direct measures, such as the price of a transaction, but also on the basis of indirect measures such as gross margins realized on a particular transaction.

Increasing practical difficulties in applying the transactional methods became apparent soon after the release of the report in 1979, as illustrated in a study from 1992, which found that in over 90% of cases no suitable comparables could be found in order to successfully apply one of the proposed methods.⁵⁶ Faced with a growing number of transfer pricing disputes, the US Treasury formulated two additional methods for establishing the ALP, based on analysing the function performed by the relevant affiliates.⁵⁷ In response to the developments in the US, which was perceived by the OECD as a threat to the ALP and the established international consensus, the latter set up a task force to review the US regulations and formulate a joint

⁵⁴ The UN Manual includes the Sixth Method, discussed below, and country examples that can be said to diverge from the ALP. Nevertheless, it endorses the arm's length standard, as was requested in the Subcommittee's mandate. Specifically that the Manual "reflects the operation of Article 9 of the United Nations Model Convention, and the Arm's Length Principle embodied in it, and is consistent with relevant Commentaries of the U.N. Model". Department of Economic & Social Affairs, "United Nations Practical Manual on Transfer Pricing for Developing Countries" (New York, NY, 2017), <http://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf>. p.2

⁵⁵ Veronica Grondona, "Transfer Pricing: Concepts and Practices of the 'Sixth Method' in Transfer Pricing" (Geneva, 2018).

⁵⁶ Reuven S. Avi-Yonah, "Between Formulary Apportionment and the OECD Guidelines: A Proposal for Reconciliation," *World Tax Journal* 2, no. 1 (2010): 3–18.

⁵⁷ Picciotto, "Problems of Transfer Pricing and Possibilities for Simplification."

response.⁵⁸ The result was what was seen as an *uneasy* compromise:⁵⁹ the US reduced its emphasis on profit-based methods while the OECD added two profit-based methods broadly similar to those formulated by the US Treasury to their set of *acceptable* methods.⁶⁰ The resulting transactional profit methods consider the terms and conditions of actual transactions. Transactional profit methods measure the net operating profits realized from controlled transactions and compare that profit level to the profit level realized by independent enterprises that are engaged in comparable transactions. Whilst the transactional profit methods are considered to be less precise than the traditional transaction methods, they are more frequently applied due to the difficulties in finding the detailed information required for applying traditional transaction methods.⁶¹ Whilst the UN does not state any preference between the five methods,⁶² the OECD generally views the transactional profit methods as the *second-best option*,⁶³ although the last resort status applied to the two transactional profit methods was lifted in 2010, and the former hierarchy of methods was substituted by a *Most Appropriate Method* analysis.⁶⁴

To successfully apply the five standard transfer pricing methods to estimating the ALP requires considerable technical capacity and expertise,⁶⁵ something that is often lacking in developing countries.⁶⁶ As stated by Muten, “transfer pricing is a difficult subject for any tax administration, and in developing countries, the tax administrations rarely find themselves able to give the matter the attention needed to counter the findings of more resourceful administrations in industrial countries”.⁶⁷

⁵⁸ Rixen, “Politicization and Institutional (Non-) Change in International Taxation.”

⁵⁹ Picciotto, “Problems of Transfer Pricing and Possibilities for Simplification.”

⁶⁰ The Comparable Profit Method (CPM), as formulated by the US Treasury, was renamed to Transactional Net Margin Method (TNMM) so as to emphasise that it does not involve a global profit allocation but rather allocation for the particular transaction, since the CPM is closer to a formulary approach (Avi-Yonah 2010: 2)

⁶¹ Interview with member of UN Committee of Experts on International Cooperation in Tax Matters, Geneva, 18.10.2018.

⁶² Department of Economic & Social Affairs, “United Nations Practical Manual on Transfer Pricing for Developing Countries.”

⁶³ OECD, “OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017” (Paris, 2017), <https://doi.org/10.1787/tpg-2017-en>.

⁶⁴ OECD, “Review of Comparability Analysis and Profit Methods: Revision of Chapters I-III of the Transfer Pricing Guidelines” (Paris, 2010), <https://www.oecd.org/ctp/transfer-pricing/45763692.pdf>.

⁶⁵ Veronika Solilová and Danuše Nerudová, “Sixth Method as a Simplified Measurement for SMEs?,” *European Financial and Accounting Journal* 10, no. 3 (2015): 45–61, <https://doi.org/10.18267/j.efaj.145>.

⁶⁶ Interview with Andrus...

⁶⁷ Leif Muten, “Double Taxation Conventions Between Industrialized and Developing Countries,” in *Double Taxation Treaties Between Industrialized and Developing Countries; OECD and UN Models, a Comparison* (Deventer: Kluwer, 1992), 3–8. P.7.

Assessing transfer pricing in a way that is consistent with the ALP moreover requires data on comparable independent market transactions, which can be difficult if not impossible to find.⁶⁸ As Vega argues, if the existence of firms is justified by the purpose of avoiding the transaction costs of market exchanges, establishing a comparable market price will be impossible in many cases. The lack of adequate comparables is a frequently stated reason why countries struggle with applying the ALP. The problem of findings comparables is particularly striking in the case of developing countries.⁶⁹ As noted by the Platform for Collaboration on Tax,

“Often, the information relevant to a jurisdiction can only be accessed through the purchase of a license from database providers. However, even putting aside the financial cost of acquiring access to such databases, challenges for developing country tax administrations often remain, particularly in cases where little relevant information relating to a specific jurisdiction or even region exists. Where the information does exist, it may exhibit differences compared to the transactions under review. Typically, in such cases, transfer pricing practitioners need to consider using imperfect data, including the use of data from foreign markets.”⁷⁰

In a response to the challenges of implementing the five internationally accepted methods, an array of alternative simplified methods to establish the ALP, has developed. At one end of the spectrum, there are simplification measures that are seen as diverging only little from standard methods. These methods simplify certain aspects of the price setting but still rely on an assessment of facts and circumstances to determine the final price, allowing for a greater degree of discretion on behalf of taxpayers. In this group of methods, we find safe harbour rules, defined as “a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country’s general transfer pricing rules”.⁷¹ Another form of simplification comes in the form of advance pricing agreements (APA). An APA is a formal arrangement between a tax authority and a MNE in which the parties jointly agree ex ante on the MNE’s transfer pricing

⁶⁸ Vega, “International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines”; Picciotto, “Problems of Transfer Pricing and Possibilities for Simplification.”

⁶⁹ The Platform for Collaboration on Tax, “A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses,” 2017, <https://www.oecd.org/tax/toolkit-on-comparability-and-mineral-pricing.pdf>.

⁷⁰ Platform for Collaboration on Tax, “A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses” (Paris, 2017).

⁷¹ OECD, “OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017.” Para. 4.102

methodology, estimated taxable income and tax payments for a fixed period, consequently reducing the likelihood of an income tax dispute.⁷² Measures such as safe harbours and APAs are deemed acceptable by the OECD on the condition that amongst other things they are elective for the taxpayer and prudently defined eligibility criteria so that all comparable taxpayers are treated alike.⁷³

Other simplified methods are sector-specific. Especially in regards to the extractive sector, a number of countries have resorted to using benchmark prices as the basis when determining the transfer price. This to make up for the problem of finding suitable comparables, mentioned above. What is often referred to as ‘administrative pricing’ regimes, the sector specific method is most commonly used by petroleum producing countries as benchmark prices are easily available for a range of traded crudes and the quality variation between them is more limited than is the case for other minerals.⁷⁴ Pioneered by Norway for the valuation of its North Sea crude oil, such regimes are now in use in several countries including Indonesia, Nigeria and Angola.⁷⁵ This simplification measure is mandatory for firms conducting related party sales, and in some cases apply to all sales in the sector, related and unrelated.⁷⁶ Yet, there is room for tax payers to contest the price set by domestic authorities.

Another simplified method used in the commodities sector, which also relies on benchmark prices, is the so-called Argentinean ‘sixth method’. This is a simplified version of the comparable uncontrolled price (CUP) transfer pricing method, designed specifically to limit the risk of transfer mispricing in commodity transactions. The sixth method obliges exporters of commodities to use the publicly quoted price on the date of loading, regardless of the price agreed upon at the execution date between the exporter and the foreign trader, unless the latter is higher. The price is subsequently adjusted to take account of the average market premium.⁷⁷ The sixth method can be formulated to allow for quality adjustments, but it does

⁷² Lorraine Eden and William Byrnes, “Transfer Pricing and State Aid: The Unintended Consequences of Advance Pricing Agreements,” Legal Studies Research Paper Series (Fort Worth, 2018).

⁷³ Picciotto, “Problems of Transfer Pricing and Possibilities for Simplification.”

⁷⁴ Alexandra Readhead, “What Mining Can Learn from Oil,” *CGD Policy Paper 128 July 2018*, no. July (2018).

⁷⁵ Michael C. Durst, “Improving the Performance of Natural Resource Taxation in Developing Countries,” *SSRN*, no. 2013 (2018): 1167–80, <https://doi.org/10.2139/ssrn.3120472>.

⁷⁶ The case in Norway and Indonesia. Applying the rule to all sales ensures that tax authorities can avoid having to verify if transactions constitute a sale between related entities or not, which may be complex and time consuming in itself.

⁷⁷ Durst, “Improving the Performance of Natural Resource Taxation in Developing Countries.”

not have to as some countries do in fact not accept comparability adjustments.⁷⁸ In the case that comparability adjustments are not allowed, the sixth method is seen at odds with the recommendations of the OECD, thus placing it on the other side of the spectrum, as amongst the methods most in conflict with the OECD TPGs. At this side of the scale we also find the Brazilian transfer pricing rules, sometimes referred to as the fixed margin method. Commonly, the starting point for the fixed margin method is prices observed in market transactions between unrelated parties, but these are required to be an annual average, rather than a single price, or a range. Furthermore, legislation specifies the profit margins to be applied to each type of transaction. Brazil's methodology clearly breaks with the recommendations of the TPGs, that the specific facts and circumstances of each firm should be taken into consideration.⁷⁹

In this paper we focus on simplified methods that are non-voluntary, i.e. applied automatically, which carries the implication that they can be argued to be incompatible with the basic principles of the TPGs as they do not allow firms a choice between methods nor do they consider the 'facts and circumstances' of each case. This includes versions of the 'sixth method' and the Brazilian fixed margin method. From now onwards when referring to simplified transfer pricing methods or simplified methods for short, it is exclusively the latter methods that we are referring to.

The reason why those simplified methods conflict with the OECD TPGs is the same reason why some countries have chosen to adopt them. Requiring that the specific facts and circumstances of each firm should be taken into consideration requires extensive resources and capacity on the side of the tax authorities, which is often lacking. Moreover, individual adjustments on a case-by-case basis offers considerable discretion to the officials in charge of establishing transfer pricing on behalf of the government, making the exercise vulnerable to manipulation.⁸⁰ In light of these issues, one would expect simplified methods to be an attractive option to developing country governments.

Yet, simplified methods have not successfully challenged the dominance of the OECD prescribed standard methods, as discussed above. Since the first edition of the TPG in 1995,

⁷⁸ Grondona, "Transfer Pricing: Concepts and Practices of the 'Sixth Method' in Transfer Pricing."

⁷⁹ Sol Picciotto, "Simplified Transfer Pricing Methods: An Overview and Analysis" (Brighton, 2018).

⁸⁰ Interview with former senior OECD official, via Skype, 12.10.2018.

simplified methods were not included in the subsequent 2009 and 2010 revisions. Only in the 2017 edition of the TPG, the OECD included (but not endorsed) the sixth method in addition to the five recommended methods.⁸¹ Simplified methods have had little traction amongst developing countries with few countries currently applying such methods. In the remainder of the paper we present a constructivist explanation to the low uptake of simplified methods on the world stage.

5. The power of ideas – the case for a constructivist approach

The flipside of the low uptake of simplified methods is the dominance of the standard methods which has come to represent the international best practice in the transgovernmental standard setting process. For countries that have entered into bilateral tax treaties to prevent double taxation based on the OECD Model Tax Convention and/or the UN Model, following the ALP becomes necessary according to Article 9 of both conventions. Other countries adhere to the TPGs without having double tax agreements in place. In these cases, the TPGs constitute only international ‘soft law’, meaning that they are recommendations and not formally binding on states. Countries define independently the methods to deal with transfer pricing through its sovereign tax laws and regulation. Yet, we observe that the recommendations of the OECD TPGs and/or the UN Manual on Transfer Pricing trickle down to the level of national legislation with the TPGs incorporated into domestic law in many countries both directly and indirectly (in the administrative process). According to surveys of countries’ transfer pricing practices, conducted by the big four accountancy firms,⁸² the majority of countries surveyed applied the standard methods while simplified TP methods rarely show up.⁸³

Reference to the TPGs is most frequently made in circulars issued by tax administrations, which are, in principle, only binding to them but not to taxpayers or the judiciary.

⁸¹ Andrus and Collier, *Transfer Pricing and the Arm’s Length Principle After BEPS*; OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (Paris: OECD, 2017). As noted by Collier and Andrus, in a short section on commodity transactions, the TPGs state that a methodology based on exchange prices for commodities can theoretically be brought within the already existing boundaries for the application of the CUP method.

⁸² The “Big Four” refers to KPMG, EY, PWC and Deloitte as the four biggest professional services networks in the world.

⁸³ Deloitte, “2016 Global Transfer Pricing Country Guide” (New York, 2016), <https://www2.deloitte.com/content/dam/Deloitte/co/Documents/tax/us-tax-2016-global-transfer-pricing-country-guide-051816.pdf>; KPMG, “Global Transfer Pricing Review” (Zürich, 2016); Ernst & Young, “Worldwide Transfer Pricing Reference Guide 2017-2018” (London, 2018).

Nonetheless, most taxpayers will follow these circulars in order to avoid audits and litigation processes.⁸⁴ Moreover, as examples from a range of countries such as Canada, Germany, Spain, Italy and Switzerland illustrate, by referencing the Guidelines in the case-law of the main courts in these countries, the Guidelines have almost been transformed into hard law.⁸⁵ Even courts of non-OECD members have taken the Guidelines into account: in 2005, a Kenyan judge ruled in favour of a MNE saying that it had applied a transfer pricing method approved under the OECD Guidelines, which the judge accepted as established global standard despite the fact that Kenyan legislation at the time made no reference them. Consequently, Kenya enacted transfer pricing regulation based on the OECD Guidelines.⁸⁶

Existing literature dealing with the question of why countries chose to act in accordance with international best practise, which in our case would be to apply the standard methods, can be broadly grouped into the rationalist or in the constructivist camp. We will briefly discuss the main thesis of both camps, starting with the former. Most rationalist approaches to explaining compliance with international best practise emphasize the cost/benefit calculations by actors motivated by given material interests. The cost of complying involves domestic costs that arise from having to adjust existing practices and systems, so as to adhere to new standards, and/or losses that arise because new standards reduce the value of existing assets. For instance, developing countries may fear that measures trying to enhance the enforcement of tax provisions could be seen as a hostile act which could have a negative impact on the attraction of foreign direct investment.⁸⁷ External costs may additionally arise as markets or regulators sanction actors who must now reveal new and potentially damaging information.⁸⁸ But there are also potential material benefits that can be gained from acting in accordance with international best practise and actors are likely to consider these. Potential benefits can include a mixture of market and regulatory benefits, such as higher levels and/or greater stability of inward capital flow, lower borrowing costs for governments and domestic firms, and lower surveillance and listing costs for firms at home and abroad.

⁸⁴ Vega, "International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines."

⁸⁵ Vega.

⁸⁶ Picciotto, "Problems of Transfer Pricing and Possibilities for Simplification."

⁸⁷ Sanjaya Lall, "Introduction: Transnational Corporations and Economic Development," in *Transnational Corporations and Economic Development*, ed. Sanjaya Lall (London: Routledge, 1993). P. 218.

⁸⁸ James Boughton and Alex Mourmouras, "Is Policy Ownership an Operational Concept?," IMF Working Paper (Washington, DC, 2002), <https://www.imf.org/external/pubs/ft/wp/2002/wp0272.pdf>; Alex Mourmouras and Wolfgang Mayer, "Vested Interests in a Positive Theory of IFI Conditionality," IMF Working Papers (Washington, DC, 2002).

Following this logic, developing countries competing for inward investments could be adopting the standard methods in an effort to lower the perceived costs for inward investors. A common perception is that prescribing to the OECD standard methods lowers the adjustment cost for foreign companies seeking to operate in the country, thus helping countries to attract them.⁸⁹ The question is whether it really matters to multinationals if countries diverge from the standard methods or not and whether the introduction of simplified methods discourages foreign investment. Based on research by Mescall and Klassen and others we are led to assume that what is equally important to multinationals is consistency and certainty in their business dealings.⁹⁰ Mooij and Liu find that there is a larger reduction in investment if transfer pricing regulation become stricter – the government identifies an order of transfer pricing methods to use – but says nothing about the use of simplified methods.⁹¹ If anything, what the experience with the standard methods shows is that they introduce a large degree of discretion on behalf of both taxpayers and tax administrations which increases tax uncertainty.⁹² Such discretion may in turn translate into a higher number of legal disputes between officials and tax payers. As noted by Hunter et al. the number of transfer pricing disputes and proposed adjustments have been increasing. In the case of the United States, data from the U.S. Internal Revenue Service showed that the total number of proposed tax authority adjustments increased from 100 in 2010 to 237 in 2015.⁹³ The BEPS Monitoring Group gives the example of India, which has some 3000 cases pending before its tax tribunals.⁹⁴ As an alternative, using the price quoted on a relevant exchange as the comparable (as is the practice with the Sixth Method) provide a clearer and comparatively objective point of reference to challenge the prices attributed in transactions between related entities.⁹⁵ This is argued to make the process of price adjustment clearer and

⁸⁹ Interview with Swiss State Secretariat for Economic Affairs, 12.07.2018.

⁹⁰ Devan Mescall and Kenneth J. Klassen, “How Does Transfer Pricing Risk Affect Premia in Cross-Border Mergers and Acquisitions?,” *SSRN*, 2014, 1–59, <https://doi.org/10.2139/ssrn.2461278>.

⁹¹ De Mooij and Liu, “At A Cost: The Real Effects of Transfer Pricing Regulations.”

⁹² Solilová and Nerudová, “Sixth Method as a Simplified Measurement for SMEs?”; Rocha, *Brazil’s International Tax Policy*.

⁹³ U.S. Internal Revenue Service, “Internal Revenue Service Large Business and International Division Competent Authority Statistics” (Washington, DC, 2014), <https://www.irs.gov/pub/irs-utl/2013USCAStat.pdf>; U.S. Internal Revenue Service, “Internal Revenue Service Large Business and International Division Competent Authority Statistics” (Washington, DC, 2016), https://www.irs.gov/pub/irs-utl/2015_usca_statistics_report.pdf.

⁹⁴ OECD, “Comments Received on Revised Public Discussion Draft: BEPS ACTION 10: TRANSFER PRICING ASPECTS OF CROSS- BORDER COMMODITY TRANSACTIONS,” 2015.

⁹⁵ Grondona, “Transfer Pricing: Concepts and Practices of the ‘Sixth Method’ in Transfer Pricing.”

more predictable,⁹⁶ whilst for tax authorities the process becomes easier to audit and control.⁹⁷

Another rationalist explanation to the adoption of standard methods by developing countries is that it is cheaper for domestic authorities to adopt the prevailing international best practice rather than to innovate. As has been shown in the case of international banking standards, these standards provide regulators in standard-taking countries with off-the-rack guidance, which is particularly welcome as designing tailored regulation can be overwhelming and costly.⁹⁸ Yet in the case of the standard methods, the evidence points to the adoption of international best practice being the more complicated and by consequence the costlier option that countries can opt for. As discussed above, applying the standard methods is time- and resource consuming for both developing and developed countries. Therefore, if the motivation is to minimize cost of adoption it would seem that the simplified methods would be the cheaper option for country governments.

The lack of empirical evidence demonstrating the superiority of standard methods from a cost/benefit perspective leads us to the second dominant approach explaining why countries choose to act in accordance with international best practice. By contrast to rationalist approaches, constructivist approaches view shared norms and legitimacy as important drivers of policy coordination among countries to pursue their domestic interests as their international power.⁹⁹

We show how the standard methods are upheld as the policymaking norm in the debate surrounding appropriate TP methods. This in turn serves to undermine the diffusion of simplified methods. Following March and Olsen, norms are here understood as "a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of

⁹⁶ Platform for Collaboration on Tax, "A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses," 2017.

⁹⁷ Solilová and Nerudová, "Sixth Method as a Simplified Measurement for SMEs?"; Rocha, *Brazil's International Tax Policy*.

⁹⁸ Chris Brummer, "How International Financial Law Works (and How It Doesn't)," *Georgetown Law Journal* 99 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542829.

⁹⁹ John Gerard Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge," *International Organization* 52, no. 4 (1998): 855–85, <http://www.indiana.edu/~gradipe/docs/ruggie02.pdf>; Thomas Risse, Stephen C Ropp, and Kathryn Sikkink, *The Power of Human Rights International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), <http://www.cup.cam.ac.ukhttp://www.cup.org>.

actors in specific situations".¹⁰⁰ In complex situations such as the economic interdependence and a globalized economy where domestic and international agendas become increasingly interlinked, policy makers face increasing challenges or even fail to comprehend the linkages. In such situations – which have become the norm rather than the exception – “knowledge-based experts – epistemic communities – play [an increasingly important role] in articulating the cause-and-effect relationships of complex problems, helping states identify their interests, framing the issues for collective debate, proposing specific policies, and identifying salient points for negotiation”.¹⁰¹

Epistemic communities are defined as technocratic, knowledge-based networks of “professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area”.¹⁰² The notion of epistemic communities has been referred to by several scholars to explain the dissemination of international tax standards on the world stage.¹⁰³ What makes the notion of epistemic community so convincing in the case of international tax standards such as transfer pricing methods is that the agreement on what constitutes accepted policies can be traced back to a distinct community of international tax practitioners based in national tax authorities, finance ministries, MNEs, business services firms, academia and international organizations. These experts interact regularly and their frequent interactions, some relationships spanning decades, have generated a shared set of ideas amongst them. This despite the fact that individual actors might be positioned on different sides of distributional

¹⁰⁰ James G March and Johan P Olsen, “The Institutional Dynamics of International Political Orders” 52, no. 4 (1998): 943–69, <https://doi.org/10.1162/002081898550699>. p.948

¹⁰¹ Peter M. Haas, “Introduction : Epistemic Communities and International Policy Coordination Peter M . Haas,” *International Organization* 46, no. 1 (1992): 1–35.

¹⁰² Peter M Haas, “Introduction: Epistemic Communities and International Policy Coordination,” *International Organization* 46, no. 1 (1992): 441–73, <https://doi.org/10.1017/S0020818300001442>; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2005); G John Ikenberry, “A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement,” *International Organization* 46, no. 1 (1992): 289–321, [http://www3.nccu.edu.tw/~lorenzo/Ikenberry A world economy restored.pdf](http://www3.nccu.edu.tw/~lorenzo/Ikenberry%20A%20world%20economy%20restored.pdf).

¹⁰³ Leonard Seabrooke and Duncan Wigan, “Powering Ideas through Expertise: Professionals in Global Tax Battles,” *Journal of European Public Policy* 23, no. 3 (2016): 357–74, <https://doi.org/10.1080/13501763.2015.1115536>; Rasmus Christensen, “Professional Competition in Global Tax Reform: Transparency in Global Wealth Chains,” no. May (2017): 1–45, <https://doi.org/10.17605/OSF.IO/GU63M>; Büttner and Thiemann, “Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation.”

conflict - as for instance in the case of national tax authorities and international accountancy firms - or hail from different professional groups.¹⁰⁴

The principal arena where our epistemic community of interest meets is at the OECD.¹⁰⁵ As emphasized by Finnemore and Sikkink, “All norm promoters at the international level need some kind of organizational platform from and through which they promote their norms.”¹⁰⁶ Haas and Adler add that, “the influence of epistemic communities persists mainly through the institutions that they help create and inform with their preferred world vision.”¹⁰⁷

International institutions are important to ensure hegemonic formation. Following Cox, these institutions help define policy guidelines and, in doing this, “reflect orientations favourable to the dominant social and economic forces” and ideologically legitimate the norms of the world order.¹⁰⁸ The ALP can be seen as a policy prescription that fits the more powerful countries and firms.

Scholars have long emphasized that legitimation is important for states and that international sources of legitimation can be a factor in shaping state behaviour.¹⁰⁹ We concur with the constructivist argument that policies spread through constructed consent and social acceptance as a policymaking norm. The OECD facilitates tax policy development by hosting hundreds of meetings, conferences, and workshops for the purpose of producing nonbinding norms around which nations can converge.¹¹⁰

The OECD’s status as leading authority in tax matters partially derives from the unique composition and prestige of its governing body (refer to Annex 1). The OECD Council is the

¹⁰⁴ Rachel Tansey, “Accounting for Influence - How the Big Four Are Embedded in EU Policy-Making on Tax Avoidance” (Brussels, 2018), <https://corporateeurope.org/sites/default/files/tax-avoidance-industry-lobby-low-res.pdf>. Rasmus Christensen, “Professional Competition in Global Tax Reform: Transparency in Global Wealth Chains” (Copenhagen, 2017), <https://doi.org/10.17605/OSF.IO/GU63M>.

¹⁰⁵ Durst, “The Two Worlds of Transfer Pricing Policymaking”; Christians, “Networks, Norms and National Tax Policy.”

¹⁰⁶ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization*, accessed November 27, 2018, <https://www.jstor.org/stable/pdf/2601361.pdf?refreqid=excelsior%3Ad6752a584df936dbdf78e05ffee6a313>. P. 899.

¹⁰⁷ Emanuel Adler and Peter M. Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program,” *International Organization* 46, no. 1 (1992): 367–90, https://www.jstor.org/stable/2706960?seq=1#metadata_info_tab_contents. P.375.

¹⁰⁸ Taylor Cox, *Cultural Diversity in Organizations: Theory, Research and Practice* (San Francisco: Berrett-Koehler Publishers, 1993). P.63.

¹⁰⁹ Finnemore and Sikkink, “International Norm Dynamics and Political Change.”

¹¹⁰ Allison Christians, “Networks, Norms, and National Tax Policy,” *Washington University Global Studies Law Review* 9, no. 1 (2010): 1–38, <https://doi.org/10.2139/ssrn.1358611>.

highest governing body. Its members are high-level diplomats representing the member countries and the European Commission, usually ministers of finance, economy or foreign affairs, as well as secretaries of state and trade commissioners. The Council, which is vested with decision-making power,¹¹¹ provides a transnational space where member countries can aggregate their agendas by disseminating official statements under the auspices of the OECD.¹¹² Yet, the content of these statements, reports, recommendations and standards, are created within designated groups and committees (organized by the OECD secretariat). Hence, key function of the Council is to mandate the OECD staff to organize and direct committees in a consensus-based setting. The actual tax-related work is carried out by the Centre for Tax Policy and Administration (CTPA) which is composed of technical staff hired by OECD from 30+ countries. In turn, the CTPA provides organization and technical support to the Committee on Fiscal Affairs (CFA) and its working groups where most of the substantive discussions and negotiations take place.¹¹³ The frequently changing composition of these OECD bodies, together with the regular consultation and exchange with observers and organized representation from interest groups, particularly the Business and Industry Advisory Committee (BIAC), nourish the growth and strengthening of the epistemic community.

Over the past decades, the epistemic community we are here concerned with has managed to establish its causal beliefs and political vision as reference point at the OECD, resulting in the application of the epistemic community's consensual knowledge to policymaking. At the heart of the discourse on transfer pricing rules is the principled belief that the standard transfer pricing methods fulfil the important social function of maximizing free trade and cross-border investment, in turn maximizing welfare. The casual belief linked to this policy making norm is that transfer pricing rules that deviate from the international best practice might create barriers for foreign direct investment and situations of double taxation.¹¹⁴ The ALP is firmly embedded in this policymaking norm as the way of ensuring the allocation of the multinational tax base in a fair manner. The acceptance of standard transfer pricing methods as the policymaking norm builds on the shared interest of those who promote it in

¹¹¹ All decisions are taken by consensus (OECD 2018b). This central consensus principle has been said to lead a country to sacrifice its particular case in order to have more support for a future issue of greater importance (Vega 2012: 9).

¹¹² Christians, "Networks, Norms, and National Tax Policy."

¹¹³ OECD, "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017."

¹¹⁴ Tsilly Dagan, *International Tax Policy*, ed. Peter Harris (Cambridge: Cambridge University Press, 2018), <https://doi.org/10.1017/9781316282496>.

maximizing international trade and investments. The epistemic community has a vested interest in protecting the internal coherence of what is framed as a technical process against distributional conflicts.¹¹⁵

In the aftermath of the financial crisis, new and alternative policies, such as the simplified transfer pricing methods, are evaluated against compliance with the OECD standards.¹¹⁶ This does not square well with the policy entrepreneurs outside the epistemic community who are vouching for simplified transfer pricing methods. This group learnt different lessons and uses arguments to interpret and evaluate experiences and observations through a different set of epistemological assumptions, normative and causal beliefs. As Alder points out, “experiences or observations are secondary to the theories or hypotheses which people already have in their minds and which are used to organize such experiences”.¹¹⁷ In some sense one could describe this group as an emerging – and competing – epistemic community bringing with a new set of “practices and rules defining appropriate behaviour”.¹¹⁸ Their different view of what constitutes appropriate behaviour means that disagreements between the two camps are inevitable and bridging the two views becomes difficult. To defend the institutionalized orthodoxy, the degree of consensus among the community members is a crucial factor. Another factor is the diffusion of their cause-and-effect understanding, whereby, as Alder notes, the “importance of these understandings lies not merely in being true but also in being shared.”¹¹⁹ Based on theory, we expect the ALP community to resort to strategies that aim at securing the dominance of their cause-and-effect beliefs. Strategies to create this consensus include not only argumentative debates but also attempts to absorb contradicting ideas and find the right minimum level of accommodation to satisfy opposing epistemologies without scarifying the own core beliefs.

In the next section, we hypothesize how the theory elaborated above plays out in our case.

¹¹⁵ Ring, Who Is Making International Tax Policy? International Organizations as Power Players in a High Stakes World; Christians, “While Parliament Sleeps: Tax Treaty Practice in Canada”; Picciotto, International Business Taxation: A Study in the Internationalization of Business Regulation; Evers, “Tracing the Origins of the Netherlands’ Tax Treaty”; Picciotto, “Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation.”

¹¹⁶ Martin Hearson, “Bargaining Away the Tax Base: The North-South Politics of Tax Treaty Diffusion,” no. August (2016), http://etheses.lse.ac.uk/3529/1/Hearson_Bargaining_away_the_tax_base.pdf.

¹¹⁷ Adler and Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program.” P. 385.

¹¹⁸ March and Olsen, “The Institutional Dynamics of International Political Orders.”

¹¹⁹ Adler and Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program.” P. 386.

6. Hypotheses

Based on the above discussion, we expect to see a well-defined epistemic community, centring around the OECD and including actors who stand out for their technical expertise rather than their political position. These actors include representatives from the industry, law and accounting firms. When it comes to the actors in favour of simplified TP methods, we expect civil society organisations to dominate. Developing countries are not expected to frequent repeatedly in our analysis, but we do expect emerging economies (Argentina, Brazil, India) to take a stance in favour of simplified methods. It is further expected that the debate goes from being more limited at the turn of the millennium to become livelier as we get to the global financial crisis and the BEPS reform process. As more actors become involved the number and diversity of concepts that are being presented is expected to increase.

Based on the literature, we hypothesize that actors will use the following concepts to further their cause – either for or against simplified TP methods. Concepts are in italic and denoted with quotation marks.

On the side of the dominant epistemic community, we expect the concepts being promoted in the public discourse to contribute to the standard methods being seen as the best solution for countries who want to attract foreign investors.

“ALP promotes investment” whilst “Simplified methods overburden companies”. It follows from this that *“ALP should not be more rigid”*.

We further expect to see reflected in the discourse the fact that the epistemic community is trying to promote the standard methods by appealing to people’s appreciation of international cooperation and solidarity.

“ALP is well established” and “ALP is based on international consensus”. On the other hand, *“Simplified methods undermine cooperation” and “Simplified methods breaks with the Convention 9 of the Model Tax Agreement”*.

The epistemic community recognises that the standard method and the ALP on which they are based is not perfect. In the use of these next concepts we would expect at least some overlap with the policy entrepreneurs who take a stance against the standard methods.

“ALP is too complex”, “ALP is too ambiguous”, and “ALP has large compliance costs”.

Yet the epistemic community believe that the standard method based on the ALP is the best option available.

“ALP is the closest we have to a market price”, “ALP guarantees adequate taxation”, and “ALP is fair”. This is contrasted with *“Simplified methods are inaccurate”.*

On the side of the policy entrepreneurs who seek to promote simplified methods, we expect to see concepts speaking directly to the superiority of simplified methods.

“Simplified methods are clear and transparent”, “Simplified methods are easier to administer”, “Simplified methods provide greater predictability”, “Simplified methods have lower compliance costs”, and “Simplified methods are more suited to the reality of developing countries.”

After the global financial crisis and with the start of the BEPS reform agenda, we also expect to see the established epistemic community trying to bring the emerging policy entrepreneurs in line with the dominant discourse, assuming a greater area of the latter’s domain. This includes going some way in accommodating the policy entrepreneurs’ concerns for the need for greater simplification. Yet, to make such an option palatable for the epistemic community the simplified methods will need to be adjusted, which in practise means bringing simplified methods more in line with the ALP as expressed in the following concepts:

“Make simplified methods less ridged”, “Relax the legal standing of simplified methods”, “Make simplified methods optional”, “Make the definition of benchmark price transparent”,¹²⁰ and “Limit the applicability of simplified methods to certain sectors”.

¹²⁰ As noted earlier, some simplified methods use benchmark prices, for instance from publicly traded exchanges, or as in the case of Brazil, benchmark price is calculated by analyzing (i) the average prices practiced with independent parties, or (ii) the production cost.

We also expect there to be actors that make a point out of distinguishing between simplified methods and formulary apportionment. Whereas the former believe that they are in line with the ALP and see simplified methods as a way of working within the current system, the latter ultimately suggests a clear break with the dominant principle. We therefore hypothesises that it is in the interest of the emerging policy entrepreneurs to present simplified methods as something different from formulary apportionment.

“Simplified methods should be clearly distinguished from formulary apportionment”.

In the subsequent sections, we use DNA to analyse how the discursive battle between the two camps is fought, based on the concepts identified in the current section. First, however, we offer a brief note on our methodological approach.

7. Methodology

Using discourse network analysis (DNA), we analyse how discourse coalitions evolve and interact with opposing coalitions in a dynamic perspective, and how the competitive use of concepts translates into effective decisions. We chose to work with DNA for our analysis as it represents a unique methodology to combine social network analysis with qualitative content analysis, with a special emphasis on the systematic analysis of longitudinal discourse dynamics.¹²¹ This allows us to map not only existing discourse coalitions for a given period of time but also to map the changes that have occurred over time, and to compare the co-evolution of both actor coalitions and concept clusters.

The DNA software satisfies two important objectives: first, to assign statement tags to time-stamped text data, and second, to convert these structured data into different networks.¹²² The software allows for qualitative annotation of documents, imported as text data. In the text, different actors' statements were manually encoded, forming the basic unit of analysis. Every

¹²¹ Leifeld, “Discourse Network Analysis: Policy Debates as Dynamic Networks.”

¹²² Leifeld, “Discourse Network Analysis: Policy Debates as Dynamic Networks.”

statement that disclosed an actor's opinion regarding simplified transfer pricing methods and/or the ALP was manually coded using the set of predefined concepts introduced above. The initial set included 5 concepts with 4-6 sub-concepts, all informed by our initial literature review. The concepts were grouped at a later stage of the analysis, in order to simplify the visualisation of the political discourse surrounding simplified methods.

Concepts are defined as clusters of opinions, policy preferences or justifications for positions, in our case, in favour of or against simplified methods and/ or the ALP. In addition to the concept a statement refers to, four additional variables were defined, in order to capture important information about each statement. These variables were Person, Organisation, Agreement and Forum. Person refers to the actor who utters a statement. It was not always possible to identify this information for each statement, such as in the case of anonymous meeting reports or discussion draft comments that were issued in the name of an organisation.

Organisation then defined the affiliation of the person, who made the statement. Organisations were grouped into the following main categories (some with sub-categories): Government, Intergovernmental Organisations, Industry, Academia and Think Tanks, Accounting and Law Firms, Civil Society and Media. Agreement is a dummy variable which indicates whether an actor agrees in his/her statement with the concept referred to or not. This distinction between agreement and disagreement is critical, as opposing coalitions often refer to the same concepts but with differing positions. If these differences were ignored, opposing discourse coalitions would be grouped together in spite of their rivalling stances. Lastly, the Forum variable refers to the context in which a statement was made, such as the process of OECD discussion drafts and comments, conferences and meetings or media.

The DNA software allows for a number of different network types to be established from the coded data: concept networks, affiliation networks, congruence networks, and conflict networks. Concept networks represent a content-centred approach to discourse analysis, which focuses on questions such as which concepts co-occur frequently and which are used separately and by whom? What circumstantial events impact the use of certain concepts and how does their use vary over time? Which are the concepts that certain actors refer to most frequently or only rarely? By calculating the weight of concepts by means of how frequently they are referred to by actors, the concept network thus helps to illustrate empirical, rather

than theoretical links between concepts. This type also allows to expose overlapping topics or concept clusters.

Affiliation networks illustrate the link between concepts and actors by connecting them graphically: a (central) concept is connected to all the actors that refer to the respective concept. Moreover, they display the interconnectedness of actors by use of concepts: an actor can be linked to several concepts. Agreement or disagreement with a concept are displayed in separate networks but can be combined into multiplex networks. This method thus results in clusters of actors surrounding a concept and allows an illustration of affiliated actors.

The congruence network, on the other hand, only displays actors. It connects them according to the frequency with which they refer to the same concepts. The resulting clusters in the network explicitly maps advocacy coalitions established in the discourse. This type of network therefore measures and visualises mutual attachment of actors by means of their use of concepts.

Unlike the preceding types of networks, the conflict network does not represent the similarity between concepts used and / or actors that use them, but their dissimilarity. The resulting network is similar to an affiliation network but displays both congruence and conflict in different colours. This allows for an illustration of both conflict between and within advocacy coalitions.

6.1 Data collection and selection

The data selection for the following analysis was designed to capture the public discourse surrounding simplified transfer pricing methods, as defined in section 2. The data includes a range of document types, including written comments on various OECD discussion drafts related to transfer pricing, in addition to other publications by private sector stakeholders, accountancy and law firms, civil society organisations and independent experts, (meeting) reports and tax policy related guides published by intergovernmental organisations (OECD, United Nations, World Bank), the US Senate and other governmental agencies hearings and publications, and finally online newspaper articles. All data was published between 1995 (i.e. the year of the release of the first Transfer Pricing Guidelines (TPGs) by the OECD) and 2018. Written documents were complemented by semi-structured interviews

conducted from September throughout December 2018 with former and current members of the transfer pricing committees of the OECD and the UN.

The primary means of data collection was through desk research, using subject-specific professional websites by inter- and non-governmental as well as private organisations and tax-related businesses and media outlets, newspaper databases and web-based search engines, as well as institutional archives (OECD, UN).

In order to capture as many relevant publications referencing a simplified method to transfer pricing as possible, the following search strategy was employed:

Concept 1	Concept 2	Concept 3	Concept 4
Transfer pricing	Simplified method/s	Sixth method	Brazilian method
Transfer price/s	Simplified approach	Argentina	Fixed margin method
	Alternative method/s	India	Fixed margin/s
	Alternative approach	Reference price	
		Market price	

These main search terms were based on our previously determined definition of simplified methods, as discussed in section 2. The search terms are grouped according to the concept they are referring to. The identification of concepts was in turn informed by our initial literature search, from which we got an indication of the contexts in which public discussion of simplified methods has taken place, be it in connection with the work of the Working Party 6 at the OECD or in the discussion surrounding transfer prices for commodity transactions.

Inclusion criteria for the data were that the documents included opinions and statements on simplified transfer pricing methods and/or the ALP, such as advantages and disadvantages thereof, rather than value-free statements or explanations of their applicability. Only non-academic publications were considered in order to represent the public discussion on simplified methods. The latter decision resulted in the exclusion of a rather large number of sources.

During the data collection, difficulties were encountered which considerably limited the number of documents available for analysis. Of greatest consequence was the so-called ‘thirty-year-rule’, which provides that a large number of government documents remain unavailable to the public for the thirty years after they were created. The rule unfortunately also pertained the vast majority of OECD documents, including minutes of meetings and negotiations within Working Party 6 – the forum of greatest interest to the present analysis – and for the entire period of interest.

Additionally, public interest and discussion of transfer pricing remains rather limited. Given the highly technical nature of the topic, the discussions typically excludes most mainstream media. A number of civil society organisations and think tanks have become interested and rather vocal on the subject, but wider interest was sparked only after the financial crisis in 2009. Another limiting influence on the sources of public discussion of transfer pricing matters is that the OECD practice of releasing discussion drafts for public comment was established only in the second half of the 2000s.

Because of this limited access to written institutional and governmental sources, we complemented our analysis of the public discourse over transfer pricing with interviews of key informants. We adopted a semi-structured approach to interviewing as it is commonly believed to be an approach that allows interviewees to express themselves in a more unrestrained manner,¹²³ increasing the chance of capturing people’s beliefs and attitudes. We did not choose key informants through random sampling but rather identified and selected people for interviews based on their position and assumed ability to offer insights into the discussions and processes surrounding simplified methods.

8. Empirical Analysis

7.1 Four periods of public debate on transfer pricing

As stated earlier, we have divided the empirical analysis into four time periods in order to showcase the development over time in the discourse and actors involved.

¹²³ Oisín Tansey, “Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling,” *PS: Political Science & Politics* 40, no. 04 (October 3, 2007): 765–72, <https://doi.org/10.1017/S1049096507071211>.

Phase 1 starts mid 1990s with the release of the 1995 TPGs by OECD and lasts until the arrival of the global financial crisis of 2008. Whereas previously the lack of administrative guidance in most countries had been an obstacle to the application of the ALP, the 1995 TPGs stipulated the methods by which to apply it. Following the release of the TPGs and until 2000, the TPGs were expanded to include guidance on intangibles, cross-border services, cost contribution arrangements, and advanced pricing arrangements.¹²⁴

In 2004, the UN Tax Committee was upgraded from an ad-hoc group to a permanent expert committee. Two UN-led Financing for Development conferences were held, in Monterey in 2002 and in Doha on the eve of the financial crisis in 2008. The UN-led Financing for Development conferences represent the only multilateral setting where the international community has discussed the concept of “financing for development” in a comprehensive way.¹²⁵ Yet, globalization-related tax issues such as the under-taxation of multinationals and extractive industries, inter-state tax competition to attract foreign capital, and capital flight did not feature prominently in the final declaration of either summit. At the 2002 UN Summit in Monterrey, the UN encouraged greater tax cooperation “...giving special attention to the needs of developing countries and countries with economies in transition”, yet the final declaration made little mention of taxation.¹²⁶ Globalization-related tax issues were completely neglected in the Monterrey declaration.¹²⁷

The 2008 Doha Declaration contains only few more references to tax.¹²⁸ Combating tax evasion and strengthening technical assistance, however, are now explicitly mentioned. The final declaration was weakened by significant political pressure from the US and other allies, resulting in no actual decisions or firm official declarations on the issue. Nonetheless, as argued by Lesage et al., whereas Doha might have taken only a weak stance in their outcome

¹²⁴ Jeffrey Owens, “OECD Conference: Transfer Pricing and Treaties in a Changing World Opening Speech” (Paris: OECD, 2009).

¹²⁵ Dries Lesage, David McNair, and Mattias Vermeiren, “From Monterrey to Doha: Taxation and Financing for Development,” *Development Policy Review* 28, no. 2 (2010): 155–72, <https://doi.org/10.1111/j.1467-7679.2010.00479.x>.

¹²⁶ This is in contrast to the preparatory high-level report [Zedillo Report], which calls for an International Tax Organization and “unitary taxation to thwart the misuse of transfer pricing” Report of the High-level Panel on Financing for Development (2001):

http://www.un.org/en/events/pastevents/financing_for_development_report.shtml;

¹²⁷ Lesage, McNair, and Vermeiren, “From Monterrey to Doha: Taxation and Financing for Development.”

¹²⁸ United Nations, “Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus” (Doha, 2008), <https://undocs.org/A/CONF.212/L.1/Rev.1>.

documents, the Financing for Development process at this stage helped catalyse a more inclusive engagement on the international tax agenda, involving in the discussion not only governments but other international organizations and NGOs.¹²⁹

Phase 1 is also the period in which we see the first simplified transfer pricing method regimes emerge, notably in Brazil in 1996 and Argentina 2003. Brazil's transfer pricing regime was established in 1996 in the context of wider economic reform initiated by Fernando Henrique Cardoso, Brazil's then president. Amongst others, his aim was to streamline and simplify tax collection¹³⁰ in a legal context that critics have called a "wild hairy beast, topped with a crust so thick it takes a vast amount of time, experience and expertise to get to the bottom of the policy underlying much of the legislation".¹³¹ The bill that introduced transfer pricing legislation was passed specifically in order to address transfer pricing schemes that resulted in tax evasion.¹³² As already mentioned, the main distinction of Brazil's transfer pricing methods come down to their use of fixed profit margins. The deviation of the Brazil method from the OECD standard methods was justified by the former being "easy to apply by taxpayers and simple to audit and control by tax authorities".¹³³

In 2003, Argentina introduces the so-called sixth method, which we discussed in a previous section. The adoption of the method in national transfer pricing rules followed significant effort by the country's Federal Administration of Public Revenues to curb tax evasion through manipulation of transfer prices on primary products.¹³⁴ The name of the new transfer pricing legislation was derived from the respective amendment to the sixth paragraph of Article 15 of the Argentine Income Tax Law (LIG), which applies to commodity exports where international intermediaries (a trading entity), frequently located in low or zero tax

¹²⁹ Lesage, McNair, and Vermeiren, "From Monterrey to Doha: Taxation and Financing for Development."

¹³⁰ Edmund Amann and Werner Baer, "The Illusion of Stability: The Brazilian Economy Under Cardoso," accessed December 18, 2018, www.elsevier.com/locate/worlddev.

¹³¹ Tatiana Falcão, "THE BRAZILIAN TRANSFER PRICING RULES: A NEW APPROACH TO," n.d., 1–15.

¹³² Department of Economic & Social Affairs, "United Nations Practical Manual on Transfer Pricing for Developing Countries."

¹³³ Rocha, *Brazil's International Tax Policy*.

¹³⁴ Isaac Esteban, "The So-Called '6th Method,'" Ciat, 2014, <https://www.ciat.org/the-so-called-6th-method/?lang=en>.

jurisdictions, are involved¹³⁵. Following in Argentina's footsteps, Zambia introduced the sixth method for the copper industry. In 2008, the Zambian Ministry of Finance amended the transfer pricing provisions of the country's Income Tax Act, requiring mining companies to calculate all related party mineral sales according to global reference prices.¹³⁶

Despite the developments mentioned above including the adoption of simplified methods in Brazil, Argentina and Zambia, there is practically no public discussion of transfer pricing methods during this first period.¹³⁷ The few mentions detected in our analysis originate in the OECD and the discourse is one in support of the ALP. The ALP is seen as "well established", representing the closest thing we have to market prices, and essential for the promotion of FDI. During this period, the Accounting and Law firms come out once publicly in support of the ALP as well standard TP-methods. There is from the beginning - and through all four time periods – a wide held understanding that the ALP is complex, somewhat ambiguous and that its establishment involves large compliance cost for tax payers and collectors. Whilst not speaking directly about simplified methods, methods that were seen as diverging from the standard methods and by extension the ALP, were seen as distorting level playing field among countries and undermining international agreement to reduce the risks of double taxation.

¹³⁵ Veronica Grondona and Andres Knobel, "Transfer Pricing in Argentina 1932-2015," ICTD Working Paper (Brighton, 2017)

¹³⁶ Alexandra Readhead, "Transfer Pricing in the Mining Sector in Zambia" (New York, NY, 2016).

¹³⁷ We have not systematically included Latin American newspapers / financial press so far so cannot rule out that the topic might have been widely discussed in these mediums. Yet we have checked international online information sources as a first step, including LexisNexis and Factiva, for any relevant documents and this yielded few results.

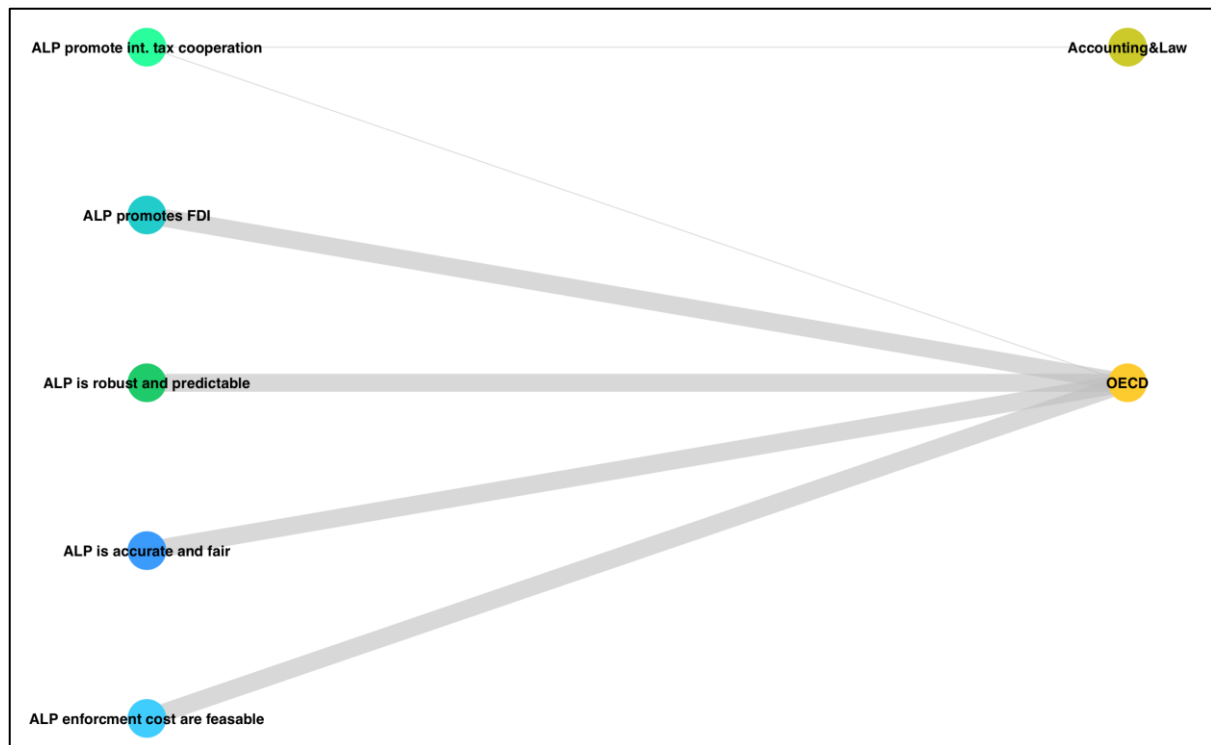


Figure 1: Concepts reference by actors in period I, 1996 – 2008¹³⁸

The second period lasts from late 2008 to early 2009 to the release of the updated version of the OECD TP guidelines in 2010. At this stage we see the public debate on transfer pricing becoming significantly more animated and more actors getting involved. The public debate is still dominated by the OECD, but the involvement of accounting and law firms significantly increases.

In the aftermath of the global financial crisis, G20 countries were joining forces to confront – amongst other issues – the increasing need for domestic resource mobilization and collecting tax revenues from multinationals. Greater attention was paid to the transfer pricing practices employed by MNEs, with company structures acknowledged as becoming increasingly complex.

It was during this period that the tax-transparency agenda was revived, emphasizing the co-operation between tax authorities in investigating international tax avoidance and evasion.¹³⁹

¹³⁸ Please note: (1) the edges denote the number of times an actor (right column) refers to a concept (left column), either supporting or rejecting it. The strength of the edges in the graphs represents relative presence of the actors during this period, not absolute activity over all observation periods

Complex business structures trending national borders were acknowledged to pose particular challenges for developing countries.¹⁴⁰ During a joint meeting of the OECD's CFA and the Development Assistance Committee (DAC) in the beginning of 2010, it was decided to set up an informal Task Force on Tax and Development to support the development of more effective tax systems in developing countries. The Task Force is composed of representatives from OECD member countries, business, donor agencies, developing and emerging economies and civil society as well as UN, IMF, WB and regional organizations such as the Inter-American Centre of Tax Administrations and the African Tax Administration Forum.

2009 was the year that the UN Tax Committee mandated its transfer pricing subcommittee to develop a practical manual on transfer pricing. The UN Tax Committee, while echoing the view of the OECD in favour of the ALP and an internationally coordinated approach, also expresses that simplified TP methods might suit the reality of developing countries better than the traditional transfer pricing methods based on the arm's length principle.¹⁴¹ During this time, transfer pricing issues starts appearing on the radar of civil society organisations as well, who challenge the accuracy of the ALP and the suitability of these methods for developing countries. The entrance of the UN Tax Committee signifies – at least in theory – the more direct involvement of developing countries.

The transfer-pricing related arguments appearing in the public debate during this period are more varied, although the OECD as the dominant player still relies on the same arguments seen in the last period, focusing on advantages of the ALP and the need for an internationally coordinated approach. The option of using simplified TP methods enters the debate for the first time. It was immediately after the 2010 updated TPGs were approved that the OECD started working on revising the guidelines on safe harbours, acknowledged as a way of simplify transfer pricing compliance and administration.¹⁴²

¹³⁹ Richard Eccleston and Helen Smith, "The G20, BEPS and the Future of International Tax Governance," in *Global Tax Governance: What Is Wrong with It and How to Fix It*, ed. Thomas Rixen (Rowman & Littlefield International, 2016), 175–98.

¹⁴⁰ Owens, "OECD Conference: Transfer Pricing and Treaties in a Changing World Opening Speech."

¹⁴¹ UN Tax Committee, "UN Tax Committee Mandates for Subcommittee and Working Groups, and Related Matters as Agreed at the 5th Annual Session of the Committee, 19-23 October 2009." (Geneva, 2009), <https://www.un.org/esa/ffd/tax/fifthsession/SubcommitteesMandates.pdf>, p.2.

¹⁴² Interview with Andrus

Similarly, accounting and law firms acknowledge that simplified TP methods can be transparent, easier to administer and cheaper. These concessions are most often uttered by firms located in developing countries or countries that actually implement simplified methods such as Brazil or India. However, the group puts forth a series of conditions to make simplified TP methods more *acceptable* i.e. in line with the ALP. The ways they suggest to *bridge* the gap between the simplified and the standard TP methods include increasing transparency of the benchmark price setting, making simplified methods less rigid (that is, to allow for comparability adjustments when using quoted or benchmark prices) as well as limiting their applicability to specific sectors or even export products.

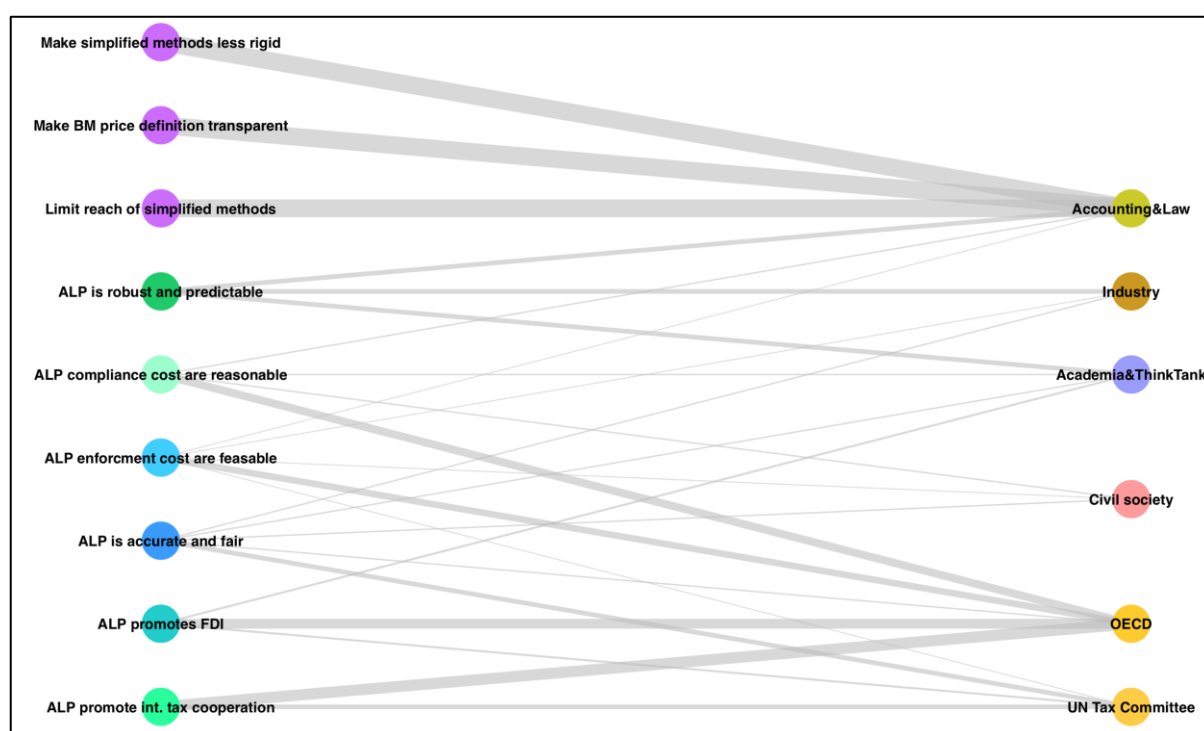


Figure 2: Concepts reference by actors in period II, 2009-2010

The third period lasts up until the launch of the BEPS initiative in 2013 and the release of the UN Practical Manual on Transfer Pricing for Developing Countries that same year. During this period, the public debate increased significantly.

The BEPS initiative was launched at the request of the G20 in 2013 to identify and address the causes of the loss of revenue from corporate income tax. Concerns over tax planning by MNEs had intensified considerably since 2011. The worldwide economic downturn, which

forced governments world over to cut public spending, made revenue losses due to base erosion and profit shifting increasingly hard to ignore.¹⁴³ The tensions were amplified by media exposure of tax planning schemes of high-profile MNCs, including Starbucks, Google, IKEA, Amazon, and Apple. Greater public awareness was prompted by public parliamentary hearings and increased involvement of the civil society, spearheaded by the Tax Justice Network,¹⁴⁴ resulting in what observers called a “perfect storm”. The G20 demanded action.¹⁴⁵

The G20 Leaders meeting in Mexico in June 2012 explicitly referred to “the need to prevent base erosion and profit shifting” in their final declaration.¹⁴⁶ This message was reiterated at the G20 finance ministers’ meeting in November 2012. The final communiqué stated that the ministers, “welcome the work that the OECD is undertaking into the problem of base erosion and profit shifting and look forward to a report about progress of the work at our next meeting”.¹⁴⁷ Also in November of the same year,, UK’s then Chancellor, George Osborne, and Germany’s Minister of Finance, Wolfgang Schäuble, issued a joint statement (backed by France’s Economy and Finance Minister, Pierre Moscovici) calling for coordinated action to strengthen international tax standards and for states to back efforts by the OECD to identify loopholes in tax laws.¹⁴⁸ US President Barack Obama soon after voiced similar concerns over the income-shifting behaviour by MNEs.

The OECD was called upon by the G20 finance ministers to develop an action plan to address BEPS in a coordinated and comprehensive manner. In the first instance, the OECD issued a report on *Addressing Base Erosion and Profit Shifting*, in February 2013, recognizing amongst other things the increased separation between the location of where

¹⁴³ Büttner and Thiemann, “Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation.”

¹⁴⁴ Richard Eccleston and Helen Smith, “The G20, BEPS and the Future of International Tax Governance,” *Global Tax Governance: What Is Wrong with It and How to Fix It*, 2016, 175–98; Leonard Seabrooke and Duncan Wigan, “Powering Ideas through Expertise: Professionals in Global Tax Battles,” *Journal of European Public Policy* 23, no. 3 (2016): 357–74, <https://doi.org/10.1080/13501763.2015.1115536>.

¹⁴⁵ Yariv Brauner, “What the BEPS?,” *Florida Tax Review* 16, no. 2 (2014): 55–115, <https://doi.org/10.2139/ssrn.2408034>, p.58.

¹⁴⁶ G20, “G20 Leaders Declaration” (Los Cabos, 2012), <http://www.g20.utoronto.ca/2012/2012-0619-loscabos.pdf>.

¹⁴⁷ G20 Ministerials, “Communiqué of Meeting of G20 Finance Ministers and Central Bank Governors” (Mexico City, 2012), <http://www.g20.utoronto.ca/2012/2012-121105-finance-en.html>.

¹⁴⁸ George Osborn, “Statement by the Chancellor of the Exchequer, Rt Hon George Osborne MP; Britain & Germany Call for International Action to Strengthen Tax Standards - GOV.UK” (London, 2012), <https://www.gov.uk/government/speeches/statement-by-the-chancellor-of-the-exchequer-rt-hon-george-osborne-mp-britain-germany-call-for-international-action-to-strengthen-tax-standards>.

actual business activities and investment are taking place and the location where profits are reported for tax purposes.¹⁴⁹ The report was followed the same year by an Action Plan, proposed by the OECD and endorsed by the G20, which sought to counter the tax avoidance strategies by MNCs through the implementing a series of fifteen actions.¹⁵⁰ Transfer pricing issues formed a substantial portion of the subject matter of the BEPS agenda.¹⁵¹ Regarding transfer pricing, bold commitments were made at the first meeting of the Global Forum on Transfer Pricing in 2012: The OECD General Secretary Ángel Gurría announced that “the time has come to simplify the rules and alleviate the compliance burden for both tax authorities and taxpayers”. Similarly, Pascal Saint-Amans, the director of the OECD Centre for Tax Policy and Administration (CTPA) stressed that “it is essential to simplify and strengthen the TP rules for the benefit of both developed and developing economies, as well as for businesses.”¹⁵²

The launching of the BEPS action plan coincided with greater participation in the public debate on transfer pricing in part due to the public discussion drafts released by OECD, which by the second half of the 2000s became one way of opening up the OECD decision making process to broader participation. Especially civil society organization and accounting and law firms become more active during this time, whilst developing countries continued to be largely silent in the debate.¹⁵³

It was also during this time that the UN Tax Committee came to take a more notable stand as in preparation for the release of its own TPGs. 2013 marked the launch of the UN Practical Manual on Transfer Pricing for Developing Countries, where the Committee sought to provide more user-friendly guidance on transfer pricing in particular for developing country administrations. Whilst the UN Practical Manual remains committed to the ALP, it did include a chapter on country transfer pricing practices that differ from the OECD methods.

¹⁴⁹ OECD, “Addressing Base Erosion and Profit Shifting” (Paris, 2013), <https://www.oecd-ilibrary.org/docserver/9789264192744-en.pdf?expires=1523622651&id=id&accname=ocid72024074a&checksum=C292D5E058A3F3A607BEA93957852771>.

¹⁵⁰ The action plan sought the delivery of a wide set of measures by two primary deadlines, September 2014 and September 2015. Yariv Brauner, “BEPS: An Interim Evaluation,” *World Tax Journal*, no. FEBRUARY (2014): 10–39.

¹⁵¹ Andrus and Oosterhuis, “Transfer Pricing After BEPS: Where Are We and Where Should We Be Going.”
¹⁵² <https://www.oecd.org/newsroom/taxoecdtoSimplifytransferpricingrules.htm>

¹⁵³ As discussed in section 2, participation in the public discussion was overwhelming by actors based in developed countries.

One of the countries included in the UN Practical Manual was Brazil but also India.¹⁵⁴ In 2012, the Government of India introduced an advance pricing agreement (APA) regime with a view to reducing transfer pricing litigation.

By the end of the third period, in 2013, it is clear that two coalitions adopting distinct discourses have formed. On the one hand, there is the “ALP only”-camp, led by the accounting and law firms, on the one hand, who categorically oppose any transfer pricing regime that does not conform with the ALP. An opposing stance takes the “pro simplified TP methods”-camp, led by the civil society organisations, which advocate for a simplification of the current transfer pricing rules.

Thematically, the discussion centers around the complexity as well as the ambiguity of the standard TP methods contrasted to the relative easier application of the simplified TP methods. However, the “ALP only”-camp also points to the lack of precision of the simplified TP methods and the additional burden companies face by having to apply these. Most critics stressed that these country-specific regulations, diverging from the widely applied standard methods, carry a risk of leading to double taxation for companies. In an effort to undermine the simplified TP methods, the “ALP only” therefore stresses the fact that the ALP has been firmly established through international cooperation, and alluding to the uncertainty that would come from breaking with this international norm by adopting simplified methods. Governments, particularly from BRICS countries, who have adopted such simplified methods, are forced to defend their decision on diverging from the international consensus.

The UN tax committee, for its part, was visibly taking a bridging position during this third period. The committee acknowledges the benefits of simplified TP methods to developing countries but at the same time insisted on the need to make the methods more lenient (and more similar to the ALP-like methods) in order to safeguard international tax cooperation. Their overall favorable position towards simplified methods does not go unnoticed by accounting and law firms, which consequently seek to undermine the UN’s subcommittee working on transfer pricing issues by referring to the fact that subcommittee members serve in their “personal capacity” and are thus less representative than the BEPS Inclusive

¹⁵⁴ Department of Economic & Social Affairs, “2013 United Nations Practical Manual on Transfer Pricing for Developing Countries.”

Framework who continue to support the ALP¹⁵⁵. The tension between these two divergent positions as one of the key battlegrounds becomes even more apparent when we turn to the fourth period.

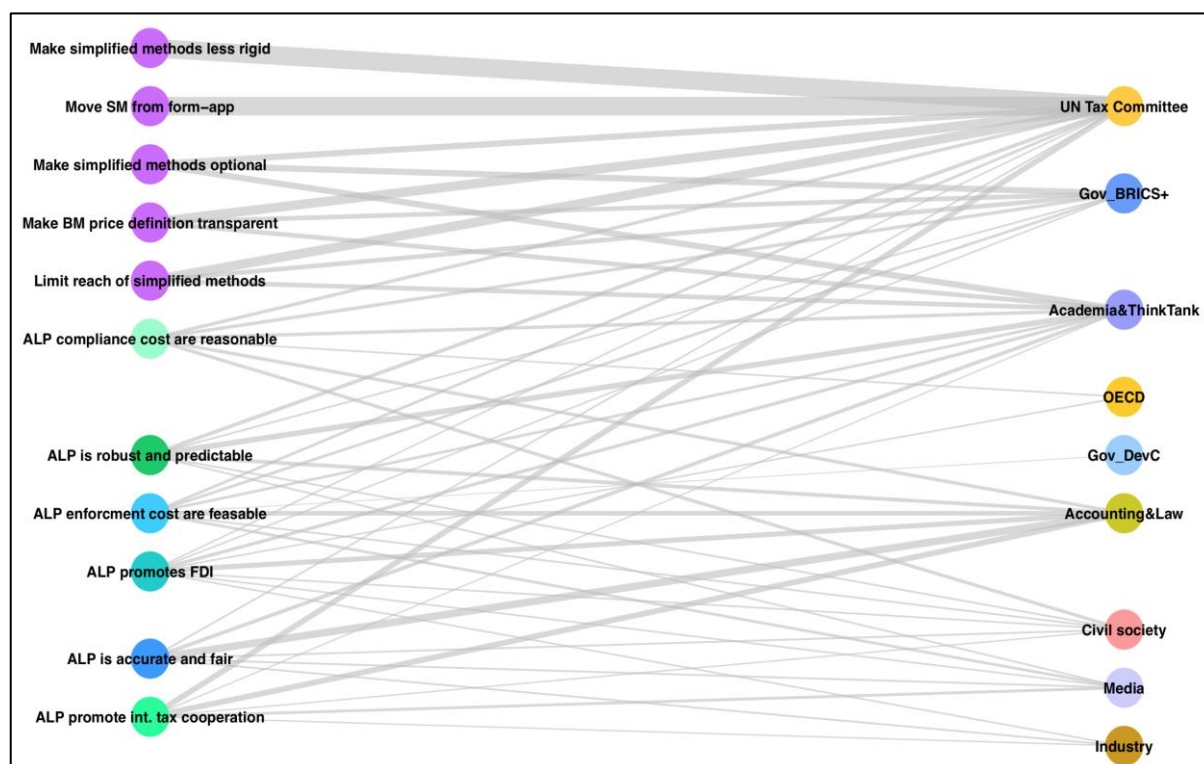


Figure 3: Concepts reference by actors in period III, 2010 – 2013

The final period that we analyse ends in mid 2018 and includes the release of the most recent update of the OECD TPG in 2017. In early 2016, G20 called on the OECD to develop an Inclusive Framework to monitor the implementation of the BEPS project globally. This involved interested non-OECD countries and jurisdictions committed to implementing the BEPS project, including developing economies, who would participate “on an equal footing”.¹⁵⁶ To these ends, the decision making body for the OECD's work on tax, CFA, was opened up to “interested and committed” countries who could participate in implementation as ‘BEPS associates’.¹⁵⁷ According to the OECD Background Brief Inclusive Framework on BEPS, “Members of the Inclusive Framework on BEPS are entitled to attend and take part to

¹⁵⁵ Carol Dunahoo, Holly Glenn, and Gary Sprague, “TPWG Comments on Discussion Draft of A Toolkit for Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Data” (Washington, DC, 2017).

¹⁵⁶ G20, “G20 Leaders’ Communique: Antalya Summit, 15-16 November 2015” (Antalya, 2015), <http://www.g20.utoronto.ca/2015/151116-draft-communique.pdf>.

¹⁵⁷ OECD, “Background Brief Inclusive Framework on BEPS” (Paris, 2017), <http://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf>.

the decision-making process in all BEPS-related meetings of the CFA and its subsidiary bodies”.¹⁵⁸ Since the establishment of the Inclusive Framework, no meeting in the CFA with substantial discussion has taken place but the subsidiary bodies (Working Parties) are working and will be reporting to the CFA where “senior officials of [Inclusive Framework] member countries can: i) decide, on a consensus-based approach, on the working groups' outcomes; ii) hold further discussions on issues working groups could not reach consensus on; or iii) require the working groups to carry out further work.”¹⁵⁹

The broadening of participation in key working parties and decision-making bodies has so far not been reflected in a more productive debate on transfer pricing. In the fourth period the public discourse undergoes two significant changes pushed by the actors in the “ALP only”-camp. Firstly, relatively recent arguments that only emerged during the third period analyzed above, are expanded and soon dominate the debate. The “ALP only”-camp changes the tone of the debate and is seen directly attacking simplified TP methods as being in conflict with the ALP and thus undermining international cooperation by breaking the spirit of convention 9 of the UN and OECD Model Tax Conventions. Simplified TP methods are accused of being inaccurate and the source of double taxation for enterprises operating in countries adopting simplified methods.

The direct attacks from the “ALP only”-camp constitutes the bulk of the statements (41%) captured in the public debate during this period, with some dismissing simplified methods with rather strong and questionable arguments: “Developing economies should not be able to 'have their cake and eat it’”¹⁶⁰. It is followed by demands to transform simplified TP methods (29%). These demands resemble what was previously referred to as efforts to bridge the divide between the simplified and the standard TP methods, with the consequence that simplified TP methods would lose the characteristics that distinguish these rule-based TP methods from the standard methods that allow for greater discretion on behalf of both tax payers and tax collectors. The main demands are to make simplified TP methods less rigid, i.e. allow for comparability adjustments, remove them from formulary apportionment, relax their legal standing, i.e. define them as anti-avoidance measures only, and make them

¹⁵⁸ Inclusive framework

¹⁵⁹ OECD, “Background Brief Inclusive Framework on BEPS.”

¹⁶⁰ Francesca Lagerberg, “OECD Public Discussion Draft BEPS Action 10: Discussion Draft on the Transfer Pricing Aspects of Cross-Border Commodity Transactions” (London, 2015).

optional. Both types of arguments, those directly attacking simplified TP methods and those seeking to modify them, only emerged in the third phase and became dominant after 2014.

There is some ambiguity with regards to the position of the “ALP only”-camp in this fourth phase. 15% of the arguments made by the “ALP only”-camp mention features of simplified TP methods, including transparency, predictability, simplicity and cost in a positive light. A closer examination reveals that these arguments are put forth by companies based in countries that have put in place simplified methods, such as for example Shell Brazil: “In essence, fixed margins are easier to follow, regulate and inspect.”¹⁶¹

Additionally, while the camps remain unchanged, the intensification and accentuation of the debate is accompanied by a broadening of the “ALP only”-camp. First, the industry as a stakeholder group has been activated and now makes the second most active player in the public discourse on transfer pricing after the accountancy and law firms.

Second, the Platform for Collaboration on Tax, initiated by the G20 and formally established in 2016, emerges as a voice in support of the main tenets of the “ALP only”-camp. This is significant insofar as this later development unites the most important international financial institutions and the UN in providing technical assistance in tax matters to developing countries, overall taking a favorable stance towards of standard TP methods.¹⁶² After having been an important player in relative terms during one period, the UN Tax Committee becomes largely silent on the topic after its TPGs are published in 2013.

In contrast, the “pro simplified TP methods”-camp shows no transformation comparable to that of the “ALP only”-camp, neither in its discursive strategy nor in the composition of its camp. Although the group has stepped up its efforts as well, it has fallen far behind the “ALP only”-camp when considering their participation and control over the public discourse (16% versus 50% activity compared to the “ALP only”-camp in phase 3 and 4).

What appears to make matters worse for the “pro simplified TP methods”-camp is that so far, they have been inept to come up with a unified response that would mollify the two main

¹⁶¹ Fabio Gasper, “How Will BEPS Change Brazil’s Tax Practices ?,” *KNect* 365 (London, July 2016).

¹⁶² IMF et al., “Concept Note: The Platform for Collaboration on Tax,” 2016, <https://www.imf.org/external/np/sec/pr/2016/pdf/pr16176.pdf>.

arguments raised against them; namely that simplified TP methods are inaccurate and that in order to be compatible with the ALP adjustments are needed (i.e. simplified methods should be less rigid). Instead, the “pro simplified TP methods”-camp continues to emphasize the ambiguity of the ALP (20%) which is widely uncontested, and that the ALP is not close to the market price, a claim that is neither controversial. Defenders of the ALP will typically argue that the principle is not a perfect estimation of the market price but it is the best option available. As argued by KPMG representatives, “the ALP, while being very complicated to apply in some cases and leading to disputes in others, remains theoretically sound... To some extent, the current debate on the ALP brings to mind Winston Churchill’s famous statement on democracy, as expressed in the UK’s House of Commons in 1947: “Democracy is the worst form of government, except for all the others”. ”¹⁶³

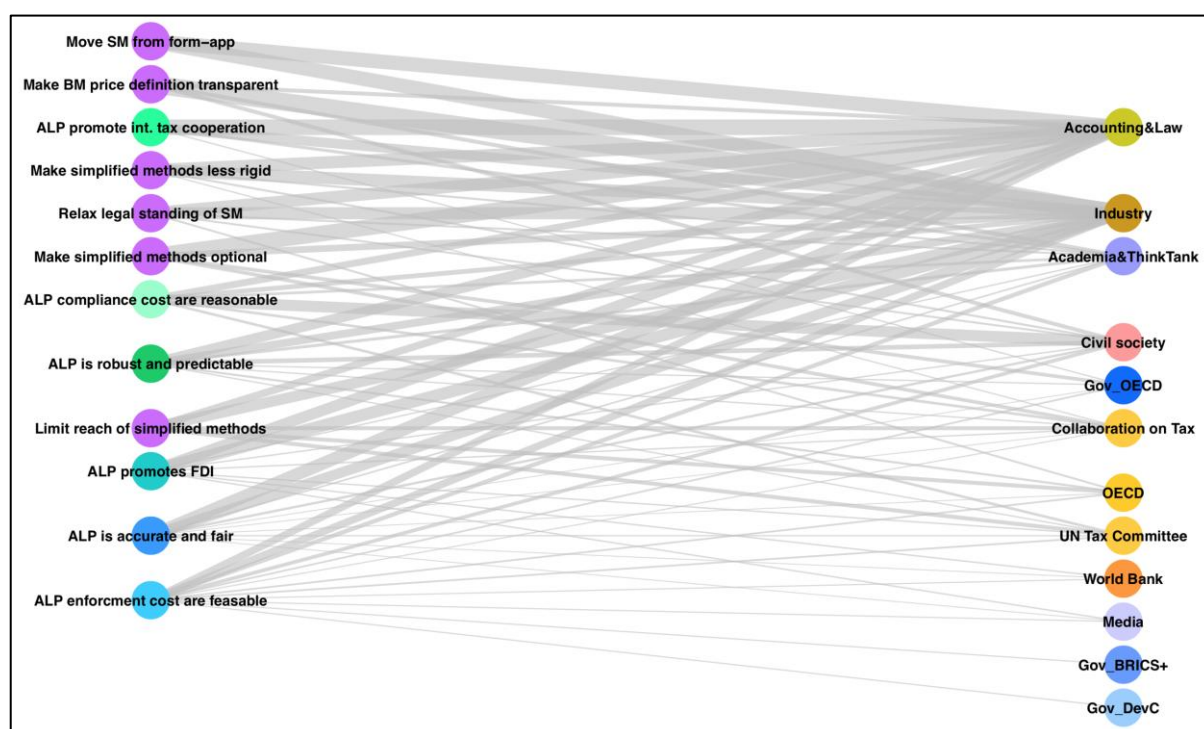


Figure 4: Concepts reference by actors in period IV, 2014 - 2017

7.2 Findings and conclusion

Our empirical analysis demonstrates that the debate over transfer pricing has become increasingly politicised. The evolution of the debate over the four timer periods illustrates

¹⁶³ KPMG International, “What to Tax? — How to Tax?,” 2018, <https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/10/what-to-tax-web.pdf>.

how the topic of transfer prices has changed from being an issue for experts and technocrats in the late 1990s early 2000s to become increasingly central on the political agenda from 2009 onwards. This has posed challenges to the epistemic community. While devising rules for transfer pricing used to place in closed group of like-minded specialists from OECD member countries, the epistemic community has seen its authority challenged after the global financial crises. We find that the epistemic community has reacted to this challenge with a two-sided strategy. Firstly, it started to defend its policy project by reaffirming the accuracy and fairness of the ALP, the positive effect of the principle on FDI and international cooperation and that the standard methods was indeed technically and financially feasible for countries and companies alike to implement. With this strategy, there is little room for any convergence with those in favour of simplified methods.

The second strategy focuses on the epistemic community proactively diffusing its position beyond the OECD and accommodating some of the concerns voiced by its critics. Over the last three time periods, an increasing number of actors have been included in the TP debate, which have contributed to diffusing the OECD norms beyond the epistemic community. This process has taken place through the OECD itself opening up, as for instance through the BEPS Inclusive Framework. The move towards including “BEPS associates” at a point in time when the bulk of the substantial discussion is over and the focus shifts to implementation, makes it hard to see whether there is a genuine attempt to create a level playing field or rather an attempt to co-opt potential future sympathizers of simplified methods. Other actors become increasingly involved on the topic as well, such as the UN Expert Committee, other international organisations and regional bodies such the African Tax Administration Forum (ATAF) and the Inter-American Centre of tax administrations (CIAT).¹⁶⁴ Expect for perhaps the CIAT, these organisations largely agree with the epistemic community on the ALP as an underlying principle on transfer pricing issues. The agreement between the different organisations is neither surprising given that there is also a case of ‘revolving door’ happening between the international organizations, where individuals move from one organization to another, in the process shaping the organization’s position on the topic.¹⁶⁵

¹⁶⁴ In another forthcoming paper we explore specifically the role of organizations in diffusing norms and practices in the case of transfer pricing methodology in developing countries. We hypothesises that regional organizations, ATAF and CIAT, play a particularly crucial role in diffusing norms and practices in the case of the choice of transfer pricing methods in their respective regions.

¹⁶⁵ Thanks to Matthieu Leimgruber for making this point.

At the same time, the epistemic community can be seen as having made some concessions to the simplification camp since at least the second period, inducing measures such as giving greater focus on APAs in the 2010 revision of the OECD TPGs, the OECD's work on safe harbours from 2010, and the inclusion of country examples of simplification in the UN Practical Manual on TP in 2013. This might be interpreted to the fact that the criticism levied against the ALP – particularly with regards to the complicated nature of its application, and relatedly, the unsuitability of standard TP methods to the developing country contexts – have not fallen on deaf ears.

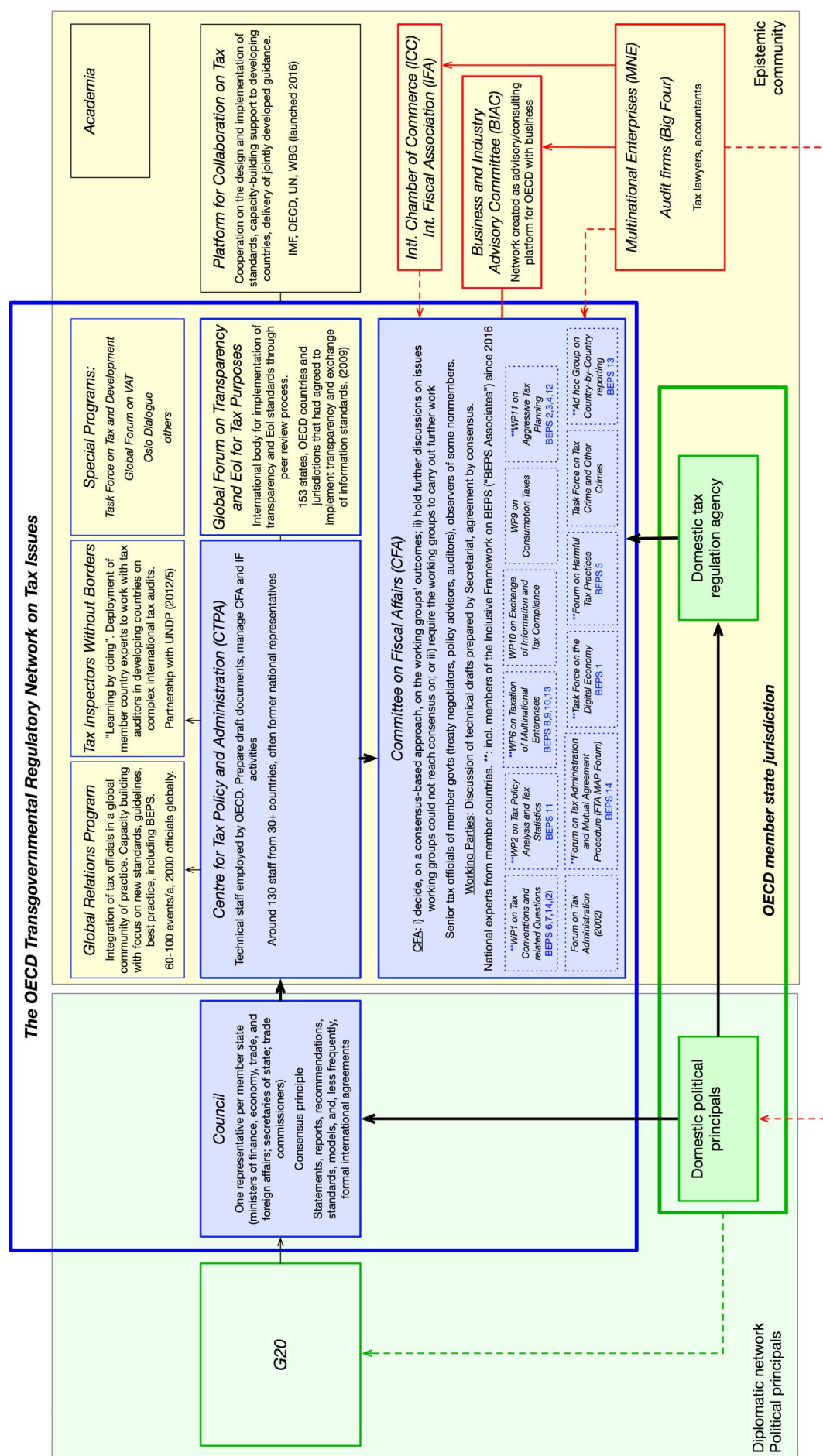
Yet, making concessions in the form of tolerating simplification measures does not mean that the epistemic community is moving away from the ALP. On the contrary, it remains firmly committed to the principle. We interpret this as the epistemic community trying to win ways with developing countries by showing them that simplifying whilst adhering to the ALP is a possibility but it has to be done according to the methods of the OECD. Whilst the experts are extending a hand to the “pro simplified TP methods” camp, they are doing so without compromising on its core beliefs and policy prescriptions. Rather the epistemic community is engaging in a pre-emptive integration as a way to absorb and pacify the “simplified TP methods” camp.

Over the same period the “pro simplified TP methods”-camp is clearly on the defence. After entering the stage in the second period, they largely keep to the same arguments for simplified methods and against the standard methods and the ALP throughout the four periods. Because the two groups have a fundamentally different understanding about whether simplified methods are or are not in fact in line with the ALP, they are not able to find common ground. Over the period we also see that the policy entrepreneurs are not able to effectively counter the epistemic community's arguments against simplified methods nor build a broader coalition for a rule-based approach.

As the analysis shows, the TP debate is not about technicalities but is a struggle over principled beliefs about cause-and-effect relationships when it comes to representation of intra-company transfers with a view to curb profit shifting and enforce adequate taxation. If the “pro simplified TP methods”-camp will not lose ground, it has to broaden its alliance but also to find compelling arguments that respond to the charges launched against simplified

methods. This as the epistemic community is successfully extending its hegemony. We find that this extension is taking place through the co-optation of a greater number of actors and organizations in what is fundamentally an OECD-led policy making process on transfer pricing methods. And by incorporating simplification measures in the conventional OECD TP recommendations, which in practise means that trying to redefine simplified methods so that they are in line with the ALP from the view of the epistemic community.

A premature end of the debate over simplified methods would not only have consequences for the plurality of transfer pricing methods available to countries, it would also mean a forgone opportunity for a more profound public debate over the fundamentals of corporate taxation.

Figure 5: the trans-governmental tax policy network (source: authors, based on www.oecd.org)