OECD-BEPS: A quick guide for the perplexed

Daniel Shaviro, NYU Law School

ABA Section of International Law,

April 14, 2016

What is BEPS?

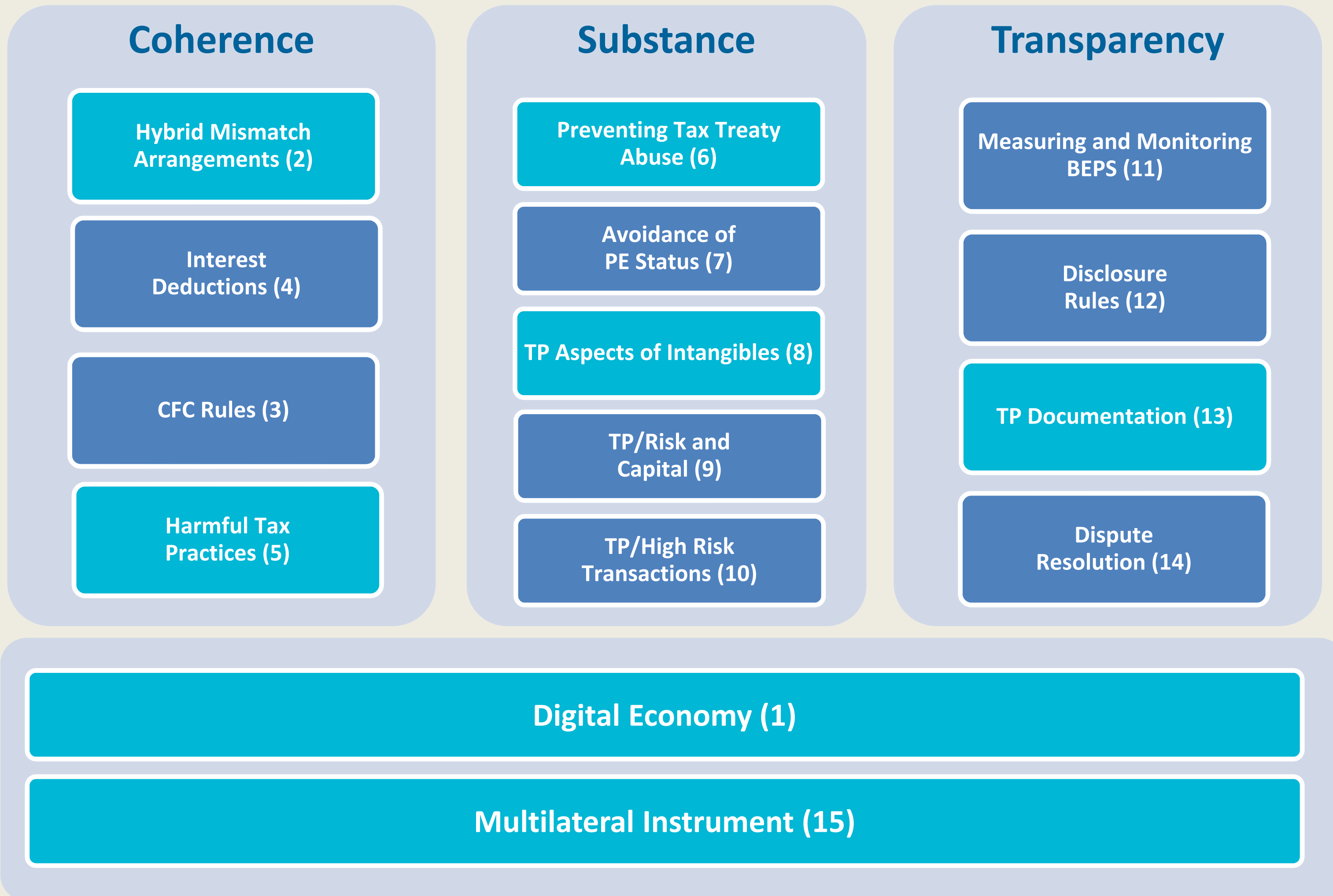
OECD: “Stated simply, tax base erosion and profit shifting (BEPS) arises because under the existing rules it is possible to **artificially** separate the allocation of taxable profits from the jurisdictions in which these profits arise.”

2013: OECD instructed to develop analysis & proposals regarding how countries could respond.

Final report issued 2015 after extensive public discussion & debate.

Countries around the world are deciding if / how to respond.

15 Actions around 3 main pillars



What triggered OECD-BEPS?

Multinationals have gotten ever better at creating “stateless income” (effectively taxed nowhere).

Causes include the rising importance of IP, falling transportation & communication costs, rise of global production networks, changes in tax rules & tax planning “technology,” role of tax havens, etc.

For a long time, this was actively tolerated by both residence & source countries.

But at a certain point, many decided that it had gone “too far.”

This reflected (1) sheer amount of “stateless income,” (2) investigative journalism (using official reports & academic research), (3) politics post-2008 and post-Piketty, & (4) EU concern about U.S. companies.

The key: foreign-to-foreign tax planning

Most big companies still mainly (a) reside in "big" countries with real tax systems, & (b) are active economically in such countries.

So the key is "foreign-to-foreign" tax planning – diverting reported profits from home & true source countries to tax havens.

So two puzzles to think about:

(1) Why would a residence country object to foreign-to-foreign tax planning? From the domestic standpoint, foreign taxes are just a cost.

(2) Why don't source countries protect themselves more? After all, they're the ones losing revenue in the first instance.

But in fact, both sides should sometimes like, & sometimes dislike, foreign-to-foreign tax planning.

The residence country perspective

The best rationale for impeding foreign-to-foreign tax planning is that it's backdoor residence tax base protection.

Once income is labeled as foreign source, getting it to a tax haven is much easier.

If can't convert domestic source income into foreign source income, foreign-to-foreign tax planning is good for the "home team" – but when & to what extent should one think of it as fixed? (Actual shifts, reporting shifts)

This conundrum leads countries to act ambivalently / inconsistently, as in the long & twisting saga of U.S. international taxation.

It also explains the lack of scholarly consensus on these questions.

The source country perspective

While impeding profit-shifting is hard, source countries have long been more tolerant than they needed to be.

It's targeted tax competition – lower effective tax rates for mobile inbound investment – that needn't be explicit or acknowledged.

But once it went "too far," & especially with tight budgets, austerity, & concern about high-end inequality, many countries got concerned.

U.S. companies' tax planning is the best-known, reflecting high quality of the U.S. tax press (& outstanding U.S. researchers, Capital Hill hearings / reports).

This has created a bit of a U.S. vs. EU story, reflected in EU "state aid" cases & in the Obama Administration's response to OECD-BEPS.

How will OECD-BEPS play out?

Yogi Berra: “It’s tough to make predictions, especially about the future.”

For once, Yogi was wrong: it’s actually quite easy to make predictions! People do it all the time.

But it’s hard if you care about being right.

My best guess is that the upshot of OECD-BEPS will be anti-climactic – but perhaps my knowing the U.S. scene best makes me too pessimistic.

More generally, it seems to be the case that both “Something *must* happen” & “Nothing *can* happen.”