

The power and limits of soft law in shaping emerging economies' anti-tax avoidance policies

Frederik Heitmüller
PhD Candidate, Leiden University

Lisbon International and European Tax Law Seminars
14 January 2021



Universiteit
Leiden
The Netherlands

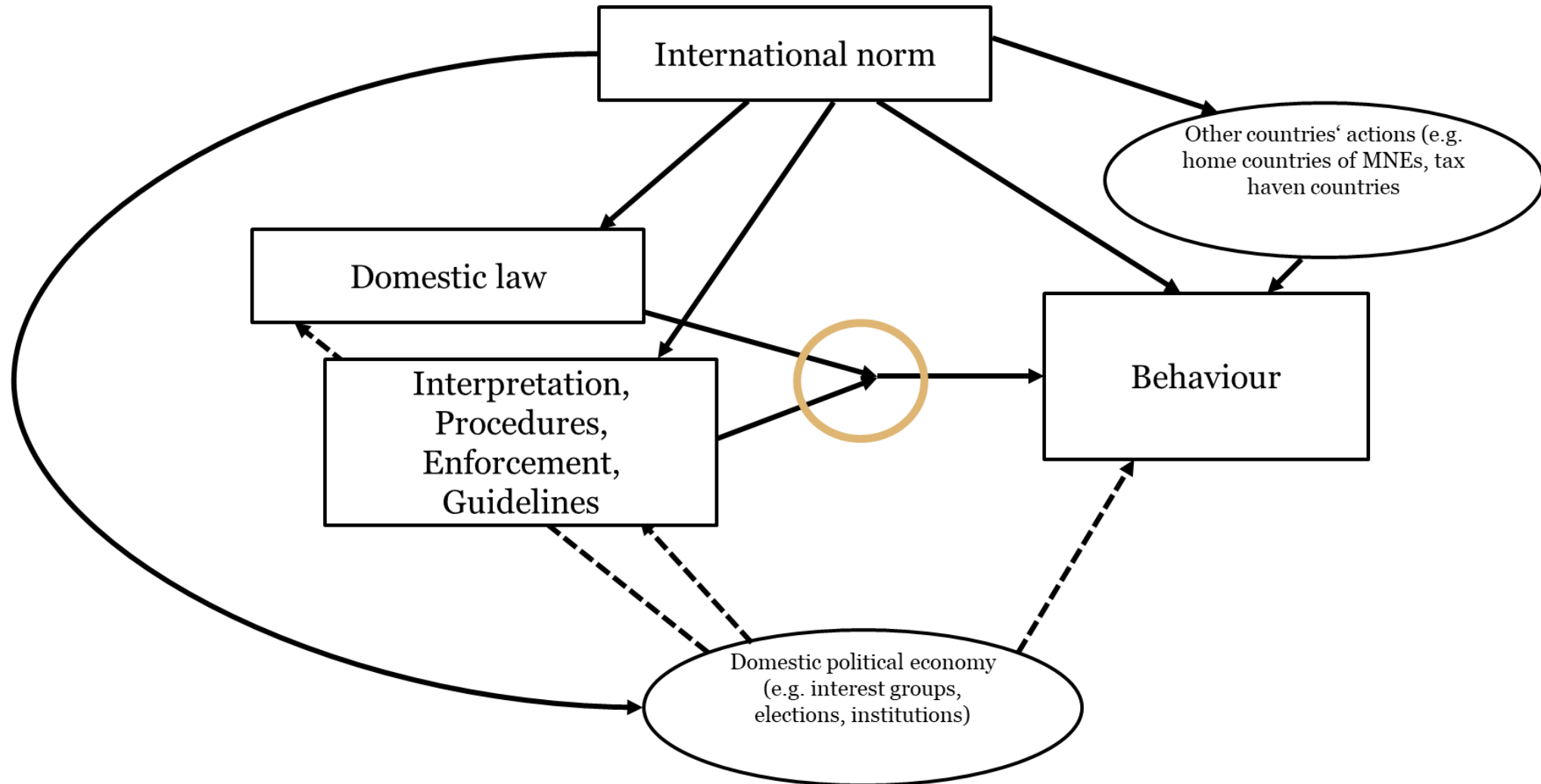


GLOBTAXGOV
A NEW MODEL OF GLOBAL GOVERNANCE IN INTERNATIONAL TAX LAW MAKING



European Research Council
Established by the European Commission

Does the BEPS project prompt countries with high taxes and a large real economy to regulate international tax avoidance in a stricter way?

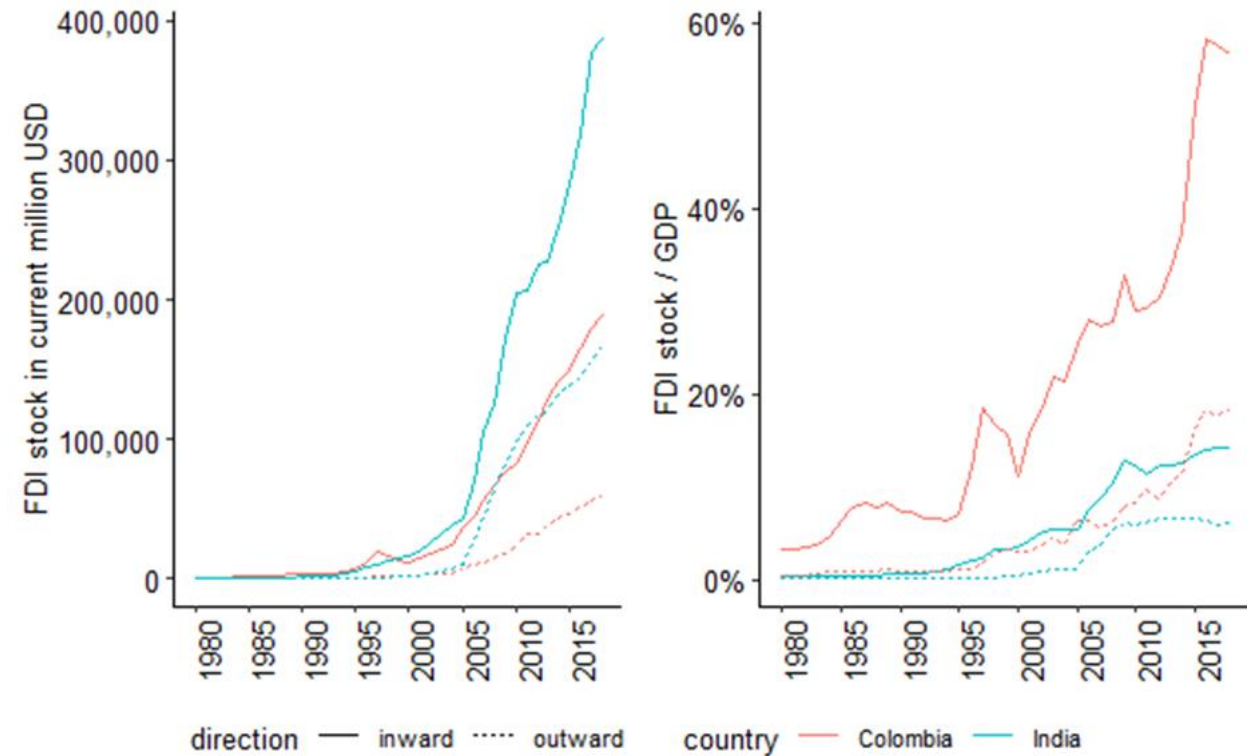


Data sources / methodology

- Country specific literature
- Semi-structured interviews (tax advisors, companies, tax administration, interest groups, academics, journalists)
- FDI data

International taxation in India and Colombia: background

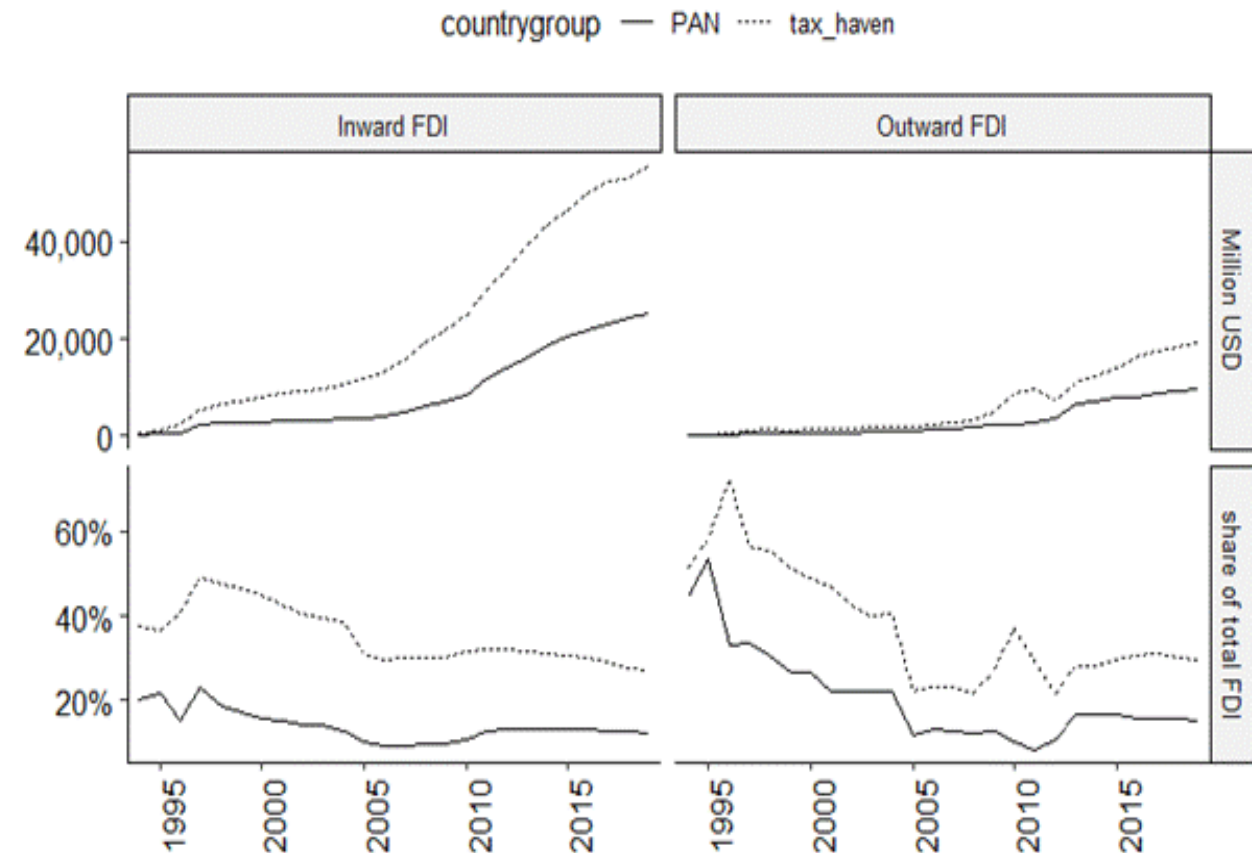
- Open economies since 1991
- Colombia: slow development of international tax rules
 - First tax treaty in force 2008 (Spain)
 - Few people with international tax expertise in tax administration
- India: rapid development
 - Almost 100 tax treaties (since 1960s)
 - High level of expertise in tax administration



Data: UNCTAD, World Bank

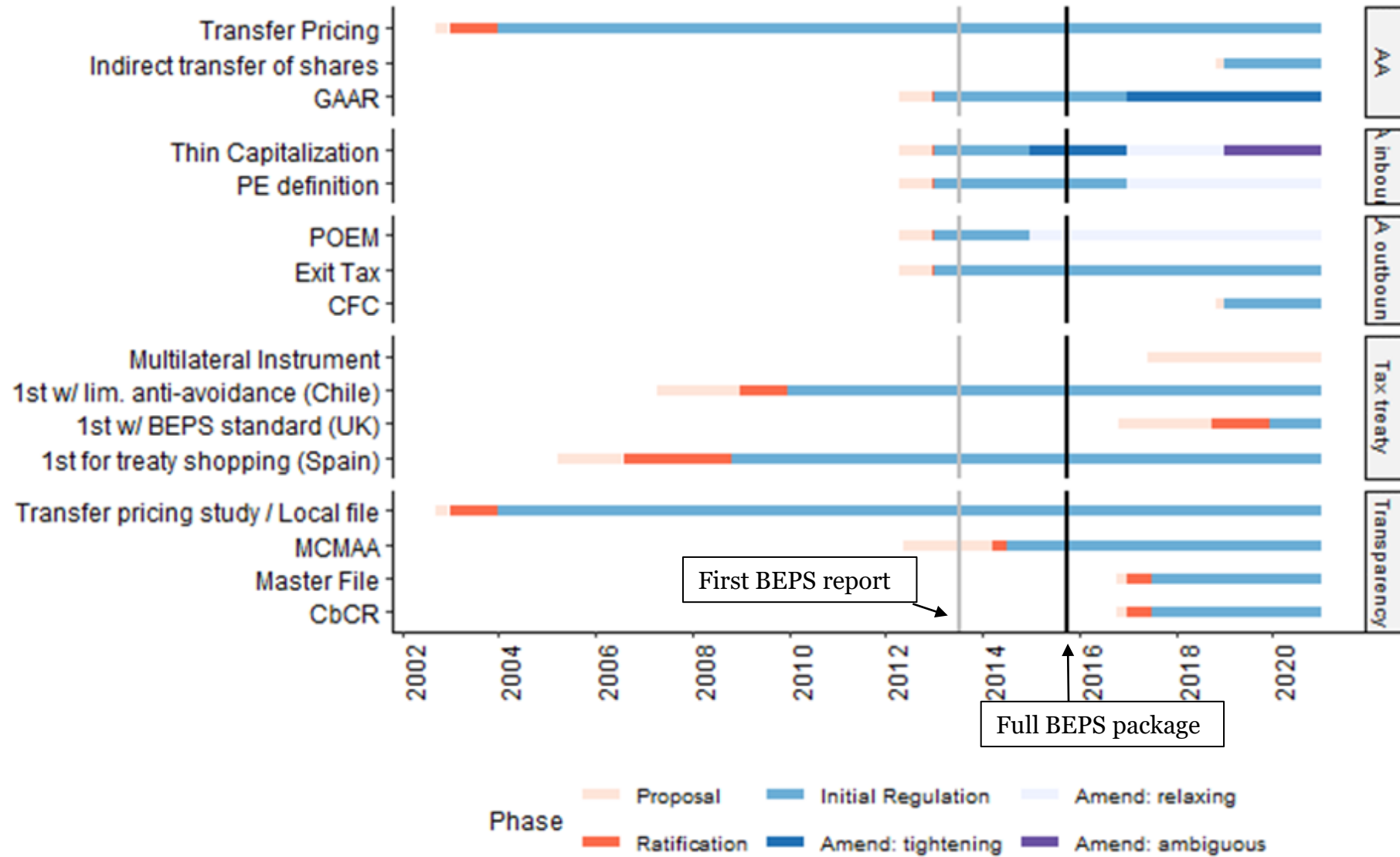
Colombia – practice

- "For example, here the typical thing was always to replace capital with debt. When a foreign investor arrived, [...] there were a lot of back to back structures. A lot. But commonplace to the point that you talked about them openly in a meeting without any kind of blush." (Tax lawyer)
- "I remember that, for example, in the past the financial services companies [...] that trade in derivatives. [...] They had their global transfer pricing agreements with everybody except with Colombia, because in Colombia you could do a lot of things that you couldn't do elsewhere." (Tax lawyer)



Data: Banco de la República, Colombia. Tax haven list based on Bolwijn et al. 2018 and OECD 2000

Colombia: Timing of reforms

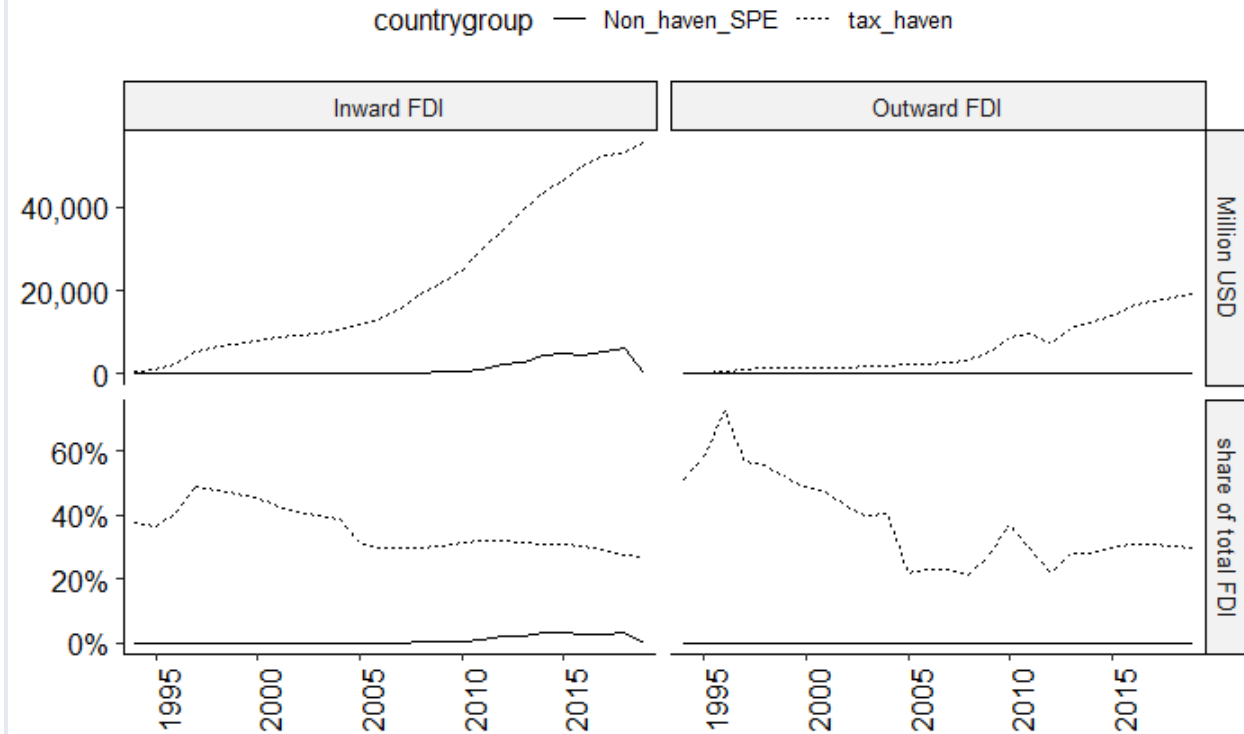


Colombia – country by country reporting

- “What you see in a country by country report is very difficult to interpret. Because it is not the reality as you would see it from the point of view [of the Colombian accounting rules]. [...] There are some very big differences, especially in terms of costs, expenses, and what the real net income is... how gross and net income is calculated.” (former government member)
- “Many firms used to have a lot of profits per employee in a company in Panama and this would look bad in a country by country report. As a reaction, some firms restructure, but some write documentation explaining why employees in Panama do the ‘magic of the business’” (tax lawyer)

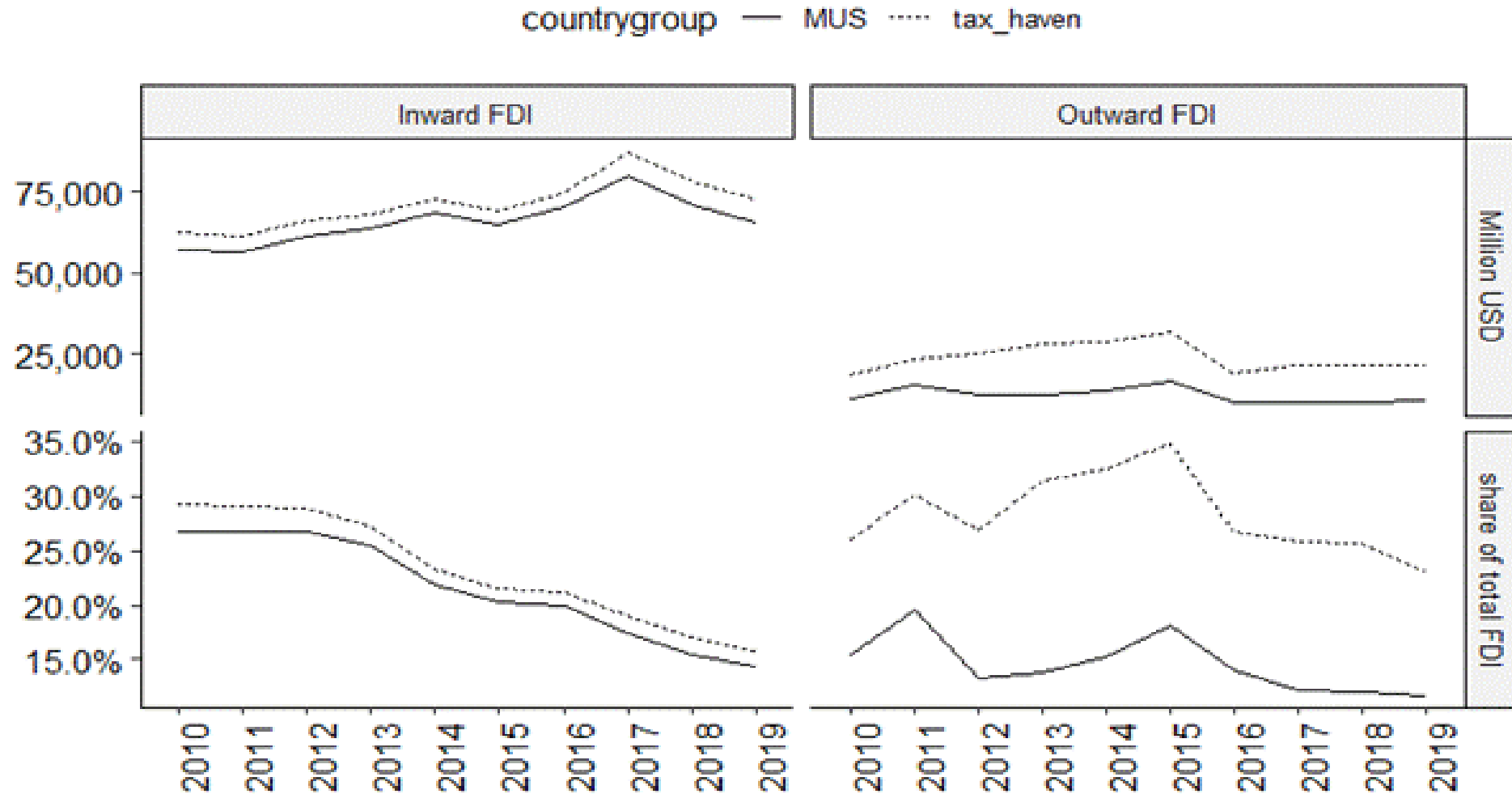
Colombia: relevance of Action 6 / MLI?

- “[...] 10 years ago, a very common planning request by clients was to make holding structures, taking advantage of a treaty to avoid double taxation. So let's make the famous ETVE in Spain, and that company will own the shares in Colombia and Peru, or in all the jurisdictions that have a treaty.” (tax lawyer)
- “The agreement with Spain is a very bad agreement for Colombia” (former government official)



Data: Banco de la República, Colombia; Ministro de Comercio, Spain.

India: Importance of tax havens in inward FDI



Data: International Monetary Fund: Coordinated Direct Investment Survey. Tax haven list based on OECD 2000 / Bolwijn et al. 2018

India: country by country reporting

- Feeling that procedure was made more difficult than necessary
- APA or advance ruling means company does not have a reason to change

India: „Cultural“ influence helps spur policy change

- Long conflict around Mauritius treaty
- “Amendments were long overdue. The world at large was frowning upon India and upon liberal jurisdictions. But there was also pressure by the new world order, which is BEPS.” (Tax lawyer)

„Cultural“ influence impacts interpretation

- "When we were going to make tax structures, we talked about tax havens openly. That's all over now. Today, I look at my opinions from 15 years ago and those of today and I say: 'How could we?' Back then it was very easy to make all kinds of structures and there was not that social, moral pressure that exists now." (Tax lawyer, Colombia)
- "courts are getting more cognizant of tax planning structures, thanks to publicity going around the world, Irish structures and the BEPS initiative." (Tax lawyer, India)

Colombia BEPS implementation by other countries:

- „But today, for example, the questioning of the beneficial ownership of these holdings. We are already seeing, for example, the Spanish authorities being very active in this area.” (tax lawyer)
- Potentially: Tax strategies by MNE headquartered in Europe

Open questions

- Representativeness
- Data availability

**Thank you!
Muito obrigado!**

f.heimuller@law.leidenuniv.nl

Twitter: @heimuellerf
<https://globtaxgov.weblog.leidenuniv.nl/>

**Lisbon International and European Tax Law Seminars
14 January 2021**



**Universiteit
Leiden**
The Netherlands



GLOBTAXGOV
A NEW MODEL OF GLOBAL GOVERNANCE IN INTERNATIONAL TAX LAW MAKING



European Research Council
Established by the European Commission