
BEPS

Global and Indian perspective

February 2016



Preface

The year 2015 heralded the beginning of 'BEPS - related actions' – but it was really just the beginning! Going forward, if these actions take shape as planned, and coherently across most of the world, we are certainly at the threshold of a paradigm shift in the international taxation regime. We will, more likely than not, witness a change in the way businesses operate and how tax authorities will look at business transactions. Practically, on-the-ground implementation of the plans will undoubtedly take time, but if there is political will, and if policies require, these are likely to steadily pave the way for change!

The buzz is that India is likely to see changes in the coming Budget 2016 – legislative, as well as those relating to administrative aspects. In this regard, it is important to define prospects closer home – what we can expect in India in the days ahead.

However, before exploring the Indian state of play and to be able to contextualise the possible transformation that India may undergo, an understanding of the global picture becomes most relevant.

This paper¹ outlines the key facets of the 'BEPS world' after finalisation of the BEPS deliverables, and the "what next" for India as a corollary to the BEPS project. It attempts to present the 'big picture' on BEPS – globally and in India, and also provides insights on the Indian political intent and deliberation on BEPS.

Clearly, there is a lot more on the horizon on BEPS and because of BEPS!!

Gautam Mehra
PwC India Tax Leader

Vijay Mathur
PwC India BEPS Leader

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Setting the *context*

Why BEPS?

Before the launch of the Base Erosion and Profit Shifting (BEPS) project, the Organisation for Economic Cooperation and Development (OECD) estimated that global corporate income tax (CIT) revenue losses were somewhere between 4% to 10% of global CIT revenues, i.e., USD 100 to 240 billion annually. As per the OECD, these statistics confirmed the magnitude of the problem, and established the need for and criticality of the BEPS project.

Five pillars of the BEPS project

The five pillars or underlying themes of the BEPS project:

- Need for increased transparency of multinational companies' (MNCs) operations
- Emphasis on substance
- Alignment of taxation with location of economic activity and value creation
- Updating of international tax treaties and coherence in domestic rules that affect cross-border activities.
- Need for certainty for businesses and governments.

All BEPS action plans² focus on achievement of some or all of the above.

BEPS actions – the more the merrier!

BEPS is inherently a cross-border issue and therefore coherence with and amongst other countries is of utmost importance. Further, most BEPS counter measures cannot be unilateral.

The BEPS outcomes are not just any other OECD study. They have been conceived by a particular mandate and designed to achieve specific objectives. The outcomes therefore involve consensus, not only from the 34 OECD countries but also from G20 non-OECD nations. Apart from that, the G20 has been consistently stressing on the need for other non-G20, non-OECD countries to join in the project, and has been making consistent efforts to involve larger number of developing nations.

In fact, the OECD brought in 14 more countries that were not members of either group, in BEPS consultations and meetings – although they only had an observer status.

It is estimated that G-20 accounts for more than 85% of the global GDP. Thus, G-20's commitment to the BEPS project and actions taken thereof, may by itself be sufficient to bring a change in the international taxation regime!

The final BEPS package *A mixed bag!*

The final BEPS package is a mix of the following three categories of outcomes:

- **Minimum standards** – G20 and OECD countries have agreed that there is no going back on these, i.e., they are committed to implementing these.
It has been agreed that Action 5, on harmful tax practices; Action 6, on preventing inappropriate granting of treaty benefits; Action 13, on transfer pricing (TP) documentation and country by country reporting (CbCR); and Action 14, on improving efficiency of mutual agreement procedures (MAP) and dispute resolutions, are the “minimum standards”. Specifically on Action 6, countries have agreed to include anti-abuse provisions, including a minimum standard to counter treaty shopping, in their treaties.
Minimum standards are therefore going to be an immediate priority for countries to implement.
- **Recommendations** – These essentially entail updating of existing practices or guidance. Countries are expected to adopt these, and incorporate them in their legislation.
Countries have agreed to a general tax policy direction and common approaches for implementation of these measures. It is expected that they will converge over time, thereby enabling consideration of whether these should become minimum standards in the future.
- **Best practices** – These are not binding. Implementation is left to countries' discretion. Measures, such as Action 4, on limiting earnings stripping through interest deductions, or Action 2, to eliminate hybrid mismatch arrangements, are considered best practices, which countries could choose to use unilaterally to protect their tax bases.

Implementation

What's being done globally?

Many of the BEPS outcomes will require countries to change their existing tax laws or create new ones, and many of them will also require countries to make adjustments to their bilateral tax treaties or create new ones. Some countries have already begun taking action. The majority of the changes are expected to be in place in the coming months. In 2016, the focus across countries will be on implementation of BEPS outcomes, and then monitoring the implementation. There are multiple steps being taken in this regard which are either underway or planned. The main ones are discussed below.

Inclusive monitoring framework

It is recognized that there will be several challenges, including capacity issues, development of skill sets, lack of flexibility in the existing domestic tax systems, etc., in implementing tax reforms resulting from the BEPS project.

To address some of these challenges, in early 2016 OECD and G20 countries will work together to design and propose an 'Inclusive Framework', which will be a platform for them to work together in monitoring and implementing the BEPS package. Countries and jurisdictions will work together, participating on an equal footing along with businesses, international organisations such as the World Bank, the United Nations (UN), the International Monetary Fund (IMF), etc., and regional tax organisations.

To formulate this framework, there may be online surveys, sharing of experiences, and provision of regulatory options including model legislations, consultation on policy matters, guidance for tax administrations, training materials, and so forth.

Regional co-operation

Not all countries want to directly participate in efforts to implement BEPS. Some believe that collective representation through regional organisations would be more effective, since it may help them deal better with their capacity constraints. The OECD is, therefore, working through consultations with regional organizations such as the African Tax Administration Forum, the Inter-American Centre of Tax Administration for Latin America, and others, to help countries understand the issues involved and assess these countries' needs while implementing counter-measures.

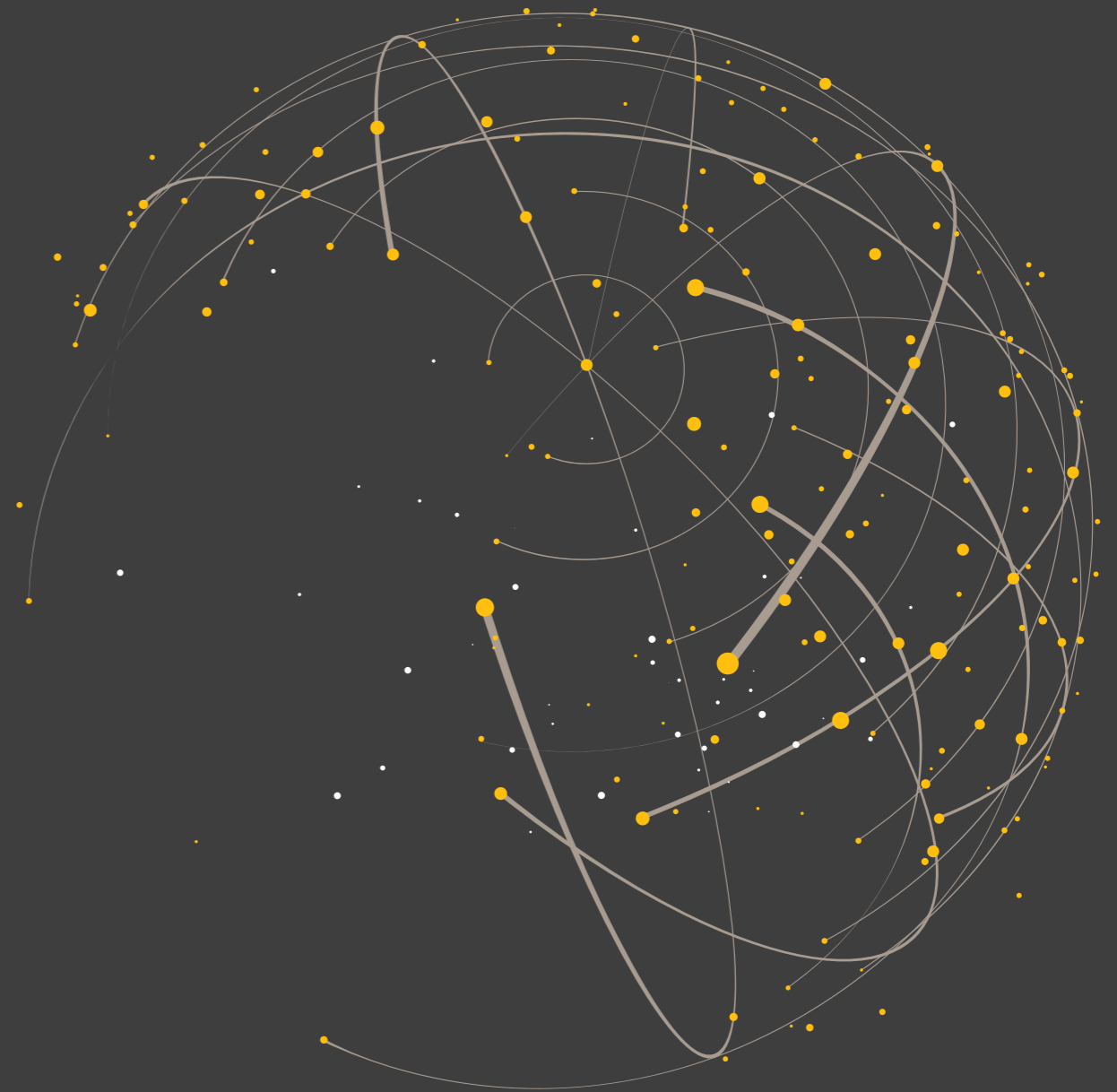
India is not part of any such regional co-operation with other countries, since it does not feel the need for it at present.

Multilateral instrument

The much talked about multilateral instrument is an innovative mechanism (which has no precedent in the tax world). It has been launched to update the global network of more than 3500 bilateral tax treaties. An 'ad hoc group' of countries was formed to develop this instrument, and till date includes 94 members from the OECD, G-20, and developing countries, as well as non-OECD and non-G-20 economies, and more countries may join this group.

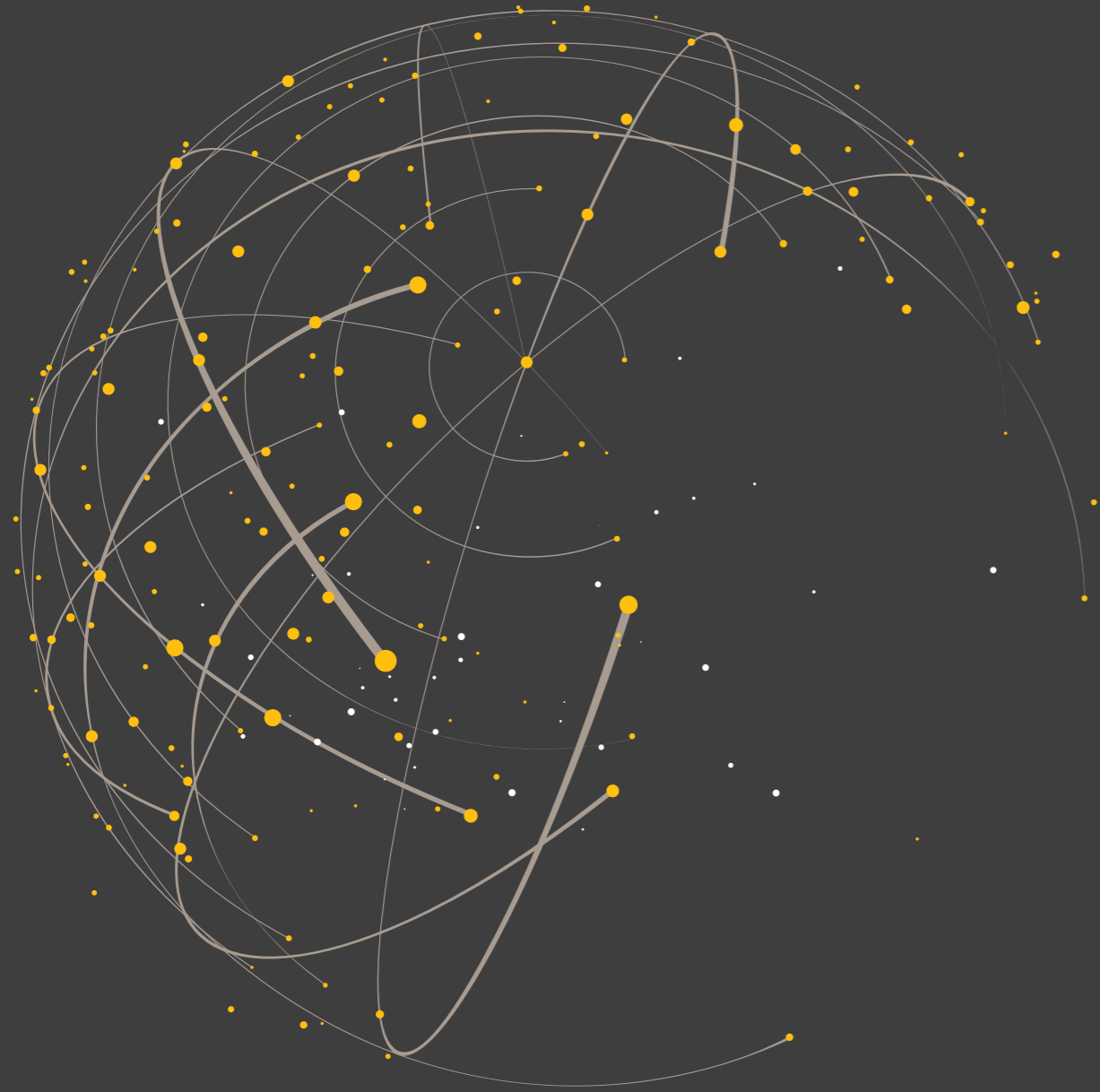
These countries have joined to negotiate a multilateral instrument, a kind of "magic bullet", to implement treaty-related BEPS measures which will facilitate modification of bilateral tax treaties in a synchronised and efficient manner, without the need to invest resources to bilaterally renegotiate each treaty. It should be noted that this instrument will only be dedicated to implementation of treaty-related BEPS measures and will not include all the articles of an entire treaty (for example, it will not touch upon articles such as Article 8 on profits from shipping, inland waterways transport, and air transport).

Therefore, this instrument will co-exist with the bilateral tax treaty network, and will modify BEPS-related provisions that are common to most existing bilateral treaties, and add new one that are specifically designed to counter BEPS.



This multilateral instrument, to be finalised by the end of 2016, will enhance coordination and improve international tax cooperation.

From an efficiency perspective it would be beneficial to have a single tax law which applies to all non-residents, but from a political perspective this seems challenging, since every country will look to its own investor base, the benefits it secures and gives up, and whether the treaty's exact wording fits in with what they want to achieve.



The big question relates to the form the multilateral instrument will take—a single package to ratify or reject, or a “mix and match” one. It is likely that it will be flexible, or modular, and allow countries to select the parts they want to. However, although it may be flexible, participating countries are likely to be required to make a minimum commitment – but it’s not entirely clear yet what that will be.

Mandatory binding arbitration

What is mandatory binding arbitration? In simple terms, if no resolution is reached through MAP, there is a proposal to introduce provisions in tax treaties (supplementing existing MAP provisions) on mandatory and binding arbitration, whereby disputes under consideration, which remain unresolved through MAP, will be taken to arbitrator/s for resolution. Their decision will be binding on the countries party to the dispute. Therefore, if countries agree to mandatory binding arbitration under the treaties, in effect, they will waive certain specific rights, such as their ability to appeal decisions.

Mandatory binding arbitration remains a bilateral issue to which there is strong opposition by several countries (particularly developing countries), including India. On the other hand, countries that have agreed to participate in mandatory arbitration include Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the U.K. and the U.S. These countries were involved in more than 90 per cent of outstanding MAP cases at the end of 2013. The U.S., in particular, has been pushing in favour of binding arbitration.

Technical areas of focus in 2016 and beyond

The years 2016 to 2018 are expected to witness BEPS deliverables on the following technical matters:

- The TP aspects of financial transactions (likely to be a new project)
- Attribution of profits to permanent establishments (There will be additional guidance provided in light of the changes made to the definition of permanent establishment. Follow-up work may also be needed in 2016 to incorporate changes resulting from the report on Action 7 into the Model Tax Convention through an update of the Model.)
- Use of the Profit Split Method (expected to be largely a clarification of the existing guidelines)
- Implementation of hard-to-value intangibles (clarification on the practical approach)
- Special rules for the insurance and banking sectors in the area of interest deductibility
- Development of a strategy to expand the participation of non-OECD and non-G20 countries in the work being carried out on harmful tax practices, including possible revision of the relevant criteria

The OECD’s own model tax treaty will also be developed during 2016. There are plans to include a specific anti-abuse rule, i.e., the “limitation on benefits” rule in this model tax treaty—one that limits treaty benefits to entities that can show a sufficient link to their state of residence. In addition, it will include a more general anti-abuse rule—one that puts in place a test (a “principal purpose test”) that will deny benefits if the principal purpose of a transaction or arrangement is to obtain these benefits.

Special measures for developing countries

At this stage, despite their lack of involvement and the insufficient attention given to their specific issues, many developing countries seem to be ready to adopt a number of BEPS recommendations, although with extended timeframes, simplifications and with guidance on applying the principles. The actions which seem to interest developing countries the most are Actions 4, 6, 7, 8-10, 13, and 14.

The OECD has made efforts to assess the nature and level of challenges faced by developing countries in implementing the BEPS project, as well as other areas of particular interest to developing countries. These include issues relating to availability of transfer pricing comparables (including in the commodities sector), transparent and effective tax incentives, indirect transfers of assets, valuation of intangibles, etc.

The OECD has commenced work in partnership with regional tax organisations, as well as the IMF, the World Bank, and the UN (also in some cases the European Commission) to develop ‘toolkits’ to help developing countries with practical considerations in implementing BEPS and best practice policy issues. The matters covered and publication dates include:

- Tax incentives – published in 2015 (designing and governance of tax incentives and suggestions on good practices in this area, including tools to help assess the costs and benefits of tax incentives)
- Indirect transfers of assets – September 2016
- TP comparatives – October 2016
- TP documentation – October 2016
- Treaty negotiation – December 2016
- Base-eroding payments – June 2017
- Supply chain management – March 2018
- BEPS risk assessment – March 2018

These toolkits will be relevant and useful for many developing countries from a capacity building perspective, since they are intended to assist tax officials in developing countries to better understand causes of BEPS in their respective countries, identify BEPS-related risks in the context of their respective domestic tax laws and tax treaty network, and assess options available to them to deal with BEPS-related issues. This is much needed because most developing countries are currently at a nascent stage of development on the international tax front – having insufficient regulations, policies, guidance, etc.

India’s tax regime is at a mature and developed stage. Nevertheless, as and when these toolkits are published, India will review them and may adopt them as it deems appropriate. India has been, providing guidance and training to few countries on many international taxation aspects.

Guidance and training by international organisations (mentioned above) is also on the cards, to address the limited capacity and expertise-related issues faced by many developing countries.

India

What's next?

India's involvement in the BEPS project has been intensive. It has been involved in devising the Action Plans, and being part of various working groups, task forces and committees that were set up to examine the different aspects of the Action Plans. In November 2015, the G-20 country leaders (including India) formally endorsed the 15-item action plan. The G-20 Finance Ministers (including India's) have committed themselves to rapid, widespread and consistent implementation of BEPS measures.

After the final BEPS deliverables were published, many Indian Government officials have addressed several public forums and made statements to the press on the Indian Government's views on and reactions to the outcomes of the BEPS project. These provide valuable insights into the possible transformation of the Indian tax regime that may be in the offing as a result of the BEPS project, and how the Indian Government intends to deal with this.

Overall perspectives

The following is a collation of views and reactions of some prominent Indian Government officials, outlining the Government's overall perspective on BEPS.

Ms. Anita Kapur, former chairperson of the Central Board of Direct Taxes:

- OECD's BEPS project is an expression of virtually every stand India has taken on taxation³.
- BEPS deliverables reflect what India has been saying for 20 years, and have transformed India from a minority to a majority voice⁴.
- The four principles of the BEPS project underlie India's treaty policy, i.e., avoiding harmful tax practices, dispute resolution, avoiding treaty abuse and country-by-country reporting³.
- The Indian Government is pleased that global thinking on international tax policies is moving in the "source-based" direction – something which India has been advocating as a lone, minority voice³.
- India's taxation principles are based on the concept of fairness — that if a corporation works in a country or earns income from it, if it is adding value in that country, if the economic activity is carried out in that country, and if it is using the public goods of that country — it is only fair that the corporation pays tax in that country. This is the view of the Indian Government, which has now been recognized by the OECD BEPS project³.
- Although further complexity is inevitable under BEPS, it is important for the G-20, the OECD and the UN to break down the new rules into simple, easy to understand tenets that can help to get multinationals on board and help tax administrations to improve the capabilities of their staff. These rules must then be consistently interpreted to give multinationals a fair opportunity to do business³.
- A majority of the APAs have been unilateral. Companies are willing to accept some double taxation in the interest of gaining certainty. They can accept the cost of double taxation because the cost will ultimately be transmitted to clients or consumers, but certainty is the goal they are pursuing. If, based on the new rules, tax administrations can provide certainty, then, despite the new complexity introduced by BEPS, India is moving in the right direction³.



Mr. Akhikesh Ranjan, India's Competent Authority:

- BEPS deliverables are the outcome of two years of intense discussions and deliberations to which India has been an active participant. Actions will be taken in India – either legislative or administrative⁵.
- Implementation will be crucial. Industry will have concerns about the regulations and laws that will be introduced. Every country will need to develop specific legislation with a focus on minimising subjectivity in them in order to reduce disputes. It will be a difficult task for policy makers in India, but at least countries will be sharing their experiences as they draft the new rules and laws⁴.
- As a G20 country, we believe India will implement most or almost all BEPS recommendations. The only question is when and to what extent? These recommendations are not just OECD's but India's as well, since India has been a part of the project⁶.
- India will certainly implement minimum standards, and will abide by updating existing standards. As for recommendations on best practices, India will study and analyse these to decide on when and to what extent they will be implemented⁶.

From an overall perspective, implementation of BEPS is likely to take place in phases, with the 'minimum standards' expected to be put through in the coming Finance Bill, 2016 (wherever legislative action is required).



More specifically speaking....

Apart from the above comments, Indian officials have also spoken about specific actions that are either already under way or planned. Some of these are discussed below.

India's involvement with and views on the multilateral instrument

India is an active participant of the OECD ad hoc group (comprising 94 countries) writing the multilateral tax treaty. It strongly supports the development of this instrument, since it seems to be the most effective way of implementing treaty related recommendations. Otherwise, it would be very time consuming for India to revise all its bilateral tax treaties.

India's Competent Authority, Mr Akhilesh Ranjan⁷ states what the multilateral treaty will cover, and provides his views on this

Coverage	Views
Hybrid mismatch arrangements (BEPS Action 2)	This is not such a major issue in the Indian context ⁶ .
Countering tax treaty abuse (BEPS Action 6)	This is a minimum standard which India fully endorses. It is strongly committed to implementing measures recommended by this Action Plan. India prefers to adopt a combination of the Action 6 limitation on benefits (LOB) test and the principal purpose test (PPT), in addition to its existing GAAR. LOB clauses which lay down objective parameters may in many cases not capture situations of treaty abuse and in those situations the PPT will need to be applied ⁶ .
Prevention of artificial avoidance of permanent establishment status (BEPS Action 7)	This is something India has been saying all along, and will certainly implement it ⁶ .
Dispute resolution (BEPS Action 14)	-

India's position on mandatory arbitration under treaties

India continues to be unwilling to accept mandatory arbitration, since it believes that this will impinge on its national sovereignty. According to Mr. G.C. Shrivastava, former Director General of International Taxation, "India has never accepted binding arbitration - it believes it has enough appellate mechanisms and courts to handle disputes effectively"⁸.

India is already strengthening the effectiveness and efficiency of its MAP process under tax treaties – and does not think mandatory arbitration is warranted in its case. It has settled 98 cases under MAP since January. Therefore, according to Ms Anita Kapur, "This proves that if MAP functions, you don't need arbitration – it would be an additional complication rather than an additional solution. And I don't believe, as some do, that MAP only works when there is a threat of arbitration"⁸.

India may implement recommended best practices that facilitate effective implementation of MAP, including suspension of collection of taxes during pendency of MAP proceedings, which are already included in its tax treaties with the US, the UK, Denmark and now Korea.

India's views on confidentiality of data disclosed in CbCR

Industry has been concerned about how confidentiality of information contained in the TP documentation, particularly CbCR, will be maintained. Even if tax authorities keep the reported information confidential, this will be publicly available once the cases reach the Tribunals, which have public hearings – and then the final judgments will also reveal this information.

It remains to be seen how the Indian Government will address and handle these concerns. However, for the time being, the comments of Mr Sanjeev Sharma, Commissioner of Income Tax, are as follows and are worth noting⁹:

- India will follow best practices on handling sensitive information in CbCR.
- Standards, safeguards, how information will be received, by whom and how it will be used – all this has been laid down.
- These confidentiality standards are not confined to one country. India's confidentiality standards will be peer-reviewed by other countries to evaluate if India is safe in terms of confidentiality (i.e., whether India is able to keep information confidential).
- Many people—not just tax officials, but the public and the judiciary, will need to be sensitised and trained on the need to protect companies' reported information. CbCR is an international agreement and there will be consequences if information is leaked.

Industry may also draw some comfort from Mr Akhilesh Ranjan's comments who categorically states as follows: "We have to make sure the information doesn't go to every tax authority in the country. The information will come through structured processes and only the relevant information will go to the tax officer for use. We have to devise systems to handle this information. Risk assessment analysis should be done so that it is not confused with regular assessments. All these systems need to be in place so that information is confined only to sections of the tax administration who need it and that it is used for the right purposes"¹⁴.

Practically speaking, it may also be fair to say that in the last several years of TP audits – there has been no instance of leakage of information provided by taxpayers. Going by Mr Akhilesh Ranjan's comments, the information that will be received from taxpayers will anyway go through a specialised and specific process / methodology before it reaches a tax officer. Moreover, the information processed through this process / methodology will be used for the specific purpose of risk assessment (and not a TP audit) to enable evaluation of the cases that need to be selected for scrutiny. The objective is to make selection of cases easier and more scientific.

In this regard, it may be worth noting that the model 'Competent Authority Agreement on Exchange of CbCR' provided in the BEPS Action-13 final deliverable, clearly provides for confidentiality of data and its appropriate use. According to this model agreement¹⁰, TP adjustments cannot be simply made on the basis of CbCR, since information contained in CbCR does not, on its own, constitute conclusive evidence.

Apart from broader concerns on maintenance of confidentiality, there is also an apprehension that information contained in the master file could be used for past cases. To this end, it may be worth noting what Mr Akhilesh Ranjan has to say: “The objective of the master file and CbCR is to act as tools for risk assessment this documentation has to be used essentially for risk analysis and not for actual adjustments.....which then implies that we would be using this information for future audits.....so the essential application of the master file would be futuristic; it would be for future audits, but then if there is an ongoing audit and at that time another current case also comes up through risk analysis, would the tax officer look at these facts? I think he would and I would not be honest enough if I say that he will not use it; he will certainly use that information. But I would look at it the other way; I think the more information the tax officer has I think the better and the more fair assessment that we can expect him to make. So perhaps it may be better for him to have more information available”⁶.

Accordingly, although Indian Government officials seem committed to maintenance of confidentiality and introducing systems and checks to ensure this – however, when it comes to use of such data by Revenue authorities for past years, the officials do not seem to be making any promises yet!

India’s outlook on exchange of information

India seems extremely buoyant and optimistic about exchange of information as a measure to counter BEPS. The Finance Minister, Mr Arun Jaitley has emphasised the need to ensure that the Common Reporting Standards on Automatic Exchange of Information are implemented globally on a fully reciprocal basis as this will be a key to prevent international tax evasion and avoidance¹¹.

From the standpoint of implementation, the Commissioner of Income-tax, Mr Sanjeev Sharma, stated the following⁹:

- India will establish mechanisms for receiving and transmitting information from and to tax administrations in other countries.
- Information from other countries will be received by India through a centralised system and disseminated to tax officers on a need-to-know basis once it has been channelled through the Competent Authority.
- Proper systems will be put in place. Assesseees need not be scared of how the information will be used. Not everyone will get this information and we will follow best practices. It will not fall into the wrong hands.
- Notably, India has already previously subjected its systems for automatic exchange of information, to the US’ scrutiny, when the two countries signed the Foreign Account Tax Compliance Act (FATCA) earlier this year.

India gearing up for CbCR

India is planning to adopt several measures to prepare for CbCR. These include the following:

- Domestic legislation will be amended to ensure implementation of reporting requirements. India will align its present transfer pricing rules on documentation with the new standardised approach under BEPS recommendations. The latter is likely to apply to companies with an overseas presence and consolidated revenue of more than INR 5,500 crore (Euro 750 million). The Budget 2016 may carry these amendments, since they are likely to be effective from April 2016. Some rules will have to be introduced and work is already underway on these aspects.
- Risk assessment systems are being developed for effective use of information. Guidelines to tax officers are also expected with respect to selection of audits (i.e., a risk-based selection of cases).

According to Mr Akhilesh Ranjan, “This is one of the minimum standards that has been agreed to, and India is fully committed to implementing it.....we will of course not be departing from the main aspects of the requirements as laid down in the report, but then timing, threshold etc. are things that we would certainly be having a look at”⁶.

The augmented data-reporting legislation is likely to cover more than 200 companies in India.

India’s take on other specific BEPS outcomes (comments by Mr Akhilesh Ranjan):

Actions 8-10: “Many of the recommendations are things that the Indian transfer pricing auditors and tax authorities have been maintaining themselves.....these reports are a sort of endorsement or give us support in the work that we have been doing.....they will bring consistency to our approach in transfer pricing audits.....we do intend implementing these recommendations.....we are already practicing some of them, but then we would like to have a more formal way of implementing them”⁶.

Intangibles (in specific): Given the new emphasis on substance, Mr Akhilesh Ranjan said, “Mere capital will not attract income.” If an entity is capitalised in one jurisdiction and acquires an intangible, he remarked that “the income from that intangible may not necessarily flow to where the capital is held. The entity should get a limited return on capital unless it does something to enhance value”⁴.

“BEPS reports do not really comment specifically on the issue of marketing intangibles....these reports are not giving any clear answer to us on how we have to deal with this issue.....the solution is something that we have to think about locally.....we have to find the solution quickly”⁶.

Treaties: Mr Akhilesh Ranjan noted that many international tax treaties are more than 70 years old, belong to a different economic era and lend themselves to misuse. He added, “BEPS doesn’t mean that there will be a dramatic shift in principles such as source based taxation, but aspects that gave rise to abuse will be changed and this will mean a shift from bilateralism to multilateralism – this is a new and very important development in international taxation”⁴.

Attribution of profits: “India has not really supported the ‘Authorized OECD Approach’ which was based on transfer pricing analysis.....mere transfer pricing approach may not be enough to resolve issues of attribution..... there is a substantial amount of work which is now being done and will be done in 2016 on attribution and once there is some consensus, questions on attribution can be answered”⁶.

Thin capitalisation: “GAAR regulations as they stand.....cover things like thin capitalisation.....they are competent enough to address those situations.....It is not only for related parties but also in the context of unrelated parties where financing through debt rather than equity could in some way lead to a tax arbitrage or which could lead to base erosion in a particular country.....it is something that we have to look at very closely”⁶.

Interest deductibility: “BEPS Action 4 goes beyond thin cap. It talks of interest payment themselves constituting base erosion if they exceed a certain percentage of the profits or the earnings. Interest payments are used particularly in related party transactions to a large extent in shifting out profits to the jurisdictions because a certain finite amount of net interest liability can be distributed within the group in such a way that the tax outcomes are minimised.....So, it is an issue that has to be considered”⁶.

Controlled Foreign Corporations (CFCs): It seems that CFC provisions are unlikely to be introduced soon. Mr Akhilesh Ranjan stated, “Foreign dividends are taxed at a nominal rate in the hands of the Indian MNCs that is 15%certainly not a very big tax which could prevent corporates from bringing profits in.....but the scope of CFC also covers deferment of taxes, in a sense that it is trying to cover income which can be parked and accumulated in places without any distribution happening at all....India is as concerned with deferment of tax. So relevance of CFC is very much there in spite of the 15% tax on dividends.....however, whether India can implement BEPS reports’ recommendations now, has to be seen”⁶.

Re-characterisation or disregarding a transaction: When asked whether the principles of re-characterisation or disregarding of a transaction, as articulated in Actions 8-10, will be actually incorporated or adopted when the GAAR provisions are implemented, Mr Akhilesh Ranjan said, “Yes, application of GAAR will take into account these concepts..... general application of GAAR would look at the facts of the case and the actual conduct of parties and transaction..... The stress in these reports is on delineating the actual conduct of the parties, and not going by simply the contractual obligations, and therefore every TP study will have to be preceded by a very thorough analysis of facts on the ground.....the conduct of parties will in turn determine the correct allocation of risks – as to who controls the risks, who actually has the capacity to assume the risks and then price the whole transaction keeping these aspects in mind”⁶.

References

1. This paper has been prepared by collating relevant material from various published articles (in Bloomberg BNA, Taxsutra, etc.), PwC Global tax insights and bulletins, business dailies in India, the explanatory statement on BEPS deliverables by the OECD, and other sources in the public domain (including a publicly available transcript of a webcast in which the Indian Competent Authority participated).
2. Action 1 on Digital Economy; Action 2 on Hybrid Mismatch Arrangements; Action 3 on Controlled Foreign Company Rules; Action 4 on Interest Deductions and Other Financial Payments; Action 5 on Harmful Tax Practices; Action 6 on Treaty Abuse; Action 7 on Artificial Avoidance of Permanent Establishment; Actions 8-10 on Aligning transfer pricing outcomes with value creation; Action 11 on Measuring and Monitoring BEPS; Action 12 on Mandatory Disclosure Rules; Action 13 on Transfer Pricing Documentation and Country-by-Country Reporting; Action 14 on Dispute Resolution Mechanisms and Action 15 on Multilateral Instrument
3. Article titled 'Kapur: BEPS Outcomes Vindicate India's Position on Taxes' – Bloomberg BNA (December 2015)
4. Article titled 'India's Top Tax Official: BEPS Reports Validate Country's Views' – Bloomberg BNA (October 2015)
5. Article titled 'India reacts to BEPS reports, to decide soon on legislative/administrative action' – Taxsutra (October 2015)
6. Publicly available transcript of a webcast in which the Indian Competent Authority participated
7. Mr Akhilesh Ranjan has been recently promoted to the level of Chief Commissioner of Income-tax. However, for the purposes of this document, we have referred to him as India's Competent Authority.
8. Article titled 'India Still Unwilling to Accept Arbitration in Treaties' – Bloomberg BNA (December 2015)
9. Article titled 'Sharma: India to Protect Data in Country-by-Country Reports' – Bloomberg BNA (December 2015)
10. It should be noted that on January 27, 2016, 31 countries signed a Multilateral Competent Authority Agreement for the automatic exchange of CbCR. The 31 countries are: Australia, Austria, Belgium, Chile, Costa Rica, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, the Netherlands, Nigeria, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland and the United Kingdom.
11. PIB Press Release dated 8 October 2015, issued by the Ministry of Finance, Government of India

Concluding *thoughts*

For successful implementation of the BEPS project, simultaneous actions and coherence amongst countries is vital. Inaction on their part could lead to the emergence of competing sets of international rules, which could result in “global chaos” marked by massive unrelieved double taxation.

‘Consensus’ has been and continues to be one of the significant concerns relating to implementation of the BEPS outcomes. However, steadily, a larger number of countries are seeing the need for implementing the BEPS outcomes, and are demonstrating their willingness to adopt them. Of late, more and more countries have been seen to be implementing at least the minimum standards and particularly Action 13 (TP documentation, including CbCR). Where required, OECD as well as regional and international organisations are also lending a strong helping hand in implementation of these measures.

As far as India is concerned, apart from announcements in its upcoming Budget 2016, subordinate legislation by way of administrative circulars, notifications, and rules is also anticipated. It is hoped that in bringing in these amendments, the Government will take (as it has in the recent past) a consultative approach with stakeholders, and also be sensitive to a general grievance of many stakeholders that BEPS counter measures are currently lop sided in favour of the Revenue.

For an emerging economy such as India, it is extremely important to balance implementation of BEPS measures while continuing to be an alluring investment destination, as well as attract the much needed foreign capital, and ensure ease of doing business. A cautious and calibrated implementation approach will help the country to remain competitive.

On the one hand, while the Government will face the challenge of striking the right balance, MNCs, on the other hand, may need to rethink their tax strategies. They will also have to evaluate their state of preparedness and make alterations, if required, in their tax policies and corresponding processes to ensure that they are BEPS-compliant.

These are undoubtedly exciting times, as countries stand at the brink of a new world tax order, with several changes, modifications and amendments on the cards. It will be interesting to see how the next few months span out!

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Contacts

Gautam Mehra

PwC India Tax Leader

Direct: +91 22 6689 1130 | Mobile: +91 98670 33822

Email: gautam.mehra@in.pwc.com

PricewaterhouseCoopers Private Limited

PwC House, Plot No. 18 A, Guru Nanak Road (Station Road), Bandra,
Mumbai 400 050, India

Vijay Mathur

PwC India BEPS Leader

Direct: +91 (124) 3306511 | Mobile: +91 9910322141

Email: vijay.mathur@in.pwc.com

PricewaterhouseCoopers Pvt. Ltd.

Building 10, Tower C, 17th & 18th Floor, DLF Cyber City
Gurgaon-122 002, India

pwc.in

Data Classification: DCO

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AK 474 - February 2016 BEPS: Global and Indian perspective .indd
Designed by: PwC Corporate Communications, India