

- 
- The background of the slide is a dense collection of small, colorful globes. Each globe shows a different map of the world with various color schemes for continents and oceans. The globes are arranged in a way that they appear to be stacked or piled together, creating a textured, spherical background. The colors used include shades of blue, green, yellow, pink, and orange.
- **A paradigm shift towards an era of global tax transparency**
 - **BEPS Actions Plans and their impact on international taxation from Indian perspective**

What is Base Erosion and Profit Shifting

- Multi-national companies (MNC) are often able to implement wide range of cross border tax planning techniques to move profits to jurisdictions with lower tax rates and expenses to jurisdictions providing higher tax deductions resulting in:
 - Minimization of taxation in source country
 - No or low withholding tax at source
 - Low or no taxation at level of recipient
 - No current taxation of low taxed profits of ultimate parent such results are referred as base erosion and profit sharing (BEPS)
- There was a growing perception that Governments lose substantial tax revenue due to legal tax planning as most BEPS planning is legal i.e. erodes tax base and shifts profits to locations with favorable tax treatments
- No single country acting unilaterally can effectively address the issue
- Need for a multilaterally agreed solution

Global Tax Revolution

- Currently MNCs are facing a number of new challenges including:



- This new global tax environment has resulted in the following actions – a Global Tax Revolution:

**Changing
behaviours of
tax authorities
re tax treaties
and tax laws**

BEPS objectives

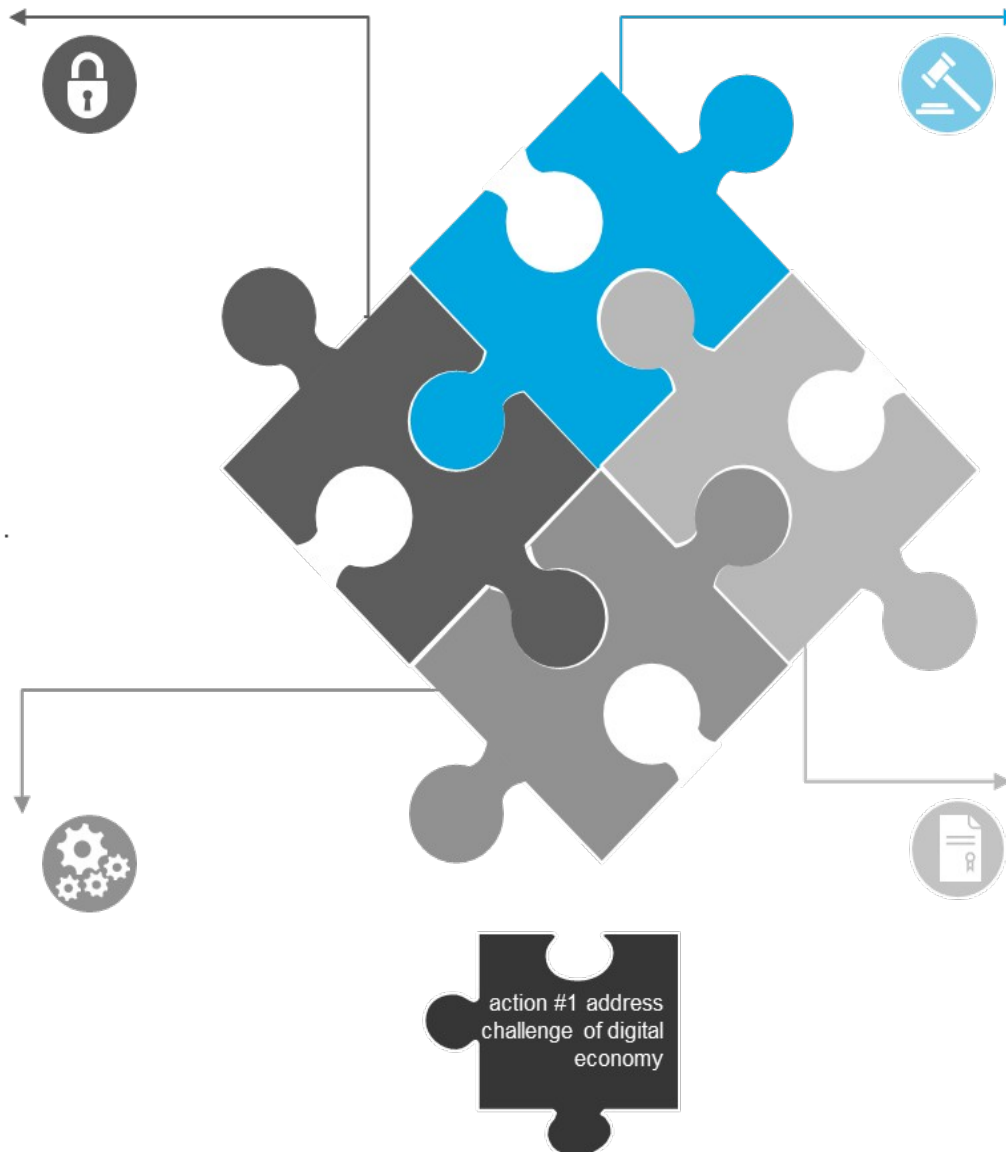
- A new global tax environment

Establishing coherence in corporate taxation

- action #2 hybrid mismatches
- action #3 CFC rules
- action #4 limit base erosion
- action #5 harmful practices

Turning tax policies into tax rules

- #15 develop multilateral instrument.



Restoring effects of international standards

- action #6 prevent treaty abuses
- action #7 artificial avoidance of PE
- action #8, 9, 10 value creation intangibles, risks and capital, high risks transactions

Ensuring transparency while promoting predictability

- action #11 data collection & analysis
- action #12 disclosure aggressive tax planning
- action #13 TP documentation & CbC reporting
- action #14 dispute resolution mechanisms

BEPS Project – Current Status

- Project started in 2013
- October 2015 - Final reports
- December 2016 – Target for Multilateral Instrument
- Ongoing work on certain aspects
- Minimum Standards
 - Treaty abuse provisions in the treaty
 - Country-by-Country Reporting
 - Peer review process to address harmful tax practices
 - Effective MAP



**BEPS Action Plan 1 -
Addressing the Tax
Challenges of the Digital
Economy**

Action Plan 1 - Digital economy

- Difficulties posed by digital economy for application of existing international tax rules
- Ring-fencing of digital economy for tax purpose would be “difficult, if not impossible”

Issues

- Significant digital presence in economy of another country
- Attribution of value
- Characterization of income
- Application of “source” rule
- VAT on cross border supply of goods/ services

Original Proposals

- Amendment to Article 5(4)
- “Significant digital presence” – New nexus based approach to replace PE concept
- Withholding tax on digital transactions
- “Bit tax”

Action Plan 1 - Digital economy



Final Proposals

To be also addressed by other Action Plans linked to digital economy (PE, controlled foreign corporation (CFC), transfer pricing)

Not a Minimum Standard

Action Plan 1 : India Impact

- **What are the issues in India?**
- Taxation of cross-border payments for :
 - ❑ Online advertisements, Subscription for online databases, Data processing, Online training, Use of hard disc at data center, Live broadcasting, telecasting, Use of bandwidth, Use and exploit design engineering, Satellite rights, Sale of capacity in sub-marine fiber optic telecom link cable system, International carriage and connectivity services, Cable TV / DTH provider, Card operating system for smart cards, bar coding, biometrics etc., online market research payments, technical design and drawings services, basic engineering package, arrangement of international lease line connectivity, transmission of data and voice, distribution of news and photos by international news agency, offshore service contract for setting up nuclear power plant, customized research and retail management, receiving satellite signals in capacity of multiple system operator, imparting training to personnel, enterprise solutions based on smart cards, use of computer software, end to end long distance telecommunication service, reservation service, engineering services for oil and gas pipeline transmission service, Use of information concerning industrial, commercial, scientific experience , use of process

Action Plan 1 : India Impact

- **What was the outcome?**
- 66 SOT 193, 44 Taxmann.com 420, 48 Taxmann.com 149, 44 Taxmann.com 237, 66 SOT 9, 62 SOT 40, 43 Taxmann.com 223, 66 SOT 24, 65 SOT 23, 47 Taxmann.com 10, 62 SOT 108, 46 Taxmann.com 52, 62 SOT 141, 66 SOT 112, 47 Taxmann.com 410, 46 Taxmann.com 146, 61 SOT 105, 63 SOT 111, 42 Taxmann.com 500, 43 Taxmann.com 343, 42 Taxmann.com 42, 66 SOT 33, 66 SOT 261, 47 Taxmann.com 409, 51 Taxmann.com 186, 66 SOT 183, 63 SOT 16, 64 SOT 257, 62 SOT 282, 48 Taxmann.com 332, 49 Taxmann.com 478, 46 Taxmann.com 50, 66 SOT 18, 44 Taxmann.com 296, 44 Taxmann.com 419, 56 Taxmann.com 179, 61 Taxmann.com 36, 60 Taxmann.com 432, 56 Taxmann.com 339, 56 Taxmann.com 92, 56 Taxmann.com 179, 61 Taxmann.com 47, 28 Taxmann.com¹⁰

Action Plan 1 : India Impact

- **Government reaction : Changes to the Act (Finance Act, 2012)**
- Explanations 4, 5 and 6 to section 9(1)(vi)
 - ❑ Right to use software (copyright v. copyrighted article issue)
 - ❑ Possession or control of right, property or information (right to use equipment issue)
 - ❑ Transmission by satellite, cable, optic fiber (process related, secret process)

Action Plan 1 : India Impact

- **BEPS Implementation in India : Equalization Levy (Finance Act, 2016)**
- Chapter VIII of the Finance Act, 2016
- Equalization levy @6% on the consideration for “specified services” receivable by non-resident payable by –
 - ❑ A resident carrying on business
 - ❑ A non-resident having a PE in India
- Levy not payable –
 - ❑ If services are effectively connected to the PE of non-resident service provider
 - ❑ Consideration does not exceed Rs. 100,000
 - ❑ The payment is not for carrying on business or profession
- Specified services – Online advertisement, related services or other services as may be notified

Action Plan 1 : India Impact

- **Pre Equalization Levy**
- Taxable @10%, if income taxable
- Characterization issue – “royalties”, “fees for technical services”, “business profits”
- Treaty benefit available
- Credit in the home country

Click icon to add chart

- **Post to Equalization Levy**
- Taxable @ 6%, if income taxable
- Section 10(50)
- Treaty benefit?
- Credit in the home country?



**BEPS Action Plan 2 -
Neutralising the Effects of
Hybrid Mismatch
Arrangements**

Action 2 - Hybrid mismatch arrangements

Not a Minimum Standard

Action 2 - Hybrid mismatch arrangements

Specific hybrid mismatch rules recommended

- Approach seeks to align tax treatment of an instrument or entity with tax outcomes in counterparty jurisdiction

‘Linking rules’ to be adopted within domestic legislation

D/NI

- Primary rule to apply whenever mismatch arises (denying deduction in payer jurisdiction)
- Secondary or defensive rule to apply where primary rule does not apply (tax income in payee jurisdiction)

DD

- Primary rule to apply whenever mismatch arises (deny deduction in parent jurisdiction)
- Secondary or defensive rule to apply where primary rule does not apply (deny deduction in payer jurisdiction)

Action Plan 2 : India Impact

- **What are the issues in India?**
- Hybrid instruments / arrangements / entities prevalent in India
 - ❑ Convertible debentures
 - ❑ Preference shares
 - ❑ REPO / leasing transactions
 - ❑ Trusts / Partnerships
- Are the payments related to hybrid instruments seen as raising BEPS concerns in India?

Action Plan 2 : India Impact

- **BEPS Implementation in India :**
- No changes made to the domestic law
- Adoption of changes to the tax treaties pursuant to Action Plan 2?



**BEPS Action Plan 3 -
Designing Effective
Controlled Foreign Company
Rules**

Action Plan 3 – Controlled Foreign Company Rules

- First CFC Rules enacted in the year 1962
- CFC rules have not kept pace with the changes in the international business environment and do not address the BEPS concerns
- Action Plan sets out **six building blocks** for the purpose of design of effective CFC rules
- Definition of a CFC
- CFC exemptions and threshold requirements
- Definition of CFC income
- Rules for computing income
- Rules for attributing income



**BEPS Action Plan 4 -
Limiting Base Erosion
Involving Interest
Deductions and Other
Financial Payments**

Action Plan 4 – Interest deductions

- Design rules to address base erosion through use of interest and economically equivalent payments
- “Interest” includes:
 - Interest on all forms of debt
 - Payments that are economically equivalent to interest
 - Expenses incurred with raising of finance
- Covers all interest expenses – related party and third party, cross-border and

Interest deduction to be limited with reference to

- Fixed ratio rule
- Group ratio rule

De minimis monetary threshold


Need for special rules to address issues of banking and insurance sectors

Grandfathering

Not a Minimum Standard

Action Plan 4 : India Impact

- **BEPS Implementation in India :**
- Is interest deductions perceived as raising BEPS concerns in India?
- No changes made to the domestic law
- Adoption of changes to the tax treaties pursuant to Action Plan 2?



**BEPS Action Plan 5 -
Countering Harmful Tax
Practices More Effectively,
Taking into Account
Transparency and Substance**

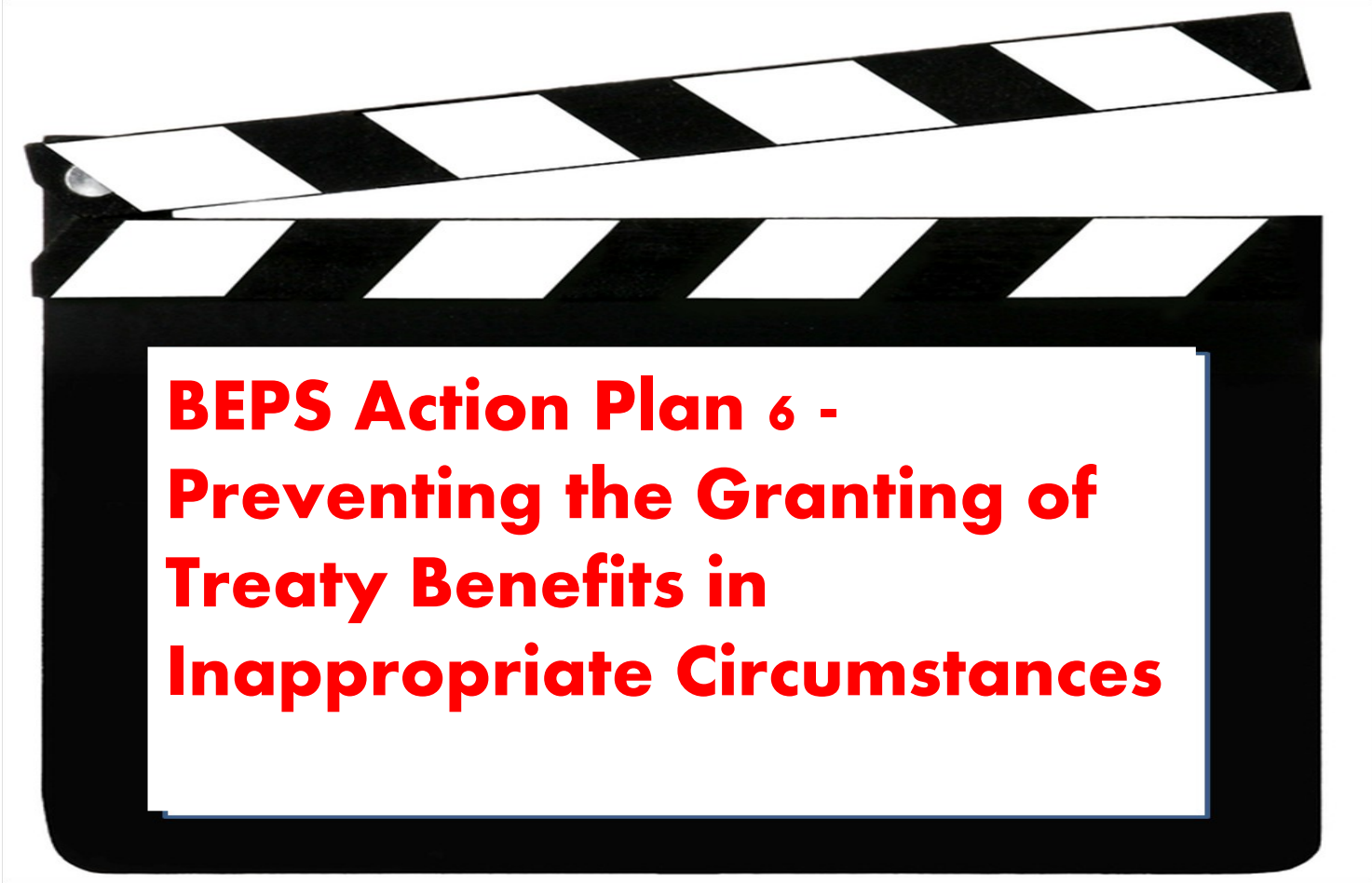
Action Plan 5 : Countering Harmful Tax Practices

- Targeted at the harmful tax practices followed by various countries
 - ❑ Preferential tax regimes
 - ❑ Lack of transparency as regards certain tax rulings
- OECD 1998 Report “Harmful Tax Competition: An Emerging Global Issue
- “Nexus Approach” for IP regimes
- Exchange of information as regards certain types of rulings

Peer review - a Minimum Standard

Action Plan 5 : India Impact

- **BEPS Implementation in India :**
- India generally not seen as indulging in harmful tax practices



**BEPS Action Plan 6 -
Preventing the Granting of
Treaty Benefits in
Inappropriate Circumstances**

Action Plan 6 - Preventing treaty abuse

- Limitation of Benefit (LOB) clause to address treaty shopping situations
- Principal purpose test (PPT) to supplement LOB clause
 - Denying treaty applicability where one of the principal purposes of the arrangement/ transaction is to obtain treaty benefits
 - Flexibility to adopt LOB and/or PPT rules as long as approach adopted addresses treaty abuse
 - Express statement that the common intention is to eliminate double taxation without creating opportunities for treaty shopping

This is a Minimum Standard

Action Plan 6 - Preventing treaty abuse

- **PPT clause**

- *7. Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.*

Action Plan 6 - Preventing treaty abuse

- Other situations addressed by Action Plan 6
 - Treaty Abuse
 - Splitting up of contracts
 - Hiring-out of labour cases
 - Avoidance of dividend characterization
 - Dividend transfer situations
 - Circumvention of Article 13(4)
 - Tie-breaker rule
 - Anti-abuse rule for PE in third state
 - Domestic law abuse using treaty provisions

Action Plan 6 : Preventing Treaty benefit in Inappropriate Circumstances

- **What are the issues in India?**
- Treaty Shopping
 - ✓ Substantial investments routed thru countries such as Mauritius, Cyprus, Singapore etc.
 - ✓ Approach of Supreme Court
 - Azadi Bachao (treaty shopping legitimate)
 - Vodafone (Looking at as against Looking thru)
 - ✓ Approach of the Government
 - CBDT Circular no. 789
 - Protocol to India-Singapore treaty
 - Notification of Cyprus u/s 94A
 - Protocol to India-Mauritius treaty
 - GAAR provisions

Action Plan 6 : India Impact

- **BEPS Implementation in India :**
 - ✓ Claiming treaty benefit to become much more difficult
 - ✓ Would domestic GAAR and treaty GAAR both be applicable?



**BEPS Action Plan 7 -
Preventing the Artificial
Avoidance of Permanent
Establishment Status**

Action Plan 7 - Permanent establishment

- **Commissionnaire arrangement**
 - **Existing Article 5(5)**
- *is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State and authority **to conclude contracts in the name of the enterprise***

Action Plan 7 - Permanent establishment

- **Example of Commissionnaire arrangement**
- XCO is a company resident of State X. It specialises in the sale of medical products.
- Until 2000, these products are sold to clinics and hospitals in State Y by YCO, a company resident of State Y. XCO and YCO are members of the same multinational group.
- In 2000, the status of YCO is changed to that of *commissionnaire* following the conclusion of a *commissionnaire* contract between the two companies. Pursuant to the contract, YCO transfers to XCO its fixed assets, its stock and its customer base and agrees to sell in State Y the products of XCO in its own name, but for the account of and at the risk of XCO.
- As a consequence, the taxable profits of YCO in State Y are substantially reduced.

Action Plan 7 - Permanent establishment

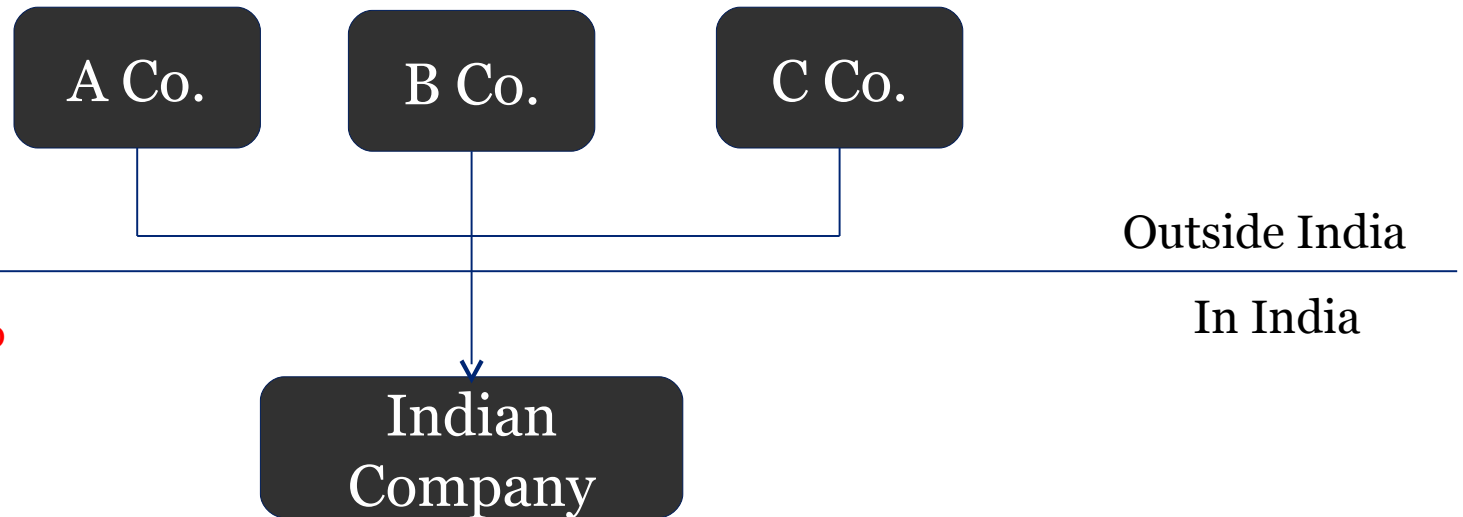
- **Proposed Article 5(5)**
- 5.*in doing so, habitually concludes contracts, or habitually*
- *plays the principal role leading to the conclusion of contracts that are routinely*
- *concluded without material modification by the enterprise, and these contracts are*
- a) in the name of the enterprise, **or**
- *b) for the transfer of the ownership of, or for the granting of the right to use,*
- *property owned by that enterprise or that the enterprise has the right to use,*
- **or**
- *c) for the provision of services by that enterprise,*
- that enterprise shall be deemed to have a permanent

Action Plan 7 - Permanent establishment

- **Independent agent provision**
- Existing provision
- *“An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.”*

Artificial arrangement – Independent Agent

• Company A, B and C are associated enterprises



• Indian Company is into distribution business

• Conducts distribution business exclusively exclusively for company A,B and C

- No specific provision in the Model Convention to consider Indian Co. as a PE of Foreign Co. in such cases
- BEPS Report proposes to include specific provision in Article 5(6) not to consider such Enterprise as an agent of independent status.
- It is relevant to note that India Position categorically provides that an agent whose activities are conducted wholly or almost wholly on behalf of a single enterprise will not be considered as an agent of independent status.

Action Plan 7 - Permanent establishment

- **Other artificial avoidance strategies addressed**
 - Specific activity exemption in Article 5(4)
 - Application of “preparatory and auxiliary character” on a cumulative basis
 - Fragmentation of activities between related enterprise to avail benefit of Article 5(4)
 - New anti-fragmentation rule
 - Splitting up of contracts to avoid time threshold
 - Reliance on PPT provision (example)

Action Plan 7 : India Impact

- **BEPS India implications**

- ❑ To be implemented through multilateral agreement
- ❑ Definition of PE to become more stringent
- ❑ Certain business models to be reconsidered

- **DDIT v. Jebon Corporation India [2010] 125 ITD 340 (Bangalore)**

- ✓ LO was treated as PE of an assessee as LO was conducting full fledged trading activities of an assessee

- **ADIT v. Valentine Maritime (Mauritius) Ltd. [2011] 45 SOT 34 (Mum)**

- ✓ Mumbai Bench of the Tribunal deliberated whether splitting-up of arrangement can be said to be alleged treaty abuse



**BEPS Action Plan 8 – 10
Aligning Transfer Pricing
Outcomes with Value
Creation**

Action Plan 8, 9 and 10

- **Action 8 : Value creation**
- **Intangibles :**
 - Compensation for Indian R & D units at cost plus
 - BPO or KPO
- **Action 9 : Realigning the risk**
 - Six steps process for the purpose of realignment
 - Ability of the entity to take risk
 - Risk free return to the funding entity
- **Action 10 : Low value adding services**

Click icon to add chart

Transparency and Certainty

Need for transparency

- No current taxation of the low taxed profits at the level of the parent
- Low or no taxation at the level of the recipient
- Low or no withholding tax at source
- Minimisation of taxation in a foreign operating country





**BEPS Action Plan 11 -
Measuring and Monitoring
BEPS**

Action Plan 11 - Measuring and Monitoring

- **BEPS** Global corporate income tax (CIT) revenue losses estimated between 4% and 10% of global CIT revenues. i.e. USD 100 to 240 billion annually.
- Indicators of BEPS:
 - Profit rate of MNE affiliates located in lower-tax jurisdictions are higher than group's average worldwide profit rates.
 - The effective rate paid by large MNE's is approximately 4 to 8.5% lower than similar enterprises with domestic-only operations.
 - Foreign direct investment is increasingly concentrated
 - The separation of taxable profits from the location of value creating activity is particularly clear with respect to intangible assets, and the phenomenon has grown rapidly
 - Debt from both related and third-parties in MNE affiliates in higher statutory tax-rate countries.

More of administrative in nature. Does not lead to change in charging provisions.



**BEPS Action Plan 12 -
Mandatory Disclosure Rules**

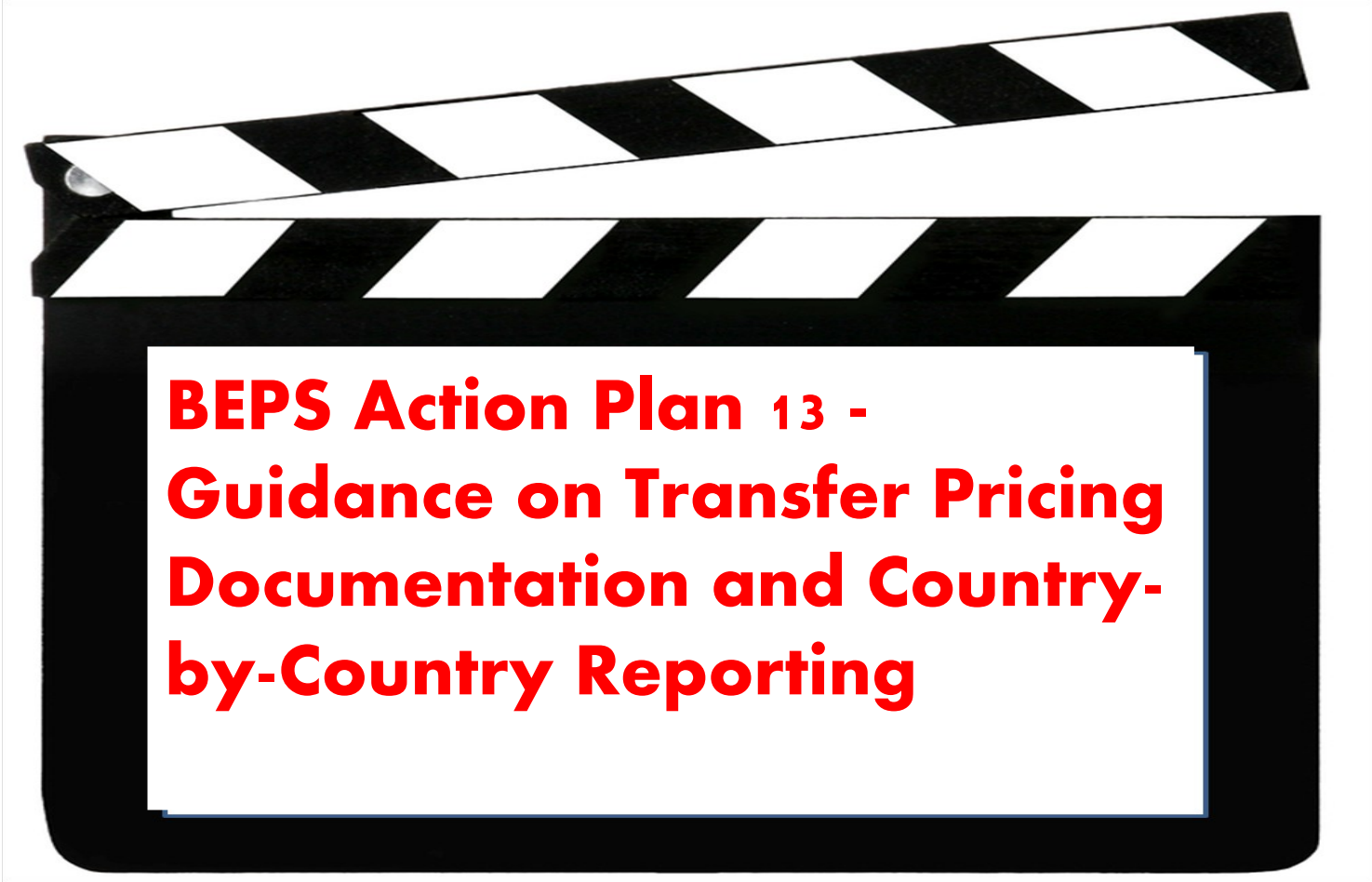
Action Plan 12 - Mandatory Disclosure Rules

- The objectives of the rules are:
 - to obtain early information about potentially aggressive or abusive tax avoidance schemes in order to inform risk assessment;
 - to identify schemes, and the users and promoters of schemes in a timely manner; and
 - to act as a deterrent, to reduce the promotion and use of avoidance schemes.
- Onerous disclosure requirements
- Promotor
- Obligation to report on the tax payer and / or the Promotor
- Hallmarks for the reportable schemes
 - Generic – Confidentiality, Success fees etc.
 - Specific – Use of losses, leasing transactions, hybrid instruments

Not a minimum standard.

Action Plan 12 – India Impact

- **BEPS Implementation in India**
 - Not adopted. No changes made to the domestic law



**BEPS Action Plan 13 -
Guidance on Transfer Pricing
Documentation and Country-
by-Country Reporting**

Action Plan 13 : TP Documentation and CbCR

New guidelines adopt 3-tiered approach

Country-by-country report

- Key financial information on all group members on an aggregate country basis with an activity code for each member

Master file

- Key information about the group's global operations including a high-level overview of a company's business operations along with important information on a company's global TP policies with respect to intangibles and financing

Local file

- Information and support of the intercompany transactions that the local company engages in with related parties

- Substantially more information disclosure on MNEs global operations
- Disclosure includes global operations and policies for IP and financing
- Unprecedented transparency on MNEs' global TP policies

Country by Country Report

- Information request

Table 1. Overview of allocation of income, taxes and business activities by tax jurisdiction

Name of the MNE group: Fiscal year concerned:										
Tax Jurisdiction	Revenues			Profit (Loss) Before Income Tax	Income Tax Paid (on cash basis)	Income Tax Accrued – Current Year	Stated capital	Accumulated earnings	Number of Employees	Tangible Assets other than Cash and Cash Equivalents
	Unrelated Party	Related Party	Total							

Table 2. List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction

Name of the MNE group: Fiscal year concerned:														
Tax Jurisdiction	Constituent Entities resident in the Tax Jurisdiction	Tax Jurisdiction of organisation or incorporation if different from Tax Jurisdiction of Residence	Main business activity(ies)											
			Research and Development	Holding or Managing intellectual property	Purchasing or Procurement	Manufacturing or Production	Sales, Marketing or Distribution	Administrative, Management or Support Services	Provision of Services to unrelated parties	Internal Group Finance	Regulated Financial Services	Insurance	Holding shares or other equity instruments	Dormant
	1.													
	2.													
	3.													
	1.													
	2.													
	3.													

² Please specify the nature of the activity of the Constituent Entity in the “Additional Information” section.

CbC - Impact / challenges / considerations

- Data required are often not centrally collected on an entity or country basis
- Sheer volume of information will substantially increase compliance burden for many companies
- Larger companies should perform reporting systems readiness assessment
- Consider technology solutions
 - Utilize the company's Enterprise Resource Planning (ERP) system, consolidation, HR and other systems to facilitate the collection, validation, analysis, and presentation of the information
 - Enable better transfer pricing compliance management through periodic updates
 - Proposed solutions and the impact on other items such as customs duties
- Will report result in
 - Value chain analysis with people and tangible assets as the driver?
 - Greater use of profit splits?
 - Increased emphasis on Location Specific Advantages?

Action Plan 13 : India Impact

- **BEPS Implementation in India**
 - Insertion of section 286 by the Finance Act, 2016
- Risk based assessment – CbCR to be shared only at higher levels



**BEPS Action Plan 14 -
Making Dispute Resolution
Mechanisms More Effective**

Action Plan 14 – Dispute resolution

- All OECD and G20 countries have agreed on a **minimum standard** regarding MAP
- Minimum standard contains 17 commitments, including these:
 - Commitment to seek to resolve MAP cases in timely manner
 - Provide timely and complete reports of MAP statistics
 - Commitment to have their compliance with the minimum standard reviewed by their peers
 - Commitment to not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue

Action Plan 14 – Dispute resolution

- **Mandatory Arbitration**

- Commitment to provide mandatory Arbitration by 20 countries (Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, UK and USA) (> 90% of outstanding cases)



**BEPS Action Plan 15 -
Developing a Multilateral
Instrument to Modify
Bilateral Tax Treaties**

Action Plan 15 - Multilateral instrument

- Report concludes that multilateral instrument is feasible and desirable
 - Multilateral instrument simultaneously revises entire network of tax treaties
 - Allows swift amendment of existing tax treaties in line with changes decided
- Work launched and ongoing
 - About 90 jurisdictions participating on equal footing to date
 - Inaugural meeting in November
- Open for signature in 2017 by jurisdictions

Action Plan 15 – India Impact

- **BEPS Implementation in India**
 - Changes to the tax treaties through the Multilateral instrument

BEPS Impact



Thank You

This presentation is in the personal capacity of the presenter and does not necessarily represent views of any organisation. Nothing contained in this can substitute a professional advice.