HOW VIABLE IS THE OECD/G20 PROJECT ON BEPS? A STUDY ON ITS IMPACT ON INDIAN TAXATION STRUCTURE

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ABSTRACT

The international corporate arena has given birth to numerous tax-evading manoeuvres under intricate BEPS strategies aimed at circumventing levy of tax by multiple sovereign authorities, majorly through creation of sham entities for depositing of profits offshore. To combat this growing menace, the OECD and G20 nations have drafted various Action Plans (APs) under the collective reference of the "BEPS project", attempting to cover every single aspect of tax circumvention on the international sphere. The descriptive and elaborate nature of these APs assists the nations to tackle global corporations and business organisations devising ways to harness the discrepancies and inadvertent loopholes between different domestic tax policies.

Thus, the paper wishes to not only assess the goals to be achieved by the OECD/G20 BEPS project, but also examine the limitations mainly faced pertaining to its viability and legitimacy. The paper gives due recognition to the lack of proper implementation strategies and a consolidated framework for bringing all countries to the same footing, while also analysing the areas where the BEPS project simply failed to make an impact. The case of India has been additionally taken for considering the need to revamp its international policies similar to its stringent domestic taxation framework. Through this theoretical analysis of the BEPS framework and its implementation potential on both the domestic and international fronts, the paper aims to bring out the problems associated with BEPS both by its own complex structural existence, and the foundational issues attributable to any legislation or policy sought to be enacted at the international level by all countries with the same fervour and enforceability.

I. INTRODUCTION

Base Erosion and Profit Shifting (BEPS) refers to the mechanism of employing strategies related to comprehensive tax planning, with the foremost objective of building structures which exploit the "mismatches" and discrepancies in tax rules, through the faux "disappearance" of profits and incomes, or the shifting of such profits to "tax havens" i.e. jurisdictions with lesser or no tax on such incomes. The main issue with BEPS is that there is no patent illegality under any individual domestic tax regime, since every BEPS transaction is carefully formulated with a view not to overstep the statutory boundaries of every tax jurisdiction, while storing the incomes legally in countries with lower tax rates or more assessee-friendly taxation provisions.

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It is considered that BEPS relates mainly to instances of inconsistent domestic laws of different countries, which either creates double taxation or entitles the income to totally evade taxation. This objective of tax evasion is achieved by companies through policies and activities such as aggressive tax planning by multi-national entities (MNEs), lack of transparency as well as absence of coordination between tax jurisdictions, discrepancies amongst taxation regimes of different countries, and other harmful tax practices by individuals and organisations. The OECD recognises three main reasons behind the urgent need for combating the increasing BEPS amongst countries:

- Competition between businesses is highly distorted, since international companies with cross-border operations are allowed to profit from BEPS strategies, putting domestic businesses at a major disadvantage.
- The allocation of resources in any national economy does not reach its optimality, since investment decisions are diverted towards activities giving higher returns after tax.
- The incentive of voluntary compliance of taxation provisions is undermined through the large-scale evasion of tax by international corporate houses and business giants.[2]

The Indian Government provided its position on the driving force behind India's association with the drafting of the BEPS project, on the ground of it acting to the detriment of the Indian economic structure through the drastic reduction in potential tax revenues. This hampers the pace of India's economic development, its dependence on tax revenues being a major chunk of the economic support available to the Government, for dealing with poverty and inequality issues. Also, developing countries like India rely on the power of international tax conventions to tackle inter-country BEPS transactions which escape the radar of domestic tax authorities.[3]

II. RATIONALE BEHIND ORIGIN OF THE BEPS PROJECT

To combat the festering of the existing international tax regime with increasing BEPS opportunities, the G20 nations joined forces with those associated with the OECD programme to form the OECD Committee on Fiscal Affairs (CFA), comprising of 44 nations in totality, for arriving at a universally acceptable and properly coordinated solution to pervade the problematic walls created with discrepancies between domestic tax laws of different nations. The efforts which had begun in 2012 culminated into the first OECD report in February 2013, which laid the foundational groundwork for the release of the final

[2] 'BEPS Frequently Asked Questions'(*OECD Official Website*) <https://www.oecd.org/ctp/BEPS-FAQsEnglish.pdf> accessed 24 August 2021.
[3] 'Questionnaire – Countries' experiences regarding base erosion and profit shifting issues'(*United Nations Official Website*) <https://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-BEPS-CommentsIndia.pdf> accessed24 August 2021.

Action Plans in July 2013, aiming for implementation of 15 APs within a highly ambitious two-year timeline.[4]

The countries that were not members of the drafting group of the BEPS Action Plans were consulted extensively through the mode of fora meetings held both regionally and globally, and were included within the "Inclusive Framework" formulated by the OECD members, which focussed mainly on the coverage of the BEPS project to be proactively expanded to non-OECD nations as well. The first 7 APs were released and discussed by the G20 Leaders in the Brisbane Summit held in 2014, while the remaining 8 were delivered within the next 2 years. The 15 APs are listed as follows:

1) AP 1 – Addressing the tax challenges of the digital economy.
2) AP 2 – Neutralising the impacts caused by hybrid mismatch arrangements.
3) AP 3 – Designing effective rules for Controlled Foreign Corporations (CFCs).
4) AP 4 – Limiting Base Erosion through interest deductions and additional finance payments.
5) AP 5 – Effectively countering harmful tax practices through transparency and substance requirements.
6) AP 6 – Preventing abuse of tax treaties.
7) AP 7 – Preventing artificial avoidance of the Permanent Establishment (PE) mandate.
8) AP 8-10 – Aligning transfer pricing outcomes with creation of actual value.
9) AP 11 – Monitoring and calculating BEPS transactions.
10) AP 12 – Mandating disclosure of aggressive tax planning arrangements.
11) AP 13 – Re-examining documentation on transfer pricing.
12) AP 14 – Strengthening dispute resolution mechanisms.
13) AP 15 – Developing a multilateral instrument for maintaining consistency of bilateral tax treaties.

Working on the same objectives gave birth to the 15-point Action Plans (APs) formulated to tackle the problem-riddled BEPS issue. The APs were floated with the foremost object of ensuring taxation of incomes from economic activities which have originated in one country, while the impact and utilisation of the same is being done in a different country. They were drafted in response and accordance to around 3500 pages of comments and recommendations, obtained through both online webcasts and public consultation meetings between business organisations and individuals of the labour sector.

The nations involved in the formulation of the BEPS policies seem to be ideologically invested in developing common solutions to similar issues and obstacles, while retaining their individual sovereignty in taxing the incomes falling within the BEPS bracket. This participation is further consolidating the view of countries addressing the fundamental conflicts between domestic tax laws both amongst themselves and with the international commitments which countries owe under multilateral agreements and conventions.

[4]Jason J. Fichtner and Adam N. Michel, 'The OECD's Conquest of the United States: Understanding the Costs and Consequences of the BEPS Project and Tax Harmonisation'(*Mercatus Research, Mercatus Centre*, March 2016)<https://www.mercatus.org/system/files/Fichtner-BEPS-Initiative-v1.pdf> accessed 25 August 2021.

The viewpoint is substantiated with the calculation of the annual loss of 4-10% of the global corporate income tax (CIT) revenue, amounting to $ 100-240 billion per year.[5]

(i) "Double Irish-Dutch Sandwich" Structure

One of the most appropriate examples explaining a glaring lack of international rules and discrepancies in domestic laws giving rise to BEPS arrangements is the "Double Irish-Dutch Sandwich" arrangement. Booming international technological giants such as Google and Apple are accredited with laying down the foundations for this structure, which notably enabled such companies to escape tax liabilities amounting upto USD 1 trillion, enjoying a single-digit tax rate in all three countries of United States, Ireland and the Netherlands.[6] This structure acts as one of the foremost disadvantages which were proposed to be tackled under the aforementioned BEPS project formulated by OECD. However, this structure does not find its origins in the Indian tax regime, due to the supporting tax rebates made available to home-grown patents and other forms of intellectual property (IP) registered in India.

The forenamed structure can be understood through a hypothetical example. First, a holding company 'A', with both its incorporation and place of control being in the United States, builds a subsidiary 'B' in Ireland. This is done because of the existence of an Irish taxation provision, which does not tax any entity whose control is not located in Ireland itself. Another subsidiary 'C' is formed in the Netherlands, which is credited with the registration of all the intellectual property used by B for carrying out its business activities, which necessitates the payment of certain amounts of royalties by B to C. Thereafter, the transaction works in the manner that B performs the sale and pockets the proceeds, which it then uses to pay royalties to the Dutch subsidiary C. This effectuates the reduction in the profits of B, due to which its tax liability is substantially reduced.

The rationale behind C being situated in the Netherlands is substantiated by the provisions of the Irish-Dutch bilateral tax treaty, which exempts the taxation of certain kinds of incomes such as royalties, for their personal promotion of acquisition of Intellectual Property (IP) from other capable jurisdictions. Therefore, in effect, the income obtained by C is not taxed as per the provisions of the Irish-Dutch treaty, while B is taxed low due to lower profits in their books. This structure undermines the potential tax revenue from all the entities involved, since the entire structure is legal as per the respective domestic tax laws, while the individual countries feel handicapped in acting against such sham entities, brought into existence only for the objective of tax manipulation.

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[5] 'Explanatory Statement'(OECD/G20 BEPS Project 2015)<http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf> accessed 25 August 2021.

[6] Edward Helmore, 'Google says it will no longer use 'Double Irish, Dutch sandwich' tax loophole'*The Guardian*(London, 1 January 2020)<https://www.theguardian.com/technology/2020/jan/01/google-says-it-will-no-longer-use-double-irish-dutch-sandwich-tax-loophole> accessed 27 August 2021.

The consequences of this arrangement entail the factum of the profits made by such international business giants being parked in tax havens, wherein the number of employees and the amount of resources employed are too less in comparison to the income shown as profit in such offshore companies. In addition, these profits are covered under the exemptions of taxes levied by individual tax havens, both under their domestic laws as well as the provisions of bilateral tax treaties with other countries. The sales made by entities escape the taxation stream of high-end countries like the United States, even after the consideration of all these entities as one single taxable entity. These subsidiary entities are increasingly used for whittling down the taxable income to extremely low levels, even below zero in some cases. These circumstances have created the need for the BEPS project to address this problem specifically under the APs.

To deal with situations like these, the BEPS Action Plan 6 was specifically drafted for preventing the grant of treaty benefits under inappropriate circumstances, prescribing the following options to be adopted:

1) Principal Purpose Test (PPT) – The particular rule states that if the obtaining of benefits available under a treaty is one of the "principal purposes" behind a particular transaction, the benefits accrued under the treaty must be denied. Resultantly, the determination of what counts as "principal purpose" is open to interpretation with the tax authorities, who have a higher discretion in this regard. The PPT rule is prescribed as the bare minimum standard to be necessarily included within every bilateral treaty or domestic legal framework, and is much broader in scope as compared to the "main purpose" stand taken by the Indian tax regime.

2) Limitation of Benefit (LoB) Clause –The LoB clause, being inclusive of the PPT rule, utilises the "Derivative Test" to analyse whether the benefits of the treaty in question are lesser in essence or restriction to the benefits entailed through the treaty of the taxing country with the country wherein the actual source/residency of the impugned assessee is. For instance, if a Mauritius resident entity is owned by a US-based company, and wishes to take the benefits of the India-Mauritius tax treaty for availing the capital gains tax exemption under the said treaty, the benefits would be denied if found to be greater in comparison to the benefits accrued through the India-US treaty to the companies. This "Derivative Test" is considered to be applicable only if the entity has an "active business" established in the particular taxing country.

Thus, in the example discussed above, while under the PPT rule, B and C would have to prove whether the conduct of their business is one of the "principal purposes" behind their establishment, while under the LoB clause, B would be entitled to the benefits of the Irish-Dutch treaty only if the benefits available as per the Irish-Dutch tax treaty would be lesser or equivalent to the benefits accrued under the tax treaty between Ireland and the US, the US being the source country of the Irish company management. Similar would be the case on the part of C, with the Irish angle under B's case being replaced with the Dutch perspective.

III. LIMITATIONS OF THE BEPS PROJECT

It must be noted that the following limitations are not simply limited to the drafting of the BEPS project being riddled with certain drawbacks, but are also pertaining to the impact caused by it, as well as the major issues emerging from the statistical and empirical data regarding the execution of the OECD Action Plans. That is not to say that the BEPS Project had its advantages; however, the areas that the project was unable to address subject the beneficiary provisions to certain points of criticism, as briefly explained below.

(i) Sovereignty and legitimacy concerns

One of the foremost issues raised from the fundamental existence and acceptance of international law is the factum of the absence of any superior authority entrusted with the power of governing independent nations regarding their carrying out of international obligations towards other countries. On a *prima facie* level, both the OECD and G20 lack the institutional structure to enforce the standards prescribed under the BEPS Project, depending wholly on the voluntary acceptance of obligations and incorporation of provisions by the concerned nations in lieu of their participation, and a glaring lack of authority to impose sanctions on countries not complying with these rules. This primarily associates itself with every bilateral treaty and multilateral convention entered into by nations on different issues, and the implementation of the BEPS project seems to suffer from the same predicament.

It must be noted that there have been multiple attempts to establish superior bodies of authority, to which the individual nations surrender a part of their sovereignty and agree to be bound by their sanctions, etc. However, this simply translates to the unsaid supremacy imposed by developed countries on developing countries, cemented by the fact of underrepresentation of African countries and complete non-representation of low-income countries in the G20, which includes the well-developed global economies representing roughly 90% of the Gross Domestic Product (GDP) on the global level as well as 80% of the international trade.[7] Furthermore, although the OECD attempts to include the views of the non-member nations in a proactive manner, the decision-making power under the OECD is vested with the OECD Council only, which also suffers from a lack of representation of the non-OECD countries.

Additionally, the participation of developing economies comparable to India in the BEPS project is questioned on the ground of the existence of any valid reasons behind the participation of countries in the initiative. One of the indications points towards the presence of immensely low technical knowledge of such countries on taxation matters coupled with the proper implementation of BEPS policies, which requires a certain level of expertise. Moreover, the countries require some specialised assistance and greater technical knowledge on transfer pricing transactions and provisions, while asking for flexible time schedules and a cost-benefit analysis of preferential tax regimes on their domestic revenues and GDPs. The recent

[7] Sissie Fung, 'The Questionable Legitimacy of the OECD/G20 BEPS Project' (2017)2ELR <http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/2/ELR_2017_010_002.pdf> accessed 27 August 2021.

deliberations on the BEPS 2.0 Project portray the increasing pressure imposed by countries like India on high-end economies to present their issues on the global front for being considered as important factors behind drafting of reformed policies and mechanisms under the BEPS Project.

(ii) Major spurt in costs for mandating corporate tax compliance

The new BEPS rules stipulate intricate policies and frameworks for tackling specific problems, which require the employment of certain specialised resources particularly indigenous to such policies, leading to the incurring of costs for procuring them. Tax compliance is already seen as a major cost-expenditure exercise to ensure that the due taxes are obtained from only the liable persons, and the correct amount is detected through a labyrinth of transactions to arrive at an informed and undisputed tax liability. The BEPS project seems to simply add on to the existing exorbitant costs for inducing tax compliance, which is adjudged as nothing more than an added financial burden for the already financially struggling developing and less-developed countries.

The impact falling on the budding international companies and multi-national corporations (MNCs) cannot also be ignored, which might crack under the piling tax compliance targets and fail to compete with the major players leading to oligopolistic markets in the low-income countries.Also, country-to-country reporting under the BEPS project would lead to tax administrations putting immense pressure on the global companies to pay disproportionate taxes due to their inter-country trade and management structure, which would lead to a much more complicated tax structure instead of simplifying the same. While transparency is always appreciated as a high-valued moral virtue, it would merely lead to increased financial burdens on the developing companies and nascent trade entities through automatic information exchange between tax jurisdictions.

(iii) Unchecked uniformity of the Multi-lateral Instrument (MLI)

The mechanism of achieving a uniform tax regime for all countries to be followed, the MLI under the BEPS Action Plan, is firstly amenable to the criticism of being tone-deaf towards the specific needs of certain countries. For instance, the bilateral tax treaties of developing countries like India with tax havens such as Mauritius and Cayman Islands would contain peculiar provisions for handling tax exemptions in a sensitive manner, with the backdrop of cultural links or good international relations between the concerned countries for avoiding both double taxation and BEPS. However, the MLI ignores such specialised and individualistic provisions by floating a "one-size-fits-all" structure, which is not suitable for underprivileged countries wishing to create a better global standing.

Further, Parliamentary approval as an underlying but necessary condition for the incorporation of the BEPS project into the domestic sphere would lead to the inevitable requirement of the respective Parliament being up-to-date about the ongoing BEPS transactions, which would require a special kind of knowledge and

expertise in the field of international taxation. Not just the Parliament, but even the companies at large recognise the impact which the MLI would have on domestic taxation, especially in high-income and rapidly growing economies like India, while being completely unaware of the ways in which the BEPS Action Plans would affect the day-to-day business activities of numerous corporate entities around the globe.

Also, it must be noted that the MLI introduced a concept of exclusion under the BEPS project, wherein any country could exempt particular treaties from the purview of the BEPS project, or skip the execution and implementation of certain provisions altogether, as per its capabilities and special needs and requirements. A consequential example is the exclusion of the Mauritius-India Double Taxation Avoidance Agreement (DTAA) out of the ambit of the MLI, which results in provisions such as the Principal Purpose Test (PPT) not being applicable on the mentioned treaty. Although the recognition of the General Anti-Avoidance Rules (GAARs) in the Indian tax law sphere aids the tax administration of the country to combat any discrepancies or violations of the DTAA, the option of excluding the treaty from the scope of operation of the OECD project would result in the concerned MLI being rendered as mere show.

In order to address these problems, around 130 member nations of the OECD/G20 Inclusive Framework on BEPS (IF) have entered into a "historic" agreement in July 2021 for assuring a revised framework to reform the international tax rules in order to increase the adaptability of these rules by the wide range of tax regimes existing throughout the globe. As per the statement issued by OECD named "Statement on a Two Pillar Solution to Address the Tax Challenges Arising from the Digitisation of the Economy", the new framework rests its implementation on the two pillars of BEPS 2.0 – "Pillar One" referring to the proposals reallocating taxing rights and profits, and "Pillar Two" comprising of global minimum tax rules or measures. Steps like these taken collectively by nations on the international front represent the ideal of an inclusive framework consistent with individual tax regimes having peculiar concessions and tax compliance mechanisms, satisfying the requirements of both strict tax regimes like India and popular tax havens like Luxembourg.

(iv) Looming threats on viability of business organisations

Apart from the afore discussed issue of immense financial burdens on young businesses to deal with increased tax compliance in consonance with the BEPS project, a major sphere of concern for all kinds of enterprises operating on the international sphere would be the enormous loss to companies which can be gauged in terms of the release of sensitive and even confidential information of businesses to the public, and consequently to other market competitors, under the reporting standards for countries for honouring the obligations under the BEPS project. Specifically addressing the impact of the BEPS architecture on the "Double Irish-Dutch Sandwich" structure, it must be understood that the mere introduction of the PPT rule as well as the Limitation of Benefit (LoB) clause would not solve the purpose, unless and until a fool proof mechanism is created to embed the requirement of commercial substance in the transaction. In other words, the entity created solely for the purpose of tax evasion or BEPS must be subjected to a detailed

course of action, irrespective of the economic threshold, to prove their substance through specialised audits or other schemes and policies.

This also ignores the alleged participation of developed countries such as the United States and the United Kingdom in deliberately framing tax laws and policies with glaring loopholes, introduced with the objective to promote corporate growth in their regions. The incorporation of provisions and policies asunder the BEPS project in all the bilateral tax treaties entered into by individual nations, especially low-income tax jurisdictions, would not only be tone-deaf in relation to the nuances and hidden objectives of individual treaties, but also require some specialised knowledge and skill-set to be able to analyse the drawbacks of the existing treaty provisions and bringing them in consonance to the BEPS mandate while also maintaining special relations between the nation parties to the treaty.

In addition, the COVID-19 pandemic which rocked the entire world in 2020, the repercussions of which are still being borne by the budding businesses in their nascent stages, forced an overwhelming majority of both Government-owned as well as private business organisations to shut shop temporarily, being subjected to widespread layoffs and lockdown restrictions. These had a direct impact on the everyday functioning of many businesses, with numerous entities losing their significance due to their inability to transition from the physical to the online mode of sale-purchase.

The issue is that the BEPS Project, being formulated and released half a decade ago, did not account for any such major development which wreaked havoc not only on a domestic level, but also on the international trade map. Many businesses could not compete with the instant technological transition, the reason majorly being the pandemic coupled with high level of tax liabilities and compliances, as mandated by the BEPS project. The provisions under the BEPS Action Plans exhibit a total exclusion of the impact of such a pandemic on the monetary income thresholds set for considering an entity eligible to enjoy the benefits of, say, the LoB clause.

IV. HOW BENEFICIAL WAS THE BEPS PROJECT FOR THE INDIAN ECONOMY?

In relation to the enforcement of international conventions and obligations at the domestic level, it has always been seen that developing countries like India are expected to have a proactive approach towards self-awareness, more supported by the economic sanctions impending from the developed nations for non-observance of such obligations. However, the participation of developing countries in the decision-making process and the recognition of their interests, though attracting increased attention in recent times, still requires individual attention to factor in the specific problems faced by individual nations, more affected by countries such as India adopting strict tax regimens instead of becoming tax havens to attract foreign investments. The possible reformative measures such as the July 2021 agreement keeps the same aim in mind, incorporating changes to increase its suitability in developing economies like India, giving them an opportunity to present their views to the world.

(i) India's legislative and judicial position on domestic taxation of BEPS

Both before and after the initiation of the BEPS project, the Indian Government had acknowledged the existence of sham BEPS transactions entered into by corporate entities to enter into treaty shopping. However, there was no uniformity on the part of India in terms of the same provision being inserted under all its treaties with different countries. For instance, the India-Singapore tax treaty provided for an expenditure-based test for screening the eligibility of companies applying for the tax exemption granted to capital gains transactions. On the other hand, while Indian treaties with countries like Mexico, Ireland and the United States contained elaborate LoB clauses, its tax treaties with Kuwait, Finland and the notoriously tax-friendly Luxembourg contained the PPT rule specifying the requirement of substance in the alleged BEPS transactions, while also giving supremacy to the Indian domestic anti-abuse provisions like GAAR.

Coming to the domestic framework of the Indian tax regime, which has been continually strengthened post the global acceptance of the OECD/G20 BEPS project, the Indian Parliament repeatedly amended their income tax laws to establish the supremacy of the Act on any provision contained under any treaty or bilateral agreement which India has entered into with any nation(s) for granting relief on taxation or avoiding double taxation.[8] Additionally, the insertion of Chapter XA into the Act in 2013 stipulates the existence of the GAAR as an overriding provision over the Act, which if read with Section 90(2), would create a legal deadlock for sham companies to engage into BEPS arrangements.

The Income-tax Act defines an "impermissible avoidance arrangement" to include any enlisted transaction which has been entered into with the "main purpose" of obtaining any tax benefit, which is more in consonance with the PPT rule.[9]On the other hand, the Act also defines the characteristic features of recognising "commercial substance" under any trade arrangement.[10]The relevant sanctions are imposed through an exhaustive list of options available with the Indian tax authorities to adopt as consequences for entering into such "impermissible avoidance arrangements".[11] Thus, the Indian Government has specifically addressed both the PPT principle as well as the requirement of some "commercial substance" in the BEPS arrangements, applicable on any assessee covered under either the domestic law or the treaties and bilateral agreements of the Indian Government with other countries.

The BEPS Project involved India's participation as a proactive and fully supportive member of the OECD/G20 nations indulged in the drafting of the BEPS Action Plans. Before the BEPS project, the jurisprudence and reasoning of the Indian courts in this regard was on the principle of respecting the form of the corporate entity or entities involved in the concerned transaction, unless the form itself has been made on sham or non-genuine considerations. The Supreme Court of India itself, in the landmark Azadi

[8] The Income-tax Act 1961 (India), s 90(2).
[9] ibid s 96.
[10] ibid s 97.
[11] ibid s 98.

Bachao Andolan[12] and Vodafone International[13]cases, rejected the contention of "treaty shopping" against the petition to deny treaty benefits to such sham entities. The Court particularly observed that because of the absence of the LoB clause in the Indian treaties, the treaty benefits accrued to the parties could not be revoked and were valid, unless and until it has been proved that the entire entity was formed with the perspective of avoiding tax, and did not possess any commercial substance in its essence.

(ii) Recognition of international BEPS rules by Indian authorities

India has always established its standing as a forerunning contender influencing digital companies in the new age to pay their fair share of taxes. This is evident from it being one of the first countries to introduce the concept of equalisation levy on almost all kinds of online cross-border sale and purchase of goods and services. Additionally, it has improved its global tax standing by incorporating the nexus rule of "significant economic presence" (SEP) into the income tax law sphere in 2018, with due recognition being given to the principles under the recommendations provided by BEPS Action Plan 1.[14] Despite the initial unacceptance of BEPS guidelines by the Indian tax authorities, India has made its mandate to reform its domestic taxation structure to bring it in line with globally accepted tax structures and principles.

The Indian Government has realised the due importance to be accorded to the drafting and formulation of BEPS policies to be dealt with on an international level, since acting on this issue on the domestic front may present differences and even conflicts in opinions of different countries. However, the need to pursue the breaking down of corporate structures and practices which propagate BEPS must still be persistently given attention. Ms. Anita Kapur, former chairperson of the Central Board of Direct Taxes (CBDT) went to the extent of saying that the BEPS project by the OECD/G20 can virtually be considered as giving express recognition to the stand India has taken on BEPS, transforming India "from a minority to a majority voice".[15] The four major areas of BEPS transactions being practised in India and requiring immediate scrutiny by the Indian Government through the BEPS radar have been identified:

- Shifting of profits by international business organisations and MNCs through aggressive transfer pricing policies, involving payments being made to foreign-affiliated companies.
- Non-taxation of transactions pertaining to the digital economy, in the country of their source or origin.
- Rampant treaty shopping through sham entities and masked transactions.

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[12] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1, (2003) 263 ITR 706 (SC).
[13] *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 757, (2012) 341 ITR 1 (SC).
[14] Karanjot Singh Khurana and S. Vasudevan, 'Significant economic presence in Indian tax law: How significant will it be?' (International Tax Review, 29 June 2021) <https://www.internationaltaxreview.com/article/b1sgt2plmxj9df/significant-economic-presence-in-indian-tax-law-how-significant-will-it-be> accessed 06 December 2021.
[15] 'BEPS – Global and Indian Perspective'(PricewaterhouseCoopers,February 2016)<https://www.pwc.in/assets/pdfs/publications/2016/beps-global-and-indian-perspective.pdf> accessed 29 August 2021.

- Artificial avoidance of the Permanent Establishment (PE) status.

On the other hand, the Indian representatives at the OECD interpreted the meetings to be giving an impression of the real and material issues being "swept under the carpet", while the superficial ones that are ancillary to the main problem are being addressed with greater detail and precision than required. It is believed that if the problem can be considered as a leaking bucket, it is the bucket which needs repair or replacement, and not the quantity or manner of inflow of water into the bucket.

It is suggested by the Indian authorities that in order to tackle the problem of developing countries being underrepresented, technical assistance can be provided on the part of the OECD or G20 group of nations through regional tax organisations and associations of countries, such as the African Tax Administrative Forum or the Inter-American Centre of Tax Administration for Latin America.Also, effective Exchange of Information pertaining to contemporary BEPS techniques and mechanisms being employed by international entities to surpass the tax radar of multiple countries can easily address many major areas of BEPS which require immediate or urgent attention by nations. This would be strengthened by the mandate of preferential tax rulings being spontaneously exchanged, along with its collaboration with the implementation of the Common Reporting Standards on Automatic Exchange of Information.

V. CONCLUSION

A major thread of scrutiny, which emerges from the analysis made in the preceding paragraphs, is the high level of subjectivity and discretion which is exercisable on the part of countries to adopt the BEPS Action Plans as per individual convenience and incorporate them into their domestic tax laws. Even the initiatives such as the measurement of the impact of the BEPS Project under Action Plan 11, or the Pillars 1 and 2 for the implementation of Action Plan 1, or even the Inclusive Framework for the BEPS Project to address the concerns of the developing and underprivileged nations, cannot work to its optimum level unless the affected countries themselves arrive at a consensus to adopt the BEPS Project and participate proactively to bring out the limitations of the existing scheme and the options for newer solutions to BEPS problems.

In the context of India accepting the OECD/G20 project, it might be seen that India already has the domestic legal framework needed to tackle BEPS arrangements and regimens, introducing the "commercial substance" requirement and the "main purpose" test in the Income Tax Act, 1961 during the initial stages of the discussions and sessions on BEPS. Additionally, as opined by Mr. Kamlesh Varshney, the Joint Secretary of Tax Policy and Legislation in the Indian Finance Ministry, the BEPS Project has somehow failed to address the very problem of BEPS which it sought to combat, leading to unilateral measures in India such as the equalisation levy policy primarily concerned with the growing number of e-commerce

transactions.[16] The recent deliberations on the BEPS 2.0 project, still undergoing the discussions stage, is argued to have been the base for certain countries including India to recall its unilateral measures like the equalisation levy for e-commerce operators.[17]

However, as the current political bent of mind in India demonstrates, there are a large number of relaxations and exemptions introduced for body corporates, with the ultimate aim to invite further investments and revenues to the country's coffers. It is still debated with respect to amendments in other corporate laws that in the race of the luring of investments through legally sanctioned relaxations, the situation may spiral out of control from the hands of the Indian Government itself.This approach creates a precarious situation for the Indian Government and authorities to strike a considerable balance between the BEPS mandate and the incentivising of foreign corporate investors to set up shop in the Indian playing field, something which *prima facie* brings out a fundamental dichotomy and which can only be achieved through an intense tax policy on BEPS.

(i) Recommendations and India's suggested contribution to the BEPS Project

Thus, the OECD/G20 efforts manifested through the BEPS project require a thorough fact check at the very grassroot level, as sought to be achieved by the BEPS 2.0 Framework alongside the OECD statement in July 2021. This is to float universally sound principles to be equally followed by all nations ignores *inter alia* the difference between the economic standings of countries, and their motives of meting out lesser restrictions for countries with better trade opportunities, since the ultimate aim of revamping the tax structures of countries seems to be the creation of an attractive investment environment, and not achieving universal uniformity of taxation schemes and policies.

On the other hand, the Indian taxation regime must merge its existing tax infrastructure with the BEPS regulation mechanisms, to achieve a two-fold objective of shedding its status of being a strict tax regime for inviting prospective investors as well as not letting any corporate transactions escape scrutiny by tax authorities. This dual purpose will not only put the Indian economy on the map of global tax regimes for coming into the eyes of international investments, but will also strengthen its motive of erasing tax evasion by eradicating as many loopholes as possible. India must recognise the importance of being a part of a global initiative like the BEPS project, in order to satisfy its expectations as a tax regime alongside the economic perspective of increasing investments, and possibly build on the existing success of developed countries like the United States in this respect.

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[16] Anjana Haines, 'BEPS fell short of revenue expectations, says Indian official'(International Tax Review, 23 March 2020) <https://www.internationaltaxreview.com/article/b1kwfg9dcjcpnq/beps-fell-short-of-revenue-expectations-says-indian-official> accessed 29 August 2021.

[17] 'India, US reach settlement on 2% equalization levy on e-comm operators' (Business Today, 25 November 2021) <https://www.businesstoday.in/latest/economy/story/india-us-reach-settlement-on-2-equalisation-levy-on-e-comm-operators-313320-2021-11-25> accessed 05 December 2021.

India's current standing on the international front is adequately aggressive to put forth the needs and issues of developing and underprivileged economies affected by international BEPS transactions. Its participation in the BEPS 2.0 or future deliberations would ensure putting the lower-ranking tax regimes on the world map, replete with all the problems faced by them in combating advanced tax evasive manoeuvres like BEPS. In fact, India can be considered as one of the only countries which can take the initiative for bridging the knowledge gap between developed and less-developed countries in this regard. It is expected that the new BEPS 2.0 initiative may address the inadequacies brought forth by the implementation of the original BEPS plans, with developing countries like India acting as catalysts to speed up the smooth transition of countries to well-developed tax economies in accordance with their existing knowledge resources as well as gradually built international relations.