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Transparency and Disclosure

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Chapter X

Transparency and disclosure

Diane Ring*

1. Introduction

1.1 Base erosion and profit shifting and tax information

Across the globe, countries increasingly express the concern that they are facing serious financial challenges from base erosion and profit shifting (BEPS). Without a stable and adequate tax base, countries lose the financial capacity to provide the infrastructure, social services and development opportunities important to their citizens. In response, the G20 and the Organisation for Economic Co-operation and Development (OECD) organized the project on BEPS. Much of the project has been focused on substantive law—the rules and practices that can allow the tax base of a country to be eroded and profits to be shifted out of the country. But the project recognizes that improved substantive tax rules alone are not sufficient to guarantee the tax base of a country. Without adequate transparency and disclosure of tax information to the taxing authorities, even the most carefully designed substantive tax rules will fail to protect the base. Thus, an important part of BEPS work targets the more administrative issues of transparency and disclosure. Ultimately, the goal is to ensure that tax authorities have adequate and appropriate access to the information necessary for the effective administration of the tax law. As part of this mission, the OECD project on BEPS has included the development of standards for information reporting by multinational enterprises—referred to as “country-by-country reporting” (see section 3.3.2 below).

1.2 Broader context for tax information issues

BEPS work on transparency and disclosure is not occurring in a vacuum. Existing tools offer tax administrators different avenues for

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accessing information. Such tools include: bilateral tax treaties—based on the United Nations Model Double Taxation Convention between Developed and Developing Countries¹ (United Nations Model Convention) and/or the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital² (OECD Model Convention)—tax information exchange agreements (TIEAs), regional agreements, and the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes (see sections 5.2–5.6 below). Additionally, there are new developments taking place outside the formal OECD project on BEPS, some initiated by individual countries, others by regional networks or other international bodies, including: intergovernmental agreements (IGAs) (see section 4.5 below), automatic exchange of information agreements, the Common Reporting Standard (CRS) for automatic exchange (see section 4.3 below), increased attention to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (section 5.4 below) and automatic exchange of tax rulings among jurisdictions (section 4.7 below). More recently, transparency regarding the beneficial ownership of entities has gained traction as the next frontier on transparency (see section 4.6 below). Although the primary focus of global work on transparency and disclosure has targeted exchange with and disclosure to governments, there is a related and active, but distinct, debate over whether and to what degree such information should be made public.

1.3 Scope of the chapter

The purpose of this chapter is to provide developing countries with an overview of both the new developments in transparency and disclosure as well as existing options for obtaining information. Some of the new developments remain in progress. But the examination provided below of the key goals, concerns, advantages and disadvantages of various options (including existing methods and newly proposed ones)

¹United Nations, Department of Economic and Social Affairs, United Nations Model Double Taxation Convention between Developed and Developing Countries (New York: United Nations, 2011).

may help countries evaluate their own circumstances and determine which options make the most sense for them in their efforts to curb BEPS. Given the newness of certain proposals (for example, actions taken under the OECD project on BEPS, including country-by-country (CbC) reporting), this chapter will devote more attention to reviewing the content and implementation of those options with which countries may be less familiar.

1.4 Pervasive questions in transparency and disclosure

Regardless of the specific mechanism for providing information to tax administrators, a number of universal questions arise: (a) What type of information must be provided? (b) How difficult will it be for the taxpayer to provide that information? (c) How will the information be provided? (d) What kind of technology and infrastructure will be needed by the taxpayers and the country to implement this system? (e) To whom will the information be distributed? (f) What are the permissible uses of the information? (g) Does the country have the capacity to meaningfully use the information? and (h) How will data protection and taxpayer privacy be ensured? The success, failure and impact of a given regime for providing tax information will depend significantly upon the responses to these concerns. That said, there is no single appropriate response to these questions. By examining each of the new emerging information regimes, as well as the existing ones, against the backdrop of these questions, a country can determine its own most effective path towards appropriately protecting its tax base.

2. Transparency and disclosure in the current tax world

2.1 Overview

Recent efforts to ensure that countries have access to the information needed to meaningfully and effectively implement their tax laws have focused on the goals of “transparency” and “disclosure.” These terms appear in the OECD Action Plan on BEPS\(^3\) and a variety of related

documents and commentaries. These two terms are distinct from the related phrase “exchange of information”; thus, it may be useful to specify their meaning. All three play a critical role in guaranteeing that countries have the needed information.

2.1.1 Transparency

The term “transparency” reflects the idea that a country needs to understand how a taxpayer is conducting its business, structuring its operations and making investments in the country. To achieve this level of understanding, it may be necessary for the country to have a solid grasp of the activities, transactions and business structure of the taxpayer beyond the borders of its jurisdiction.

2.1.2 Disclosure

The term “disclosure” captures the idea that a country will need access to the information necessary to provide transparency regarding the activities of a taxpayer.

2.1.3 Exchange of information

The phrase “exchange of information” refers to the process (and mechanism) by which a country can obtain information regarding a taxpayer or the transactions of the taxpayer, typically from another country. The most well-known mechanisms for exchange of information are bilateral tax treaty provisions based on Article 26 of both the United Nations and the OECD Model Conventions, discussed in section 5.2 below.

2.2 Current need for information

As noted above, and discussed more extensively in section 5.1 below, the demand for taxpayer information by taxing authorities is not new. However, the current lack of transparency that many countries face (owing in part to insufficient disclosure) has become a significant problem. The growth in cross-border commerce by multinational enterprises (MNEs), both foreign and domestic, has created a crisis in information for several reasons, as outlined below.
2.2.1 Cross-border tax planning

Taxpayers with cross-border activities can engage in a wider array of tax planning techniques which can lead to base erosion and profit shifting. Substantive tax law changes that are designed to eliminate various arbitrage opportunities are one tool for attacking this problem. But substantive tax reform is insufficient given that arbitrage may be difficult to identify and fully eradicate. Adequate disclosure remains vital for the needed transparency regarding taxpayer activities.

2.2.2 Volume of cross-border business

Both the number of taxpayers engaging in cross-border business and the volume of business they conduct have been increasing. Thus, the scale of the base erosion and profit shifting at stake is significant. Correspondingly, the amount of information that countries must access, process and evaluate to stem the loss of tax base is also quite large. Mechanisms for providing information to countries must be tailored to promote the goal of transparency and understanding.

2.2.3 Role of developing countries in the global economy

Developing countries have experienced significant growth in inbound investment by foreign multinationals as well as in outbound activities of their own multinationals. Income generated by these MNEs forms a critical portion of the tax base and, as noted in section 2.2.1 above, is especially susceptible to base erosion and profit shifting tax planning.4

For all countries facing such base erosion and profit shifting from multinationals, the ability to access and use tax information is vital. However, developing countries may find that they encounter serious barriers to securing needed information, compared with other jurisdictions. Not only do developing countries often experience

a number of domestic constraints on their ability to access and use taxpayer information (see section 2.2.4.2 below), they also may find it more difficult to obtain information from other jurisdictions (see section 2.2.4.3 below). Additionally, to the extent that foreign multinationals pose a greater information transparency and disclosure risk than domestic ones, developing countries face a distinct challenge. These countries typically have a substantial amount of inbound investment relative to outbound and therefore have more foreign multinational taxpayers than domestic ones.

2.2.4 Informational challenges for developing countries

As noted in section 2.2.3 above, developing countries are especially dependent upon corporate taxation of MNEs for their tax base. To the extent that MNEs are able to engage in successful BEPS transactions, developing countries typically have fewer alternative tax bases upon which to draw (for example, individual taxes and consumption taxes). Thus, BEPS problems can be particularly significant for these jurisdictions. The costs of BEPS to developing countries may be more severe and the impediments to overcoming BEPS may also be greater for these jurisdictions. Developing countries may experience a number of hurdles in securing information, transparency and disclosure from multinational businesses. A review of these barriers directs attention to the changes that may be needed and allows reform proposals to be measured against the list of challenges so as to see where and to what extent such proposals can help. The impediments can be grouped into roughly three categories: (a) domestic law; (b) domestic enforcement; and (c) international support.

2.2.4.1 Domestic law impediments

Some countries already have in place domestic law reporting requirements that provide relevant taxpayer information. Such reporting requirements can include the obligation of the taxpayer to provide information regarding: (a) foreign related entities and related-party

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transactions; (b) foreign financial assets and accounts; (c) discrepancies between tax reporting and accounting treatment; and (d) certain kinds of tax shelters or otherwise suspect transactions and structures. This information can be useful in helping a country determine whether to initiate an audit, and where and how to direct its attention in an audit. If a developing country does not have such reporting regimes in place, changes to domestic law reporting requirements may be one step in the process of enhancing transparency and disclosure. The final recommendations from the OECD project on BEPS regarding Actions 12 and 13 in the OECD Action Plan can serve as a guide for countries that are just starting to institute such reporting requirements (see sections 3.4 and 3.3 below, respectively).

The work of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) identifies other fundamental domestic law features that can inhibit (or conversely, facilitate) transparency. The peer review process of the Global Forum serves as a mechanism for assessing the compliance of a country with “the international standard of transparency and exchange of information” 6 (see section 5.6 below). In evaluating a jurisdiction against this standard, the Global Forum reviews a number of key dimensions of the domestic law critical to transparency. One set of factors looks to the availability of information on the following topics: (a) ownership and identity information for entities and structures; (b) accounting records; and (c) banking information for account holders. Another set of factors looks at the rules and procedures governing access to that information. The expectation is that the designated tax authority in the country (the competent authority) has the power under domestic law to obtain such information and provide it under an exchange of information mechanism, while respecting taxpayer rights. 7 Although


the focus of the peer review process and recommendations may be directed towards enhancing exchange of information with other countries, many of the same rules, practices and procedures that enable a country to participate actively in the exchange of information would improve the ability of a country to implement its own tax system and limit base erosion and profit shifting. The same availability of and access to information that enables a jurisdiction to be a global partner in sharing information with other countries would facilitate its own tax enforcement and revenue collection. Thus, engagement in the work of the Global Forum may be useful for developing countries, regardless of the amount of taxpayer information sought from their jurisdiction (see section 5.6 below).

A more targeted form of peer review, assessing for compliance with BEPS Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, is being implemented under the auspices of the OECD (see section 3.3 below). 8

2.2.4.2 Domestic enforcement impediments

All countries face the question of whether their administrative system is effective in using the information available. However, developing countries may face barriers to deriving maximum benefit from the information that they currently possess (or that they may be able to acquire in the immediate future). 9 These barriers can include: (a) limited audit staff; (b) audit staff without the required training and experience (for example, an ability to review foreign language documents, a detailed understanding of transfer pricing and tax law); (c) regular attrition of highly trained staff; (d) technological limitations to the ability to receive, manage, store and work with different types of data; (e) inadequate systems for identifying and matching taxpayers; and (f) existing culture of limited tax compliance.

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Any recommendations on how to increase access to information and improve transparency and disclosure (for example, recommendations pursuant to Actions 11, 12 and 13 of the OECD Action Plan on BEPS) should be evaluated against the backdrop of such domestic enforcement impediments. For example, transparency and disclosure recommendations that could ease any of the current impediments might be particularly attractive to developing countries, even if other options were more effective for developed economies. To the extent that a particular recommendation would yield more limited benefits for a developing country owing to domestic enforcement constraints, adoption of that recommendation might be paired with a concrete support plan designed to build the capacity of the tax administration to use the information effectively so as to curb BEPS in its jurisdiction. In recognition of the capacity-building needs of many developing countries, the International Monetary Fund (IMF), the OECD, the United Nations and the World Bank announced their joint engagement on a “Platform for Collaboration on Tax” in April 2016. The accompanying “Concept Note” emphasized that this collaboration among these major international organizations aims to offer support and assistance to developing countries. As an example of such support, in January 2017, the Platform announced that it had designed a “draft toolkit” to provide developing countries with assistance in transfer pricing analysis and implementation, and in particular with the identification of “comparables.” Additionally, in July 2015, the United Nations Development Programme (UNDP) and the OECD initiated a joint

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10 See, for example, C20, “Position Paper Background: Governance” (7 August 2014), at 6, which encourages research regarding the cost/benefit trade-off for automatic exchange of information and the impact on developing countries.


project for building tax capacity, “Tax Inspectors without Borders” (TIWB). As part of the TIWB mission, “tax experts from both developed and developing countries are deployed to work side-by-side with local tax officials on tax audits.” 13 Among the criteria that the TIWB has developed for assessing success in building tax capacity within a jurisdiction are: (a) increases in requests made by the jurisdiction to other countries for exchange of information; and (b) increased willingness among taxpayers to “provide data and information to tax administration”, characterized as “voluntary disclosure of data and information.” 14

2.2.4.3 International impediments

The success of a country in tackling BEPS will depend in part upon its ability to actively engage with the international community and obtain information from other jurisdictions. The most obvious examples of such engagement arise under exchange of information provisions in bilateral tax treaties (based on Article 26 of the United Nations and OECD Model Conventions) and under TIEAs (such as those based on the OECD Model Agreement on Exchange of Information on Tax Matters) (see sections 5.2 and 5.3 below). Therefore, the more limited the network of bilateral treaties and TIEAs of a country, the more constrained it may be in gathering needed information. In the same vein, bilateral tax treaties and TIEAs whose terms impose significant barriers to exchange (such as the level of information that the requester must provide, or the nature of the tax violation in the requesting State) effectively reduce the value of these agreements as meaningful tools for developing countries.

International mechanisms for sharing information across borders are important in their own right as independent and currently existing tools for responding to BEPS problems. But the availability of these mechanisms may also be important as the OECD BEPS project final recommendations are being implemented across the globe. The

14 Ibid., at 16.
ability of a country to benefit fully from BEPS recommendations will depend upon its treaty network. For example, as discussed more extensively in section 3.3., access to CbC reports under BEPS Action 13 requires a country to obtain that information from the home jurisdiction of the MNE parent. The expected mechanism is an exchange of information provision in an existing treaty (including the Multilateral Convention on Mutual Administrative Assistance in Tax Matters). Thus, developing jurisdictions, particularly those with more limited treaty networks (tax treaties and TIEAs) will find it harder to obtain the information and proceed with their efforts to stop base erosion and profit shifting. This issue is widely acknowledged, and is discussed more extensively in section 3.3.5.2 below.

2.3 Response to increased need for information

The focus of the global tax community on BEPS has included recognition of the centrality of information to tax administrations. As discussed below, the G20 also supports the OECD Action Plan on BEPS, including its attention to transparency, disclosure and information. The Action Plan operates against the backdrop of existing mechanisms for the provision of information. Its value added derives from its focus on the information-driven crisis points in BEPS. It targets the gaps created by the current system of providing information to tax authorities that leave countries susceptible to BEPS through related-party transactions, transfer pricing and cross-border arbitrage.

However, the BEPS setting is not the only context in which global tax actors continue to examine how tax administrations can be strengthened through transparency and disclosure. In some cases, individual countries have taken action that has triggered a more global response. For example, the United States implementation of the Foreign Account Tax Compliance Act (FATCA) regime, which requires foreign financial entities to disclose information regarding United States taxpayers to the United States tax authorities or face penalties, has led

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to the signing of IGAs (see section 4.5 below). Additionally, other countries increasingly seek to secure similar commitments for taxpayer information from foreign financial entities. In yet other cases, international bodies are promoting enhanced access to information through automatic information exchange (see section 4.2 and 4.7 below) and/or through the expansion of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (section 5.4 below).

Thus, while the need to acquire information is as old as the international tax system itself, the current climate for tax administrations differs from that of the past. The scale of information needed, its complexity and its importance have all grown dramatically. Although traditional information-based tools for facilitating tax compliance remain relevant and valuable, close examination of the ways in which transparency and disclosure can be enhanced is now a critical topic for countries. To that end, section 3 of this chapter reviews and analyses the work on transparency and disclosure carried out by the OECD project on BEPS. Section 4 then undertakes a similar examination of new developments in information-gathering occurring outside of the OECD project on BEPS. Finally, section 5 provides context for the new reforms and recommendations by revisiting more familiar tools and techniques currently available for enhancing transparency and disclosure.

As the review of each new and old information-related provision and practice reveals, there are no simple solutions to the complexity of today’s information-rich (and information-dependent) environment. There may be substantial agreement on the importance of transparency and disclosure as broad concepts, but the effort to translate those principles into specific practices and regimes unmasks the challenges and concerns outlined in section 1.4 above. A country’s assessment of the right balance and mix among these risks, trade-offs and benefits may vary depending upon its domestic infrastructure, economic position, existing network of tax agreements and tools, and substantive tax system.

2.4 Summary of the current tax environment and its connection to transparency and disclosure

Multinationals with significant cross-border business activities form an important part of today’s economy for all countries. The growth
in cross-border commerce has increased the opportunity for tax planning and, correspondingly, the needs of countries for taxpayer information. Developing countries may confront a number of challenges as their tax administrators seek the information necessary for effective enforcement of the tax laws. The challenges include: (a) domestic law impediments (inadequate required reporting by multinationals regarding assets, accounts and transactions); (b) constrained domestic enforcement (owing to limited audit staff; inexperienced staff; attrition of trained staff; and insufficient technological capacity to receive, manage and store data, and to link taxpayers to data); and (c) international impediments (a limited treaty network and high treaty thresholds for requesting information). The OECD project on BEPS recognizes the centrality of tax information to meaningful tax administration and the action items discussed below explicitly seek to increase both the quality and the availability of relevant information. But in addition to the OECD project on BEPS, transparency and disclosure is the subject of other international efforts to curtail base erosion and profit shifting, including the rising number of IGAs, the support for automatic exchange of information, and the expansion of treaty networks. Finally, the varied efforts to enhance countries’ access to information through both transparency and disclosure have been accompanied by a growing call for more public disclosure of tax information. The public disclosure of tax and tax-related information is greatly debated, and the resulting tension is playing out on a national, regional and global level.

3. **BEPS and transparency and disclosure**

3.1 **Overview of BEPS action items related to tax information, transparency and disclosure**

The OECD Action Plan on BEPS released in July 2013 included two significant action items related to the increased provision of information to countries by taxpayers: Action 12: Require taxpayers to disclose

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16 Other action items may, in a more limited manner, enhance transparency and disclosure through mechanisms not based on taxpayer provision of information. For example, Action 5: Counter harmful tax practices more
their aggressive tax planning arrangements; and Action 13: Re-examine transfer pricing documentation (including the “country-by-country reporting” template). The final reports were issued on 5 October 2015.

The most serious attention has been directed to Action 13 (transfer pricing and related issues), which includes the recommendation for CbC reporting. This action item, which has been ranked as being of “high” relevance to developing countries,17 is discussed extensively in section 3.3 below. The companion information-reporting provision, Action 12 (aggressive tax planning), which has been reported as being of “medium” relevance to developing countries,18 is more briefly considered in section 3.4 below.

One additional action item, Action 11, seeks to improve the understanding of countries (and of the global tax community) of the “scale and economic impact” of BEPS by establishing “methodologies to collect and analyse data on BEPS and the actions to address it.” This action item, which has been listed as being of “high” relevance for developing countries,19 is considered in section 3.2 below.

3.2 Action 11: collect and analyse data on BEPS

Although Actions 12 and 13 share with Action 11 the common mission of helping countries more effectively address BEPS problems through improved knowledge and understanding, their focus and “solutions” are different. Actions 12 and 13 target specific taxpayer conduct through enhanced reporting requirements for actual taxpayers. Both Actions 12 and 13 change the kinds of information that taxpayers


18 Ibid., at 30.
19 Ibid.
must provide to countries. The new information presumably will enable a country to evaluate a multinational taxpayer more effectively and accurately and identify conduct that is creating BEPS (either by aggressive planning or by cross-border related-party transactions and structures). In that way, Actions 12 and 13 function more as a support to and enhancement of the audit function.

3.2.1 Goals of Action 11

In contrast to Actions 12 and 13, Action 11 targets a more systemic goal — obtaining a comprehensive, overall picture of the BEPS problem. Action 11 identifies “[s]ix indicators of BEPS activity” that “highlight BEPS behaviours using different sources of data, employing different metrics, and examining different BEPS channels.”

Under Action 11, ongoing analysis and monitoring of BEPS impacts across jurisdictions and across time seek to determine the effects of BEPS and of BEPS countermeasures on overall tax receipts, total employment, geographic location of employment, investment in physical capital, investments in knowledge-based capital, tax competition, and so forth. However, the Final Report observes that the use of the six BEPS indicators and the resulting BEPS analyses are “severely” hindered by “the limitations of the currently available data.”

The data to be collected pursuant to Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance and Action 13 (transfer pricing-related documentation, see section 3.3 below) are expected to be an important new source of BEPS-related data. Once the data and methodologies are in place to “measure” the problem, the indicators and tools to monitor the success of BEPS actions taken by countries can provide guidance on continuing challenges as well as areas of success.

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23 Ibid., at 15–16.
The focus is on not only what is happening within a given country owing to BEPS, but also the “spillover” effects on other jurisdictions.\textsuperscript{24} This newly collected information, along with the diagnostic tools in Action 11, is expected to help policymakers and countries evaluate all of the changes implemented pursuant to the OECD Action Plan on BEPS and determine whether the implementation of steps under other BEPS action items are meeting their goals.

3.2.2 Data collection under Action 11 and its impact

Some of the data will be collected on an aggregate basis (such as foreign direct investment (FDI) and balance-of-payments data), but as noted in section 3.2.1 above, Action 11 also envisages that taxpayer-level data (financial statements, tax returns) will play an important role. We can expect that the taxpayer-level data portion of Action 11 will raise many of the same questions and concerns as Actions 12 and 13. Thus, the examination of these questions in section 3.3 below in the context of CbC reporting should be relevant and helpful to the discussions surrounding implementation of Action 11 undertaken by governments and researchers. Data collection, reporting and analysis under Action 11, though potentially influential in the longer term, will have less immediate relevance for those developing countries seeking to protect their tax base.

3.3 Action 13: transfer pricing–related documentation

3.3.1 Overview

Action 13 responds to the determination that transfer pricing is a crucial facet of BEPS and that tax administrators face a serious problem in responding to these BEPS issues because of information asymmetry between tax authorities and taxpayers. Tax authorities need the ability

to evaluate the global value chain of an MNE and to obtain detailed data on the structure of its activities, operations and intragroup transactions. Taxpayers, too, may find current transfer pricing regimes unsatisfactory to the extent that varying transfer pricing documentation standards and practices across countries place an unnecessary and unproductive burden on reporting taxpayers.  

Action 13 calls for a re-examination of transfer pricing documentation, with attention devoted to two potentially competing goals: enhancement of transparency for tax administration, and sensitivity to taxpayer compliance costs. But perhaps more importantly, Action 13 seeks the establishment of rules that would require an MNE to “provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.” This reporting template concept is known as “country-by-country reporting.”

The introduction in Action 13 of the new reporting format with new information has raised a number of questions that have dominated the discussion of CbC reporting. Briefly, the issues can be broadly identified as: (a) the kind of information required; (b) the burden on taxpayers; (c) the permitted recipients of the information; (d) the permitted uses of the information; (e) the ability of a country to use the information; (f) the protection of taxpayer data; and (g) the delivery mechanism.

3.3.2 OECD introduction of Action 13

In October 2015, the OECD released the Final Report on Action 13 regarding Transfer Pricing Documentation and CbC Reporting. It

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identified the three core goals for transfer pricing documentation: (a) risk assessment: “to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment”; (b) appropriate taxpayer pricing practices: “to ensure that taxpayers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between associated enterprises and in reporting the income derived from such transactions in their tax returns”; and (c) audit support: “to provide tax administrations with useful information to employ in conducting an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction.”

3.3.3 Transfer pricing documentation and country-by-country reporting under Action 13

Action 13 recommends a standardized reporting system for taxpayers, with three components: (a) the master file; (b) the CbC template; and (c) the local file.

3.3.3.1 Master file

The master file should contain “standardized information for all MNE group members.” The goal of this information is to provide an “overview of the MNE group business, including the nature of its global business operations, its overall transfer pricing policies, and its global allocation of income and economic activity in order to assist tax administrations in evaluating the presence of significant transfer pricing risk.”

The information required in the master file covers five categories: (a) the group organizational structure; (b) a description of business or businesses; (c)

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30Ibid., at 14.
the intangibles held by the group; (d) the intercompany financial activities; and (e) the financial and tax positions of the MNE.

The relative brevity of the description of the master file belies the number of complicated choices and options embedded in its design. One issue was whether to have MNEs prepare the file for the group as a whole or by line of business. The Final Report specifies that the taxpayer “should present the information in the master file for the MNE as a whole.” 31 But the report allows for the organization of information by line of business, where appropriate — although emphasizing that “[e]ven where line of business presentation is selected, the entire master file consisting of all business lines should be available to each country in order to assure that an appropriate overview of the MNE group’s global business is provided.” 32 The Final Report reiterated that the master file information is intended to provide a high-level risk overview and should be used consistent with that function (and, for example, should not replace actual audits and more detailed taxpayer-specific analysis and inquiry).

3.3.3.2 Country-by-country template

The CbC template requires taxpayer reporting on the following items: (a) revenue (related and unrelated party); (b) profit (loss) before income tax; (c) cash tax; (d) current year tax accruals; (e) stated capital; (f) accumulated earnings; (g) number of employees; and (h) tangible assets. 33 This information should be provided on a country-by-country basis (as opposed to entity-by-entity). The template should be accompanied by a list of all group entities and permanent establishments (PEs), by country, along with a specification of their major activities.

31 Ibid., at 15.

32 Ibid., at 15.

The Final Report responded to several questions regarding the CbC template:

(a) **Accounting approach**: In addressing a number of questions that arose regarding the proper source of data used in the CbC report and whether the template should reflect a bottom-up approach using local statutory accounts, or whether the template should reflect top-down allocation of the group’s consolidated income, the Final Report noted:

(i) The Reporting MNE should use the same data sources consistently from year to year in the CbC report;

(ii) The Reporting MNE may “use data from its consolidation reporting packages, from separate entity statutory financial statements, regulatory financial statements, or internal management accounts”; 34

(iii) The revenue, profit and tax reporting in the CbC template need not be reconciled to the consolidated financial statements;

(iv) If the Reporting MNE chooses to use statutory financials as the foundation for the CbC report, then “all amounts should be translated to the stated functional currency of the Reporting MNE at the average exchange rate for the year”; 35

(v) Differences in accounting principles across jurisdictions do not have to be reflected through adjustments.

(b) **Taxes**: Taxes paid “include[s] withholding taxes paid by other entities” (whether associated or independent) on behalf of the MNE group. 36

(c) **Cross-border related-party payments**: The revenue reported on the CbC template should be divided into related party and unrelated party revenues. These revenue numbers “include revenues from sales of inventory and properties, services, royalties, interest, premiums and any other

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35 Ibid.
36 Ibid., at 33.
amounts,” but does not include payments that are treated by the payor jurisdiction as dividends. 37

Thus, in summary, taxpayers have the flexibility to use either statutory account data or financial statement reporting packages to complete the template—if data usage is applied consistently across the group and across years. Information contained in the CbC template should provide tax authorities with a clearer picture of the relationship between reported profits, taxes paid and the underlying details of economic activity (for example, tangible assets, employees, employee expense). The information provided through the CbC template offers countries the ability to assess the transfer pricing and base erosion risk they face with the multinational and thus determine where and how to audit. But acknowledging a serious concern of taxpayers, the Final Report cautions against countries effectively bypassing detailed audit work and using the CbC data to assert transfer pricing adjustments.

3.3.3.3 Local file

The third element in the Action 13 package of transfer pricing information is the local file. The local file includes jurisdiction-specific information that complements the master file in helping the country ensure that the taxpayer complies with the arm’s length principle and transfer pricing rules in its major transactions connected to that jurisdiction. Broadly, the local file includes more detailed information regarding relevant transactions between the MNE entity in the local jurisdiction and its related entities in other countries, such as financial details of the transactions, a comparability analysis for pricing, and “selection and application of the most appropriate transfer pricing method.” 38

The Final Report contains an annex delineating the local file information. 39 The information is grouped into three categories:

(a) Local entity: The first concerns information regarding the local entity itself: its management structure, organization chart, identification of individuals to whom the local

37 Ibid., at 33.
38 Ibid., at 15.
39 Ibid., at 27–28.
management must report (and the jurisdiction of their principal offices), local entity business strategy, any recent participation by the local entity in a business restructuring, and key competitors.

(b) Controlled transactions: The second category pertains to information regarding controlled transactions involving the local entity. A more specific list of information is enumerated here, which goes to the core of how the taxpayer applies the transfer pricing rules:

- Description of the transactions (for example, services, purchase of goods, loans) and the context in which that transaction took place (for example, business activity, financial activity, cost contribution arrangement);
- Aggregate charges for each category of transaction;
- Identity of the related parties involved and the nature of their relationships;
- Functional analysis of the taxpayer and the related entities regarding each category of controlled transactions (functions performed, assets used, assets contributed, intangibles involved, risks borne and changes compared to prior years);
- Identification and description of controlled-party transactions that might impact the transaction in question;
- Specification of the most appropriate transfer pricing method by category, the reasoning for the selection, which entity is the tested party (where relevant) and why, assumptions made in using the method, and financial information used;
- If using a multi-year analysis, include an explanation why;
- Information regarding comparables—how selected, search strategy, application of method, and relevant financial indicators used in the analysis;
- Any adjustments to comparables, to the tested party;
- Copies of material intercompany agreements executed by the local entity;
- Copies of unilateral, bilateral, and/or multilateral APAs, or other tax rulings, to which the local jurisdiction is not a
party but which are related to the controlled transactions included above;

- Conclusions regarding the arm’s length status of related-party transactions based on application of the selected method.

(c) Financial information: The third category seeks financial information important to the application of transfer pricing analysis: the annual financial accounts of a local entity (audited, if available), schedules showing how financial data that was used in the transfer pricing method is linked to the annual financial statements, and summary schedules of the financial data of the comparables and the source of that data.

3.3.4 Implementation issues under Action 13

Documentation and burden: Taxpayers are expected to price at arm’s length based on contemporaneous information, and prior to engaging in the transaction, with confirmation completed before filing the tax return. But Action 13 urges countries to consider the burden on the taxpayers when making documentation requests. For example, taxpayers that can reasonably demonstrate the absence of comparables (or their absence at an appropriate cost) should not be required to bear such a burden. Furthermore, the Final Report specifically does not recommend that transfer pricing documentation be certified by an outside auditor.

Timing: Given the diversity in country expectations regarding when documentation should be available (at the time of filing the return or by the time of audit) and how long taxpayers should have to respond to requests, the suggested best practice is to require that taxpayers have the local file ready by the time the tax return for the relevant year is filed (unless the jurisdiction practises contemporaneous auditing, which would require the information prior to the filing of the return). The master file should be updated, if necessary, by the filing date for the ultimate MNE parent’s tax return. In countries for which final statutory financial statements and related CbC reporting data are not available until after the tax return is due, the best practice

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40 Ibid., at 16.
41 Ibid., at 20.
would allow for extension of completion of the CbC template to one year after the last day of the fiscal year of the MNE parent.

*Materiality*: Conscious of the need to balance the competing interests of countries (seeking access to transfer pricing information) and taxpayers (seeking a “reasonable” documentation burden), Action 13 recommends documentation requirements with materiality thresholds based on the “size and nature of the local economy, the importance of the MNE group in that economy, and the size and nature of local operating entities, in addition to the overall size and nature of the MNE group.” 42 For example, many jurisdictions offer simplified transfer pricing documentation rules for small and medium-sized enterprises. Nonetheless, such smaller businesses would be expected to provide data and documentation regarding material cross-border related-party transactions upon request and also to complete the CbC template.

*Document retention*: Again, balancing taxpayer burdens and the need of a country to access information, the Final Report recommends that tax administrators take into account the difficulty in locating documents from prior years, and that they should make such requests only when there is a “good reason” relating to a transaction under review. To assist in the balance of burden and need, taxpayers should be permitted to store the documentation in a manner they deem appropriate (electronic, paper, and so forth) as long as it can be produced in a useable form to the tax authorities.

*Documentation updates*: The master file, the local file and the CbC report should be updated annually, although in many cases information (for example, functional analysis or description of business) may not change. To the extent that operating conditions are unchanged, tax administrations may permit taxpayers to update their database searches for comparables in the local file every three years. However, financial data for the comparables would be updated annually.

*Language*: Recognizing the potential cost and burden of providing documentation in the local language, the Final Report states that local law should specify the required language. But Action 13 encourages countries to permit filing of documentation in “commonly used languages where it will not compromise the usefulness of the

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42Ibid., at 77.
documents.” To the extent the tax authorities need a translation of documents, they can make that request to taxpayers and provide adequate time to secure the translation.

**Penalties:** The Final Report cautions against the imposition of documentation-related penalties (civil or criminal) where taxpayers do not have access to the information. But it is not a good defence to contend that some other related party bears the group responsibility for documentation. The decision not to impose these penalties would not prevent a jurisdiction from making the underlying transfer pricing adjustment in order to bring taxpayers into compliance with the arm’s length principle. Two strategic observations regarding documentation-related penalties may guide the thinking of a country about designing a penalty regime:

(a) Differences in penalty regimes among countries may influence whether a taxpayer “favours” one jurisdiction over another in pricing. For example, if one jurisdiction imposes stronger penalties (compliance and/or underlying substantive pricing penalties) than another, the taxpayer may be more inclined to shift resources (and even transfer pricing profits) to the jurisdiction with the stronger penalty regime so as to avoid the imposition of large penalties;

(b) A documentation regime that includes benefits for compliant taxpayers may increase the actual compliance of a taxpayer with the documentation rules, resulting in a favourable outcome for the country. For example, if taxpayers who meet documentation requirements receive some measure of penalty protection or a shift in burden on some or all issues, there will be added taxpayer incentive for upfront conformity with the documentation requirements.

**Confidentiality:** As the prospect of increased disclosure of information becomes more likely, taxpayers are expressing greater concern regarding confidentiality. Action 13 urges tax administrations to protect taxpayers from public disclosure of trade secrets, scientific secrets and other confidential information. The need for protection should lead countries to carefully consider their requests for such information and

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43 Ibid., at 18.
to provide assurances to the taxpayer regarding confidentiality. To the extent that public court proceedings or judicial decisions will entail some measure of disclosure, confidentiality should be preserved to the extent possible and disclosure should be as limited as possible.

**Implementation:**

(a) *Changes to domestic law:* Tax law, including transfer pricing rules, are a function of domestic law. Thus, in order to achieve the benefits of increased uniformity under Action 13 (as well as the widespread adoption of best practices advocated by the Final Report), countries need to make changes to their own domestic law. Thus, for example, countries need to enact transfer pricing and documentation rules that require their locally based MNE affiliates to produce information required for the master file, CbC template and local file (as detailed in the three annexes attached to the Final Report). Given the general importance of consistency, and the need for master file information to be consistent across jurisdictions, countries should review their own domestic rules. The goal would be domestic rules that require production of information for the master file that conforms to the annexes contained in the Final Report (detailing the information in both the master file and the CbC reporting template). In terms of timing, Action 13 recommends that MNEs (with annual consolidated group revenue equal to or exceeding €750 million) be required to file their first CbC report for fiscal years beginning on or after 1 January 2016, although the Final Report acknowledges that some jurisdictions may need additional time to follow their domestic law procedures for implementing new rules. To facilitate timely introduction of these new reporting requirements, the annex contained in the Final Report includes model legislation for requiring the MNE parent to file the CbC report in its residence jurisdiction. This model could be modified by individual jurisdictions to meet their specific needs.

(b) *Delivery mechanism:* The Final Report recommends that the MNE parent make the master file and the local file available to the local affiliates, who will then share it with their
local taxing authorities (“the master file and local file [will] be filed directly with the tax administrations in each relevant jurisdiction as required by those administrations”).

The CbC reports, however, would be filed with the residence jurisdiction of the MNE parent. Then, the MNE parent jurisdiction would share the CbC report with the jurisdictions of the local affiliates through a treaty information exchange mechanism. The Final Report includes three model competent authority agreements (CAAs) to be used to facilitate exchange of CbC reports. The models are based on exchange under: (a) the Convention on Mutual Administrative Assistance in Tax Matters; (b) bilateral tax conventions; and (c) tax information exchange agreements (TIEAs). Although three models are provided, ideally the mechanism would be a CAA under the Multilateral Convention. That is, parties to the Convention could sign the CAA under the Convention and achieve widespread automatic exchange in a more streamlined manner. In accordance with this CAA, each signatory would exchange any CbC reports it received from MNEs headquartered in its jurisdiction with other signatories satisfying the terms of the CAA (including confidentiality). As at 26 January 2017, 57 jurisdictions have signed the CAA for automatic exchange of CbC reports under the Multilateral Convention.

Under what are expected to be limited circumstances, a secondary mechanism for obtaining the CbC report, including local filing, may be possible as a backup.

Given that access to this new reporting format and information is at the heart of Action 13, many countries have strongly advocated that the delivery mechanism should be uncomplicated and widely available (see section 3.3.6.2.2

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44Ibid., at 20. This direct filing has raised some concerns regarding taxpayer protection. See Ryan Finley, “Lawmakers Urge Limiting Exchange of CbC Reports,” (2016) Vol. 81, Tax Notes International, 751. (The Vice President of Tax and Domestic Economic Policy at the National Association of Manufacturers noted she was particularly troubled by the direct filing of the master report with local tax authorities because it would not be protected by the Treasury’s safeguards that are in place for the exchange of the CbC reports.)
Taxpayers, however, have repeated their concerns that the delivery mechanism should include appropriate safeguards ensuring the protection of their information.

3.3.5 General questions regarding Action 13 recommendations

3.3.5.1 Taxpayer burden

The Action 13 recommendations (see section 3.3.3 above) have sought to reflect the concerns raised by multinational taxpayers and their advisers. Primarily, these concerns centre on an overarching theme that compliance with documentation is much more difficult than the OECD and governments understand. Taxpayers had enumerated a variety of challenges and barriers to their immediate, low-burden compliance with the master file, CbC template and local file requirements. These difficulties included: existing reporting systems not aligned to the requested information; different reporting and measurement approaches within different parts of a multinational and across multinationals; difficulty in securing the information in a timely fashion; the need to rework data from affiliates into a consistent reporting format; the cost of gathering requested data; the burden arising from uncertainty in definitions and applications (for example, what counts as an employee). Not surprisingly, given the objections articulated, taxpayers raised the most questions about the CbC template.

Despite this general critique, taxpayer responses to the release of the recommendations under Action 13 seem to vary considerably. MNEs have pursued one or more of the following steps: (a) reported that their operations are significantly out of step with the data sought; (b) used the OECD comment period (after release of the Discussion Draft) to press for modifications; (c) tested their ability to comply with the master file, CbC template and local file structure; and (d) explored new information management systems to facilitate their compliance with anticipated reporting requirements. As jurisdictions have begun enacting domestic legislation regarding the master file, local file and CbC report, taxpayers have commenced their own corresponding data collection process. In some cases, MNEs may have already been gathering such information in order to comply with pre-existing, country-specific reporting requirements imposed by jurisdictions which already had required reporting on the worldwide activities of their MNEs and certain foreign subsidiaries.
3.3.5.2 Delivery mechanism

Among the most controversial issues raised by Action 13 is how the required information (master file, CbC template, local file) is delivered. As noted in 3.3.4 above, the CbC report will be filed with the MNE parent’s residence jurisdiction and shared with other countries via a treaty exchange mechanism. The master file and local file will be filed directly with the local jurisdiction.

Taxpayers had generally urged that required filings be made to the country of the MNE parent corporation. The primary argument advanced for the single central filing (at least of the master file and the CbC template) was the concern that some jurisdictions might not adequately protect information. The expectation is that if the data is provided only to the parent jurisdiction and then shared via treaty request, there will be additional protection because countries requesting information pursuant to a treaty must ensure and commit to specified confidentiality requirements.

The significance of the taxpayer concern about confidentiality turns on two points: the legitimacy of the concern over protection of taxpayer information, and the sensitive nature of the data. First, appropriate protection of taxpayer data is an accepted norm, although there are differences in exactly what is protected, when it is protected and how. Model exchange of information provisions (for example, Article 26 of both the United Nations and OECD Model Conventions) make reference to the expectations regarding taxpayer privacy, and expound further upon the application of the standard in the accompanying commentaries. Thus, the decision in the Final Report to share the CbC template via treaty mechanisms directly addresses taxpayer concerns over data protection. But that same delivery mechanism decision poses challenges for requesting jurisdictions, particularly developing countries (see section 3.3.6 below).

Second, regardless of the broader subject of taxpayer privacy, to the extent that information in the master file and the CbC template is generally publicly available in the case of many multinationals, the argument in favour of filing those documents only with the jurisdiction of the parent—as ultimately concluded in the Final Report—may be weakened. For example, in the case of publicly traded entities, how much of the information is publicly reported in compliance with
securities (or other) regulations? Are there other public sources for that information? If so, how much weight should have been given to arguments about uncertain protection of the data? Alternatively, should the public availability of data be less relevant in the debate if the “public” information is cumbersome to gather? This argument would be grounded on the assumption that difficult-to-assemble data is in reality “less public” and thus there would be a real impact on these taxpayers if their well-organized reporting to the tax authorities were inadvertently made public. Should privately held multinationals be treated differently if their publicly available entity information is more limited?

The conclusion in the Final Report to specify treaty-based delivery of the CbC report reflects OECD determination that arguments favouring enhanced confidentiality were ultimately more persuasive.

3.3.5.3 Use of information

Related to the delivery mechanism concern (see section 3.3.5.2 above) is the separate question of which information a country may access and what it may appropriately do with the information. Taxpayers typically have expressed several concerns about what jurisdictions might do with information compiled by taxpayers.

Replace audit: One concern articulated by taxpayers is that countries, particularly those that may be resource-constrained, will use the master file and the template data as the basis for an actual transfer pricing allocation. For example, if such a jurisdiction draws the conclusion that inadequate income (and thus tax) is being reported in its jurisdiction relative to the value chain, functions and reporting of income worldwide, the tax authorities might simply stop at that stage and make a transfer pricing adjustment. The OECD has stated that the purpose of the master file and the CbC template is to facilitate risk assessment and decisions about where to allocate audit resources—not to replace the audit. The Final Report explicitly states that the master file and CbC template are understood to be a high-level view and are not expected to displace an audit of the taxpayer.⁴⁵

Shift to formulary: In a similar vein, taxpayers are also concerned that countries may use this information (master file and CbC template) to shift informally to a formulary approach to transfer pricing, despite formally being committed to an arm’s length approach. In part, countries might be inclined to use the information in this way if they find it difficult to locate comparables for the traditional application of the arm’s length method. Again, developing countries, in particular, may face this challenge (see section 3.3.6 below). Although substantive reforms to transfer pricing rules are not part of Action 13, this taxpayer concern reveals the connections among administration, documentation and substantive law. However, the work of the Platform for Collaboration on Tax (see section 2.2.4.2 above) in developing a transfer pricing draft toolkit could serve as a brake on any inclination to informally shift to formulary, by assisting developing countries in identifying useful comparables.

Assist beyond transfer pricing: Should countries use some of this high-level information, in particular the CbC template, to assist more broadly in efforts to combat base erosion and profit shifting? Certainly, Action 11 envisions that the data generated through compliance with Action 13 (including the CbC report) will assist in assessing the medium- and longer-term effects of BEPS and BEPS countermeasures. The decisions made in the Final Report regarding the content of the CbC template and the specific columns of information will impact how countries can effectively use the filings to reach beyond transfer pricing concerns to other causes of base erosion.

Format and function: Taxpayers raised a variety of questions regarding exactly how to report data properly, especially under the CbC template, including how to handle various accounting differences within the multinational group, how to define “employees” and how to treat PEs. The annex to the Final Report provides “specific instructions” on completing each column of the template. The basic content of the columns, along with these instructions, likely reflects the intended and appropriate uses of the data, and the potential burdens on taxpayers.

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For example, the decision to require reporting of only the number of employees and not their compensation likely reflects a conclusion that the effort of trying to ascertain what counts as compensation for all employees across entities and jurisdictions is not necessary for a high-level risk assessment given the burden it might impose. “Number of employees” in each jurisdiction might be an adequate and less burdensome measure of the MNE presence in a country. Emphasizing consistency in reporting across tax years, the instructions provide guidance on full-time equivalent reporting of employees, reliance on average employment levels and treatment of independent contractors.

The flexibility permitted in sourcing financial data similarly reflects the view that a steady comparative picture of the MNE activities across countries and years is the core of the high-level risk assessment intended by the master file and CbC template. However, the Final Report’s flexibility on whether taxpayers report information from the bottom up or the top down (see section 3.3.3.2 above) has been viewed by some as directly impacting the template’s ability to aid in providing even a high-level risk assessment. From this viewpoint, bottom-up reporting effectively replicates (and obscures) any BEPS already in place and thus fails to signal the real risk to the tax authorities; only top-down reporting reveals even the high-level risk of BEPS problems for the jurisdiction.

3.3.5.4 Data protection and authorized public disclosure

In addition to the concern expressed by countries regarding how the master file and template will be reported and shared (see section 3.3.5.2 above) is a general focus on data protection and a special focus on the potential for authorized public disclosure. On a broad level, taxpayers fear that some jurisdictions will not follow agreed and accepted standards for data protection, either because of inadequate internal rules and oversight mechanisms or because of a more intentional decision to share information with other agencies or domestic competitors. As discussed in section 3.3.5.2 above, the decision in the Final Report that MNEs file the CbC report only with the parent jurisdiction, who shares it only with countries committed to data protection consistent with the model treaties, provides a measure of certainty regarding data protection. Suggestions for further enhancing confidentiality have included a mechanism for reviewing country compliance with
confidentiality protocols, a reporting system for taxpayers experiencing confidentiality problems and possible penalties for jurisdictions that fail to appropriately protect taxpayer data.

A country’s compliance with the confidentiality standards of Action 13 will be assessed as part of a peer review process under the auspices of a new OECD-based group. In February 2016, following the October 2015 release of the BEPS Final Reports, the OECD announced a “new framework” for country participation in the continuing BEPS work and in the updating of international tax rules: the Inclusive Framework. The goal of the Inclusive Framework is to enable all interested jurisdictions to “participate as BEPS Associates in an extension of the OECD’s Committee on Fiscal Affairs (CFA).” Participation in the Inclusive Framework, however, requires that the BEPS Associates commit to implementing the four minimum standards from the final BEPS Project recommendations: (a) tackling harmful tax practices; (b) confronting treaty shopping; (c) implementing CbC reporting; and (d) improving dispute resolution. This commitment will be tested through a peer review process. In February 2017, the OECD released a document containing “key documents” to be used in the peer review of Inclusive Framework members regarding their commitment to CbC reporting: (a) terms of reference; (b) methodology for the conduct of peer reviews; and (c) detailed outline of the phases of the review. Compliance with confidentiality standards plays a prominent role in this review.


50 Ibid., at 13.


52 The three major elements of compliance with Action 13 to be explored in the review process are: (a) the domestic legal and administrative frame-
In the context of BEPS, data protection has an additional dimension beyond the above-discussed concern that countries might either: (a) carelessly allow unauthorized access to private commercial or tax information; or (b) intentionally share information with State-owned competitors or with favoured domestic competitors. Specifically, taxpayers also worry that reporting to governments under Action 13 will serve as a prelude to authorized public disclosure of certain tax information. Not only have there been explicit demands for public disclosure of some Action 13 material (particularly the CbC template), but a disclosure trend can be observed in recent public disclosure projects, including new United States Securities and Exchange Commission reporting rules and other similar projects in extractive and financial industry sectors (see section 4.4 below). The increased public awareness of the role and conduct of multinationals in the economy and the import of BEPS issues has led to calls for public disclosure of some, or all, of the information that would be provided by businesses to tax authorities under the BEPS initiatives.  

From a perspective that citizens should be able to assess and evaluate the conduct of their own government with MNEs, and should be able to ensure that the country and the treasury are properly protected, public release of some or all of the master file and template data would likely be sought. Public release of basic tax information could serve as a check on corruption, inadequate enforcement and/or inadequate substantive tax rules.

Following the release of the 2014 BEPS Deliverables, including on Action 13, the BEPS Monitoring Group issued a review of the progress on the BEPS action items to date. With regard to the question of disclosure of Action 13 to the public, the group concluded:

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53 See, for example, C20, “Position Paper Background: Governance,” supra note 10, at 5 (advocating a “commitment to make public country-by-country reporting the global standard” assuming that “[e]nsuring this information is made public would enable tax administrators in the poorest countries to easily access this information and address base erosion and profit shifting”). See also, Andrew Goodall, “U.K. Ministers Reject MPs’ Call to Action on Transparency,” Worldwide Tax Daily (23 January 2017) (discussing new United Kingdom power to require public disclosure).
In view of the very general nature of the information required by the CbC report template, there seems no valid reason why these reports should not be published. The [BEPS] report rightly stresses the need for tax authorities to preserve strict confidentiality of information which may be commercially confidential. However, the CbC report as now designed would not normally include such information. Publication should therefore be the norm, subject perhaps to allowance for exceptional cases. There is widespread public interest in such greater corporate transparency, which has led to mandatory publication requirements especially in the EU and the US of such reports in specific sectors (extractive industries and financial services). Finally, this data would constitute an invaluable information resource, which should be treated as public domain. At present, corporate data, even if they originate from state legal requirements e.g. for publication of company accounts, are in practice extremely difficult to access. Hence, both researchers and even government bodies such as tax authorities, are dependent on private providers of data-bases. This is particularly damaging to developing countries, both because of the high cost of subscriptions, and because the coverage of developing countries in such databases is poor. The G20 should take a lead in making this important standard a worldwide expectation, and ensure that the data is publicly available to support corporate transparency and facilitate tax enforcement everywhere in the world.54

Other organizations have similarly urged increased public reporting.55 For example, Christian Aid, in commenting on the January 2014 OECD Discussion Draft for Action 13, stated that it is “firmly of the belief that the Country by Country (CbC) report be made public,” citing the opportunity to hold both governments and multinationals more accountable on the basis of such tax information.56


56 Christian Aid Submission, OECD BEPS project: Discussion draft on
Trade Union Advisory Committee to the OECD (TUAC) similarly supported public disclosure of certain MNE taxpayer information in order to facilitate informed public discussion.\textsuperscript{57}

The government of the United Kingdom of Great Britain and Northern Ireland was granted domestic statutory power in 2016 to require multinationals to publicly report their CbC profits and taxes. Now the debate in the United Kingdom concerns whether, when and how it should exercise this new power. The United Kingdom Department for International Development maintains that the OECD is the best and most appropriate place to pursue such discussions and action.\textsuperscript{58} On a more regional level, the European Union (EU) Council


\textsuperscript{57}See Trade Union Advisory Committee (TUAC), \textit{OECD Public Consultation on Draft Revised Guidance on Transfer Pricing Documentation and Country-by-Country Reporting: Comments by the TUAC} (21 February 2014), available at \url{http://www.oecd.org/ctp/transfer-pricing/volume4.pdf}. It states that “[p]ublic disclosure would resolve a number of outstanding issues, including the above mentioned problem of access to information for developing countries. It would also help inform other stakeholders, who are affected by the activities and operations of MNEs, including workers, local communities, civil society groups and of course citizens at large. The content of the public filing could cover a selected number of reporting items which in our view would not threaten or violate business confidentiality rights. Items could include: (i) organisational structure, (ii) important drivers of business profit, (iii) supply chain for material products and services, (iv) service arrangements between members of the MNE group, (v) business restructuring transactions during the fiscal year, (vi) geographic distribution of the top 5/10% highest compensated employees, (vii) geographic distribution of employees and other supervised workers expressed in number of full-time employments, and (viii) MNE’s important financing arrangements with unrelated lenders. . . . Regarding reporting on tax and incomes, reporting should include (i) consolidated group accounts and (ii) tax due and tax paid in each country. The public filing should at least include reporting on a single ratio between tax charge and declared profits to give some indication on the potential presence of risk for transfer pricing manipulation and other aggressive tax planning schemes.”

\textsuperscript{58}Andrew Goodall, “UK Ministers Reject MPs’ Call to Action on Transparency,” supra note 53 (noting the debate within the United Kingdom
has been reviewing a proposal to require MNEs to publicly disclose their income taxes paid and certain other information. But in December 2016, the French Constitutional Council ruled that public CbC reporting is not constitutional.

Business organizations continue to strongly urge careful protection of taxpayer data and reject the idea that public disclosure of some of the Action 13 information (such as the CbC report) could be an appropriate response. The Business and Industry Advisory Committee to the OECD (BIAC) contended that the master file and the CbC report “should only be provided by taxpayers to their home (headquarter) tax administrations, to then be shared through existing exchange of information channels with the necessary confidentiality requirements.” Rather than contemplate some form of limited public disclosure, BIAC sought enhanced measures to safeguard taxpayer information (including “anti-infringement procedures” to protect taxpayers from unauthorized disclosure, the viewing of certain information only at the taxpayer site, and legally binding confidentiality agreements between taxpayers and tax administrations). The International Alliance for Principled Taxation similarly recommended that “the CbC report be filed with the parent company’s home country tax authority as the Discussion Draft contemplates, but that it then be shared with other tax authorities only through a formal EOI channel (whether spontaneously or upon request), so that confidentiality obligations will apply to the recipient governments.”

regarding whether and how the government should exercise its new (2016) statutory power to require multinationals to publish CbC reports of their profits and taxes).


Ibid.

In addition to the concerns about the public disclosure of trade secrets and related information, multinationals and their representatives have expressed concern that public disclosure of tax information could easily be misinterpreted and used (inappropriately) for political purposes.

The OECD has repeatedly asserted that the Action 13 information is intended only for governments and only for the purposes of making risk assessments for BEPS. The Final Report reiterates that “[t]ax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information.” 64 Given the importance of this issue (access and use of information) and the widely differing views on what information should be made available to whom, and on what terms, implementation of Action 13 will continue to generate significant debate.

### 3.3.5.5 Independent country action

One important thread paralleling the entire BEPS process is the distinct possibility that countries may pursue unilateral responses to their BEPS problems. Such action could be in advance of broad agreement on BEPS steps or contemporaneous with it. Additionally, as noted in section 3.3.5.1 above, some countries already impose fairly extensive reporting obligations on their own multinationals, as well as on other entities doing business in their jurisdiction. The risk or possibility of independent unilateral action by countries on BEPS problems is relevant throughout the debates on specific BEPS recommendations. For example, in measuring and evaluating the burden imposed on taxpayers by the requirements under the master file, CbC template and local file, it is fair to consider the reduction in burden that corporations may experience through such a unified and streamlined reporting system. Similarly, taxpayers themselves may reassess their resistance to the OECD project on BEPS given the risk of multiple, country-specific reporting requirements that might arise should the project not continue to move forward with some success. Such individual country requirements seem all the more possible given that countries could use the Action 13 master file and CbC template as a baseline in crafting

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their own reporting legislation. This “risk” of independent action by countries may be greatest with respect to those jurisdictions that have some leverage in the market. In contrast, a developing country that perceives itself as having more limited negotiating power vis-à-vis multinationals may be less inclined to impose independent reporting requirements perceived as “unfriendly” to business. Effectively, countries could be competing based on their relative lack of disclosure. Those developing countries might find it advantageous if a uniform standard of public reporting is broadly adopted (along the lines of BEPS Action 13), if it is adopted at all.

3.3.6 Developing country issues regarding Action 13

Although all countries share many of the same concerns, questions and goals regarding reporting under Action 13, developing countries may have a distinct perspective. In terms of both the overall mission of Action 13 and the implementation-specific decisions, developing countries should evaluate the BEPS project against their own circumstances.

3.3.6.1 Overall perspective

The broad mission of Action 13, to improve a country’s risk assessments for BEPS (through the master file and CbC template) and to facilitate transfer pricing audits (through the local file), is likely important to developing countries with limited audit and other resources. First, to the extent that developing countries must decide where to direct their most sophisticated audit resources, they would want to identify their most serious BEPS problems. A high-level assessment tool (master file and CbC template) for each MNE operating in the jurisdiction would provide the country with a solid basis for making that preliminary risk assessment and assigning audit resources.

Second, assuming the form and content of the information package (the master file, CbC template and local file) becomes standard for MNEs, developing countries can rely on a unified format as they make both high-level risk assessment decisions and as they evaluate taxpayer-specific transactions among related entities. Both their

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65 See section 3.3.5.4 above for examples regarding the efforts in the United Kingdom, France and the EU to require public CbC reporting.
own MNEs, as well as foreign multinationals conducting business in their jurisdiction, will be utilizing the same format and standards, thereby producing more uniform information that may be more readily subject to comparison. Again, for a jurisdiction with limited resources, this enhanced uniformity in reporting (assuming it carries the requisite content) should allow the tax administration to process and evaluate the information more effectively—and train new tax professionals.

Third, a global commitment to Action 13 recommendations should benefit developing countries. If many countries, including countries with more enforcement resources, are seeking the information, presumably taxpayers will more readily comply. Moreover, this compliance would likely be not only in name (for example, providing documents labelled “master file” and “template”) but also in spirit (providing materials meeting the expectations articulated for each of these documents). Thus, use of the BEPS process to enhance information reporting and document production by MNEs offers certain advantages for resource-constrained jurisdictions.

3.3.6.2 Implementation-specific perspective

Although the driving purpose behind Action 13 would be compatible with and would help facilitate most developing country audit and enforcement goals, the details regarding the actual implementation of Action 13 are critical to their real-world impact. Both the content of the reporting (the master file, the CbC template and the local file) and the manner in which this information is provided to countries will ultimately determine whether the potential value of Action 13 is realized.

3.3.6.2.1 Content

Several of the design questions that have arisen in the context of crafting the master file, CbC template and local file may be particularly relevant for developing countries.

Reporting entities: First, given that developing countries may find they have many permanent establishments (PEs) operating in their jurisdiction, the clarifications in the Final Report regarding the operations for which reporting is required should prove valuable. The annex contained in the Final Report confirms that a “Constituent Entity” of the MNE group which must be included in the reporting is: (a) any
separate business unit of the MNE group included in the Consolidated Financial Statements (or that would be included if publicly traded); (b) any business unit excluded from the MNE group’s Consolidated Financial Statements solely on size or materiality; (c) any PE of any separate business unit of the MNE group included in (a) or (b) if the unit prepares separate financial statements for financial reporting, regulatory, tax reporting or internal management control purposes.66

Accounting: Second, as initially noted in sections 3.3.3.2 and 3.3.5.3 above, countries in general, but developing countries especially, might prefer the top-down allocation of group income to the extent that they are concerned that use of the local statutory accounts to construct a bottom-up reporting may disguise underlying BEPS problems. If the local statutory accounts reflect inappropriate pricing and profit shifting, that reality might be built into the template responses and effectively obscure the base erosion and profit shifting. This concern is not unique to developing countries. As noted in 3.3.5.3 above, the Final Report allows either approach so long as it is applied consistently by the MNE. However, the choice of the MNE, and the resulting template, may play a more pivotal role in the tax enforcement process of a developing country if it lacks other reporting mechanisms or information that could signal a risk for BEPS with regard to a particular taxpayer.

Verification: Third, although attention has been given to the source of data used in constructing the files, less attention has been focused on verification of the information. Of course, verification of data is always an issue for tax authorities. If there are expectations regarding the ability of a country to verify information, it would be useful to outline them more specifically; the Final Report has not addressed this issue. This concern may be most prominent in the local file context because that information would likely be circulated to a more limited pool of tax authorities. In contrast, the master file and CbC template would likely receive wider circulation. It is not clear, however, whether a jurisdiction that finds the master file or template inaccurate would be expected to unilaterally share that information with other countries in possession of the file or template.

Language: Fourth, the Final Report does not specify a reporting language and leaves that decision to local law. However, countries are “encouraged” to allow taxpayers to file their documentation in “commonly used languages.” 67 Certainly, in many cases it is likely to be more efficient for the developing country that the master file be in English rather than the language of the MNE parent jurisdiction (assuming that language is not English). However, the personnel constraints that developing country tax administrations face include the limited pool of English-speaking tax professionals with sufficient international tax training to effectively review the files, make risk assessments and then pursue taxpayer audits where appropriate. If more information is made available in the language of the developing country, the number of tax professionals in government available to work on audits, reviews and examinations may increase.

Burden: Fifth, the dominant taxpayer critique of Action 13 reporting (master file, CbC template and local file) has been that of the burden it imposes on taxpayers (see section 3.3.5.1 above). Although the question of burden is important, and requested information should be useful and reasonable in context, the balance of benefit and burden may look different from a developing country perspective. Taxpayers have urged that they not be asked to provide difficult-to-gather data that a country would be unable to use. This objection is not levelled solely at developing countries, but it is one that is heightened where a country has limited resources and is ultimately constrained in its ability to process information meaningfully. However, despite this claim, which might suggest that the benefits to developing countries would be less than the burden to the taxpayer, a broader look at the benefits and burden question might produce a different conclusion. Developing countries are often understood to be highly dependent upon income taxes, specifically corporate income taxes, for their revenue base. There are a number of factors contributing to this fiscal picture and although it may shift in the long term, at present there is a serious cost to the fiscal welfare and stability of these countries when they are unable to collect corporate income tax otherwise due. Additionally, developing countries have fewer internal resources to engage in extensive monitoring and reviewing of multinational taxpayers and their tax planning. Thus,

67 Ibid., at 18.
transparency and disclosure

the benefit to these jurisdictions in having MNEs provide relatively uniform, comprehensive information of both a qualitative and quantitative nature that assists in risk assessment and in audit is distinctly valuable. That said, the BEPS project is a group effort by countries to respond to BEPS. However, in making a group-wide assessment of the burden imposed on taxpayers by Action 13 compared to the benefit for tax administrations, it will be important to bear in mind that the benefit should not be measured solely from a developed country perspective.68

3.3.6.2.2 Delivery

Just as the question of to whom (and how) information will be provided is very significant for taxpayers, it is equally critical for developing countries. As suggested in section 3.3.6.1 above, Action 13 will play little meaningful role if countries cannot predictably and effectively access the information in the master file, CbC template and local file. Given that many of the key advantages of this information package for developing countries derive from the resource-savings opportunities it provides (see section 3.3.6.1 above), it is important that countries have easy access to the information in a timely fashion. To the extent that

68 Various international groups have urged that the OECD project on BEPS appropriately incorporate the views and needs of developing countries. See, for example, C20, “Position Paper Background: Governance,” supra note 10, at 2 (recommending “an inclusive and transparent process that ensures developing countries benefit from these tax reforms”); G20 Leaders’ Declaration (St. Petersburg, 6 September 2013), at 13 (“Developing countries should be able to reap the benefits of a more transparent international tax system, and to enhance their revenue capacity, as mobilizing domestic resources is critical to financing development”), available at https://g20.org/wp-content/uploads/2014/12/Saint_Petersburg_Declaration_ENG_0.pdf; G20 Leaders’ Communiqué (Brisbane, 16 November 2014), at 2 (“We welcome deeper engagement of developing countries in the BEPS project to address their concerns. We will work with them to build their tax administration capacity and implement AEOI.”), available at https://www.g20.org/Content/DE/_Anlagen/G7_G20/2014-g20-abschlusserklaerung-eng.pdf?__blob=publicationFile&v=3. It was in part in response to these critiques that the OECD introduced its Inclusive Framework in February 2016, discussed above in 3.3.5.4. The Inclusive Framework commits to providing all members with the opportunity to participate on an equal footing.
the delivery mechanism imposes costs, the value of the entire process for developing countries is diminished.

For example, given that the CbC report is provided only to the jurisdiction of the MNE parent, with the expectation that other countries will secure that information through an automatic exchange of information, several barriers are created. First, the developing country must be a signatory to a relevant treaty (Multilateral Convention, bilateral treaty or TIEA). Given that developing countries typically have more limited treaty networks and more limited capacity to expand their networks, straightforward access to the CbC report may be problematic for some countries. Second, even if the developing country is a signatory to one of the three categories of treaties, there must also be a competent authority agreement (CAA) in place providing for automatic exchange. Particularly in cases where a developing country has only a TIEA, or perhaps a bilateral treaty, it may take time to get the treaty partner to execute the necessary CAA (this practical limitation was the motivation in the Final Report for advocating for a multilateral CAA under the Multilateral Convention). In the absence of the CAA for automatic exchange, the developing country could pursue the process of requesting the information. This step requires the efforts of a tax professional sufficiently familiar with the process, the rules and possibly a foreign language. Moreover, it is not clear what information the requesting jurisdiction would have to provide to make this request. One of the long-standing problems with treaty-based exchange of information provisions has been the requirement imposed on requesting jurisdictions to provide upfront details regarding the underlying taxpayer and the matter being investigated. This requirement would contradict one of the core tenets of Action 13—allowing countries to make more meaningful BEPS risk assessment early in the process. Yet depending upon the precise treaty mechanism under which the country is making the request for information, it might need to know much more information in order to request the master file and template. Not only would this be difficult to accomplish in some cases, it will inevitably require more audit resources simply to secure the information intended to provide the risk assessment tools. Developing countries will be able to take these steps for fewer taxpayers, thus decreasing the beneficial impact of Action 13.

Third, tax administrations generally are seeking to make the audit process more contemporaneous. Working through an on-request
treaty mechanism to obtain the master CbC report, particularly if the requesting country must provide detailed supporting information, would only extend the audit process.

Fourth, developing countries are less likely to have MNEs with the parent located in their jurisdiction. As a result, a much larger portion of their enforcement work to combat BEPS would require the preliminary step of obtaining CbC reports from other countries. In contrast, developed countries typically have more multinationals headquartered in their jurisdictions and would (under a system of filing only in the parent country) have the information immediately available. Moreover, these developed countries would likely be particularly, though not exclusively, interested in BEPS on the part of their own major multinationals. Thus, although all countries would (under this approach) be required to seek information via treaty (including automatic exchange), the burden would be most significant for developing countries which are resource-constrained, dependent upon corporate income taxes and have few domestic multinationals.

3.3.6.2.3 Domestic

Commitment to implementation of Action 13 raises several questions for countries from a domestic perspective. As with some of the observations above, these points may not apply uniquely to developing countries, but they may resonate strongly with them. First, domestic legislation would be required to fully implement the recommendations. To the extent that countries have not yet implemented significant reporting requirements for MNEs, they would likely need to do so now. Given the importance of obtaining the information, developing countries would want to ensure their ability to enact the required legislation.

Second, taxpayers have expressed the concern that countries, especially developing countries, may be inclined to bypass a real audit, and use the master file and CbC template to impose a transfer pricing adjustment based on a more formulary approach (see 3.3.5.3). Some taxpayers have urged that the OECD secure commitments from countries affirming that they will not forgo the arm’s length method, even informally. It is unclear what such a commitment would look like. However, the peer review for the Inclusive Framework will include examination of whether a jurisdiction is using the CbC reports appropriately to ensure that it is not employing them as conclusive evidence
for an adjustment or as the basis of a formulary adjustment. Given this attention to the issue, it makes sense for jurisdictions, including developing countries, to review their own positions and commitments on the subject.

Third, taxpayers have also repeatedly raised confidentiality as an objection to widespread filing of the master file and CbC template. Regardless of the delivery mechanism(s), countries receiving access to information are expected to comply with standards of confidentiality and privacy regarding taxpayer information. If the current domestic law of a country is not consistent with the typical expectations reflected in, for example, the Multilateral Convention and Article 26 of either the United Nations or OECD Model Convention, the country may wish to pre-emptively evaluate the changes that would be necessary to domestic law for compliance.

Fourth, Action 13 itself does not impose documentation or transfer pricing penalties. That remains the province of the individual countries. The Final Report recommends against documentation penalties in cases where the taxpayer does not have access to the data. But the Final Report anticipates the need for both documentation and mispricing penalties in some cases. As countries examine their own documentation and substantive pricing penalties, it is important to bear in mind the risk that taxpayers will “favour” jurisdictions with more severe penalties: taxpayers might devote more resources to documentation compliance in such jurisdictions and, where in doubt on pricing, shift profits to the jurisdiction with higher penalties (to avoid the imposition of such penalties). Given that developed countries frequently have well-established transfer pricing documentation and substantive penalties regimes, developing countries should carefully evaluate their own penalty regimes with these observations in mind.

3.3.6.3 Options

Assuming that developing countries secure workable access to the CbC template, there remains the question of how they can best use this information. Given the resource constraints faced by many developing countries, targeted capacity-building might enhance the ability of these countries to use the information received from all three formats (master file, CbC template and local file) in a strategic manner. For example, training for developing country tax auditors could focus on
the information included in these files and how to use that information to make overall risk assessments and, where appropriate, to pursue taxpayer-level audits. Using “case studies” of hypothetical taxpayers with corresponding master files, CbC templates and local files would help developing countries not only receive the information but begin to use it effectively and more immediately to tackle base erosion and profit shifting.\footnote{See, for example, African Tax Administration Forum, A Practical Guide on Information Exchange for Developing Countries (2013), at 46 – 47 (outlining an abbreviated version of the case study concept in the context of requesting information).} Real-time technical assistance and capacity-building could also be pursued through the “Tax Inspectors Without Borders” programme,\footnote{See generally, OECD website at http://www.oecd.org/tax/taxinspectors.htm.} which provides expertise to developing-country tax administrations during the course of real-time audit and enforcement.\footnote{OECD Task Force on Tax and Development, Final Report on the Feasibility Study into the Tax Inspectors Without Borders Initiative (5 June 2013), at 1 (“Experts would be deployed to work directly with local tax officials on current audits and audit-related issues concerning international tax matters, and to share general audit practices. In addition to improvements in the quality and consistency of audits and the transfer of knowledge to recipient administrations (tax administrations seeking assistance), broader benefits are also anticipated including the potential for more revenues, greater certainty for taxpayers and encouraging a culture of compliance through more effective enforcement”), available at http://www.oecd.org/ctp/tax-global/TIWB_feasibility_study.pdf.} The G20 has noted its support for this programme.\footnote{G20 Leaders’ Declaration, supra note 68, at 13 (“we welcome the OECD Tax Inspectors without Borders initiative, which aims to share knowledge and increase domestic capacities in developing countries in the tax area”).}

### 3.3.7 Summary of Action 13

Action 13 in the OECD Action Plan on BEPS addresses the challenge of transfer pricing documentation and the need to understand the activities of an MNE across the globe. The action item introduces three new reporting mechanisms: (a) the master file (standardized information for the entire MNE group regarding business activities, finance, debt structure, taxation and allocation of income); (b) the CbC reporting...
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template (a template completed by each multinational providing data on a country-by-country basis on seven key questions); and (c) the local file (jurisdiction-specific information on the local entities, their financial accounts, financial data of comparables for transfer pricing analysis and detailed information on related-party transactions).

The goal of this reporting is to assist countries in: (a) risk assessment; (b) enforcement of transfer pricing requirements; and (c) audit. The reporting under Action 13 has raised a number of implementation issues: (a) burden on the taxpayer; (b) timing of the provision of information; (c) scaling of documentation requirements to reflect the materiality of the taxpayer and the transactions (based on the size and nature of the local economy, and the size and nature of the MNE and its activities both globally and locally); (d) expectations regarding document retention and updates; (e) language requirements for reporting; (f) nature and impact of documentation penalties; (g) confidentiality; and (h) actual implementation (domestic law changes, oversight of taxpayer reporting, mechanism(s) for delivering information—centralized to MNE parent, locally or other options). Among some of the most important concerns that have emerged regarding the design and implementation challenges are: (a) burden: the gap between how MNEs manage their group reporting and the expectations under Action 13; (b) delivery mechanism: the need to ensure taxpayer confidentiality while also ensuring meaningful access to reported information, especially by developing countries; (c) use of information: the expectation that the CbC template will not lead countries to bypass audit and directly impose a transfer pricing adjustment, and the expectation that countries will not abandon an arm’s length approach.

Developing countries may want to devote particular attention to the following key issues in Action 13: (a) the broad goal of Action 13 (to improve information necessary for tax authorities to make valid risk assessments) may be especially valuable to resource-constrained developing countries which must decide where and how to allocate scarce audit resources; (b) similarly, as the Action 13 reporting package (master file, CbC template and local file) becomes the MNE standard, the increased reporting uniformity should also help developing countries conserve and best direct their tax and audit resources; (c) the choice of reporting language can also directly impact the ability of developing countries to access information; thus, reporting at least the
local file in the local language may be very important; (d) the actual availability of CbC data will be diminished for developing countries that have a smaller treaty network, or have few CAAs for automatic exchange under a treaty and must rely on limited tax enforcement staff to make the treaty-based inquiries for all information sought; (e) the ability to ensure confidentiality under domestic law will be vital and will be the subject of peer review; and (f) the capacity-building support that would benefit developing countries in making the most of information available under the Action 13 reporting package.

3.4 Disclosure of aggressive tax planning: BEPS Action 12

Action 13 is not the only part of the OECD project on BEPS seeking increased information from taxpayers. Action 12 targets aggressive tax planning arrangements and seeks taxpayer disclosure regarding these structures. The Final Report for Action 12 was also issued on 5 October 2015.73

3.4.1 Goals of Action 12

Based on the view that countries can more effectively tackle base erosion and profit shifting if they receive timely and relevant information, Action 12 provides a framework for jurisdictions seeking to design a disclosure regime for aggressive or abusive tax planning. Paralleling the work on Action 13, the work on Action 12 includes the design of a reporting standard that specifies who reports, what is reported and when information is reported, and what the consequences for non-compliance are. Many of the same concerns raised under Action 13 for both taxpayers and governments will also arise, including: taxpayer burden, consistency, country-specific needs, and value of qualitative and group-wide information. Action 12 provides three key outputs in service of its general mission: (a) recommendations for the modular design of mandatory disclosure rules; (b) a focus on international tax schemes and consideration of a wide definition of tax benefit to capture relevant transactions; and (c) enhanced

models of information sharing for international tax schemes. In order to achieve the necessary integration of individual country needs and broader international cohesiveness, the Action 12 recommendations for mandatory disclosure aim to allow maximum consistency between countries “while being sensitive to country specific needs and risks and the costs for tax administrations and business.”^74

Not surprisingly, the analysis in the Final Report on Action 12, like that of Action 13, includes extensive consideration of burden on the taxpayer and the benefits to tax enforcement and tax compliance from mandatory disclosure of certain information. However, unlike Action 13, the recommendations under Action 12 are viewed explicitly as modular and optional for jurisdictions seeking to construct a mandatory reporting regime that makes the most sense within their legal system. Action 12 advocates for exchange of information with other jurisdictions regarding abusive transactions and explores how data gathered under mandatory disclosure could be part of the information sharing within the Joint International Tax Shelter Information and Collaboration Network (JITSIC Network).^75 Although all countries should be concerned about the impact of aggressive tax planning structures and transactions on their tax base, many developing countries may find that their more immediate BEPS threat comes from “straightforward” profit shifting. In that case, the recommendations under Action 13 may have more significant, immediate relevance to such countries. That said, if developing countries currently experiencing BEPS through more traditional transfer pricing mechanisms successfully curb this loss of tax revenue, they may find that taxpayers shift to more sophisticated techniques for reducing their tax bill. At that point, Action 12 would take on a greater role in the response of developing countries to BEPS.

3.5 **Summary of the OECD project on BEPS and transparency and disclosure**

The OECD Action Plan on BEPS includes two action items directly bearing on transparency and disclosure. Action 12 outlines options for

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^74 Ibid., at 14.
^75 Ibid., at 81.
jurisdictions looking to design a mandatory regime in their country for disclosure of aggressive tax planning. Perhaps of greater importance for developing countries at present, however, are the recommendations under Action 13 pertaining to documentation of transfer pricing and the multinational group. This action item has been the subject of extensive debate and comment and its three-part reporting package (master file, CbC template and local file) could play a very significant role in developing country tax enforcement. Additionally, Action 11 might play a role in the future to the extent that its anticipated collection of broad-level data regarding the success of strategies targeting BEPS provides guidance on future reform.

4. Other new developments in transparency and disclosure

4.1 Overview

The OECD project on BEPS is the most expansive effort to address base erosion and profit shifting, including through transparency and disclosure. But it is not the only venue for such action. Other work on transparency, disclosure and exchange of information is taking place at the national, regional and global levels—including at the OECD. A review of these efforts helps provide a more complete picture of the tools being developed to enhance the ability of countries to enforce their tax laws in a global economy.

4.2 Automatic exchange of information

4.2.1 Overview

Before the OECD project on BEPS began, countries were struggling with the question of how to improve access to taxpayer information and thus improve tax enforcement. Although global taxpayers are not new and exchange of information provisions have existed in bilateral tax treaties for decades, the explosion of cross-border commercial activity and investment by businesses and individuals has increased the need of tax authorities for information from locations outside their jurisdiction. Existing exchange of information provisions in bilateral tax treaties have been insufficient, in part because
they generally call for exchange of information upon request. But that process can be slow, burdensome and difficult for requesting countries (see section 5.2 below). Many in the international tax community have advocated for automatic exchange of information—a process and commitment between or among jurisdictions to regularly send country specific types of tax-related information regarding the taxpayers of that country. Others, however, have resisted on various grounds, including: domestic traditions of bank secrecy, administrative burden, the inability of the recipient to meaningfully process large quantities of information, and privacy concerns. Perhaps a less often acknowledged reason that some resist automatic exchange of information is related to tax competition. Countries which impose low taxes on outsiders investing in or through their jurisdiction would see little upside to helping the home country gather information and impose tax and thereby negate the “value” of “investing” in that low tax jurisdiction.

4.2.2 Current practices

At present, neither Article 26 (Exchange of information) of the United Nations Model Convention nor Article 26 of the OECD Model Convention requires automatic exchange (see section 5.2 below). However, the United Nations Commentary on Article 26 offers alternative language that would include automatic exchange of information as part of the commitment of the State.\(^{76}\) The OECD Commentary on Article 26 similarly considers automatic exchange of information as one of the mechanisms available for countries to adopt.\(^{77}\) The OECD Model Tax Information Exchange Agreement, which formally uses the upon-request mode of exchanging information, envisages in its Commentary that countries could use the document for automatic exchange of information subject to agreement by the two States.\(^{78}\)

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\(^{76}\) Paragraph 29.2 of the Commentary on Article 26 of the United Nations Model Convention.

\(^{77}\) Paragraphs 9 and 9.1 of the Commentary on Article 26 of the OECD Model Convention.

way, for example, a CAA for automatic exchange of CbC reports could be executed by two jurisdictions pursuant to their existing TIEA, based on the model CAA provided by the BEPS Action 13 Final Report (see section 3.3.4 above). The Multilateral Convention on Mutual Administrative Assistance in Tax Matters provides for automatic exchange of information between members pursuant to terms mutually agreed to by those States (see section 5.4 below). The multilateral model CAA included in the BEPS Action 13 Final Report serves as the foundation for agreement to automatically exchange CbC reports among signatory jurisdictions. As noted above in section 3.3.4, 57 jurisdictions have signed the CAA under the Multilateral Convention as at 26 January 2017.


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4.2.3 Challenges

Successful automatic exchange of information requires several elements: (a) a common standard regarding information reporting; (b) due diligence by financial institutions; (c) an exchange process; (d) a legal framework through which to execute the exchange; and (e) compatible technical systems.\(^\text{83}\) Primary challenges in moving from the idea of automatic information exchange to the reality of widespread committed implementation have included: historic bank secrecy provisions, disagreement on the types of information, reciprocity, confidentiality, taxpayer identification, data security, format and feasibility. The first challenge, bank secrecy, has been under attack since approximately 2009. Over the past seven years, most countries have substantially limited or eliminated domestic rules on bank secrecy that barred their own financial institutions from providing client information (to the local government or foreign governments) and/or barred the country from providing that information to another country pursuant to an exchange of information request.

4.2.4 OECD, the G20 and automatic exchange

The remaining challenges have been the focus of global work over the past two years. As of April 2013, the G20 has formally supported the “progress made towards automatic exchange of information which is expected to be the standard, and urge[d] all jurisdictions to move towards exchanging information automatically with their treaty partners, as appropriate.”\(^\text{84}\) The G20 had given the OECD a mandate to prepare standards and guidance on automatic exchange of information. In February 2014, the OECD released the first part of this project, the “Standard for Automatic Exchange of Financial Account Information:


Common Reporting Standard,” which the G20 approved: “We endorse the Common Reporting Standard for automatic exchange of tax information on a reciprocal basis and will work with all relevant parties, including our financial institutions, to detail our implementation plan at our September meeting.”

As a follow-up to its February 2014 document, the OECD released its more comprehensive “Standard for Automatic Exchange of Financial Account Information in Tax Matters” in July 2014. The July report included: (a) the text of a Model Competent Authority Agreement (CAA) for automatic exchange of certain tax information; (b) the Common Reporting Standard (CRS); and (c) Commentary intended to facilitate uniform implementation of the agreement and standard. Exchange of information under this system requires that each country take two basic steps.

First, countries must implement any domestic law changes necessary for: (a) requiring financial entities to gather and report the designated information; and (b) ensuring appropriate protection of taxpayer data. Second, countries (through their competent authorities) must agree to the exchange on an automatic basis and must set the terms of that exchange (for example, the CAA). The report urges that this agreement be executed under the legal framework of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (see section 5.4 below) because it allows for more than one country to enter into such a competent authority agreement, potentially reducing the amount of negotiating a country must do. Alternatively, the competent authority agreement could be executed under a bilateral tax treaty between two countries. These options

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86 Communiqué, G20 Meeting of Finance Ministers and Central Bank Governors, supra note 84.

foreshadowed the options supported by BEPS Action 13, which also encouraged and facilitated automatic exchange via a multilateral CAA under the Multilateral Convention, or a bilateral CAA under a bilateral tax treaty or TIEA.

Much of the discussion and debate surrounding implementation of automatic exchange of information concerns the same questions that arose in considering the work under BEPS Action 13: the information to be provided, the level of burden imposed, the usefulness of the information and the protection of taxpayer data. One notable difference is that automatic exchange of information places the reporting burden on third-party financial entities, not the taxpayer.

In October 2014, 51 countries signed a Multilateral Competent Authority Agreement committing to automatic exchange of information based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Some States signed as “early adopters” committing to exchanges by September 2017. Others will seek to implement automatic exchange by 2018. In total, as at January 2017, over 100 jurisdictions have committed to exchange under the CRS. As a support to the automatic exchange process, the Global Forum on Transparency and Exchange of Information for Tax Purposes plans to establish a peer review process to ensure effective implementation of the new agreement, although a panel of experts from committed jurisdictions already has been conducting “confidentiality and data safeguard pre-assessments of committed jurisdictions.”

To the extent that the recommendations regarding automatic exchange of information in the July 2014 OECD report form the baseline for automatic exchange of information relationships, developing countries must carefully evaluate whether its contents and structure would adequately meet their informational needs for the foreseeable future. In section 4.3 below, the Common Reporting Standard and the

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Model Competent Authority Agreement are outlined briefly and then analysed from a developing country perspective.

4.3 **Common Reporting Standard and Model Competent Authority Agreement**

### 4.3.1 Overview

The underlying goal of the OECD automatic exchange of information project is to put in place a system that: (a) enables the sharing of taxpayer information that is necessary for effective tax enforcement; and (b) does so in a manner that is sufficiently uniform and standardized that information can be efficiently provided, shared and processed. The OECD commented that it drew “extensively” on the intergovernmental response to the United States financial reporting requirements (the Foreign Account Tax Compliance Act (FATCA)) in designing the CRS (see section 4.5 below for further discussion of the intergovernmental agreements). Under this system, certain financial entities have an obligation to report specified information on account holders to the tax authorities in their own jurisdiction. That jurisdiction would then share the account information with the country in which the account holder is a resident. The expectation is that the emerging standard and system would be a minimum standard of sharing information between jurisdictions. Countries could, of course, decide to exchange additional information.

### 4.3.2 Common Reporting Standard

The CRS details the entities that must report, the type of information to be reported, the types of accounts for which information must be reported and the due diligence required of the reporting financial entities.

**Reporting entities**: Under the CRS, the following types of financial institutions are required to participate in reporting financial information of taxpayers: custodial institutions, depository institutions, investment entities and specified insurance companies (unless there is low risk of evasion). In November 2016, the OECD reported that financial institutions in over 50 participating jurisdictions were already collecting information to be exchanged in 2017, and have in
place the necessary implementing international agreements. Financial institutions in an additional 50 countries are expected to join the reporting process for 2018.90

*Information provided:* The types of financial information to be provided by the reporting financial entities include: interest, dividends, account balance or value, income from certain insurance produces, sales proceeds from financial assets, and other income generated by assets held in the account or payments made with respect to the account.91

*Covered accounts:* The accounts (“reportable accounts”) for which reporting must be made by the reporting financial entities include accounts held by individuals and entities (including trusts and foundations). To limit evasive tax planning, the reporting financial entities must look through passive entities and report on the controlling persons. In terms of providing identifying information regarding the account, the financial entity must report the “name, address, jurisdiction(s) of residence, TIN(s) and date and place of birth (in the case of an individual) of each Reportable Person that is an Account Holder.”92

*Due diligence:* To ensure meaningful and effective provision of information, reporting financial entities must perform a specified level of due diligence aimed at securing accurate information regarding the identity of the account holder. Different standards of diligence are applied depending upon when the account was created, its contents, its value and other information known to the financial entity.

### 4.3.3 Model Competent Authority Agreement

The CAA is drafted as a bilateral agreement between two jurisdictions to commit to the automatic exchange of financial account information. Pursuant to the agreement, the countries agree to have domestic rules requiring financial institutions to report accounts and follow due

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92 Ibid., at 29.
diligence procedures consistent with the CRS and the terms of the specific CAA. Additionally, the signatories confirm that they have: (a) the appropriate safeguards to protect the confidentiality of taxpayer data; and (b) the infrastructure necessary for effective exchange (including mechanisms for “timely, accurate, and confidential information exchanges, effective and reliable communications, and capabilities to promptly resolve questions and concerns about exchanges or requests for exchanges”).

4.3.4 Developing country analysis

4.3.4.1 Overview

A range of developing countries have expressed interest in automatic exchange of information and a number of them have already committed to exchange for either 2017 or 2018. Income tax evasion poses a serious fiscal challenge for many developing countries which rely substantially on the income tax base. Current methods for obtaining information located outside the jurisdiction can be costly or unavailable. Treaties generally permit exchange of information only upon request (a process that can be burdensome in terms of time, money and expertise). Moreover, many developing countries have a more limited treaty network (even including TIEAs), and may not have treaties with key tax haven jurisdictions (used by their residents to avoid the developing country income tax). As a result, some developing countries are among those who have committed to early adoption of the CRS (see section 4.2.4 above)

4.3.4.2 Advantages of the Common Reporting Standard and the Competent Authority Agreement

The overall automatic exchange of information project advances the potential for meaningful income tax enforcement. Widespread dissemination of relevant taxpayer information to the appropriate taxing authorities enhances real enforcement and, more broadly, alerts taxpayers to the risks of tax evasion. As noted in section 4.3.4.1 above, current

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93Ibid., at 21–22.
information exchange mechanisms can be too burdensome to serve as a regular component of tax enforcement. Automatic, bulk provision of the information enumerated in the CRS would significantly reduce the costs of acquiring that information through existing mechanisms. Additionally, the automatic nature of the delivery reduces the opportunity for pressure, leverage and corruption in tax administration.

The scope of taxpayers whose accounts are covered by the CRS further increases the value of the information exchange. The decision to include entities and not just individuals, and to reach trusts and other often opaque holding structures, expands the coverage of this automatic exchange of information system beyond that of some other programmes.

4.3.4.3 Limitations of the Common Reporting Standard and the Competent Authority Agreement

The advantages of the CRS and CAA described above essentially reflect the reduced costs and difficulties of acquiring information compared with obtaining it via an existing bilateral treaty. But the ability to participate in the CRS and CAA is currently contingent upon; (a) meeting the standards necessary to commit to providing—not just receiving—information (required reciprocity); and (b) getting the key jurisdiction to sign a CAA (participation).

4.3.4.3.1 Reciprocity

The CAA is premised on reciprocity between or among signatories. Although countries may sign a CAA in advance of being ready to participate, the agreement takes effect only when they are in fact prepared to share information reciprocally. The only option for non-reciprocal participation in the CRS and CAA is provided for countries which do “not need to be reciprocal” (for example, because one of the jurisdictions does not have an income tax). This has been characterized by some commentators as intended to facilitate automatic exchange of information from tax havens. There is no current model or provision

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95 See, for example, OECD, Standard for Automatic Exchange of Financial Account Information in Tax Matters, supra note 87, at 27.
96 Ibid., at 223.
allowing for non-reciprocal automatic exchange of information with (or more precisely, to) a developing country (that is to say, providing information to that developing country without receiving information in return). The absence of such an alternative may render the current CRS and CAA out of reach of developing countries that cannot currently commit to or meet the standards for domestic collection of the required tax information (that is, the domestic law provisions and enforcement of data collection from reporting financial entities) and the processing and transmission of the information (inside the tax administration). These developing countries could benefit from the receipt of information under automatic information exchange, however. The only requirement they would need to meet would be the protection of taxpayer data. Even if the developing country were not yet able to make maximum use of the bulk data it receives, the country could nonetheless begin to improve tax enforcement with the information.

If non-reciprocity with developing countries were permitted, it could be managed in a gradual manner. The country could commit to meeting established benchmarks for domestic information collection and processing. While the country was meeting the benchmarks, it could receive information under the CRS and CAA, with the goal being full and reciprocal participation. The loss for the other country during this period of time would likely be minimal. Developing countries are typically not the financial destinations of major tax evaders, and developed countries would likely receive little significant information from this automatic exchange of information. Thus, the cost of helping developing countries improve tax collection while building their internal capacity to fully participate in automatic exchange should not be unduly high.

Although a reciprocity phase-in is not currently part of the CRS automatic exchange structure, the Global Forum on Transparency and Exchange of Information for Tax Purposes has identified technical assistance as an important key in enabling developing countries to participate in and benefit from the automatic exchange.\footnote{OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax Transparency 2016: Report on Progress, supra note 89, at 26.} The Global Forum has five pilot projects under way that partner a developing country with
a developed country. The goal is to help the developing country implement the new CRS standard in an “appropriate” time frame. Any developing country member “which is not a financial centre” can request to participate in this technical assistance pilot programme.

More broadly, the Global Forum has introduced a new programme, an “Induction Programme,” designed to help new members (most of which are developing countries) become familiar with the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and to assist them on implementing standards, preparing for reviews, and putting in place the infrastructure necessary to participate in and benefit from the information exchange mechanisms. The Induction Programme engages not only with the tax administration but also with the finance ministries in the developing countries. Current assistance under way includes drafting of automatic exchange of information legislation (assisting 20 jurisdictions), data confidentiality safeguards and information security management (assisting 5 jurisdictions), and automatic exchange implementation seminars (113 participants representing 41 jurisdictions).

Additionally, the Global Forum has engaged with regional partnerships in Africa, Asia and Latin America and the Caribbean.

4.3.4.3.2 Participation

Even with adequate infrastructure to participate in automatic exchange of information under the CRS and CAA, developing countries must

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actually be able to persuade partner countries to sign these agreements. The bilateral version offered as the main example of a CAA would be less effective for many developing countries. It would have to be negotiated on a bilateral basis with each country and could be completed only with current treaty partners (bilateral tax treaties or TIEAs). The alternative, multilateral version of a CAA provided in Annex 1 of the July 2104 OECD document (signed by 51 countries in October 2014, and a total of 87 as at 2 November 2016)\(^\text{102}\) has its legal basis in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (see section 4.2.4 above).\(^\text{103}\) This multilateral version offers two key advantages to developing countries—only a single agreement to negotiate and a wide pool of potential signatory partners. There are, however, three problems.

First, with the availability and prominence of the bilateral version, there may be inadequate motivation for some countries to pursue the multilateral one, although the number of signatories suggests this may not prove to be a significant problem. Second, even if countries do participate in a multilateral CAA, it is not clear that they would be required to invite a developing country to sign (signatories to the multilateral CAA for automatic exchange retain the power to determine which other signatories they will accept as exchange partners). Specifically, some developing countries that have been unable to sign treaties with tax havens may be concerned that tax havens would also refuse to participate in a CAA with them. Yet these havens are key jurisdictions from which a developing country may need to acquire tax information, and unlike developed countries the developing country may have little leverage to persuade or entice the participation of the tax haven. Finally, unlike the United States FATCA regime, which inspired the CRS and CAA, it is not clear what sanctions would apply to non-participants. The absence of sanctions may be a concern for developing countries that are trying to get tax havens to join them in a CAA.


4.4 Industry-specific reporting requirements (natural resources, financial services)

Industry-specific CbC reporting has also been a focus of increased transparency for countries. For example, United States securities law regulations now require extractive industries to report various payments made to foreign governments by businesses engaged in extractive industries (exploration, extraction, processing and export of oil, natural gas or minerals, or the acquisition of a licence to engage in such activity). These payments, which must be reported on a country-by-country basis, include “taxes, royalties, fees (including licence fees), production entitlements, bonuses, and other material benefits.”

On a more global scale, the Extractive Industries Transparency Initiative (EITI) seeks to promote a two-pronged reporting approach for transparency in extractive industries under which businesses report what they pay to each jurisdiction, and the governments report what they receive. However, work on industry-targeted disclosure has not been limited to extractive industries. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC) seeks disclosure by covered financial institutions of information on a country-by-country basis, including: profit or loss before tax, tax paid, subsidies received, average number of employees. Member States of the EU must enact rules domestically to require the reporting.

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106 EITI countries and country reports are available at http://eiti.org/countries.


108 See, for example, the United Kingdom reporting rules which came into effect in January 2014, with the first reporting required by 1 July 2014. See
In some cases, efforts to combat corruption prompted the push for transparency and disclosure initiatives. Where transparency and disclosure serve an anti-corruption role, the public release of disclosed information can be important. Not surprisingly, the nature and scope of any public disclosure of taxpayer data has generated debate and objection in the business community (see sections 2.4 and 3.3.5.4 above).

Although the issue of public disclosure of taxpayer information has been raised by some advocates in the context of BEPS (see section 3.3.5.4 above), the OECD does not expect that Action 13 files would be made available to the public. But corruption concerns have surfaced as a possible factor in the limited collection of income tax in some countries, and public disclosure of at least some information in the master file, CbC template and/or local file could play a role in improving tax enforcement.

4.5 Intergovernmental agreements and related developments

In 2010, the United States enacted the Foreign Account Tax Compliance Act (FATCA). Prompted by the number of United States taxpayers using offshore financial accounts to avoid United States income tax, the new legislation effectively requires a wide range of financial institutions (foreign and domestic) to provide data to the United States regarding its taxpayers who hold accounts at those institutions. The FATCA legislation imposes due diligence and reporting burdens on these third-party entities, and failure to comply can result in negative United States tax consequences for the financial institutions’ own United States source income.

In an effort to streamline compliance for foreign financial entities required to report under FATCA, and to address various disclosure


109 United States Internal Revenue Code, sections 1471–1474.
and confidentiality concerns, a number of countries entered into intergovernmental agreements (IGAs) with the United States that provided specific guidance on the type of information that their own domestic financial institutions would gather on United States taxpayers and detailed how that information would be provided to the United States. These IGAs were negotiated under the legal framework of the existing bilateral tax treaty of each country with the United States. Given the increasing number of IGAs being signed with the United States, other countries have expressed interest in receiving the same type of tax-related information on the foreign financial accounts of their own residents, and have pursued a broader IGA format.

4.6 Beneficial ownership information

Concern over the level of transparency in some jurisdictions regarding beneficial ownership of entities is not new, but the topic received renewed attention in 2016 following a high-profile global leak of significant beneficial ownership data. A number of jurisdictions have now turned their attention to the importance of transparency regarding beneficial ownership of offshore entities. Some have announced steps to register the beneficial ownership of offshore trusts and other entities. The G5 countries have agreed to develop a global multilateral

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110 Ultimately, the United States provided two model intergovernmental agreements that formed the basis of its negotiations with other countries, IGA Model 1 and Model 2.

111 See, for example, letter dated 9 April 2013, signed by the finance ministers of France, Germany, Italy, Spain and the United Kingdom announcing their pilot programme to automatically exchange information (a “multilateral exchange facility”), available at http://taxnews.lexisnexis.co.uk/TaxNewsLive/Members/BreakingNewsFullText.aspx?id=4335&css=1&xml=0. The signatories encouraged other European Union member States to join them in their pilot programme based on IGAs signed with the United States pursuant to FATCA. See also Itai Grinberg, “Taxing Capital in Emerging Countries: Will FATCA Open the Door?” (2013) Vol. 5, World Tax Journal, 325.


4.7 Exchange of government information

A new EU Council Directive of 8 December 2015 called on member States to agree to automatic exchange of advance cross-border tax rulings and advance pricing agreements.\footnote{EU Council Directive 2015/2376. 2015 O.J. (L332) 1, 203 (EU), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2376&qid=1487009643392&from=en.} The impetus for this 2015 Directive came from the public awareness that tax rulings were issued in some member States resulting in low taxes on “artificially high amounts of income in the country issuing . . . the advance ruling” and yet leave “artificially low amounts of income to be taxed in any other country involved” in the transactions or financial flows.\footnote{Ibid., at 1. In parallel developments, the European Parliament created the Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE 1), which was tasked with investigating ruling practices. The European Parliament adopted the final report of the Special Committee on 25 November 2015; the report contains legislative recommendations for tax transparency and for EU-wide tax policy convergence through a common corporate tax base, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN.} Relatedly, in June 2015, the European Commission launched a consultation on corporate transparency, exploring whether requiring MNEs to disclose more information about taxes paid (via public CbC reporting), and/or public disclosure of tax rulings, would reduce tax avoidance

and aggressive tax structuring by MNEs. In July 2015, the members of the European Parliament voted in favour of a revised Directive requiring CbC reporting of taxes paid by MNEs.

4.8 Summary of other developments in transparency and disclosure

In addition to the OECD project on BEPS, there are several other global efforts to limit base erosion and profit shifting. The OECD and G20 have been advocating introduction of automatic exchange of information including a “Common Reporting Standard” for the information that should be exchanged. The OECD released its comprehensive standard in July 2014 (including the CRS itself), a Model Competent Authority Agreement and a Commentary (to facilitate uniform implementation). The CRS specifies which financial entities must report taxpayer information, which information must be reported and which accounts are subject to reporting. Exchange of information as a tool for transparency and disclosure avoids the burdens of pursuing exchange upon request. But it still requires an agreement to the exchange. The implementation of a multilateral CAA through the Multilateral Convention on Mutual Administrative Assistance in Tax Matters obviates the need to enter into many bilateral arrangements. This would be an advantage for countries with few current treaties and limited resources for tax administration. In October 2014, over 50 countries signed a multilateral CAA to implement automatic exchange of information (see section 4.2.4 above). However, even this path (use of the Multilateral Convention) would not guarantee that crucial jurisdictions would join.

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a developing country in exchange of information. Another barrier for developing countries is the “reciprocal” nature of the CAA. Exchanges would start only after both countries complied fully under the agreement. Phasing in reciprocity would allow developing countries to receive valuable tax information and tackle base erosion straight away, while building their internal capacity to comply with all aspects of the CAA. Other potentially interesting initiatives for transparency and disclosure include: (a) efforts such as the Extractive Industries Transparency Initiative, which encourages industry-based reporting of tax payments (with both business and government reporting payments and receipts); (b) bilateral and regional efforts to replicate the kind of information exchange being promised under IGAs that have been signed in the wake of the new United States reporting requirements for financial entities; (c) transparency and disclosure of beneficial ownership of entities; and (d) disclosure of tax rulings to other governments, and potentially the public.

5. **Existing mechanisms supporting transparency and disclosure**

5.1 **Overview**

Significant attention has been directed to transparency and disclosure in recent years, but these concepts are not new to the tax system. For example, tax treaties have included exchange of information provisions for decades, which although more limited in scope and effect than some of the transparency and disclosure projects currently under way, have nonetheless sought to enhance access of a tax administration to vital taxpayer data. A brief review of these existing mechanisms which support and facilitate tax transparency and disclosure provides: (a) a better understanding of what may be needed in new mechanisms; and (b) the role that these current agreements or structures can play in supporting any new developments in transparency and disclosure.

5.2 **Article 26 of the Model Conventions**

Both the United Nations Model Convention and the OECD Model Convention include an Article 26 (Exchange of information) that
outlines the primary terms governing exchange of information between the two signatories: the duty to exchange, the duty to protect taxpayer information, the grounds upon which a request for information can be declined and the grounds which do not form an appropriate basis for refusal to exchange information. The United Nations and OECD versions of Article 26 (and their respective Commentaries) differ in some regards and on balance share several common deficits, but their common features are reflected in the bilateral tax treaties of many countries. Moreover, as referenced below, changes have been made to Article 26 of both Conventions in an effort to increase the likelihood of meaningful exchange of information.

5.2.1 Standard governing requests

As noted earlier, Article 26 of neither the United Nations nor the OECD Model Convention requires automatic exchange of information. Thus, countries requesting information must meet certain thresholds for documenting their request (in other words, “no fishing expeditions”). This step limits jurisdictions to requesting information only about taxpayers and activities for which they already have some knowledge. Moreover, the specific threshold requirements imposed by existing bilateral tax treaties decrease the likelihood that information will be requested. Recent changes to Article 26 of the United Nations Model Convention decreased the impact of these “thresholds.” For example, changes to Article 26 (1) in 2011 sought to extend the scope of exchange of information by providing that information should be exchanged if it is “foreseeably relevant for carrying out the provisions of [the] Convention or to the administration or enforcement of the domestic laws of the Contracting States.” The phrase “foreseeably relevant” replaced the earlier term “necessary.”

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119 Paragraph 4 of the Commentary on Article 26 of the United Nations Model Convention characterized the change to “foreseeably relevant” as one
on Article 26 of the United Nations Model Convention offers some alternative language for the new phrase “foreseeably relevant,” but these options are intended to allow treaty partners to choose language that they find clear in specifying the goal of “effective” exchange of information.\footnote{Article 26 of the OECD Model Convention also uses the phrase “foreseeably relevant.”}

Despite the expanded scope of exchange of information under the “foreseeably relevant” language of Article 26, it is important to note that automatic exchange of information entirely eliminates even a broad test for demonstrating the connection between the requested information and the investigation of the taxing authorities. The automatic receipt of specified bulk data effectively would place no such constraints on jurisdictions seeking information in the designated categories. Additionally, the current “upon request” process requires an allocation of the potentially limited resources of the requesting country, which would be alleviated under automatic exchange of information.

\textbf{5.2.2 Bank secrecy}

Historically, States have declined to comply with a request for information under Article 26 on the grounds that compliance would violate domestic law, specifically, bank secrecy rules. Where countries had such domestic law provisions severely limiting (often under significant penalty) the ability of a financial institution to share information with the government regarding a client, and/or limiting the ability of the government to share such information with another country, domestic law regularly trumped the operation of Article 26. In 2011, Article 26 of the United Nations Model Convention was revised to provide that certain domestic laws may not be used as a defence in complying with an exchange of information request. Thus, the new language in Article 26 (5) states: “In no case shall the provision of paragraph 3 [outlining appropriate grounds to refuse a request] be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or

\footnote{that was not substantive. Rather, it was intended to “remove doubts” and “clarify” the prior language.}
person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.” 121

5.2.3 Information sought not needed by requested State for own purposes

A further 2011 change to Article 26 of the United Nations Model Convention sought to eliminate an additional argument that a State might use to decline to provide requested information: that the State asked to produce the information has itself no need or use for the information in administering its tax law. Article 26 (4) now provides that: “If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information-gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes.” Anticipating that some States might try to argue that they are not legally capable of providing information that they do not need for a tax purpose (despite the language in Article 26 (4)), the United Nations Commentary on Article 26 offers alternative language. This alternative phrasing requires that each Contracting State must undertake to ensure that its competent authority will have the requisite power under domestic law to secure the information needed for tax treaty information exchange purposes. In some cases, domestic legislation, rulemaking or administrative changes may be necessary to ensure that power.122

5.2.4 Format

Article 26 exchange of information provisions do not require that information be provided in a certain format. But more uniformity in the content and format of information provided by taxpayers to the government might, increasingly, lead to the government of a requesting State receiving information in a desired format. For example, recommendations under BEPS Action 13 would notably enhance transparency and disclosure by requiring that taxpayers collect, generate and

121 Article 26 of the OECD Model Convention also bars refusal on the grounds of bank secrecy.

122 See paragraph 26.3 of the Commentary on Article 26 of the United Nations Model Convention.
provide information in a specified format to the tax authorities. This rule, implemented in each jurisdiction through domestic legislation (master file, CbC template and local file reporting requirements), would shift the burden to the taxpayers, who have a distinct ability to access their own information. To the extent that reporting for the master file, CbC template and local file is fairly uniform and consistent over time, across countries and across taxpayers, the information may be easier for tax authorities to use. For resource-constrained developing countries, this uniformity could facilitate training and decrease audit burdens.

5.2.5 Article 26 of the Model Conventions: summary

Existing bilateral tax treaties still constitute a relevant tool in encouraging transparency and disclosure. First, they can provide the legal basis or framework for an agreement between competent authorities to exchange information on an automatic basis (as can TIEAs or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (see sections 5.3 and 5.4 below)). Second, they may explicitly permit requests regarding persons neither resident nor engaged in economic activity in the State from which information is sought. An automatic exchange of information arrangement would be unlikely to include data regarding such persons. Third, the “residual” ability under Article 26 provisions to seek information upon request remains useful if a country finds that it requires information beyond the scope of that provided automatically.

Although bilateral treaty provisions based on Article 26 of either the United Nations or the OECD Model Convention are inadequate in meeting the full range of transparency and disclosure needs of tax administrations today, they continue to provide possible access to information not likely available through automatic exchange of information or through the taxpayer reporting envisaged by BEPS Action 13 recommendations.

5.3 Tax Information Exchange Agreements

TIEAs are stand-alone agreements, typically negotiated between countries that have not negotiated a bilateral tax treaty, that focus exclusively on exchange of information. The expectation is that even
countries that do not have a bilateral treaty may still seek to exchange tax information. The TIEA provides the legal basis and structure for doing so. The OECD Model TIEA, not surprisingly, is very similar to Article 26 of the OECD Model Convention (and the United Nations Model Convention). The primary differences between the OECD Model TIEA and Article 26 include the following: (a) TIEAs can be bilateral or multilateral; (b) TIEAs focus on exchange “upon request”; (c) TIEAs cover specific taxes; and (d) TIEAs provide more detail regarding the information that the requesting State must provide to initiate its request.

For countries pursuing increased transparency and disclosure in tax, TIEAs provide a legal framework and context to agree to exchange information automatically. That is, although TIEAs call for exchange “upon request,” they permit contracting States to expand their cooperation through agreement by the competent authorities. Thus, as with comprehensive bilateral treaties in the case of Article 26, TIEAs can serve as the legal foundation for countries to agree to automatic exchange under CRS and under the BEPS Action 13 CbC framework. To the extent that some developing countries have a more limited network of comprehensive tax treaties but do have a network of TIEAs, such a role for TIEAs could become important.

5.4 Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The multilateral Convention on Mutual Administrative Assistance in Tax Matters, which originally was developed by the OECD and the Council of Europe in 1988, was amended in 2011 to welcome all countries as participants. At present, over 60 countries have signed the Convention, including developing countries. The Convention must be signed and ratified by a country in order for it to apply — and countries can make individual reservations to the basic terms of the Convention. As a result, reliance on the Convention depends upon whether the countries in question have ratified it and whether they have made any

relevant reservations to significant terms. But, as a multilateral framework, the Convention offers a potentially valuable legal foundation for countries looking to pursue enhanced transparency and disclosure among a group of nations in a relatively simultaneous and efficient way.

With respect to exchange of information, the Convention includes a comprehensive consideration of: (a) prerequisites to exchange; (b) what can be exchanged; and (c) the mechanism for exchange. As drafted, the Convention envisages exchange of information upon request, spontaneously and automatically (according to procedures and terms mutually agreed to by two or more parties).\textsuperscript{124}

The Commentary on the Convention emphasizes the value of standardization in automatic exchange, noting savings in time and workload, but observes that these advantages accrue primarily when large numbers of countries participate in the standardization process. The Multilateral CAA that was signed by 51 countries in October 2014 (and by over 100 as at January 2017), committing to automatic exchange of information, is grounded in the legal framework of the Convention, with the advantages and concerns for developing countries noted in sections 4.3.4.2 and 4.3.4.3 above.

\subsection*{5.5 Regional agreements}

In addition to bilateral tax treaties, TIEAs and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, regional agreements exist which could serve as the legal basis and framework for exchange of information among the signatory States. Examples of such regional agreements include: (a) the 2008 West African Economic Monetary Union (WAEMU) Income and Inheritance Tax Convention (Article 33); (b) the South Asian Association for Regional Cooperation (SAARC) Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance (Article 5); and (c) the Agreement Among the Member States of the Caribbean Community (CARICOM) for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment (Article 24). However, a major limitation of

\textsuperscript{124}Ibid., Articles 6 and 7.
regional agreements is their membership. Both the requesting State
and the country from which it is seeking information must be mem-
bers of the applicable regional agreement. To the extent that the tax-
payers of a country conduct business or hold their assets and accounts
in other jurisdictions, the regional agreements offer little assistance.
Moreover, their relatively abbreviated exchange of information provi-
sions do not detail the expectations regarding the delivery mechanism
for information and do not call for automatic exchange.

5.6 Global Forum on Transparency and Exchange
of Information for Tax Purposes

5.6.1 Overview

In the late 1990s, many countries became concerned with the effects
of tax havens and preferential tax regimes which impeded effective
tax enforcement by virtue of their lack of transparency and their lack
of information exchange. As a response, the predecessor of the cur-
tent Global Forum on Transparency and Exchange of Information
for Tax Purposes was formed in 2000 under the auspices of the
OECD. The Global Forum has 139 members (as at February 2017),125
including developed and developing countries, and OECD and
non-OECD members.

The Global Forum has pursued two projects relevant to transpar-
ency and disclosure: (a) the development of the Model Tax Information
Exchange Agreement (TIEA) (see section 5.3 above); and (b) the devel-
opment and implementation of the peer review process (the legal and
regulatory framework for assessing countries’ compliance with the
standards for transparency and exchange of information). The peer
review process, which began in 2009, is undertaken in two phases
(Phase 1 and Phase 2), although they can be combined.126 The review
evaluates a country by reference to its capacity for and actual perfor-
mance in providing information upon request. Thus, the peer review
process explores the degree to which a country is compliant with

125 See http://www.oecd.org/tax/transparency/.
126 OECD, Global Forum on Transparency and Exchange of Information
commitments under treaty provisions comparable to Article 26 of the United Nations and OECD Model Conventions, or to the Model TIEA. Additionally, following the signing of the Multilateral CAA for automatic exchange, the Global Forum announced its intent to establish a peer review process to ensure compliance with the exchange commitment (see section 4.2.4 above).

The current peer review process examines the domestic laws and practices of a country along a number of dimensions to assess whether: (a) the ownership and identity of entities and arrangements are available to the competent authority; (b) reliable accounting records are maintained for such entities; (c) account holder banking information is available; (d) the competent authority has the power to obtain and provide information pursuant to an exchange of information request; (e) appropriate safeguards apply to persons in the requested country; (f) all relevant partners are covered by the network of information exchange mechanisms of the jurisdiction; (g) adequate confidentiality mechanisms exist to protect information received; (h) the rights and safeguards of taxpayers and third parties are respected; and (i) information is provided in a timely manner for requests made under its exchange of information mechanisms.

Input is sought from all members of the Global Forum during the process of reviewing a specific country. Members complete an extensive questionnaire about their own practical experience in working with the country under review. The review is performed by an assessment team (two expert assessors from peer jurisdictions, along with a coordinator from the Global Forum secretariat). The report of the team is presented to the 30-member Peer Review Group (PRG), and upon approval becomes a formal report of the PRG. At that stage, the entire membership of the Global Forum is asked to approve the report. To date, 113 countries have participated in the peer review process and have been the subject of a completed and published report.

As part of the review process, recommendations are made to countries for ways in which to improve their ability to participate and cooperate in exchange of information. Over 80 countries have introduced or proposed domestic law changes in order to implement the more than 400 recommendations that have emerged from the peer review process.  

5.6.2 Developing countries and the Global Forum

From the perspective of a developing country, a number of observations can be offered regarding the work of the Global Forum. First, the promotion of TIEAs can be beneficial to jurisdictions not currently in a position to negotiate many bilateral treaties. Second, to the extent that the peer review process improves the general transparency of domestic banking, tax and regulatory rules of other jurisdictions, developing countries may gain. Assuming that developing countries would have had little leverage to instigate these transparency changes on their own, they may now find that their information requests made to other jurisdictions are more efficiently managed.

Third, a peer review of a developing country itself may provide support for the internal efforts of the tax administration to encourage and effectuate domestic law (and practice) changes consistent with active participation in exchange of information. This will be most true where the developing country receives any needed and requested technical assistance on the more detailed facets of managing information and requests. As discussed above in section 4.3.4.3.1, the Global Forum on Transparency and Exchange of Information for Tax Purposes has introduced new programmes to provide more effective and targeted technical assistance to developing countries. Fourth, the current benchmark for the peer reviews is exchange upon request (which still imposes burdens on developing countries (see section

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4.3.4.1 above)). But the domestic law and infrastructure standards that the peer review process promotes would also be essential if and when countries ultimately adopt some version of automatic exchange of information. Finally, to gain the maximum benefit from enhanced compliance by other countries, developing countries need to be in a position to request information (until automatic exchange takes hold) and to make effective use of such information. Additional work by the Global Forum in providing relevant assistance to developing countries, consistent with the G20 emphasis on ensuring that all States benefit from improved exchange of information, would help guarantee that developing countries are not just providers of information but also knowledgeable “consumers” of exchanged information.\textsuperscript{130}

5.7 Summary of existing support for transparency and disclosure

Transparency and disclosure are not new to the international tax system. The versions of Article 26 of both the United Nations and the OECD Model Conventions call for exchanging information “upon request” and in recent years, changes made to the provision have enhanced the likelihood of effective and useful information exchange taking place. Among the most important reforms are: (a) elimination of domestic bank secrecy rules as a justification for denying a request for information; (b) reduction of the threshold that the requesting State must meet to demonstrate that the information requested is “foreseeably relevant for carrying out the provisions of [the] Convention or to the administration or enforcement of the domestic tax laws of the Contracting States”; and (c) elimination of the argument that requested information

\textsuperscript{130}See, for example, Communiqué, G20 Meeting of Finance Ministers and Central Bank Governors (Moscow, 20 July 2013), available at http://en.g20russia.ru/events_financial_track/20130719/780961553.html (“All countries must benefit from the new transparent environment and we call on the Global Forum on Exchange of Information for Tax Purposes to work with the OECD task force on tax and development, the World Bank Group and others to help developing countries identify their need for technical assistance and capacity building”); OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, \textit{Tax Transparency 2013: Report on Progress}, supra note 129, at 25.
need not be provided because the requested State itself does not need the information. Additionally, the work of the Global Forum, particularly in the peer review process, has the potential to help countries seeking to improve their own transparency and disclosure laws (which will improve both their own enforcement capacity and their ability to participate globally in transparency and disclosure projects). Moreover, to the extent that the peer review process improves the transparency and disclosure capacity of countries from which a developing country is seeking information, the developing countries need not expend resources to encourage such reform in its partners.

6. Summary observations regarding the role of tax transparency and disclosure in preventing base erosion and profit shifting

Base erosion and profit shifting are critical problems for all countries, but especially for developing countries that rely significantly on the corporate income tax. Although many reforms will be important for a successful global response to this challenge, increased transparency and disclosure regarding multinational businesses are essential. Countries face a number of barriers to achieving this level of transparency and disclosure. First, domestic law may not currently require adequate reporting regarding financial accounts, cross-border related-party transactions, foreign financial assets or foreign business activities. The final recommendations from the OECD project on BEPS, in particular those grounded in Actions 12 and 13, can serve as useful guides for countries exploring domestic reform. Additionally, the Global Forum peer review process provides a mechanism for both assessing and facilitating domestic improvements in transparency and disclosure.

Second, countries may face domestic enforcement impediments to their effective acquisition and use of information. Developing countries that are resource-constrained (for example, limited audit staff, limited international tax expertise, limited technological resources) might find it difficult to seek and acquire the information necessary to effectively audit all of the major multinational businesses operating in their jurisdiction. To the extent that proposed reforms can ease any of these constraints or burdens, they may be particularly useful to developing countries. Conversely, if reforms require resources or treaty
relationships not currently available to many countries, their formal adoption will likely have less impact on resource-constrained States.

Third, effective responses to BEPS will require engagement with the broader tax community. Information can be sought directly from taxpayers, but often important information will be needed from other countries. Thus, the crucial question is whether a State has treaty relationships (bilateral, TIEA or other) with the countries from which it is most likely to need information. If the transparency and disclosure reforms rely less on bilateral relationships and more on multilateral approaches, jurisdictions with more limited treaty networks can more readily enjoy the benefits of the new reforms.

Among the most prominent transparency and disclosure reforms currently under way are the documentation reforms in Action 13 of the OECD Action Plan on BEPS (focused on improved reporting for transfer pricing documentation and the global activities of a multinational group). The reporting package under Action 13 includes: (a) the master file (standardized global information regarding the multinational group); (b) the CbC template (which reports selected information on a country-by-country basis for the group, along with identifying information on entities operating in each jurisdiction); and (c) the local file (more country-specific details regarding activities, assets, income and related-party transactions). The reporting package should help tax administrators assess risk and focus audit efforts. This assistance is especially valuable for resource-constrained countries seeking to allocate scarce audit resources to their more serious and relevant BEPS problems. A number of important issues continue to be debated regarding Action 13. The decision to have MNEs provide the CbC report only to the residence jurisdiction of the MNE parent (then to be shared via treaty), means that developing countries with limited treaty networks, or limited resources to pursue treaty requests, or both, will face a burden in retrieving the information. At the same time, taxpayers have voiced concerns over their own potential documentation burden, the risks of inadequate data protection and the possibility that countries could use the information in unintended ways (for example, as a replacement for audit).

The OECD project on BEPS is not the sole avenue for potential reforms in transparency and disclosure. The OECD and the G20 have
advocated for increased use of automatic exchange of information. To further this goal, in 2014 the OECD released a proposed Common Reporting Standard (CRS) along with a Commentary for automatic exchange of information. In October 2014, 51 countries signed a Multilateral Competent Authority Agreement under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters committing themselves to automatic exchange; by January 2017, the number was over 100. As with the work under Action 13, reforms that increase uniform provision of information more directly to States can be distinctly advantageous for developing countries trying to maximize the impact of their available tax administration resources. A critical question is the ease with which countries can join an automatic exchange of information. The multilateral mechanism for sharing information best serves States with limited treaty partners. But other barriers, including reciprocity, may constrain the ability of developing countries to participate. Allowing developing countries temporary access to automatic exchange on a non-reciprocal basis would enable these countries to start tackling base erosion immediately, with relatively little risk to other countries.

Finally, countries can continue to explore the use of existing bilateral treaties and TIEAs to seek taxpayer information. The United Nations and OECD Model Conventions both incorporate new standards that reject bank secrecy as a ground for refusing to share information and reduce the burden of the requesting State to show the precise use of the information sought.

Ultimately, transparency and disclosure of information remain vital to the effective enforcement of tax laws in a global economy. All countries should be attentive to the existing techniques for obtaining needed information, and should evaluate active reform proposals for their relevance, effectiveness and required capacity-building. Transparency and disclosure have centre stage in international tax policy reform, and the goal is to ensure that the outcomes of this focus meaningfully reduce the base erosion and profit shifting faced by jurisdictions around the world.