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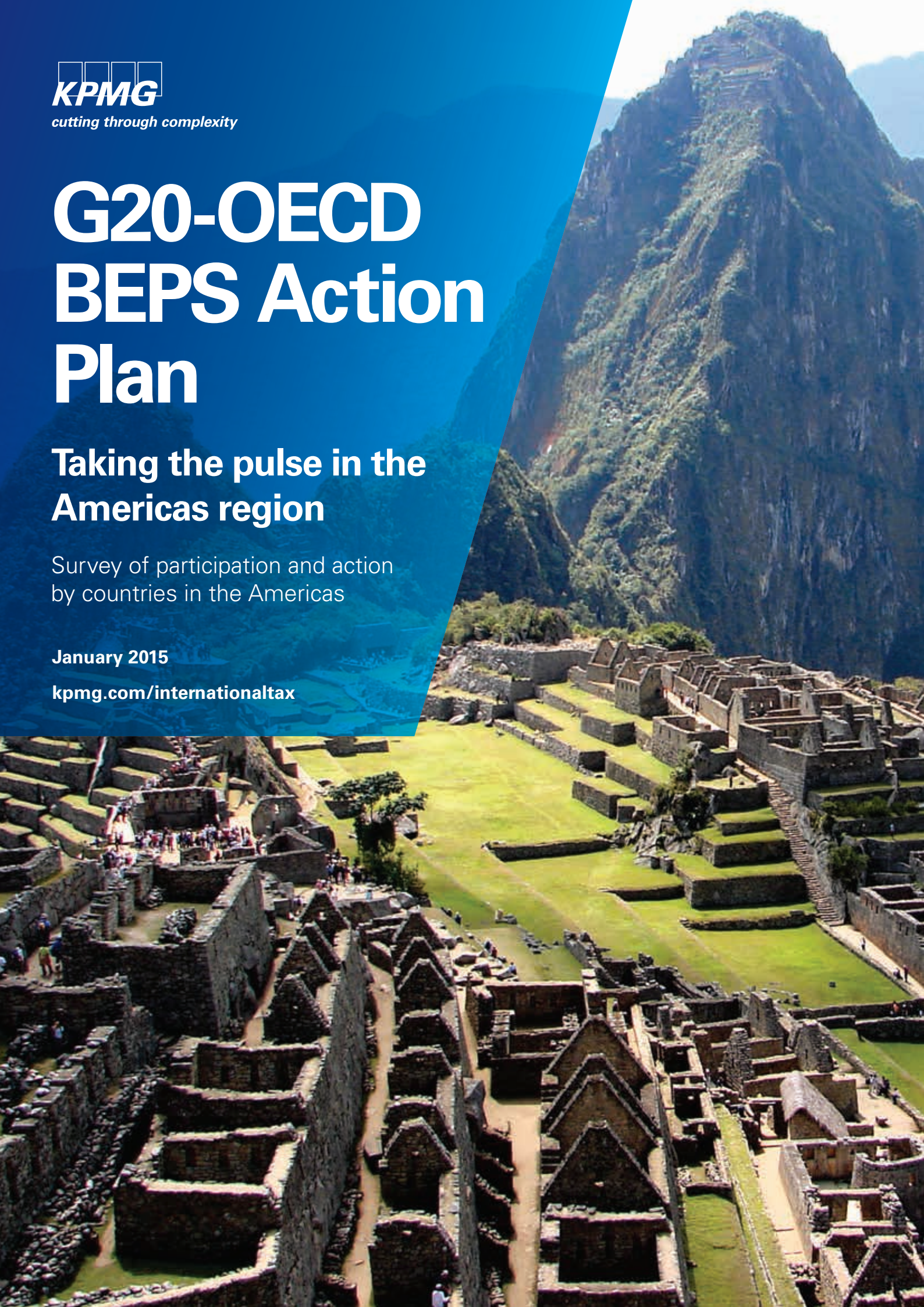
G20-OECD BEPS Action Plan

Taking the pulse in the Americas region

Survey of participation and action
by countries in the Americas

January 2015

kpmg.com/internationaltax



Introduction

For tax executives of international companies headquartered in the Americas, the future of international taxation has never been more uncertain. The global project to address tax base erosion and profit shifting (BEPS) is in full swing, and the Organisation for Economic Co-operation and Development's (OECD) Action Plan on BEPS¹ is progressing quickly. The OECD's recommendations are starting to take shape, but what it will ultimately recommend and how individual countries will translate these recommendations into law are still unknown.

While countries in Europe and North America may appear to have the strongest voices in the debate, many countries in Latin America are influencing – and being influenced by – the profound international taxation changes that are under review.

How is BEPS-related tax policy evolving in the diverse Americas region? At the mid-point in the G20-OECD Action Plan's two year mandate, KPMG International ("KPMG") polled senior tax policy specialists in KPMG member firms across the Americas to take stock of trends and developments in these countries. In particular, we asked:

- How are Americas' governments responding to the G20-OECD BEPS Action Plan currently in progress?
- Which governments may adopt the new international tax guidelines that will result?
- What unilateral actions to combat BEPS and other perceived tax avoidance are governments in the Americas taking and/or considering outside of the OECD BEPS process?
- What are the potential implications for international companies doing business in the region?

Our findings are set out in the following pages, starting with an overview of BEPS-related trends in the region as a whole, followed by an in-depth look at how events are unfolding in selected Americas countries. We conclude with guidance that tax directors of international companies should consider now to address these changes and help them continue to thrive in the Americas' new tax reality.



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¹ Organisation for Economic Co-operation and Development (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing. <http://dx.doi.org/10.1787/9789264202719-en> (referred to herein as 'OECD Action Plan').

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Bracing for BEPS: Are you ready?





G20-OECD BEPS Action Plan:

Taking the pulse in the Americas region

G20-OECD BEPS Action Plan: Taking the pulse in the Americas region

“The tension between developed and developing countries appears to be easing as the Action Plan moves forward.”

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On 19 July 2013, the OECD released its Action Plan on BEPS, identifying 15 specific actions that will give governments the domestic and international instruments to help prevent multinational corporations from paying little or no taxes. The OECD's goal is to achieve consensus on a coordinated implementation of uniform international taxation principles for the modern age.

According to the OECD, the Action Plan's rationale is that globalization of the world economy has resulted in multinational enterprises shifting from country-specific models to global models with integrated supply chains, centralization of service functions, location of activities that are distant from the physical location of customers and increasing delivery of service and digital products over the internet. The OECD says these developments have created opportunities for multinational enterprises to greatly reduce their tax burden, leading to heightened sensitivity on what paying one's fair share really means.

On 16 September 2014, the OECD released seven documents totaling 720 pages and covering Action Plan items in several areas, including the digital economy, transfer pricing for intangibles, transfer pricing documentation and hybrids. In reality, these deliverables are interim reports for the broader work-in-progress, which is on track for completion by the end of 2015. The individual projects have significant interdependencies that will require skilled coordination, and so the deliverables to date need further work.

Sometimes, this extra work reflects a need to gain greater consensus among the high number of countries involved. Despite skepticism that such consensus can be achieved, there are encouraging signs. No participating country has decided to opt out of the process. And while the degree of flexibility and optionality within some of the Action Plan items leaves room for inconsistent implementation, it will enable the project to move forward.

G20-OECD BEPS Action Plan Items

- * Action 1 – **Address tax challenges of the digital economy**
- * Action 2 – **Neutralize effects of hybrid mismatch arrangements**
- Action 3 – **Strengthen controlled foreign company rules**
- Action 4 – **Limit base erosion via interest deductions and other financial payments**
- * Action 5 – **Counter harmful tax practices more effectively, taking into account transparency and substance**
- * Action 6 – **Prevent treaty abuse**
- Action 7 – **Prevent artificial avoidance of permanent establishment status**
- Actions 8, 9, 10 – **Assure transfer pricing outcomes are in line with value creation**
- * **Action 8 – intangibles**
- Action 9 – risks and capital**
- Action 10 – other high-risk transactions**
- Action 11 – **Establish methodologies to collect and analyze data on BEPS and the actions to address it**
- Action 12 – **Require taxpayers to disclose their aggressive tax planning arrangements**
- * Action 13 – **Re-examine transfer pricing documentation**
- Action 14 – **Make dispute resolution mechanisms more effective**
- * Action 15 – **Develop a multilateral instrument**

* = deliverable released in September 2014
Source, KPMG International, 2014.

Which countries are on board?

In their engagement with the G20-OECD BEPS Action Plan, countries in the Americas fall on a spectrum that runs from full participation and commitment to non-engagement. At one extreme, countries that are both G20 and OECD members – **Canada, Mexico** and the **United States** – are highly engaged and making their views known as the BEPS proposals take shape. New OECD members in the region, like **Chile** (joined in 2010) and **Colombia** (which is in the OECD accession process), are similarly on board.

Countries that aspire to OECD membership, like **Costa Rica** and **Peru**, will probably follow the OECD guidelines as part of their efforts to develop their tax and financial systems. **Costa Rica** has recently proposed thin capitalization rules, domestic rules to enable exchange of tax information with other countries, anti-tax haven rules and other anti-BEPS legislation. **Peru** already has in place a number of such rules (e.g., on controlled foreign companies, thin capitalization, indirect share transfers). **Peru** has also negotiated limitation on benefits clauses in recently concluded treaties, and the OECD's BEPS project may exert further influence on its tax treaty policies.

Along the middle of the spectrum are G20 countries, such as **Brazil**, which are engaging in the OECD discussions but could pick and choose to adopt only those aspects of the BEPS proposals that suit their domestic purposes.

Many of the Caribbean countries that are perceived as low-tax jurisdictions, such as **Barbados** and **Curacao**, are watching the project unfold quietly on the sidelines to determine how changing international tax principles could affect their tax regimes.

They are also pursuing bilateral exchange of tax information agreements in efforts to avoid being blacklisted as harmful tax regimes.

Finally, many of the region's developing countries have shown little interest to date in the OECD's project. With scant foreign direct investment, low international activity and generally less developed taxation systems, these countries do not see BEPS as a priority.

Building consensus

The G20-OECD Action Plan items are targeted to be complete by the end of 2015. However, many new developments and activities will certainly occur within and beyond this timeframe. The plan is ambitious, and it will be difficult to align the taxation approaches of so many countries, especially given their different economies and stages of development. The OECD's working groups have kept to the G20-OECD Action Plan timetable so far, and it seems likely that they will continue to deliver according to plan.

However, there are concerns that the plan is so complex and large in scope that the outcomes could lack sufficient depth and detail, opening opportunities for divergent interpretations as countries transpose the guidelines into domestic law. Further, the deliverables produced so far, in areas such as hybrid mismatches and transfer pricing for intangibles, cannot be considered as complete. More thinking needs to be done to integrate the Action Plan's 2014 deliverables with the items to be delivered in 2015.

Notwithstanding the goal of consistent and coordinated implementation, some countries, like **Mexico**, have enacted legislation in some areas, despite pressure from businesses and other countries against unilateral activity.

Such implementations in advance of the final proposals could disrupt the creation of a harmonized international tax system that the G20-OECD Action Plan aims to achieve.

Developed versus developing countries – narrowing the divide

The G20-OECD Action Plan builds on existing fundamental tax principles of residence-based taxation, with limited discussion of potential alternatives, such as unitary or destination-based taxation. At the project's outset, there was concern that because certain OECD members in developed countries were leading the debate, thinking on BEPS would be dominated by tax models that favor developed countries.

For example, as capital exporters, OECD countries like the United States have an interest in residence-based taxation, which allows them to tax a bigger share of repatriated profits earned offshore. As capital importers, developing countries in Latin America stand to benefit more from taxation based on source, so they can tax a larger share of income generated within their borders.

However, the tension between developed and developing countries appears to be easing as the Action Plan moves forward. The OECD has recognized that, for this collective international effort to succeed, developing countries need to have a voice in the BEPS project to avoid perceptions that the proposals tilt too far toward the benefit of developed countries.

Earlier this year, at the G20's request, the OECD held a series of direct consultations on BEPS in Latin America, Asia and Africa, and later released a two-part report² on the potential impact of BEPS in low-income countries. In the report, the OECD says it recognizes that the risks faced by developing countries from BEPS, and the challenges faced in addressing them, may differ in nature and scale to those faced by developed countries. Therefore BEPS actions for developing countries may need specific emphases or nuances compared to those most suitable for advanced economies.

The two-part report points out that developing countries need help to build the legislative and administrative capacity to implement and enforce highly complex rules and to examine well-advised and experienced multinational enterprises (MNEs). Some key concerns of developing countries have already shaped the Action Plan deliverables. For example, the revised transfer pricing rules and template for country-by-country reporting to tax administrations responds to developing countries' needs. However, the OECD says the engagement of developing countries in the design of solutions needs to be stepped up and that it will further strengthen the way it engages with developing countries.

Preparing for uncertainty

As you will see in the individual country discussions that follow, despite the OECD's efforts to bring together a diverse range of countries with competing objectives to forge consensus on international tax principles, there is still risk that its implementation will be fragmented among individual jurisdictions. International companies in the Americas could experience more uncertainty and tax controversy in the coming years than ever before.



² Organisation for Economic Co-operation and Development, *A Report to the G20 Development Working Group on the Impact of BEPS on Low-Income Countries*, Part 1 (July 2014) and Part 2 (August 2014).

Tax health check: Top 5 items for review

What can tax directors in the Americas do now to begin preparing for the coming wave of change? At the end of this report, you will find general advice that companies should think about, no matter where they operate. In examining their existing tax arrangements, companies should consider giving high priority to 5 specific areas:

1. Consider existing **hybrid entities and structures** and investigate potential alternatives.
2. Determine there is sufficient **business substance** in offshore business structures, especially those involving low- or no-tax jurisdictions.
3. Review the extent and nature of your **business presence in foreign jurisdictions** in light of potential changes to existing permanent establishment concepts.
4. Develop a central approach to **transfer pricing** and prepare processes and tools to enable **country-by-country tax reporting**.
5. Prepare your **plan for communicating your tax position** to your various stakeholders.

Above all, given the quick pace of the BEPS project, companies should closely **monitor developments** and their **potential impact** on their tax processes and structures. They should also **take a proactive role in BEPS consultations** to determine that practical business issues are raised and considered early in the process.

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Countries in focus: Action or reaction?





ARGENTINA



As a member of the G20, Argentina supports the goals of the OECD's Action Plan and intends to follow the recommendations that result. No significant legislative changes have been adopted to date in direct response to the OECD's work, but the country has taken steps to address perceived international tax avoidance through domestic measures.

In recent years, companies in Argentina have faced increasing audit activity from the tax authorities at all jurisdictional levels, and international transactions are in focus. In particular, transfer pricing and thin capitalization transactions have attracted scrutiny and more recently tax audit activity has targeted imports and treaty shopping.

Argentine tax authorities are particularly inclined to challenge tax-motivated transactions and structures on the basis of 'substance over form'. The principle is embedded in Argentina's Tax Procedures Act, and Argentine tax authorities apply it broadly to disregard the legal form of an arrangement and apply tax on the basis of the form or structure that best reflects the taxpayers' actual intention.

of conduit companies and other areas, depending on the treaty.

Argentina recently signed new treaties with Spain and Switzerland, and talks toward a new treaty with Chile have commenced. In addition to eliminating the potential for abuse, the new Swiss and Spanish treaties incorporate the current international standard regarding the automatic exchange of tax information.

The new treaty with Switzerland provides for reduced withholding rates on dividends, interest, royalties and capital gains. It also provides for the exchange of information on request (Article 25). The treaty is still to be ratified by both governments and is expected to enter into force in 2016.

Preventing treaty abuse

Tax avoidance involving tax treaties have received particular attention. In 2011, an Argentine government commission reviewed the country's tax treaty network to determine whether there was potential for abuse. The following year, Argentina unilaterally terminated its tax treaties with Switzerland, Spain and Chile, mainly to eliminate the Argentine wealth tax exemption and also to address perceived potential for abuse regarding withholding taxes on royalties and inappropriate use

White list of cooperative jurisdictions

Argentina has replaced its black list of tax havens with a white list of 'cooperative' countries, for transparency purposes. A 2013 decree³ established that, for all purposes of Argentine income tax law and regulations, any reference to 'jurisdictions with low or null taxation' is understood to refer to jurisdictions not

³ Decree No. 589/2013, dated 27 May 2013.

considered to be 'cooperative for the purposes of tax transparency'.

Cooperative jurisdictions are those that have entered into or are negotiating a tax treaty or exchange of information agreement with Argentina. Accordingly, countries and territories that are not on the white list are considered countries with low tax or no taxation – tax haven jurisdictions. The white list is periodically updated and posted on the Argentine tax authorities' website.⁴

The income tax law also sets out special provisions for transactions between Argentine taxpayers and parties in non-cooperative countries (formerly 'tax havens'). These include:

- Argentine controlled foreign corporation rules
- non-deductibility of certain expenses until they are effectively paid
- increased withholding rates on interests
- application of Argentina's transfer pricing regime.

In addition, Argentine procedural tax law applies a presumption that deems amounts received by a local party from a non-cooperative jurisdiction to be an increase in assets not justified by the local party. The law therefore subjects the local party to income tax and value added tax on a taxable base of 110 percent.

Punitive withholdings on exports to non-cooperative jurisdictions

Argentina's tax administration issued a resolution⁵ in January 2014 establishing a withholding regime for export of goods in cases where the final destination is different from the buyer's country of residence. This rule is related to transfer pricing and aims to address some harmful practices that affect Argentine taxation. The tax applies at the rate of 0.5 percent on the value used for customs duties – and at 2 percent on the customs value used for exports billed to non-cooperative jurisdictions.

Focus on related-party data

Argentine tax authorities are also making efforts to gather more information concerning taxpayers' transactions with related parties either located in Argentina or abroad. In 2013, Argentina issued new tax information reporting requirements. Among other things, this guidance introduced a

new system for registering contracts entered into by Argentine taxpayers with foreign entities and for reporting certain financial statements.⁶ The rule applies to specific types of entities or investment vehicles conducting business operations in Argentina that involve cross-border transactions, effective 3 January 2014.

Given the Argentine tax authorities' focus on substance over form, foreign companies doing business there should be sure to have a sound, well-documented business purpose for their business structures and transactions. In many litigated tax disputes that have reached the country's Supreme Court, taxpayers that have been able to demonstrate the business substance of their arrangements have been more likely to achieve a favorable outcome.



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⁴ <http://www.afip.gov.ar/genericos/novedades/jurisdiccionesCooperantes.asp>

⁵ Resolution No. 3577.

⁶ Resolución General N° 3573/13.

BRAZIL



Brazil has a long history of going its own way where international tax standards are concerned. Brazil is taking part in OECD working group meetings as a vocal observer but has not committed to adopting the BEPS project's results. However, there are signs that Brazil may be prepared to adjust its international tax rules in selected areas to bring the rules somewhat more in line with global norms.

BEPS already on tax authorities' agenda

As the recipient of significant foreign direct investment, Brazil has been concerned about BEPS for many years. The country has had a number of international tax rules, foreign exchange controls, and other measures in place for several years to stem the flow of earnings outside the country. For example, royalty payments for foreign related parties are subject to statutory limits and require approval by a regulatory agency based on a detailed analysis.

Traditionally, Brazil has been unwilling to harmonize with OECD international taxation principles, for example, in its transfer pricing, thin capitalization and controlled foreign corporation (CFC) regimes. Brazil's current versions of these rules leave little scope for BEPS-style tax planning. Rather, they often expose companies to double taxation risk, and there is no recourse to OECD-sanctioned mechanisms, such as mutual agreement procedures, for resolving double tax disputes.

Moving closer to international norms?

Because Brazilian transfer pricing requirements do not follow the arm's length principle, most companies face challenges in supporting their transfer pricing policies in Brazil. A recent ruling by the Brazilian tax authority states that a report issued by an independent company is acceptable for evidencing the costs incurred by the tested party abroad, provided the report verifies the costs of production incurred by the supplier abroad and documents the costs using data available at origin. By potentially allowing taxpayers to align their transfer pricing policies, this ruling could help eliminate potential contingent liabilities, reduce taxable adjustments, and/or eliminate the double taxation arising from transfer pricing regulation mismatches.

In 1999, Brazil established a list of countries that are considered to be low-tax jurisdictions (with further updates) and, in 2010, published a new list of 'privileged tax regimes'. Payments made to entities in listed



countries are subject to a withholding tax at a rate of 25 percent (instead of the usual withholding tax rate of 15 percent). Brazil's transfer pricing, thin capitalization and tax deductibility rules are stricter in relation to transactions with entities in listed countries or operating under privileged tax regimes.

Some recent changes suggest that Brazil is open to bringing its tax rules closer to OECD principles in cases where doing so serves the country's interests. For example, amendments to Brazil's CFC regime introduced in May 2014 appear to draw on OECD recommendations in this area.

Starting in 2015, Brazilian companies will be required to disclose their profits for tax purposes by country, including profits of all their foreign subsidiaries. The required report will be in essence similar to the type of report required under the OECD's country-by-country tax reporting proposals, but the information will be provided in the companies' accounting records.

Brazil has also signed up as a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes. In the OECD's Phase 2 Review of Brazil's compliance, the

OECD found the country's practice to be in line with the international standard for transparency and exchange of information for tax purposes.

Piecemeal adoption opens double tax risk

Even though Brazil may be aligning some of its international tax rules in step with global standards to some extent, its piecemeal approach to adoption of the OECD's recommendations could open potential for more double taxation and tax disputes. Foreign multinationals operating in Brazil and Brazilian companies with foreign operations will all be affected, but with different impacts:

- **Brazilian companies** will be directly affected as the countries they do business in translate the final OECD BEPS recommendations into domestic law. These companies should monitor developments in their countries of operation closely, and prepare contingency plans in the event that BEPS-related legislative change upsets existing arrangements.

- **Foreign companies** with operations in Brazil should keep a close watch on Brazilian tax policy changes and ensure their tax reporting systems and processes will be able to provide the necessary data to satisfy their parent company country-by-country tax reporting obligations.

All companies should make every effort to document the economic substance of their cross-border transactions and business arrangements. With adequate preparation, international businesses in Brazil can adapt to the new tax landscape created by BEPS without incurring excessive tax costs or business disruption during the transition.



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CANADA



As a member of both the OECD and G20, Canada is an active contributor to the OECD's work on BEPS. But Canadian government officials are keeping their cards close to their vests as far as domestic legislative change is concerned, and they are consulting extensively with Canadians on the potential effects of new anti-BEPS rules. Whether and to what extent Canada will adopt the entire package of OECD recommendations remains to be seen. While it is difficult to speculate, we anticipate that any government measures will take into account calls from business and other stakeholders to balance the OECD recommendations with the interests of Canadian businesses and the country's broader economy.

The G20-OECD Action Plan on BEPS clearly aligns with Canada's longstanding goals. Well before the OECD's current work began, Canada's government saw a need to update its own international taxation principles. In 2008, the government appointed an international tax advisory panel of business and tax leaders to study the country's international tax system. The panel's final report set out a series of recommendations for tightening and improving the country's tax rules.

Since then, Canada has adopted some of the panel's recommendations by, among other things, tightening its thin capitalization rules, curbing foreign affiliate 'debt dumping' practices, and closing various loopholes in Canada's international tax law. Implementation of other panel recommendations continues, but now these changes are being considered and positioned as in keeping with the OECD's broader international project.



For example, in August 2013, Canada announced consultations on the possible adoption of an anti-treaty shopping measure. Canada has not yet finalized an approach to perceived treaty abuses, as the panel recommended. In its February 2014 federal budget, the Canadian government proposed a domestic general 'main purpose' treaty shopping rule, instead of a treaty-based approach that is being favored by the OECD. In the budget, the Department of Finance Canada stated that a treaty-based approach would be time consuming to implement and less effective than a domestic rule.

At the same time, the government announced further consultations on the implementation of a domestic rule. After these and other consultations, the government announced that it would suspend the treaty shopping proposal's implementation pending further work by the OECD and the G20 on its BEPS initiative.

Also in the budget, the government announced consultations on the G20-OECD's BEPS Action Plan. The goal is to allow stakeholders to provide input on issues related to international tax planning that would help the government to set its priorities and inform Canada's participation in international discussions. The government also announced specific domestic proposals or consultations related to several G20-OECD Action Plan items, including:

- sales tax on e-commerce sales to Canadians by foreign-based vendors (Action 1)
- controlled foreign affiliates that are captive insurance companies earning income through the use of derivative 'insurance swaps' (Action 3)

- the use of back-to-back loans to circumvent thin capitalization rules and Canadian withholding tax (Action 4)
- automatic exchange of information (Action 5).

These consultations show the government's commitment to consider the input and concerns of Canadian taxpayers to inform its discussions with OECD and before adopting any anti-BEPS recommendations that the OECD may propose.

At the same time, the Canadian government is cooperating with other tax authorities worldwide to address international tax evasion, reinforcing their tax treaties with new agreements on the exchange of taxpayer information. Canada has 21 [tax information exchange agreements](#) in force, with another one signed but not in force and eight under negotiation. Canada also signed on to the OECD's multi-lateral instrument on administrative exchange (e.g. information exchange).

On the administration side, Canada's tax authority has been staffing up on international tax auditors in recent years (although recent announcements suggest that the Canada Revenue Agency (CRA) is reducing its workforce). International audit activity has increased, with particular attention being given to transfer pricing audits.

The CRA has identified aggressive tax planning (domestic and international) as one of the highest risks to its mandate to ensure taxpayers meet compliance obligations, and it has set up an Aggressive Tax Planning (ATP) program dedicated to identifying emerging tax avoidance issues, arrangements and products, and it handles cases requiring a remedy for tax avoidance. Canada

has also imposed an ATP reporting regime that requires taxpayers to disclose certain 'reportable transactions' undertaken for tax avoidance purposes.

So what can international companies in Canada expect in terms of anti-BEPS related changes in the future? Sweeping change is unlikely, given the government's longstanding focus on establishing a well-protected tax base while encouraging cross-border trade. In fact, in introducing its recommendations, the international tax panel prefaced its discussion with its predominant view that "Canada's international tax system is a good one that has served Canada well."⁷

Targeted changes are still likely, as Canada considers adopting OECD recommendations that match its domestic tax policy goals, especially in the areas of treaty shopping, hybrid arrangements, transfer pricing and country-by-country reporting.

Other countries' BEPS measures – managing the impact

As other countries adopt the OECD's anti-BEPS recommendations, Canadian multinational companies may be affected in similar ways to US companies – see page 19 for details.



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⁷ Advisory Panel on Canada's System of International Taxation, *Final Report – Enhancing Canada's International Tax Advantage*, (Ottawa: Department of Finance Canada, December 2008), at page 2.

MEXICO



As an OECD member and G20 country, Mexico is fully aligned and committed to the OECD's anti-BEPS project. The Mexican Tax Authority (MTA) has publicly confirmed that they will closely follow the BEPS results and are active participants in the OECD's working groups. Among its significant contributions, the MTA has sent the senior official in charge of its tax legal area on rotation to the OECD to work on Action Plan 14.

Mexico has also embraced the anti-BEPS movement through early legislative change. In 2014, Mexico implemented a tax reform based on certain concepts mentioned in preliminary BEPS reports, including several new deductibility restrictions:

- **Limits on deductibility of interest, royalty, and technical assistance payments** – Such payments made to a foreign entity that controls or is controlled by the taxpayer are non-deductible (subject to exceptions) where:
 - the receiving entity is transparent
 - the payment is disregarded for tax purposes in the foreign country
 - the foreign entity does not consider the payment as taxable income.
- **Non-deductibility of certain payments** – The deduction of payments is denied where a related party is entitled to deduct the same amount, except when the related party includes the amount in its gross income for the same year or the next.
- **Non-deductibility of payments to recipients whose income is subject to a preferential tax regime** – In order to deduct these payments, the taxpayer must demonstrate that the amount paid is equal to the price or consideration that would have been agreed in comparable transactions by independent parties.

Taxpayers have filed for injunctive relief against the first two of the above three provisions and other 2014 tax reform measures on the basis that they are unconstitutional. Whether the measures will survive these legal challenges remains to be seen.

Mexico has also changed its tax treaty policy and is now seeking to include limitation on benefits clauses. Additionally, a new provision for related party transactions was introduced allowing the tax authorities to request a statement under oath indicating that there is a legal double non-taxation on the Mexican source income received. Again, it is possible that the Mexican courts will reject the constitutionality of this provision on the basis that it represents a treaty override. In the meantime, the provision is allowing the MTA to collect information about the types of double non-taxation occurring through the use of Mexico's tax treaties.

Further, Mexico's enthusiasm in adopting BEPS proposals could work against the goals of the OECD BEPS project. The above proposals were based on discussion drafts of the OECD's recommendations. Until an integrated set of new tax principles is finalized for all 15 Action Plan items, countries that adopt early versions of this work in progress could complicate the global tax situation and hamper the implementation of commonly agreed and fully developed tax principles.



Moratorium on tax reforms

For this reason, the Mexican government's tax certainty agreement is welcome. Announced in February 2014 after taxpayers launched constitutional challenges to the 2014 tax reforms, the tax certainty agreement commits the federal government to a moratorium on tax law changes until the current presidential period ends in November 2018.

The agreement is aimed to foster tax stability and economic growth by providing taxpayers with the certainty to facilitate their business decision-making and planning. The moratorium does not extend to possible tax changes that aim to facilitate foreign investment, such as pending secondary laws regarding Mexico's energy reform.

Taking non-legislative action

The tax certainty agreement does not stop the MTA from taking non-legislative action against BEPS activities, for example, by re-negotiating treaties, revising regulations and adopting new administrative measures.

On the administrative front, the MTA has become much more focused on investigating BEPS activities, adding more resources and strengthening its international tax audit capabilities. Among other things, the MTA announced a Pilot Tax Audit programs focused on about 26 companies with cross-border transactions with special focus on principal structures, permanent establishment issues, payments to foreign parties and transfer pricing documentation.

The MTA has made it clear that it will review any transaction that reduces Mexico's tax base and demand evidence that substantiates that the operation in Mexico has in fact changed in a way that justifies the decreased profitability. The MTA has published some non-binding criteria for what they consider as aggressive tax planning, such as certain tax planning involving intangible property.

While Mexico is a strong supporter of anti-BEPS initiatives, at both the OECD and domestic levels, measures like the tax certainty agreement show the current government is equally interested in attracting foreign investors. Companies taking advantage of Mexico's rich business opportunities should be prepared to meet increasingly aggressive and sophisticated international tax audit and enforcement activity. On a brighter note, they also have some assurance that they will probably enjoy certainty in Mexican tax legislation between now and the end of 2018. These companies can guard against tax authority challenges.



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UNITED STATES



Like other countries that are both OECD and G20 members, the United States is fully engaged in the OECD's BEPS project. Representatives of the US Treasury Department have actively participated in the OECD negotiations and generally have expressed support for the goals of the project. Some members of the US Congress have also expressed their support for the project, but others have reserved judgment or expressed concern that the project may unfairly focus on US multinationals.

The United States has good reason to believe its companies are being disproportionately targeted. Within Europe, much of the public and media attention relating to BEPS has focused on the perceived tax behavior of US-based multinationals that derive profits from high-value marketing intangibles. A significant portion of the G20-OECD Action Plan focuses on tax issues involving intangible property, and the US is home to many of the world's highest value brands.

US influence on OECD's work

Many of the proposals released to date – especially in the transfer pricing area – have been revised to address US concerns about the original proposals.

For example, early versions of the OECD's recommendations for country-by-country tax reporting sought much more detailed disclosures. Due to concerns expressed



by US policy officials regarding burden, misuse of information and confidentiality, which are shared by a number of other officials, the OECD's 16 September 2014 recommendations on country-by-country reporting are narrower.

The US influence is also evident in the OECD's 16 September 2014 anti-treaty shopping recommendations. Previously, it appeared the OECD was set to recommend that countries adopt both a limitation on benefits article in their treaties and a domestic principal purpose test under which treaty benefits would be denied where gaining the benefit is one of an arrangement's principal purposes. In line with the general US preference for objective tests over general anti-abuse or anti-avoidance rules, US representatives participating in the BEPS project (among others) felt the domestic principal purpose test would create too much uncertainty.

The revised current recommendations – which the US supports – call on countries to adopt either a principal purpose test or an objective limitation on benefits provision coupled with targeted domestic anti-abuse rules, such as anti-conduit rules. While less stringent than the OECD's earlier proposal, if adopted, such a measure, would still be tighter than the OECD's current treaty guidance.

Will the US adopt anti-BEPS recommendations?

Representatives of the US Treasury Department have indicated the Obama Administration will consider implementation of the OECD BEPS project results, at least to the extent certain results of the OECD BEPS project may be implemented solely through administrative actions. The Administration has suggested it may also choose to propose statutory changes

based on the OECD BEPS project results, but the likelihood any such proposed changes would be enacted remains uncertain.

Both House Ways and Means Chairman Dave Camp and Senate Finance Committee Chairman Max Baucus have introduced proposals for international tax reform that include provisions targeted at base erosion. President Obama's 2015 budget also includes several international tax reform proposals designed to address BEPS concerns.

Common to these proposals are variations on measures that would:

- create new categories of Subpart F income for certain low-taxed earnings of a controlled foreign company (e.g., where the earnings are attributable to intangibles)
- impose limitations on earnings stripping interest expense
- neutralize tax benefits from certain hybrid arrangements
- deter tax inversions.

Among the four sets of proposals are distinct measures that would address tax planning that involves, for example, hybrid arrangements, conduit financing arrangements and tax inversion transactions.

Managing the potential impact of other countries' anti-BEPS measures

Regardless of whether the US makes these or other regulatory or administrative changes, US-based companies with foreign operations may have to:

- comply with changes in the local tax laws of the countries in which they operate
- prepare enterprise-wide transfer pricing documentation in accordance with new OECD country-by-country reporting recommendations as soon as they are adopted by any other country in which the company operates – and manage the implications of other countries' tax authorities requesting the same information
- monitor and manage the impact of unilateral rules to deny deductions arising from hybrid mismatch arrangements as countries adopt them (e.g., such rules have already been proposed or adopted in Mexico and France)
- address special measures designed to require additional substance to support the allocation of profit to risk and capital in the context of intercompany transactions.

These are just a few of the BEPS-related changes that US companies should begin preparing for regardless of whether or not the US adopts them domestically. Other potential effects may result from changes to treaties, new views on permanent establishments and the digital economy, and changes in competent authority and international dispute resolution.

<http://www.kpmg-institutes.com/content/dam/kpmg/taxwatch/pdf/2014/why-beps-us-multinationals-dtr-091514.pdf>



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Bracing for BEPS: Are you ready?



Given current global tax developments, all signs suggest that we will continue to see increased pressure for more scrutiny of international transactions and structures, more transparency between taxpayers and the tax authorities, and more disclosure by companies on how much and where they pay tax. No matter what tax changes result or where your company does business, you need to create a tax management plan to drive how your company communicates about tax, governs its tax affairs and manages tax risk.

The following are key actions that businesses should take seriously and consider addressing now, regardless of industry or location.

- **Stay informed** – Keep on top of developments as they occur locally and internationally. Consider how these developments could affect your tax positions and planning.
- **Get involved** – Engage in BEPS-related consultations so that your practical business issues are raised and considered. Effective, widely accepted solutions can only be forged through broad consultation with tax professionals in business, government and public practice.
- **Conduct a tax health check** – Review your existing tax transactions and structures in order to identify potential weaknesses, and take measures to rectify these areas. Identify potential weaknesses according to the G20-OECD Action Plan and take steps to make improvements. This may include, among other steps, the movement of functions, assets and personnel within the group, development of legal, tax, and transfer pricing documentation as support, and preparation of internal controls and working guidelines to mitigate tax risks. With adequate preparations, multinational corporations will be better able to adapt to the new tax landscape created by BEPS and mitigate unwarranted disruptions in business operations or incurring excessive amounts of tax costs during the transition.
- **Prepare for questions** – Be prepared to comment on your business and tax activity at any given moment. (A particularly important capability in the era of social media). Determine board members, C-suite executives, and the core tax team are aware of potential questions and challenges that could come from any number of stakeholders such as regulators, investors, media and the general public.
- **Think reputational risk** – Determine that decisions around tax are made taking into account potential reputational risks and not simply whether your organization has complied with the tax laws in various jurisdictions.
- **Assess your company's relationship with tax authorities** – Determine that relationships with local tax authorities are appropriate, open and respectful in all countries in which you operate.

Contact us

For more information about this survey or to explore the potential of BEPS-related developments on your business in the Americas or worldwide, please contact your local KPMG International member firm tax professional or one of the professionals listed below.

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