KPMG

# OECD BEPS Action Plan

## Moving from talk to action in the Americas

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# Introduction

A whirlwind of international tax change has swept the globe in the past year, and for tax executives in the Americas there is no end in sight. From broader requirements for tax transparency through more stringent transfer pricing policies to greater scrutiny of business substance, every country and every multinational company is feeling the impact.

With the release of all final recommendations[1] on base erosion and profit shifting (BEPS) and their endorsement by the G20 and European Union (EU) in 2015, the Organisation for Economic Co-operation and Development (OECD) delivered a groundbreaking starting point for global tax coordination. Since then, many countries globally, including in the Americas, have started putting in place parts of the package of BEPS recommendations, and the OECD has begun monitoring this implementation.

How is BEPS-related tax policy evolving in the diverse Americas region? Now that we have turned the corner from consultation to implementation, the time is right to take stock. This report is the third in our series of updates on how actions on BEPS policy are progressing in the Americas. In these pages, international tax leaders from KPMG's member firms in the Americas offer insights on:

— the impact of the BEPS debate on tax policy in the region and selected countries in the Americas

— recent and pending changes to tax codes in step with the OECD recommendations

— the changing attitudes of tax authorities as international tax reforms take hold

— how international companies are reacting to and managing these reforms.

Our perspectives are set out in the following pages, starting with an overview of BEPS-related trends in the region, followed by an in-depth look at how events are unfolding in selected Americas countries. We conclude with general guidance for tax directors of multinational organizations, who will have to understand and navigate the potential changes and challenges in the new tax reality across the Americas.

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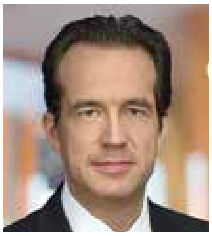

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1 Organisation for Economic Co-operation and Development (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en (referred to herein as 'OECD Action Plan').

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The OECD Action Plan on BEPS, introduced in 2013, set 15 specific action points to ensure international tax rules are fit for an increasingly globalized, digitized business world and prevent international companies from paying little or no tax. After 2 years of outstanding effort, on 5 October 2015, the OECD published guidance on domestic legislative and administrative changes to address all 15 of the plan's action points. The recommendations gained the G20's approval on 16 November 2015.

Most OECD and G20 countries have been engaged in the OECD's work, and many other countries in the Americas and worldwide have been either fully engaged or watching developments closely. Each government must determine how the guidance affects its existing rules and undertake the process of proposing, debating and enacting domestic tax changes.

### Next steps?

The OECD has started a process for monitoring and reviewing BEPS implementation. However, businesses have raised concerns over the uncertainty and complexity that is bound to result from staggered and fragmented implementation of new rules among different countries. The Action Plan charts a course for coordinated implementation of its outcomes, but achieving actual alignment in implementation of the Action Plan's recommendations seems to remain challenging. This leaves businesses with a more complicated international taxation landscape than ever before.

Going forward, it is hoped that the OECD will continue to monitor participating countries in their implementation of new international tax rules to ensure consistency and adherence to the agreed consensus.

### Americas move forward on BEPS

In their engagement with the OECD BEPS Action Plan, countries in the Americas fall on a spectrum that runs from full commitment to non-engagement. Countries that are both G20 and OECD members — like Canada and Mexico — are on the way to implementing the OECD BEPS minimum standards. Initially, the United States was constructively engaged in the BEPS process, but the country is now looking at a structural corporate tax reform with potentially far-reaching implications, also in the context of BEPS. New OECD members in the region, like Chile (joined in 2010) and Colombia (which is in the OECD accession process), are on board with the BEPS implementation process and have initiated reforms showing clear commitment to the OECD's work.

| OECD Action Plan on BEPS — action items |
|---|
| Action 1 — **Address tax challenges of the digital economy** |
| Action 2 — **Neutralize effects of hybrid mismatch arrangements** |
| Action 3 — **Strengthen controlled foreign company (CFC) 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 and 10 — **Ensure transfer pricing outcomes are in line with value creation**<br>**Action 8 — intangibles**<br>**Action 9 — risks and capital**<br>**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** |

Source, KPMG International, 2017.

Countries that aspire to OECD membership, like **Costa Rica** and **Peru**, might choose to follow the OECD guidelines as part of their efforts to develop their tax and financial systems. Both countries have declared commitment to join the OECD BEPS Inclusive Framework approach coordinating effective implementation of parts of the BEPS package. Costa Rica also seems willing to join the OECD multilateral instrument potentially amending many applicable tax treaties.

Along the middle of the spectrum are G20 countries, such as **Brazil and Argentina**, which have been engaged in the OECD discussions and have supported the process and goals of the OECD. However, implementation remains elusive, and it seems that these countries 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. The EU initiative to create a coordinated EU tax haven blacklist by the end of 2017 complicates the BEPS implementation process. Some Caribbean countries therefore seem to be pursuing bilateral exchange of tax information agreements in efforts to avoid being blacklisted.

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.

## More tax complexity ahead

Just as domestic rules will be enacted at different paces in different places, it's also becoming apparent that the interpretation and implementation of the OECD recommendations vary considerably. While many Americas countries have committed to follow the OECD's recommendations in principle, unilateral action taken or proposed to date suggests that, on implementation, individual countries will tailor the proposals to suit their own purposes. For example:

— In **Chile**, rules introduced in 2014 require taxpayers to report information about electronic gambling activities, digital commerce in any form, online applications and digital services.

— **Costa Rica** proposed legislation to implement 2:1 thin capitalization rules and has virtually eliminated withholding tax exemptions for foreign lenders.

— **Mexico** introduced anti-hybrid and double deduction provisions that limit deductions for interest, royalty and technical assistance payments that are not subject to tax in the recipient country.

— **Canada** introduced complex back-to-back rules that apply to outbound payments of interest, royalties and similar payments.

A more detailed list of unilateral legislative actions taken to date by Americas countries is featured in the Appendix.

Globally, these departures from the letter of the OECD recommendations are expected to multiply. In 2016 and 2017, for example, **EU member states** adopted several legislative and coordination proposals, such as exchange of tax rulings, anti-hybrid mismatch provisions, CFC rules and limitations on interest deductibility. Although BEPS-inspired, these proposals are not completely aligned with the BEPS recommendations.

Moreover, the European Commission's state aid decisions against EU member states' tax rulings seem to follow their own logic in fighting perceived aggressive tax planning, complicating the taxation landscape even more. And the EU is proceeding with a series of initiatives to address tax avoidance, increase transparency and improve EU coordination.

Meanwhile, in the area of transfer pricing, **China**, **India** and other Asian countries appear to be going their own way in interpreting how market characteristics, activities and intangible assets contribute value for purposes of allocating profit.

So even though the OECD Action Plan sought to instill more uniformity and certainty in the international tax system, it is increasingly apparent that its implementation will be staggered and fragmented among regions and individual countries.

## Developed versus developing countries — narrowing the divide

The 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.

The OECD recognized that, for this collective international effort to succeed, developing countries needed to have a voice in the BEPS project to avoid perceptions that the proposals would tilt too far toward the benefit of developed countries.

In 2015, 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 report[2] on the potential impact of BEPS in low-income countries. In the report, the OECD says it recognized 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 needed specific emphases or nuances compared to those most suitable for advanced economies.

The report pointed 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 (MNE). The inclusion of many Latin American countries in the OECD in the inclusive framework process and the multilateral instrument project in 2017, coordinating effective implementation of parts of the BEPS package, signals the ongoing commitment of many countries in the region.

## Raising the bar for international tax policy

While the ideal of a coordinated, consistent and fair international tax system appears to remain challenging, the OECD's work to date has spurred some important progress:

— **Advanced understanding of tax:** The OECD's working groups have generated an enormous amount of well-considered, in-depth research and analysis on international tax principles, a technically excellent body of work that will influence international tax policy decisions for many years to come.

— **Fewer loopholes:** The OECD's work has led policy makers to close some of the more egregious tax loopholes that have allowed some international companies to escape tax inappropriately.

— **Bringing emerging markets to the table:** Developing countries outside the OECD and G20 have been brought into the debate. While they may not share the same views, countries like Costa Rica and Peru have learned a great deal about the impact of international tax principles on their own tax revenues and tax competitiveness. They are upgrading their tax rules and administrative resources accordingly.

— **Engaging business:** Over the past 4 years, the attitude of many international businesses toward the debate has moved from disinterest to keen engagement. Internally, company directors and management are taking more interest in their tax affairs, the implications of their tax strategies, and their tax governance. Externally, companies' participation in the OECD debates helped to ensure that the OECD's recommendations were developed with an eye to practical business concerns.

In short, the OECD's project has raised the bar for international tax policy across the globe. While the work may fall short of delivering an ideal tax world, and may even make matters worse in the near term, it still has the potential to bring us many steps closer, especially where tax fairness and transparency are concerned.

[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 five items for review

What can tax directors in the Americas do to begin preparing for the 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 five 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 prospect of staggered and fragmented implementation of the OECD's guidance, companies should closely **monitor developments** and their **potential impact** on their tax processes and structures.

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# Countries in focus:

## Implementation moves ahead

# Argentina

As a member of the G20, Argentina supports the goals of the OECD's Action Plan and intends to follow the recommendations that resulted. 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. Argentina's new president took office in December 2015 and some changes to the tax legislation were introduced. A broader tax reform is still expected.

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

Argentine tax authorities are becoming more inclined to challenge tax-motivated transactions and structures based on '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 impose tax based on the form or structure that best reflects the taxpayers' actual intention.

## Preventing treaty abuse

Tax avoidance involving tax treaties has received 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 to address perceived potential for abuse regarding withholding taxes on royalties, inappropriate use of conduit companies and other areas, depending on the treaty.

Argentina recently signed new treaties with:

— Spain (in force retroactively as of 1 January 2013)

— Switzerland (in force as of 1 January 2015 for withholding taxes and 1 January 2016 for other articles and Article 25)

— Chile (in force as of 1 January 2017)

— Mexico (signed and expected to enter in force as of 1 January 2018; notification from Mexico is pending).

In addition to eliminating the potential for abuse, these treaties incorporate the current international standard on the automatic exchange of tax information.

## Recent developments

Tax reform proposals were introduced during 2016 and at the beginning of 2017. Among other measures, the following have been enacted:

— tax amnesty and voluntary disclosure regime for local residents

— repeal of the 10 percent withholding tax on dividends paid to non-resident investors

— elimination of the minimum presumed income tax in 2019

— update of the income tax thresholds and rates for individuals

— reduction of the wealth tax burden (its repeal is being analyzed for 2019 and later years).

Further, Argentina has signed the global agreements on the automatic exchange of information and the common reporting standard. As a result, the Argentine tax authority (AFIP) will obtain information about individuals and entities residing in Argentina who have opened accounts at financial institutions located abroad. Such information will include account balances or value as of 31 December each year, and, in some cases, amounts of interest, dividends and other

yields. identification and tax residency data of account holders or managers must be provided as well.

The AFIP will exchange this data with 55 states starting in 2017, and, in 2018, with another 40 states, or 95 states in total.

Finally, the software industry, the mining activity and the generation of renewable energies are being highly promoted.

Argentina has replaced its black list of tax havens with a white list of 'cooperative' countries, for transparency purposes. A 2013 decree[3] 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 considered '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. The white list is periodically updated and posted on the Argentine tax authorities' website.[3]

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 CFC 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 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 (VAT) on a taxable base of 110 percent.

## Punitive withholdings on exports to non-cooperative jurisdictions

In January 2014, Argentina's tax administration established a withholding regime for the export of goods where the final destination is different from the buyer's country of residence.[4] This rule relates 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 gathering more information concerning taxpayers' transactions with related parties 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.[5] 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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[3] http://www.afip.gov.ar/genericos/novedades/jurisdiccionesCooperantes.asp.
[4] General Resolution 3577.
[5] General Resolution 3573/13.


As a G20 country, Brazil has been engaged in the OECD's work and the Brazilian Revenue Service has said it intends to adopt BEPS recommendations. Nevertheless, Brazil has a long history of going its own way where international tax standards are concerned, and it's possible that Brazil could adopt only those aspects of the proposals that suit Brazil's domestic purposes.

## BEPS already on tax authorities' agenda

As a recipient of significant foreign direct investment, Brazil has been concerned with BEPS for many years. The country has longstanding international tax rules and other measures in place 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 and thin capitalization rules and CFC regime. Brazil's current versions of these rules leave little space for BEPS-style tax planning. Rather, they often expose companies to double taxation risk.

## Moving closer to international norms?

It currently appears that Brazilian tax authorities are determining how the OECD's guidance on BEPS affects existing rules in Brazil.

As a result, any domestic tax changes might require a lengthy process of debates and discussion by the Brazilian Congress. For example, inspired by mandatory disclosure recommendations under Action 12 of BEPS, the Executive Branch of the Brazilian government's introduced a provisional measure (PM 685/2015) requiring taxpayers to formally report transactions that could result in a tax benefit for Brazilian taxpayers. However, the proposal's wording prompted heated debate, and the Brazilian Congress did not pass the provisional measure.

Because Brazilian transfer pricing rules 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 supports the costs using data available at origin. By potentially allowing taxpayers to align their transfer pricing policies, this ruling could help to eliminate potential contingent liabilities, reduce taxable adjustments, and/or eliminate double taxation arising from transfer pricing rule mismatches.

In 1999, Brazil established a list of countries that are considered as 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 generally subject to withholding tax rate of 25 percent (instead of the usual 15 percent rate). Brazil's transfer pricing, thin capitalization and tax deductibility rules are generally stricter in relation to transactions with entities in listed countries or operating under privileged tax regimes.

Some changes suggest that Brazil is willing to bringing its domestic tax rules closer to OECD principles in cases where doing so suits the country's interests. For example, amendments to Brazil's CFC regime were introduced in May 2014 appear to accept OECD recommendations in this area.

According to new CFC rules that entered into force in 2015, Brazilian companies are required to disclose their profits for tax purposes individually for each foreign investment, including profits of all their foreign subsidiaries. The required report is similar to the type of report required under the OECD's country-by-country tax reporting proposals, but the information is provided in the companies' accounting records.

Brazil has also became 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 is in line with the international

standard for transparency and exchange of information for tax purposes.

In 2016, Brazil moved forward to implement some steps related to BEPS Actions.

Regarding Action 13, Brazil signed the Multilateral Competent Authority Agreement on Exchange of Country-by-Country Reporting and implemented the agreement domestically in 2016. This agreement enables forms of administrative assistance in tax matters between the countries, including the exchange of information for tax purposes.

The Brazilian Revenue Service also imposed country-by-country reporting requirements for Brazilian entities that are the ultimate parent entity of a multinational group, among other situations. The required report follows the OECD's Action 13 guidelines.

Regarding Action 14, the Brazilian Revenue Service issued a normative instruction providing rules on the mutual agreement procedure (MAP) under treaties for the avoidance of double taxation. All of Brazil's 32 tax treaties have a MAP article establishing a specific channel for consultation by taxpayers in cases where measures result in taxation that is not in accordance with the tax treaty. The normative instruction establishes a specific regulation for this consultation process and a channel of discussion between Brazil and the treaty partner.

Some developments in Brazil's domestic tax legislation are also influenced by the BEPS project. These include changes to the Brazilian Corporate Taxpayers Registry (CNPJ), which now requires the disclosure of information with respect to 'ultimate beneficial owners'.

## Piecemeal adoption opens double tax risk

Even though Brazil may be aligning some of its international tax rules with global standards to some extent, its piecemeal approach to adopting the OECD's recommendations could potentially generate more double taxation and tax disputes. Foreign multinationals operating in Brazil and Brazilian companies with foreign operations will all be affected, 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 can 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 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 has been an active contributor to the OECD's work on BEPS. In its 2017 spring budget, the Canadian government reiterated its commitment to implementing all of the minimum standards agreed to by all participants in the OECD's BEPS project. In 2016, Canada enacted country-by-country reporting rules and is implementing the new common reporting standard starting on 1 July 2017. It also began the spontaneous exchange of tax rulings with other jurisdictions. Canada participated in the development of the multilateral instrument but has not yet signed it or indicated which of the instrument's provisions it will adopt. It is unlikely that Canada will make sweeping changes to its domestic rules in 2017 related to the BEPS project. Canada's existing foreign affiliate rules already provide a comprehensive CFC regime and it recently introduced complex back-to-back rules that apply to outbound payments of interest, royalties and similar payments for purposes of its thin capitalization rules and withholding tax.

The OECD Action Plan on BEPS clearly aligns with Canada's longstanding goals to address base erosion in Canada. 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 (i.e., investment by Canadian subsidiaries of foreign multinationals in other group companies as a mechanism to increase leverage or repatriate funds), introducing back-to-back rules for certain outbound payments 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 Ministry of Finance Canada stated that a treaty-based approach would be time consuming to implement and less effective than a domestic rule.

However, after consultations, the treaty shopping proposal's implementation was suspended pending further work by the OECD and the G20 on its BEPS initiative.

Since the release of the OECD's final reports, the Canadian government has not clarified whether it will continue to pursue a domestic anti-treaty shopping rule or instead rely on the OECD's multilateral instrument (discussed below). In 2016, Canada introduced complex back-to-back rules that apply to outbound payments of interest, royalties and similar payments, which appear to be intended to prevent multinational companies from treaty shopping or interposing an intermediary entity to

indirectly obtain treaty benefits. The rules also address the use of third-party intermediaries to access Canada's domestic law exemption from withholding tax on arm's length interest payments. Most of Canada's recently negotiated treaties contain 'main purpose' anti-avoidance clauses in the dividends, interest and royalties article, and some also include a main purpose test in the capital gains article.

The Canadian government enacted country-by-country reporting in 2016 and has begun the spontaneous exchange of tax rulings with other jurisdictions.

In its March 2017 budget, the Canadian government did not propose any specific BEPS-related changes to its domestic legislation but reiterated its intention to ensure that its tax system meets all of the minimum standards agreed to under the OECD's BEPS project. The budget confirmed the government's view that Canada's CFC rules are robust, which suggests that sweeping changes to its foreign affiliate regime are unlikely. The government also stated that it has committed to improve the efficiency and effectiveness of the MAP contained in its treaties.

Canada participated in the development of the multilateral instrument but has not yet signed the instrument or indicated which of the instrument's provisions it will adopt. The government stated in its 2017 budget that it is undertaking the necessary domestic processes to pursue the signing of the multilateral instrument. The government also said that it is applying the revised international guidance on transfer pricing.

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 22 tax information exchange agreements in force, with another one signed but not in force and seven under negotiation.[6]

In 2016, Canada implemented the new common reporting standard starting on 1 July 2017 under the OECD's Multilateral Competent Authority Agreement, which activated the automatic exchange of information between jurisdictions. This will allow for the first exchanges of information with other countries in 2018. In its 2017 budget, the government announced that it will put in place a national strategy to improve the availability of beneficial ownership information and strengthen the transparency of legal persons and legal arrangements.

On the administration side, the Canada Revenue Agency (CRA) has increased its international audit activity, with particular attention 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. Canada requires taxpayers, promoters and advisers to disclose specified tax avoidance transactions to the CRA. In its 2017 budget, the government announced 524 million Canadian dollars (CAD) of new funding for the CRA to boost its audit activity to uncover tax evasion and avoidance.

So what can international companies in Canada expect in terms of additional 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 of advisors that studied Canada's international tax system in 2008 prefaced its discussion with a predominant view that "Canada's international tax system is a good one that has served Canada well."[7]

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[6] http://www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp
[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.

# Colombia

Colombia has been in the process of accession to the OECD since 2013, and reforms already initiated by the government show its intention to implement the standards and practices developed under the OECD's Action Plan on BEPS. In December 2016, Colombia's National Tax Authority enacted in Law 1819, making major changes to the country's transfer pricing regime. However, the regulatory decree setting out when the new requirements take effect has not been issued to date.

## Controlled foreign companies

Additional measures in Law 1819 influenced by the OECD BEPS Action Plan recommendations include the enactment of the CFC standards proposed under Action 3.

The bill's CFC rules — like those of the US and EU — aim to prevent base erosion through the use of foreign companies controlled by resident shareholders in Colombia or those located in jurisdictions of low or zero taxation or non-cooperatives, where the foreign company's income is mainly passive (e.g. dividends, royalties, interest, income from the alienation or leasing of real estate and provision of services).

In the Colombian regulation, CFCs are understood to be entities that are not Colombian tax residents and that comply with the requirements of subordination or economic linkage under Colombia's transfer pricing regime.[8] CFCs include investment vehicles (e.g. corporations, independent assets, trusts, collective investment funds, other fiduciary businesses, private foundations) that are incorporated, domiciled or operating abroad, regardless of whether they have legal personality or are transparent for tax purposes.

The regulation presumes that Colombian tax residents always have control over CFCs that are domiciled, incorporated or operating in a non-cooperating or low- or no-tax jurisdiction or entities subject to a preferential tax regime,[9] regardless of their participation in them.

For income tax purposes, a CFC's taxable income and associated costs and deductions are considered to accrue to the Colombian tax residents who control the CFC directly or indirectly, in the taxable period in which the CFC accrues the income and costs (even where profits are undistributed) in proportion to their participation in the capital of the CFC or in its results (in which case the foreign tax credit would apply).

Taxpayers subject to the CFC regime should give special consideration to the tax rules for calculating income from a CFC, income on the dividends distributed by the controlled foreign entity on the sale of its shares, and the foreign tax credit claimed for foreign tax paid on the CFC's income.

## Preferential tax regimes

Law 1819 includes measures proposed under Action 5 of the OECD's Action Plan, which aims to modernize the OECD's 1998 work on harmful tax practices. The Action 5 proposals set business substance requirements for preferential regimes using the nexus approach, thus preventing the artificial shifting of benefits.

Preferential regimes are identified as those that attract income from mobile activities, such as services and intangible assets, and that grant preferential tax treatment to non-resident entities compared to residents.

To defend against these regimes, the Colombian government issued a ruling decree listing preferential tax regimes that meet at least two of the four criteria to characterize a jurisdiction as non-cooperating (i.e. as a tax haven). These criteria are:

- low or zero level of taxation
- lack of effective exchange of information
- lack of transparency
- absence of substantial activities.

[8] Article 260-1 of the tax code.
[9] Under article 260- 7 of the tax code.



Also listed are so-called 'ring-fenced' regimes that give preferential tax treatment to a jurisdiction's non-resident entities.

Listed jurisdictions are subject to the same limitations and requirements as non-cooperating jurisdictions, including higher withholding tax rates.

## New VAT rules for cross-border services

Colombia has implemented the OECD's digital economy recommendations under Action 1, substantially changing the VAT rules for services rendered from abroad to the Colombian territory.

The new rules impose VAT on services rendered from abroad at the place of use or consumption of the services, instead of where they were executed, as was the case before 2016. Thus, with some exceptions, VAT now applies to all services rendered from abroad to beneficiaries in Colombia.

Further, the Colombian government will introduce a principal system requiring direct VAT compliance by foreigners providing digital services. Where the service provider does not observe the principal system, a secondary system will require financial entities that manage credit and debit cards and others authorized by the tax authorities to withhold VAT on payments to foreign suppliers of digital services.

Colombian VAT now also applies on the sale or license of intangibles related to industrial property.

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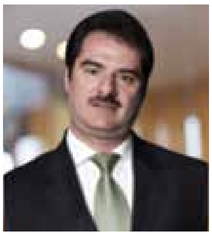
Partner, Tax
KPMG in Colombia



**Vicente Torres**
International Corporate Tax Partner,
KPMG in Colombia

# Mexico

As an OECD member and G20 country, Mexico has been fully aligned and committed to the OECD's anti-BEPS project. The Mexican Tax Authority (MTA) has followed the BEPS results closely and actively participated in the OECD's working groups. Among its significant contributions, the MTA sent a 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 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 overrides a treaty. 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.

In 2015, Mexico implemented a requirement for taxpayers to report certain transactions by filing Form 76, 'Relevant Transactions'. Taxpayers are required to file the form whenever they perform certain transactions and (except for taxpayers comprising the Mexican financial system) the accumulated balance of such transactions in the period in question is equal to or more than 60 million Mexican pesos (MXN). Relevant transactions include:

- **Financial operations**, including compound financial operations, financial transactions for trading and advance termination of financial transactions.
- **Transfer pricing operations** involving adjustments that modify the transaction's original amount by more than either 20 percent or MXN5 million.
- **Transactions involving equity participation and tax residence**, including amendments to the direct or indirect shareholding investment, share transfers, changing from foreign to Mexican residency, and obtaining dual tax residence.
- **Reorganizations and restructurings**, including those derived from a transfer of shares and the centralization or decentralization of relevant functions by the economic group to which the taxpayer belongs.
- **Other relevant transactions**, including the alienation of intangibles or financial assets, the contribution of financial assets to a trust with the right to reacquire them, the alienation of goods due to a merger or spin-off, and transactions with countries that have a territorial tax regime where treaty benefits were obtained.

The new form must be filed quarterly, and it is due on the last day of the second month after the end of the quarter.

## Moratorium on tax reforms

In February 2014, the Mexican government announced a tax certainty agreement after taxpayers launched constitutional challenges to the 2014 tax reforms. The agreement commits the federal government to a moratorium on creating new taxes or increasing current taxes until the current presidential period ends in November 2018.

The agreement aims 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.

In fact, the 2016 tax reform introduced the following new reports that will expand Mexico's existing transfer pricing disclosure requirements.

**Master file** — Information to be submitted under 'master information returns' of the multinational group would contain information regarding that group's:

— organizational structure

— description of activity, intangibles, financial activities with related parties

— financial and tax position.

**Local file** — Information to be submitted under 'local information returns' for related parties would include:

— description of the organizational structure, business and strategic activities, and intercompany transactions

— the taxpayer's financial information and information of comparable transactions or companies used in the transfer pricing analysis.

**Country-by-country reports** — Members of multinational groups must report:

— information by tax jurisdiction related to the global allocation of the MNE group's income and taxes paid

— indicators of the location of the economic activities in the tax jurisdictions in which the MNE group conducted business activities in the fiscal year, including the tax jurisdiction(s); total income, distinguishing income derived from related-party versus third-party transactions; profit and loss before taxes; income tax 'effectively' paid; income tax accrued in the fiscal year; capital accounts; accumulated profit and losses; number of employees; fixed assets and inventories

— a list of all MNE group members and their permanent establishments, including the main business activities of each MNE group member; tax jurisdiction of incorporation where it differs from the entity's tax address; and any additional information that would clarify the requested information.

The country-by-country reporting requirement applies to:

— Mexican residents

— entities that have subsidiaries under Mexican GAAP or permanent establishments located outside Mexico

— entities that are not subsidiaries of a foreign resident

— entities that prepare consolidated financial statements either according to Mexican GAAP or derived from entities that are located in other tax jurisdictions

— entities that have accounting consolidated revenues in the fiscal year of MXN12 billion or more.

The new information returns must be filed in December of the year following the year to which the return corresponds, with the first set of reports for 2016 due in December 2017.

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 program involving 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 is also strengthening its transfer pricing team.

The MTA says it will review any transaction that reduces Mexico's tax base and demand evidence that substantiates that changes to the operation in Mexico justify any decreased profitability. The MTA has published some non-binding criteria for what it considers as aggressive tax planning, such as certain tax planning involving intangible property.

The Mexican tax authorities, on 17 October 2016 issued the final rules of the General Tax Rules (Resolución Miscelánea Fiscal) related to Article 76-A of the Mexican Income Tax Law. Said Resolution regulates the filling and delivery of the annual informative returns of related parties (i.e. Master File, Local File and Country by Country Report) aligned with the BEPS Action 13. Please find a link to a detailed report and a Tax Flash published on this subject.

While Mexico has been a strong supporter of anti-BEPS initiatives, measures like the tax certainty agreement show the current government is equally interested in attracting foreign investors. Companies doing business in Mexico should be prepared to meet increasingly aggressive and sophisticated international tax audit and enforcement activity. On a brighter note, they will probably enjoy certainty in Mexican tax legislation between now and the end of 2018, which will help them guard against tax authority challenges.

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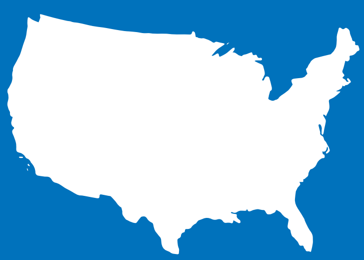
Mexican Practice
KPMG in Mexico

# United States



Like other countries that are both OECD and G20 members, the United States has been fully engaged in the OECD's BEPS project. Representatives of the US Treasury Department have actively participated in the OECD negotiations and generally 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 have unfairly focused on US multinationals.

The United States has good reason to believe its companies have been 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 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 OECD's recommendations have been revised to address US concerns about the original proposals.

For example, early versions of the OECD's recommendations for country-by-country reporting sought much more detailed disclosures. Due to concerns expressed by US policy officials regarding burden, misuse of information and confidentiality, which a number of other officials shared, the OECD's final recommendations on country-by-country reporting are narrower.

The US influence is also evident in the OECD's anti-treaty shopping recommendations. Previously, the OECD appeared 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 final recommendations 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.

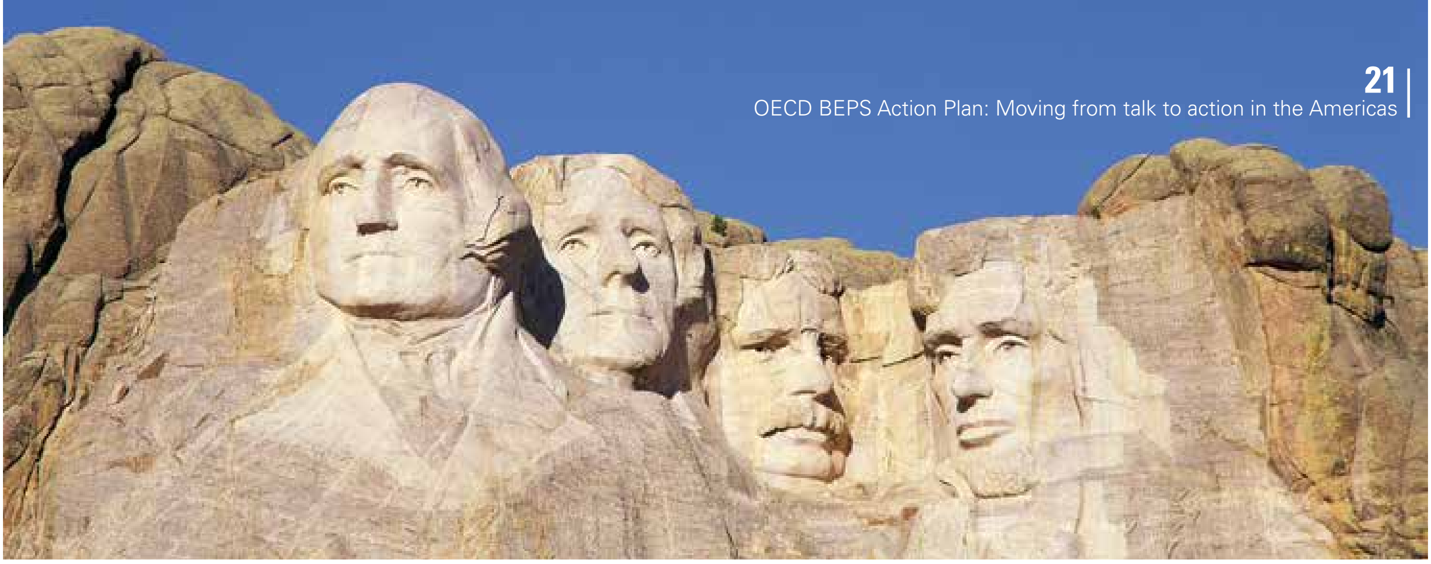
## US adoption of OECD's recommendations?

The US Treasury Department and the Internal Revenue Service issued final regulations requiring annual country-by-country reporting by US persons that are the ultimate parent entity of an MNE group that has annual revenue for the preceding annual accounting period of 850 million US dollars (USD) or more for taxable years of the ultimate parent entity beginning on or after 30 June 2016.

The first reportable period for calendar-year MNE groups is thus 2017, which is 1 year later than the OECD's recommended first reporting period. However, the US will allow voluntary filing for periods beginning on or after 1 January 2016. US voluntary filing by a US tax-resident ultimate parent entity should suffice to prevent secondary filing obligations in other jurisdictions, provided that a qualifying competent authority agreement is in effect between the US and the other jurisdictions by the first country-by-country report's filing deadline.

The US Treasury Department released a revised US model income tax treaty on 17 February 2016. The revisions are designed to respond to changes in US treaty partners' tax regimes that the Treasury Department believes may encourage BEPS. The changes include provisions aimed at inversion transactions, 'special tax regimes', and so-called 'exempt permanent establishments'. The new model includes provisions requiring mandatory binding arbitration to resolve disputes between tax authorities.

US companies and policy-makers have been emphasizing the need for reform of the US tax rules for many years. Past tax reform proposals have included provisions to discourage profit shifting and protect the US tax base. For example, both former House Ways and Means Chairman Dave Camp and former Senate Finance Committee Chairman Max Baucus



had previously introduced proposals for international tax reform that include provisions targeted at base erosion. The former Administration's 2017 budget also included 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 CFC (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.

Various legislative proposals for a preferential regime for intellectual property have also been put forward. Presumably, these proposals would be considered in the context of broader international tax reform. Under the current Administration, the prospects for dramatic and sweeping reform of the US corporate tax system, including the taxation of international business, are high. Current House Ways and Means Committee Chairman Kevin Brady has outlined a 'Blueprint' for tax reform that proposes, among other things, replacing the current corporate tax system with a border adjustable tax (BAT). If enacted, the changes likely would shift the US international tax system toward a territorial, consumption-based system. While there are few details as to how such a system would be implemented, several aspects of the approach directly or indirectly address BEPS concerns from a US perspective but could raise BEPS concerns for other jurisdictions. Given the tremendous political and procedural complexities associated with enacting tax reform, it is far from certain how quickly or how sweeping any tax reform measures might be. The Trump Administration also has outlined a framework for reform that, while short on details, proposes to significantly reduce the Corporate tax rate, shift to a territorial system, and eliminate a number of special deductions.

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

Regardless of whether the US enacts major tax reform or other statutory or regulatory changes, US-based companies with foreign operations must comply with BEPS-related changes in the local tax laws of the countries in which they operate. In particular, US-based companies may be required to file a country-by-country report locally in jurisdictions in which they operate or designate a surrogate filing jurisdiction to the extent the US does not exchange country-by-country reports with those jurisdictions.

US-based companies also need to:

— monitor and manage the impact of the implementation of anti-hybrid rules

— address special measures designed to require additional substance to support the allocation of profit to risk and capital in the context of intercompany transactions

— evaluate the impact on changes to the rules on permanent establishments in treaties or domestic laws

— assess the availability of treaty benefits under anti-treaty shopping rules.

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 new limitations on interest deductibility, European Commission state aid cases, evolving views on the digital economy and changes in dispute resolution.

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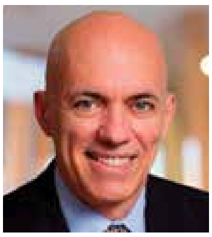
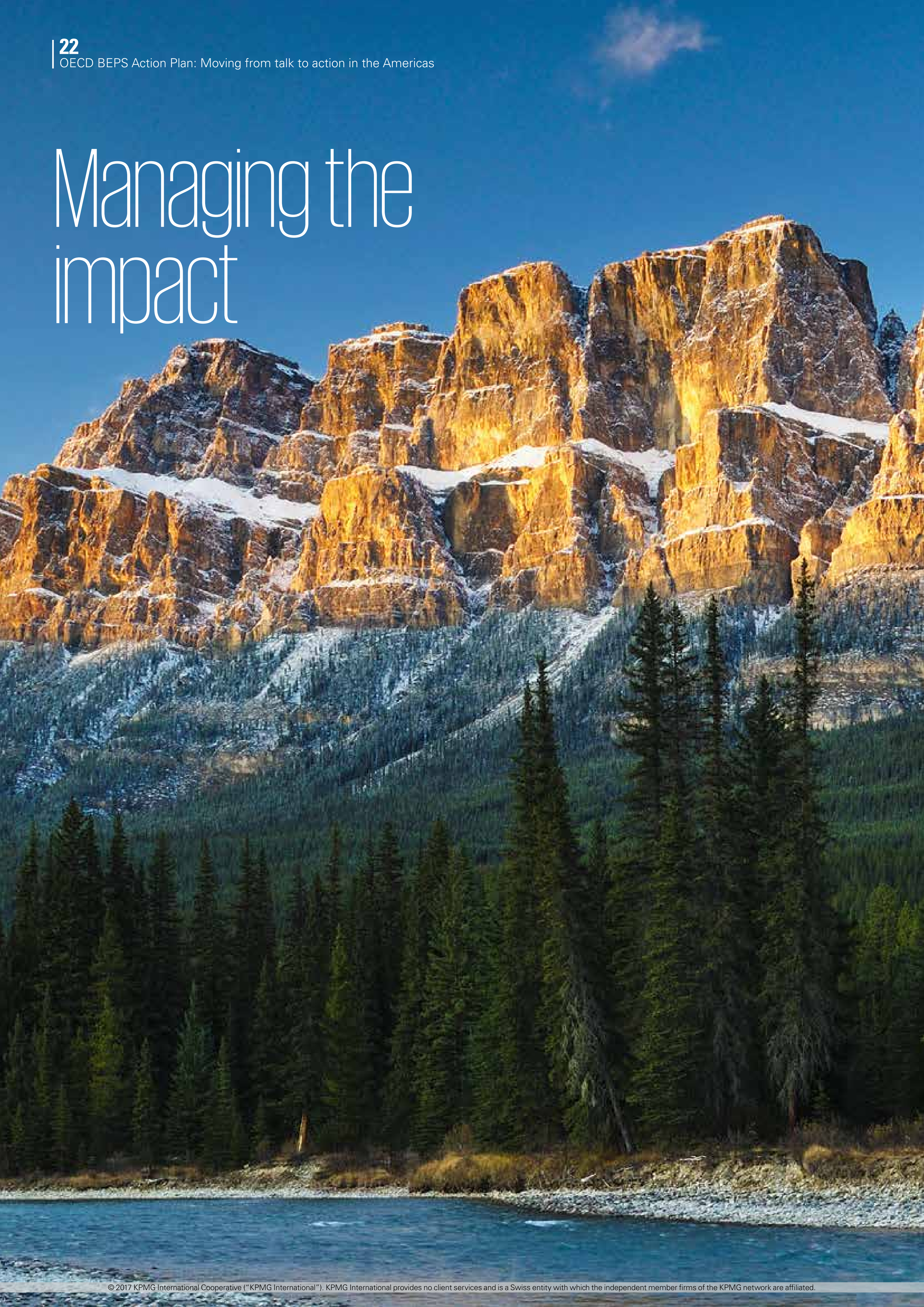


**Brett Weaver**
Partner, Head of KPMG Value Management Services and Co-Head of Global BEPS Network KPMG in the US

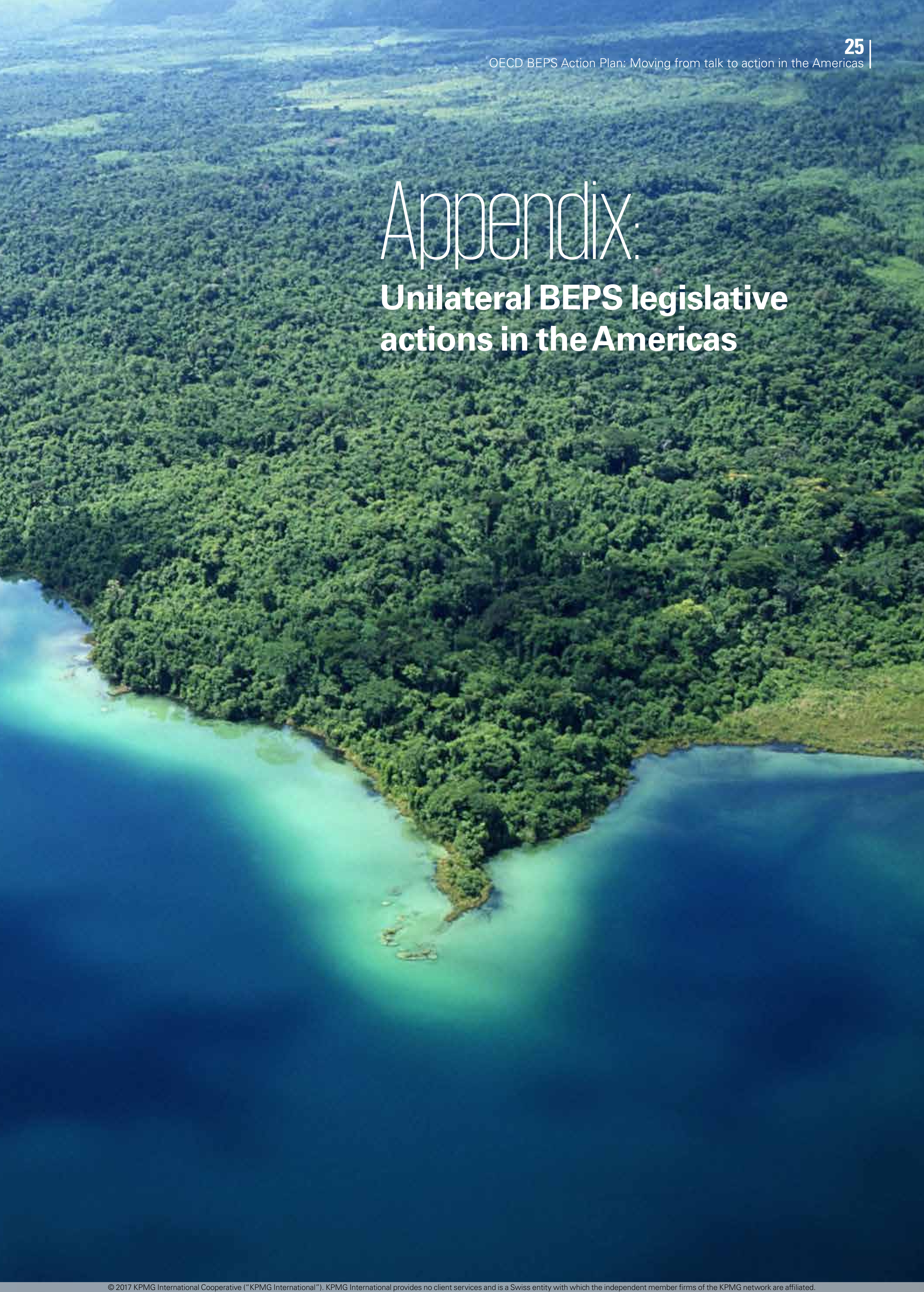
# Managing the impact



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 establish a management plan that provides a framework for 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.

- **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 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.



# Appendix:

## Unilateral BEPS legislative actions in the Americas

Since the OECD BEPS Action Plan final reports were published in October 2015, many countries have started changing their tax legislation or administration in response. Below we summarize actions taken so far by countries in the Americas regarding the Action Plan's 15 points.

| Action 1 | Address tax challenges of the digital economy |
|---|---|
| **Brazil** | There have been some developments regarding the taxation of the digital economy, but these developments do not relate to the implementation of Action 1. |
| **Chile** | Tax reforms adopted in 2014 empowered the Chilean Internal Revenue Service (IRS) to require taxpayers to report information about electronic gambling activities, digital commerce in any form, online applications and digital services. The Chilean IRS also instituted a Special Audit Unit to analyze technological systems. |
| **Costa Rica** | Costa Rica's government is unlikely to take action on the digital economy. |
| **Peru** | In 2003, Peruvian tax legislation introduced provisions, currently in force, to tax income arising from digital services economically utilized, used or consumed in Peru at a rate of 30 percent. These provisions allow Peru to tax income derived from e-commerce transactions with economic impact in Peru regardless physical presence of the service provider in the country. |
| **United States** | The former Administration's proposal would tax foreign transactions involving digital goods or services, but whether the Trump Administration will endorse this proposal is unclear. The proposal for a BAT in the House Blueprint likely would obviate the need for special rules in the US to deal with the digital economy. |
| **Uruguay** | Uruguay recently introduced new rules to regulate the activities of foreign entities that intermediate in certain services provided in Uruguay (e.g. transportation, tourist accommodation). Generally, these rules contemplate a joint responsibility under certain circumstances for tax and labor liabilities of the service supplier. They also provide notional rules for determining which part of the foreign entity's income are considered as Uruguay source, and thus taxable (Uruguay generally uses the source principle for income tax purposes). |

| Action 2 | Neutralize effects of hybrid mismatch arrangements |
|---|---|
| **Canada** | Canada currently has limited rules that cover investments in hybrids where the income earned is subject to CFC rules. Canada has not announced any changes to its domestic rules to broadly address hybrid mismatch arrangements. |
| **Costa Rica** | Costa Rica's government is unlikely to take action on hybrid arrangements. |
| **United States** | The former Administration's proposal would deny deductions for related-party interest and royalty payments in certain situations involving hybrid arrangements and would currently tax some payments received by US-owned foreign reverse hybrid entities. However, if a BAT were enacted, as proposed under the House Blueprint, many US concerns relating to hybrid arrangements likely would be moot. |

| Action 3 | Strengthen controlled foreign company rules |
|---|---|
| **Brazil** | Brazil already has one of the world's most stringent CFC regimes, and these rules were further strengthened in 2014. |
| **Canada** | Canada already has CFC rules in the form of the foreign affiliate and foreign accrual property income regimes. In its 2017 budget, the federal government said it considers Canada's CFC rules to be robust, which suggests that sweeping changes to the rules are unlikely. |
| **Chile** | CFC legislation was introduced in 2014 and applies from 2016 onward. The new rules generally meet the strengthened standards recommended by the OECD. |
| **Costa Rica** | Draft legislation would tax extraterritorial passive income in some circumstances. |
| **Mexico** | The 'passive income' definition was broadened in 2014 to include income earned from the sale of properties or from granting the temporary use or enjoyment of properties and income earned for no valuable consideration. |
| **Peru** | CFC legislation was introduced in 2012 and applies from 2013 onward. The regime is designed to prevent the deferral of income tax on passive income acquired by CFCs owned by Peruvian residents. |
| **United States** | The former Administration's proposal included a 19 percent minimum tax on certain foreign income of CFCs. The proposal for a BAT in the House Blueprint does not provide any special treatment for income from intangibles. However, export income produced by the intangibles would be exempt under the general 'border adjustment' feature of the proposal and the research and experimentation tax credit would be retained. |
| **Uruguay** | Uruguay has established CFC rules for attributing to resident individuals taxable profits obtained by entities located in low- or no-tax jurisdictions. The taxation of foreign dividends and interest for resident individuals constitutes an exception to the source principle; this treatment now extends to capital gains from the sale of equity participations in foreign entities if more than 50 percent of their value results from assets located in Uruguay. |

| Action 4 | Limit base erosion via interest deductions and other financial payments |
|---|---|
| **Argentina** | Cross-border loans are being audited by the Argentine tax authorities. They have issued an instructions with guidelines for determining whether a loan qualifies as a financial loan or as equity. |
| **Brazil** | Brazil already has thin capitalization rules, transfer pricing rules, deduction restrictions for payments to tax havens and other measures to fight base erosion via interest deductions and other financial payments. |
| **Canada** | Canada already has thin capitalization rules that are based on the ratio of debt to equity. However, Canada does not have earnings-stripping rules. |
| **Chile** | Thin capitalization rules were enhanced as of 2015. Stricter provisions for interest deductibility are in force from 2014, along with deductibility requirements for related-party payments. |

| | |
|---|---|
| **Costa Rica** | Draft legislation would limit the deduction of interest. The current draft legislation uses thin capitalization mechanisms, but a new version is being prepared that would be more in line with Action 4. |
| **Curaçao** | Thin capitalization rules apply where the creditor is an exempt company or similar foreign entity. |
| **Mexico** | Deductions for interest, royalty and technical assistance payments are disallowed where the payments are not subject to tax in the recipient country. |
| **Panama** | Financing among related parties is subject to transfer pricing regulations. Back-to-back loans are permitted but interest deduction is limited to the spread. |
| **Peru** | Interest paid to related companies is not deductible if it exceeds the ratio of 3:1 debt-to-equity. Peruvian income tax law includes provisions that prevent back-to-back schemes, and the government is considering adopting other BEPS measures, including proposals under Action 4 to further limit the deduction of interest. |
| **United States** | The former Administration's proposal would have limited the deductibility of interest expense based on the ratio of the leverage of a multinational group's US operations to that of its worldwide operations. The House Blueprint proposal would allow deductions for interest expense against any interest income but would deny any current deduction for net interest expense. Any net interest expense may be carried forward indefinitely and deducted against net interest income in future years. |
| **Uruguay** | Uruguay applies a general tax rule under which an expense (including interest and other financial payments) is only deductible for corporate income tax purposes if it is taxable for the foreign counterpart. Uruguay's transfer pricing rules are in line with OECD principles. |

| Action 5 | **Counter harmful tax practices more effectively, taking into account transparency and substance** |
|---|---|
| **Argentina** | Argentina has signed the multilateral agreements implementing the automatic exchange of tax information and common reporting standard. The 'substance over form' principle is embedded in Argentina's Tax Procedures Act. |
| **Brazil** | Although not expressly related to Action 5, some domestic tax changes are somewhat connected with the BEPS project. For example, the Brazilian Corporate Taxpayers Registry (CNPJ) now requires the disclosure of information about 'ultimate beneficial owners'. |
| **Canada** | Canada's research and development tax credit and intellectual property regimes were not identified in the OECD report as being inconsistent with the nexus approach.<br>Canada is committed to implementing the BEPS minimum standard for the spontaneous exchange of certain tax rulings. It has begun the spontaneous exchange with other jurisdictions that have committed to the minimum standard. |
| **Chile** | General anti-avoidance rules (based on the substance-over-form principle) entered into force in 2015, and the definition of 'preferential tax regime' has been broadened. |
| **Costa Rica** | The government has aggressively pursued transactions based on the economic reality principle, challenging structures that do not have proper substance. |
| **Panama** | In a September 2015 resolution, the tax authority further developed the concept of substance on the request of tax residence certificates. |

| | |
|---|---|
| **Peru** | Tax law provisions were adopted to facilitate exchange of information between competent authorities on request, automatically and spontaneously. Peruvian officials have committed to subscribe to the conventions and start exchanging information in the near future. These tax reforms also granted the Peruvian tax authority the power to request financial information from Peruvian financial institutions about their clients' passive operations. |
| **United States** | Previous tax reform proposals have included a legislative proposal for a regime that would provide incentives for intangible property. The BAT proposal in the House Blueprint does not provide any special treatment for intangibles. |
| **Uruguay** | During the last year, Uruguay has introduced measures to discourage the use of low- or no-tax jurisdictions, defined as those that apply a tax rate of less than 12 percent on income obtained from Uruguay and that do not have a tax treaty with an information clause or an exchange of information treaty in force and effect with Uruguay. The tax authority has issued a list of these jurisdictions. Among these measures, applicable tax rates are increased (e.g. non-resident income is taxed at 25 percent, and at 30.25 percent for real estate income, rather than the standard 12 percent rate), and certain types of income obtained abroad are re-characterized as Uruguay source and thus taxable (e.g. capital gains on foreign shares deriving their main value from Uruguay assets, income from exports to Uruguay between related companies under certain circumstances). Transactions with low- or no-tax jurisdictions are subject to transfer pricing regulations.<br>In 2016, Uruguay signed the Convention on Mutual Administrative Assistance in Tax Matters and the Common Reporting Standard Multilateral Competent Authority Agreement, with the first automatic exchanges of information intended to occur in September 2018. |

| Action 6 | **Prevent treaty abuse** |
|---|---|
| **Argentina** | Argentina has renegotiated several treaties to eliminate the potential for abuse and to incorporate the international standard on the automatic exchange of tax information. |
| **Brazil** | Limitation on benefits provisions are included in the most recent tax treaties executed by Brazil. |
| **Canada** | In 2016, Canada confirmed its commitment to address treaty abuse in accordance with the OECD's minimum standard. Going forward, Canada will consider either the principal purposes test or the limitation on benefits approach, depending on the circumstances and discussions with Canada's tax treaty partners. |
| **Chile** | Administrative instructions define the scope of 'beneficial owner'. New tax treaties under negotiation include explicit limitation on benefit clauses, anti-treaty shopping clauses and a principal purpose test. |
| **Costa Rica** | The government has stopped negotiating new tax treaties. |
| **Mexico** | In addition to changes limiting the application of tax treaties in 2014, for related-party transactions, the Mexican tax authorities may request certification of legal double taxation. |
| **Panama** | A September 2015 resolution established regulations for the proper application of treaty benefits. |
| **Peru** | Peru has entered into tax treaties that include limitation on benefits clauses to prevent treaty abuse. Peru's tax treaties with Mexico and Korea expressly include such a clause, while the treaty with Switzerland incorporates the clause by protocol. Most of of Peru's tax treaties (e.g. with Brazil, Canada, Chile, Korea, Mexico, Portugal and Switzerland) include the concept of 'beneficial owner' in order to prevent treaty shopping. |

| | |
|---|---|
| **United States** | The US Treasury Department published a new US model treaty that, among other things, revises the limitation on benefits provisions. It also introduces rules to address treaty abuse in the context of 'special tax regimes' and subsequent changes in law. |
| **Uruguay** | Some of Uruguay's newest treaties (e.g. with Chile) include detailed limitation on benefits and anti-abuse clauses in line withe Action 6. |

| Action 7 | **Prevent artificial avoidance of permanent establishment status** |
|---|---|
| **Canada** | Canada broadly defines 'carrying on business' and treaties are helpful in narrowing the scope of activities covered. It is not clear yet whether Canada will change its domestic rules or opt into the provisions in the multilateral instrument, which specifically affects the permanent establishment article in tax treaties. |
| **Chile** | No legislation to date. However, the 'permanent establishment' definition in Chile's tax treaties is typically broader than the OECD model definition and the exception for preparatory and auxiliary activities is narrower. |
| **Costa Rica** | Costa Rica's government is unlikely to take action regarding permanent establishments. |
| **Peru** | Peru has traditionally incorporated the permanent establishment concept in domestic legislation. 'Permanent establishment' is defined as a fixed place of business located within Peruvian territory whereby a foreign company performs all or part of its business activity. Peru's tax treaties generally follow the OECD model tax convention, and some treaties define permanent establishment more broadly (i.e. service permanent establishment, lower thresholds for construction projects and insurance). |
| **Uruguay** | Domestic law and some tax treaties exclude warehouses for the delivery of goods for permanent establishment determinations. The new tax treaty with Chile also contemplates some of the OECD recommendations under Action 7, including the creation of permanent establishments by agents without representation facilities but with active roles in contract negotiation, along with measures to prevent the artificial fragmentation of construction or service permanent establishments. |

| Actions 8, 9 and 10 | **Ensure transfer pricing outcomes are in line with value creation**<br>**Action 8 — intangibles \| Action 9 — risks and capital**<br>**Action 10 — other high-risk transactions** |
|---|---|
| **Canada** | Canada's tax authority is applying the OECD's updated interpretation of the arm's length principle in its audit and assessing practices. KPMG in Canada reports increased audit activity in transfer pricing. |
| **Chile** | Transfer pricing is under more scrutiny, and the scope of Chile's business restructuring rule has been broadened. |
| **Colombia** | Colombia's transfer pricing regime has been amended to include the value creation criteria and a new method of analyzing commodities (i.e. comparable uncontrolled price method). |
| **Costa Rica** | The tax authority has not published any announcement about value creation in accordance with Actions 8-10. |
| **Curaçao** | Transfer pricing documentation requirements were recently introduced. |

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| **Mexico** | Mexico closely follows the OECD guidelines and recommendations for transfer pricing purposes. |
| **Peru** | Tax audits addressing application of arm's length principle are increasing. Peru's tax laws expressly regard the OECD's transfer pricing guidelines as an authoritative source of interpretation.<br><br>A recent tax reform amended the transfer pricing rules in line with the OECD Action Plan. New legislation includes criteria for establishing the market value for:<br>— Commodity export/import transactions between related parties or with entities located in tax havens using comparable uncontrolled price method ('sixth method'); these transactions must be priced based on the international quote of the commodity as of the shipment date (exports) or landing date (imports).<br>— For intragroup services, a 'benefit test' has been included in the income tax law as a condition for deduction. Supporting documentation must be submitted to the tax authorities to prove that services were effectively provided.<br>— The arm's length value of intragroup services must be determined based on a net cost plus mark-up basis. The distinction of 'low value' and 'high value' for intragroup services is now included in the law; the deductible mark-up for low-value services is capped at 5 percent for the service recipient. |

| Action 11 | Establish methodologies to collect and analyze data on BEPS and the actions to address it |
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| **Chile** | New rules require large corporate taxpayers to file an annual information return on the 'global tax characterization' of their operations. The first returns were due in 2016 for calendar year 2015. |
| **Costa Rica** | The tax code has been modified to give the tax administration more powers to collect data. |
| **Curaçao** | Transfer pricing documentation requirements were recently introduced. |
| **Mexico** | Mexico's filing obligations adhere to the OECD's recommendations for country-by-country, local and master file reporting, with the first reports for 2016 due by December 2017. |
| **Peru** | The most recent tax reform introduced measures on the exchange of information allowing the tax administration to collect more taxpayer data and giving the administration additional power to guarantee effective information exchange. |

| Action 12 | Require taxpayers to disclose their aggressive tax planning arrangements |
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| **Brazil** | No action to date. A proposal to require taxpayers to formally report to the Brazilian tax authorities transactions that result in a tax benefit proved highly controversial, and it did not pass before the Brazilian Congress. |
| **Canada** | Taxpayers and promoters are required to report aggressive tax planning that meets certain hallmarks. Significant penalties apply if such transactions are not reported. |

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| **Chile** | A voluntary disclosure mechanism allows for a determination that a particular tax plan is not abusive under Chile's new GAAR provisions. Corporate taxpayers will be required to submit a sworn statement to inform the Chilean IRS, of the amounts, types and destination of investments performed abroad and in Chile. |
| **Costa Rica** | A longstanding information return for large taxpayers (AMPO) requires disclosure of certain transactions and financial changes. |
| **Mexico** | Taxpayers are obliged to file a 'relevant transactions' information return to report information about tax planning that the tax authorities might consider aggressive. |
| **Peru** | Tax law amendments allow the Peruvian tax authority to exchange information with foreign tax administrations (automatically, on request and spontaneously). Bank secrecy rules have been amended to facilitate the effective exchange of information. |

| Action 13 | **Re-examine transfer pricing documentation** |
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| **Brazil** | Brazil's tax authorities issued a normative instruction in December 2016 that establishes the rules for mandatory annual filing of country-by-country reports, starting with information relating to calendar year 2016. |
| **Canada** | Canada enacted country-by-country reporting legislation in 2016. The legislation does not require master file reporting. |
| **Chile** | Chile is a signatory to the Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports. Regulations are expected to be released this year for the implementation of the convention on mutual administrative assistance. New reporting requirements require a specific country-by-country report to be filed together with the annual transfer pricing return. |
| **Colombia** | Colombia has adopted the three-tiered approach to transfer pricing documentation (i.e., local and master file and country-by-country reporting). |
| **Costa Rica** | Draft legislation requiring master file and local file documentation in line with Action 13 has been released, but its effective date is not yet published. |
| **Curaçao** | Curaçao has signed the Multilateral Competent Authority Agreement on Exchange of Country-by-Country Reporting and is expected to take the steps needed to implement the agreement domestically. |
| **Mexico** | New reporting rules have been introduced, requiring local file, master file and country-by-country reporting. |
| **Panama** | A 2016 executive decree was enacted that seeks to align the local requirements for transfer pricing documentation with the guidelines established in Action 13, including local file and master file reporting. |

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| **Peru** | Tax law changes were recently introduced to align with BEPS Action 13 recommendations. The changes include:<br>— Local file reporting: Mandatory for taxpayers with annual revenues exceeding about USD2.3 million. The first report is due in 2017 addressing intragroup transactions performed in 2016.<br>— Master file reporting: Mandatory from 2018 for taxpayers that belong to an economic group with annual revenue over about USD20 million.<br>— Country-by-country reporting: Mandatory from 2018 for taxpayers that belong to an economic group.<br>— Regulations prescribing formats and deadlines are not yet issued. The information and reports could be shared with foreign tax authorities under new exchange of information provisions. |
| **United States** | Final regulations require annual country-by-country reporting by US persons that are the ultimate parent entity of a multinational enterprise group that has annual revenue for the preceding annual accounting period of USD850 million or more. The rules apply for taxable years of the ultimate parent entity beginning on or after 30 June 2016. |
| **Uruguay** | Uruguay has introduced rules to implement country-by-country reporting for transfer pricing purposes in line with the BEPS. |

| Action 14 | **Make dispute resolution mechanisms more effective** |
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| **Brazil** | The Brazilian Revenue Service issued a normative instruction setting out rules on the mutual agreement procedure under tax treaties. |
| **Canada** | Canada is among the first batch of countries to take part in the mutual agreement procedure peer review and monitoring process that started in December 2016.<br>In its 2017 federal budget, Canada's government reaffirmed its commitment to develop more effective and timely mutual agreement procedures (e.g. arbitration) in the resolution of tax treaty-related disputes. |
| **United States** | The new US model income tax treaty contains rules to make more efficient and effective dispute resolution mechanisms between tax authorities through the use of mandatory binding arbitration. |

| Action 15 | **Develop a multilateral instrument** |
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| **Canada** | Canada has indicated that it is pursuing signing of the multilateral instrument. |
| **Chile** | Chile took part in the ad hoc group that developed the multilateral instrument and is expected to sign the instrument. |
| **Mexico** | Although there has been no response to date, it appears likely that Mexico will adhere to the multilateral instrument. |
| **Panama** | On 31 October 2016, Panama joined the inclusive framework on BEPS, becoming the 87th member. To date, the government has issued no further guidance or regulation regarding a multilateral instrument on BEPS. |
| **United States** | The US is not expected to sign the multilateral instrument. |

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