KPMG

OECD BEPS Action Plan

Taking the pulse in the Americas region

February 2016

KPMG International

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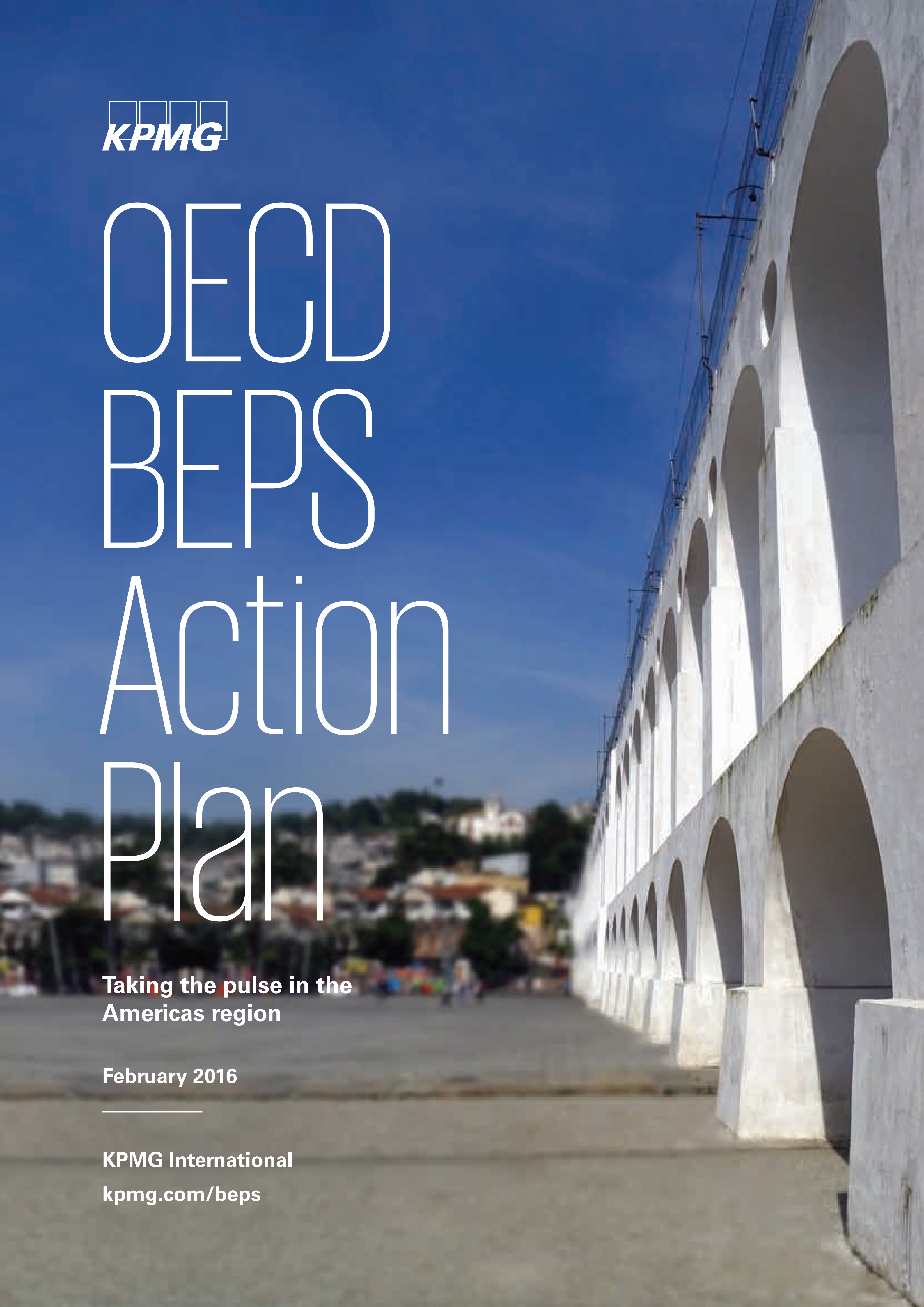


Introduction

For tax executives of multinational companies headquartered in the Americas, the future of international taxation is increasingly uncertain. The global project to address tax base erosion and profit shifting (BEPS) continues to build momentum. With the release of fina recommendations on all fifteen BEPS proposals and their endorsement by the G20, countries are beginning to adopt legislation to implant recommendations, and the Organisation for Economic Co-operation and Development (OECD) is expected to start monitoring implementation of its Action Plan on BEPS.[1]

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? As we turn the corner from consultation to implementation, the time is right to take stock. This report is the second in our series of 'pulse checks' on how actions on BEPS policy are progressing in the Americas. For this report, we polled international tax leaders from KPMG's member firms to get their views on trends and developments in the region. In particular, we asked:

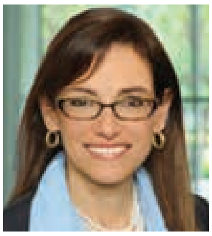
— How are Americas' governments responding to the final OECD BEPS recommendations?

— Which governments are frontrunners in adopting the new international tax guidelines?

— 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. Based on these findings, our report concludes 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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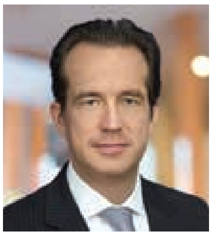

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1 Organisation for Economic Co-operation and Development (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en (referred to herein as 'OECD Action Plan').

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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 to 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 are either fully engaged or watching developments closely. Each government will have to determine how the guidance affects its existing rules, and then undertake the process of proposing, debating, and enacting domestic tax changes. In some countries, years may pass before reforms become law.

Next steps?

Now that the Action Plan guidance is complete, the next steps are not so clear. Businesses have raised concerns over the uncertainty and complexity that is bound to result from staggered implementation of new rules among different countries. The Action Plan charts a course for coordinated implementation of its outcomes, but there currently seems to be no guidance or monitoring of unilateral implementation of the Action Plan's recommendations at the OECD level.

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.

Which countries are on board?

In their engagement with the 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 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,

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**

Source, KPMG International, 2016.

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.

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

— **Mexico** has 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.

— The **United States (executive branch)** has proposed to impose a 19 percent minimum tax on foreign income of controlled foreign companies and to limit 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; alternative proposals have emerged from the US Congress.

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. For example, in June 2015, the European Commission presented its own action plan for reforming corporate taxation in the EU. Overlapping with the OECD's work in many areas, the plan sets out 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 appears increasingly likely 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.

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.

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 recognizes that the risks faced by developing countries from BEPS, and the challenges faced in addressing them, may differ in nature

[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).

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 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 (MNE). 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 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.

Raising the bar for international tax policy

While the ideal of a coordinated, consistent and fair international tax system appears to remain out of reach, 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 influenc 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 Indonesia, the Philippines and Thailand 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 2 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 will help ensure the OECD's recommendations are 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.

Rough road ahead

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.

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 fi e 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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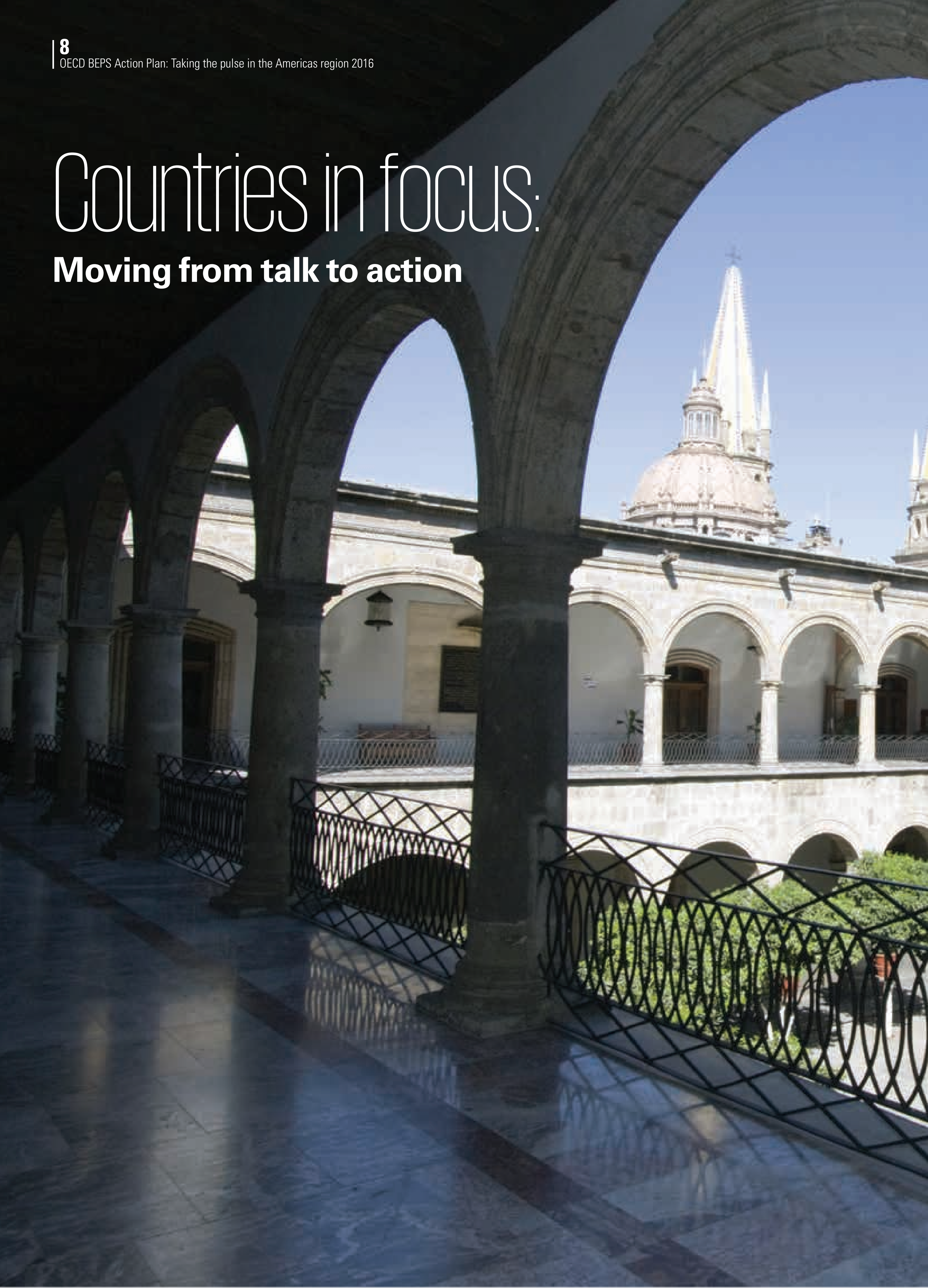
Countries in focus:

Moving from talk to action



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. Argentina's new president took offic in December 2015, and tax reform is expected, although the timing is uncertain.

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. 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 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.

Preventing treaty abuse

Tax avoidance involving tax treaties has 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 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.

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

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

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.

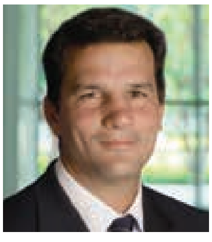
Punitive withholdings on exports to non-cooperative jurisdictions

Argentina's tax administration issued a resolution[5] in January 2014 establishing a withholding regime for the export of goods where the final destination is different from the buyer's country of residence. 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 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

As a G20 country, Brazil has been engaged in the OECD’s work and the Brazilian Revenue Service has already expressed its intention 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 will pick and choose to adopt only those aspects of the proposals that suit Brazil’s domestic purposes.

BEPS already on tax authorities’ agenda

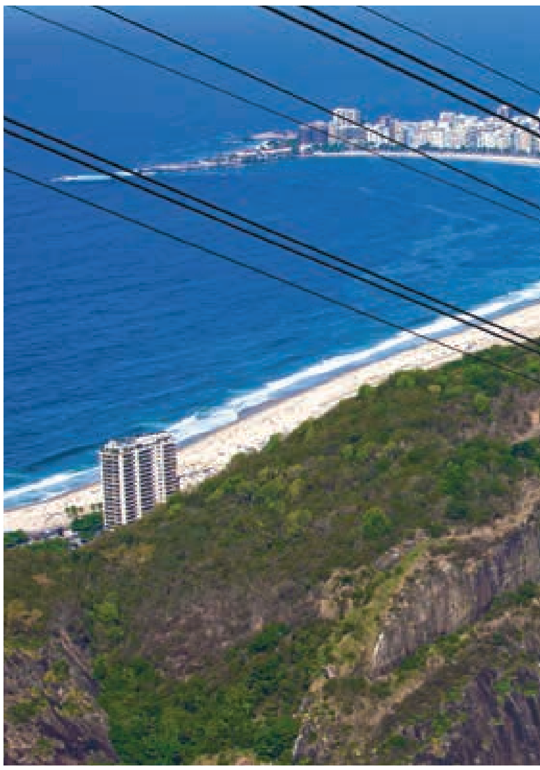
As the recipient of significant foreign direct investment, Brazil has been concerned about BEPS for many years. The country has had a number of international tax rules and other measures in place for several years to stem the flow of earnings outside the country. For example, royalty payments for foreign 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?

As a G20 country, Brazil has been engaged in the OECD’s work and the Brazilian Revenue Service has expressed publicly its intention to adopt BEPS recommendations. Despite this, it appears that Brazilian tax authorities are currently determining how the guidance affects Brazilian existing rules.

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



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 are required to disclose their profits for tax purposes by country, 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 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 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 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 the Canadian government seems unlikely to make sweeping changes in the near future. While Canada's Liberal government endorsed the OECD's final recommendations at the G20's November 2015 Summit in Turkey, the newly elected government is expected to evaluate the specifics in light of its policy objectives. Not surprisingly, Canadian government officials have informally indicated that they expect to adopt the country-by-country reporting recommendations. A formal announcement on these requirements is expected this year and perhaps as early as the upcoming federal budget in the spring of 2016.

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.

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 affiliat '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 finali ed 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 Canadian Department of Finance stated that a treaty-based approach would be time consuming to implement and less effective than a domestic rule.

The government also 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.

Since the release of the OECD's fina reports, the Canadian government has not clarified whether it will continue to pursue a domestic anti-treaty shopping rule. Rather, it is possible that Canada's concerns may be resolved by adopting certain of the OECD's recommendations, such as the multilateral instrument with other countries to address treaty-related BEPS issues.

The government has consulted with stakeholders on the OECD's BEPS Action Plan and said in its 2015 federal budget that this input has helped shape Canada's

ongoing participation in the international discussions related to BEPS. In the budget, the government also highlighted its intention to proceed in this area in a manner that balances tax integrity and fairness with the competitiveness of Canada's tax system.

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. Canada signed on to the OECD's multilateral instrument on administrative exchange (e.g. information exchange).

Canada has also endorsed the OECD's new common reporting standard for automatic information exchange. Under the new standard, foreign tax authorities would provide information to the Canadian tax authorities relating to financial accounts in their jurisdictions held by Canadian residents. On a reciprocal basis, the Canadian tax authorities will provide corresponding information to foreign tax authorities on accounts in Canada held by residents of their jurisdictions.

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. The CRA 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's newly elected government considers adopting OECD recommendations that match its domestic tax policy goals, especially in the areas of treaty shopping, hybrid arrangements and transfer pricing. As noted, the Canadian government has informally indicated that it will adopt the OECD's recommendations on country-by-country reporting. Canada also appears to be carefully considering the prospect of signing on to the multilateral instrument for addressing treaty-related BEPS issues.

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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 been following 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, financia 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 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.

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 the following information regarding that group:

— 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 the following information:

— 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 fisca year; capital accounts; accumulated profit and losses; number of employees; fi ed 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 firs 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.

While Mexico is 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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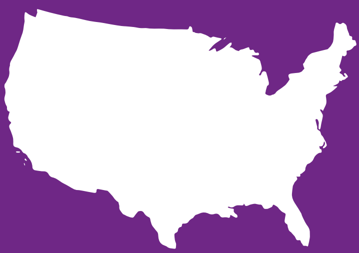
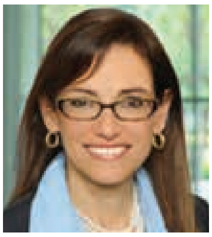


Like other countries that are both OECD and G20 members, the United States has been fully engaged in the OECD's BEPS project. Representatives of the US Treasury Department have actively participated in the OECD negotiations and generally expressed support for the goals of the project. Some members of 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.



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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 official regarding burden, misuse of information and confidentiali y, which are shared by a number of other officials, 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, 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 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?

On 22 December 2015, the US Treasury Department and the Internal Revenue Service issued proposed regulations that would require 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. The proposed regulations would be applicable to taxable years of ultimate parent entities of MNE groups beginning on or after the date of publication of the final regulations.

Given the late publication date for the proposed regulations, final regulations are not expected until sometime during 2016, pushing the first reportable period for calendar-year MNE groups to 2017, which is 1 year later than the OECD's recommended first reporting period.

The US Treasury Department released proposals to revise the US model income tax treaty on 22 May 2015. The revisions

are designed to respond to changes in US treaty partners' tax regimes that the Treasury Department believes may encourage BEPS. The proposed changes include provisions aimed at inversion transactions, 'special tax regimes', and so-called 'exempt permanent establishments'. The Treasury Department has stated that, for the next US model income tax treaty update, a new article would be introduced for resolving disputes between tax authorities through mandatory binding arbitration, although this measure is not among the current proposals.

Previously, the US indicated that it did not intend to take part in the ad hoc group working on the development of a multilateral instrument, but the US has subsequently enlisted as a member of that group.

Beyond these developments, the Obama Administration has indicated it will consider implementation of the OECD BEPS project results, at least to the extent certain results 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 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. President Obama's 2017 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.

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.

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

Regardless of whether the US enacts these 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 where relevant, prior to the effective date of the requirement in the US.

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.

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 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.

— **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 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

Even though the OECD BEPS Action Plan final reports were only published on 5 October 2015, many countries are already changing their tax legislation or administration in response. Below we summarize such actions taken so far by countries in the Americas regarding the Action Plan's 15 points.

OECD BEPS Action Plan	Unilateral responses to date
Action 1 — Address tax challenges of the digital economy	**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. **United States** — The Obama Administration has proposed a rule to currently tax foreign transactions involving digital goods or services.
Action 2 — Neutralize effects of hybrid mismatch arrangements	**Chile** — Although no specific anti-hybrid rules have been introduced, a general anti-avoidance rule that can be used to challenge structures or transactions involving hybrid mismatches took effect in October 2015. **Mexico** — Anti-hybrid and double deduction provisions have been introduced that limit deductions for interest, royalty and technical assistance payments that are not subject to tax in the recipient country. **United States** — The Obama Administration has proposed a rule that would deny deductions for related-party interest and royalty payments in certain situations involving hybrid arrangements and to currently tax some payments received by US-owned foreign reverse hybrid entities.
Action 3 — Strengthen controlled foreign company (CFC) rules	**Brazil** — Brazil already has one of the world's most stringent CFC regimes, and these rules further strengthened in 2014. **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** — Proposed legislation would tax extraterritorial passive income on repatriation. **United States** — An Obama Administration proposal would impose a 19 percent minimum tax on certain foreign income of CFCs.
Action 4 — Limit base erosion via interest deductions and other financial payments	**Brazil** — Brazil already has thin capitalization rules, transfer pricing rules, deduction restrictions to payments to tax havens and other measures to fight base erosion via interest deductions and other financial payments. **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** — Proposed legislation sets out 2:1 thin capitalization rules. Withholding tax exemptions for foreign lenders have been virtually eliminated. **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. Moreover, back-to-back loans are permitted but interest deduction is limited to the spread. **United States** — The Obama Administration has proposed a rule to limit 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.
Action 5 — Counter harmful tax practices more effectively, taking into account transparency and substance	**Canada** — Canada has joined the Multilateral Competent Authority Agreement, which implements the Standard for Automatic Exchange of Financial Information in Tax Matters. **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. **Panama** — Regulations were enacted in 2015 to develop the concept of substance upon the request of tax residence certificates **United States** — There is a legislative proposal for a regime that would provide incentives for intangible property.
Action 6 — Prevent treaty abuse	**Brazil** — Limitation on benefits provisions are included in the most recent tax treaties executed by Brazil.

OECD BEPS Action Plan	Unilateral responses to date
Action 6 — Prevent treaty abuse (cont.)	**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. **Panama** — A new regulation has been adopted regarding the proper application of treaty benefits. **Costa Rica** — The government has been reluctant to negotiate new treaties. The country has only one treaty in effect, while two others have been submitted for legislative approval. **United States** — The Obama Administration has proposed revisions to the US model treaty that include, among other things, draft provisions addressing issues arising from 'special tax regimes'.
Action 7 — Prevent artificial avoidance of permanent establishment status	**Canada** — Since 2013, Canada has been evaluating measures to combat treaty shopping. **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.
Actions 8, 9, 10 — Ensure transfer pricing outcomes are in line with value creation **Action 8 — intangibles** **Action 9 — risks and capital** **Action 10 — other high-risk transactions**	**Canada** — KPMG in Canada has seen cases in which the Canada Revenue Agency has applied the OECD's recommended principles in transfer pricing audits. **Chile** — Transfer pricing is under more scrutiny, and the scope of Chile's business restructuring rule has been broadened. **Mexico** — A new transfer pricing group has been formed with the tax authority in order to increase scrutiny of transfer prices. **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.
Action 11 — Establish methodologies to collect and analyze data on BEPS and the actions to address it	**Chile** — New rules require large corporate taxpayers to file an annual information return on the 'global tax characterization' of their operations, with the first returns 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.
Action 12 — Require taxpayers to disclose their aggressive tax planning arrangements	**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. **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 inform the Chilean IRS, through a sworn statement of the amounts, types and the destination of the investments performed abroad and in Chile. **Mexico** — Taxpayers are obliged to file a 'Relevant Transactions' information return to report information about tax planning that the tax authorities might consider aggressive.
Action 13 — Re-examine transfer pricing documentation	**Canada** — Representatives of the Canadian government have informally indicated that it will enact country-by-country reporting legislation. A formal announcement is expected to be made in the 2016 federal budget, which will be tabled in the spring of 2016. **Chile** — Chile 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 in the near future. **Mexico** — New reporting rules have been introduced, requiring local file, master file and country-by-country reporting. **United States** — Proposed regulations would require country-by-country reporting by US persons that are the ultimate parent entity of a multinational enterprise group.
Action 14 — Make dispute resolution mechanisms more effective	No unilateral action among countries in the Americas to date.
Action 15 — Develop a multilateral instrument	**Canada** — Canada is taking part in the ad hoc group that is developing the multilateral instrument. **United States** — The US is taking part in the ad hoc group that is developing the multilateral instrument.

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