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BEPS in Latin America – An Analysis of Current Implementation and Problems

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Este trabajo está dedicado a mis padres a quienes les agradezco su amor y apoyo incondicional durante mis estudios.

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Resumen

BEPS en América Latina - Un análisis de la aplicación y los problemas actuales

El presente Trabajo de investigación analiza el proyecto BEPS de la OCDE en el contexto Latinoamericano. Se evaluaron y discutieron las acciones más importantes del proyecto, así mismo se analizó y examinó la aplicación y los problemas que pueden surgir en cada país. Posteriormente, se debatió en profundidad cómo el proyecto BEPS puede ayudar a los países latinoamericanos a controlar la fiscalidad. El resultado del trabajo se divide, por un lado, en afirmar que el enfoque BEPS es relevante para la fiscalidad internacional y por el otro, en que hay que tener en cuenta que el proyecto puede no tener éxito por razones legales y socioculturales.

Palabras clave: BEPS, Transferencia de beneficios, América Latina, Erosión fiscal

Abstract

The following paper discusses the OECD BEPS project in the Latin American context. The most important actions of the project were evaluated and discussed, as well as the implementation of the individual countries was analyzed and examined for their problems. A detailed discussion was then held on how the BEPS project can help Latin American countries gain control over taxation. The result of the work is divided. On the one hand, we stated that BEPS approaches are relevant to international taxation. On the other hand, it must be considered that the project may not be successful due to socio-cultural and legal reasons.

Keywords: BEPS, Profitshifting, Latin-America, Tax erosion

Agenda

I. List of Abbreviation

ALP	Arm's Length Principle
APA	Advanced Pricing Agreements
BEPS	Base Erosion and Profit Shifting
CFC	Controlled Foreign Company
CTA	Covered Tax Agreements
DIAN	Dirección de Impuestos y Aduanas Nacionales
DTA	Double Tax Agreement
DTT	Double Tax Treaty
e.g.	for example
EPC	Engineering-Procurement-Construction
GDP	Gross-Domestic-Product
i.e.	id est
ICMS	Imposto sobre Operações relativas à Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação
ICT	Information and Communication Technology
ILADT	Instituto Latinamerica de Derecho Tributario
IP	Impuesto al Patrimonio

IPI	Imposto sobre Produtos Industrializados
IRNR	Impuesto a las Rentas de los No Residentes
IRPF	Impuesto a las Rentas de las Personas Fisicas
ISS	Imposto sobre Serviços de Qualquer Natureza
LoB	Limitation of Benefits
LONT	List of Low- or No-Taxation
MAP	Mutual Agreement Procedure
MDR	Mandatory Disclosure Rules
Mio.	Million
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Preven BEPS
OECD	Organization for Economic Co-operation and Development
OECD-MA	Organization for Economic Co-operation and Development-Model agreemen
PE	Permanent Establishment
PPT	Principal Purpose Test
SAT	Tax Administration Service
TNMM	Transaction Net Margin Method
TP	Transfer Prices
USMCA	United States–Mexico–Canada Agreement
VAT	Value Added Tax

1. Introduction

Since 2014, BEPS has been the cross-national and dominant issue in the context of international taxation. The term Base Erosion and Profit Shifting (BEPS) refers to the planned reduction of tax bases and the cross-border shifting of profits by multinational corporations. According to the OECD, the tax base's erosion poses a threat to tax revenues, tax sovereignty, and tax fairness. Tax planning by multinationals has become more aggressive over time. Therefore, it is necessary to level the tax playing field at the international level to a certain extent to ensure that each tax jurisdiction receives a fair share of the tax substrate to which it is entitled.

Therefore, most of the BEPS Action Plan measures aim to identify and prevent tax structuring opportunities. The states also want to make international cooperation more efficient and develop cross-border international tax regulations to prevent tax competition. In February 2013, the OECD, for the first time, prepared and published research results on the extent and functioning of profit shifting in the report "Addressing Base Erosion and Profit Shifting." In July 2013, the OECD published the BEPS Action Plan at the G20 Summit in Moscow, proposing 15 concrete measures to combat BEPS. In 2014, the BEPS Action Plan was elaborated. The plan should be implemented gradually by the end of 2015. This has not yet happened. The problems of implementing a general project so quickly in individual tax law are too significant. Besides, there are conflicts of interest between the individual countries.

The MLI measure has found its place within the BEPS project. As its name indicates, the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) aims to prevent tax base erosion and profit shifting. The OECD's MLI was published on November 24th, 2016, and arises from the OECD/G20 Base Erosion and Profit shifting initiative known as Action 15.[1] Since July 2018, the current 89 signatories are committed to uphold and implement the Treaty. As of September 30th,

[1] OECD

2019, 34 of the signatories have implemented the measures of the Treaty. With the ongoing implementation process, the MLI's importance will grow in the next few years and change the international tax competition completely.

The MLI arose "because of jurisdiction perceptions that they were suffering from the tax practices of others."[2] Due to France, Germany, and the United Kingdom's latest reactions, the MLI was used to respond to taxation avoidance structures applied by multinational companies mostly based in the United States, e.g., Apple and Google.

Opponents of the MLI-Treaty criticize that most of the Treaty ruling countries are countries defined by the World Bank index as high-income countries. At the same time, only about 37% of the signatories are defined as low-income or middle-income countries.[3] Therefore, it can be assumed that the impact of that minority, formed by middle- and low-income countries, on co-determination is below. Even if especially those countries need the most help to develop and grow in an economic sense.

Further, there will be many problems with the implementation of the MLI due to its incompatibility with current existing bilateral tax treaties. For example, 53% of Mauritius's tax treaties will be affected by MLI's implementation.[4]

10 Latin American countries have signed the BEPS project, some of which have also committed to implementing well-defined actions quickly through the MLI. Latin American countries have many different problems with taxation in different areas. In particular, the Central American countries, which live mainly from financial transactions, like Panama, and indirectly from foreign companies' establishment, conflict with the Latin American countries, which earn their GDP through import/export transactions. In addition

[2] Christians and Shay (2017)
[3] Johann Hattingh (2018)
[4] Johann Hattingh (2018)

to cultural issues, problems, and individual tax systems' complexity, Latin American countries also suffer from tax avoidance and evasion.

Consequently, this research project aims to identify the present problems implementing the BEPS Latin America. The same applies to the question of how far BEPS can help Latin American countries to improve taxation. The aim of these qualitative-descriptive studies is to provide a comprehensive summary of the BEPS project in Latin America, based on the literature. The Descriptive Scientific Method aims to obtain all the necessary data on a given issue, then to analyse this data in context, to discuss and analyse its problems, as well as to provide an outlook.[5][6]

1.1 Justification and Macro theory

In an interconnected world, trade, politics, and communication are conducted across national borders. The term "globalization" is widely used but ill-defined. It usually refers to economic, environmental, social, and political issues that are addressed between multiple countries, states, and regions. Globalization reduces the previously perceived distance between the individual countries of the world. As a result, there is a lack of clear distinction. International trade has long since become the norm. As a result, taxation can no longer be guaranteed as it used to be.[7]

The magnitude of the impact of greater economic integration on capital taxation is not directly foreseeable, but it is becoming more relevant in an increasingly globalizing world.[8] The problem, however, is that control usually depends on national political stability, so that international trade can provoke tax loopholes such as capital flight.[9]

[5] Dulock (1993)
[6] Snyder (2019)
[7] Asher Mukul G. and Rajan Ramkishen S. (2001)
[8] Antonis Adam, Pantelis Kammas, and Athina Lagou (2013)
[9] Kumar, Quinn, and International Monetary, Fund (2012)

Examples of economic and political cooperation among several or all countries of the world include the European Union (EU), the OECD Economic Area, or the United Nations (UN). Low fuel prices and favorable transport options in container shipping and aviation are rapidly reducing the cost of transporting goods. This makes it worthwhile for large corporations to produce and market their products worldwide. Since the 1950s, the export of goods and commodities has been strongly globalized. Investment by companies abroad has also increased. They are looking for sales markets and favorable production locations to compete in world trade. They are then referred to as multinational companies. Political processes shape an important aspect that also affects the economy: The opening of national markets is a significant feature of globalization. Import tariffs, import quotas, and import bans have been restricted or lifted altogether worldwide since the 1980s.

That is precisely where the importance of international taxation rules comes in. The BEPS project is formed to counteract tax fraud and problems due to rising globalization. But how can different countries implement uniform rules in all the different tax systems all over the world to make sure taxation is secured.

Since every country has different tax avoidance and control problems, they all will face different Problems, implement the MLI, and gain different results from it. In Latinoamérica México, Colombia, Panamá, Costa-Rica, Belice, Perú, Chile, Argentina, Bolivia, Brasil, and Uruguay have signed the MLI.

That means they are forced to restructure their taxation policy and maybe can gain an advantage of tax fraud.

The Multilateral Instrument and the BEPS project are meant to be a real revolution in international taxation. Not only because 83 countries committed to applying the new rules to their jurisdiction, but also because it is one of the first sweeping changes of international taxation standards and the first innovative cooperation of so many nations. As mentioned, the BEPS project and the MLI are detailed. That is why it is essential to narrow the subject of my thesis. Actions 2,6,7,12 are highly discussed Actions in the Literature, and when applied, they will have a considerable impact and conduct many changes on international company and trade strategies. In addition, actions 8-10 must be discussed together as they represent the transfer pricing arrangements. We limit ourselves to these actions because they are the base of the tax avoidance programs. Primarily the actions belonging to the MLI are relevant here since the MLI is a commitment of some countries as part of the BEPS project. Furthermore, the restriction of the actions serves to ensure the scope of the thesis and present clarity. It must be mentioned again that the actions are the most discussed in the literature, which sufficiently justifies the relevance.

Since the Latin American countries pursue different economic policies, the individual advantages of the countries diverge widely. For example, Panama, a country in which many companies are based due to low taxes, has completely different interests than Peru, which generally lives from exports. It is also questionable whether only advantages result from the BEPS project.

Because of the problems described above, the Research Question is the following: What impact will the BEPS implementation have on global taxation, and what may be the problems of implementing different Actions within a Latin American context?

How can participation within the BEPS Project help Latin American countries to gain more control over tax fraud and stabilize the taxation system?

Furthermore, it should not be forgotten that it is essential to question the theory behind BEPS. This means that individual actions have to be taken apart to create clarity vis-à-vis the implementation. Consequently, in the first part of this thesis, the individual actions' theory will be addressed and discussed based on their Theory and an explanation of the action's problems. The Second Chapter follows a systematic analysis of the current implementation of BEPS in Latin American countries. In the third part of the Tesis, we will apply parts 1 and 2 to each other and other cultural problems of Latin America, such as corruption in companies. With that made, BEPS will be discussed in a Latin American context and will answer the further mentioned questions.

2. Theory and Questioning of the Different BEPS-Actions

To get a deeper understanding of these actions, it is essential to explain the terminology first. Therefore let's take a look at what is a mismatch. In the following section, we will present and discuss the different BEPS Actions on their value to international taxation and investigate their sense and application issues. Only actions are discussed, which will be discussed later in the Latin American context, as a continental basis and basis of the individual countries.

2.1 Action 2 - Neutralising the Effects of Hybrid Mismatch Arrangements

Action 2 is about hybrid mismatches and neutralizing their effects.

Let's take a look at what a mismatch is. A mismatch is a discrepancy arising from the different tax treatment under the laws of each jurisdiction. This means that a mismatch occurs due to the disagreement between other laws.

Because Action 2 of BEPS is exclusively targeting hybrid mismatches, we need to understand what hybrid means and what a hybrid element is. The hybrid element is present when several companies take advantage of different regulations for tax purposes. You benefit from such a structure through a lack of clarity and transparency. It is irrelevant whether it is just two companies, a single business, a single site, or even a whole group.

In its introduction of Action 2 from 2012, the OECD defines four essential elements: part of hybrid mismatch arrangements.

First of all, hybrid entities Corporations are entities with different status in different countries. That means the Corporation is transparent taxable in one country and non-transparent in the other and, due to that, not taxable. That results in the problem that if the entity can influence their status by electing the State of transparency, they are likely to save taxes.[10]

The second hybrid mismatch arrangement is dual resident entities. Those entities have residency status in two countries.[11]

Further, they define hybrid instruments, which use different tax regulations in the countries to shift profits. The most famous scenario is to offset gains and losses with each other. For example, based in Germany, the A-Ltd turns its profit into the related B-Ltd, based in Australia. Under German jurisdiction, parts are deductible without any concerns until a threshold of 3 Mio. € and due to Australian jurisdiction, dividends from related Companies are not taxable. As a result of that, the Group does not pay taxes because of good tax planning.

The last criterium is Hybrid remittances: These are arrangements whereby property is transferred for tax purposes to take advantage of foreign regulations. To be mentioned, the criteria do not necessarily occur individually, but sometimes in combination.

Bringing that together, the OECD defines a hybrid mismatch as the following: A Hybrid mismatch is a constellation that allows enterprises to save taxes through profit shifting to a related company in another country. These Hybrid mismatches develop through different jurisdictions.[12]

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[10] Haigh, Walker, Bacq, and Kickul (2015)
[11] Àlvarez (2019)
[12] Christian Kahlenberg (2016)

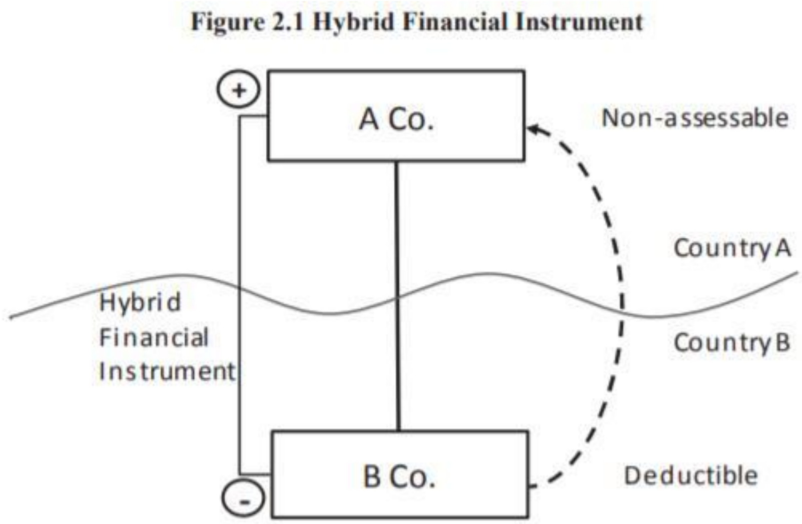

Figure 1: Hybrid Missmacht[13]

Furthermore, the OECD claims that hybrid mismatches have several effects. They would ensure a double deduction of taxes, as losses are made in different countries. It would also avoid taxation of profits, as interest is deducted in one country, and gains are tax-free in others. Furthermore, the OECD claims that hybrid mismatches give rise to tax credits that would not be possible from a purely national point of view and have been obtained by fraud. But is that true? In the Literature, the existence of hybrid mismatches is highly discussed.

A primary problem is the generally known vagueness of the regulations in the different states. With Action 2 of the BEPS project, the OECD has decided against a supranational solution favoring an individual state solution. As a consequence, the amendment of more than 3000 double taxation agreements would be necessary. All the changes would have to be coordinated, just as the individual state regulations would have

[13] Organisation for Economic Co-operation and Development, author (2014)

to be changed if necessary.[14] The state regulations of the individual countries must be changed under the BEPS project. Once the effort has been made, it is still difficult for individual countries to change their tax laws, as this would mean re-examining all of the more than 3000 double taxation agreements.

A further problem is posed by the recommendations of Action 2, which encourages States to amend their national law so that, where appropriate, a tax claim is waived. This can lead to double taxation. Against the background that double taxation treaties exist to eliminate double taxation, this is undoubtedly lucrative for the tax authorities but does not lead to the desired result.[15]

The question arises if states would not lose their sovereignty through such an intervention in their jurisdiction. In the event of a structural change in a country's policy, the new government would no longer be able to implement its interests and those of the country's citizens from which it was elected. Much more control is being relinquished here.[16]

It is still unclear which State has to change its regulations if a hybrid instrument's constellation is possible. This raises the question of power and justice. Are economically weaker countries such as Colombia obliged to change their laws as soon as a hybrid instrument with a developed industrial state is in place? What are the consequences if two states cannot agree? Who intervenes here?

In summary, the vague formulation and implementation at the national rather than supranational level is a significant problem for Action 2. It is still unclear how the implementation will occur, and many questions arise that cannot be answered yet.

[14] Graeme S. Cooper (2015)
[15] Paolo Piantavigna (2017)
[16] Graeme S. Cooper (2015)

2.2 Action 3 - Controlled Foreign Company

The BEPS Action 3 regulates the additional taxation. The Intention behind CFC is to counteract the shift of sources of income to low-taxed foreign companies. The Counteraction will be achieved by attributing foreign companies' income to the shareholders if they do not carry out any actual economic activity. Action 3 defines six basic principles of an additional system.

The CFC rule applies to both legal and natural persons. The legal consequence of the additional taxation is that the foreign company's operating profits are taxed in the shareholder's residence country. The foreign company's profit is added according to the income and taxed at your usual income tax rate. This can often be a fictitious profit estimate. The criteria of a foreign-controlled company are met if:

You hold more than 50 percent of the shares of a foreign company and therefore have a controlling influence (trusts are "transparent" here). The foreign company cannot demonstrate any active activities in the country of domicile (see definition below). The foreign company is located in a low-tax country (corporate income tax < 25 percent).[17]

It does not matter whether the country of residence of the shareholder is the same. The domicile country is either the country of residence or the country of domicile of the parent company with which the foreign company has signed a DTA or not.[18]

On the other hand, there are three different types of CFC exemptions, and threshold requirements were which will be considered by the countries involved in this work:

1. a fixed de minimis amount below which the CFC rules would not apply;

[17] OECD (2020h)
[18] OECD (2015a)

2. an anti-avoidance requirement, which would focus CFC rules on situations where there was a motive or Purpose for the tax avoidance;

3. A rate exemption where the CFC rules would only apply to CFCs that are

Countries with a lower tax rate than the parent company;[19]

However, Action 3 also poses many problems and is considered to be the most vaguely formulated action. First and foremost are the problems of application in national law and its application to international relations.

Firstly, there are typical problems with the interpretation and interpretation of the beneficial owner. Several definitions are regularly issued between the different countries to cover all cases. However, this has the consequence that several interpretations are applicable in particular cases, and the final taxing State remains undefined until a dispute is settled. This situation will increase with the implementation of BEPS and lead to even greater uncertainty.[20]

There are further problems with the State of residence's obligation to grant tax relief for taxes levied on income controlled by CFCs. In general, CFCs give rise to three discrepancies. The first is the discrepancy between taxable events, as the State of the entity taxes both realization and income distribution. That means the profit and its distribution are taxed, while the State of the shareholders taxes the only realization. Second, a consequence of this is the timing discrepancy concerning the same income item: if the former State taxes the shareholders at the moment of dividend distribution, the latter State - through transparency - has already taxed this income at the moment of realization. Third, a discrepancy between taxpayers - for the same level of taxation - arises from the

[19] OECD (2015a)
[20] Daniele Canè (2017)

discrepancy between the taxable events, since the former State taxes the CFC at the moment of realization. The latter (simultaneously) imposes taxes on the shareholders.[21]

These discrepancies directly impact double taxation of situations, particularly where the State of the shareholder's levies full and final taxation on the foreign Corporation's profits while the corporation levies taxation on profits distributions. This is not conducive to achieving the objective of a double taxation convention, namely the prevention of double taxation.[22]

Two solutions have been worked out in the form of recognition as royalty payments, which would result in crediting or reducing the tax base to the respective State. However, no agreement was reached.[23]

In summary, this means that Action 3 is likely to continue to promote double taxation in the future. The objective of avoiding non-taxation is probably far more critical than avoiding double taxation. Accordingly, Action 3 makes it possible to question the usefulness of double taxation agreements and why, despite such blatant promotion of double taxation, a complicated attempt is not made to avoid taxation if this approach could transfer taxation to any country once.

2.3 Action 6 - Prevention of Tax Treaty Abuse

Action 6 of BEPS aims to counteract treaty shopping. By establishing double taxation treaties over the last decades, double taxation has been virtually eliminated worldwide in the international context. The problem is that other double taxation agreements can be used creatively so that taxation is avoided altogether. That is called tax treaty abuse.

[21] Daniele Canè (2017)
[22] Kuzniacki (2015)
[23] Mitchell A. Kane (2014)

The prevention of tax treaty abuse is mostly about the ban of treaty shopping. Treaty Shopping is called actions. Without a Double Tax Treaty, two countries interpose a company with a beneficial double Tax treaty-making improper Profit due to the Treaty regulation.

For example, the A ltd, based in the Cayman Islands, plans to do business with the B-ltd based in South Africa. Because both nations do not have a double tax treaty, the A-ltd provides the trade through the C-Ltd, based in Belgium, which further trades everything to a B-Ltd. Important is that the C-Ltd. is only used because Belgium states beneficial double tax treaties, which the Cayman Islands and South Africa.

In addition to treaty shopping, treaty abuse includes conduct. A treaty country resident engages in transactions to obtain tax benefits and implements them strategically in its planning.[24]

The OECD has been trying to put an end to this drift for decades. The first measures were taken as early as 1977 when the first owner issues were clarified and included in the OECD Model Tax Convention to avoid Treaty Shopping situations in which profit is not taxed due to relocation and lack of clarity about the owner.

Action 6 only sets two minimum Standards, an express statement on non-taxation and one of three methods of addressing treaty shopping. The parties must commit to including in their tax treaties provisions dealing with treaty shopping to ensure a minimum level of protection against treaty abuse. Those minimum Standards should be provided through the OECD's elaborated Principal Purpose Test, which is highly discussed in taxation literature.[25] Because of the complicated construction of treaty shopping possibilities, it is questionable if the MLI can prevent International taxation from all tax abuse constellations.

[24] Broe and Luts (2015)
[25] Błażej Kuźniacki (2018)

The express statement on non-taxation is a statement of intention to prevent non-taxation treaty abuse. This statement should look suggested:

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States).[26]

This statement's sense is questionable since the statement itself won't change anything on tax treaty abuse. More important is the application of one of the three methods of addressing treaty shopping. The first method applies the principal purpose test (PPT) due to article 29 of the OECD tax convention Model from 2017 and the limitation of benefits rule. The second method is to apply the PPT alone. The third possibility is introducing regulations that deal with conduct arrangements that aren't already taken into account by domestic tax law. All signatory states are committed to meet the minimum standards.[27]

The PPT mainly consists of two elements. Firstly, obtaining a tax advantage must be one of the primary purposes of a transaction or corporate structure. Therefore, the scope of applying the norm is vast, covering almost all cases of business activities abroad. Taxes are always an important cost factor in the planning process, and therefore in almost all cases, it will have to be concluded that taxes are one of the main motives for transactions and structures. Even if it can be argued that other reasons such as political stability, effectiveness, and transparency, the presence of a well-trained workforce, low labor costs, a large customer base, or a business-friendly climate were decisive in the choice of location, the decision may be questioned from a tax perspective, especially since source states have

[26] OECD (2015e)
[27] OECD (2019c)

an interest in taking a critical view of tax structures if they lead to the application of double tax treaties and thus limited tax rates.[28]

The LoB clause exists in two forms: the detailed US version and a simplified version (to be implemented alternatively). This provision is intended to reorganize access to the double tax treaties. Accordingly, in addition to the residency criterion in one of the two contracting states, the LoB clause's conditions must also be met. In essence, this means that to obtain favorable treatment under the agreement, the taxpayer must pass one of the tests laid down in the LoB clause. If no test is passed, an attempt can still be made to obtain agreement benefits by way of a discretionary decision by the tax administration.

Action 6 is the most discussed measure of the BEPS project. This is primarily due to the implementation and interpretation of the PPT. The spongy formulation leaves many questions open. We will now explain some of these questions and describe the problems.

After the BEPS project's publication, it was first questioned whether hybrid financial instruments existed at all. Kahlenberg and Kopec have proven this in Europe. Accordingly, the question of existence is no longer relevant.[29]

If we look at the implementation of BEPS action 6 by all signatory parties, it quickly becomes apparent that they all passed the Principal Purpose Test. As a result, the PPT applies to more than 2000 double taxation agreements.[30] This involves a vast legal effort, which is, of course, not free of problems.

First of all, it must be taken into account that the legislative process differs from country to country and that the implementation of the PPT must be adapted to the individual jurisdiction. This means that the rapid implementation and adaptation of national laws depend on the respective countries and does not necessarily occur at the OECD's speed.

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[28] OECD (2015d)
[29] Christian Kahlenberg (2016)
[30] Błażej Kuźniacki (2018)

Existing tax treaties need to be adapted. The number of agreements varies considerably in the Latin American context.[31] For Example, Colombia currently has only 13 double taxation agreements with Canada, Chile, Spain, Mexico, India, the Czech Republic, Portugal, South

[31] Błażej Kuźniacki (2018)

Korea, Switzerland, and the Andean Community (Bolivia, Ecuador, and Peru). In comparison, Mexico has more than 60 double taxation agreements.[32]

On the other hand, there are reasons for not implementing the PPT in the legislation. The PPT gives the executive a vast discretion, which makes its use questionable since the broad interpretation that results from it means that the objectives are no longer necessarily achieved.[33] Moreover, the wording of Action 6 neglects non-tax reasons such as expansion into new markets with high demand. Generally, it encourages tax abuse, which can lead to the loss of contractual advantages. This means that the threshold for actions to be considered as abuse of the Treaty is surprisingly low. This is generally contrary to tax treaties' Purpose, as states conclude them to create incentives to expand into other states and indirectly promote globalization. A too-broad definition of PPT, therefore, disturbs the balance between preventing double taxation and tax abuse.[34]

Furthermore, the broad wording of the Principal purpose test is a problem, as it causes implementation difficulties and interpretation problems.

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and Purpose of the relevant provisions of this Convention.[35]

If we look closely at the wording, we can see that tax avoidance can also be a secondary reason for moving abroad. The meaning of the main reason is not necessarily

[32] PriceWaterhouseCooper (2020a)
[33] Matczak (2017)
[34] Błażej Kuźniacki (2018)
[35] OECD (2015c)

necessary.[36] Tax authorities could assume a secondary reason reasonably because they aim to increase the tax authorities' revenue.

In summary, concerning Action 6, it should be noted that hybrid financing instruments exist. Therefore, the reason for prohibiting tax benefits is against, but some problems with implementation will arise. To what extent further problems will arise in the coming years as most signatory states are currently engaged in implementation remains to be seen.

2.4 Action 7 - Permanente Establishment Status

Action 7 aims to broaden the definition of permanent establishment as defined in Article 5 of the OECD Model Tax Convention ("OECD-MA"). This concerns primarily the amendment of the concept of a representative establishment and the construction and assembly site. Besides, the OECD provides for a tightening of the conditions for the exemption.

BEPS Action 7 accordingly recommends the extension of the permanent establishment as defined in the OECD Model Convention. The term permanent establishment is defined in Art. 5 paragraph 2 OECD Model Tax Convention as:

The term "permanent establishment" includes especially: a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop, and f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources. (OECD, 2019b)

Therefore, the definition of permanent establishment included in tax treaties is crucial in determining whether a non-resident enterprise must pay income tax in another jurisdiction. The commission agreement is probably one of the best-known strategies. Here it is pretended that an entrepreneur sells products in his name in a foreign country, even

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[36] Dr. Arne Schnitger, Dr. Ronald Gebhardt, Judy Taing (2018)

though he is acting on behalf of the company. In this way, establishing a permanent establishment can be avoided, and taxes can be avoided.

Tax treaties generally provide that a foreign enterprise's business profits are taxable in a jurisdiction only to the extent that the enterprise has in that jurisdiction a permanent establishment to which the profits are attributable.[37] In total, the definition of permanent establishment is essential to determine whether a non-resident enterprise must pay income tax in another jurisdiction.[38] Establishments get their own action in the project because the term's fragile definition can easily circumvent an establishment's existence. This is also called Artificial avoidance of PE. One of the changes envisaged is that no power of attorney to conclude contracts is required to define the existence of a permanent establishment.

Furthermore, it should no longer be necessary for the representative to act exclusively on behalf of the headmaster. Under the new definition, it is no longer necessary for the representative to sign the contract. Instead, it is considered sufficient to negotiate the contract's essential elements and details, which will become binding on the headmaster. This means that a permanent establishment is created when a representative concludes contracts and when a representative plays an essential role ("principal role") in the conclusion of contracts.

The first significant changes are the rewording of the definition of an independent representative and dependent representative. Unlike a dependent representative, an independent representative's activities do not give rise to a representative's permanent establishment. Previously, a representative was considered dependent if he or she was responsible for another entrepreneur's long-term business and was subject to the latter's instructions. According to the new definition of dependence, a representative depends on

[37] Vishesh Dhuldhoya
[38] Gillespie (2018)

whether he works exclusively or almost exclusively for one or more companies with which he is affiliated or subordinate to him.[39]

Secondly, Article 5 (4) of the OECD Model Tax Convention defines various exemptions for "specific activities" from PE status. These relate, for example, to the maintenance of facilities for the display or storage of goods. Action 7 recommends that the different states in their BEPS implementation implement this type of exception catalog in their legislation or implement the anti-fragmentation rule.

It was previously possible to operate abroad up to a certain threshold without establishing a permanent establishment. Without the existence of a permanent establishment, no taxation is generally possible. The problem has been that companies have divided their profits from abroad between different areas to make maximum use of the thresholds but never exceed them.[40] The new anti-fragmentation rules are defined in Article 5 (4.1) OECD-MA-New. It's intended to prevent companies from splitting a substantial operational activity between several companies because each company carries out a purely ancillary activity. As a result of the article's changes, to assess whether a permanent establishment exists, the activities must no longer be considered individually but in aggregate. This is to counteract the argument that the totality of the activities is not preparatory or ancillary and thus excludes the application of Article 5 (4) OECD-MA.[41]

To summarise, any PE status adjustment must be consistent, consensual, and clear to ensure continued globalized trade. However, the punishment of legitimate commercial practices must be avoided. This is particularly questionable given the catalog of assets used in the OECD-MA. The catalog of assets ensures that only exempt activities do not give rise to PE. The problem here is that newly emerging professions are not taken into account, and adaptation of the MA can take a long time. Furthermore, there is a risk that,

[39] OECD (2015c)
[40] Vishesh Dhuldhoya
[41] OECD (2015c)

due to the vagueness of the wording, these options may aim at more than just the agreements of the Commissioners. It remains to be seen how transnational cooperations without an OECD-MA will implement the measure. The individual case does not seem to be taken into account.

Indeed, a new version of the OECD Model Convention's definition can be used to narrow the scope of some forms. However, it remains open to Latin American countries and states that do not use the OECD Model Convention. We will discuss that fact more in detail in section four.

2.5 Action 12 - Mandatory Disclosure Rules

Action 12 of the BEPS project is called the Mandatory Disclosure Rule. The background is that tax abuse occurs because tax authorities worldwide lack information, time, and human resources. The Mandatory Disclosure Rule is a crucial Action within the BEPS project. Its purpose is to prevent aggressive tax planning by publishing constant information on law changes. The problem gives the importance that professionals are using new, establishing loopholes to benefits their clients. International cooperation can help to reduce such a lack in international taxation. Critical at this Action is that international tax law is complicated.

The main goal of this action is thus tax avoidance early against work. The OECD further states three main advantages of Action 12:

1. *to obtain early information about potentially aggressive or abusive tax avoidance schemes in order to inform risk assessment;*
2. *• to identify schemes, and the users and promoters of schemes in a timely manner;*
3. *• to act as a deterrent, to reduce the promotion and use of avoidance schemes. (OECD, 2015b)*

The literature questions if it is even possible to close all loopholes that opened because of law changes and how agile the OECD will be able to counter act those law changes only through the signatories' publishing.

It is also necessary to discuss the fact that Action 12 is a vital intervention in the taxpayer's rights. If there is an interference, this interference must be justified under the Constitution. This justification differs from country to country. Let us now look at the freedoms of tax design.

Every taxpayer has the right to save taxes. This is the basis of any tax system. Saving taxes can be done in two ways. Illegally, by simple tax evasion and the publication of false facts, and legally by tax planning. We do not need to discuss the illegal way to save taxes any further. What is relevant is that we must make tax-saving every taxpayer's right in the sense of tax planning. If we now look at this in the context of Action 12, it quickly becomes apparent that Action 12 aims to prevent cross-border tax structuring. So what is the legal basis for this? Could it be that Action 12 cannot be implemented without restricting the taxpayer's rights?

First, the taxpayer has a right to legal certainty. This can be defined according to the following criteria: (i) accessibility of legislation; (ii) accessibility of court decisions; (iii) predictability of the law; (iv) stability and consistency of the law; (v) legitimate expectations; (vi) non-retroactivity; (vii) nullum crimen, nulla poena sine lege; and (viii) res judicata principles.[42]

Another problem could be the data protection rules of individual countries. Suppose data is passed on to third uninvolved countries in order to avoid tax evasion in the future, as MDR intends to do. In that case, the right to data confidentiality may be violated due to

[42] Nevia Čičin-Šain (2019)

the different regulations in the individual OECD member states. The confidentiality of personal data cannot be guaranteed in 94 different countries that have signed the MLI.[43]

2.6 Action 14 Mutual Agreement Procedure

As shown in the previous actions, the legal uncertainty and the high probability of disputes between authorities and taxpayers are to be expected due to different interpretations. This is because the guidelines of the action plan and their concepts are not very well defined. This is where Action 14 comes into play. An amendment to Article 25 in the OECD-MA is specifically designed to create the basis for disputes between taxpayers and signatory states to be resolved amicably.[44] Instead, Action 14 seeks to encourage countries to develop their own solutions to remove obstacles that prevent countries from resolving contract-related disputes under the MAP, including the absence of arbitration provisions in most contracts and the fact that access to the MAP and arbitration may be denied in some instances.[45] This is relevant because the proper application and interpretation of tax treaties are essential for all parties concerned.

2.7 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

The MLI includes in particular measures of the BEPS action points 2 (Hybrid Designs), 6 (Prevention of Agreement Abuse), 7 (Prevention of Artificial Circumvention of Establishment Status), and 14 (Mutual Agreement Procedure). The MLI makes these measures directly useful for the double taxation agreements of the signatory states. The MLI was designed to enable the broadest possible consensus among the participating states. As a result, it offers participating states a wide range of options and alternatives, both in terms of the double taxation agreements to which they wish to apply it and the

[43] Nevia Čičin-Šain (2019)
[44] Harsh Arora (2017)
[45] Pit (2014)

implemented measures. For this reason, each State must submit a notification at the time of signing, stating to which double taxation agreements it wishes to apply the MLI and which measures it wishes to implement. This notification thus represents the position of the respective State. The position only becomes final once the MLI has been ratified, so most positions are currently provisional. All Latin American countries have signed the Multilateral Instrument, which means that they have committed themselves to implement the actions mentioned above.

3. BEPS Implementation in Latin America

In order to clarify the context of BEPS and Latin America, the following chapter clarifies the BEPS implementation of all Latinamerican signature Countries of the Project. We will also explain how far the individual countries have implemented the BEPS actions by the end of 2020. This serves as a basis for the discussion of the BEPS measures in Latin America. We will focus on the international context of taxation to draw a bow to the BEPS project later on in this section.

3.1 Colombia

The Colombian government has been trying to become a member of the OECD since 2013. This was finally achieved in 2020 by fulfilling certain conditions. Looking at Colombia's international fiscal context, it is clear that Colombia has very few double taxation agreements. This is due to the well-known measures for double taxation of income. If there is double taxation, this hinders the general economic traffic. This significantly hinders economic performance in Colombia's case since internationally active companies are less chosen to settle in Colombia.

The Colombian tax system is very complex and regressive. It contains several exemptions and special regimes, making it inequitable and ineffective in terms of collection, not very attractive for investment, and very vulnerable to evasion.[46] The current regime generates a low level of collection compared to what could really be collected given its economic conditions. This does not contribute to a better distribution of income since it is horizontally inequitable due to the application of different treatments to individuals and companies with similar conditions. Further, it is complicated for taxpayers and the fiscal

[46] Pinto López and Tibambre Oviedo (2019)

authorities, administration, and control, and it significantly punishes investment, employment, growth, and competitiveness.[47]

Another problem with the Colombian tax system is that it has a fixed income tax tariff of 31 percent for corporations. This means that the system is not progressive and creates social injustice. Taxpayers do not pay taxes to the extent that they can, but equally and without taking their financial circumstances into account. This is because new taxes that could make the tax system more progressive, such as income and wealth taxes, have historically collected little in Colombia.[48]

To Colombia's corporate taxation, the following can be seen. Companies resident in Colombia are subject to corporate income tax (Impuesto de Sociedades) as a form of income tax (Impuesto sobre la Renta) with their worldwide income. The regular tax rate for companies based in Colombia will be gradually reduced under the Colombian tax reform of 2019. It will be 32 percent in 2020, 31 percent in 2021, and 30 percent from 2022 onwards. Small and medium-sized companies with sales of approximately $1.3 million and only 50 employees will be taxed at reduced rates.[49] Foreign companies are taxable only on their Colombian income, where Colombian Corporations are taxable with their world income.

This makes Colombia one of the few countries that provide global taxation for the profits of your company. In order to that, double taxation cannot be entirely avoided due to the lack of double taxation treaties. The only way to avoid double taxation is to be defined by a foreign company. This means that a head office abroad is necessary. Consequently, only domestic profits would be taxable. With its corporate tax rate of 31 percent, Colombia is on average worldwide, so it is neither a highly taxed country nor does it participate in international tax competition. Discrimination against national companies generally does not seem logical. It merely inhibits the globalization and expansion of Colombian companies.

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[47] Comisión de Expertos para la Equidad y la Competitividad Tributaria et al. (2015)
[48] Comisión de Expertos para la Equidad y la Competitividad Tributaria et al. (2015)
[49] Montoya Presiga, Girón Uribe, and Hernández Ramírez (2018)

International trade is of immense importance for the development of a country in a capitalist world. Further, Colombia has a network of 13 double-tax treaties.[50]

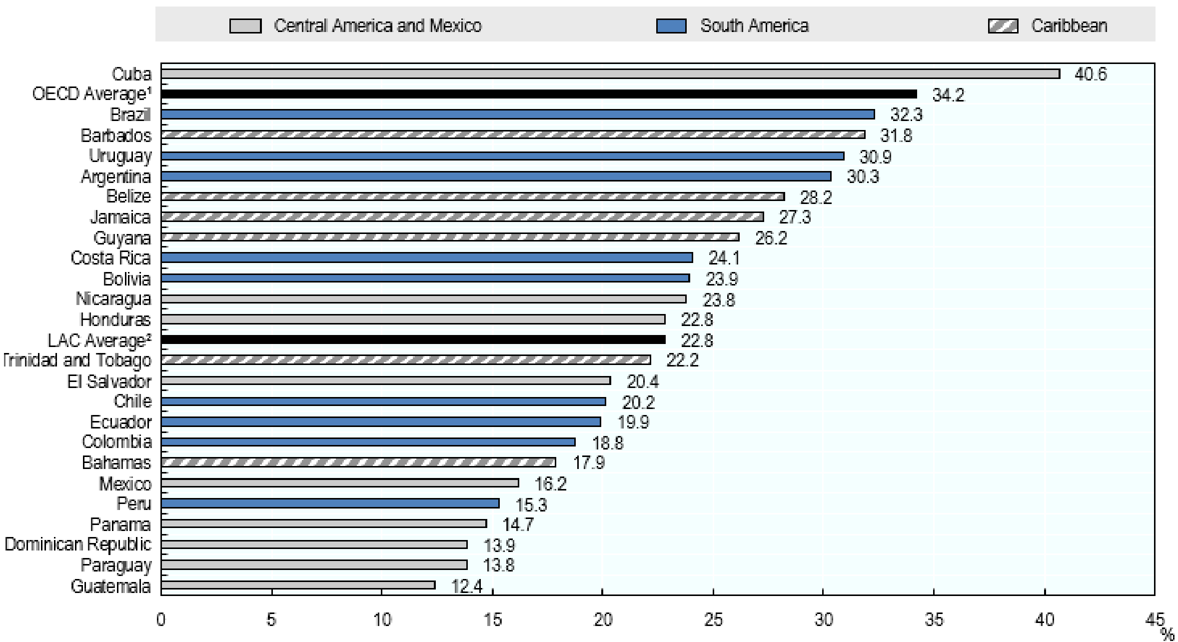

Figure 2: Tax-to-GDP ratios, 2017[51]

Therefore, the fact that the tax burden, as measured by the ratio of total tax revenues to the revenues of the economy in Colombia, is still low is a problem. Although it has increased over the past two decades, total collection, including that from non-central national and territorial units, represents 20.1 percent of the gross domestic product (GDP), below the average for Latin America (21.3 percent) and well below the average for OECD countries (34.1 percent).[52] This is further proof that one of the core problems of taxation in Colombia is tax collection and discrimination against national companies.

[50] DIAN (2021)
[51] OECD, Inter-American Center of Tax Administrations, Economic Commission for Latin America, the Caribbean, and Inter-American Development Bank (2020)
[52] Comisión de Expertos para la Equidad y la Competitividad Tributaria et al. (2015)

In connection with BEPS, the question arises about the impact of the project on Colombia's overall taxation. Colombia has already passed three tax reforms with BEPS reference for 2012, 2014, and 2016.

The tax reform of 2012, law 1607, was the first tax reform in the BEPS context. It was intended to implement actions 4, 6, 7, 8, 9, and 10 of the BEPS action plan. In the following, we will limit ourselves to the relevant actions 4,6,7.

For Action 4, the reform introduced article 109 that the deduction of interest expenses for income taxpayers and additional taxpayers may only deduct interest on debts whose average total amount during the relevant tax period is the result of multiplying the taxpayer's net assets determined as of December 31st of the immediately preceding tax year by no more than 3.[53] This standard is controversial because it includes debts to related and unrelated parties and can distort competition, particularly in markets with a high debt level, as financing costs can suddenly cease to be a tax-relevant fact, and double taxation can result.

As part of Action 6, Article 122 and Article 869 were added to the Tax Statute in 2012. This was done by introducing a general anti-abuse clause that allowed the tax administration to redesign a transaction that, if investigated, was found to have changed or modified a transaction and therefore constituted abuse. This explicitly mentions artificial acts or transactions as artificially created facts that appear to have the sole purpose of generating a tax advantage. This means that the clause allows DIAN to investigate such situations and act upon them to counteract this type of practice and achieve this action's purpose.[54]

Concerning Action 7 and permanent establishments, Article 86 provides as follows. Permanent establishments, which can be defined as a place of business located in the

[53] EL CONGRESO DE COLOMBIA (2020)
[54] EL CONGRESO DE COLOMBIA (2020)

country where a foreign company or natural person develops all or part of its economic activity, can be defined as permanent establishments. Also, a permanent establishment is defined as a place of business in the country where a person who is not an independent agent acts on behalf of a foreign company and has or usually exercises in the country powers enabling him to conclude acts or contracts binding on the company.[55]

The legal implementation of the norm can generally be regarded as successful. The DIAN has been provided with the necessary instruments to correct and prevent the transfer of profits abroad. Furthermore, this law finally provides clarity regarding the definition of permanent establishments in Colombia. No detailed statistics on implementation have yet been published. It, therefore, remains to be seen to what extent taxation has benefited from this.

With the tax reform of 2014, Action 3 should then also be implemented. Article 43 of the 2014 reform adds Article 607 to the tax statute, which defines the declaration of assets' content and the obligation to make an annual declaration of assets in, for example, Switzerland and abroad. The problem with this implementation is that it is generally assumed that there is deliberate abuse. At the same time, most Colombians, due to the country's continuing insecurity, have transferred their capital abroad as security. It is not at all a matter of concealing the facts.

To counteract the Problems of Action 3 and update Action 6 implementation, Law 1819 was enacted in 2016. This law represents the first tax reform in Colombia related to BEPS, especially in the technology sector concerning VAT. The reason for this was that there was a significant shift between the generating fact and the tax base. As a result, some services were excluded, such as Virtual educational services for the development of digital content, under regulations issued by the Ministry of ICT, provided in Colombia or abroad, the provision of websites, servers (hosting), cloud computing, and remote maintenance of

[55] EL CONGRESO DE COLOMBIA (2020)

programs and equipment, acquisition of software licenses for the commercial development of digital content, under regulations issued by the Ministry of ICT[56] are excluded.

The general objective was to encourage foreign companies to offer these services in Colombia, thereby creating full competition and at the same time subjecting them to the BEPS project, thus preventing tax evasion and avoidance. The tax reform also changed the withholding tax for payments abroad and applied to cases where there are no double taxation agreements between countries. If this is the case, the withholding rate would be 10 percent and could not exceed the other parties' limit to the BEPS project.[57] It can be assumed that Colombia will nevertheless try to sign more double tax treaties. The lack of such treaties will continue to inhibit entrepreneurs from establishing themselves in Colombia.

Therefore, Colombia is trying to unify tax rates to reduce tax evasion by bringing them closer to Action 3 of the BEPS project. Another critical change in this respect within the tax reform in terms of tax evasion is the omission of assets or inclusion of non-existent liabilities; an offense is punished with very high economic sanctions for taxpayers.

Concerning Action 6, the standard was legally revised and monitored based on the newly adopted OECD standards. It was important to raise the issues of abuse in tax matters again and empower DIAN to recharacterize a business, liquidate it after the facts were established, and empower DIAN to remove the corporate veil.

In the return conclusion, this means that in the sense of the tax reform, there is a short impact on the BEPS project that Colombia has been working on.

Especially concerning profit shifting, the Colombian authorities seem to gain control through your new legislation. Moreover, it remains to be seen how the actions will be changed and adapted in the future. The Example of Action 3 shows that the Colombian

[56] DIAN (2020)
[57] J. Orlando Corredor Alejo and Paula Arboleda Currea

legislators are interactively addressing problems of compatibility between BEPS and the Colombian tax system. Unfortunately, Colombia still lacks sufficient double taxation treaties to provide greater clarity. It remains to be seen how this will develop in the coming years as other countries' BEPS implementation increases.

3.2 Mexico

Let's start with the general things regarding Mexico. With the tax reform in 2014, Mexico tried to increase tax revenues and at the same time curb special regulations. This means that the corporate tax has always been 30 percent of income. Affiliated companies can fall back on group taxation if the parent company holds at least 80% of the subsidiary. The unrestricted offsetting of dividends and taxes is not possible. Furthermore, a withholding tax of 10 percent is levied on dividends paid to domestic or foreign individuals. Capital gains derived by individuals from the sale of listed shares are taxed at 25 percent on the sale's proceeds or 35 percent on the capital gain.

Regardless of nationality, individual residents in Mexico are subject to Mexican income tax on income earned worldwide. Foreigners who have their regular residence in Mexico are considered residents and therefore subject to tax unless they are physically abroad for more than 183 days per calendar year and can prove their income liability in another country.

Similar to other Latin American countries, taxation in Mexico suffers from a lack of control. If we include Colombia as a direct comparison, one of the key differences is that Mexico has a network of double taxation treaties[58] and a free trade agreement (USMCA) with Canada and the USA.

First, it should be mentioned that Mexico, as a signatory to the MLI, is obligated to implement the given actions. Once the MLI has been integrated into the Mexican tax

[58] Gobierno de Mexico (2021)

systems, all Covered Tax Agreements (CTAs) in Mexico will be amended in accordance with the scope provided for in Articles 1 and 2 of the MLI. This is subject to the final list of positions, reservations, and notifications of Mexico and its tax treaty partners to be submitted when their ratification instrument with the OECD.

This means in detail that Mexico must adapt its double taxation. This has already been done partly by Mexico. Never the less Mexico published a drawn up list of agreements that need to be adapted. Although the USA is listed, an adaptation of Mexico and the USA's agreement is unlikely since the USA has decided against signing the MLI.

The implementation of the MLI and BEPS has particular implications for Mexico concerning Action 2,6 and 7.

Mexico will amend its agreements in the following manner. For a Hedged Tax Convention, income derived from or through an enterprise or arrangement that is treated as wholly or partly fiscally transparent under the tax laws of a Contracting State shall be deemed to be the income of an enterprise resident in a Contracting State, but only to the extent that the income is treated for taxation by that Contracting State as income of a resident of that Contracting State. The new provision is intended to deny treaty benefits to transparent enterprises in a jurisdiction that is different from their shareholders or partners. Mexico, however, opts to make exceptions to this rule.[59] To accomplish this, Mexico has submitted a list of 18 contracting states for which specific provisions have been amended in the relevant tax treaty.

Concerning Action 2, there will be no changes for Mexico to eliminate double taxation. In this particular case, Mexico has chosen not to apply any of the three alternatives related to MLI.[60]

[59] Juan Angel Becerra
[60] (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, 2016)

Companies domiciled in several countries, the MLI states that taxation should typically be clarified by mutual agreement. In the absence of such agreement, such person shall not be entitled to exemption or relief from the tax provided by the covered tax agreement, except to the extent and in the manner that the treaty courts' competent authorities may agree. However, Mexico opted to deny treaty benefits without the competent authorities' need to initiate a mutual agreement procedure.

Let us consider below Mexico's changes concerning BEPS Action 6.

Except for the agreements with Argentina, Guatemala, the Philippines, and Spain, Mexico will align its double taxation agreements with Article 6 of the MLI and amend them to specify the intention to eliminate double taxation without at the same time creating the possibilities of non-taxation or reduced taxation through tax evasion or avoidance. In particular, this includes treaty-shopping arrangements aimed at obtaining relief provided for in the treaty for the indirect benefit of residents of third countries. In very concrete terms, this means that Mexico wants to counter treaty abuse. Treaty abuse played a subordinate role in the previous chapter on Colombia's implementation since Colombia has few agreements. But what exactly does that mean for Mexico?

For Mexico, this means that, first and foremost, explicit action will be taken against the abuse of the agreement. So now there is a legal consolidation of the fight against tax abuse with the mentioned countries. However, the question remains how exactly the treaty abuse will be handled with countries where no new treaty is agreed, or the existing treaty is not valid in the BEPS context. Furthermore, it is still unclear to what extent the clause proposed by MLI and applied by Mexico can be implemented in a meaningful way. Furthermore, different rules must result from the non-application of MLI Article 7 among the signatory states. There is a well-founded fear that new tax loopholes will be created as a result of this disagreement.[61]

[61] OECD (2015e)

Secondly, the dividend transfer is to be stopped. In this context, the 365-day rule of the MLI will be integrated. This rule stipulates that to apply the reduced rates, it is now necessary to fulfill the requirements for the duration of share ownership in the dividend-paying company and the criteria already stipulated by the DTA. The shares' holding period is at least 365 days, including the date of the dividend payment. This new regulation primarily creates legal clarity for investors and tax authorities.[62]

Thirdly, Mexico will insert a taxation provision in their treaties that will allow you to tax profits not taxed abroad. However, some of Mexico's most important treaty partners made a reservation on this article, e.g., Canada, France, Germany, Japan, Luxembourg, the Netherlands, and Spain. Therefore, this provision will not apply to these treaties.[63]

Furthermore, the implementation of Action 7 has begun in Mexico. Again, Mexico will adopt the guidelines proposed by BEPS in action 12. Since the late 1990s, Mexico has suffered from strategies of permanent artificial establishments that prevent taxation. These will be put to an end with this new implementation. Many of these strategies have already been objected to by the Mexican Servicio de Administración Tributaria (Tax Administration Service, SAT). This effect is further enhanced because Mexico definitively recognizes the definition of a related party in your right.

Notwithstanding, the reservations of another jurisdiction, such as Belgium, Canada, Germany, or the United Kingdom, should be considered when determining the final reading of a CTA.

In summary, Mexico is well on its way to implementing BEPS through the MLI, and the first steps have been taken. However, it remains to be seen and researched how the BEPS project will work in the end. Mexico's tax losses will likely decrease in the coming years. This is due to the specific implementation of Actions 2,6 and 7. This can generate

[62] OECD (2018)
[63] OECD (2020g)

control from the government side. However, further adjustments will likely be necessary to eliminate new tax loopholes or legal uncertainties.

One point of contention remains that Mexico has not amended all of its double taxation treaties. This results in a bipolar treatment of international taxation. Furthermore, in the context of the common BEPS framework, it does not seem to be appropriate to double taxation treaties with other BEPS countries. In the Latin American context, the DTA between Mexico and Argentina is particularly interesting and discussed in the next chapter when Argentina is considered in the BEPS context.

3.3 Argentina

Let us first explain the Argentine tax system.

Argentina levies taxes at the federal, provincial, and municipal levels. To prevent multiple taxations, a double taxation agreement (DTA) has existed with Germany since 1978, which protects German companies from the high Argentine withholding taxes. Income tax (Impuesto a las Ganancias) is levied on all income, including capital gains. For companies, the tax rate is 25%. Furthermore, Argentina has double taxation agreements with Australia, Belgium, Bolivia, Canada, Brazil, Denmark, UAE, Spain, France, Finland, Italy, Mexico, Norway, Netherlands, Russia, Switzerland, Sweden.[64] In the international context, Argentina levies a flat tax rate of 1% on all foreign income earned by Argentine companies or individuals abroad if it exceeds 200,000 pesos.[65]

As explained in the previous chapter, Argentina and Mexico signed a tax treaty in 2015, which is not based on BEPS or MLI and therefore does not comply with OECD standards. Therefore, it is essential to explain what differences exist through this agreement and where the problems are related to BEPS.

[64] Ministerio de Economia Argentina (2018)
[65] PriceWaterhouseCooper (2020b)

The agreement between Mexico and Argentina seems to be a mix of OECD and UN agreements. Concerning the taxation of corporate profits, the double taxation agreement mostly follows the UN model, which is in line with Action 7. Thus, according to the wording of Art. 5, the permanent establishment threshold has been lowered in many cases to the effect that the core activities of companies can no longer benefit unduly from the exemption for preparatory and auxiliary activities and that the status of a permanent establishment can no longer be circumvented by the use of commission agents or similar structures. The agreement's problem is that it does not result in a basic MLI implementation between Argentina and Mexico.[66]

Next, let's look at the implementation of BEPS in Argentina. According to the OECD's BEPS Monitor, Argentina seems to be on the right track.[67] Only the implementation of Action 2 and Action 12 is currently missing. Argentina also seems to be improving in signing tax treaties, with more and more tax treaties being signed on an OECD basis in recent years, for example, Luxembourg and Japan.

Implementing the transfer pricing rule at the end of 2018, which came into force in 2020, is particularly important. This implementation will provide important planning security for authorities and taxpayers in the future, as internationally uniform rules now exist. Detailed regulations accompany this on certain goods, the implementation of Action 13, and the BEPS-compliant definition of permanent establishments under Action 7.

Transfer prices have always been a critical problem for Argentina. There has always been a lack of control. After using at least six different methods in the last 15 years, the Argentine government has now implemented the OECD methods and can hope that control will be granted. The new rule could also help Argentina to tax the profits of its domestic

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[66] D. Fuentes Hernández, M.S. Screpante
[67] IBFD (2020c)

companies better and avoid relocation, for example, to poorer neighboring Latin American countries.

However, one problem could be that Argentina will have to record losses in its taxation. Due to its confusing regulations and anticipatory holding rules, a European tax-saving model set up holding companies in Argentina. This will be destroyed with the new transfer pricing rules.

In summary, the most crucial change for Argentina is introducing a transfer price rule, which is aligned with the OECD standard and will hopefully help the authorities control taxation and avoid profit shifting abroad.

3.4 Panama

In recent years, Panama made big headlines with scandals known in the media as the Panama Papers. The Panama Papers comprise 11.5 million documents. These are mainly emails, PDFs, photo files, and excerpts from an internal database of the law firm Mossack Fonseca. The data, dating from the 1970s to early 2016, reveals shell companies set up by individuals worldwide to benefit from Panama's offshore jurisdiction.[68]

Looking at the tax law in Panama, the following can be summarized. If you reside in Panama for more than 183 days, you are considered a resident for tax purposes. One must then file a tax return annually by March 15. Taxes are only collected on income earned in Panama itself. There is no wealth, inheritance, or gift tax in Panama.

However, if one is a tax non-resident with a Panama company, the foreign income is not taxed in Panama. Panama has no foreign tax laws. Accordingly, there are no taxes on dividends and salaries.[69]

[68] Süddeutsche Zeitung (2018)
[69] Deloitte

In the BEPS context, it can be considered extremely problematic that Panama has no external tax law. This automatically makes it a tax haven for countries with which there are no double taxation agreements. Panama has already signed a double tax treaty with Barbados, South Korea, Qatar, Mexico, UAE, Spain, France, Portugal, Luxembourg, Netherlands, Ireland, Italy, Singapore, Czech Republic, and the UK. Further, they are negotiating with many other countries.[70] However, by signing the MLI, Panama commits itself to counteract profit shifting and thus tax avoidance. To guarantee this, Panama is obliged to sign a DTT with all BEPS countries or implement legal regulations. The second option is probably the more likely.

And it is precisely here that Panama faces what is arguably the biggest problem of the entire BEPS project. Currently, Panama has not yet implemented any of the BEPS and MLI measures. The implementation would have a significant impact on the tax structure used worldwide.[71] Because of the letterbox companies and the non-existing accounting obligation, there is no foreign income control.

Let's look at the individual measures in detail. It can be expected that the implementation of Action 2 will destroy the structure of dividend shifting to Panama, and companies will no longer be able to use this route. This will help Latin American countries and all BEPS signatories generate control and enforce their taxing rights under the OECD-MA.

The same must be assumed for the issues of foreigner control and transfer prices. If Panama implements the minimum standards, then any constellations currently associated with Panama will fall away. If we look again at the definition of foreign control from the second chapter, it quickly becomes apparent that shell companies do not adequately cover it. Thus, the Panamanian tax law is no longer interesting to shift profits.

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[70] ("Guide of Double Taxation Treaties signed by Panama," 2020)
[71] IBFD

Also, transfer pricing regulations in the sense of BEPS Action 8-10 will ensure that the taxation right of Panama's 0% rule will migrate to other countries.

It is essential now to ask yourself the question, what is the point of all this? First and foremost, it is clear that Panama has joined the BEPS project but does not consider the implementation to be particularly urgent. The OECD has not yet set a deadline. It is also a fact that Panama is passively benefiting from its 0% taxation on foreign income, as the costs of establishing companies in Panama are not insignificant.

Offshore jurisdictions are an attractive market for lawyers, as well as companies interested in tax avoidance. This means that if Panama implements the BEPS guidelines, this will not have anything to do with companies paying more taxes in their "real" countries of residence. Instead, companies will migrate to jurisdictions that do not support the BEPS project and offer attractive offshore opportunities. These countries could include countries such as Cyprus, Samoa, or Vanuatu. That is because interestingly nearly all Caribbean offshore jurisdiction has agreed to implement the BEPS project.[72]

3.5 Belize

Belize has another Latin American offshore jurisdiction. Belize became known after the Panama Papers in the Paradise Papers' wake and had a similar jurisdiction to Panama.

In Belize, only domestic income is taxed if you work there, for example. The income tax rate in Belize is 25% flat. However, the definitions of ordinary residence and unlimited tax liability are the same as those in other countries. The requirements are accordingly a residence and or spending more than 183 days in the country. Belize has double taxation agreements with the United Kingdom, Sweden, Denmark, the Caribbean Community countries. Also, it has tax information exchange agreements with some European countries such as the United Kingdom, Australia, the Netherlands, Ireland, France, Finland, Norway,

[72] OECD

Sweden, Iceland, Greenland, Denmark, the Faroe Islands, and Portugal.[73] The goal here is to ensure that Belize is no longer permanently blacklisted by the OECD.[74]

Belize is also far behind in implementing BEPS. Belize has not yet met any of the OECD mine standards, nor has it addressed implementation to any degree. Therefore, it is still considered a tax haven in consulting circles, and there is no information on how interested Belize is in integrating and implementing BEPS.[75]

3.6 Costa Rica

In principle, companies and private individuals pay taxes only on income generated domestically; therefore, foreign income is not taxed. As far as the taxation of capital is concerned, the rates are far below what has to be paid to the treasury in Europe or the USA. All individuals and legal entities thus pay taxes on the portion of their income earned in Costa Rica. Income earned abroad is not taxed in Costa Rica, regardless of the source. Because of this limited tax liability, double taxation does not arise from a Costa Rican perspective. Accordingly, Costa Rica has only three active double taxation treaties- Spain, Germany, and Mexico- as well as a project for adoption with the UAE.[76]

Taxable income is determined by subtracting items established by law from a comprehensive gross income. Gross income includes all income and gains earned in a tax year in Costa Rica. The top tax rate for companies and individuals is therefore 15%.

[73] Wolters Kluwer (2021)
[74] OECD (2020d)
[75] OECD (2019a)
[76] Ministerio de Hacienda República de Costa Rica (2020)

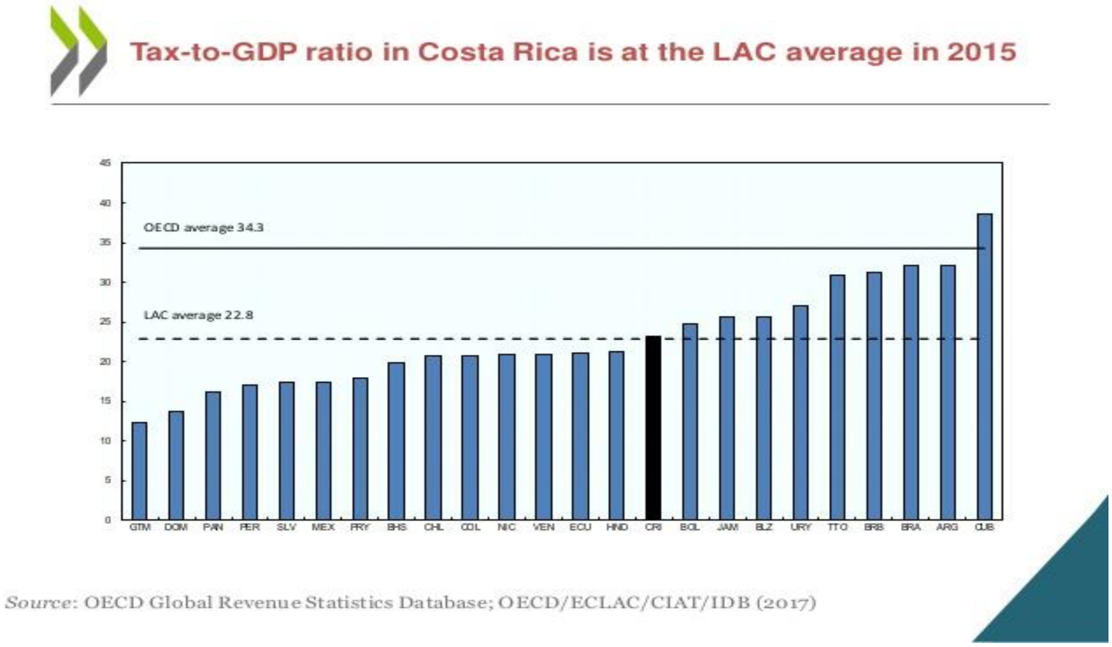

Figure 3: Tax rate Costa Rica compared with OECD's Average.[77]

If we look at BEPS, it quickly becomes apparent that double taxation cannot exist by law in Costa Rica. Foreign income does not interest the Costa Rican government. The implementation of BEPS in Costa Rica is more interesting for countries that would like to tax the tax-free income in Costa Rica.

Hybrid mismatches are not relevant for Costa Rica as there is no group taxation. Therefore, cross-group and cross-border loss deduction, as well as dividend offsetting, are not relevant.[78]

A relevant topic in the BEPS context is transfer pricing and Action 13, which has started to be integrated into national law in 2019.

[77] OECD (2020i)
[78] PriceWaterhouseCooper (2020c)

Resolution DGT-R-001-2018 introduced the obligation to file the Country-by-Country Report in Costa Rica. This resolution applies to all parent companies resident in the country whose total income exceeds €750 million and is retroactive to 2017.[79]

In 2019, amendments related to transfer pricing were published with Law no. 9635 to improve public finances. This contains, among other things, a new chapter concerning the Income-tax law. The corresponding Executive Order No. 41818-H on Amendments and Additions to the Regulations of the Income Tax Law, Executive Order No. 18445-H, regulates the new transfer pricing practice. The amendments consist of, among others, the introduction of the application of transfer pricing standards, applicable analysis methods, OECD guidelines, and Advance Pricing Agreements.[80][81]

At the end of 2019, the Directorate General of Taxes published Decision DGT-R-49-2019, which establishes the new documentation requirements related to transfer pricing. In summary, the changes amount to the decision that taxpayers conducting related party transactions must keep, for the period specified in Article 109 of the Tax Code, the documentation evidencing the transactions between related parties and compliance with the transfer pricing rules. It is particularly relevant in this regard that the transfer prices of both parties are consistent.[82]

The new transfer pricing system in Costa Rica can ensure that no unequal transfer prices are published and that profits remain untaxed.

However, Costa Rica has not implemented any other measures of the BEPS project. Implementation is, therefore, still pending in the course of the MLI. Costa Rica is obliged to implement at least the minimum standards. In particular, the implementation of the CFC rule is missing. Measures on treaty shopping are less relevant due to the small number of

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[79] Dirección General de Tributación Directa (2020a)
[80] Dirección General de Tributación Directa (2020c)
[81] Dirección General de Tributación Directa (2020b)
[82] Dirección General de Tributación Directa (2020b)

double taxation agreements.[83] However, due to the mere implementation of Action 13, Costa Rica is far behind the other countries and can theoretically still serve as a country for profit shifting abroad. This is due to the mere non-taxation of foreign profits and the Costa Rican government's indifference to where these profits come from and how they are earned. A publication of these profits is not necessary according to the current legal situation, but it should be within the framework of BEPS.

3.7 Peru

Let's go back to the South and look at Peru. Let us first look at the Peruvian tax law. In Peru, there are three types of taxation. For corporate income tax, a rate of thirty percent is applied. Losses can be carried forward to the fiscal years following the year in which they occurred. A loss carryback, as it is possible in Germany, is not known in Peru.

There is a progression in income taxation, which is, however, not linear but staggered. There are different tax rates for different types of income. For example, income from dividends is taxed at only 4.1 percent, while income from a business is taxed at 30 percent.

Peru further taxes the world income of persons considered residents in the State. Peru has double taxation agreements with Chile, Canada, Korea, Mexico, Switzerland, Portugal, Brazil, Ecuador, Colombia, and Bolivia simultaneously through the Communidad Adina.

Peru has already started to implement a large part of the actions of the BEPS project. Let's start in order with Action 3. Observing the Peruvian legislation, it can be seen that the primary source of national legislation has been taken as a determining influence of BEPS Action 3. There is a control of income by Peruvian institutions. Further, the Peruvian CFC regulation does not aim to create new resources for the tax administrations, but

[83] IBFD

instead, they intend to avoid the transfer of taxable income abroad. This principle is consistent with the so-called export neutral of capital, which, from the perspective of a domestic tax policy, eliminates domestic investors' considerations in investments at home and abroad. The extension of the CFC rules' implementation has affected the possibilities of passive income investment abroad for nationals of Peru. Still, the consequences remain to be seen in the specific case.[84][85]

To tie in with the CFC rules, a corresponding definition of permanent establishments is essential. In Peru, the permanent establishment concept has gained importance since the entry into force of the double taxation treaties, as the country is considered an importer of capital. Peruvian tax law refers to non-resident taxpayers having jurisdiction over their branches, agencies, or permanent establishments and imposes tax only on income generated at the Peruvian source. The problem here is that branches and permanent establishments are equated, leading to great confusion in the OECD context.

The problem here is that branches and permanent establishments are equated, leading to great confusion in the OECD context. Since the Peruvian approach overlaps with that of the OECD, an adjustment is necessary. Furthermore, the Peruvian courts currently interpret the permanent establishment definition to continue circumvention and capital relocation to Peru.[86] Therefore, the BEPS Action Plan Action 7 redefinitions of the concept of the permanent establishment are needed to address the artificial avoidance of permanent establishment status that has taken place under the current article.

It would be desirable to define a reasonably clear standard when a permanent establishment does or does not exist. There is no consensus even on such fundamental issues as the core elements of its definition of a permanent establishment (fixed place of business through which all or part of the activity or dependent agency is carried on), as the

[84] TOLEDO CONCHA and RAMÍREZ ADRIAZOLA (2017)
[85] Felices Gutiérrez (2016)
[86] PriceWaterhouseCooper (2020d)

various recent OECD works in this regard show, leading to considerable legal uncertainty in a basic concept of international taxation.

Concerning that, Peru amended the Directive published on February 28, 2020, clarifying the tax treatment of profits distributed by a Peruvian branch of a non-resident company. Under Article 24-A of the Income Tax Law (the Law), payments to shareholders that constitute an indirect business income disposition are considered dividends for tax purposes. They are subject to a 5 percent withholding tax rate.[87] The Guidance explains that Article 24-A of the Law contains a specific anti-abuse rule that applies to cases where a company transfers profits without a formal agreement in a shareholders' meeting. In this regard, the Guidance states that Article 24-A of the Law does not apply to branches of non-resident companies in Peru. The Guide explains that branches do not have a legal personality, and therefore, the distribution of profits is decided by the non-domiciled company. The Guide concludes that the deemed distribution of profits by a branch of a non-resident company is subject to branch tax under Article 56 of the Law. This article provides that the total after-tax profits of a branch or permanent establishment of a non-resident company in Peru are taxed at 5 percent. Furthermore, this article states that the profits are considered distributed when the branch or permanent establishment files the annual tax return.[88]

The first transfer pricing regulations were adjusted to BEPS in 2019 and reached the OECD's minimum standards. Further, in February 2020, the transfer pricing guidelines in relation to VAT were adjusted. The changes compared to the previous law of 2012 are that in case of unclear or doubtful transactions between related parties, the tax authority may adjust the amounts of the transactions taking into account the market value. As a result, this means that a transfer pricing adjustment concerning services provided between

[87] OAS
[88] IBFD (2020b)

related parties will have no effect for VAT purposes and, therefore, comply with the BEPS standard.[89]

Further application of BEPS in Peru is still under development and integration of tax law. It should therefore be noted that Peru is striving to implement the provisions of the BEPS project.

3.8 Chile

Chilean tax law consists of a mixed system of direct and indirect taxes. It can essentially be divided into Impuesto a la Renta (Income Tax), Impuesto a las Ventas y Servicios (Value Added Tax), Impuestos Específicos (Special Excise Taxes), and other taxes. The latter include, above all, Impuesto de Timbres y Estampillas (Stamp Tax), which is levied on documents with credit transactions. In addition, there is inheritance and gift tax, property tax, and the Patents Municipal (business license) levied by the municipalities, which applies to both commercial business activities and the practice of liberal professions.

The corporate income tax rate is 18 percent. Profit is any income derived from a property or business operation. Value increases, regardless of the source, are also considered taxable income. Fees, as well as interest in principle, are deducted from income. This does not apply to dividends earned in Chile and paid to a company resident in the country. Regarding non-residents, income taxes amount to 35 percent, although there is also a 20 percent tax and special regulations. For dividends, it is also 35 percent, and for fees, 30 percent or 15 percent.

Chile, like many Latin American countries, taxes the global income of its citizens. However, with 25 different double taxation treaties, Chile has many in Latin American. Thus, the double taxation of income is less significant but very high.[90]

[89] IBFD (2020a)
[90] Subsecretaría de Relaciones Económicas Internacionales (2020)

Chile has already integrated some actions of the BEPS plan into national law.

We are starting with the CFC rule. The CFC rule was integrated into the Chilean tax law in 2014 and revised again in 2016.[91][92] In this regard, it should be noted that the structure of the Chilean standard generally follows the recommendations of the final report of Action 3 of the BEPS Project. In this sense, the standard includes a definition of CFC, controlled entity, passive income, how this income is attributed to Chilean taxpayers and the credit granted, and administrative and reporting rules to the tax authority.

Concerning the control requirement and the entities involved in it, a broad definition of both the controller and the controlled entity is established. Practically, all legal forms are included in the norm.

On the other hand, control by management powers is the one that poses the most significant challenges, as it may not be compatible with the principle of legal certainty due to its subjective nature. Legal changes are needed here in the future. The Chilean CFC standard also contains presumptions, in line with the OECD recommendations. For example, control is presumed if there is a call option or if the foreign company is resident in a country with low or no taxation. Besides, cases of indirect control and exclusions are regulated for the sake of simplicity. Thus, BEPS Action 3 has been integrated into Chilean tax law but, as feared at the outset of the BEPS project, brings high legal uncertainty.[93]

Further, Chile has included changes to the definition of a permanent establishment in its Income Tax Law 2020. Under Article 2(12) and Article 58(1), the term has been modified to allow the taxation of a non-resident company's income, even if that company does not have a permanent establishment in Chile. The term permanent establishment has been modified only to determine how a foreign company's income may be taxed in Chile.

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[91] Ignacio Burrull and Germán Campos (2014)
[92] Orbitax (2020)
[93] Francisco Ossandón Cerda (2019)

Be it through a domestic tax or even through an additional tax on distributions made abroad. This expanded concept incorporates the elements of the post-BEPS concept of EPC agent in Article 5(5) of the OECD and UN Model (2017) and Article 12 of the MLI. In particular, the new concept of a local permanent establishment includes the hypothesis of an agent or representative playing a substantial role in the conclusion of transactions of the foreign company.

Of particular relevance to the new PE is that the authority is decisive for taxation, so companies that conclude that unauthorized contracts in Chile are automatically defined as branches and taxed. This creates legal clarity in international trade.[94]

As a third major implementation, Chile has already adapted its transfer pricing rules to OECD standards to achieve best practice.

In conclusion, Chile is implementing BEPS step by step but is always struggling with constitutional issues and legal uncertainty for tax authorities and companies.

3.9 Uruguay

In terms of GDP per capita, Uruguay is the wealthiest Latin American country. That is due to being politically stable and consisting of a bride-spread middle class. In this context, its relatively low population, with around 3.5 million, has to be considered as well.[95][96][97]

Uruguay's tax system does not have an explicit corporate income tax, but only a business tax amounts to 25 percent of profits as a "tax on economic activities." There are numerous exceptions to this rule, depending on the amount of profit, land, and company type.

[94] Carolina Masihy and Gonzalo Suffiotti (2021)
[95] Worldbank.org (2021a)
[96] Datosmacro.com (2021)
[97] For further Information: Julio Martinez-Galarraga, Adrián Rodríguez Miranda, and Henry Willebald (2020)

There is also a wealth tax. The Wealth Tax (Impuesto al Patrimonio[98]- IP) is levied on the net assets (net fiscal assets) of individuals, groups of individuals, banks, domestic and foreign corporate forms. Foreign assets are not taxed. Legal entities are also liable to pay wealth tax, but they pay a reduced tax rate of 1.5 percent, taking into account tax deductions.

Income tax (Impuesto a las Rentas de las Personas Fisicas - IRPF) is payable by all natural persons whose income originates in Uruguay. In the tax sense, individuals are those in the country for at least 183 days per year or who have declared Uruguay as the center of their life or economic interests.[99]

This tax is levied under a dual system, i.e., different tax rates are assessed for income from work and income from capital, progressively 0 percent to 25 percent, for income from work and 3 percent to 12 percent depending on the type of income from capital. Income from dividends is not taken into account to avoid double taxation. There is also a separate income tax for foreigners (Impuesto a las Rentas de los No Residentes - IRNR). This tax applies to all foreign individuals and legal entities that generate income from Uruguay. Depending on the type of investment income, a proportional 3 percent – 12 percent is levied.[100]

Uruguay has 16 double tax treaties with Argentina, Australia, Brazil, Canada, Chile, Denmark, Faroe Islands, France, Greenland, Guernsey, Iceland, Netherlands, Norway, South Africa, Sweden, and the United Kingdom. However, the double taxation treaties have yet to be adapted to the BEPS standard. The majority of the agreements do not regulate the limitation of benefits. Furthermore, the DTAs do not regulate individual companies' offshore activities, which still represents a tax loophole.

[98] Dirección General Impositiva (2021c)
[99] Dirección General Impositiva (2021a)
[100] Dirección General Impositiva (2021b)

According to the BEPS project, Uruguay has partially implemented the CFC rules of the OECD. Since 2011, Law 18.718 and Decree 510/011 have made the CFC rules (reglas de transparencia fiscal) applicable only concerning individual foreign source income earned by a CFC in a LONT company. Such income earned by a LONT company will be considered taxable income of the resident individual in proportion to the control exercised over the LONT company. For these purposes, control is defined as ownership (without limitation or threshold), except in the case of foreign trusts and foreign investment funds where control is deemed to be exercised by the beneficial owner.[101]

The CFC rules apply to foreign financial income (rendimientos de capital mobiliario). However, as of 2017, the CFC rules also apply to foreign income from real estate (e.g., rentals, leases, capital gains) and other investment income earned by a LONT entity through Fiscal Transparency Law 19.484. The problem is that income earned by foreign pension funds and foreign collective investment funds are not subject to the CFC rules, provided it is audited by a recognized firm (Article 6 and following the IITR).[102]

A LONT jurisdiction is considered as such if income from activities carried out in Uruguay, goods located there, or rights economically exploited there are taxed in those countries, jurisdictions, or regimes at an effective tax rate lower than 12 percent and no information exchange agreement or tax treaty with an information exchange clause is in force or, even if an information exchange agreement or tax treaty is in force, the country, jurisdiction or regime does not exchange information with Uruguay.[103]

Seti January 01, 2020, the Uruguayan Tax Administration has issued a unified list of countries, jurisdictions, and special regimes with low or no taxation to provide planning certainty for companies and tax authorities. Suppose a resident entity (with income from capital or labor, rentas puras) is interposed between the LONT entity and the resident

[101] Gobierno de Uruguay
[102] Ministerio de Economía y Finanzas (2021)
[103] Ernst & Young (2021)

individual. In that case, the LONT entity's income that is subject to the CFC rules will be attributed to the resident individual once the resident entity distributes the dividends to the resident individual.

Tax Transparency Law 19.484 also introduced other measures, such as increased withholding tax rates on transactions with LONT entities, to discourage such entities' use.[104]

Furthermore, Uruguay has not yet implemented any BEPS measures, although it has announced its intention to comply with the OECD's definition of permanent establishments in the future. However, how this will be implemented in domestic law remains unclear. There is no further information on the implementation of other actions such as Action 12. It remains to be seen how and when Uruguay will implement BEPS.[105]

3.10 Brasil

Last but not least, let's look at Brazil.

Brazil has one of the most complex tax systems in the world. There are more than eighty different levies in taxes, special levies, contributions, fees, and the like. The Brazilian tax system's complexity is not only reflected in the number of different taxes and levies. Brazilian VAT law is regulated at three levels: the federal, state, and municipal levels. There is thus no uniform turnover tax in Brazil. IPI (Imposto sobre Produtos Industrializados) is a turnover tax at the federal level, a tax on the value-added in the processing and further processing of products. This tax, therefore, only covers specific facts in the context of value creation. It is important to note, however, that IPI always applies to imports. ICMS (Imposto sobre Operações relativas à Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação). It is a national sales tax and

[104] Ministerio de Economía y Finanzas (2021)
[105] IBFD

one of the most complicated taxes in Brazil. Goods traffic and services in the areas of transport and communication are subject to taxation.

The ISS (Imposto sobre Serviços de Qualquer Natureza) is a municipal tax on services. A special feature of the Brazilian tax system is that numerous taxes are structured as withholding taxes. Besides, various taxes are not dependent on profits. In non-compliance with payment and declaration deadlines, high interest and late payment penalties are usually incurred.

As far as income is concerned, a Brazilian resident's world income with unlimited tax liability is subject to progressive taxation of up to 27.5 percent. According to the progressive income table, there are tiers of 0 percent, 7.5 percent, 15 percent, 22.5 percent, and 27.5 percent. All other taxpayers in Brazil are subject to limited taxation only on their income from Brazilian sources of payment. These individuals are assessed at a flat tax rate of 25 percent. Any income from foreign (i.e., non-Brazilian) sources is not taxed.

Furthermore, the Brazilian tax system is currently in transition. A new legislative proposal provides for the levying of 20 percent as income tax on profits and dividends. Currently, Brazilian legislation allows high incomes to be earned without taxation, with 67 percent of the tax-exempt income declared in 2017 coming from profits and dividends. The text proposes to reduce the corporate tax rate from 15 percent to 10 percent for legal entities. Part of this reduction for companies will result from the increase in tax rates for individuals.

In summary, the Brazilian tax system is incredibly complicated. For some time now, attempts have been made to simplify it, with only limited success.

In the international context, Brazil has a vast network of 34 double taxation agreements with South Africa, Germany, Argentina, Austria, Belgium, Canada, Chile, China, South Korea, Denmark, Ecuador, Slovakia, Spain, Philippines, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Norway, Netherlands, Peru, Portugal, Czech Republic, Russia, Sweden, Trinidad and Tobago, Turkey, Ukraine, Venezuela. This makes Brazil the Latin American country with the most double taxation treaties.[106]

BEPS implementation in Brazil is already in full swing. As of today, Brazil has implemented actions 2, 4, 5, 13, and 14. The implementation of Action 13 was based on minimum standards. This is interesting because actions 8-10, which deal with transfer prices, were not implemented in an OECD-compliant manner. Instead, Brazil has defined its minimum standards. Further changes and adaptations to the OECD standards are not expected soon.[107]

The biggest issue is that the Brazilian transfer pricing rules have not been effectively updated since 1996. However, they were considered very modern, relatively practical, and straightforward for Brazilian taxpayers and tax authorities. [108]

They fail to resolve important double taxation issues. In a globalized world, they fail to regulate essential issues such as intercompany services and cost-sharing arrangements, intangible assets and intellectual property, reorganizations, and financial transactions (except for loans). [109]

Problems include lack of Advanced Pricing Agreements - APAs, which are essential for resolving double taxation / non-taxation issues. Also, lack of compliance with the Arm's Length Principle - ALP. Brazilian rules do not follow ALP standards (BEPS actions 8 to 10) - the use of fixed margins is said to create distortions as they would not reflect all operations' economic characteristics. This implementation into national law is relevant to keep BEPS standard upright and give the project a future.[110]

[106] Receita Federal (2021)
[107] Deloitte
[108] A. Gomes de Oliveira and F. Lisboa Moreira
[109] A. Gomes de Oliveira and F. Lisboa Moreira
[110] Iglesias (2020)

Also questionable is that Brazilian taxpayers are free to choose the TP calculation method that better suits their needs. While this may provide some domestic legal certainty, it departs from the OECD's Most Appropriate Method, which thoroughly analyzes each transaction and effectively mitigates double taxation and double non-taxation issues. Thus, this standard is also not OECD and BEPS compliant.[111]

The application of safe harbors in Brazilian TP legislation is comprehensive and not harmonized with the OECD practice, leading to some distortions and hurdles in double taxation and double non-taxation.

Further, Brazilian law lacks specific transfer pricing rules to analyze transactions involving intangible assets, such as the Transaction Net Margin Method (TNMM) and the Profit Split Method. The Brazilian methods are simply not comprehensive enough in comparison.[112]

In summary, this means that Brazil has committed to BEPS but does not seem interested in recognizing the relevance of the transfer pricing rules. This may be due, among other things, to the fact that Brazilian tax law, in its complexity, is tempted to open up loopholes with every amendment. However, since Brazil has now joined the OECD's transfer pricing project, it remains to be seen what changes will result.[113]

[111] Pereira Valadão
[112] L. Kurth Marques Carvalho (2020)
[113] Brazil and OECD (2019)

4. Discussion

Let's now move on to the issues that have arisen from the previous chapter and explain how or whether BEPS can help Latin America gain control over its taxation. We will further address whether the BEPS project is designed to help developing countries at all. Before we go into the individual tax problems of each Latin American country, we will discuss the common problems.

4.1 Corruption in Latin America

First of all, corruption in the government and the population.

With the Paradise Papers a worldwide scandal was uncovered. The Latin American continent was immensely involved in this scandal. In the course of the data leaks around the law firm Appleby, which specializes in the offshore business, which became known as "Paradise Papers," numerous high-ranking Latin American politicians were also targeted by further investigations. In many cases, the documents revealed the problematic interrelationship between high political office and private economic interests. Investments in offshore paradises are used to conceal conflicts of interest and invest capital in a tax-friendly manner. Appleby also names functionaries and entrepreneurs, who are under investigation in the corruption scandals surrounding the parastatal oil company Petrobras in Brazil or the world football association Fifa, as customers of Appleby suggests suspicion of money laundering activities.

Colombian President Juan Manuel Santos appears in Appleby's records as a board member of the Global Tuition and Education Insurance Corporation, a company based on the Caribbean island of Barbados. This is an insurance company specializing in the private financing of secondary education. According to documents, Santos was a member of the company's Board of Directors from 2001 to 2003, a period during which he also served as Minister of Finance. In its official statement, Santos denies having held a position in the company at the time.

In Argentina, two high-ranking members of the government of President Mauricio Macri, who is himself under investigation for the revelation of the Panama Papers, have been targeted by the judiciary. In the leaked documents, Finance Minister Nicolás Caputo is named in the documents as the manager of an investment company called "Noctua Partners" with headquarters in Miami and offices in Deleware and the Caiman Islands. The company is also believed to have traded with hedge funds, which recently brought Argentina to the brink of a new national bankruptcy. Caputo told the daily La Nación that there was no conflict of interest, as he no longer had any relationship with the company. He also didn't believe that any of these hedge funds had cooperated with Noctua. Argentinean Energy Minister Juan José Aranguren has been charged with criminal offenses. According to the "Paradise Papers," Aranguren was a director of at least two offshore companies belonging to the Shell group. One of the two, "Shell Western Supply and Trading Ltd.," was awarded the contract for the state purchase of diesel oil in 2016 under Aranguren's leadership as Energy Minister. He is accused of deliberately concealing his connection to the company.

Furthermore, there is a general failure in the Latin American countries to set taxes. For more than 30 years, legislators in countries like Brazil have been unable to agree on a uniform tax system. Tax assessment continues to fail due to corruption that is prevalent in all Latin American countries.

This corruption is a central problem in Latin America. This problem affects all areas of life and thus also affects the executive power. The tax authorities are generally subordinate to the executive power. This means that if auditors and tax collectors are not regulated, and a means to suppress corruption is found, it is questionable how taxation can be secured.

Corruption defines as the abuse of entrusted power for private benefit or advantage. These include bribery or corruptibility in international business transactions or one's own country, whether venality in politics or the attempt to gain advantages through bribery.[114] This not only causes material damage but also undermines the foundations of society.

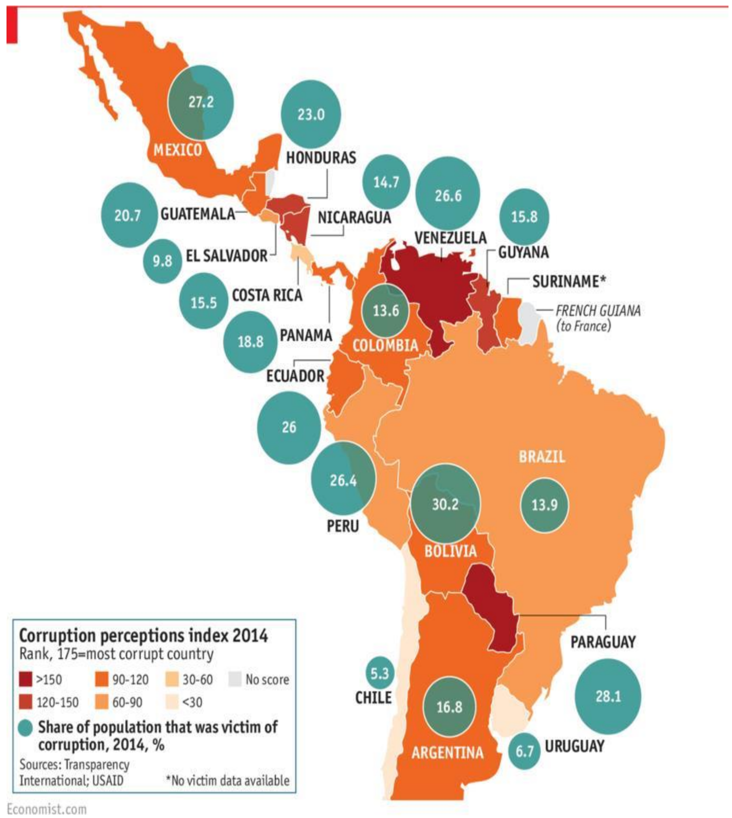

Figure 4: World Economic Forum 2311[115]

If we take a closer look at the graph, we see that corruption is an immense problem in almost all Latin American countries. Corruption is described by the World Economic Forum as the most significant social problem in Latin America followed by education and social inequality.

Some scientific studies assume that corruption and social inequality go hand in hand. On the other hand, other scientists describe that corruption has a similar effect on

[114] Ariely and Uslaner (2017)
[115] World Economic Forum (2020)

citizens as an additional tax.[116] In turn, this additional tax can increase socioeconomic inequality, not unlike the cost to citizens whose interests are not represented in works or projects aimed at reducing economic inequality. Corruption exacerbates inequality and inefficiency in the provision of public services, promotes the plundering of natural resources, and generates widespread mistrust.

The comparison of corruption as tax lacks at many different points. Corruption can help companies and private individuals to save taxes. So it should therefore more be seen as an immoral investment. This is the case, for example, when tax authorities are paid to disregard tax issues during audits. Furthermore, the problem of buying votes in political elections in Latin America is a very real one. Since politics, as a legislative power, enacts the tax law, it is influenced by it. Therefore, corruption can be understood as a business investment that saves taxes in the long and medium term and does not represent an extra tax.

Since the OECD commissions the BEPS project, the OECD's anti-corruption measures must be observed. According to its own information, the OECD has long been fighting corruption in the economy, taxes, development aid, and governance in its member countries. It has taken specific measures to this end.[117]

The first measure against corruption is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered 1999. This is considered the first legally binding instrument that focuses on bribes to foreign public officials. This instrument means that the countries that offer, promise, or give bribes to foreign public officials must prosecute and impose effective penalties. These can range from money to prison sentences, depending on the severity of the offense. The prosecution is transnational.[118]

[116] Rothstein and Uslaner (2005)
[117] OECD (2020c)
[118] OECD (2020a)

The second measure relates to the coordination of national export credit policies, including the anti-corruption measures applied by export credit agencies. It came into force in 2006 under the name anti-bribery conventions. It requires governments to take measures to deter and sanction bribery of foreign officials in transactions supported by official export credits. The implementation of this anti-corruption guideline is monitored in the peer-review process.[119]

Besides, the OECD's Anti-Bribery Convention prohibits the contracting parties from taking bribes to foreign public officials as tax deductions. The OECD Handbook on Raising Awareness of Bribes among Tax Inspectors helps tax inspectors create suspicious payments, which is applied since 1996. This handbook is also intended to help countries strengthen their internal audit guidelines for raising awareness and detecting bribes.[120]

However, the most critical measure for the Latin American countries is the measure to prevent corruption in the public sector, which came into force in 2010. The different measures have been summarized as OECD principles for transparency and integrity in lobbying. The reason is that corruption in the public sector hinders public services' efficiency, undermines them, and robs the population of trust. The OECD Recommendation is designed to strengthen ethical behavior in the public sector in particular.[121]

This is probably an essential measure in terms of tax control in Latin American countries. It prevents corruption in the interaction between taxpayers and authorities, at least in theory. As figure 3 shows, only Mexico and Chile have signed the agreement so far. This was done in 2010, and the success of the agreement to date remains questionable.

[119] OECD (2020e)
[120] OECD (2020b)
[121] OECD (2020f)

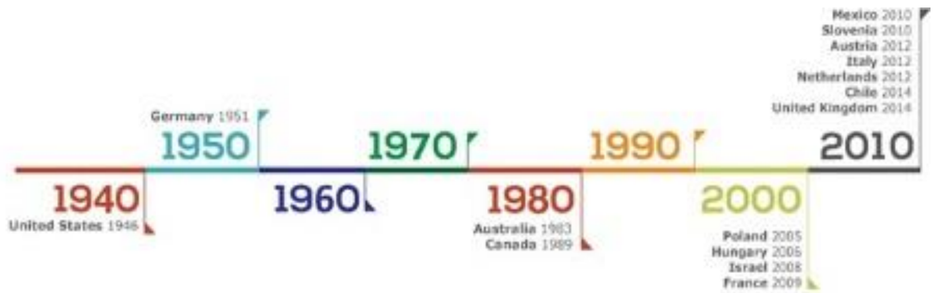

Figure 5: Timeline of Lobbying Regulation[122]

There are already several scientific studies of corruption and its impact on the taxation of countries. Among other things, it has been found that corruption is provoked by factors such as outdated laws, obsolete tax administration, costly procedures, poor pay and wide discretionary powers of officials. Corruption appears to operate where there is greater interaction between tax authorities and private individuals.[123]

Furthermore, it is of utmost importance that the issue of corruption is discussed in the context of taxes. Otherwise, there is a further danger that it is not the personal experience with corruption that is relevant, but rather the public one. If nothing is done about it, it stands to reason that corruption will gradually become the norm, so that the tax morale of citizens will also decline. This would provoke a vicious circle, representing a country's institutional weakness in responding to the problem in a timely manner.[124]

In summary, it must be noted that if the Latin American countries implement the BEPS, they will also implement the corruption regulations of the OECD. This means that BEPS goes hand in hand with anti-corruption measures. However, it can be observed that the OECD and the first world countries put more pressure on the Latin American countries to implement the individual actions than to demand an equal fight against corruption. There are two reasons for this. The first is to avoid creating unnecessary political conflicts. The

[122] OECD (2020e)
[123] Fernando Bardales (2016)
[124] Castañeda Rodríguez (2015)

second is that corruption is a problem of national taxation rather than international taxation and concerns the national context more.

Nevertheless, it must be noted that BEPS can fight corruption. The most relevant factor here, however, is that the OECD system is applied. Currently, Latin American countries use the ILADT model. This model competes with the OECD and differs greatly in certain respects.

4.2 The ILADT Model

Within the Literature, there is an ongoing discussion of what Latin-American taxation systems miss. For Example, they need more straightforward rules with less possibility of interpretation for taxpayers and the treasury and apply international and domestic taxation rules addressing the wanted concerns.[125] Especially mentioned is a network of double tax treaties.

There were two different systems on which most double tax treaties were based — the System of the OECD and the UN's System. The main difference between those systems where the UN double taxation system was focused on helping developing countries, and the OECD's system's focus was developing the taxation world in general.[126]

Because the application of those systems does not fulfill its focus, Latin-American countries developed a new double tax treaty system in 2012. This system was developed by the Instituto Latinamerica de Derecho Tributario (ILADT) and is commonly known as the ILADT system. It was signed by 18 countries, including European countries such as Spain, Italy, and Portugal, next to the Latin-American countries.

Since the Latin-American countries, México, Colombia, Panamá, Costa-Rica, Belice, Perú, Chile, Argentina, Bolivia, and Uruguay have signed the MLI BEPS project are

[125] Betty Andrade Rodríguez (2017)
[126] P. Schoueri

forced to change the ILADT model to the OECD model. On the first look, those two models may seem similar. There are huge differences regarding their structure and how those systems are handling Double taxation.

First, the ILADT model applies the exemption method. The exemption method avoids double taxation by exempting income or assets from abroad from taxation in the country of residence. The exemption method can be designed as an unconditional or conditional exemption on the one hand and as an exemption with or without progression proviso on the other.[127] The State of residence grants the unconditional exemption, irrespective of whether the source State taxes the income or assets. In contrast, the conditional exemption is only granted by the State of residence if the source State taxes the income or assets. With the progression proviso, the source state's income or assets are used in the state of residence to calculate the applicable tax rate.[128]

Further, the ILADT dismisses the credit method, which is considered as an alternative by the OECD.

Under this method, the foreign tax paid on foreign income is credited against the domestic tax liability, i.e., the tax to be paid is reduced by this amount. In contrast, foreign income is tax-exempt under the exemption method so that no German tax arises in this respect. Concerning income tax, instead of the imputation method, the application-based deduction method may be more favorable under certain circumstances. In this case, the foreign tax is deducted from the income.[129]

A third significant difference between ILADT and OECD models is the unconformity on how to treat passive income. Here the OECD has many different regulations and

[127] OECD (2014)
[128] OECD (2015c)
[129] OECD (2015c)

possibilities where the ILADT follows a straight-line through the credit method – a maximum of 15 % additional taxation.

It's questionable how the Latin-American Countries will implement the further explained actions. Currently, the Latin-American country's main problems are tax avoidance and evasion. Further, they have a problem implementing tax audits, which means they cannot counteract those problems.[130]

Referring to Chapter 2.4, a standardized definition of permanent establishments is crucial. There is a massive conflict between developing and developed countries since both want to have taxation.[131] The ILADT-model focuses on taxing the Profit in the generated country, where the OECD states that the Profit is generally taxable in the country of residence. Only through a PE can be switched to the establishing state if that isn't a must.[132] The formulation of Action 7 within the BEPS project left space for discussions since it is not as detailed as possible.[133]

Chapter 2.3 and Action 6 of the BEPS project are not sure if the phenomenon of treaty shopping exists. If it exists, it is crucial to display treaty shopping constellations that are important for Colombia and further apply the BEPS projects' consequences, which regard gaining control for the Colombian financial authorities.[134][135]

As mentioned before in 2.1, the goal of Action 2 is to prevent hybrid mismatches. Therefore, it is essential to show current used hybrid mismatches in context with Latin-American countries, specifically Colombia. Action 2 gives guidelines on how to change the domestic legislation, but the main problem is that there is currently no system to counteract

130 Betty Andrade Rodríguez (2017)
131 (“Tax Executive,” 2015)
132 OECD (2017)
133 Gillespie (2018)
134 OECD (2015e)
135 (“Making dispute resolution more effective - MAP peer review report,” 2019)

the deduction of hybrid mismatches. The worldwide deduction system is lacking a strategy on how to handle tax deduction on capital tax.

Lacking control is a massive problem in Latin American countries. If as mentioned before, action 12s goal is to make aggressive tax planning harder. If we now take both into account. Applying action 12 into their jurisdiction can help the Latin American countries gain control. Questionable is the "how" because they already tried to gain control over tax abuse and tax fraud before BEPS without the wanted success.

But one thing is sure. The Latin American participants in the BEPS project are encouraged to apply the OECD-MA. This means more for some countries and less change for others. For example, Colombia has only 13 double taxation treaties in which the partner is predominantly of Latin American origin. On the other hand, Argentina has 20 treaties, and Mexico has more than 50, although it should be noted that the ILADT treaties mainly govern the relationship between Latin American countries. In order to comply with the BEPS project, countries like Colombia will have to sign new OECD-MA with many countries.

In summary, this means that a unified double taxation avoidance system is needed. With the OECD-MA foreseen worldwide, Latin American countries will need to adapt their double taxation treaties to meet the long-term goal of BEPS and improve their control over taxation.

4.3 How does BEPS Help Latin America

4.3.1 Transfer pricing

If we look at the CFC rules in isolation, we see that virtually all Latin American countries have adopted some kind of rules on transfer prices. However, we also find that the rules adopted are not always OECD compliant.

If we look at Central America with Costa Rica and Panama in isolation, we find that the application of transfer pricing in these countries does not make any difference. The countries exempt foreign income and have no interest in taxation. They live rather from the fact that foreign companies settle here and profit from the legislation. In this case, Latin American countries benefit indirectly through the establishment. The transfer prices, therefore, help rather European countries, which want to avoid the profit shifting abroad. It can be assumed that Panama and Costa Rica will lose letterbox companies with further implementation of BEPS measures. This is only because of the need to help first world countries and the impossibility of Central American countries to resist the pressure of the OECD. Therefore, the CFC does not particularly help these countries but will lead to a decrease in Costa Rican and Panamanian subsidiaries.

On the other hand, transfer pricing can help countries that are not economically dependent on financial transactions but live more from international trade to gain control over taxation. If we look at countries like Mexico, Peru, and Colombia that live on exports, it becomes clear that unequally published prices are removed from taxation, minimizing the tax base and reducing tax revenues. This is particularly serious when one considers the volume of exports in these countries. In Colombia, exports account for about 16 percent[136] of GDP. In Peru, it is about 25 percent[137] , and in Mexico, it was even 38 percent[138] in 2019. This means that if the smallest deviations in the prices become a habit, this has a huge impact on the tax revenues of a country.

Furthermore, inconsistent implementation is a problem. Although the OECD offers several options for implementation that are compliant with the BEPS project, these proposals are not uniformly adhered to. The example of Brazil alone shows that implementation is difficult. It is obvious that a uniform implementation can help to export nations to avoid tax evasion. However, changes in the law always run the risk of creating new tax loopholes. As explained in the example of Chile, legal uncertainty and unconstitutionality can occur, which ensures that neither taxpayers nor tax authorities

[136] Worldbank.org (2021d)
[137] Worldbank.org (2021c)
[138] Worldbank.org (2021b)

implement the new rules, resulting in new tax structures that, in the worst case, completely avoid taxation in the country of residence. This problem occurs worldwide and can also be seen in Europe, for example.[139]

In the worst case, different applications of transfer prices lead to double taxation. This is also counterproductive to the BEPS project. The project officially aims at fair taxation. This means that neither tax avoidance nor double taxation can be tolerated and must be counteracted to the same extent.[140]

In summary, it is not possible to make a general judgment on whether actions 8-10 in conjunction with action 13 will help Latin America or not. This has to be determined individually for each country. It is clear that Central American countries are more likely to be disadvantaged, while countries dependent on exports and imports can benefit from the regulations.

4.3.2 Treaty Network

Having already discussed the Latam model, it is now important to apply it to BEPS in Latin America. In general, the DTAs particularly concerns hybrid mismatches and treaty shopping. If we summarize again, we can primarily see that Latin American countries have only a small number of double taxation treaties. As shown in the table below.

Country	Amount of DTAs
Brazil	34
Mexico	61
Colombia	13
Chile	25
Argentina	20

139 P. Piantavigna (2017)
140 Georg Kofler (2012)

Peru	9
Uruguay	16
Costa Rica	3
Belize	13
Panama	15

First, let's look at hybrid arrangements. To avoid hybrid arrangements, an extensive network of double taxation treaties is essential. This allows the respective treaty partners to avoid the conflicts of interest deduction and tax deferral, as explained in point 2.1. With regard to Latin America, however, it is obvious that such a network does not exist. Rather, there are agreements with neighboring countries, which are generally not OECD-MA agreements and are therefore not 100% BEPS compliant. Again and again, exceptions to the OECD-MA are made, which are generally harmful. See, for example, the agreement between Mexico and Argentina.

The number of double taxation agreements is far from sufficient. Assuming that all countries that have signed BEPS are interested in implementing the project, which if you look at Belize and Brazil seems like a bit of a stretch, it would be necessary to have a number of 136 treaties per country that are all BEPS compliant. This means 136 individual agreements per signatory country. The table shows that Mexico, with 61 agreements, is the country closest to meeting this target, assuming that all of these agreements are BEPS compliant - which they are not.

Treaty shopping poses similar problems for BEPS in the Latin American context. In the absence of a network of tax treaties and their inconsistency, new treaty shopping opportunities may arise. The aforementioned inconsistency of double tax treaties in combination with the use of different models mentioned in the ILADT chapter creates confusion and helps creative advisors to find design models to partially or completely avoid taxation.

It is therefore also under this point that it is necessary to further expand the network of double taxation agreements and to agree on a uniform system. Only in this way can treaty shopping be circumvented. In the beginning, we raised the question of whether treaty shopping exists at all. This is to be affirmed. However, it depends on the country of residence.

In Europe, treaty shopping constellations are almost extinct. This is due to the wide network of double taxation treaties, which Latin America, for example, lacks. In addition, the EU free trade zone and the associated regularities must not be disregarded. In summary, this means that Latin American countries need to find a way to build a network of double taxation treaties - in the best case, BEPS compliant with the OECD-MA.

Third, in the context of treaty policy, the taxation of world income must be addressed. As the name Base Erosion and Profit Shifting suggests, BEPS generally addresses tax avoidance and tax evasion. However, it should not be neglected that a secondary goal of BEPS is to prevent double taxation. It seems that this second objective is largely disregarded by the OECD as well as by the signatory countries. This is not surprising in that it is in the nature of things that the individual tax authorities want to increase the assessment amounts of the companies. In this regard, there is definitely a lack of representation of the business side in the entire project. Particular consideration must be given to the issue of taxing world income. In view of the lack of a network of double taxation treaties mentioned in this chapter and thus of inconsistent regulations regarding the right to tax, double taxation in individual cases is unimaginable. It is therefore questionable to what extent a national rule on the taxation of world income, such as Colombia's, is BEPS-compliant and why the secondary purpose of BEPS - the avoidance of double taxation - is disregarded.

Accordingly, it should be mentioned further that the growth of the individual economy of a state is rather harmed by double or excessive taxation. Companies generally work more efficiently than governments. If, therefore, the investment scope of companies is minimized by double taxation, and the basis of economic activity is not thus minimized for them, then the growth of the company is strongly attacked, and, in the long run, economic growth is harmed.

4.3.3 Permanent Establishment in Latin-America

The indispensability of a uniform concept of permanent establishments and the integration of a uniform definition in national law and double taxation agreements has already been discussed in chapter 2.

If we now look at the integration of the individual Latin American countries, we see no such thing as unity. The OECD gives guidelines, but the implementation has so far happened only slightly. The Central American countries sometimes do not seem to be interested in the integration of a permanent establishment concept. The fear of further measures and the compulsion to change the fiscal conditions is much too great. As a result of changes, one would lose local companies that do not help the country economically through direct tax payments but much more through indirect benefits.

Furthermore, we can see that the OECD in the BEPS project has thought out the adjustment of the permanent establishment concept very nicely. The example shows the complexity of such an implementation and the problems. There may be unconstitutional laws that are declared invalid. At the very least, legal uncertainty is to be expected.

It is also questionable whether the conflict of interests between the individual countries described above will be regulated. There are in part vital economic interests with the implementation or non-implementation of Action 7 against each other.

The uniform implementation of a permanent establishment concept would create clarity in the international context but would have to be implemented constitutionally in all countries, which is questionable. In addition, all double taxation agreements would have to be adapted in line with the OECD, as any irregularity could lead directly to treaty shopping.

In summary, it can be said that the implementation of the OECD-compliant establishment definition would have advantages if it were implemented constitutionally and without legal uncertainties. This is not the case. The Latin American countries that have redefined the term are struggling with exactly these problems. On the other hand, there are countries, especially in Central America, that have no interest in implementing permanent establishments due to their preferential taxation of foreign income. This means that a good integration of the permanent establishment concept due to OECD standards could clarify Latin America's taxation, but it is still a long way off.

4.3.4 Mandatory disclosure Rule

The Mandatory disclosure rule from Action 12 has not yet been implemented to the usual extent. Although some Latin American countries have confirmed their disclosure to Action 12, no helpful system can be seen yet. In addition, in a global context, it remains to be seen to what extent the action makes sense. Legal changes and problems are published, but the implementation of measures usually takes place at the country level. This means that the interpretation has to be improved nationally, and the negotiation takes place, in the best case, between two countries. Again, we conclude that implementation is best done through double taxation agreements with OECD conformity between individual participating countries.

5. Conclusión

In summary, the following can be stated.

The BEPS actions all have their pros and cons. We have discussed in detail the general theoretical problems of the BEPS actions and explained why they make sense or not. If we look at Latin America, it becomes clear that almost all Latin American countries are BEPS signatories. A majority of them have committed to implement the MLI to the extent of Action 14 BEPS.

Particular problems arise from the uncoordinated nature of the double taxation agreements, as well as the existing scope of these. In theory, the Latin American countries' grain role could be improved by uniform rules of international taxation. Furthermore, large conflicts of interest can be discovered between the Latin American countries. For example, Central American countries such as Panama and Costa Rica are not necessarily interested in changing national law. It is far too tempting for them to allow international companies to establish themselves here because of the non-taxation of international income.

Exporting countries like Peru, Chile, and Mexico, however, are interested in eliminating profit shifting. In particular, intermediary companies and transfer pricing are relevant issues and have been discussed extensively. As a critical issue in this area, the problem of unconstitutionality and resulting legal uncertainty must be mentioned.

It is also necessary to summarize two other points of view again. First, we raised the point in the introduction that BEPS may be designed to help rich countries continue to tax and poorer countries are left out. This has proven to be true in certain respects. For example, Belize is being forced to implement BEPS and enter into double taxation agreements to allow companies to operate internationally. This is, therefore, an external, indirect, and coercive interference in national law. We also note that BEPS implementation in Latin America is of little benefit to the individual countries.

As a second point, it is important to address the consumer perspective. It seems that the goal of eliminating double taxation has been forgotten. The BEPS project is currently being implemented in legislation according to the motto "double is better" and has the approval of the first world and the OECD. This must be changed. The project's goal to prevent avoidance of taxation must be done under a fair background and must not be changed to a motto main thing taxation.

In addition to problems of control, Latin America struggles, in particular with problems such as corruption. In summary, this means that even if the BEPS project creates control, corruption can completely counteract it and nullify this effect accordingly.

This means that the individual implementation of BEPS can improve the control of the Latin American and the worldwide tax authorities. Still, individual problems such as corruption, constitutional problems, and legal uncertainty must be eliminated to ensure fair international taxation in the long term and not to endanger the economic traffic. For this, an internationally coordinated network of double taxation agreements will be indispensable. However, it remains to be seen whether this will ever happen. Currently, the implementation of BEPS is slow in a global context, which can be blamed on the corona pandemic but should not be.

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