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1. Executive summary

We wrote this paper because, for some time, mining businesses have been trying to make long-term decisions in an environment of unprecedented tax change and uncertainty. The G20/OECD's Base Erosion and Profit Shifting (“BEPS”) project has made it clear that the impact of change to international corporate taxation is not limited to any particular sector. Since the OECD published the final BEPS papers in October last year, we now have much greater clarity on the proposed actions and how they may be implemented – some through a multilateral convention and other double tax treaty changes that will re-align international tax rules governing the allocation of profits, and others through changes in domestic rules on a country-by-country basis.

Mining companies need to keep abreast of these rule changes, appraise their current corporate structures and business models, and be ready to take action where necessary. We hope that this paper helps inform mining groups on where the changes are likely to come from, as well as provide a few ideas on how to prepare for them. We have attempted to avoid too much technical detail so that the paper can be accessible to all in the sector.
2. A recent history – The international tax and transparency landscape for mining

2.1 The commodity price rollercoaster and resource nationalism

The mining industry has endured a torrid time in recent years. Many commodity prices reached record levels during the heady days of 2007 and early 2008 when faith in a seemingly endless commodity super-cycle could call on a broad church of believers.

However, metal prices then led the way into the global financial crisis, losing 40% of their value by mid-2009. But just as the world’s major mining companies saw their stock market values plummet earlier, and more sharply, than other industrial sectors on the way into the downturn, so they were at the forefront of the ensuing recovery – by January 2010, six of the ten FTSE 100 mining companies’ market capitalisations had recovered to their March 2008 levels.

The broader economic recovery proved to be fragile however, and many governments around the world, struggling with the burden of record levels of national debt, high unemployment, and inflationary pressures that threatened to erode the wealth and spending power of their citizens, could not help but notice the mining sector’s seemingly rapid return to rude health. Perhaps understandably, governments looked anew at their arsenal of options for tapping into the wealth of their domestic mineral resources, and the period from 2010 to 2012 saw a number of mechanisms deployed with a view to gaining a bigger share of international mining groups’ spoils, with CEOs at the time deploiring the “curse” of resource nationalism.

Indeed, an unprecedented number of governments, both in the world’s major established mining territories and in many emerging mining jurisdictions, introduced new measures ranging from mining royalties and windfall taxes, to increased export duties, the renegotiation of tax stability agreements and the enforcement of equity participation or indigenisation plans.

Some of these measures stuck, for instance the new mining royalty regime in Chile introduced in October 2010. Others survived despite a difficult birth – the introduction of the mining royalty regime in South Africa in March 2010 was delayed by a number of months, at least in part, to ease the pressure on mining groups which might otherwise have been forced to make deep retrenchments to their workforces during the global economic downturn.

Still other measures either never saw the light of day or made only a brief appearance, with their relevance effectively snuffed out by the onset of the next slide in prices which began, for most commodities, during 2012. Australia sits squarely in this category – controversial proposals for a Resource Super Profits Tax (‘RSPT’) announced in May 2010, and which could have subjected Australian mining companies to an effective tax rate up to 57%, were eventually replaced by a less onerous Mineral Resource Rent Tax (‘MRRT’) which was introduced in July 2012. Such was the decline in iron ore and coal prices by this time, however, that very few mining groups ended up paying the tax and MRRT was duly repealed in October 2014.

Figure 1. Price movements for key commodities from 2005 to present day

Source: The World Bank Commodities Price Data

![Price movements for key commodities from 2005 to present day](source)
2.2 The emerging importance of transparency for extractive groups

The commodity price falls which have endured from 2012 through to the present day have been widely documented as attributable to the combined effects of significant oversupply arising from investments made during the good years, and the ongoing slowdown in Chinese economic growth. To some extent, the threat of resource nationalism has receded somewhat in this environment.

One theme that has emerged out of its shadow for mining, and indeed other extractive sectors, is transparency – the public disclosure of tax and other payments to governments from their domestic extractive industries.

Understandably, various non-governmental organisations (‘NGOs’) have long had a focus on the contribution that extractive industries make to the economies of the developing world. The most notable movement in this respect is the Extractive Industries Transparency Initiative (‘EITI’), a non-profit organisation which, since its launch in 2002, has developed a series of rules, and now an international standard, for governments to publicly disclose the revenues they receive from extractive companies operating in their country. The EITI is actually a regime which governments, rather than companies, voluntarily sign up to but once a country becomes a member, the reporting requirements oblige both the government to disclose the revenues they receive, and extractive companies to report the payments they make, with independent assurance then undertaken to reconcile those figures for publication in an EITI report.

In tandem with initiatives such as the EITI, which currently has 49 implementing countries, the major international mining groups have taken it upon themselves to significantly increase their voluntary disclosure of tax and other contributions to governments in recent years, with such transparency undergoing an evolution from occupying perhaps a page of a Corporate Social Responsibility report a few years ago, to now warranting a detailed standalone report on economic contribution and payments to governments.

Such disclosure, and the messaging around it, is now seen as part and parcel of maintaining a social licence to operate in the world’s resource-rich developing economies.

Most recently, there have been a number of moves to shift the transparency landscape for the extractive industries from a fundamentally voluntary exercise, to a mandatory requirement. The first broad-based initiative out of the blocks in this respect were the US rules issued by the Securities & Exchange Commission (‘SEC’) in August 2012 on the back of the 2010 Dodd-Frank Act, requiring US-listed resource companies to publicly disclose payments made to governments from October 2013, with most groups expected to issue their first reports in May 2014.

However, the rules fell at the first hurdle with the American Petroleum Institute, together with other extractive industry bodies, launching a successful civil action through the courts to have the rules vacated.

This left the way clear for the EU to pioneer mandatory transparency requirements for the extractive sector with the enactment of Accounting Directive 2013/34/EU in June 2013, with EU member states required to apply the rules to companies in their countries for periods beginning on or after 1 January 2016. Indeed, the UK implemented the rules for periods from 1 January 2015, such that most, if not all, mining groups listed on the London Stock Exchange Main Market will already be within the disclosure requirements and, for groups with a 31 December year-end, their first reporting of payments to governments will be due by 30 June 2016.

2.3 Tax hits the headlines and the birth of BEPS

Around the same time in 2012 that US and EU authorities were developing transparency rules for the extractives sector, international corporate tax started to hit the headlines with enquiries by law makers in France, the UK, the US, Australia, and the European Parliament, expressing concerns that some multinationals had low effective rates of tax due to profits being recorded in low or zero-tax jurisdictions.

At their meeting in November 2012, the G20 issued a remit to the OECD to address so-called ‘Base Erosion and Profit Shifting’ (‘BEPS’) – a term encompassing those tax planning strategies which were perceived to be employed by multinational groups of companies in order to exploit gaps and mismatches in domestic and international tax rules to artificially shift profits to low or no-tax jurisdictions where there was little or no real economic activity undertaken.
The OECD subsequently issued a BEPS Action Plan in February 2013, identifying 15 key areas to be addressed.

This was formally endorsed by the G20 in July 2013, triggering the start of an ambitious timetable for working parties on each of the 15 Actions to come to a consensus and, in some instances, issue interim reports. The final BEPS package comprising deliverables across all 15 Actions was presented to the G20 Finance Ministers at their meeting in Lima on 8 October 2015 and endorsed by G20 Leaders on 15-16 November.

The table below categorises the Actions broadly into the perceived issues that they are seeking to address, be that ‘coherence’ in the interaction of domestic tax regimes which may result in the non-taxation of income, or the availability of excessive expense deductions, ‘restoring international standards’ where tax might be avoided through structural or contractual arrangements which are either not in line with the true economic substance of the business being undertaken, or where the business itself is undertaken in a purposively contrived manner, and ‘transparency’ – making information available to tax authorities to assist them with tax audits.

The BEPS Actions can also be divided broadly into three different ‘weight’ categories in terms of whether the G20 / OECD’s findings on each represent a ‘minimum standard’ which should be adopted by all countries, a view of desirable ‘best practice’, or merely a ‘recommendation’ for individual countries to consider.

In all, 62 countries have collaborated on the BEPS project – not only the G20 and OECD nations, but also a number of developing countries. The countries involved include many of the world’s major mining jurisdictions – Australia, Brazil, Canada, Chile, Colombia, China, India, Mexico, Peru, Russia, South Africa and the US.

It should be noted that a country’s relative engagement with the BEPS project to date may not necessarily translate in terms of the speed or degree to which the project’s findings are embedded into local tax rules. Indeed, a number of approaches might be pursued. Some countries have adopted, or may yet consider adopting, unilateral measures which are not directly drawn from the BEPS Action Plan.

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**Figure 2. The 15 BEPS Actions**

<table>
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<th>Action 1: Address the tax challenges of the digital economy</th>
<th>Action 6: Neutralise the effects of hybrid mismatch arrangements</th>
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<tr>
<td>Coherence</td>
<td>ii. Restoring international standards</td>
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<td>Action 2:</td>
<td>Action 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it</td>
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<td>Neutralise the effects of hybrid mismatch arrangements</td>
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<td>Action 12: Require taxpayers to disclose their aggressive tax planning arrangements</td>
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<td>Strengthen controlled foreign company (CFC) rules</td>
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<td>Limit base erosion via interest deductions and other financial payments</td>
<td>Action 9: Risk and capital</td>
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<td>Action 5:</td>
<td>Action 10: Other high-risk transactions</td>
</tr>
<tr>
<td>Counter harmful tax practices more effectively, taking into account transparency and substance</td>
<td>Action 14: Make dispute resolution mechanisms more effective</td>
</tr>
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</table>

Action 15: Develop a multilateral instrument

Source: OECD website.
The UK’s recent introduction of a ‘Diverted Profits Tax’ is just one example of this, and has been followed by Australia with its Multinational Anti-Avoidance Law, Other countries, such as Germany, have introduced the ‘subject to tax’ clause which limit or deny tax deductions for payments to low or zero tax jurisdictions.

Even countries seeking to directly comply with the BEPS findings will need to consider various tools for implementing them, whether that is through passing their own legislative instruments, amending double tax treaties bilaterally, or signing up to the multilateral instrument envisaged by Action 15.

Countries which are not part of the BEPS project may choose not to implement any direct change to their domestic tax legislation, but instead attempt to draw on the BEPS findings in guiding their interpretation of existing rules and treaties in the future, potentially causing significant uncertainty for taxpayers.

Appendix 1 tries to summarise some of the current perceptions and expectations in some of the world’s major mining jurisdictions in relation to addressing tax avoidance either through taking unilateral measures, or implementing the findings of the BEPS project.

With the global mining sector as a whole coming to terms with reduced commodity prices and diminishing prospects in China, the difficulties that may be imposed by BEPS are both an unwelcome distraction and an additional layer of uncertainty for the future of the industry. The BEPS project, once embedded into domestic tax regimes and through an overlaying multilateral instrument, is widely expected to culminate in the biggest change to the international tax landscape since the first model tax treaty was published by the OECD in 1963. Mining groups need to be ready for this.

The purpose of this paper, set against the historical economic, fiscal and transparency backdrop described in this introduction, is to analyse those specific BEPS Actions which we consider to be of most relevance to international mining groups, and to provide some suggested next steps for those groups to understand and deal with the possible implications.
3. Action 4 – Interest deductions

What is the G20 / OECD’s concern?
The G20 and OECD governments perceive that interest flows (and in particular interest flows between related parties) are perhaps the most simple technique used in international tax planning. A particular concern is that multinational groups seek to concentrate interest deductions in high-tax entities or jurisdictions, even where this may be disproportionate to the level of economic activity in that jurisdiction and/or the group’s overall external interest burden.

The proposals
The Action recommends that countries should include certain provisions in their domestic law to counteract tax base erosion through interest and other financing expenses. Specifically, it recommends that countries should adopt a system-wide limitation on interest deductions.

The key recommendation is that the net interest expense deductible for tax purposes should not exceed a certain proportion of earnings in the relevant entity/jurisdiction. The suggestion is that a range of 10% – 30% of EBITDA should be adopted, with discretion for countries within this recommended range. Net interest expense exceeding the limit would not be deductible, although could potentially be available for carry-forward if there are future periods with excess capacity.

Certain relieving provisions are included in the Action Plan, including in particular the possibility that countries could permit entities to deduct a higher level of interest expense to the extent that it does not exceed the worldwide group’s net interest: EBITDA ratio. This would clearly assist those groups whose external leverage ratio exceeds the 10% – 30% rates recommended to be adopted by individual countries.

In order to have any effect, the recommendations would need to be embedded into domestic law and therefore the timing of implementation across jurisdictions will inevitably vary. By way of example, the UK has historically had a relatively generous approach to interest deductibility (including permitting interest to be deducted on borrowings that effectively finance non-UK investments). Following the BEPS recommendations, the UK government has commenced a consultation process on the potential introduction of interest restrictions, albeit indicating that measures would be unlikely to take effect before 1 April 2017.

Application to the mining sector
Some common commercial aspects of how international mining groups typically finance their overseas operations could mean that Action 4 of the BEPS project has far-reaching consequences. We illustrate this by way of two examples.

Example 1 – Parent companies with ‘structural’ finance deficits
A group parent company, or often a group finance company located in the same jurisdiction as the parent, may choose to finance a long-term overseas mine development project by agreeing a significant debt facility with an external provider, typically a bank (or syndicate of banks). These facilities may require a pre-determined schedule of drawdowns which would have been agreed based, at least in part, on the mining group’s anticipated timetable for significant capital expenditure over the course of the project’s development. In the current low commodity price environment, one of the first costs to be reined in across the mining sector has been capital expenditure on new projects, with the result that group parent and/or finance companies may now be burdened with external debt that has not been fully on-lent overseas. Whereas the parent group may have originally envisaged breaking even, or even making a net financing return, on funds on-lent intragroup, that parent jurisdiction may in fact now suffer from a ‘structural’ deficit in relation to financing costs, effectively being awash with external interest expense (and unlikely to be earning significant interest income on surplus cash).

Clearly, even without considering Action 4, the above scenario would entail no immediate benefit for any tax deductions available on the external debt in the parent jurisdiction. In many jurisdictions, those deductions would generally be available to carry forward against future taxable income of a similar nature (e.g. interest income). In the event that the Action 4 approach is adopted in the parent jurisdiction, then there could be a permanent disallowance of excess interest expense, or a deferral that might only reverse in line with conditions that may be more stringent than those for the utilisation of a carried-forward tax loss.
Example 2 – Groups aligning interest burdens to commercial circumstances

An international mining group with overseas operations in several jurisdictions may have in place, as part of its overall group financing arrangements, very different relative interest burdens in those geographies based on genuine commercial rationale.

Most obviously, where a group is undertaking pure exploration activity in a country, whereas debt is often the quickest and most flexible way of financing that activity, it would generally make little sense to burden a local exploration company with interest costs so early in the cycle and with such uncertainty over any future project viability, particularly when local interest withholding taxes might give rise to ongoing cash tax liabilities.

Even once a project has reached the development stage, the timing of introducing interest on intragroup debt can be a finely-balanced decision. For tax purposes, the major capital expenditure involved in building and ramping up a new mining operation is often accompanied by significant upfront or accelerated tax allowances, with the result that local interest deductions might rarely be of any near-term benefit in sheltering taxable income once production is underway.

Other facets of local tax or regulatory regimes may also be influential on the relative interest burdens across international mining groups. South Africa, for instance, does not allow interest deductions on debt which has been used for corporate share acquisitions, and exchange control regulations may also impact the ability of groups to finance subsidiaries via debt.

BEPS Action 4 poses a potential problem for mining groups with differentiated relative interest burdens across their geographies. If a multinational mining group has decided not to push down debt into certain jurisdictions – for reasons such as exchange control, withholding taxes, or simply because no local tax deduction is available, then by implication it may well be the case that net interest expense is more concentrated in other jurisdictions including that of the parent company.

Any impact will depend on whether and when individual territories choose to adopt the Action 4 recommendations, but such a concentration of interest expense may cause the interest expense in certain territories to breach whatever EBITDA percentage limitation is imposed. Furthermore, it will probably cause some jurisdictions to have interest ratios exceeding that of the overall group and hence leave companies unable to benefit from the group-wide ratio exclusion.

Recommended actions

OECD recommendations on Action 4 do not, of themselves, have direct effect. A key priority for international groups is to monitor developments concerning the potential implementation of new laws in the territories in which they operate and the detail and timing of such actions.

It would also be worthwhile performing some sensitivity analysis – i.e. using current and forecast financial information to compare net interest expense with EBITDA in the various jurisdictions in which a group operates, in order to identify territories where there is a likelihood of a tax impact if Action 4 recommendations, or other changes intended to have a similar impact, are implemented. In the event that there are clear instances of exposure, then groups should assess whether remedial action could be taken quickly and easily if required. In general terms, transactions to “push down” debt into existing international operations may not be straightforward and any refinancing may take time to implement given issues such as exchange control approval. Being ready to change should the need arise is likely to be key.
4. Action 6 – Prevent treaty abuse

At the very least, Action 6 is likely to cause mining groups to look again at any intermediate holding company jurisdictions within their corporate structures.

What is the G20 / OECD’s concern?
The G20 / OECD governments are concerned that some multinationals (and investment funds) engage in “treaty shopping” – that is, arranging their affairs with a specific purpose of obtaining benefits under a particular bilateral treaty in a way which was not intended by the treaty parties. An example would be seeking to route intragroup income flows through a subsidiary in a particular intermediary jurisdiction in order to benefit from reduced withholding tax rates, rather than the ultimate recipient receiving the income directly.

The OECD is also more generally concerned that multinationals are taking steps to circumvent existing limitations in treaties, and use treaties to achieve outcomes that involve double non-taxation.

The proposals
The OECD notes that agreement has been reached to include “minimum standards” of anti-abuse provisions into bilateral tax treaties. Specifically these include:

- Countries should include in their tax treaties a clear statement that treaties are not intended to create opportunities for non-taxation or reduced taxation through avoidance (including treaty-shopping arrangements).

- Countries should include in their treaties some combination of “limitation on benefits” (“LOB”) rules, and “principal purpose tests” (“PPT”) to counteract treaty shopping.

LOB rules, already widely used in US treaties, impose strict factual tests to determine whether a particular entity is entitled to benefit from a treaty (i.e. mere residence in the relevant territory is not sufficient). The tests generally require the entity to have substantial presence in its territory of residence, for example through having a stock market listing in that territory or through carrying on an active trade or business there. There are typically complex rules which may enable subsidiary entities established in an intermediary jurisdiction to obtain treaty benefits equivalent to, but not more favourable than, those which their parent company could obtain (the so-called “equivalent beneficiary” rule).

PPT rules would typically involve a denial of treaty benefits where there are transactions or arrangements whose principal purpose is to secure such benefits, and obtaining such benefits would not be consistent with the object and purpose of the treaty.

In addition, certain more specific recommendations are made in the Action plan to deal with particular issues including residence tie-breakers, the impact of third country branches and certain dividend transfer transactions.

Practically speaking, changes to treaties require the agreement of both parties and there is uncertainty as to how quickly any such recommendations will be reflected. In order to expedite the effectiveness of the changes, it is expected that, under BEPS Action 15, the minimum standards will be included in a “multilateral instrument” to be negotiated in 2016, which could update treaty provisions on an aggregate basis.

The multilateral instrument is not limited to G20 and OECD member states; ninety-two countries have joined the negotiations. The aim is to develop the instrument so that it is available for signature from 2017.

We should also expect that the BEPS recommendations may be added into existing treaties through protocols and new treaty negotiations.

Application to the mining sector
Example 1 – General application of LOB clauses

A number of fairly typical parent company structures in the mining sector may cause difficulties with LOB clauses.

It is not uncommon for a group parent company to be incorporated and tax resident in a jurisdiction different from the country in which it has a stock market listing. For example a number of groups have parent companies resident in the Channel Islands or the Isle of Man, but with a stock market listing in the UK. Because those parent company jurisdictions have limited treaty networks, such groups may use an intermediate company resident, say, in the Netherlands which is party to dividend and interest flows.

If these treaties were then to include LOB clauses similar to the proposed model, then treaty access for the intermediate company might prove difficult. Specifically, the intermediate company may not be seen as actively conducting a trade or a business in the territory (that concept is primarily aimed at “operating” rather than “investment” businesses). Furthermore, whilst subsidiaries of listed companies that are listed in their territory of residence may qualify, this would not be the case where the parent company is not resident in the territory of its stock market listing.
Example 2 – Taxation of non-resident capital gains

One form of taxation that applies disproportionately to the mining sector is so-called non-resident capital gains tax (‘NRCGT’). This form of taxation is applied by many resource-rich jurisdictions where, for instance, a non-resident parent company makes a gain on the disposal of its shares in a local mining subsidiary. It would typically be expected that the parent company jurisdiction would be able to exercise taxing rights over such a gain but, with NRCGT, the subsidiary jurisdiction would also seek to tax the gain, usually on the basis that the value of the shares being divested is intrinsically linked with the natural resources of the subsidiary’s host country. By way of example, South Africa would seek to impose tax on a capital gain made on the disposal of a South African subsidiary by a non-South African parent where at least 80% of the value of the subsidiary’s shares is attributable directly or indirectly to ‘immoveable property’ (which would include mineral resources) situated in South Africa.

It is therefore perhaps not surprising that, historically at least, faced with the potential prospect of two jurisdictions seeking to tax the same gain on a disposal (or sometimes merely an internal reorganisation) of a subsidiary, some mining groups have sought to mitigate their exposure to NRCGT through establishing intermediate holding companies in jurisdictions whose tax treaties award sole taxing rights on such gains to the disposing entity’s country.

At the very least, Action 6 is likely to cause mining groups to look again at any intermediate holding company jurisdictions within their corporate structures. Many holding companies will have genuine economic substance and sound commercial reasons for their location which are not tax-related. In recent years for instance, the availability of bilateral investment treaties – which offer various protections and protocols around investment security – has become a key factor in the structuring of mining investments, particularly into some less-developed economies.

Recommended actions

Similar to the recommendation for Action 4, a key priority for international groups is to monitor developments concerning the potential implementation of treaty changes (whether by the multilateral instrument or otherwise) by the territories in which they operate.

Mining groups will be able to identify areas of potential sensitivity in the meantime, and should seek to do so on a case by case basis. The appropriate starting point might be to review existing group structures for instances of material reliance on tax treaties, and then assess the impact of any potential treaty changes. Examples of instances of reliance might include dividend and interest flows and non-resident capital gains taxes, and indicators of exposure to potential changes would be transactions involving “substance-light” entities.

Where there is considered to be significant potential exposure groups may seek to commence remedial action prior to the actual implementation of any treaty changes. Actions might include, for example, the concentration of transactions and flows in entities in territories where the LOB or PPT are unlikely to be in point. Some actions (e.g. a change in the tax residence of a parent company to match the jurisdiction of its stock market listing) may have wider tax ramifications and so require careful analysis prior to taking any firm decisions.

It is noteworthy that there is significant current activity, in the mining sector and more widely, in terms of reviewing group structures. There is a general movement away from the use of entities in territories that may be perceived as “havens” even where they confer no particular tax benefit. There are also a number of groups considering the location of residence of their parent company.
5. Action 7 – Permanent establishment status

What is the G20 / OECD’s concern?
Action 7 focuses on updating the definition of permanent establishment ("PE") in Article 5 of the OECD model tax treaty. The main objective is to prevent the artificial avoidance of PEs where there is significant activity in a country. The proposed changes to Article 5 are wide-reaching and, if adopted, will significantly increase the occasions on which a PE will be created. The G20 / OECD Working Party will develop further guidance on the attribution of profit to a PE. It is intended that this work will be completed by the end of 2016.

The proposals
The basic principle – that a PE requires a fixed place of business – remains unchanged. A PE can be created in one of two ways. The first is where an agent concludes contracts on behalf of its principal. Under the proposed changes to the model treaty this concept of an Agency PE will be broadened so that a PE is created in situations where "an intermediary habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise". There is currently an exemption to this definition of an Agency PE where the intermediary is an independent agent. This exemption will remain under the new framework, but the definition of independent agent will be narrowed down and will not be available to agents acting only for one group of companies.

The other way in which a PE can currently be created under the model treaty is where a foreign entity maintains a fixed place business in another country. At present, there is an exemption for some specific activities such as the storage or display of goods, or any other activity that is of a preparatory or auxiliary nature. Under the new framework, this specific activities exemption will be restricted to activities that are solely considered preparatory or auxiliary to the business as a whole.

This will mean that the exemption is not available when, for example, the storage, display, or delivery of goods is an important and strategic aspect of the business in question. The exemption will also no longer be available where activities that constitute a fixed place of business in a country are artificially ‘fragmented’ between different group companies so that each individual company meets the requirements of the exemptions for activities that are preparatory or auxiliary.

Application to the mining sector
Action 7 of the BEPS project has the potential to be one of the most punitive of all the BEPS Actions in terms of its application to common commercial activities within the mining industry.

Example – Stockpile of mineral ore held in China
There are many commercial circumstances in which a stock of goods is held in a country by an overseas entity. This means that there will now be many cases where a stock of goods will in the future create a PE where none would exist under the current rules even though there is no intention to artificially avoid creating a PE. Of particular relevance to the mining industry is the situation where a stockpile of product is held in China before sale to third parties.

Under the current PE definition a stockpile would fall under the specific activities exemption and not create a PE because it is a fixed place of business maintained for the storage of goods. When assessing whether a PE is created under the new framework, the non-resident entity will have to show that the stockpiling of product is of a preparatory or auxiliary nature for the entity when viewed as a whole. This may not be easy as it could be argued that holding the goods in China is a strategic decision given the proximity to customers and the cost of freight.

Further, the conclusion on this preparatory or auxiliary question may differ depending on what other activities the entity undertakes. For example, an entity that owns a number of producing mines that are all in operation and that is then storing the production from those mines in China prior to sale is much more likely to be able to show that the stockpile storage activity is auxiliary to its business than a different entity that solely purchases offtake from one mine, transports all of that production to China, and then stockpiles it prior to resale to third parties.

Another scenario that will require careful consideration is where head office staff, such as geologists, spend time in countries where the group undertakes activities. Traditionally these costs would be charged from the head office to the local mining entity with a mark-up. It may now be the case that the head office has a PE in the mining territory and therefore needs to file a tax return and pay taxes.
**Recommended actions**

It is likely that changes to bilateral double tax treaties to reflect the new conditions will be included as part of the multilateral instrument which will have earliest effect from 2017. Mining groups should therefore start to consider the potential impact of these proposals on their current business models as changes to supply chain structures may well be required to avoid both additional taxation and a greater compliance burden. Unfortunately, it seems inevitable that PEs will be created under the new proposals by a range of common commercial practices that are widely seen in the mining industry at present.

By way of further example, careful consideration might need to be given to a scenario in which a subsidiary in a mining group negotiates contracts habitually concluded by other parties. The key question to consider here will be the extent to which the agent "plays the principal role" and also the extent to which contracts are concluded "without material modification by the principal".

An interesting result from the BEPS Actions is that we could see a move from marketing agents to fully fledged buy/sell intermediaries – the PE guidance is explicit that such an activity should not create a PE and further, as will be discussed in relation to Action 10, additional guidance is provided in the TP guidelines suggesting that it is proper to fully reward such entities.

Against the backdrop of PE creation, consideration should also be given to what additional profit would be likely to be attributed to any new PE. In some instances, especially if there is a local subsidiary already fully rewarded for functions, risks and assets in-country, it may be possible to argue that no incremental profit is due.

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- Multinational iron ore mining group.
- Australian mining company sells to Singapore marketing company which holds ore in China on stockpile.
- The iron ore is then sold to third parties in China.
- Is this activity auxiliary in the context of a sales organisation?
- Would the answer be different if the Australian mining entity held ore on stockpile?
6. Action 9 – Transfer pricing, risk and capital

Introduction
BEPs Actions 8, 9 and 10 represent the work on the transfer pricing of intangibles, risk and capital, and other high risk transactions respectively. Collectively, the objective of these three actions is to ensure that the transfer pricing rules and the arm’s length principle appropriately align returns with value creation. From these three actions, the G20 / OECD have proposed significant amendments to two parts of the Transfer Pricing Guidelines that will be of particular interest to miners; (1) Chapter II with respect to the transfer pricing aspects of cross-border commodity transactions, and (2) Chapter I with regard to Risk and Recharacterisation.

We start by considering Action 9 which focuses on risk.

What is the G20 / OECD’s concern?
Risk, along with functions and assets, is a key factor in analysing transactions between group companies in order to compare them with those undertaken by independent parties.

The proposals
The text revisions to Chapter I of the Transfer Pricing Guidelines emphasise that identifying risks is a critical part of a transfer pricing analysis and should go hand in hand with identifying functions and assets. The intention of this Action is therefore to update and expand guidance on the allocation and transfer pricing of risk within a multinational group, and also make it clearer when it may be appropriate for transactions to be ‘recharacterised’ by tax authorities.

The proposed updates to the guidance on risk will form part of the section in the revised Chapter I of the Guidelines on performing a functional analysis. A materiality threshold is included, and therefore only ‘economically significant’ risks need to be identified when performing future functional analyses.

The revised Guidelines will put a spotlight on identifying and fully considering risks when performing a transfer pricing analysis and applying the arm’s length principle, however uncertainty remains over how risks should be priced in many more complex cases. Unfortunately analysis of risk from a transfer pricing perspective is currently, and will remain, a difficult concept to tackle. The draft Commentary provides a number of example situations to try to make its guidance more understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help make this area of transfer pricing more accessible and understandable. However, this has done little to help

As well as examining the relative abilities of the parties to the transaction to control significant risks, a factor that may be relevant when considering whether a risk would be transferred is whether the party assuming the risk has the financial capacity to take on that risk at the time the risk is allocated to it. Having the financial capacity to take on a risk does not necessarily mean that a risk-bearer has the financial capacity to bear the full cost of the risk materialising; it could be that the risk-bearer has the capacity to protect itself (e.g. through insurance premium payments) from the consequences of any risk materialising.

It should also be noted that for some mining groups, there could be instances where the proposed amendments might be helpful. If the individuals they employ within a group marketing company do really control significant risks, and crucially if the marketing company does in fact have the financial capacity to bear the risks in question, the proposed amendments to the Guidelines make it clear that the marketing company should bear a share of the residual return. This is a helpful clarification and confirmation of a point that many mining groups had assumed and incorporated into their transfer pricing models.

Application to the mining sector
Although Action 9 is less focussed on the extractives sector than Action 10 as noted below, Action 9 should be considered no less important for mining groups.

Example – Allocation of risk within a multinational mining group
Interestingly, while not in the final suggested OECD Guidelines text, the first paper the OECD released on risk (back in 2014) specifically included an example on the mining industry when discussing how risks are assumed within a multinational group. The example set out the situation of a group with a subsidiary that conducts mining operations in one country and has another subsidiary in a different country that agrees to purchase 100% of the production of the first subsidiary for the next 10 years.

This production is purchased at a transfer price that is based on the price achieved by the second subsidiary in its sales to independent customers less a discount. In this situation, the paper reasonably asserts (assuming the commodity has a liquid index) that neither of the subsidiaries is likely to be able to materially influence the market price of the commodity and so the mitigation of price risk within the group focuses on the supply side.
This mitigation therefore involves the management of strategic risk related to the investment decisions, varying production capacity and the operational management of production costs.

Without directly stating the point, the OECD insinuated that the marketing subsidiary that purchases the group’s mine output does not bear price risk because it does not perform any functions that enable the group to respond to and manage the effect of that price risk. However, by placing greater emphasis on the location of strategic and key operational decisions, the consequences of this assertion are that, in many cases, it will be the location of regional or group head office companies within the multinational mining group that are determined to assume this price risk.

**Recommended actions**

The culmination of the Action 9 workstream is that greater emphasis will be placed on risks when analysing the arm’s length nature of a transaction in the future.

The amendments to the OECD Guidelines highlight the importance of determining where, in a group, the capability and functionality exists to manage risks associated with business opportunities. A group company that does not control risk will not be allocated it and will not be entitled to unanticipated profits/losses. It therefore follows that if an asset owner does not have the capability to control risks associated with the exploitation of an asset, the legal owner is considered in substance to only be providing financing equating to the cost of the asset.

Mining groups will need to be mindful of this development as there will be a very real possibility of double taxation given the uncertainties that remain in allocating and pricing risks under the new framework in Chapter I of the Guidelines.

There is also a link here to Action 13 and the amended documentation requirements that companies will have to adhere to. A thorough and wide-reaching risk analysis is now likely to become a fundamental part of such a documentation exercise for many mining groups.
7. Action 10 – Transfer pricing aspects of cross-border commodity transactions

What is the G20 / OECD’s concern?
With 'commodity' in the title, this revision area is the most apparent of the BEPS releases to have a significant impact on mining groups. The Action considers additional guidance for determining the arm’s length price for commodity transactions and has been driven by concerns, particularly in some commodity-producing developing countries, that the tax base may be being eroded in relation to (i) the difference between the price charged and publicly quoted commodity prices, (ii) variable dates for pricing the commodity transaction prior to shipment, and (iii) adjustments made to publicly-quoted prices in relation to services performed by other group companies.

The proposals
The OECD propose the use of quoted commodity prices as a starting point for transfer pricing, where the quoted prices are used in commercial transactions between third parties. On the face of it, this is a welcome comment. However, difficulties will undoubtedly arise in then adjusting this quoted price in the numerous circumstances when the quoted price is not the same as the market price for the specific commodity in question at the location where title transfers from the extractive company.

The prices reported may be based on a sample of trades conducted and based on notional weight, quality etc. and in particular, may not cover the market as a whole. Their reliability will depend on the facts and circumstances including, inter alia, the commodity in question, the size and liquidity of the quoted market, and the location and quality of the commodity being sold. There is no discussion in the proposed text to assess the reliability of the quoted market and although some indices are genuinely liquid and used abundantly by third parties in the industry, others are much less so.

Adjustments commonly made to an index price by market participants are listed in the table below.

The proposed text then spends a surprisingly large amount of time discussing dates. It proposes that text is inserted into the Guidelines to make it clear that a tax authority can (i) overrule a pricing reference date selected by the taxpayer if “inconsistent with the actual conduct of the parties or other facts of the case” or (ii) insert a pricing reference date of the bill of lading if no date is provided by the taxpayer.

Finally, the text provides guidance on adjustments to an index price to reflect the value added by marketing companies. It is worth noting that the original proposed text, released towards the end of 2014, omitted any reference to marketing activities in relation to commodities. The position the 2014 paper put forward could be interpreted as seeking to remove a marketing margin entirely for some commodities by implying that if it was possible to determine a price (through use of an index with an adjustment for freight costs) at the port of lading, that price should be used to set the transfer price to the marketing company.

The vast majority of submissions to the OECD by taxpayers and other parties focused on this point and stressed that although their value will depend on facts and circumstances, it is widely held that marketing activities may add significant value through the arrangement of long term-contracts which then allows a mine to produce to a set capacity for a number of years, in the knowledge that there are buyers for the commodity. Also, in other cases where there is a shortage of the commodity, it was noted that the value of marketing activities in the supply chain may instead relate to the ability to achieve pricing premiums from customers.

<table>
<thead>
<tr>
<th>Adjustment</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quality</td>
<td>Adjustments to represent how either the metal content or energy content of product differs from the specification of the quoted index</td>
</tr>
<tr>
<td>Freight</td>
<td>Adjustments to represent additional costs associated with delivery, if different from point specified by index</td>
</tr>
<tr>
<td>Impurities</td>
<td>Adjustments to reflect impurities (often found in copper ore, iron ore and bauxite) which increase the cost of refinement</td>
</tr>
<tr>
<td>Volume</td>
<td>Adjustments to reflect large (or small) volumes</td>
</tr>
<tr>
<td>Marketing</td>
<td>Adjustments to reflect the margin applicable for the functions, risks and assets of a marketing enterprise</td>
</tr>
<tr>
<td>Ore size</td>
<td>Adjustments to reflect the size of the ore itself (e.g. larger iron ore often commands a premium to smaller sizes)</td>
</tr>
</tbody>
</table>
Fortunately, the final text to be inserted in the OECD Guidelines reflected these submissions. Text was added in noting that “Contributions made in the form of functions performed, assets used and risks assumed by other entities in the supply chain should be compensated in accordance with the guidance provided in these Guidelines.” This effectively suggests that, provided the value added by real functions, the bearing of real risks and the exploitation of key assets can be suitably demonstrated, it is appropriate to adjust the price accordingly.

**Application to the mining sector**

As noted, this revision area arguably has the most direct impact of the BEPS releases on mining groups.

**Example – Implications for a mining group with an iron ore marketing company**

A mining group has a marketing company which seeks customers, develops relationships, purchases iron ore under a long-term contract with another group company that has a producing mine, and then also makes sales of iron ore to end-users. This marketing company purchases iron ore from the mine for a fixed price with an inflation link over the course of the long-term contract.

Unfortunately, this type of arrangement is unlikely to hold up under much scrutiny against the proposed revisions to Chapter II of the Guidelines. Going forward, the group would be advised to sell the iron ore from the mine to the marketing company at a global transparent index price (e.g. Platts, TSI) at the bill of lading date less a transportation fee and then also less a marketing margin that can be robustly defended (as this is likely to be an area of contention).

**Recommended actions**

These amendments to the OECD Guidelines will be of relevance to any entity trading commodities, but are particularly important for a mining group selling to a related-party marketing company. Any group selling, using an internal comparable or non-index linked price would clearly be open to challenge under the new framework (assuming the commodity in question is index-traded).

Also, any entity retrospectively selecting quotation periods to obtain the best possible price would also be open to challenge. In addition, anyone selling a commodity on a ‘net back’ basis where the purchase price from the mine is set with reference to the end sales price achieved (less a deduction for marketing margin) is going to have to robustly demonstrate value-adding functions, risks and assets in their marketing company.
8. Action 13 – Transfer pricing documentation and country-by-country reporting

What is the G20 / OECD’s concern?
The aim of Action 13 has been to develop a common template for preparing transfer pricing documentation. This would help to address the widely-perceived need to provide ‘big picture’ information allowing tax authorities to understand the wider context of a taxpayer’s transactions. There will therefore be a new three-tier global standard for transfer pricing documentation requirements with a common template for country-by-country reporting and then a global Master file and local file approach for filing transfer pricing documentation. The country-by-country report is a minimum standard and has already been legislated by many countries. The other two elements – a Master file and local file – represent best practice and will not necessarily be adopted in the form set out in the Action Plan by all countries.

The proposals
The country-by-country report will be a standalone document for the purposes of risk assessment, and not part of the transfer pricing Master file. It will need to be prepared by all groups with consolidated group revenue of greater than €750 million in the previous fiscal year. Data will be included on an aggregated country-by-country (not entity-by-entity) basis, together with a list of entities and permanent establishments in each country, with activity codes. Financial data to show revenue, profit before tax, cash taxes paid and current year tax accrual, number of employees, tangible assets and capital and retained earnings must be provided as part of the report. There will be flexibility for businesses regarding the source of financial data, provided a group adopts a consistent approach across all countries and from year to year.

The template provided by the OECD for the purposes of country-by-country reporting is shown below:

In addition to the country-by-country report, the new guidance includes requirements for businesses to prepare a transfer pricing Master file setting out an overview of the group’s transfer pricing policies and activities. Groups will be able to choose whether the Master file is prepared on a group-wide basis or by line of business. The Action Plan makes it clear that the Master file is intended to provide a high level overview to put the business activities in context, and that transactional information will be reserved for the local file. There will not be a requirement for details of the 25 highest-paid employees as was suggested in earlier drafts of the revised Guidelines.

The final tier of documentation will be a local file that will contain detailed entity and transactional level information. Some of this information (e.g. functional and economic analyses and selection of the most appropriate method) will be required under local documentation requirements currently, but the list of information to be included goes further than many countries’ requirements.

Application to the mining sector
Many mining groups will currently produce transfer pricing documentation for only some of the countries in which they have operations, or only for some of the intra-group transactions that take place. Groups that presently follow this ad hoc approach will need to transition to preparing a central Master file for their head office location with supporting local files …

<table>
<thead>
<tr>
<th>Tax jurisdiction</th>
<th>Revenue</th>
<th>Profit (Loss) before tax</th>
<th>Income tax paid (on cash basis)</th>
<th>Income tax accrued – Current year</th>
<th>Stated capital</th>
<th>Accumulated earnings</th>
<th>Number of employees</th>
<th>Tangible assets other than cash and cash equivalents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unrelated party revenue</td>
<td>Related party revenue</td>
<td>Total revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Example – Mining group that currently produces ad hoc transfer pricing documentation

For a group that does not prepare their transfer pricing documentation on a global basis, the new approach will require a substantial change. The group is likely to find that it is necessary to now prepare, or at least coordinate, their documentation centrally to ensure that the country-by-country template, Master file and local files provide consistent information about global and local operations and transfer pricing policies. The group will need to implement new procedures to locate, collect, store, validate and assemble the information. The increase in transparency and the greater need for global consistency will also mean that the group has to increase the resources devoted to transfer pricing compliance, and the collection of data for the country-by-country template.

Recommended actions

The OECD proposes very significant changes to the compliance and reporting of global information for risk assessment and transfer pricing purposes. The three-tier approach of Master file, local file and country-by-country report represents a significant change to the way most multinationals address their transfer pricing documentation, and will require considerable effort to implement.

The OECD has proposed that country-by-country information should be required for years beginning on or after 1 January 2016 and be filed annually within 12 months of the end of the financial reporting year to which it relates. Groups with a year ending 31 December 2016 will be first to file, with a deadline of 31 December 2017. Information will then be exchanged automatically by the parent country tax authority within six months of the first period and within three months thereafter.
Appendix – Major mining jurisdictions’ perspectives on BEPS implementation

In Section 2.3, we noted that different countries might adopt very different approaches to tackling the areas of perceived tax avoidance which the BEPS project was designed to address. Those approaches might depend on the G20 and OECD membership status of those countries and their governments’ level of agreement with the outcomes of the different BEPS Actions. As a result, the level of adoption of the BEPS findings could vary significantly between governments and tax authorities from full adherence across the board via domestic legislative change and signing up to Action 15’s multilateral instrument, to ‘cherry-picking’ certain Action outcomes, to tax authorities merely ‘borrowing’ from BEPS findings to support particular interpretations of their own regimes, or indeed governments simply ‘going it alone’ and implementing their own unilateral actions.

The following pages summarise a high-level view of some of the current perceptions and expectations in relation to BEPS implementation for some of the world’s major mining jurisdictions. Certain other countries, such as the UK, Netherlands and Luxembourg, are also included on the basis of their common occurrence as holding company jurisdictions within multinational mining groups. The following pages contain current scorecards at the date of publication, for the latest versions please go to:


Further information on BEPS can be found at the dedicated Deloitte website:

Australia

Current Legislative Position
A number of anti-avoidance measures already exist:

- GAAR (recently strengthened);
- CFC rules;
- Thin capitalisation regime (safe harbour rules tightened (from 75% to 60%) as from 1 July 2014);
- Transfer pricing rules (enhanced, including extensive recharacterisation powers granted to the tax authorities);
- New tax transparency laws with public disclosure of tax paid (for companies with turnover exceeding AUD 100 million);
- The participation exemption has been amended to align with substance-based tests (effective from 16 October 2014); and
- The Australian Taxation Office (ATO) has commenced the automatic exchange of rulings under Action 5.

Announced measures and mooted reforms:

12 May 2015 – Budget announcements

- GST to apply to the supply of intangible products by non-residents to Australian consumers as from 1 July 2017 (exposure draft legislation released) (Action 1).
- A new multinational anti-avoidance law (MAAL) to tackle the artificial avoidance of Australian permanent establishments that will apply to businesses with a global group income of AUD 1 billion or more. The Bill is currently in Parliament and will apply to tax benefits derived from 1 January 2016 onwards (these unilateral measures are intended to address similar issues to those identified under Action 7).
- The Board of Taxation (BoT) is to consult on implementation of anti-hybrid rules (Action 2) (terms of reference for the consultation on anti-hybrid rules issued on 14 July 2015). The BoT is due to report back by March 2016 for consideration in the 2016-2017 Federal Budget.
- The maximum administrative penalties that can be imposed by the Commissioner on large companies that enter into tax avoidance and profit shifting schemes will be doubled where the Commissioner believes the anti-avoidance rules apply and the taxpayer’s position is not “reasonably arguable” (to apply to companies with a group global revenue of AUD 1 billion or more and income years commencing on or after 1 July 2015). The bill currently is before Parliament.
- The OECD transfer pricing documentation recommendations will be implemented, including the requirement to prepare and file a country-by-country report, local file and master file (to apply to companies with global revenue of AUD 1 billion or more and income years commencing on or after 1 January 2016). The bill is currently before Parliament (Action 13). The Australian CbC reporting legislation could impose CbC reporting obligations on Australian subsidiaries where their foreign parent companies are not yet required to, or does not file a CbC report that is shared with the ATO.
- Harmful tax practices and exchanges of rulings will be implemented to identify secret or preferential tax arrangements to multinationals that harm other countries.
- The government indicated it will incorporate treaty abuse in its tax treaty negotiations.
• The BoT is to consult on the development of a voluntary public tax transparency code, (terms of reference for the consultation issued on 14 July 2015) and will lead to greater public disclosure of tax information by businesses, particularly large multinationals. The BoT is due to report by May 2016.

Previous announcements

• Review of the thin capitalisation arm’s length debt test. The completed report is now with the government.

• The debt and equity rules will be reviewed to address inconsistencies between Australian rules and debt-to-equity rules of other jurisdictions that could give rise to tax arbitrage opportunities. The completed report is now with the government.

Perspective of Government

In October 2015, the Treasurer noted that Australia has been “ahead of the curve” in its commitment to ensure correct taxation is paid by corporations:

• No action will be taken regarding Australia’s CFC regime, which is considered to be stronger than OECD standards (Action 3).

• The existing thin capitalisation rules are unlikely to be amended at this time; the rules were tightened in 2014 (Action 4).

• The OECD’s recommendations on tackling treaty abuse will be incorporated into Australia’s tax treaty negotiations (Action 6).

• There will not be any fundamental changes to Australia’s transfer pricing rules, but enhanced guidance will be issued to assist administration by the ATO (Actions 8-10).

• The ATO is considering the costs and benefits of implementing the disclosure of aggressive tax planning (Action 12).

• Australia is committed to binding arbitration (Action 14).

• Australia is part of the group negotiating the multilateral instrument (Action 15).

• The senate has been inquiring into corporate tax avoidance. This has been high profile and has resulted in numerous companies, as well as the ATO and tax advisers, giving evidence. An interim report released in August 2015 focused on greater transparency and additional financial statement disclosure.

Current Tax Authority Assessing Practice

A specific BEPS unit has been set up in the ATO (International Structuring and Profit Shifting (ISAPS) audit program). The ISAPS audit program aims to address BEPS within existing laws – focused audits, principally offshore trading hubs and business restructurings, but also broader international tax areas (e.g. transfer pricing, permanent establishment, thin capitalisation, CFCs and ecommerce, including collaboration with five foreign tax authorities to pool knowledge and review arrangements of large technology multinationals).

Strong position on advance preparation for the introduction of the MAAL.

Australia has signed up to the common reporting standard (CRS), the first exchanges of information expected to occur in the income year ended 30 June 2015. Exposure draft has been released.

The ATO has begun exchanging bank information with the US per the US Foreign Account Tax Compliance Act (FATCA).
**Perspective of the Public**

Debate in the press as to how and when international tax reform will be introduced.


**Unilateral BEPS Actions**

See "Current legislative position" above.

New multinational measures (MAAL) to tackle the artificial avoidance of Australian permanent establishments that will apply to businesses with a global group income of AUD 1 billion or more. This measure requires a principal purpose of tax avoidance and will apply to benefits arising from 1 January 2016.

Further action likely will be within international/OECD frameworks.
**Brazil**

Updated: June 2015

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**Current Legislative Position**
There are several anti-avoidance rules already in effect:

- CFC provisions;
- Thin capitalisation rules;
- Rules to address excessive interest deductions; and
- Rules disallowing a deduction for payments made to tax haven (“black list”) or tax privileged regime (“grey list”) jurisdictions where the payments do not satisfy “substance” rules.

There have not been any changes in the tax laws specifically related to BEPS.

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**Perspective of Government**
The Brazilian tax authorities have not made any public announcements specific to BEPS. Instead, the authorities are focused on addressing the effects of an ongoing “tax war” among the Brazilian states, some of which have been adopting unilateral tax incentives to attract local investment.

A representative of the Brazilian tax authorities, however, has attended BEPS meetings as an “observer” to understand and monitor developments.

As a result of government budget constraints and a reduction in tax collection (due to the downturn in the economy), the federal government is discussing measures such as taxation of dividend payments, limiting the deduction of interest based on net equity, and introducing new taxes on high/ultra-high net worth individuals. The government is justifying some of these measures as being aligned with the BEPS initiative.

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**Current Tax Authority Assessing Practice**
The tax authorities have been assessing taxpayers regarding arrangements designed solely to reduce the tax burden. Items commonly challenged include deductions for goodwill and interest, tax credits claimed for VAT inputs, non-resident capital gains and tax incentives. The authorities also have been using the abuse of law doctrine to attack form-over-substance planning.

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**Perspective of the Public**
Brazilian corporate taxpayers not entirely familiar with the BEPS initiative, in part because the tax authorities have not made reference to adopting any of the BEPS actions in the near term. The project also has failed to attract the interest of the general public, with the focus instead being on the effects of the tax war and a proposed draft bill that would introduce a withholding tax on dividend remittances.

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**Unilateral BEPS Actions**
The Brazilian tax authorities have informally indicated that they intend to wait for the initial results of the OECD’s efforts on the BEPS project before deciding how to proceed. For example, it is possible that the new CFC rules will be revisited after five years to take into account the results of the BEPS discussions.
**Current Legislative Position**
A number of anti-avoidance measures already exist:

- Transfer pricing;
- GAAR;
- CFC provisions; and
- Thin capitalization provisions.

Proposed measures:

- There is an anti-treaty shopping proposal, but on 29 August 2014, the Department of Finance indicated that draft legislation would be delayed pending further input from the OECD’s BEPS project.

**Perspective of Government**
As a member of the G20, Canada is generally supportive of the BEPS initiative.

Very little public commentary, although the government has indicated that it plans to adopt country-by-country reporting.

The government has acknowledged that competitiveness will be one of the factors it takes into account in assessing BEPS proposals.

The Liberal party won the federal election on 19 October 2015, replacing the Conservative party. BEPS was not addressed as part of the Liberal party election platform. It is unlikely that there will be any significant announcements regarding the implementation of OECD recommendations until the next federal budget, which will be released in February or March 2016. Corporate tax rates generally are expected to remain the same.

**Current Tax Authority Assessing Practice**
The Canada Revenue Agency (CRA) follows a risk assessment approach regarding its tax audits.

However, the CRA generally is perceived as aggressive both in terms of the position it takes on audit and in accessing taxpayer information.

**Perspective of the Public**
There has been some media attention and some activist group activity relating to the “Responsible Tax” issue.

**Unilateral BEPS Actions**
The anti-treaty shopping proposal referred to above arguably is a unilateral measure. While the proposal generally is aligned with the framework set out in the OECD’s draft paper on treaty abuse, it was proposed before the paper was released and the Canadian government is proposing to implement it with a domestic law override of its tax treaties. The Canadian government has made it clear that it plans to proceed with an anti-treaty shopping measure (the details and timing of which remain to be seen).
Current Legislative Position
There are several anti-avoidance measures already in effect:

• Transfer pricing rules (in line with the OECD guidelines);
• Payments made to foreign related parties are not entitled to a deduction for tax purposes until they have been paid (or the funds for payment are available), and the corresponding withholding tax (if applicable) has been paid; and
• Thin capitalisation rules applicable to certain related party loans, which recently were tightened.

A GAAR will come into force from 30 September 2015 and CFC legislation will apply as from 2016.

Perspective of Government
Although, the Chilean government is supportive of the G20 / OECD BEPS initiative, the tax authorities have not made any public announcements specifically in relation to BEPS. Instead, the tax authorities are focused on addressing the effects of the recent tax reform published in September 2014 and that includes BEPS-related measures. This law is the most comprehensive tax reform approved in Chile in the last 30 years and substantially modifies the income tax system.

Chile has signed the Convention on Mutual Administrative Assistance in Tax Matters and the government also is focused on obtaining congressional approval of the Convention which was approved by the Lower House in August 2015.

The government is starting to consider BEPS Actions 6 (preventing treaty abuse) and 7 (preventing artificial avoidance of permanent establishment status) in the negotiation of tax treaties.

Current Tax Authority Assessing Practice
The tax authorities are aware of the international debate. Tax audits have a strong focus on cross-border transactions and particularly on taxpayers that are in a tax loss position.

Perspective of the Public
Taxation is an important area of focus in the media, with mixed views of the changes implemented in the 2014 tax reform.

Chilean taxpayers are not necessarily familiar with the BEPS initiative, but public opinion is alert to, and critical of, tax benefits obtained by multinational corporations through tax planning and reorganisations.

Unilateral BEPS Actions
The 2014 tax reform included a number of BEPS-related measures, such as a GAAR and the introduction of additional requirements to deduct expenses paid to related parties and CFC rules.
Current Legislative Position
A number of anti-avoidance measures already exist:

• GAAR;
• Transfer pricing rules;
• CFC rules;
• Thin capitalisation rules;
• Rules on the determination of “beneficial owner” (Circular 601); and
• Rules governing the deductibility of outbound payments (Bulletin (2015) No. 16).

No specific changes have been made to domestic tax law in light of BEPS (but see the new guidance on the GAAR discussed under “Unilateral BEPS actions”).

Perspective of Government
The Chinese president emphasised the importance of strengthening global tax cooperation to combat international tax evasion and avoidance in late 2014 at the G20 Leaders’ Summit.

In September 2015, the government issued a public discussion draft on “Special Tax Adjustments”. This draft addresses China’s “localization” of the BEPS actions related to transfer pricing and controlled foreign corporations. With this guidance, it appears increasingly possible to foresee what parts of the BEPS agenda will (or will not) be adopted by China.

The Discussion Draft integrates elements of the BEPS proposals for TP and for Controlled Foreign Company (CFC) rules. However, it also, in parallel, formalizes many of the unique China TP concepts which the tax authorities (State Administration of Taxation or “SAT”) has developed in recent years, thus ‘localizing’ the BEPS TP work for a China context.

National and local level tax authorities have commented that it is their view that multinationals are engaging in BEPS activities, thereby eroding the Chinese tax base.

China is actively involved in the BEPS initiative, in particular, in the digital economy task force. The country also plans to combat international tax evasion and avoidance through the following:

• Improving domestic tax legislation with reference to the latest developments in the BEPS action plans;
• Strengthening the administration of anti-tax avoidance measures by using international “collaborative mechanisms” and modernising IT systems; and
• Developing an international tax service and administration system for outbound investments by Chinese companies in the context of BEPS.
Current Tax Authority Assessing Practice

See below under “Unilateral BEPS actions”.

In 2014, the Jiangsu SAT circulated a document to multinationals notifying them that, as part of tax audits, the SAT intended to focus on practices that result in BEPS.

The national SAT held a conference on 25 September 2014 to announce its positions and plans regarding BEPS to representatives from businesses and accounting firms.

The SAT has published 15 “unacceptable” behaviours on its website, i.e. practices that the SAT will not tolerate:

1. Base erosion and profit shifting;
2. Double/multiple non-taxation;
3. Aggressive tax planning;
4. Non-transparent tax regimes;
5. Structures or arrangements that lack business substance;
6. Unreasonable expense deductions;
7. Loss-positions of single-function subsidiaries of multinationals in China;
8. Tax treaty abuse;
9. Unreasonable overpricing of intangible assets;
10. Remuneration that is inconsistent with functions and contributions;
11. High-tech companies with low profit margins;
12. Disrespecting characteristics of the Chinese market, e.g. geographic advantages, location savings, supply and demand;
13. Transferring losses from other countries;
14. Failure to provide information to the Chinese tax authorities; and
15. Hybrid mismatch arrangements for tax avoidance purposes.

In 2014, the SAT surveyed taxpayers asking for details of significant outbound service fee and royalty payments made in the previous 10 years. In March 2015, the SAT issued guidance (Bulletin No. 16) on the deductibility of outbound payments by Chinese enterprises to offshore related parties. It generally formalises the “Six Tests of Deductibility”, which focus on the following factors: benefit (to the payer); need; duplication; value creation; remuneration; and authenticity. Of particular note, the bulletin stipulates that no tax deduction be allowed for payments made by enterprises to their offshore related parties that do not perform functions, bear risks and have no substantial operating activities.

The tax authorities are expected to start selectively auditing taxpayers in relation to significant outbound service fee and royalty payments.
Unilateral BEPS Actions

China is applying BEPS concepts in transfer pricing cases. A senior SAT official has publicly commented on the SAT’s increased scrutiny of the appropriateness of inter-company service fees.

As noted above, the tax authorities have launched a nationwide initiative in which they have asked taxpayers for details on service fees and royalties paid offshore for the past 10 years and the authorities are expected to start selectively auditing taxpayers based on Bulletin No. 16.

The government has indicated that it will increase its focus on offshore indirect transfers, and will employ all sources of information at its disposal to identify significant unreported transfers.

The tax authorities also appear to be looking more closely at potential cases of “disguised dividends,” in particular, Chinese subsidiaries with large retained earnings that have not paid dividends for some years, and that have large amounts of receivables owing by the offshore parent and/or affiliates.

The permanent establishment (PE) discussion continues to be an area of focus, in particular in relation to agency PEs, e-commerce and the cross-border provision of services. In this connection, China vigorously advances the argument that a services PE (article 5(3)(b) of the OECD model treaty) may be found even if there is no physical presence in the jurisdiction (“furnishing of services ... within a Contracting State”).

In September 2015, the SAT released a discussion draft of “Special Tax Adjustment Implementation Measures” that would comprehensively revise the existing guidance in Circular 2). Circular 2 deals with adjustments under the GAAR, transfer pricing, CFCs, thin capitalisation, etc. The draft also incorporates a number of the OECD BEPS recommendations (including country-by-country reporting), but taking account of China’s unique economic environment and factors relevant to the revamping of Circular 2.
## Current Legislative Position

There have been no changes in the tax laws specifically related to BEPS.

The Finance Act 2013 introduced a GAAR that was intended to apply from 1 April 2015, but application has since been deferred by two years. The GAAR will apply prospectively to investments made after 1 April 2017. One of the reasons cited for deferral of the GAAR is because the Indian government wants to implement the GAAR provisions as part of a comprehensive regime to address the OECD’s recommendations on BEPS and aggressive tax avoidance.

There are general provisions that disallow the deduction of expenses in certain circumstances.

## Perspective of Government

The Indian government has not formally indicated its attitude on specific action points through clarifications or draft budget proposals, but discussions are taking place with industry bodies on the need for, and suitability of, BEPS measures from an Indian perspective.

The government maintains that a number of issues relating to BEPS have been captured as part of domestic law.

## Current Tax Authority Assessing Practice

Developments are being monitored by the Foreign Tax & Tax Research Division in the Central Board of Direct Taxes.

## Perspective of the Public

There is a sense of awareness with the public in general.

Representations are being made to the Indian government.

## Unilateral BEPS Actions

There are no clear signs that the government or the tax authorities are adopting tougher BEPS views during tax audits or litigation.
Luxembourg

Updated: September 2015

**Current Legislative Position**

A number of measures already exist:

- GAAR;
- Limits on interest deductions; and
- Transfer pricing rules.

No specific measures have been introduced in relation to BEPS but there is a clear commitment to international tax standards.

Domestic measures must comply with EU law, so as not to infringe free movement of capital and freedom of establishment principles.

**Perspective of Government**

The government has indicated that it intends to comply fully with the recommendations of the G20 / OECD.

The government may take into consideration actions taken by other EU countries.

Any rules must be compliant with EU law.

In line with the previous announcements made by the Minister of Finance, the government has clarified the transfer pricing rules. A new provision has been inserted into the procedural part of the tax law that specifically refers to transfer pricing, allowing the tax authorities to request documents to investigate transactions with related parties.

The Luxembourg government has legally formalised its advance tax decisions practice and:

(i) Upon written and legitimate request, the “Préposé” (tax inspector) of the concerned tax office will issue an advance tax decision;

(ii) The advance tax decision will be limited to the strict determination of the correct application of national and international laws;

(iii) The advance tax decision shall bind the Luxembourg tax authorities regarding future taxation.

A tax regulation on the procedure is expected to be issued.

**Current Tax Authority Assessing Practice**

The government is considering the BEPS proposals and assessing the potential implications on the local economy.

**Perspective of the Public**

There have been news article about BEPS, but in general there is no public pressure on the government to introduce any BEPS legislation without carefully considering its impact on the local economy.

**Unilateral BEPS Actions**

Unlikely.
**Current Legislative Position**
A number of anti-avoidance measures already exist:

- CFC provisions;
- Thin capitalisation rules (and back-to-back loan rules);
- Transfer pricing rules;
- Disallowance of a deduction for interest, royalty and technical assistance payments unless the payment is “subject to tax” in the state where the recipient is resident;
- Disallowance of payments to foreign related parties when the recipient of the payment is entitled to a deduction for the payment;
- A non-resident claiming benefits under a tax treaty where there has been a cross-border related party transaction must demonstrate that double taxation would arise in the absence of treaty benefits; and
- Restrictive definition of “maquila” operations to obtain benefits under the maquila regime (e.g. transfer pricing safe harbour rules, exemption from permanent establishment status, etc.).

**Perspective of Government**
As part of the comprehensive 2014 tax reform, the government organised forums with a focus on various industry sectors and international organisations. The aim of these forums was to ensure that no unilateral measures were taken that were not aligned with the BEPS objectives and to make the general public aware of the problems of tax avoidance and evasion. The Mexican tax authorities have stated publicly that they are challenging “companies that obtain profits in Mexico but pay taxes in other countries with lower tax rates,” clarifying that such “aggressive tax planning” is prohibited in Mexico and that such practices disadvantage small and medium-sized Mexican enterprises.

**Current Tax Authority Assessing Practice**
The main focus of the tax authorities is permanent establishment and supply chain re-structures.

Transfer pricing assessments are becoming more sophisticated.

**Perspective of the Public**
Tax is an important area of focus in the media, with mixed views of the changes implemented in the 2014 tax reform.
Unilateral BEPS Actions
The 2014 tax reform included a number of BEPS-related measures, such as the disallowance of a deduction on interest, royalty and technical assistance payments unless the payment is subject to tax in the recipient’s country of residence, and requiring a nonresident claiming benefits under a tax treaty to demonstrate that double taxation would arise in the absence of treaty benefits. The government considers these measures to be aligned with BEPS recommendations, so additional unilateral measures are not expected.

Three new forms for transfer pricing reporting purposes will be introduced as from 31 December 2016, to be reported by March 2017:

1. A declaration that includes information from the group (activities, intangibles, financial and tax positions);
2. A declaration that includes information from the Mexican entity, including functions, financial information and comparable companies;
3. For groups with consolidated income exceeding EUR 750 million, a country-by-country declaration that includes information on each entity in the group, its activities, income distribution, tax payment, etc.
Current Legislative Position
A number of anti-avoidance measures already exist:
• GAAR (although the GAAR is based on case-law rather than statute);
• Limits on the deduction of interest;
• Transfer pricing rules; and
• Substance requirements in relation to intragroup service structures.

The Netherlands innovation box is being reviewed by the EU and will be changed following draft proposals suggested by Germany and the UK.

The government has announced that it is implementing the amended EU parent-subsidiary directive into domestic legislation. It has also proposed changes relating to hybrid loans and the GAAR as a result of changes to the EU parent-subsidiary directive. Under the proposals, income on hybrid instruments that are deducted at source are taxable in The Netherlands. The GAAR has been implemented in the Dutch foreign shareholder regime that already serves as an anti-abuse law for income paid out of the Netherlands entities.

Domestic measures must comply with EU law, so as not to infringe free movement of capital and freedom of establishment principles.

Perspective of Government
The responsible tax debate is high on the agenda of the Ministry of Finance and the government published public statements in June and October that sets outs its policy on the debate. The government is committed to implementing measures that are internationally adopted and focus on more transparency.

The Ministry of Finance participates in all EU/OECD debates and the government is working on a plan to foster a sustainable investment climate. The Netherlands wishes to balance the efforts to combat tax avoidance and ensure the attractiveness of the Netherlands as a location to establish companies. The government favours a co-ordinated approach to hybrids, interest deduction limitations and CFC rules.

The government has concluded an agreement to disclose tax rulings with the German tax authorities and intends to cooperate with the EU plans to disclose rulings between EU tax authorities.

Current Tax Authority Assessing Practice
The tax authorities’ team responsible for advance tax rulings and advance pricing agreements are aware of the BEPS initiative and discussions. Official policy has not changed, but taxpayers must be able to demonstrate compliance substance requirements, agree to disclose information to foreign tax authorities upon request, etc.

Perspective of the Public
There has been considerable media coverage of BEPS and it has become somewhat of a political issue. The media attention seems to have slowed down in recent months, with occasional stories initiated by non-governmental organisation investigations.
Unilateral BEPS Actions

The government has indicated that it will renegotiate 23 treaties with developing countries. Five countries have agreed to implement an anti-abuse clause in their treaties. Discussions with five other countries are pending and 13 countries have not yet responded to the invitation of the Dutch government.

Other changes will be made in conjunction with EU rules or the BEPS initiative. The Netherlands is advocating a level playing field and supports a coordinated European effort.
Current Legislative Position
A number of anti-avoidance measures already exist:

- CFC rules;
- Thin capitalisation rules;
- Transfer pricing rules;
- A “black list” for non-application of the dividend participation exemption and for stricter transfer pricing control.
- Disclosure of beneficiaries of certain income received from Russian sources for the purposes of a reduced withholding tax rate.

Rules/policies that apply as from 1 January 2015 as part of the national plan to counter tax avoidance and non-disclosure of beneficiaries (“de-offshorisation”) include the following:

- CFC rules;
- Introduction of the concept of “beneficial owner” for purposes of the application of reduced withholding tax rate on dividends, interest and royalties;
- Mandatory disclosure of shareholders of foreign legal entities (foreign structures) that directly or indirectly own immovable property in Russia;
- Taxation of the indirect sale of real estate-rich companies in Russia;
- Introduction of tax residence rules for companies based on the effective place of management; and
- New rules on tax audits and the calculation of unpaid taxes of foreign companies without a Russian permanent establishment.

Perspective of Government
As a member of the G20, Russia fully supports the BEPS initiative.

The BEPS Action Plan is referred to in Russia’s tax policy plans for 2016-2018. Proposed measures to counter harmful tax practices and treaty abuse may include:

- Ensuring the automatic exchange of information on financial transactions with foreign jurisdictions for tax purposes;
- Amending the taxation of corporate borrowings;
- Further developing the CFC rules; and
- Reinforcing the transfer pricing rules.

Current Tax Authority Assessing Practice
Russia’s tax authorities do not refer to BEPS in tax examinations, but do refer to OECD practices overall, and the number of court cases involving foreign companies operating in Russia is on the rise.
**Perspective of the Public**
There is some awareness regarding BEPS based on occasional reports in the press. The public is more concerned with the domestic de-offshorisation measures.

**Unilateral BEPS Actions**
Russia has not taken any unilateral actions contrary to the BEPS project, but the de-offshorisation measures have certain elements of BEPS initiatives.
South Africa

Updated: November 2015

Current Legislative Position
A number of anti-avoidance measures already exist:

• CFC rules;
• Thin capitalisation rules;
• Transfer pricing rules, including enhanced disclosure requirements;
• Rules curbing the use of hybrid instruments; and
• Exchange control rules that apply to certain outbound payments such as royalties and management fees.

The Davis Tax Committee (DTC) released its interim report on BEPS in South Africa on 23 December 2014; the report sets out the DTC’s position based on the G20/OECD September 2014 deliverables. A further interim report is expected near the end of 2015 and input on the OECD 2015 deliverables was requested to be submitted to the DTC earlier this year. The report will be finalised once South African input has been obtained on all OECD deliverables. The DTC is of the view that South Africa already has various measures in place to prevent BEPS, but that further guidance from the South African Revenue Service (SARS) is required.

Perspective of Government
South Africa enjoys observer status at the OECD and actively participates in that capacity. In addition, South Africa was instrumental in providing input into the UN Practical Guide on Transfer Pricing and is involved in the Africa Tax Administration Forum (ATAF). The DTC has stated that it will be looking at creating a South African BEPS working group.

Perspective of the Public
Concerns have been raised that the SARS is placing heavy compliance burdens on multinational groups and the lack of certainty around changing legislation is creating a complex tax environment.

Unilateral BEPS Actions
No specific unilateral BEPS actions have been implemented to date, but BEPS is a specific focus area of the legislative review process that is underway.
Current Legislative Position
A number of anti-avoidance measures already exist:

• CFC provisions;
• Transfer pricing rules, including rules to address excessive interest deductions; and
• Anti-arbitrage rules that counter hybrids through a purpose test.

UK domestic measures must comply with EU law, so as not to infringe free movement of capital and freedom of establishment principles.

Perspective of Government
The UK government is actively participating in the OECD BEPs initiative, as evidenced by the following:

• In March 2014, the government released a policy paper on the priorities for taking forward the BEPS action plan, ‘Tackling aggressive tax planning in the global economy: UK priorities for the G20-OECD project for countering Base Erosion and Profit Shifting’.
• In December 2014, the government published a consultation document on the implementation of G20/OECD rules in UK law to prevent hybrid mismatches.
• Several actions were taken in October 2015:
  • The Chancellor endorsed the final BEPS reports; the government will be considering all recommendations set out in the reports.
  • The government issued a consultation document on interest deductibility as a response to the final report on Action 4, “Interest Deductions and Other Financial Payments.”
  • The government issued a consultation document on changes to the UK’s patent box regime to take in account of the OECD “nexus approach.”
  • Draft regulations and a draft explanatory memorandum were published for consultation on the implementation of country-by-country (CbC) reporting requirement to be implemented. The start date for CbC reporting is accounting periods beginning on or after 1 January 2016 with first reports to be filed by 31 December 2017 (in accordance with the OECD’s timetable for implementation).

Current Tax Authority Assessing Practice
Follows OECD recommended co-operative compliance approach, including a focus on risk assessment.

Perspective of the Public
The taxation of multinationals is much debated in the UK press and there is pressure from non-governmental organisations.

Tax is a political topic.
**Unilateral BEPS Actions**
The UK government is supportive of the G20 OECD BEPS initiative.

The UK government introduced a diverted profits tax intended to encourage multinationals to adjust their UK corporate tax position in advance of completion of the BEPS project. The diverted profits tax applies from 1 April 2015 at a rate of 25% tax. The tax applies in two situations:

- Where a non-UK company has artificially avoided having a taxable presence (permanent establishment) in the UK; or

- Where a group has a UK company (or UK permanent establishment of a non-UK company) and there is a tax advantage as a result of an entity or transactions that lack economic substance.
**Current Legislative Position**

A number of anti-avoidance measures already exist:

- CFC rules;
- Limitations on deductions of net interest expense, generally by foreign-parented corporations;
- Dual consolidated loss rules;
- Limitations on treaty benefits such as anti-treaty shopping rules, hybrid entity rules and limits on benefits for income derived through third-country permanent establishments; and
- Transfer pricing rules.

As part of the fiscal year 2016 budget the Administration proposed to the Congress the following additional anti-BEPS provisions, although the budget was enacted without the provisions and the likelihood of other action in the near term is quite low:

- A worldwide per-country minimum tax on the foreign earnings (in excess of a risk-free return on equity invested in active assets) of entities taxed as domestic corporations and their CFCs;
- Disallowance of deductions for interest and royalty payments made to related parties under certain hybrid arrangements;
- Limiting the application of certain exceptions to subpart F income when payments are made to a reverse hybrid entity;
- Expansion of the definition of subpart F income to include income from transactions involving digital goods or services;
- Tightened restrictions on the deductibility of interest; and
- Rules preventing certain transactions that prevent entities from being CFCs.

While current US law provides an R&D credit, a proposal was released in July 2015 for a preferential tax regime for income from intellectual property ("innovation box").

Also in the summer of 2015, there was talk in both taxwriting committees of enacting international tax reform and using one-time revenue gains from the transition to a new international system to fund a long-term highway bill (past Administration budget blueprints had proposed similar plans). Others in Congress, including some of the Republican leadership, were sceptical of separating international from broader tax reform efforts, and these legislative efforts did not materialize as Congress pursued other revenue options for highways.
Perspective of Government
Treasury officials said that they likely will not have to issue “substantial” changes to the current transfer pricing regulations to the extent the BEPS transfer pricing action items clarify the arm’s length standard that already are embodied in the IRS transfer pricing regulations. Treasury said that it may make clarifications to the current regulations if they deem it necessary.

The Congress has not been directly involved in the BEPS project, and to this point has shown little indication that it will implement it.

Senate Finance Committee Chairman Orrin Hatch, R-Utah, and House Ways and Means Committee then-Chairman Paul Ryan, R-Wis., sent two letters to Treasury Secretary Jack Lew, asking to be kept informed on the details of the BEPS project and to voice concerns regarding country-by-country (CbC) reporting, including whether the Treasury has the authority to implement CbC reporting without legislation. Recent comments from the Treasury indicate that it is comfortable with its authority to issue the reporting regulations.

The US will not adopt a treaty GAAR approach and uses instead the LOB approach. It generally favours mandatory binding arbitration provisions in treaty dispute resolution provisions.

The current Department of Treasury favours a number of the recommendations in the 2015 final reports.

Current Tax Authority Assessing Practice
BEPS-related issues are starting to be raised during IRS audits, typically in the transfer pricing area.

Valuations on intellectual property migrations are receiving heightened scrutiny. Limitations on tax-free outbound transfers of certain types of intangible property included in proposed regulations issued in September 2015.

Perspective of the Public
High-profile tax policy issues today are tax reform generally, corporate tax reform and international tax reform, the latter two of which are discussed as a remedy for “inversions,” or the migration offshore of domestic-based corporate groups. The corporate business community, and all branches of government, have expressed interest in enacting an approach to international taxation, such as a territorial system, that differs from current US law. The non-corporate business community resists efforts to reform only corporate and international tax.

Unilateral BEPS Actions
Given the disparate policy views and voter bases of the parties that control the US Congress, on the one hand, and the US executive branch, on the other, the US generally is thought to be incapable of enacting (or at least highly unlikely to enact) significant international tax legislation at least until a new Administration takes office in 2017.