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Introduction

Governments around the world are implementing policies that demand greater financial transparency and seek higher tax revenues from corporate taxpayers. Navigating the evolving global tax environment requires experience, bench strength and a deep understanding of the practical impact on multinational companies and investors.

As trusted tax counsel to leading multinational companies for more than five decades, our Global Tax Practice is one of the most highly regarded tax groups in the world. Ranked Band 1 by Chambers Global for our work in the US, Europe, Latin America and Asia Pacific, clients and industry peers recognize the high quality of the tax advice we provide in transactions worldwide, as well as in global tax policy, transfer pricing, indirect taxes, dispute resolution and wealth management matters.

Unlike accounting firms, our tax litigators can represent clients in all phases of tax disputes and have successfully defended clients in some of the largest tax disputes on record. With 950 tax practitioners — lawyers, economists and advisers — in more than 40 countries, we collaborate across borders and specialties to stay abreast of changing tax laws, practices and dispute resolution techniques around the world. Our unsurpassed global coverage enables us to help clients design, implement and defend tax strategies for their international operations and transactions everywhere they operate.

In Latin America, the Baker McKenzie Tax practice group consists of over 130 experienced attorneys, economists, and financial analysts across our offices in Argentina, Brazil*, Colombia, Chile, Mexico, Peru and Venezuela. Over the years, the Latin America Tax Practice Group has had substantial experience in the intercompany pricing area,

*Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law
both advising clients regarding the appropriate structure and pricing for transnational intercompany transactions and representing them in tax controversies before the tax authorities in the region.

The year 2022 marks the 25th year after the first transfer pricing regulations were introduced in Latin America, starting with Mexico and Argentina. Since then, virtually all the countries in the region have adopted some form of transfer pricing regulations. In this period, the transfer pricing regimes across Latin America have dramatically evolved, with jurisdictions adopting more strict and complex rules, and tax authorities acquiring more expertise in the area and significantly increasing the number and depth of transfer pricing audits.

To assist companies in these challenges, the Latin America Tax Practice Group developed the materials in this book. These materials draw on the extensive experience of the international tax lawyers, economists, and financial analysts in the Baker & McKenzie Latin America Tax Practice Group to present a clear and concise practical guide to the transfer pricing environment across the region.
Glossary of abbreviations

Throughout this handbook, the following abbreviations will be commonly used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Meaning</th>
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<tbody>
<tr>
<td>TP</td>
<td>Transfer Pricing</td>
</tr>
<tr>
<td>ITL</td>
<td>Argentine Income Tax Law</td>
</tr>
<tr>
<td>FTA or AFIP</td>
<td>Argentine Federal Tax Authority (Administración Federal de Ingresos Públicos)</td>
</tr>
<tr>
<td>GR</td>
<td>General Resolution</td>
</tr>
<tr>
<td>TP Guidelines</td>
<td>OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations</td>
</tr>
<tr>
<td>APA</td>
<td>Advance Pricing Agreements</td>
</tr>
<tr>
<td>IGJ</td>
<td>Argentine Justice Bureau (Inspección General de Justicia)</td>
</tr>
<tr>
<td>FY</td>
<td>Fiscal year</td>
</tr>
<tr>
<td>HTS</td>
<td>Harmonized Tariffs Schedule</td>
</tr>
<tr>
<td>Tax ID or CUIT</td>
<td>Argentine taxpayer’s identification number</td>
</tr>
<tr>
<td>CPA</td>
<td>Certified public accountant</td>
</tr>
<tr>
<td>TPL</td>
<td>Argentine Tax Procedure Law</td>
</tr>
<tr>
<td>INPI</td>
<td>Argentine National Institute of Industrial Property / Brazilian Patent Office</td>
</tr>
<tr>
<td>CBA</td>
<td>Central Bank of Argentina</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Meaning</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>TEIA</td>
<td>Tax Exchange Information Agreements</td>
</tr>
<tr>
<td>ETVE</td>
<td>Privileged tax regime companies (<em>Entidad de Tenencia de Valores Extranjeros</em>)</td>
</tr>
<tr>
<td>VWARG</td>
<td>Volkswagen Argentina S.A.</td>
</tr>
<tr>
<td>Cotia</td>
<td>Cotia Trading S.A.</td>
</tr>
<tr>
<td>VWBR</td>
<td>Volkswagen Do Brasil</td>
</tr>
<tr>
<td>INSSJP</td>
<td>Argentine National Institute of Social Security for Retired and Pensioned People (<em>Instituto Nacional de Servicios Sociales para Jubilados y Pensionados</em>)</td>
</tr>
<tr>
<td>CITL</td>
<td>Chilean Income Tax Law</td>
</tr>
<tr>
<td>SII</td>
<td>Chilean Tax Authority (<em>Servicio de Impuestos Internos</em>)</td>
</tr>
<tr>
<td>UVT</td>
<td>Colombian Tax Value Unit (<em>Unidad de Valor Tributario</em>)</td>
</tr>
<tr>
<td>DIAN</td>
<td>Colombian Tax Authority (<em>Dirección de Impuestos y Aduanas Nacionales</em>)</td>
</tr>
<tr>
<td>MUISCA</td>
<td>DIAN’s electronic system</td>
</tr>
<tr>
<td>RUT</td>
<td>Unique Tax Registration (<em>Registro Único Tributario</em>)</td>
</tr>
<tr>
<td>SRI</td>
<td>Ecuadorian Tax Authority (<em>Servicio de Rentas Internas</em>)</td>
</tr>
<tr>
<td>LRTI</td>
<td>Ecuadorian Tax Law (<em>Ley de Régimen Tributario Interno</em>)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Meaning</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>RALRTI</td>
<td>Ecuadorian Tax Law Rulings (<em>Reglamento para la Aplicación de la Ley de Régimen Tributario Interno</em>)</td>
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<tr>
<td>MITL</td>
<td>Mexican Income Tax Law</td>
</tr>
<tr>
<td>SAT</td>
<td>Mexican Tax Administration Service (<em>Servicio de Administración Tributaria</em>)</td>
</tr>
<tr>
<td>FFC</td>
<td>Mexican Federal Tax Code (<em>Código Fiscal de la Federación</em>)</td>
</tr>
<tr>
<td>The Act</td>
<td>Uruguayan Tax Reform Act (Law No. 18,083)</td>
</tr>
<tr>
<td>IRAE</td>
<td>Uruguayan corporate income tax (<em>Impuesto a la Renta de las Actividades Económicas</em>)</td>
</tr>
<tr>
<td>UI</td>
<td>Uruguayan Tax Value Unit (<em>Unidad Indexada</em>)</td>
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<tr>
<td>PITL</td>
<td>Peruvian Income Tax Law</td>
</tr>
<tr>
<td>SUNAT</td>
<td>Peruvian National Tax Administration (<em>Superintendencia Nacional de Administración Tributaria</em>)</td>
</tr>
<tr>
<td>UIT</td>
<td>Peruvian Tax Unit (<em>Unidad Impositiva Tributaria</em>)</td>
</tr>
<tr>
<td>VITL</td>
<td>Venezuelan Income Tax Law</td>
</tr>
<tr>
<td>SENIAT</td>
<td>Venezuelan Tax Authority (<em>Servicio Nacional Integrado de Administración Aduanera y Tributaria</em>)</td>
</tr>
<tr>
<td>UT</td>
<td>Venezuelan Tax Unit (<em>Unidad Tributaria</em>)</td>
</tr>
<tr>
<td>OTC</td>
<td>Venezuelan Organic Tax Code for national taxes</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Meaning</td>
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<tr>
<td>--------------</td>
<td>---------</td>
</tr>
<tr>
<td>ARS</td>
<td>Argentine pesos</td>
</tr>
<tr>
<td>BRL</td>
<td>Brazilian reais</td>
</tr>
<tr>
<td>COP</td>
<td>Colombian pesos</td>
</tr>
<tr>
<td>MXN</td>
<td>Mexican pesos</td>
</tr>
<tr>
<td>PEN</td>
<td>Peruvian nuevos soles</td>
</tr>
<tr>
<td>VEF</td>
<td>Venezuelan bolívares fuertes</td>
</tr>
<tr>
<td>USD</td>
<td>United States dollars</td>
</tr>
<tr>
<td>VAT/GST</td>
<td>Value-added tax/goods and services tax</td>
</tr>
<tr>
<td>UFV</td>
<td>Housing Development Units (<em>Unidades de Fomento de la Vivienda</em>)</td>
</tr>
</tbody>
</table>
Argentina
Introduction

In December 1998, through Law 25,063, Argentina introduced transfer pricing (TP) rules in the Income Tax Law (ITL), complemented by Executive Order 1,344/98 and General Resolution 702/1999 (“GR 702/99”) of the local Federal Tax Authority (FTA or Administración Federal de Ingresos Públicos (AFIP)). These rules were amended in December 1999 by Law 25,239 and Executive Order 1,037/2000 to complete the rest of the provisions established in the ITL with more precision and consistency.

Almost two years later, in October 2001, further clarification was introduced through the so-called “paramount TP rule,” General Resolution 1122/2001 (“GR 1122”), which was later modified by General Resolution 1918/2005 (“GR 1918”), where certain informative requirements were established for import and export transactions between unrelated parties. Subsequently, General Resolution 3132/2011 (“GR 3132”) introduced other new requirements.

In December 2017, Law 27,430 introduced a broad tax reform, which included changes to the ITL, the Argentine Tax Procedure Law (TPL), and the Argentine TP rules. As a consequence of the reform, the Argentine Federal Tax Authority has published firstly, in 2019, Decree No. 824/2019, that explains the new provisions introduced by Law No. 27,430 and it complementary regulation Decree No. 862/2019. Secondly, the publication in 2020 of General Resolutions 4680/2020 (“GR 4680”), 4689/2020 (“GR 4689”) and 4717/2020 (“GR 4717”) that updated GR 1122, established changes in the regulation applicable to the Informative Return, Transfer Pricing Study and Master File Report. Finally, in 2021, further changes were introduced regarding Transfer Pricing reports by the publication of General Resolution 5010/2021 (“GR 5010”).
Even though Argentina\textsuperscript{1} is not a member of the Organisation for Economic Co-operation and Development (OECD), most of the ITL rules are based on the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TP Guidelines"). In this sense, the idea that these TP Guidelines may be a useful tool for interpreting and applying the TP rules of the ITL and its executive order has been discounted in some cases. Jurisprudence in the country states that for TP issues that are not ruled, it would be good practice for both taxpayers and the AFIP to support the TP analysis by following the recommendations of the TP Guidelines. This recognized international institution, after all, has studied and shared many papers with different specialists that let it publish valuable amendments to the original version of the TP Guidelines published in 1995, which follow worldwide business trends.

**Who is obliged?**

In accordance with Section 2 of GR 4717, the following taxpayers must comply with TP regulations:

1. Those who carried out import and exports transactions with independent entities

2. Those who carried out transactions with related individuals in the following terms:

   a) Those who carried out transactions with entities domiciled abroad

   b) Those who carried out transactions with individuals or legal entities established or located in low-tax and noncooperative jurisdictions, in the terms of Section 19 of the ITL

   c) Argentine residents who carried out transactions whose permanent establishments are located abroad

\textsuperscript{1} Member of the G-20 since 1999.
d) Argentine residents who are owners of permanent establishments located abroad, in relation to the transactions that those permanent establishments carried out with individuals or other kinds of related parties domiciled, established or located abroad.

**Economic bonding criteria / related parties**

Section 18 of the ITL defines “corporate relation” (shareholding) and the “economic or functional bonding criteria.” The current Section 14 of Decree 862/2019 refers to different assumptions of corporate and economic or functional entailment between taxpayers located in Argentina and abroad in the following cases:

a) When an individual or entity owns the whole or a majority portion of the capital of an entity

b) When two or more individuals or entities alternatively have any of the following:

   1. A common individual or entity that owns the majority interest of the capital
   2. A common individual or entity that owns 100% interest or a majority interest in the capital of one or more entities and exerts a significant influence in one or more entities
   3. A common individual or legal entity that exerts a significant influence over them simultaneously

c) When an individual or entity has a number of votes to prevail in the shareholders’ or partners’ meetings

d) When two or more individuals or entities have directors, officials or common administrators

e) When an individual or entity enjoys exclusivity as agent, distributor or concessionaire to sell goods, services and rights
f) When an individual or entity provides another party with proprietary and technological information, which is the foundation of the latter party’s business.

g) When an individual or entity participates with another in an association without legal existence as joint ventures, partnerships and other entities, through which they exert significant influence on the determination of prices.

h) When an individual or entity agrees with another party’s contractual clauses that are preferential in relation to those granted to third parties in similar transactions, like volumes traded, financial terms, consignment delivery, etc.

i) When an entity participates significantly in setting entrepreneurial policies, such as, among others, raw material supply, output and marketing of another entity.

j) When an entity develops an important activity exclusively for another party (such as being a sole supplier, sole customer, etc.).

k) When an entity finances the development of another party’s business, such as, among others, making loans or guarantees of any type to another in case a third party provides financing.

l) When an entity assumes the losses of another entity.

m) When the directors, officials and administrators of an entity receive instructions or behave in another entity’s interest.

n) When agreements, circumstances or situations are granted to an individual who has a minority interest in the capital and the management of the company.

It is worth mentioning that assumptions a) to c) refer to shareholding bonding criteria, while d) to n) refer to “economic or functional” assumption of entailment.
The arm’s length principle

Arm’s length pricing

Transactions between Argentine individuals or entities and related parties created and located abroad are considered, for all purposes, uncontrolled transactions when the terms and conditions are established according to the arm’s length standard. When the terms or conditions are not at arm’s length, they are subject to adjustments under the ITL.

Comparability criteria

Section 17 of the ITL provides that in determining transfer prices, except when the methods of the sixth paragraph and seventh paragraph are applicable, the most appropriate method with regard to the type of transaction being examined must be used.

Section 32 of the Regulations provides that a transaction must be considered comparable with another transaction in any of the following cases:

a) When none of the differences between the transactions under analysis significantly affect the price, the profit margin or the amount of consideration that is required to be examined under the TP methods of Section 29 of the Regulations

b) When reasonable and justifiable adjustments can be made to eliminate such differences so as to achieve a substantial degree of comparability

Comparability of transactions and/or enterprises must be determined, taking into account, among other things, the following:

a) Characteristics of the transactions

The following elements should be examined:
1. In the case of financial transactions: (i) principal amount of the loan; (ii) term; (iii) guarantees; (iv) debtor’s solvency; (v) effective ability to repay; (vi) interest rate; (vii) commissions; (viii) administrative charges; and (ix) any other payment or charge in connection with such transactions.

2. In the case of services: (i) nature of the services; (ii) whether the associated enterprise is in need of the services; (iii) information concerning industrial, commercial, scientific experience or technical assistance (if any) involved in the transaction; and (iv) transfer or concession of intangibles.

3. In the case of sale or lease of tangible property: (i) physical features of the property; (ii) the relationship with the purchaser’s activities; (iii) the property’s quality and reliability; (iv) the availability; and (v) the volume of supply.

4. In the case of transfer or exploitation of intangible property: (i) the form of transaction (e.g., sale, license or right to use); (ii) the exclusive or nonexclusive character of the rights transferred; (iii) limitations on the geographic area in which rights may be exercised (if any); (iv) the type of property (e.g., patents, formulas, processes, designs, models, copyrights, trademarks or similar assets, methods, programs, proceedings, systems, studies or other types of technology transfer, etc.); (v) the duration and degree of protection; and (vi) the anticipated benefits from the use of the property.

b) Functions undertaken by each of the parties to the transaction (e.g., design, manufacturing, assembly, research and development (R&D), purchasing, distribution, marketing, advertising, transportation, financing, management and after-sales servicing); assets employed (e.g., intangibles, geographic location of the assets); and risks assumed by the respective parties (including commercial risks, such as input cost fluctuations, and...
financial risks, such as interest rate or currency exchange rate variability)

c) Contractual terms that could have influenced the price or margin under examination (e.g., payment conditions, volumes to be acquired or sold, duration of the agreement, guarantees, etc.)

d) Economic circumstances (e.g., the geographic location, market conditions, that is, the size of the markets, the type of markets, the levels of supply and demand in the markets, the extent of competition in the markets, etc.)

e) Business strategies, including those related to penetration, permanence and expansion of the market (Those business strategies that cannot be documented by the taxpayer in a convincingly contemporaneous manner with the decision to implement it will not be admissible.)

Transfer pricing methodology

In addition to other Latin American TP legislation that follows the OECD criteria, the following methods are also allowed:

- Comparable uncontrolled price (CUP) method
- Resale price method (RPM)
- Cost plus method (CPM)
- Profit split method (PSM)
- Transactional net margin method (TNMM)
- “Sixth paragraph”: For export/import transactions of products with international intermediaries, it must be proven that the remuneration obtained relates to the risks assumed, the functions performed and the assets involved in the operation.
- “Seventh paragraph”: Export of commodities
“Other methods”: When the special circumstances of the transaction prevent the valuation of its assets, risks or functions, other methods that permit the application of the arm’s length principle are allowed.

Best method rule

Except for the sixth paragraph method, the modified CUP explained in Section 17 of the ITL provides that in determining transfer prices, the most appropriate method regarding the type of transactions being examined must be used. In order to determine the best method applicable to the case, Section 30 of the Regimen establishes that it must meet the following criteria:

a) It is the most compatible with the business and commercial structure.

b) It has the best quality and quantity of information available for its suitable justification and application.

c) It considers the most suitable level of comparability with related or nonrelated transactions and with related companies in such comparison.

d) It requires a lesser extent of adjustments for the purpose of eliminating the existing differences between the facts and the comparable situations.

Tested party

As established in Section 5 of GR 4717, the comparability analysis must be carried out on the situation of the local subject. However, in cases when PSM is used, both parts of the transaction must be analyzed.
Sixth paragraph of Section 17 of the ITL (export/import transactions of products with international intermediaries)

In line with the changes introduced in 2017, the sixth paragraph establishes that for export/import transactions of products with international intermediaries who are not the exporter at origin or the importer at destination, it must be proven that the remuneration obtained relates to the risks assumed, the functions performed and the assets involved in the operation, only under any of the following circumstances:

a) The international intermediary is a related party of the local taxpayer.

b) The international intermediary is not included in the previous point, but the exporter in origin or the importer at destination is a related party of the local taxpayer.

In cases when the remuneration of the international intermediary is higher than that agreed upon by the independent parties, depending on the assets, functions and risks assumed by it, the excess in the amount of the former will be considered the higher profit from the Argentine source attributable to the local taxpayer.

Seventh paragraph of Section 17 of the ITL (Export of commodities)

Until fiscal year (FY) 2017, special rules were applicable to exports of grains, oil seeds, oleaginous fruits, hydrocarbons and their by-products and, in general, any other goods quoted in transparent markets (commodities). The modified CUP, also known as “Sixth Method,” was the mandatory method to be applied in cases of export of commodities where a foreign intermediary that is not the effective recipient of the goods participates in the transaction.

This method was created to avoid maneuvers of multinational groups that set up related traders in tax havens, low-tax or other jurisdictions
to increase the value of the exported goods and derive the source of profit from such jurisdictions and against Argentina.

In this sense, Section 17 of the ITL establishes that if an intermediary complies with all of the following aspects, the use of this method will not be mandatory:

- The intermediary has real presence in the country in which it is incorporated through a fixed place of business, and it files annual reports with figures that support its functions, risks and assets according to the volumes of its transactions.

- The main activities of the intermediary cannot be focused on obtaining passive income or trading activities from and to Argentina.

- Its international transactions with other members of the multinational group cannot be higher than 30% of the revenues of the intermediary.

If all such conditions cannot be demonstrated, this modified CUP method must be used by taxpayers to compare their transfer prices. Therefore, the price on which to determine the income tax base was the amount higher than the following:

- The market price on the date of the loading of the shipment
- The actual value of the transaction

This method has been criticized by many taxpayers in different industries. They complain that the method threatens the commercial principle of stability of the transactions performed, due to the fact that their income could be adversely affected by a TP adjustment derived from the use of this method. According to them, their income tax is levied on fictitious income determined from a value that is unknown at the time of entering into commercial agreements or closing forward deals.
The TP adjustment often appears in scenarios where a rise in prices of commodities is registered (such as inflation environments, reduction in the offer of specific products and lack of substitute products).

Since 2018, the new seventh paragraph of Section 17 of the ITL establishes that in the case of export of goods with a public quotation price in which an international intermediary takes part and completes any of the conditions referred to in the sixth paragraph, or is located in a noncooperative jurisdiction or a low-tax or no taxation jurisdiction, taxpayers must perform the registration of contracts entered into in connection with such transactions, notwithstanding what is required in the previous paragraph. Such registration must include the relevant characteristics of the contracts and, if applicable, the differences in comparability or the elements considered for the formation of premiums or discounts agreed. If the corresponding registration is not made in the terms that the regulation establishes or if it is carried out but the requisites are not fulfilled, the income will be determined considering the price on the date of the loading, including the adjustments of comparability that may correspond. The AFIP may extend the obligation of registration to other operations of export of goods with quotation.

Other methods

Section 17 of the ITL establishes that the most suitable methods must be apply depending on the type of transaction in analysis. In this sense, according to Section 34 of GR 4717, other methods and techniques of justification may be used that respect the principle of free competition, when “the special circumstances of the transaction” prevent the valuation of its assets, risks or functions.

Regarding the application of another method, Section 29 of the regulation explains that the methods selected by the taxpayer as the most appropriate for the analysis of each type of transaction or line of business must be used, in accordance with the provisions of the law,
as long as the factual circumstances that allowed their election or those derived from the evaluation of the assets are modified. Changes must be duly substantiated and their causes must be documented.

Use of statistical tools

In the past, the Argentine TP rules considered that when the value of the median less 5% was lower than the first quartile, the former must be considered and must replace the first quartile. On the other hand, if the value of the median plus 5% was higher than the third quartile, the former must be considered and must replace the third quartile. Therefore, the TP adjustments were performed by calculating the difference between the price, the amount of transactions or the profit margin agreed upon versus the value corresponding to the median plus (or less) 5%, depending on the transaction that is being analyzed. The new Executive Order that regulates the TP rules changed that criteria and establishes that if the price, the amount of transactions or the profit margin set by the taxpayer is outside the interquartile range, the value of the median will be considered to be the price, the amount of transactions or the profit margin that independent parties have used.

In addition, the new Executive Order stipulates that in the case of goods or services with a public quotation price, the market rank should be calculated considering the minimum and maximum prices or quotations of the day corresponding to the transaction under evaluation. Adjustments to prices or quotes can be made for technical reasons specific to the market. If the price set by the taxpayer is outside the total market range determined by the maximum and minimum, the average value between the maximum and minimum will be the price that independent parties have used.

Adjustments

While the ITL does not specifically list the type and amount of permitted adjustments, it does refer to the possibility of making
necessary adjustments to the selected comparables, requiring that the taxpayer document and keep working papers on the calculation. Section 40 of the Executive Order lists, among others, some matters to which taxpayers can make adjustments in order to increase comparability, as follows:

- Period of payment
- Quantity
- Publicity and advertising
- Costs of intermediaries
- Freight and insurance
- Type of product and content
- Date of the transactions

Selected comparables

Section 6 of GR4717 establishes that the potential comparable of the tested party must be selected from an homogeneous, independent and determined universe of companies, grouped under objective criteria resulting from the application of comparability factors.

On the data obtained, the necessary search adjustments will be made, if applicable, according to the nature of the transaction, in order to obtain a set of acceptable comparables.

Furthermore, given the limitations on obtaining information on domestic companies, information on foreign companies may be used. This practice should be accepted by the AFIP, provided that the taxpayer proves the unavailability of information on local enterprises. Any differences between comparables and the Argentine company should then be adjusted in order to increase the degree of comparability. In audit cases, AFIP may request an official Spanish translation of the comparable documentation.
Then, GR5010 changed the previous paragraph, including that the selection of operations and comparable subjects may not include those that reflect operating losses (both before and after the application of comparability adjustments), unless it is justified objectively and in detail that such losses are a characteristic of the business, due to market, industry or other criterion of comparability, and it is conclusively demonstrated that the conditions that led to the loss are not consequences of factors affecting comparability.

**OECD interpretation sources**

As previously mentioned, Argentina is not a member of the OECD, and TP rules do not expressly refer to TP Guidelines.

All the same, ITL provisions follow these guidelines, and in practice, taxpayers consider them when preparing TP reports.

Recent cases at the administrative level indicate that TP Guidelines may constitute a useful tool for interpreting and applying the TP rules of the ITL and its executive order. Judges have stated that in cases where TP issues have not been decided, it would be a good strategy to support the TP analysis or follow TP recommendations.

Guidelines are to be followed not only by taxpayers but also by the AFIP in light of the fact that OECD has issued valuable guidance.

**Financial information**

Only companies under the control of the Securities and Exchange Commission have an obligation to use International Financial Reporting Standards (IFRS).

**Transfer pricing obligations**

Requirements for international intercompany transactions

The requirements for Argentine companies are as follows:
To carry out transactions with nonresident related parties and with parties residing in low- or no-tax jurisdictions (tax havens) and noncooperative jurisdictions under similar terms and conditions as those that would have been agreed by unrelated parties in similar or comparable circumstances (arm’s length principle). As provided in Section 43 of GR 4717, to demonstrate the arm’s length nature of the transactions, a TP report must be filed with the AFIP; this annual report must cover the points contained in Section A of Annex I of the mentioned GR, as well as the mathematical calculations and formulas that justify the prices or margins obtained, and must be accompanied by the documentation that accredits the processes for preparing said calculations. To this end, the operations will be consigned by their invoiced amounts attributable to the fiscal period in which they are accrued.

In the event that the reporting party has agreed cross-border financial benefits with entities belonging to the same Multinational Enterprises Group (MNE) during the reporting fiscal period or that affect the same, they must add to the data provided for in the preceding paragraph those mentioned in Section B of the aforementioned Annex I.

The study provided by this article must be certified by an independent professional accountant or a graduate in economic sciences with a signature authenticated by the Professional Council of Economic Sciences, college or entity that exercises control of its enrollment.

Requirements for transactions with low-tax jurisdictions

Until FY 2017 and in accordance with the ITL, transactions in which the foreign counterparty is an individual or entity domiciled, created or located in low- or no-tax jurisdictions are deemed not at arm’s length. In these cases, TP provisions under Section 17 of the ITL must be applied. Therefore, the same formal obligations of filing TP returns and the TP report described in the previous section should be considered by the local taxpayer.
Since the 2017 tax reform, the ITL has established that the TP provisions under Section 17 must apply to both low or null taxation jurisdictions and noncooperative jurisdictions, which are defined under the new ITL as follows:

**Noncooperative jurisdictions**

These are jurisdictions that do not have an agreement for the exchange of information on tax matters, or an agreement to avoid double international taxation with a broad information exchange clause. Jurisdictions defined in the paragraph, which do not effectively comply with the exchange of information, will be considered as noncooperating. The agreements referred to must comply with the international standards of transparency and exchange of information in fiscal matters to which Argentina has committed. Section 24 of the regulation provides a list of noncooperating jurisdictions based on the criteria contained in this article.

**Low-tax or no-taxation jurisdictions**

These are jurisdictions that establish a maximum tax on corporate income, less than 60% of the minimum *aliquot* contemplated in Article 73. a (25%), i.e., 15%.

**Contents of transfer pricing documentation**

Section A of Exhibit I of GR 4717 provides the general information to be included in the TP report. Taxpayers are required to prepare and file documentation describing the accurate application of the TP regulations.

The TP report must include the following information:

a) Activities and functions of the taxpayer

b) Risks assumed and assets used
c) Assets, risk and functions development by intermediates, foreign related parties or entities located in tax havens and noncooperative jurisdictions

d) In the case of business restructuring, an economic analysis that evaluates the situation and the retribution that independent entities would obtain in comparable situations

e) Description of the elements, documentation, circumstances and facts evaluated in the TP report

f) Amounts and description of the related-party transactions

g) Description of financial transactions

h) Information regarding the provision of services in the terms of Art. 12 of GR4717

i) Identification of foreign entities with whom the tested party has established a transaction

j) In the case of intangible assets, the requirements including in point 11 of Section A of Exhibit I of GR 4717

k) In cases where applicable, the segmented financial information used

l) The arm’s length method used by the taxpayer and elements to support that the choice is the best method

m) Economical and technical justification of the necessity of using other methods

n) Identification of the comparables

o) Identification of sources of information that have been used to obtain the comparable companies
p) Transactions or companies that have been rejected and explanation of the reasons for rejecting them

q) Description and methodology used to make adjustments necessary to achieve comparability

r) The methodology used to select the profit indicator

s) Determination of median and interquartile ranges

t) Transcription of the income statements of the comparable companies for the FYs involved in the comparability analysis, indicating the source of information

u) Description of the activity and business characteristics of the comparable companies

v) Conclusions about the arm’s length character of the transactions carried out with related parties or entities/individuals located in tax havens

In cases where the local entity does not have the obligation of presenting the Master File to the AFIP or presenting it without including all the information demanded by exhibit I, information referring to the economic group to which the company belongs must be added.

Language of the information to be included in the transfer pricing documentation

According to Art.55 GR 4717, all the information to be included in the TP reports must be in Spanish. All information included in a foreign language must be translated into Spanish by an Argentine-certified translator, whose signature must be certified by the corresponding Argentine Association of Certified Translators.
Other documentation requirements

In addition to the TP report, taxpayers must keep in their records the documentation of the imports and exports operations executed with independent entities and those in which an international intermediary is included.

Operation with independent companies:

a) In relation to the subject residing in the country: their identification data, the activities carried out and organizational structure of the business

b) In relation to independent people from abroad: surname and names, denomination or reason company, tax identification number (NIF) in the country of tax residence, tax domicile and country of home

c) Description and characteristics of the operations, forms and execution, amount or price or remuneration agreed, currency and form of payment used, guarantees or coverage assumed

d) Bank movements linked to international operations: bank documentation and/or financial support, including banking SWIFT linked to the transaction, if applicable

e) Details of the sources of information on international prices and the criteria and methodologies applied for their selection and adoption

f) In relation to import or export operations of goods with a public price, the working papers must identify the characteristics of the operation such as the type of goods, volumes negotiated, agreed prices, rights and obligations contracted by the parties in the agreements, etc.
Operation with international intermediaries:

According to Art. 40 of the GR4717 and Art. 43 of the Regimen, the taxpayer must obtain and keep:

a) The records that prove the real presence of the subject in the
territory of residence according to the regulation of that
jurisdiction, for which registration as a legal entity must be
demonstrated, commercial registration or similar and registration
with the tax authority of said jurisdiction

b) Certification issued by a competent professional who acts in the
jurisdiction of the intermediary, which proves the detail of the
direct taxes to which the taxpayer is subject in the jurisdiction of
residence and NIF in the country of tax residence

Also, if the total amount of operation in the fiscal year being analyzed
is superior to ARS 30 million (USD 267,857):2

a) Audited financial statements of the intermediary, if applicable to
the jurisdiction, certified by a competent professional

b) Certification issued by an independent professional with
competence in the jurisdiction:

1. Of the remuneration of the international intermediary related
to its intervention in the transactions, even in the form of
commission or equivalent concept

2. Of the detail of the purchase and sale price and expenses
associated with the transaction

2 USD amounts are rounded after using the retail exchange rate published by
the Argentine Central Bank exchange of approximately USD 1 = ARS 112
Contents of the transfer pricing informative returns

Form 4501

On 10 April 2013, the AFIP issued General Resolution 3476 ("GR 3476"), which introduced modifications and new formalities to be taken into account by Argentine taxpayers in order to comply with TP regulations. Since then, the AFIP introduced a particular form to accomplish with the presentation of the TP reports (F 4501).

Form 4501 should be filed, together with (i) the annual TP report and, if necessary, the relevant translation; and (ii) a certification note signed by a CPA, with respect to certain aspects of the TP report. Both the TP report and the relevant translation, in the event there is any information in a foreign language, will have to be included in one PDF file.

The F 4501 will bear the digital signature of the taxpayer, a CPA, and the representative of the accountants’ association in which the accountant is registered, pursuant to the regulations set forth by GR 3380.

Form 2668

GR 4717 provides that taxpayers must file one informative TP return, i.e., Form F.2668.

This informative returns must list all of the operations related to activities that generate income, except those exempt or not covered by income tax, carried out by the taxpayer during the fiscal year.

The presentation of the statement will be made as long as the amounts that — according to the type of operation in question — are detailed below:
F.2668 with “Movements”:

a) Imports and exports of goods between independent entities whose FOB value amount as a whole exceed the sum of ARS 10 million (USD 89,286).³

b) Transactions governed by transfer pricing regulations, in cases where all the taxpayer transactions covered by this regime are considered as a whole in the period tax, exceed ARS 3 million (USD 26,786)⁴ or individual ARS 300,000 (USD 2,678).⁵

F.2668 without “Movements”:

c) Likewise, from the presentation of a F.2668 with or without movements, it will correspond to continue presenting said form in the following two fiscal periods, even if the tax player does not have operations for the amounts established in a) and b).

The form 2668 applicable for transactions included in a) must provide specific information, such as the following:

- Identification data of the party that issues the invoices (such as name and address of the related counterparts, kind of bonding criteria)

- Identification of the transactions analyzed in the transfer pricing study with the detail of the methods used, margin obtained by the tested party and amounts of the TP adjustments (if applicable)

- Details of transaction executed that include services, transfer of intangibles and financials interests

- In the case of import and export of goods:

³ US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.
⁴ Ibid.
⁵ Ibid.
1. United States dollar FOB

2. Unit and total price

3. Quantities

4. Unit of measurement

5. Type of goods and its Harmonized Tariffs Schedule (HTS) number

6. Country of origin of the goods, and country from where they are sourced in the case of imports

7. Country of destination in the case of exports

8. Customs clearance number and date of nationalization and delivery of goods

The preparation of the informative returns is usually cumbersome and time-consuming since it requires the taxpayer not only to list all of its international related-party transactions but also to provide specific information depending on each type of transaction.

The form 2668 applicable for transactions included in b) must provide specific information of imports and exports executed with unrelated parties, such as the following:

(i) The type of transaction (import or export)

(ii) The unit and total FOB price

(iii) Quantity

(iv) Unit of measurement

(v) HTS of the good

(vi) The name, address and country of the unrelated foreign counterpart
(vii) The market price of the commodity used to determine the income tax base

(viii) The amount of the adjustment if the value of the transaction is higher than the market price (in the case of imports) or is lower than the market price (in the case of exports)

No informative obligation exists for transactions performed with unrelated parties involving services, financial operations of any kind, transfer or license of technology, and intangibles or intellectual property.

Filings: place and date of transfer pricing filing

Transfer pricing informative return and related documentation

The Transfer Pricing Report (F.4501) must be submitted to the AFIP web page using the fiscal password. Meanwhile, the foreign operations return (F.2668) must be filed electronically on the AFIP web page. Both filings must be presented from the 23rd to 27th day of the sixth month following the end of the FY, pursuant to the ending of the CUIT (Clave Única de Identificación Tributaria). However, GR 5010 established an extraordinary deadline from the 23rd to 27th of the ninth month following the end of the FY for years closed between 31 December 2020 to 31 December 2021.

BEPS plan – additional transfer pricing informative returns

In accordance with Action 13 of the BEPS plan regarding TP documentation, on 20 September 2017, Federal Tax Authority General Resolution 4130-E (“Resolution”) was published in the Official Gazette, creating the obligation to present an annual information regime consisting of the filing of a Country-by-Country (CbC) Report and the annual MNE Group Master File (MF).
Country-by-Country Report

The report must provide information regarding the entities that form a multinational entities group ("MNE Group" or "MNE Groups") and the tax jurisdictions where they operate. The Resolution establishes that the Report has to be present in the terms of form F.8097 through the AFIP website and will have to provide the following information regarding each jurisdiction and each entity that forms an MNE group:

1. The total amount of income obtained by the MNE Group, distinguishing between related and independent entities
2. The result — profit or loss — obtained before income tax or similar taxes
3. The amount of income tax (or similar taxes) paid, including withholdings
4. The amount of income tax (or similar taxes) accrued during the existing fiscal year
5. Equity
6. Retained earnings
7. The number of employees
8. Tangible assets, apart from cash and equivalents
9. Tax ID number of the entities that form the MNE Group
10. Name of the entities that form the MNE Group, indicating its tax residence and country of incorporation
11. Main economic activities of the entities that form the MNE Group

In addition, Argentine resident entities that are part of any MNE Group will have to report information about the final controlling entity of each group and the CbC reporting entity in the terms of form F.8096. The
deadline for the presentation of the mentioned notification is the last working day of the third month after the fiscal year-end of the UEC.

The filing of the CbC Report in the applicable jurisdiction will also have to be reported in the terms of form F.8096. The deadline for the presentation of the mentioned notification is the last working day of the second month after the deadline of the CbC Report in the designated jurisdiction for the presentation.

The Resolution is applicable to fiscal years initiated from 1 January 2017, with respect to each final controlling entity of the MNE Group.

However, for fiscal years initiated from 1 January 2018, in the cases where the jurisdiction designated to present the CbC Report has a competent authority agreement with Argentine, the local entities of the MNE group is not obligated to present the CbC Report to AFIP but they still have to comply with the previously mentioned informative notifications in the terms of form F.8096.

Master File

The MF must provide general information regarding the entities that form the MNE Group and the transfer pricing policy adopted by the group.

According to Annex II of GR4717, the referring report should contain the following information:

a) A description of the main activities of the Group of Multinational Companies and the main sources of business profits

b) An explanation of the supply chain of the five main products or services of the group, in terms of billing, as well as any other product or service that represents more than 5% of the total net amount of the group’s business corresponding to the fiscal period
c) Reference of the main geographic markets in which the group offers its products and services, which are mentioned in the preceding point.

d) List and brief description of the relevant service provision agreements between members of the group, other than R&D services, including the description of the capacities of the main establishments that provide significant services; and of the policies on transfer prices used to distribute the costs of the services and determine the prices to pay for intragroup services.

e) Functional analysis of the group describing the main contributions to the creation of value performed individually by each entity of the group, that is, the functions performed, the substantial risks assumed and the significant assets used by each of them, including the changes with respect to the previous fiscal period.

f) Indication of the main operations of business reorganization, acquisition and disinvestment that occurred during the fiscal period.

g) General description of the global strategies of the Group of Multinational Companies in relation to the development, ownership and exploitation of intangible assets.

h) General reference of the transfer pricing policies followed by the group in relation to the R&D activities and with intangible assets and general description of any relevant transfer of rights over intangible assets that are occurred between the related companies during the tax period under consideration.

i) General description of the form of financing of the group, including the main agreements of financing underwritten with unrelated lenders.

j) Identification of the entities of the multinational group that perform a financing function centralized for the group, indicating the
country of its incorporation and that of its effective management headquarters

k) General description of the multinational group's transfer pricing policies regarding financing agreements between related companies

l) Consolidated annual financial statements of the Group of Multinational Companies corresponding to the fiscal period, as long as they are prepared with fines for communication of financial information regulatory, internal management, fiscal or other

m) List and brief description of the prior transfer pricing agreements in force in the unilateral decisions of the multinational group and other prior agreements or any other decision issued by a tax authority relating to the disposition of benefits between countries

The mentioned report must be signed by the legal representative of the taxpayer or responsible person and submitted to the AFIP webpage from the 23rd to 27th day of the 12th month following the end of the FY, pursuant to the ending of the CUIT.

In cases when the MF was prepared in another language than Spanish, a Spanish copy translation of the MF, executed by a local translator, must also be provided to the AFIP with the original document.

However, for the fiscal year that started after the first day of 2020, the GR5010 established that in the event that there are no changes in the year to be reported regarding the information included in the Master Report previously submitted, the taxpayer can submit a note with the character of an affidavit through which he ratifies the information provided in the last Master Report presented, and attaches the consolidated financial statements of the multinational group.
Requirements for the presentation of Transfer Pricing Documentation

The TP documents must be presented to the AFIP if the taxpayer accomplishes the estipulate amount by law in the following terms:

a) Local File or Transfer Pricing Study

b) Master File

c) CbC Report

The filing of the Local File shall not be enforceable with respect to taxpayers whose intercompany transactions carried out do not exceed the total amount equivalent to ARS 3 million (USD 26,786)\(^6\) in the fiscal period, or do not exceed the individual amount equivalent to ARS 300,000 (USD 2,679).\(^7\) Also, to have the obligation to present the Master File, in addition to complying with the amounts previously exposed for the Local File, the annual consolidated returns of the MNE Group attributable to the fiscal year before the fiscal year to be reported must be higher than ARS 400 million (USD 3,571,429).\(^8\)

To accomplish the presentation of the CbC Report and its informative notifications, the annual consolidated returns of the MNE Group attributable to the fiscal year before the fiscal year to be reported must be above EUR 750 million. Taxpayers who do not meet the criteria for the presentation of the aforementioned reports but are covered by the transfer pricing regime have to comply with the duty to preserve the documents, information and evidence that support the intercompany transactions.

\(^6\) US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.

\(^7\) Ibid.

\(^8\) Ibid.

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Simplified International Operations Regime

In 2021, with the proclamation of GR5010, the AFIP created the new Simplified International Operations Regime (Form 2672) with the intention of facilitating the compliance of the subjects in the field of transfer prices and international operations. As a result, taxpayers that adhere to the regime do not have the obligation to present F.2668 and the Local File.

Requirement

GR 5010 established that the taxpayer may benefit from the new simplified regime of international operations when they are, in the fiscal year to be reported, in any of the following four situations of inclusion:

Situation 1

That the total annual billing is less than the highest amount established for the medium category section 1 (regardless of the activity to which said amount corresponds), provided for in point A of Annex IV of Resolution 220/19 (SEPyME), currently ARS 2,588,770,000, (USD 23,114,018), as long as it complies with the following requirements together:

1. Does not present recurring negative results in the financial statements of the fiscal period to be reported and in the two immediately preceding ones

2. Has not undergone a business restructuring process in the fiscal year to be reported and in the two immediately preceding ones

3. Does not carry out operations with related subjects and/or domiciled, constituted or located in noncooperative jurisdictions or with low or no taxation that involve royalties, license rights or

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9 US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.
research and development agreements for a total that, as a whole, exceeds 1% of the amount mentioned in point 1)

4. Does not carry out operations for the provision or acquisition of services with related parties and/or domiciled, incorporated or located in noncooperative jurisdictions or with low or no taxation for an amount that, as a whole, represents more than 1% of the billing total local subject.

5. Does not act as a giver or borrower of loans with foreign related parties.

Situation 2

When the total of international transactions with related parties does not exceed 2.50% of total billing and the following requirements are met:

1. Does not carry out operations with related subjects and/or domiciled, constituted or located in noncooperative jurisdictions or with low or no taxation that involve royalties, license fees or research and development agreements for a total that as a whole exceeds 50% of total billing.

2. Does not present recurring negative results in the financial statements of the fiscal period to be reported and the two immediately preceding ones.

3. Has not undergone a business restructuring process in the fiscal year to be reported and in the two immediately preceding ones.

4. Has not carried out import and/or export operations with the intervention of an international intermediary under the terms of Article 24 of GR 4,717.
Situation 3

Be an exempt entity according to Article 26 of the ITL, have text ordered in 2019 and have a certificate of exemption issued according to GR 2,681

Situation 4

Carry out import and/or export operations with independent parties whose annual amount — per fiscal year — as a whole is greater than the sum of ARS 10 million (USD 89,286)\(^{10}\) and less than ARS 60 million (USD 535,714).\(^{11}\)

The subjects detailed in the previous points are excluded from the simplified regime if:

1. They are part of Groups of Multinational Companies that must present the “CbC Report,” regardless of the jurisdiction where they have to comply with such obligation.

2. They are obliged to present the “Master Report” or that they may choose to present a note in its place indicated above.

Information requirements

To fulfill F.2672, the taxpayer would have the obligation to provide the following information:

Data referring to the Group of Multinational Companies, such as group formation, identification of the members of each company, residence and identification of each entity (except capital placed by public offer), authorities, etc.

\(^{10}\) US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.

\(^{11}\) Ibid.
Identification of the ultimate controlling entity

Description of the transactions carried out with related entities or with noncooperative and low-taxation jurisdictions, type of operation, amounts operated and the price of transfer adjustments, if applicable.

Presentation

The taxpayer who adheres to the simplified regime, in replacement of the Transfer Pricing Study and form F.2668, must submit form “F.2672 International Operations Simplified Regime” of the reporting period, stating compliance with the framework within the regime and that the prices of its operations have been agreed as if they have been carried out between independent parties, without the intervention of an international intermediary.

The presentation of the form will be made through the service with fiscal key “Presentation of DDJJ and Payments,” using the corresponding registration format. Both general and special deadlines (year-end closing 31 December 2020 to 31 December 2021) for the presentation of F.2672 will coincide with those previously detailed for the presentation of the Transfer Pricing Study for the general regime.

It is important to point out that for those who opt for the simplified regime, which operations included in said regime exceed, in the fiscal period, the amount equivalent to ARS 3 million (USD 26,786)\(^\text{12}\) as a whole, or individually the sum of ARS 300,000 (USD 2,679)\(^\text{13}\), must present the Study of Transfer Prices and the respective work papers within 45 days of being notified by the AFIP of said obligation.

\(^{12}\) US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.

\(^{13}\) Ibid.
Penalties

TPL No. 11,683 provides for a penalty of ARS 20,000 (USD 112)\(^\text{14}\) in the case of failure to file the TP informative returns in a timely manner, and ARS 9,000 (USD 80)\(^\text{15}\) in the case of failure to file unrelated parties’ informative returns (Form F.2668).

The TPL also provides for penalties of ARS 150 (approximately USD 1)\(^\text{16}\) to ARS 45,000 (USD 402)\(^\text{17}\) in the case of failure to comply with the answers to the information requested by the AFIP in connection with international transactions. The same penalty applies in the case of failure to keep documentation to justify prices in international transactions.

In addition, the TPL provides for penalties of ARS 500 (USD 4) to ARS 45,000 (USD 402)\(^\text{18}\) in the case of failure to comply with requests made by the AFIP to file the TP informative returns. This penalty may be imposed notwithstanding the application of the penalties described in the foregoing paragraphs, which means that they are accumulative.

In the case of taxpayers with gross revenues of more than ARS 10 million (USD 89,285), a penalty of ARS 90,000 (USD 804)\(^\text{19}\) to ARS 450,000 (USD 4,018)\(^\text{20}\) is applicable where the taxpayer has failed to comply with three consecutive requests related to the same infringement.

Since the 2017 tax reform, the following penalties were established applicable to noncompliance with the information regime of the CbC Reporting.

\(^{14}\) Ibid.
\(^{15}\) Ibid.
\(^{16}\) Ibid.
\(^{17}\) Ibid.
\(^{18}\) Ibid.
\(^{19}\) Ibid.
\(^{20}\) Ibid.
a) A fine between ARS 80,000 (USD 714)\(^{21}\) and ARS 200,000 (USD 1,786)\(^{22}\) for the following conducts:

(i) Failure to inform, within the terms established for this purpose, about belonging to one or more MNE Groups, where the total consolidated annual income of each group is equal to or greater than the parameters set by the FTA; and to notify about the identifying data of the last controlling entity. The omission to report the membership of one or more MNE Groups with income below these parameters and the data of their last controlling entity will be subject to a fine adjustable between ARS 15,000 (USD 134)\(^{23}\) and ARS 70,000 (USD 625).\(^{24}\)

(ii) Failure to inform, within the deadlines established for that purpose, the identifying data of the reporting subject designated for the CbC Report presentation

(iii) To omit informing, within the terms established for this purpose, the presentation of the CbC Report by the reporting entity designated in the corresponding fiscal jurisdiction abroad

b) A fine between ARS 600,000 (USD 5,357)\(^{25}\) and ARS 900,000 (USD 8,036)\(^{26}\) for the omission to present the CbC Report, or filing a report that is partial, incomplete, with serious errors or inconsistencies, or beyond the deadline

\(^{21}\) Ibid.  
\(^{22}\) Ibid.  
\(^{23}\) Ibid.  
\(^{24}\) Ibid.  
\(^{25}\) Ibid.  
\(^{26}\) Ibid.
c) A fine between ARS 180,000 (USD 1,607)\textsuperscript{27} and ARS 300,000 (USD 2,678)\textsuperscript{28} for total or partial noncompliance with FTA requirements

d) A fine of ARS 200,000 (1,786 USD)\textsuperscript{29} for the breach of the requirements established by the FTA with regard to completing the formal duties referred to in subparagraphs a) and b). The fine provided for in this subsection is cumulative with that of subsections a) and b).

Consequences derived from transfer pricing adjustments

When the price of the transactions is adjusted in accordance with the provisions of Section 17 of the ITL, the AFIP will redetermine the taxable income declared by the Argentine company in its ITRs by applying an adjustment to the cost of sales and/or expenses or to the sales revenues, as the case may be (notwithstanding that the TP report could have been focused on gross margins or return on profits). Such redetermination of taxable income may give rise to an unpaid amount of income tax. Once taxable income has been determined, the AFIP will give notice of any income tax deficiency to the Argentine company. If the AFIP succeeds in the tax redetermination procedure, the Argentine company will be subject to interest, and eventually to the penalties described further.

Interest

The Argentine company must pay interest on the amount owed to the AFIP, as of the date when the payment of tax was due. The prescribed monthly interest rate is currently at 3.6%. Interest is applicable, regardless of whether or not the company is guilty of infringement.

\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
Penalties – tax avoidance

Under Section 45 of the TPL, every person who has made inaccurate statements in a return is guilty of infringement and is liable to a fine of 100% of the amount of the avoided tax. However, when the tax amount originates from international transactions, Section 45 provides for increased penalties. The applicable fine must be 200% of the amount of the tax avoided.

This fine is not applicable when the inaccuracy is incurred due to an excusable mistake (which is hard to prove and whose interpretation is very restrictive). The preparation of an appropriate and comprehensive TP report may, however, provide the Argentine company with grounds to support an “excusable mistake” position in order to avoid the application of this penalty.

Additional regulations

Advance pricing agreements

Since the 2017 tax reform, taxpayers may request for Joint Determination of International Operations’ Prices (DCPOI) from the FTA, which sets the criteria and methodology applicable for the determination of the prices, amounts or profit margins of the transactions referred to in Article 17 of the ITL.

The procedure will be regulated by the following provisions:

a) The request must be formalized before the FTA prior to the start of the fiscal period in which the transactions considered in the DCPOI will be carried out. The application must include a proposal on which the market value is based for the transactions or lines of business involved.

b) Its presentation will not imply a suspension of the passing of the terms nor will it justify the noncompliance of the transfer pricing regime.
c) The fiscal criteria and the methodology for determining the prices, amounts of consideration or profit margins contained in the DCPOI — agreed on the basis of the circumstances, background and other information provided, taken into account until the moment of subscription — will link exclusively to the taxpayer or responsible party and to the FTA. If relevant by application of international agreements or conventions, the reference information of the agreement may be exchanged with third countries.

d) The validity and application of the DCPOI will be subject to the resolutory condition that the transactions are carried out according to the terms set out therein. The Federal Administration of Public Revenues may render the DCPOI ineffective if it is verified that the prices, amounts of considerations or profit margins established no longer represent those that would have used independent parties in comparable operations or if the existing economic circumstances have been significantly modified at the time of approval of the DCPOI. Such measure will not affect the validity of the transactions carried out in accordance with the terms of the DCPOI, until the taxpayer is notified of the decision.

e) The FTA will regulate the form, term, requirements and other conditions with which taxpayers and responsible persons should comply. It will also be the responsibility of the FTA to establish the activity sectors or lines of business that are authorized to submit applications.

The agreement does not inhibit the verification and inspection powers of the FTA.

Mutual agreement procedure

The above-mentioned 2017 tax reform also regulated the mutual agreement procedure foreseen in the agreements to avoid double taxation concluded by the Argentine Republic, in terms of taxation on income and patrimony, which constitutes a mechanism tending to the
solution of disputes raised in those cases where there is or may be, for a particular taxpayer, an imposition not in accordance with a particular agreement. The competent authority in this procedure is the Treasury Secretariat of the Finance Ministry.

Thin capitalization

Law No. 27.430, which modified the ITL, replaced the 2:1 debt-to-equity thin capitalization rule with the base erosion and profit shifting (BEPS)-based rule.

New thin capitalization rules limit the deduction of certain categories of financial interest paid by companies and branches (other than banks and financial institutions) and by unincorporated businesses.

According to the new ITL text, interest arising from financial debts — excluding debts created by the acquisition of loans, leases and services related to the business — with related entities (under the terms of Article 17 of the ITL), whether residents or not, will be tax deductible. But such deduction cannot exceed the higher of the annual amount set by the Executive Branch. Decree No. 1170/218 established that this amount is ARS 1 million (USD 8,928)\(^{30}\) or the one equivalent to 30% of the net taxable profit arising before the deduction of interest, adjustments, FX differences and depreciations.

This limit can be increased with the excess accrued during the previous three fiscal years closed after 1 January 2018, if the interest effectively deducted in such previous three fiscal years is lower than the applicable limit, provided that such excess has not been used in accordance with the procedure herein established. If the interest cannot be deducted, it can be added to the amounts corresponding to the following five fiscal years.

\(^{30}\) Ibid.

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The ITL also establishes that the term interest also includes FX differences and updates, as long as inflation adjustment is not applicable.

These thin capitalization rules will not be applicable for (i) financial entities; (ii) financial trusts; (iii) corporations whose main purpose is to enter into leasing contracts; (iv) passive interest that do not exceed the amount of active interest; and when it can be demonstrated that (v) the relation between the interest subject to the above-mentioned restriction and the net taxable profit is below or equal to the ratio that the economic group to which the taxpayer belongs has in that fiscal year for liabilities acquired with independent creditors vis-à-vis the net taxable income of the economic group; or (vi) that the beneficiary of the interest has effectively paid taxes on such income (Decree No. 1170/218 established that this requirement would be met if the beneficiary is a foreign beneficiary that is subject to the domestic income tax withholding set forth by the ITL or is subject to a reduced income tax withholding — or is exempted from Argentine income tax withholding — under the provisions of a tax treaty executed with Argentina to avoid double taxation).

Decree No. 1170/218, however, excluded the FX differences from the benefits mentioned in (vi) above.

Please note that these new thin capitalization rules apply to interest accrued in the first fiscal year started as from 1 January 2018, regardless of whether such interest derive from financial debts existing before 1 January 2018.

Intangibles

Payments made to nonresidents for the exploitation of trademarks and patents are deductible for income tax purposes for up to 80% of the arm’s length value, provided that payments are made before the return filing deadline and that the agreement is registered before the transfer of technology authority, which is the National Institute of Industrial Property (Instituto Nacional de Propiedad Industrial (INPI)).
This requirement applies regardless of whether or not the parties are related.

**Intragroup services**

Argentine law does not directly address intragroup services.

**Sales of stock**

There are no specific TP rules regarding sales of stock. The arm's length condition of the transfer of shares, bonds, assets, debts or any other similar stock must be analyzed and included in the TP report to be filed by the local taxpayer.

**Cost-sharing agreements**

Cost-sharing agreements are not addressed by the Argentine TP rules and, in practice, taxpayers must demonstrate to the AFIP the existence of the service or intangible involved in its registration before the INPI, as well as the benefits that the local party gains for participating in such cost-sharing agreements. Otherwise, payments arising from these structures would be nondeductible. Cost-sharing payments would also be subject to base withholding tax if sourced in Argentina.

**Audits**

**Sources for targeting**

There is no public information regarding how the AFIP programs TP audits. However, the AFIP may use the following documents and/or databases, among others, to begin a TP audit:

- Tax returns (e.g., income tax, VAT, minimum presumed income tax, etc.) and other internal criteria
- Sector profitability taken from tax returns, Form F.867 or other market researches performed
• Customs database (Marie System or Sistema María)
• Central Bank of Argentina’s (CBA) database
• The Justice Bureau (Inspección General de Justicia (IGJ)) – the bureau in charge of registering incorporations and bylaws of companies, limited liability companies and certain partnerships in Buenos Aires, Argentina
• INPI – the office in charge of registering the creation of patentable inventions, agreements of companies and natural persons related to the transfer or licensing of trademarks, knowhow, technical assistance, rights, and in general, intellectual or intangible property derived from activities between local and foreign taxpayers
• Information obtained from audited financial statements filed by the taxpayers together with the annual ITR
• Direct denunciations by competitors, disgruntled employees or ordinary citizens that also give rise to audits

In the last few years, the AFIP’s systems, which were utilized as a main tool to monitor taxpayers’ transactions, were modernized. The active use of this system was noted, for example, when the AFIP required CBA records in order to match both databases (AFIP’s versus CBA’s). After reviewing them, the AFIP noted that hundreds of taxpayers received or paid considerable amounts of money from/to tax haven residents and have not filed their TP reports and returns. Hence, the AFIP issued requests for those taxpayers to explain why they did not comply with the TP regime or just file their returns and reports if still applicable.

Current audits

The AFIP conducts both on-site and desk audits focusing specifically on the commodities market (maize, olive and other seeds in general, as well as sunflower oil and fuel oil), farm and plastic products,
automotive supplies, consumer goods, leather, chemical and tobacco, as well as transactions of Argentine companies in the pharmaceutical, fishing, and oil and gas industries.

In previous years, the AFIP has shown one of its most drastic positions against certain sectors of the economy, particularly toward taxpayers exporting through related foreign parties (traders) or companies located in low/null tax jurisdictions (tax havens) that were not the actual consignees of the goods. The AFIP proceedings targeted the grains sector and oils sector, which were challenged for carrying out triangular maneuvers to avoid or reduce their income tax base in Argentina.

The AFIP audited such companies and requested the suspension of their registration on the Fiscal Registry of Grain Traders (FRGT), which resulted in the levying of an increased VAT withholding rate in the local market and could also result in a limited delivery of mandatory forms to trade in the local market.

Once again, transactions that did not comply with the arm’s length principle were closely scrutinized. In these cases, the AFIP’s ultimate goal was to sanction taxpayers who were getting excluded from their registration on the FRGT, which would increase the income tax withholding rate from 2% to 15% of their transactions in the local market.

In the case of customs valuation, the Customs Authority (Dirección General de Aduanas) is the competent authority with regard to customs duties. The Customs Authority exchanges information with the tax board, but audits are carried out independently.

Methods for customs purposes are based on the application of Article 7 of the GATT (1994), while the TP valuation methods are based on the ITL. This means that the respective valuations of goods for customs and for TP are governed by different sets of rules.
However, the importer may submit TP reports to the customs authorities if those reports contain economic information that may be useful for customs purposes.

Currently, if there is a reduction in import operations, the customs authorities may conclude that there is customs infringement (i.e., underpayment of import duties). From a TP perspective and, therefore, in this scenario, a decrease in import duties, in principle, would not give rise to any TP issues.

Transactions under review

The import and export of tangible property are still more frequently scrutinized than intangible property transactions. Financial transactions and royalty payments are also being reviewed.

In 2012, exports to related parties in which a local company exported goods through a trader that was not the recipient of the goods (i.e., triangulations) were scrutinized by the AFIP as transactions that oblige taxpayers to use the modified CUP method.

Particularly, these maneuvers were scrutinized in relation to products transported via Uruguay.

The AFIP’s intention of scrutinizing triangulations is proven by the creation of the new annual TP return (Form F.2668), which has been mandatory since 2018. Through this TP return, the AFIP would know the origin and source country of the imported goods or the destination country in the case of exports. In order to control triangulations, a closed review of these transactions is expected when the AFIP’s evidence differs between countries where the parties to the transactions are located and the countries of origin/source or destination of the goods.

Additionally, the tax authority has been relying on information obtained through the exchange of information agreements with customs offices.
In particular, in the case of Brazil, customs has online access to the export prices declared by the Brazilian exporter.

Position of the tax authority in TP audits

Due to fiscal secrecy, the official position of AFIP in TP audits remains unknown.

Opened cases

In recent years, the AFIP has become more active, and as a result, some cases litigated in the Federal Tax Court have been released. A short brief of these cases will be described further under the “Court cases” section.

The Federal Tax Court is part of the executive (not the judicial) branch. It is an administrative court of similar range to the Court of Original Jurisdiction, but specializes in taxes. If a favorable ruling is not obtained, the taxpayer may file an appeal with the Federal Court of Appeal.

Managing the audit process

Argentina has doctrine and jurisprudence to provide guidance on the development and treatment of TP inspections.

Litigation procedure

There are no alternative dispute resolution vehicles offered in TP cases beyond the typical administrative or judicial processes and litigation applicable to other taxes at the national level.

Revocation appeals

Any decision would be subject to the availability of administrative resources and, eventually, to court review.
Tax amnesty

Currently, there are no rules regarding the partial or total abatement of debts due to failure to comply with TP obligations.

Competent authority procedure

Competent authority procedures for cases of double taxation can be accessed, according to the tax treaties signed by Argentina.

Countries with double taxation agreements

Argentina has entered into double taxation treaties with the following countries:

1. Australia
2. Belgium
3. Bolivia
4. Brazil
5. Canada
6. Chile
7. Denmark
8. Finland
9. France
10. Germany
11. Italy
12. Mexico
13. Netherlands
14. Norway
15. Qatar
16. Russia
17. Spain
18. Sweden
19. Switzerland
20. United Kingdom
21. United Arab Emirates
22. Uruguay
Countries with exchange of information agreements

Argentina has entered into tax exchange information agreements (TEIAs) with the following countries:

1. Andorra
2. Armenia
3. Aruba
4. Azerbaijan
5. Bahamas
6. Bermuda
7. Cayman Islands
8. China
9. Costa Rica
10. Curaçao
11. Ecuador
12. Guernsey
13. Isle of Man
14. India
15. Ireland
16. Italy
17. Jersey
18. Macau
19. Macedonia
20. Monaco
21. Peru
22. Polonia
23. San Marino
24. South Africa
25. United Arab Emirates
26. United States of America
27. Uruguay

Additionally, all other double taxation agreements have a TEIA section to accommodate requests for information between participating countries.
Furthermore, in September 2012, Argentina ratified the Convention on Mutual Administrative Assistance in Tax Matters of the OECD (“Convention”). By ratifying the Convention, Argentina gained the chance to exchange information and to request assistance from other parties to the Convention. This Convention has been ratified by Argentina, Australia, Belgium, Denmark, Finland, France, Georgia, Iceland, India, Italy, Mexico, Moldova, the Netherlands, Norway, Poland, Slovenia, South Korea, Spain, Sweden, Ukraine, the United Kingdom and the United States.

Additionally, on 6 March 2014, Argentina approved the Declaration on Automatic Exchange of Financial Information in Tax Matters (“Declaration”). Early adopters who signed the agreement, as in the case of Argentina, have pledged to work toward launching their first information exchanges by September 2017. Other countries are expected to follow suit in 2018. The AFIP, through the General Resolution (AFIP) 3826, stipulates that Argentine financial institutions must fulfill the normative regulated in the “Common Reporting Standard” approved by the OECD and report to the Federal Tax Authority the transactions made after 31 December 2015.

Moreover, Argentina signed the Multilateral Agreement between Competent Authorities for the Exchange of CbC Reports on 30 June 2016. As of March 2020, Argentina has signed the mentioned agreement with the following jurisdictions:

1. Agüilla
2. Andorra
3. Australia
4. Austria
5. Bahamas
6. Belgium
7. Belize
8. Bermuda
9. Brazil
10. British Virgin Islands
11. Bulgaria
12. Canada
13. Cayman Islands 34. Indonesian
14. Chile 35. Ireland
15. Chinese 36. Isle of Man
16. Columbia 37. Italy
17. Costa Rica 38. Japan
19. Curacao 40. Korea
20. Cyprus 41. Latvia
21. Czech Republic 42. Liechtenstein
22. Denmark 43. Lithuania
23. Estonian 44. Luxembourg
24. Finland 45. Malaysia
25. France 46. Malta
26. Germany 47. Mauritius
27. Gibraltar 48. Mexico
28. Greece 49. Monaco
29. Guernsey 50. Netherlands
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**General treaty rules and adjustments**

Argentina’s double taxation treaties define where the profits derived by individuals and entities may be taxed in different cases. The taxation of interest, dividends, royalties and other types of income is also addressed, as well as the exchange of information rules between tax administrations.

**Corresponding adjustments**

Corresponding adjustments are applicable, according to Article 9 of the OECD model. Adjustments of this kind are considered under most international double tax treaties as signed by Argentina. However, even when this procedure is in effect, the lack of regulations regarding the method of applying them in practice reflects that no precedent has so far been identified. It is worth mentioning that the regulation
introduced in 2017 regarding mutual agreement procedures could be applicable in the case of corresponding adjustments.

Statute of limitations

The statute of limitations applied in Argentina to individuals or corporations registered with AFIP is five years, and 10 years in the case of nonregistered corporations or individuals. Such period starts on 1 January of the calendar year that follows the year corresponding to the due date of the relevant tax return.

Audit procedure

The TP audit procedure is similar to any other federal tax audit procedures. Commonly, audit procedures begin with a written notification informing the taxpayer of the impending tax audit. The notification may contain the following information:

a) Name of the taxpayer to be inspected
b) The purpose of the inspection; for example, the taxes and tax periods to be reviewed
c) Signature of a competent tax official
d) Name of the designated tax inspectors

After such notification, the tax authority may request specific information or documentation. Tax legislation does not determine a maximum term for the audit procedure. The audit must take place at the taxpayer’s fiscal domicile, so it is usually carried out through a physical visit of the FTA agents, who request commercial books and documents under the scope of the underlying audit. The mandatory accounting books are: (i) inventory and financial statements books; (ii) the daily book; and (iii) any other accounting books that may be required according to the company’s activities. If such books or documents are not available at that time, a term (generally five to 10 days) is granted for their filing. Further requests for documents may
be made by the agents. In any case, the inspector that carries out the audit must show its official identification to the taxpayer.

In certain cases, a search order may be granted by a judge allowing, within the audit process, the seizure of documents and the opening of safe deposits and drawers, etc. This kind of procedure is not common and is used only in cases where the AFIP has reasonable grounds to believe that tax fraud or other tax crimes have been perpetrated.

It is not legally possible to negotiate the scope of the audit with the FTA. The audit procedure is closed either by a resolution of the AFIP, relaying the deficiencies discovered and assessing the taxpayer’s liability, or by directly closing the audit without further requirements. The latter does not operate as clearance and the taxpayer may be subject to further audits over the audited period or the audited taxes.

Before starting a tax assessment procedure, the AFIP usually notifies the taxpayer that an assessment is imminent. At this point, there is an incentive for the taxpayer who pays the assessment without beginning litigation. This incentive is a reduction in the penalty, up to one-third of the legal minimum amount.

Tax agents have the authority to investigate and review all books and documents of the taxpayer and are forbidden to make public any information obtained through this procedure, which is related to the economic and financial situation or to the business activities of the taxpayer or third parties. The FTA can, however, release information to other tax authorities of provinces and municipalities, under a specific exchange of information legislation or agreement.

Private and public entities are obliged to give all the information requested by the AFIP before it can make a tax assessment. Financial institutions are also obliged to give information required by the tax authorities or judges under certain conditions.
In addition, certain individuals or entities appointed by law must inform the FTA of certain operations by means of several information regimes.

**Administrative and judicial tax litigations**

The federal tax law mainly contains seven different tax procedures, as follows: (a) tax assessment procedure (*procedimiento de determinación de oficio*) in which the AFIP makes tax assessments; (b) reimbursement procedure (*acción de repetición*) by means of which a taxpayer may demand the reimbursement of taxes incorrectly paid; (c) a summary procedure, in which the AFIP may claim taxes, interests and fines in specific cases under certain conditions; (d) closure of premises and fine procedure; (e) a fine procedure that is imposed as part of the tax assessment procedure; (f) the Tax Criminal Law; and (g) appeal procedure with the FTA’s director when the law does not provide a special procedure.

**Tax assessment procedure**

If the tax return is rejected and an assessment is made, the taxpayer is notified of such assessment and has 15 working days to file its defense, which should include documentary support and other evidence the taxpayer may want to offer. The taxpayer must include all arguments and evidence to defend their position.

The AFIP may determine the taxpayer’s liability through the presumptions established under Section 18 of the TPL. Such presumptions are based on known facts that are usually connected to taxable events. These presumptions include:

- The amount of the investment
- Fluctuations on assets and/or net worth
- Volume of transactions or amount of income of other FYs
- Amount of purchases or sales
• Inventories

• Normal profit margin or general amount of expenses of similar companies

• Amounts paid in connection with salaries and/or lease of the facilities

• The taxpayer’s personal expenses and assets

• The transaction value in similar operations carried out under arm’s length terms and conditions

• Differences between the inventories declared by the taxpayer and those that resulted from a tax audit

• Differences between the net worth declared by the taxpayer and that which resulted from a tax audit

• The amount of sales that are not duly registered in the commercial books or declared in the tax returns by the taxpayer, during a specific period, when this fact is directly verified by the FTA

The FTA should issue a resolution within 90 working days. If the resolution is not issued within this period, the taxpayer can file a written request to obtain such resolution. If the request is not answered within 30 working days, the procedure is concluded with no liability for the taxpayer. The AFIP can restart the procedure with the previous authorization of the AFIP’s federal administrator.

Another relevant aspect is that when the FTA performs a tax assessment, it is obliged to include the penalty. Otherwise, the AFIP will not be able to impose a penalty.

If the FTA issues a resolution rejecting the defense, determining the taxpayer’s liability and requesting the payment of the tax assessed, the taxpayer may file an appeal with the Federal Tax Court within 15 working days starting on the date when the taxpayer is notified of the
resolution. This appeal, however, is only applicable when the amounts involved exceed ARS 25,000 (i.e., USD 396),\(^\text{31}\) or ARS 50,000 (i.e., USD 793)\(^\text{32}\) in the case of carry-forward losses.

The appeal is filed before the FTA, which has the opportunity to contest the appeal. Once this stage is concluded, a procedural stage for the rendering of evidence follows. Afterward, the Federal Tax Court should decide. The taxpayer or the FTA may appeal the decision of the Federal Tax Court to the Judicial Court of Appeals within 30 working days, starting on the date when each party is notified of the decision. The decision of the Judicial Court of Appeals may be further appealed to the Federal Supreme Court (FSC) if certain requisites of admissibility are met.

When the FTA’s resolution is appealed, the taxpayer does not have to pay the amount assessed. Once the Federal Tax Court issues the resolution, the FTA will be empowered to demand the amounts claimed (except for the fines) from the taxpayer.

Instead of the appeal to the Federal Tax Court, the tax assessment made by the FTA may be appealed to the FTA director if: (i) the taxpayer decides to do so; and/or (ii) the amounts involved do not exceed ARS 25,000 (or ARS 50,000 as mentioned above). However, this option is generally not recommended.

The 2017 tax reform introduced a new settlement procedure. Prior to the issuance of the FTA’s resolution, the FTA may authorize an instance of voluntary conclusive agreement: (i) when it is necessary for determining facts’ assessment and the correct application of the rule to the specific case; (ii) when it is necessary to make estimations, valuations or measurements of data, elements or characteristics relevant to the tax obligation that hinder their quantification; or (iii)

\(^{31}\) US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.

\(^{32}\) Ibid.

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when dealing with situations that, due to their nature, novelty, complexity or transcendence, require a conciliatory solution.

Reimbursement procedure

This procedure comprises only the reimbursement of amounts paid in excess. Such payments may have been paid: (i) spontaneously; or (ii) upon a request of the FTA. Currently, overpayment interest is paid at 0.5% per month.

a) The taxpayer must request the reimbursement from the FTA. If rejected or not answered within three months, the taxpayer may opt to appeal the resolution within 15 working days to (a) the FTA’s director; (b) the Federal Tax Court (only when the amounts involved exceed ARS 25,000); or (c) the Court of Original Jurisdiction. The facts and their proof must be asserted in the first filing with the FTA. The taxpayer may request the reimbursement until the pertinent tax is barred by the statute of limitations.

(i) The resolution issued by the FTA may be appealed within 15 working days to the Court of Original Jurisdiction. If the latter rejects the appeal, the taxpayer may appeal the resolution within five working days to the Federal Court of Appeals. The decision of the Federal Court of Appeals may be further appealed to the FSC if certain requisites of admissibility are met.

(ii) The resolution issued by the Federal Tax Court may be appealed within 30 working days to the Federal Court of Appeals. The decision of the Federal Court of Appeals may be further appealed to the FSC if certain requisites of admissibility are met.

(iii) The resolution issued by the Court of Original Jurisdiction may be appealed within five working days to the Federal Court of Appeals. The decision of the Federal Court of Appeals may
be further appealed to the FSC if certain requisites of admissibility are met.

b) The taxpayer may opt to request for reimbursement from the Federal Tax Court (same procedure as a).ii) above) but only when the amounts involved exceed ARS 25,000 (USD 22333), or from the Court of Original Jurisdiction (same procedure as a).iii) above). The taxpayer may request for reimbursement until the pertinent tax is barred by the statute of limitations. The facts and their proof must be asserted in the first filing with the tax authority.

Summary procedure in order to demand taxes, interest and penalties

Payment of provisional amounts – If the taxpayer does not file the tax return in a timely manner, the FTA may demand such filing and its payment within 15 business days. If the taxpayer does not comply with such obligations, the FTA is entitled to demand payment, under a summary judicial procedure, of an amount equal to the tax reported by the taxpayer in any of the fiscal periods not barred by the statute of limitations for the tax in question. Such payment is considered a provisional payment and does not relieve the taxpayer of the obligation to properly file the omitted return and pay the appropriate taxes.

If the return is filed after this summary judicial procedure, the FTA may not consider this filing. As a result, the taxpayer must pay the amounts claimed and request the reimbursement thereof if they are incorrect.

Amounts inadmissible in the tax return – When certain concepts or amounts in the tax return are not clearly admissible, the AFIP may object to such concepts or amounts, and claim the tax due under this summary procedure.

33 Ibid.
**Final judgment** – If the taxpayer does not pay the tax assessments, interest and fines after a final judgment, the FTA may claim such amounts under this summary procedure.

**Procedure** – This procedure is restrictive and the taxpayer may allege only four defenses within five working days — starting on the date when the taxpayer is notified of the resolution. The defenses are: (i) prior payment of the amounts claimed; (ii) having obtained an extension of maturity dates to pay the amounts claimed (*espera documentada*); (iii) the amounts claimed are barred by the statute of limitations; and (iv) formal defects of the certificate issued by the FTA (*inhabilidad de título*).

The resolution issued in this summary judicial procedure may not be appealed, unless certain requirements are met, in which case the resolution may be appealed to the FSC.

**Attachment** – In addition to demanding payment, the FTA is empowered to ask the hearing judge for the authorization to attach, as a preventive measure, any bank account or funds deposited with a financial entity, property or business of the taxpayer.

**Fine procedure that is imposed as part of the tax assessment procedure**

The Tax Procedural Law allows the FTA to apply fines out of the tax assessment procedure in the following cases:

1. **When the taxpayer fails to comply with formal obligations** (such as noncompliance or late compliance with tax return filing and noncompliance with requests for information)

2. **In cases of fines in connection with omitted taxes and avoided taxes** (These fines may be imposed when the taxpayer files an amendment tax return and pays off the tax declared in such amendment.)
3. In cases of fines to be imposed when a withholding or collection agent does not remit the taxes withheld or collected to the FTA

In order to impose any of these fines, the FTA must notify the taxpayer of the decision requiring that the defense be filed within 15 working days. If the AFIP issues a resolution rejecting the defense and imposing a fine on the taxpayer, the taxpayer may make an administrative appeal (recurso de reconsideración) or appeal this resolution to the Federal Tax Court within 15 days (only when the fines exceed ARS 25,000 (i.e., USD 223)).

Should the resolution be appealed to the Federal Tax Court and it gets rejected, the taxpayer may appeal the resolution to the Federal Court of Appeals within 30 working days. The decision of the Federal Court of Appeals may be further appealed to the FSC if certain requisites of admissibility are met.

Should the taxpayer opts to file an administrative appeal (recurso de reconsideración) and the FTA rejects the appeal, the taxpayer may appeal the resolution within 15 working days — starting on the date when the decision is relayed to the Court of Original Jurisdiction. The decision of the Court of Original Jurisdiction may then be appealed to the Federal Court of Appeals, while the decision of the Federal Court of Appeals may be further appealed to the FSC if certain requisites of admissibility are met.

It is worth highlighting that the taxpayer is not required to pay the fines during the whole process until a final decision is issued.

Tax Criminal Law

Tax and social security contribution evasions and other criminal offenses as described in the Tax Criminal Law (Law No. 24,789/1996) are subject to the normal criminal procedure applicable in Argentina.

34 US dollar amounts are rounded off using the same exchange rate mentioned in the previous footnote.
The decision as to whether a criminal action may be started depends on the FTA, which has the authority to assist the judge in the investigation by providing evidence and reports.

This criminal procedure is divided into two parts. The first part is written in nature as it entails an investigation that seeks to confirm that there is criminal action. The second part of the procedure is oral, wherein it will be decided whether or not the indicted person is guilty.

Depending on the crime committed, criminal penalties may range from two to nine years of imprisonment.

Under certain conditions, the criminal action may be extinguished if the taxpayer pays the amounts claimed.

**Appeal procedure**

When the law does not provide a special procedure to appeal a resolution, the taxpayer may appeal such resolution to the FTA’s director within 15 working days. The appeal does not suspend the effects of the FTA’s resolution. However, the taxpayer may request the suspension of the effects of the resolution if certain requirements are met.

The AFIP has to issue a resolution within 60 working days. In the event of an unfavorable decision, the taxpayer may file a complaint with the Court of Original Jurisdiction within 90 working days. If the resolution is not issued within these 60 working days, the taxpayer can file a written request to obtain such resolution. If the request is not answered within 30 working days, the appeal is deemed rejected. As a result, the taxpayer may file a complaint with the Court of Original Jurisdiction.

The complaint does not suspend the effects of the FTA’s resolution. However, the taxpayer may request a court order (*medida precautoria*) suspending any AFIP action. The complaint must be filed with the court, which must attach all documents on which the plaintiff
grounds its petition. Once the notice of process is duly served, the FTA will have 30 days to file the answer to the complaint. Together with the response to the complaint, the AFIP will also have to attach all the original documents (or notarized copies of such documents) supporting its position.

Once the claim or counterclaim has been answered or the matters brought up in preliminary defenses filed by the parties have been decided, the court will declare the opening of the evidentiary stage. Once the court declares that the evidentiary stage has been completed, the parties are then entitled to submit their closing arguments, after which the court should issue its final resolution.

The resolution of the Court of Original Jurisdiction may be appealed within five working days to the Federal Court of Appeals, while the decision of the Federal Court of Appeals may be further appealed to the FSC if certain requisites of admissibility are met.

**Arbitration**

Specific arbitration and mediation procedures are not set forth by TP rules in Argentina, so these procedures are not used.

**Court cases**

**2006**

In one of the first TP proceedings released in 2006, Division B of the Federal Tax Court ruled on a pharmaceutical case regarding *Industrias Bagó S.A.* on appeal. The court held that the AFIP was unable to disprove the economic analysis submitted by the taxpayer. While offering different legal arguments, the court validated the intercompany prices used by the taxpayer and overruled the FTA’s position.
2007

In *Compañía Ericsson S.A.C.I.*, Division C of the Federal Tax Court held that the taxpayer’s criteria and rate in an intercompany loan was correct and that to comply with certain formalities when contracts were set was not essential, as the AFIP had expected. Besides, the company had agreed to a similar comparable contract with an unrelated party, which showed that the rate of the former was established under fair market value.

2009

In 2009, two cases related to TP legislation applicable before the introduction of the current TP rules (which obliges local taxpayers to file returns and a TP report to demonstrate the arm’s length principle) were released by the Federal Tax Court.

First, the TP rules applicable to FY 1998 is worth mentioning. Section 8 of the ITL established that in the case of exports, if the parties did not agree on prices or if prices agreed upon were lower than the wholesale price corresponding to the destination market, the exporter and the importer would be considered parties that are economically related, unless relevant proof is demonstrated. Then, should such wholesale price be unknown or should there be any doubt that known prices correspond to similar products or there is any other reason that makes such comparison difficult, the income tax base should be determined based on results obtained by independent parties engaged in identical or similar activities. Should identical or similar activities not exist, the FTA must be authorized to apply the net margin obtained by companies engaged in industries that show certain coincidences with the activity under analysis. Additionally, Section 11 of Executive Order No. 2,353/1986 established that once the economic relationship between the parties has been verified, the AFIP will be able to determine the income tax base, considering the wholesale prices corresponding to the market of the exporter, that is, the Argentine market. This is unless the parties agreed upon a higher
price, in which case this price should be considered (i.e., the actual price of the export transaction).

In the first case, *DaimlerChrysler Argentina S.A. v. AFIP*, Division A of the Federal Tax Court sustained the AFIP position that adjusted the export prices used by DaimlerChrysler to determine its income tax base, which consisted of the sale prices of vehicles to Mercedes Benz Do Brasil Ltda. During the tax audit, the AFIP could demonstrate the indirect corporate relationship between both parties since the headquarters of both companies was Daimler Benz AG (Germany), which held the controlling number of shares, which, in both companies, was equal to 99.999677%.

Even though DaimlerChrysler Argentina argued that the FTA should have applied Section 8 of ITL and relied upon results obtained by independent parties engaged in identical or similar activities to determine the income tax base, the judges understood that the AFIP could demonstrate the relationship between the parties. Therefore, it was reasonable to apply wholesale local prices as was established in Section 11 of the Executive Order that was previously mentioned. After certain adjustments to the tax assessment, considering the lowest wholesale prices agreed upon on the local market between DaimlerChrysler Argentina and local dealers, the former was ordered to pay the TP adjustment along with interest and fines thereon.

DaimlerChrysler Argentina also argued other relevant market differences (reflected in higher prices agreed with local dealers), such as the need to incur substantial marketing and sales expenses to sell vehicles to dealers at a local level and the fact that the FTA’s proposed expert proved that expenses were only incurred by DaimlerChrysler Argentina on sales at a local level. These arguments were, however, also disregarded by the Federal Tax Court.

In the second case, *Volkswagen Argentina S.A. v. AFIP*, Division B of the Federal Tax Court agreed with the taxpayer’s position and rejected the AFIP’s tax assessment in which the wholesale price of
the Argentine market was applied to determine the income tax base (Section 11 of the Executive Order) instead of taking into account the Brazilian wholesale price (Section 8 of the ITL). In 1998, Volkswagen Argentina (VWARG) exported light vehicles to Cotia Trading S.A. (Cotia) (located in Brazil), a company engaged in the resale of such vehicles to Volkswagen Do Brasil (VWBR).

Judges based their position on several points. The main arguments are described as follows:

i) The application of the substance-over-form principle in order to establish the relationship among the parties involved in the transaction – The agreement entered into by VWARG, Cotia and VWBR showed that the latter was the beneficiary of the insurance policy in case the vehicles being transported were damaged. VWBR assured the purchase of certain quantities from Cotia (in other words, no market risks existed for Cotia). Cotia was merely engaged in rendering logistic services (the delivery of such vehicles), while Volkswagen A.G. (Germany) controlled VWARG and VWBR. Thus, the substance of the transactions was that the automobiles were exported from VWARG to VWBR (Cotia was merely a vehicle used to avoid paying taxes in Argentina).

ii) The AFIP requested information from the Brazilian Tax Administration under the Exchange of Information provisions of Section 26 of the Double Tax Treaty executed between Argentina and Brazil. In this sense, the judges understood that the FTA had enough information to apply Brazilian wholesale prices instead of Argentine wholesale prices (Section 8 of the ITL instead of Section 11 of the Executive Order).

iii) As mentioned in the previous case of DaimlerChrysler Argentina, VWARG also argued the differences between the prices for local dealers and those for exporters. The local prices included gross receipt tax, other taxes, and higher marketing and salesforce expenses, while export prices had to take into account another
cost structure due to a higher level of freights and insurance expenses, the possibility of deducting subsidies and export reimbursements, as well as the fact that exchange rate benefits of around 20% existed in 1998 in favor of exports activities (USD 1 = ARS 1.2).

iv) There is no deep functional and economic analysis due to the fact that the AFIP should have considered different automotive agreements executed between Argentina and Brazil (in force in 1998) to promote the import and export transactions of vehicles and parts.

2010

In 2010, four important cases were released by the Federal Tax Court.

In the case *Aventis Pharma S.A. v. AFIP*, released on 26 February 2010, Division D rejected the position of the AFIP in reference to FY 2000. The FTA disagreed with the taxpayer on (i) the deduction from sales of certain credit notes that were considered extraordinary; (ii) the adjustment in which the operating income was increased by including R&D reimbursements of expenses incurred by Aventis and paid by its related company, since they were considered indirect expenses; and (iii) the acceptance of a company that performed certain incomparable activities and incurred recurrent losses that turned down the interquartile range of results in the application of the TNMM.

The resolution was in favor of the taxpayer since the judges understood that (i) the credit notes received by the taxpayer were not generated in the extraordinary course of business since the agreement signed with the National Institute of Social Security for Retired and Pensioned People (INSSJP) did not distinguish between the existence of “traditional” and that of “extraordinary” discounts; (ii) if corporations in Argentina must include within the tax base all kinds of incomes, regardless of their “direct” or “indirect” character, indirect R&D costs must be considered part of the TNMM calculation; and (iii)
the AFIP did not exhaust all means to investigate the activities of the comparable company and its rejection was made merely based on a theoretical structure without supporting its position.

In the second case, Alfred C. Toepfer Internacional S.A. v. AFIP, released on 5 July 2010, the same Division D partially accepted the position of the FTA in reference to FY 1999. The AFIP determined a TP adjustment on the export prices of grains to related parties. While the FTA intended to calculate the income tax base considering the public quotation price of goods in the international market as of the date of the delivery of the merchandise (or the actual price agreed on if it were higher), the taxpayer argued that the method that established the application of such price as a benchmark was issued in 2003. Thus, for FY 1999, the price to be used as a benchmark had to be the public price as of the date of the agreements signed by the taxpayer.

However, the judge concluded that such methodology had to be applicable only to transactions in which the taxpayer could demonstrate the “certain date” of its agreements. Otherwise, the price to be used to determine the income tax base should be the price as of the day of the exportation, which is understood to have been performed on the date the goods should have been delivered.

In the third case, Volkswagen Argentina S.A. v. AFIP, released on 12 July 2010, the same Division D rejected the position of the FTA in reference to FY 1999. The AFIP challenged the TP adjustments applied by the taxpayer to its (i) bad debtors; (ii) idle capacity; and (iii) severance payments, because the taxpayer applied such adjustments only to its results, while the AFIP understood that the same adjustments also had to be applicable to the selected comparable companies.

After various recalculations of the TP adjustment amount, the judges learned that the tax administration did not perform an in-depth investigation. Neither did it analyze the case correctly nor did it
support the facts about the TP report that had been challenged at the administrative level.

Finally, in the fourth case, *Nobleza Piccardo S.A.C.I. Y F. v. AFIP*, released on 12 July 2010, two of the three judges of Division B rejected the position of the FTA in reference to FYs 1999 and 2000 and favored the taxpayer. The AFIP challenged the TP method (i.e., TNMM) selected by the taxpayer as the best method by which to analyze the exportation of cigarettes to its major shareholder located in Switzerland (that is, exports were invoiced to this country but were delivered to a company located in Chile).

The FTA noted that export prices to its related party in Switzerland were lower than the prices at which its shareholder later sold the products to a third-party distributor in Chile. The latter prices were in fact similar to the prices that Nobleza Piccardo established in the sale of the same products to third parties in Uruguay, Chile and Argentina (and similar products in FY 2000). Thus, the AFIP understood that the CUP method was the most appropriate by which to analyze the taxpayer transfer prices in FY 1999 and the cost plus method in FY 2000.

Even when Nobleza Piccardo argued that the price differences were based on the existence of a contract manufacture agreement entered into with its shareholder through which Nobleza Piccardo “transferred” many risks, the judges disregarded the nature of such agreement and favored the taxpayer when handing down their resolution because of, once again, the lack of research and supporting activities of what was argued by the tax administration during the audit process.

**2011**

On 28 April 2011, Court Room A of the Federal Tax Court rejected the AFIP’s position in the case of *Toyota Argentina S.A. v. AFIP*. Toyota applied the TNMM and determined an idle capacity adjustment to increase the comparability of its results to the selected comparable companies for its FY 1999. Even though the tax authority recognized
the existence of idle capacity in Toyota’s results, the AFIP disagreed with the way the taxpayer calculated the said adjustment and intended to adjust Toyota’s income tax. The tax authority believes the idle capacity of Toyota that exceeded the level equivalent to the idle capacity of the median value of the comparable companies (i.e., the extraordinary idle capacity) should be adjusted. Nevertheless, the interquartile range rule was not in force in FY 1999, so the judges favored the taxpayer’s position. The interquartile range rule also did not exist at that time and the results of the taxpayer’s calculations were within the full range of comparable companies’ results.

Unfortunately, the judges solved the case based on the legality principle and did not at all refer to the technical aspect of the corresponding way of determining idle capacity adjustments. The correct way or steps to take in order to come up with an idle capacity adjustment are still gray areas that should be resolved.

2012

The first two court judgments on TP – In 2012, the Federal Court of Appeals in Contentious Administrative Matters (FCACA) ruled on the two cases. In March, Room III of the FCACA confirmed the 2010 Federal Tax Court resolution in favor of Aventis Pharma S.A., and in August of the same year, Room IV of the FCACA validated the resolution of Division B of the Federal Tax Court in favor of Volkswagen Argentina S.A.

Also in March 2012, Room A of the Federal Tax Court partially validated the position of the AFIP in the case Oleaginosa Moreno SACIFIA v. AFIP. In reference to FY 2000, the fiscal authority did not agree with the taxpayer on (i) the use of average export prices and (ii) the use of the date when the prices were agreed on, instead of the date of the shipment of goods. The resolution was in favor of the taxpayer based on the fact that (i) the CUP method should be applied on a transaction-by-transaction basis and not to an average that would lead to setting off differences; (ii) according to Section 15 of the
ITL, for export goods quoted in transparent markets, the price on which to determine the income tax base has to be the market price on the date of the shipment of the goods. However, this regulation was not issued until 2003.

In April 2012, Court Room A of the Federal Tax Court in the case of Boehringer Ingelheim v. AFIP partially validated the position of the AFIP, which disagreed with the taxpayer on the following matters:

i) The AFIP rejected three comparable companies due to the fact that one of the companies performed noncomparable activities while the other two companies would be deemed related since they both had an exclusive supplier, directors in common, and interest in the capital. The tax court confirmed the position of the AFIP.

ii) The AFIP rejected the use of a net margin calculated by considering multiple FYs. The tax court confirmed the position of the taxpayer. Judges based their position with regard to the TNMM on the OECD TP Guidelines. The said guidelines consider that for both the tested party and its comparable companies, the information of multiple years should be taken into account for their margins to be comparable and that the effects of the production cycles and the economic conditions in the short term should also be considered.

iii) The AFIP applied the operating margin over the total costs (MOTC) margin, instead of the return on sales (ROS) margin that the taxpayer used for the manufacturing function. The tax court agreed with the position of the AFIP.

iv) The tax court warned that the “country risk rate” is not a conclusive parameter in itself and that it only becomes relevant when it is compared to that of another country or when its variation in time is analyzed.
v) The AFIP used the median value of the comparable to carry out adjustments. The tax court warned that it was not until GR 1122/01 was enacted that a statistical interquartile range with concepts such as “median” and “interquartile” was established. Therefore, it concluded that the taxpayer complied with the law because this rule did not have a retrospective effect.

2013

For the first time, the Federal Tax Court analyzed the scope of the concept “economic bonding,” in the Akapol S.A. v. AFIP TP case.

The tax court states that Appendix III of the GR 1122/01 structures a set of assumptions, although one can infer elements to conclude that related parties share an economic bond and it obviously does not involve a change in the definition set out in the regulations. In this way, it is understood that in times when control is not clear (due to the direct or indirect participation in the capital or in the direction of business) but represents a functional bonding assumption, the central issue is to define whether or not the resulting relation allows one party to determine the activities of the other. In other words, the degree of subordination to the interests of another should be discerned.

A commercial exclusive distribution agreement cannot set by itself the economic bonding that reveals, directly or indirectly, the direction or control of the same natural or legal persons, nor the power of decision to guide or define other activities, as required by law.

Although the agreement has revealed a certain identity of interests of business as a result of exclusive distribution, it is not sufficient to prove the economic bonding necessary for the purposes of the TP application since it has not demonstrated the ownership by one of these companies of a significant portion of the capital of the other, or of the identity components of both companies in terms of business direction or profit-sharing. In addition, the agreement has not verified a substantial participation or predominance in the mutual interests so that there is a common use of personal tangibles or intangibles, which
assumes that a decision of one of the companies is conditional on the willingness of the other.

2014

On 2 September 2014, the FSC in the case of *Toyota Argentina S.A. v. AFIP* rejected the AFIP’s position. This is the first judgment of the FSC with regard to TP topics. From this judgment, two fundamental aspects emerge: On one hand, there is the strictly legal issue regarding the application of the principle of legality in tax matters, and on the other, there is the concept of comparability adjustments for unusual or extraordinary circumstances.

In 2012, the FCACA referred to the technical aspects of the corresponding way to determine idle capacity adjustments. The judges relayed that they considered valid the methodology followed by Toyota for determining their rate of return. This calculation included an adjustment mechanism that increased the results of Toyota by recognizing which parts of the expenses were related to the idle plant capacity in 1999. The FCACA validated Toyota’s adjustment mechanism and considered the company’s extraordinary idle capacity registered during FY 1999 because in the case of the application of Article 15 of the ITL, these unusual events were essential to homogenize the sample to those of comparable companies. The FCACA has since introduced the concept of “unusual event.”

This provides a foundation for the special treatment of extraordinary costs, which means that any factor or circumstance that is present in the company under analysis but is absent from the companies that are used as comparable should result in an adjustment or at least an assessment of the effect upon the comparability.

In the 2014 judgment, the FSC reminded the AFIP of the full force and importance of the principle of legality, with particular emphasis on tax matters governed by constitutional mandate. The FSC states that the analogy in tax matters, likewise the retroactivity in the application of the regulations corresponding to tax matters, is prohibited.
On 9 September 2014, Room C of the Federal Tax Court partially validated the position of the taxpayer in the case Oleaginosa SA v. AFIP. While the FTA intended to calculate the income tax base for FY 1999, considering the public quotation price of goods as of the date of the invoices, the taxpayer argued that the method that established the application of such price as a benchmark was issued in 2003. Thus, for FY 1999, the price to be used as a benchmark had to be the public price as of the date of the agreements signed by the taxpayer. Additionally, the fiscal authority did not agree with the taxpayer on the use of average export prices. In this regard, the resolution was in favor of the FTA based on the fact that the CUP method should be applied on a transaction-by-transaction basis and not to an average that would lead to setting off differences.

2015

On 11 August 2015, the FCACA ruled on a case where a debt, incurred as a result of import from a related party was considered by the FTA as a capital contribution because of the application of the “principle of economic reality” established in Section 2 of the Tax Procedure Law. The FTA also argued that those transactions were not in accordance with market practices. On the other hand, the FCACA states that there are precedents where courts mention that peculiar modalities would exist in multinational groups. Additionally, the FCACA cited comments from the OECD Transfer Pricing Guidelines in the same way.

2016

On 14 September, Court Room B of the Federal Tax Court rejected the AFIP’s position in the case of Vicentin SAIC. The support of the adjustment made by AFIP was that the export prices were agreed at values lower than the FOB indices of the Agriculture Secretariat, for which reason they were replaced by those FOB prices. The Court’s decision held that according to the evidence given, the prices of exports are within the margins determined by the application of the
daily prices’ dispersion obtained in the Chicago Stock Exchange on the official FOB of the Agriculture Secretariat, that is, the prices are adjusted to the normal market conditions between independent parties, even if the prices were higher or equal to the official FOB prices in some operations.

2017

On 11 July 2017, Room II of the FCACA ruled on the mentioned Vicentin SAIC case. In the opinion of this court, the arguments taken into consideration by the AFIP to make the adjustment, yield to the merits of the evidence provided by the taxpayer; therefore, the FCACA decided to rule in favor of the taxpayer.

On 6 September 2017, Court Room A of the Federal Tax Court confirmed the AFIP’s position in the case of Nidera S.A. Although the FTA intended to calculate the income tax base for FY 2001 while considering the public quotation price of goods as of the date of loading, the taxpayer argued that such rule was issued in 2003. The AFIP explained that the criteria were applied because comparable transactions carried out by third parties were agreed at prices in accordance with the public quotation on the loading date. The Federal Tax Court understood that the AFIP did not apply the six paragraph method issued in 2003 but applied the comparable uncontrolled price method. Nidera also could not use the contracts executed on the date of the agreement because the taxpayer could not demonstrate the “certain date” of its agreements, as these were not recorded in accounting books nor in any official records, not to mention that they were in a foreign language.

On 10 August 2017, the Federal Tax Court agreed with the AFIP’s position, according to the majority opinion of Court Room A, in the case of Stiefel Argentina S.A. and GlaxoSmithKline Argentina S.A. In this case, the AFIP held that the “other income” considered in calculating the operative income in the FY 2005 transfer pricing analysis was not operative. The taxpayer held that the FTA resolution
did not take into account the evidence given. While one of the judges voted in favor of the taxpayer, the other two voted in favor of the AFIP. The first judge said that the AFIP could not justify why the other incomes were not operative. On the other hand, the other two held that the taxpayer did not give that evidence before this Federal Tax Court.

2019

On 18 June 2019, the FCACA ruled on a case where the taxpayer included among its profits credit notes issued by its foreign related parties. The AFIP objected to the calculation of these amounts in the context of transfer pricing studies. The Federal Tax Court validated the fiscal criterion, thus confirming determination of income tax. The FCACA, in turn, ratified the decision.

2021

On 2 September 2021, the Supreme Court of Justice in the frame of the case law “Molinos Río de la Plata S.A.,” interpreted that in situations where there is an abusive use of a tax treaty — such as the cases of treaty shopping — the FTA could deny the application of the treaty to a taxpayer, firstly under the anti-elusion clauses included in such treaty, and, whenever the treaty does not include such clauses, based on constitutional principle of “reasonableness.”

Tax system

Legal entities domiciled or incorporated in Argentina are subject to income tax on all their income, whether sourced in Argentina or in a foreign country (worldwide-sourced income).

Trends and perspectives

The recent rules issued by the AFIP show that the FTA is able to monitor closely, in a timely manner, and without much effort and resources, market or industry trends as well as taxpayers’ activities
and results, and their compliance with the TP regulations and the application of penalties to nonfulfillment thereof. This, in turn, will generate more audits in the following years. In addition, the number of audit cases initiated is proof of the fiscal pressure that has increased year after year in Argentina. It is clear that FTA activity will focus on an in-depth analysis and will request supporting documentation of everything stated in the TP reports.

The TP regime is more complex in Argentina. Intercompany transactions represent a big portion of the Argentine gross domestic product, so that the focus on multinational companies’ behavior will be one of the hot topics of the AFIP and government representatives in their agenda. Hence, taxpayers should concentrate not only on complying with the formal requirements of the TP regime but also on performing a strong analysis of the transactions under review to avoid being challenged, and in the second instance, take advantage of their analysis in order to establish efficient TP strategies for the group.

Even though Argentina is not a member of the OECD, it is a member of the Group of Twenty (G20). The G20 finance ministers called on the OECD to develop an action plan that will address BEPS issues in a coordinated and comprehensive manner.

In light of the strong interest and support expressed on several occasions by the G20, it is proposed that interested G20 countries that are not members of the OECD will be invited to be part of the “BEPS Project” as associates, which means that these invited countries will be on equal footing with the OECD members (including at the level of the subsidiary bodies involved in the work on the BEPS), and will be expected to associate themselves with the outcome of the BEPS Project. Thus, it is expected that in the following years, there will be changes to TP laws and resolutions in Argentina.
Bolivia
Introduction

During 1986, an economic reform was carried out in Bolivia with the main objective of counteracting the galloping hyperinflation generated during the 1983-1985 administrations, causing a decrease in tax collection, which translated into a fiscal pressure that did not exceed 1% of the gross domestic product.

This economic reform could not have been conceived without considering a reform also in the tax field, replacing the tax regime that until then prevailed in Bolivia with the enactment of Law 843 of 20 May 1986. This rule introduced a series of taxes (which are mostly in force to this day), including the income tax called Tax on Presumed Income of Companies (IRPE).

Subsequently, the Tax Reform Law was partially modified by Law 1606 of 22 December 1994, creating the Tax on Business Profits (IUE) to replace the IRPE. Currently the IUE is the tax levied on the income of legal entities, sole proprietorships, independent professionals, etc.

Until 2014, Bolivia did not have a specific transfer pricing (TP) rule. But, on 4 April 2014, with the objective of promoting investments in the country, Law No. 516 was enacted establishing the general legal and institutional framework for investments in the country. It also establishes that within a 90-day period, the Ministry of Economy and Finance must elaborate on TP rules.

In July 2014, Bolivia introduced TP statutory rules for the first time by amending Section 45 of the Bolivian Tax Law (BTL) and by adding Section 45 bis and 45 ter. These rules adopted the arm’s length principle as Bolivia’s international TP standards, while retaining certain global formulary apportionment rules. These modifications were introduced through the enactment of Law No. 549 (“Law”). The Law also amended Law No. 1990 (“General Customs Law”). On 31
December 2014, the TP rules were complemented by Executive Order 2,227 (“EO 2,227”).

On 30 April 2015, Bolivia’s National Revenue Service issued Board Ruling 10-0008-15 (“BR 10-0008-15”), “Transfer Pricing in Transactions between Related Parties,” which sets out an operational framework governing compliance with the obligations imposed on taxable persons who enter into transactions with related parties.

Who is obliged?

The new rules cover transactions between taxpayers domiciled, residing or established in Bolivia and related parties.

Economic bonding criteria / related parties

The law considers that related parties exist when a natural or legal person owns or is involved in the management, control and administration of capital in another company or when a third party participates directly or indirectly in the management, control or administration in two or more companies or holds ownership interest therein. Section 2 of EO 2,227 mentions that two parties are considered related under the following circumstances:

1. A national, natural or legal person takes part, directly or through a third party, in the management, control, administration of, or owns capital in, one or more entities abroad, or in branches, affiliated companies or subsidiaries of companies abroad that carry out transactions in the national territory.

2. A natural or legal person located abroad participates directly or through a third party in the management, control, administration of, or owns capital in, one or more national entities or branches, affiliated companies or subsidiaries of foreign companies that carry out transactions in the national territory.
3. A natural or legal person who performs domestic operations maintains direct or indirect financial and/or commercial relations with natural or legal persons who are located or who carry out operations in low-tax countries or regions.

4. A branch, affiliated company or subsidiary in national territory maintains operations with its headquarters abroad or vice versa.

5. Commercial and/or financial operations take place between a branch, affiliated company or subsidiary domiciled locally and another within the same group that is domiciled abroad.

6. Commercial and/or financial operations take place between a national person and another domiciled abroad, whose owners, shareholders, partners, managers, members of the board or senior staff are related by blood up to the fourth degree and second degree of affinity.

The arm’s length principle

Arm’s length pricing

Arm’s length prices, values or profit levels are defined as “those that would have been agreed upon or derived by unrelated parties in comparable transactions and comparable circumstances.”

The Law establishes that in all financial and commercial operations between related parties, the value of such transactions must be equal to that agreed upon by independent parties in comparable market transactions.

Comparability criteria

Section 5 of EO 2,227 establishes the following:

- The price agreed upon in a commercial and/or financial operation will be compared with transactions carried out in comparable markets, as if it were under arm’s length conditions.
- Two or more operations are deemed comparable if none of the differences between them substantially affects the price or value of the goods or services or the operation’s profit. In cases where there are substantial differences, adjustments can be made to eliminate them.

- Comparability of transactions must be determined, taking into account the following:
  1. Specific features of the goods or services under analysis
  2. Functions undertaken by the parties in relation to the operations under analysis, identifying the risks assumed and weighing the assets employed
  3. Contractual terms giving rise to the operations, taking into account the responsibilities, risks and benefits assumed by each of the parties
  4. The markets’ features and other economic factors that could affect the commercial and/or financial operations
  5. Commercial strategies, such as penetration policies, stay or extension of the markets as well as any other strategy that could be relevant in each case

**Transfer pricing methodology**

The rules provide for the use of the following TP methods:

- Comparable uncontrolled price (CUP) method
- Resale price method (RPM)
- Cost plus method (CPM)
- Profit split method (PSM)
- Transactional net margin method (TNMM)
Notorious price for transactions in transparent markets

Whenever it is impossible to determine the transaction’s value following one of the previous six methods, another method aligned with the nature and economic reality of the operation may be applied.

Best method rule

Section 7 of EO 2,227 provides that the most appropriate method should be applied in relation to the nature, the economic reality and the specific circumstances of each case.

Use of statistical tools

A range of “differences of value” is described in Section 6 of EO 2,227. An upper limit (“Rup”) and a lower limit (“Rlow”) are defined, each of which must be calculated applying the following formula:

\[
R_{down} = \left[ L_{low} + \frac{(R_{up} - L_{low})}{4} \right] \quad R_{up} = \left[ L_{low} + \frac{3(R_{up} - L_{low})}{4} \right]
\]

Where:

\(L_{low}\) = Lower limit of the sample (i.e., the minimum value)

\(L_{up}\) = Upper limit of the sample (i.e., the maximum value)

If the price (price, amount of transactions or profit margin) of the transaction is within the range of differences of value, such price (price, amount of transactions or profit margin) is deemed to be at arm’s length.

If the price (price, amount of transactions or profit margin) of the transaction is outside of the range of differences of value, and as a consequence there is a reduction in the tax base for determining the corporate income tax (IUE), a TP adjustment must be performed. This adjustment has to be calculated using the following formula:
\[ R_2 = L_{low} + \frac{2(L_{up} - L_{low})}{4} \]

Where:

- \( R_2 \) = Average value of the range
- \( L_{low} \) = Lower limit of the sample (i.e., the minimum value)
- \( L_{up} \) = Upper limit of the sample (i.e., the maximum value)

**Adjustments**

Article 8 establishes that the tax administration can verify and investigate whether the commercial and/or financial transactions carried out with related parties are valued in similar conditions between third parties in comparable transactions.

If taxpayers do not comply with the above-mentioned, the authorities will adjust cost, expenses, deductions, incomes, profits, losses or any other component of the tax return submitted by the taxpayer.

Article 11 of BR 10-0008-15 further provides that, notwithstanding the determination made by the taxpayer, declared and filed through E-Form 601 and the TP study, the tax authority (i.e., *Servicio de Impuestos Nacionales* or *SIN*) has the power to apply adjustments that it considers necessary.

Also, in the development of its control, verification, inspection and investigation tasks, the tax authority can determine whether there were economic bonding criteria in the taxpayer’s operations as well as whether these tasks were valued at arm’s length prices, applying adjustments whenever it is considered applicable.

**OECD interpretation sources**

In Bolivia, there are no specific TP rules. In this sense, the OECD standards can be invoked in the case of controversies with local authorities.
Financial information

Bolivia has generally accepted accounting principles (GAAP) converged with the International Financial Reporting Standards (IFRS).

Transfer pricing obligations

The requirements for Bolivian taxpayers are as follows:

- Taxpayers should file a TP study together with the financial statements and the income tax return. The BR 10-0008-15 provides that the TP study must be prepared both in hard copy and electronic format, written in Spanish, stated in Bolivian currency, and signed by the taxpayer’s legal representative or the holder of the tax identification number (NIT), as applicable.

- They must also file an annual electronic form, i.e., Form 601 – Informative Return of Related Parties Transaction.

Contents of transfer pricing documentation

At the minimum, the TP study must include:

1. An index

2. An executive summary that includes a summarized but precise list of the taxpayer’s related parties, the nature of the relationship, the transactions performed and the selected TP method.

3. A functional analysis containing:
   - Background information on related parties
   - Description of the organizational and corporate structure of the group and of its composite entities
   - Description of the nature of the relationship between related parties
Business activities conducted by the taxpayer and the markets where it operates

Commercial strategies (aspects or factors that influence the price determination)

Description of the transactions, agreements or contracts governing relations between related parties, including the activities performed, the assets used and the risks assumed by the parties

Financial information

4. Economic analysis containing:

Description and quantification of the transactions performed with related parties

Description and election of the TP valuation method/s used for justification of the selected TP valuation method

Selected uncontrolled comparables and the sources from which the comparable information was obtained

Definition of a statistical interquartile range

Analysis and description of the results obtained

Calculation of the TP adjustment, when applicable

5. Conclusions

Contents of the transfer pricing informative returns

Subjects required to submit information

Taxable persons who enter into transactions with related parties are required to file the following:

1. E-Form 601 and the TP study (in physical and digital format) for transactions equal to or higher than BOB 15 million (approximately USD 2.155 million)\(^{35}\)

2. E-Form 601 for transactions equal to or higher than BOB 7.5 million (approximately USD 1.077 million)\(^{36}\) and less than BOB 15 million (approximately USD 2.155 million)\(^{37}\)

3. For transactions below BOB 7.5 million (approximately USD 1.077 million), taxpayers are required to keep the necessary documentation to demonstrate that their related-party transactions were conducted at arm’s length or that the necessary adjustments were made.

Filings: Place and date of filing

A hard copy of the TP study is to be filed with the tax authorities’ agencies or Large Taxpayers Offices (GRACO) in the appropriate jurisdiction, together with the financial statements for the fiscal year. The electronic version of the TP study must be submitted through the National Revenue Service webpage. The latter also applies to the filing of E-Form 601.

The TP study, both in hard copy and electronic format, and/or E-Form 601 must be filed within the term established for the presentation of the affidavit and the payment of the corporate income tax in

\(^{35}\) USD amounts are rounded after using the retail exchange rate published by the Central Bank of Bolivia exchange of approximately USD 1 = BOB 6.96.  
\(^{36}\) Ibid.  
\(^{37}\) Ibid.  
\(^{38}\) Ibid.
Consequences of transfer pricing adjustments

The tax authority, prior to the issuance of a verification order or audit, could review whether the commercial and/or financial transactions carried out between related parties were assessed in conditions similar to those carried out by independent parties.

Whenever the tax authority verifies differences between the price agreed upon between related parties and the price agreed upon between independent parties, and these differences result in a decrease in the taxable base, the tax authority will make the adjustments and determine the new price value.

The difference in value will be established in the *vista de cargo* that will include details of the new transaction value, the comparability analysis, the methodology used for the new value, and the corresponding omitted tax. Once the *vista de cargo* is issued and published, the process will continue as established in the Bolivian Tax Code.

Penalties

The following constitute noncompliance with formal duties:

- Failure to submit or late submission of the TP study in hard copy format
- Failure to file or late filing of the TP study in digital format
- Failure to file or late filing of E-Form 601
- The submission and/or filing of the TP study containing errors, incomplete information and/or that did not comply with the provisions established by Board Ruling 10-0008-15
• Sending E-Form 601 containing errors, incomplete information and/or that did not comply with the filing instructions indicated in Board Ruling 10-0008-15

Failure to comply with formal duties mentioned in the preceding paragraph must be dealt with as follows:

Penalties - TP study

<table>
<thead>
<tr>
<th>Action</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to submit the TP study in hard copy format on time</td>
<td>Fine of UFV 5,000 (\text{Unidades de Fomento de la Vivienda (UFVs)}), 39 approximately USD 1,707</td>
</tr>
<tr>
<td>Failure to file the TP study in digital format on time</td>
<td>Fine of UFV 5,000, approximately USD 1,707</td>
</tr>
<tr>
<td>Late submission of the TP study in hard copy format</td>
<td>50% of fine of UFV 5,000, approximately USD 853</td>
</tr>
<tr>
<td>Late filing of the TP study in digital format</td>
<td>50% of fine of UFV 5,000, approximately USD 853</td>
</tr>
<tr>
<td>Submission of the TP study containing errors, incomplete information and/or that did not comply with the provisions established by Board Ruling 10-0008-15</td>
<td>50% of fine of UFV 5,000, approximately USD 853</td>
</tr>
</tbody>
</table>

39 La unidad de Fomento de la Vivienda (UFV) is a reference index that shows the daily evolution of prices in Bolivia and is calculated on the basis of the Consumer Price Index (CPI) published by the National Institute of Statistics (INE). As of February 2022, the exchange is 1 UFV=BOB 2.3762.
Filing of the TP study containing errors, incomplete information and/or that did not comply with the provisions established by Board Ruling 10-0008-15 | 50% of fine of UFV 5,000, approximately USD 853

Penalties – E-Form 601 (Form 601 – Informative Return Affidavit of Related Parties Transaction)

<table>
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</tbody>
</table>

Additional regulations

Advance pricing agreements

In Bolivia, there are no rules regarding advance pricing agreements (APAs).

Thin capitalization

Bolivia does not have specific thin capitalization rules. However, the law establishes that interests paid on capital invested in loans to the company by its owners or partners are not deductible for the portion in
which those interests exceed the value of the London Interbank Offered Rate (LIBOR) plus 3% (LIBOR + 3%) in nonlocal operations. In local operations, the interest is not deductible when it exceeds the value of the bank lending rate (published by the Central Bank of Bolivia), with effect on each payment date.

Deductible interest cannot exceed 30% of the total amount of interest paid by the company to third parties in the same year.

Intangibles

There are no specific rules for intangibles developed locally and used by subsidiaries abroad. There are also no general rules that allow the tax administration to presume income when transactions are conducted with related companies.

Intragroup services

Payments for services received, such as management, legal, accounting, finance, technical and other services should be directly related to the part that corresponds to each party, whenever individualization is possible. If individualization is not possible, the payment for these services should be distributed between the part, taking into account the following: (i) the nature of the service; (ii) the circumstances of the provision of the services; and (iii) the benefits obtained by the parties.

The deductibility of these services will depend on whether the services were effectively rendered and related to the taxable activity.

Transfer pricing and customs

Law No. 549 was published in the Official Gazette on 21 July 2014. It introduced amendments to Law No. 1990 (the General Customs Law) in order to include TP rules.

Law No. 549 modifies Article 45 of Law 843, introducing the transfer pricing regime applicable to commercial and/or financial transactions.
carried out between related companies for corporate income tax purposes.

On 31 December 2014, the Bolivian government enacted Law 549 through Supreme Decree 2227, which establishes the concept of a related party, along with a requirement to submit a transfer pricing study.

The Supreme Decree establishes that taxpayers must submit a transfer pricing study to the tax office with regard to the transactions carried out between related parties, together with the statutory financial statements and the annual corporate income tax return.

The main amendment authorizes the customs administration to require TP studies from importers regarding their transactions with related parties.

Law No. 549 also indicates that TP studies will be required if there is reasonable doubt regarding the declared value in transactions among importers and their related parties.

The objective of this requirement is to evaluate whether relations among parties have affected the transaction’s value for customs purposes.

Law 549 has included in Article 145 of Law 1990 that:

[…] if there is reasonable doubt as regards the value (or price) declared before the Bolivian Customs in the case of commercial transactions carried out between related parties, the Bolivian Customs authorities can apply and/or require the importer to present a transfer pricing study to demonstrate whether the relationship between the buyer and the seller has or has not affected price determination for the application of the transaction value purposes […]
Technical transfer pricing committee

Section 10 of EO 2,227 establishes the creation of the Technical Transfer Pricing Committee (TTPC), which depends on the Economic and Public Finances Ministry. The establishment of the TTPC aims to create general guidelines on TP, perform evaluations and monitoring, and analyze suggestions from the tax authority regarding TP matters.

Countries with double taxation agreements

International double taxation, as we know, happens when two countries pay the same tax for the same operation, usually income tax (IUE). To avoid this, agreements are signed to avoid double taxation.

Currently, Bolivia has tax treaties in force with the following countries:

1. Argentina  
2. France  
3. Germany  
4. Spain  
5. Sweden  
6. United Kingdom

Additionally, Bolivia is a member of the Andean Community (CAN), which includes Colombia, Ecuador and Peru. Decision 578 of the CAN established a regime, in force since 2004, to avoid double taxation and prevent tax evasion. This Regime applies to any subject domiciled in any of the member countries of the CAN, and concerns income and wealth taxes. In Bolivia, this applies mainly to income tax. The main aim of this Regime is to avoid double taxation of the same income or assets at the community level.

Countries with tax exchange information agreements

According to Decision 40 of the CAN, Articles 19 and 20 state that member countries of the Andean Pact will, by mutual consent, exchange information regarding any difficulty or doubt in relation to administrative control as necessary in order to avoid tax fraud.

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All information exchanged will be considered confidential and cannot be transmitted to any person other than the approved authority from the tax office.

Bolivia has entered into Tax Exchange Information Agreements (TEIAs) with the following countries:

1. Multilateral agreement – Colombia, Peru, Ecuador and Bolivia
2. Argentina

Tax system

In Bolivia, taxation relies on the “source principle.” Therefore, the income and equity generated and located outside the territory of Bolivia (in other words, of a foreign source) is excluded from the scope of the taxes.

Trends and perspectives

Even though Bolivia is not a member of the OECD, further TP regulations are expected in the following years and changes to regulations in Bolivia are likely, as a consequence of the BEPS action plan that is to be implemented.
Brazil
Introduction

Transfer pricing (TP) rules have applied in Brazil since Law No. 9,430/96 came into force in January 1997. The system adopted is one that determines the maximum amount of deductible expenses and the minimum amount of taxable revenues for Brazilian entities engaged in transactions with related parties established outside of Brazil or in cross-border transactions, which are deemed “controlled” under Brazilian laws.

Who is obliged?

Legislation aims at cross-border transactions between Brazilian residents and their related foreign parties, including residents of low-tax jurisdictions or those under a privileged tax regime, whether or not they are related parties.

Economic bonding criteria / related parties

Law 9,430/96, Article 23 states that entities are deemed related parties of a Brazilian taxpayer for TP purposes if they meet the following requirements:

1. Its parent company resides abroad.
2. Its branch or agency resides abroad.
3. The individual or legal entity is residing or domiciled abroad, and its interest in the capital of the Brazilian taxpayer characterizes it as a controlling shareholder or affiliate party, as defined in the Corporate Law.
4. The legal entity residing abroad is characterized as a controlled entity or an affiliate party of the Brazilian taxpayer, pursuant to the Corporate Law.
5. The legal entity that is residing abroad and the Brazilian taxpayer are under common corporate or administrative control or at least
10% of the capital of each entity is owned by the same person or legal entity.

6. The individual or legal entity that is residing abroad, together with the Brazilian taxpayer, holds interest in the capital of a third legal entity, whose connection characterizes them as the latter’s controlling shareholders or affiliate parties, as defined in the Corporate Law.

7. The individual or legal entity is residing and domiciled abroad, and is associated, in the form of a consortium or joint dominium (condominium), pursuant to Brazilian law, to any enterprise.

8. The individual residing in Brazil is a relative up to the third degree (as defined in the Brazilian Civil Code), the spouse or companion of the Brazilian company’s management, or a direct or indirect controlling shareholder.

9. The individual or legal entity residing or domiciled abroad has exclusive rights, as agent or distributor, to purchase and sell goods, services and rights of the Brazilian entity.

10. The individual or legal entity residing or domiciled abroad has a Brazilian entity as an exclusive agent or distributor through which to purchase or sell goods, services or rights.

The TP regulations also apply in transactions performed by an entity domiciled in Brazil, through an interposed party (third party) that is not considered a related party, to the extent that this interposed party deals with another party abroad that is considered a related party to the Brazilian entity referred to.

The arm’s length principle

Arm’s length pricing

The current TP legislation provides rules and methods with which to determine maximum amounts of deductible expenses and minimum
amounts of taxable revenues for Brazilian entities engaged in transactions with related foreign parties (or foreign residents in low-tax jurisdictions or under a privileged tax regime). The result from any chosen Brazilian TP method is deemed the Brazilian arm’s length price (the so-called parameter price).

In contrast to the majority of countries with TP regulations, Brazil does not follow the arm’s length principle as is internationally established in the OECD TP Guidelines. The main peculiarities of the Brazilian TP rules are the following:

- The extensive list of deemed related foreign parties
- The need to calculate the parameter price per product, service or rights (the basket approach is not allowed)
- The minimum/maximum statutory profit margins established per economic sector regardless of the risks taken, functions performed and/or assets used by the Brazilian taxpayer
- The inapplicability of the Brazilian TP rules on royalty payments from the Brazilian taxpayer, provided there is a contract registered with the Brazilian Patent Office

Comparability criteria

For most of the applicable methods, comparability factors do not apply. In cases of the comparable uncontrolled price (CUP) method and of the average price of export sales method, the taxpayer is allowed to use certain comparable transactions (that is, with the same or similar products, services or rights). However, the comparability allowed under the Brazilian TP legislation is very limited. Brazil does not adopt the benchmark analysis (based on the functions performed, risks taken and assets used) normally applied in the case of countries that adopt the TP Guidelines. Moreover, Brazilian companies must compare the prices of the transactions rather than profit margins or return on earnings.
Transfer pricing methodology

The Brazilian TP rules provide four methods applicable in the case of import transactions with a related party or other parties subject to the TP legislation. The four methods are as follows:

- **Comparable uncontrolled price (CUP) method** – This method is defined as the weighted arithmetical average of the sales price of goods, services or rights, either identical or similar, prevailing in the Brazilian or foreign markets, in transactions of purchases and sales performed by the interested company or by third parties, under similar payment conditions. In other words, the Brazilian taxpayer compares its costs, expenses and charges of goods, services or rights imported from a related party, during a given period of time, with such weighted arithmetical average.

- **Production cost plus profits method (CPM)** – This method is defined as the weighted average production cost of goods, services or rights, either identical or similar, including the taxes levied on exports in the country where they have been originally produced and a markup of up to 20%, calculated over the production cost.

- **Resale price less profit method (RPM)** – This method is based on a proportional calculation that takes into account the imported value and the value added in Brazil. It also considers the arithmetical average of the resale prices of goods, services or rights (in Brazil), unconditional discounts granted, taxes and contributions imposed on sales, commissions and brokerage fees paid, and a profit margin that may vary according to the economic sector of the company (between 20% and 40%).

- **Exchange import price method (PCI)** – This method is based on the quotation prices of the goods or rights in the future and of commodities exchanges that are internationally recognized and listed by tax authorities, adjusted upward or downward of the
average market premium and other variables\textsuperscript{40} provided in the applicable legislation at the transaction date or at the date of registration of the import declaration, if this date is not identified.

In the case of export transactions, the Brazilian TP rules provide five methods, which are as follows:

- **Average price of export sales method (CUP)** – This method is defined as the arithmetical average of export prices adopted by the Brazilian taxpayer to unrelated parties or by other domestic exporters of goods, services or rights, either identical or similar, during the same period of calculation of the corporate income tax and under similar payment conditions.

- **Wholesale price in the destination country less profits method (WPM)** – This method is defined as the arithmetical average of the sales of goods, either identical or similar, adopted in the wholesale market in the country of destination, with similar payment conditions, after deducting the taxes computed on the sales price charged in the country of destination and a profit margin of 15% over the wholesale price.

- **Retail price in the destination country less profits method (RPM)** – This method is defined as the arithmetical average price of goods, either identical or similar, adopted in the retail market in the country of destination, with similar payment conditions, after deducting the taxes computed on the sales price charged in the country of destination and a profit margin of 30% over the retail price.

\textsuperscript{40} Other variables that may be accepted as adjustments are (i) payment conditions; (ii) quantities negotiated; (iii) climatic influences on the imported goods; (iv) agency costs in purchase and sale transactions carried out by unrelated parties, understood as the intermediation costs charged by exchanges that are internationally recognized; (v) packaging; (vi) freight and insurance; and (vii) costs of landing at the port, internal transport, storage, and customs clearance, including the import taxes and duties.
• Acquisition or production cost plus taxes and profits (CPM) – This method is defined as the arithmetical average of the acquisition or production costs of goods, services or rights exported, including the taxes levied on exports in Brazil, and a minimum profit margin of 15% over the sum of costs and taxes.

• Exchange export price method (PECEX) – This method is based on the quotation prices of goods or rights in the future and of commodities exchanges that are internationally recognized and listed by tax authorities, adjusted upward or downward of the average market premium and other variables provided in the applicable legislation, at the transaction date.

The use of the PCI and the PECEX methods is mandatory for commodities since 1 January 2013.

Change of profit margin – specific request to the tax authorities

In accordance with Ordinance MF No. 222 (enacted on 24 September 2008), taxpayers may request tax authorities for a change in the statutory profit margins.

Ordinance MF No. 222/08 brings detailed directives for the amendment of fixed profit margins established by the TP rules, indicating, for each method, the documents and data that must be presented to the competent authorities. This ordinance also brings the possibility of requesting a change in the profit margins before the end of the term of a benefit initially granted by the Federal Revenue Department, as well as of presenting studies confirming that the pleaded change is in accordance with the practices adopted by nonrelated companies in Brazil or abroad.

From a practical standpoint, however, the rules have not resulted in a new environment in terms of communication between taxpayers and

41 Id.

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the Brazilian tax authorities in order to determine a fair arm’s length price in transactions carried out with related foreign parties. Up until now, there is no public information about any request filed by a taxpayer to request such change in the profit margin.

Best method rule

There is no best method rule applicable in Brazil, except for commodities that must have been subject to the PCI or the PECEX since January 2013. Taxpayers are free to choose the TP method that results in the lowest adjustment or none at all. Brazilian taxpayers are not required to substantiate the rationale for the selection of a certain TP method in the TP documentation.

Use of statistical tools

The use of statistical ranges is generally not applicable. Statistical data may be useful if the taxpayer intends to file before the Ministry of Finance a request aimed at changing the statutory margin of any method, or if the data is used as a complementary means of supporting documentation.

Adjustments

For identical goods, services and rights, TP regulations allow adjustments related to the following:

- Payment conditions
- Quantities negotiated
- Obligations related to the warranty for goods, services or rights
- Obligations related to the promotion of goods, services or rights by means of marketing and advertising
- Obligations for quality control, standard of services and health conditions
• Agency costs in purchase and sale transactions carried out by unrelated parties

• Packaging, freight and insurance

• Costs of landing at the port, internal transport, storage, and customs clearance, including the import taxes and duties, all in the destination country of the goods

Besides these adjustments, in the case of similar goods, services or rights, the regulations allow adjustments resulting from physical differences or differences in content. In this context, two or more goods will be considered in similar conditions of use when, simultaneously, they: (i) have the same nature and function; (ii) are mutually replaceable; and (iii) have equivalent specifications.

The use of multiple-year information is not applicable, except with respect to the use of “the 10% net income safe harbor,” where the margins of the current year and the two prior years should be taken into account.

In addition, please note that for the applicability of the CUP on import transactions, there is also the possibility of using data from previous years under certain circumstances.

Selected and secret comparables

The comparable methods allow comparison of prices of products, services or rights. Taxpayers can use external data on import transactions, in the sense that prices agreed upon between nonresident parties may be used as a parameter. On export transactions, the comparison can be made only with prices used by the taxpayer or another Brazilian exporter. Therefore, the use of external transactions is limited in the case of export transactions.

Secret comparables are not used in practice. In fact, due to the lack of an appropriate local database, the fixed profit margin methods existing
in Brazil, and the absence of a best method rule, taxpayers in Brazil generally do not adopt comparable methods.

The tax authorities have a database called Siscomex, in which all import and export of goods must be registered. This database is commonly used by the tax authorities to apply the CUP. Moreover, other information provided by taxpayers (such as tax ancillary obligations and exchange contracts) must be used by the Brazilian tax authorities to control import and export transactions with goods, services and rights.

**OECD interpretation sources**

Even though Brazilian TP legislation was inspired by the OECD Model Convention, Brazil does not follow the arm’s length principle as globally established in the OECD TP Guidelines as it is not a member of this organization.

On 30 May 2017, the Brazilian Ministry of Finance and the Brazilian Ministry of Foreign Affairs sent a letter to the secretary-general of the OECD, requesting the commencement of the process for Brazil to become accepted as an OECD member.

In this respect, the OECD and the Brazilian Federal Revenue (RFB) launched a joint project in 2018 in order to examine the similarities and divergences between the Brazilian and OECD transfer pricing rules.

In December 2019, the OECD and the RFB issued a joint report on convergence of the Brazilian transfer pricing rules with the OECD standard. In summary, the RFB and the OECD identified the gaps and divergences between the Brazilian and the OECD transfer pricing rules, and agreed on two potential options for aligning Brazil's transfer pricing rules with the OECD standard.

In July 2020, the OECD and the RFB also launched a survey seeking for public collaboration in the development of safe harbors and other
simplification measures on transfer pricing matters. The main objective of the survey was to offer the opportunity for taxpayers and interested parties to present their comments related to situations where specific safe harbor regimes may be needed, considerations regarding the use of advance pricing arrangements (APAs) for specific sectors, and other simplification measures.

Although the OECD and the RFB are moving forward in discussions to align the Brazilian transfer pricing rules with the OECD guidelines, no effective change in the Brazilian legislation has been implemented up to now. If this current trend is maintained, which also depends on political factors, one may expect changes to the Brazilian transfer pricing rules in the near future.

In addition, as a signatory of BEPS, Brazil has introduced certain changes to its tax legislation as a result of the so-called minimum standards, such as the introduction of the Country-by-Country Report, Mutual Agreement Procedure (MAP), etc.

Financial information

When using financial information (e.g., revenues, costs and expenses) to demonstrate that intercompany prices are agreed at market prices, the taxpayer must prepare such information according to Brazilian generally accepted accounting principles (GAAP). In general terms, Brazilian GAAP are aligned with the International Financial Reporting Standards (IFRS).

Transfer pricing obligations

To comply with the Brazilian TP rules, taxpayers apply one of the methods described in the relevant legislation. These methods normally provide for minimum or maximum statutory profit margins, depending on the case. As previously mentioned, Brazil does not require the preparation of benchmark studies, which normally cannot be used for Brazilian compliance purposes.
Conversely, taxpayers should include the following in their annual corporate income tax return (ECF): (i) the existence of any transaction with individuals or legal entities residing abroad (which are considered related parties under the Brazilian TP rules and/or which are domiciled in low-tax jurisdictions and/or underprivileged tax regimes); (ii) the method elected for compliance purposes; (iii) the parameter price; and (iv) the need for a tax adjustment (if any). In addition, taxpayers should have supporting documentation to demonstrate the proper application of the elected method, if requested by the tax authorities.

Brazil has recently implemented the annual filing of the Country-by-Country Report, by means of Normative Instruction 1,681, from 28 December 2016. The Country-by-Country Report must be filed together with the ECF, which is usually due on the last business day of July of the year following the calendar year to which the ECF refers. The first Country-by-Country Report was filed along with the ECF due on the last business day of July 2017 by companies required to file it and with information relating to calendar year 2016.

Requirements for international intercompany transactions

There are no specific documentation requirements for international intercompany transactions in Brazil.

Transactions with low-tax jurisdictions and privileged tax regimes

In addition to the rules applicable to transactions between related parties, the TP regulations (Law 9,430, Article 24 and 24-A) set forth that such rules also apply to international transactions carried out with: (i) a person or legal entity, whether related or not, located in a so-called low-tax jurisdiction; or (ii) with a foreign party under the so-called “privileged tax regimes.”

For TP purposes, the legislation defines “low-tax jurisdiction” as any country where income is not taxed or where the maximum tax rate is
The TP rules also apply to transactions performed by Brazilian residents with individuals or legal entities, whether related or not, residing in jurisdictions whose legislation prohibits disclosure of the equity ownership.

Normative Ruling No. 1,037/10 lists the countries with favorable taxation for the purposes of income tax (the so-called low tax jurisdictions). These countries are as follows: American Samoa, American Virgin Islands, Andorra, Anguilla, Antigua and Barbuda, Aruba, Ascension Island, Bahamas, Bahrain, Barbados, Belize, Bermuda Islands, British Virgin Islands, Brunei, Campione D’Italia, Cayman Islands, Channel Islands (Alderney, Guernsey, Jersey and Sark), Cook Islands, Curacao, Cyprus, Djibouti, Dominica, Federation of St. Christopher and Nevis, French Polynesia, Gibraltar, Grenada, Hong Kong, Ireland, Isle of Man, Kiribati, Labuan, Lebanon, Liberia, Liechtenstein, Macao, Maldives, Marshall Islands, Marshall Islands, Mauritius Islands, Monaco, Montserrat Islands, Nauru, Niue Islands, Norfolk Island, Occidental Samoa, Oman, Panama, Pitcairns Islands, Qeshm Islands, St. Helena, St. Lucia, St. Martin, St. Pierre et Miquelon Islands, St. Vincent and the Grenadines, Seychelles, Solomon Islands, Swaziland, Tonga, Tristan da Cunha, Turks & Caicos Islands, United Arab Emirates and Vanuatu.

In addition, as of 1 January 2009, TP rules should also apply to transactions performed with a foreign party under the so-called privileged tax regimes. In this context, “privileged tax regime” is defined as one that presents one or more of the following characteristics:

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42 The Ministry of Finance reduced the percentage to 17% for countries, dependencies and regimes that are aligned with the international standards of fiscal transparency, in the terms to be defined by the Brazilian Federal Revenue Department, notwithstanding the observance of the other conditions provided by Articles 24 and 24-A of Law 9,430/96.
i) Income is not taxed or is taxed but at a maximum rate lower than 20%.

ii) The regime grants tax advantages to nonresident individuals or legal entities in any of the following situations: (a) without requiring any substantial economic activity carried out in the country or location; and (b) contingent or not on the absence of substantial economic activity in the country or dependence.

iii) It does not tax, or taxes at a maximum rate lower than 20%, the income earned outside its territory.

iv) It does not allow access to information related to the corporate structure, ownership of the goods/rights or the economic transactions performed.

According to Normative Ruling No. 1,037/2010, the following types of companies located in the following countries are considered privileged tax regimes: (i) Uruguay (Inversion Financial Entities - Safis); (ii) Denmark (holdings that do not perform substantive economic activity); (iii) Iceland (International Trading Companies - ITC); (iv) the United States of America (state Limited Liability Companies – LLC, whose corporate ownership is composed of nonresidents, not subject to the federal income tax); (v) Malta (International Trading Companies – ITC and International Holding Companies – IHC); (vi) the Netherlands (holding companies that do not perform substantive economic activity); (vii) Switzerland (legal entities in the form of a holding company, domiciliary company, auxiliary company, mixed company and administrative company subject to a combined corporate income tax rate lower than 20% or any other corporate legal forms which, by means of rulings issued by the Swiss tax authorities, are subject to a combined corporate income tax rate lower than 20%); (viii) Austria (holding companies that do not perform substantive economic activity); (ix) Costa Rica (Free Trade Zone Regimes); (x) Portugal

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43 Id.
44 Id.
(International Business Center of Madeira); (xi) Singapore (a few regimes with reduced tax rates); (xii) Spain (legal entities in the form of Entidade de Tenencia de Valores Extranjeros – ETVEs).

Not subject to transfer pricing rules (Law 9,430/96, Article 18, Paragraph 9)

Import transactions related to the transfer of technical, scientific and administrative assistance and royalty payments are not subject to the Brazilian TP rules. This is because the corresponding contract must be registered with the Brazilian Patent Office (INPI). For these cases, the Brazilian local legislation already provides for other deductibility rules.

Requirements for domestic intercompany transactions

Brazilian TP rules do not apply to local transactions with Brazilian related parties (in which case, specific rules on the disguised distribution of profits may apply, depending on the specific situation).

Conversely, Brazilian TP rules apply to cross-border transactions carried out by an entity domiciled in Brazil, through an interposed party (third party) who is not considered a related party, to the extent that such interposed party deals with another party abroad who is considered a related party of the Brazilian entity referred to.

Contents of the transfer pricing documentation

As a general rule, upon inspection by tax authorities, the company must supply the following documents:

i) Indication of the method adopted for the purposes of calculating the prices on transactions subject to TP control and the parameter price for each transaction

ii) Documentation used by the company as support to determine the prices and the respective calculation methodology to obtain the parameter price; or a demonstration that complies with any of the
safe harbors provided in the rules, if applicable (only in the case of an audit)

Please note that if taxpayers do not indicate the methodology applied or do not provide these documents, or in case they are insufficient for the determination of the price, tax authorities may require taxpayers to adopt another method. Likewise, if the information provided is not sufficient, the tax authorities may determine such prices based on other documents available and/or apply any of the methods provided in the legislation.

There is no exhaustive list of documents that need to be presented to the tax authorities. In general, the proper supporting documentation varies on a case-by-case analysis and depends on the nature of the transaction and the elected method.

The Federal Revenue Department recognizes the possibility of the taxpayer presenting a report from an external auditor to prove that the cost of the goods imported from a related foreign party complies with Brazilian accounting rules for the purposes of the CPM method. This position was adopted on a private request for ruling, but it is binding before the tax authorities.

Other documentation requirements

In addition to the documents regularly issued by companies with purchase and sale transactions (e.g., contract, invoices, proof of payments, etc.), the demonstration of the prices adopted by the taxpayer may also be determined based on the following:

i) Publications or official reports issued by public authorities/departments in the buyer’s/seller’s jurisdiction or the declaration of the tax authority of such country in the event Brazil has executed a treaty to avoid double taxation or exchange of information with the respective jurisdiction
Research performed by companies with a notorious reputation for technical knowledge or technical publications; such research must expressly refer to the industry sector, period, the companies and the profit margin determined upon the research; and identify the supporting data utilized for each company.

Publications, researches and official reports previously mentioned should comply with the following additional conditions for the purposes of compliance with TP rules: (a) must have been prepared based on internationally accepted criteria; and (b) must be contemporaneous with the fiscal period under analysis.

Contents of the informative return

There is no stand-alone TP return. Brazilian taxpayers must indicate in their annual corporate income tax return (ECF) the existence of any transaction with a related foreign party or with any other foreign party subject to the TP rules. Information on the transactions subject to TP rules should be filed in an appendix of the taxpayer’s ECF.

As mentioned, Brazil implemented the annual filing of the Country-by-Country Report, which consists of a specific file in the ECF and must be filed along with it. The first Country-by Country-Report for companies required to present it was filed together with the ECF, on the last business day of July 2017 and related to calendar year 2016.

Filings: Place and date of filing

Informative returns and transfer pricing documentation

Apart from the information to be filed electronically in the taxpayer’s annual corporate income tax return, there is no obligation to file any documentation before the authorities in advance. The supporting documentation, however, should be ready to be presented to the tax authorities upon request.
Timing of filing

Corporate income tax returns must usually be submitted by the last business day of July of the following year.

How long to keep records

As a general rule, books, records and financial statements must be maintained for the period of the statute of limitations, which, for tax purposes, is five years. However, considering the controversy on how to calculate the statute of limitations, it is advisable to keep records for seven years.

Language of documentation

Any TP documentation, such as the annual corporate income tax return and any supporting documentation, must be provided in Portuguese. Any documentation in a foreign language must be translated into Portuguese by a sworn translator.

Penalties

There are no specific penalties regarding transfer pricing documentation. The penalties are the same as the ones applicable to the ECF, as follows:

I – equivalent to 0.25%, for calendar month or fraction, of the net profits before the Corporate Income Taxes (IRPJ and CSLL), in the corresponding period, limited to 10%, relating to the legal entities that do not file or file the ECF with delay; or

II – 3%, not lower than BRL 100, of the value omitted, inexact or incorrect.

The fine for item I is limited to (i) BRL 100,000 for legal entities that in the previous calendar year accrued total gross revenues equal to or lower than BRL 3.6 million; and (ii) BRL 5 million for other legal entities.
The fine for item I is reduced by (i) 90%, when the ECF is presented within 30 days from the deadline; (ii) 75%, when the ECF is presented within 60 days from the deadline; (iii) 50%, when the ECF is presented within 60 days from the deadline; and (iv) 25%, when the ECF is presented within the term established in the notification.

The fine for item II is not due if the taxpayer corrects the omission or the inexact or incorrect information before a tax audit, and the fine is reduced by 50% if the correction is made within the term established in the notification.

However, if, under a tax audit the tax authorities conclude that the taxpayer was supposed to pay additional tax, the authorities will issue a tax assessment and charge a penalty of 75% (which may be increased up to 112.5%) on the unpaid tax.

If the taxpayer decides to pay the tax debt within 30 days from the tax assessment, a 50% discount on the 75% penalty applies. If the taxpayer decides to pay the tax debt within 30 days from the administrative decision, a 30% discount on the penalty applies.

Aggravated penalties of 150% to 225% apply in cases of attempted fraud, which is further imposed together with administrative and criminal penalties.

In any event, in addition to those penalties, interest on delay (SELIC rate) should apply upon the payment on any overdue tax.

The following table summarizes the applicable penalties:

<table>
<thead>
<tr>
<th>Action</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>If the taxpayer pays the relevant taxes before being notified of a tax deficiency</td>
<td>0.33% per day, limited to 20% + interest on delay</td>
</tr>
</tbody>
</table>
Exemptions and waivers applicable to export transactions

i) 90% actual safe harbor

The revenues derived from export transactions carried out with related parties are subject to Brazilian TP control whenever the average price adopted on such export transactions of goods/services/rights is lower than 90% of the average sales price charged in transactions carried out with nonrelated parties in the Brazilian market.

Therefore, in cases where the average price charged on export transactions to related parties equals or exceeds the 90% threshold, the Brazilian taxpayer is not required to adopt one of the TP methods (as described above) for the purposes of calculating the minimum revenue to be recorded on export transactions to related parties.

Note that such safe harbor does not apply to the PCI or the PECEX methods related to commodities.
ii) Imperfect safe harbors

Apart from TP methods, the Brazilian TP rules provide certain types of imperfect safe harbors, as follows:

- 10% net profit safe harbor – A taxpayer that has a minimum 10% net profit (before the provision of income tax and social contribution on net income) on its total export revenues to related parties can demonstrate its compliance with the TP rules only through documents of the export transactions with related parties. The 10% net profit must be calculated based on the annual average profit of the current year and the two preceding years. Moreover, the net revenues to foreign related parties cannot exceed 20% of the total export net revenues of the Brazilian company.

- 5% net revenues safe harbor – A taxpayer whose export net revenues in the calendar year do not exceed 5% of its total net revenues in the same period may demonstrate its compliance with the TP rules with the export documents only.

iii) Additional factor applicable to export transactions

In order to reduce the potential adverse effects on TP calculations caused by the significant appreciation of the Brazilian local currency (real) over certain foreign currencies (mainly the US dollar), taxpayers subject to the Brazilian TP rules were allowed to adjust up to 35%, 29%, 28%, 20%, 9% and 11% on export revenues recorded in 2005, 2006, 2007, 2008, 2010 and 2011, respectively. For 2009 and from 2012 to 2021, no additional factor was stipulated. For instance, if the actual value of exports to

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45 As provided in Article Nos. 48, 49 and 50 of Normative Ruling No. 1,312/12.
46 The mentioned safe harbors are not perfect as they only shift the burden of proof to the tax authorities to demonstrate that the prices are not at arm’s length. The safe harbors do not apply to cases of sales transactions of rights, goods or services to buyers domiciled in low-tax jurisdictions or to jurisdictions that prohibit disclosure of equity ownership.
related parties was BRL 100 in 2008, the taxpayer was allowed to use an amount equivalent to BRL 120, the “deemed” export amount for TP purposes.

The possibility of using the “additional factor” only applies in the following cases\(^\text{47}\): (i) comparison with uncontrolled local price in order to conclude whether the 90% threshold has been met; (ii) comparison with the parameter price in cases where the taxpayer has elected to use the production cost plus 15% profit margin method; and (iii) the calculation of the average profit margin for the past three years in order to apply the 5%/10% net profit “safe harbor” previously described.

Atypical transactions

With respect to the election of one of the methods established in the TP rules, it is important to mention that the price of goods, services and rights prevailing in atypical transactions (operações atípicas), such as liquidation of inventory, liquidation of activities or sales with governmental subsidy, should not be used as a parameter price for TP purposes.

Consequences derived from transfer pricing adjustments

The current TP legislation provides rules and methods to determine maximum amounts of deductible expenses and minimum amounts of taxable revenues for Brazilian entities engaged in transactions with related foreign parties (or foreign residents in low-tax jurisdictions or under a privileged tax regime). Any adjustment derived from the application of TP methodologies must be added and/or excluded from the determination of the tax basis of the corporate income taxes.

\(^{47}\) The benefit is not extended to the CUP or to the Resale Price (wholesale or retail) in the destination country less profits method (RPM).
Additional regulations

Advance pricing agreements

In principle, there is no APA regime in Brazil. It is possible to request before the Ministry of Finance a change in the fixed margins provided by law under the cost plus and the resale price methods, as explained above. However, this mechanism has rarely been used in Brazil. To date, there is no public information about any successful request related to the change in the statutory profit margin.

As analyzed below, Brazil introduced the MAP as one of BEPS’ minimum standards. Even though one may interpret the MAP introduced by Brazil as an instrument to obtain an APA, there are no specific rules in this regard.

Thin capitalization

The thin capitalization rules were created as follows:

Rules applicable to transactions with related parties, except for transactions with parties subject to a privileged tax regime or domiciled in low-tax jurisdictions

Debt to equity ratio – 2:1

Without prejudice to the rules limiting the deductibility of interest expenses foreseen in the Brazilian TP legislation, the interest paid or credited by a Brazilian source to related legal entities or individuals, residing or domiciled abroad, will be deductible within the fiscal year for the purposes of calculating the corporate income taxes if they meet the following requirements:

i) In cases of debt funding with a related entity abroad that has corporate interest in the Brazilian company, the sum of the debt funding, verified on the date of the accrual of the interest, must not exceed two times the amount of equity participation of the related foreign party in the net equity of the Brazilian company.
ii) In cases of debt funding with a related entity abroad that has no corporate interest in the Brazilian company, the sum of the debt funding, verified on the date of the accrual of the interest, must not exceed two times the amount of the net equity of the Brazilian company.

For the purposes of the calculation of the total debt funding, every form and term of financing must be considered by the Brazilian company, regardless of the registry of the contract with the Central Bank of Brazil.

This rule also applies to debt funding transactions raised by Brazilian entities whereby the guarantor, legal representative or any intervening party is a related party.

In cases where any excess is verified in what concerns the limits set in items i) and ii) above, the exceeding interest will be considered an unnecessary and nondeductible expense in the calculation of the corporate income taxes.

Additionally, the new requirements for the tax deduction of the interest expenses do not exclude the existing deductibility requirement prior to the new rules, according to which the expenses and costs will only be tax-deductible if they are necessary, usual and normal in the taxpayer’s activities.

Rules applicable to transactions under a privileged tax regime or carried out with parties domiciled in low-tax jurisdictions

Debt to equity ratio – 0.3:1

Similar to the rules cited above, whenever the interest is credited or paid by a Brazilian source to any individual or legal entity residing, domiciled or organized in a low-tax jurisdiction or subject to a privileged tax regime according to Articles 24 and 24-A of Law 9,430/96, the amount of the debt funding that meets such specifications will have to observe a limit of 30% of the net equity of
the Brazilian party, regardless of any effective equity participation held by the foreign party in the Brazilian entity.

In cases where any excess is verified in what concerns the limits of this case, the exceeding interest will be considered an unnecessary and nondeductible expense in the calculation of the corporate income taxes.

Intangibles

No specific rules apply to intangibles. Usually, the methods uniformly apply for goods, services or rights. In addition, royalties registered with the Brazilian Patent Office payable abroad are not subject to the Brazilian TP rules.

Intragroup services

Intercompany services are normally subject to the TP rules, without exceptions.

Interests

For agreements executed as of 1 January 2013, interest paid or credited to foreign related parties is only deductible up to the value not exceeding the following interest rates, increased by a spread based on the market average currently established by the Ministry of Finance at 3.5%:

a) In the case of transactions performed in US dollars with a prefixed rate, the sovereign bonds of the Federal Republic of Brazil issued in the foreign market in dollars from the United States of America

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48 For loan transactions in which the Brazilian company pays interests to a foreign related party, a 3.5% spread applies. For loan transactions in which the Brazilian company accrues interest revenues, the spread is 2.5% as of August 2013.

Baker McKenzie
b) In the case of transactions performed abroad in Brazilian reais with a prefixed rate, the sovereign bonds of the Federal Republic of Brazil issued in the foreign market in Brazilian reais

c) For the remaining transactions, the LIBOR during a six-month term\textsuperscript{49}

The same parameters above apply to determine the minimum taxable revenue on interests charged by Brazilian taxpayers to foreign related parties. However, the spread to be added to the parameter in this case is currently 2.5%.

Sales of stock

Intercompany sales of stock or equity are usually subject to TP rules.

Cost-sharing agreements

There is no specific provision allowing cost-sharing arrangements. As a general rule, such arrangements receive the same tax treatment applicable to services, but a case-by-case analysis is recommended. However, the Federal Revenue Department concluded in Request for Private Ruling 8/12 that if a cross-border cost-sharing agreement is in place, the TP rules should not apply, provided that such agreement contains provisions “consistent” with a cost-sharing arrangement. This implies compliance with several requirements. In such case, the full amount of expenses paid/reimbursed by the Brazilian company could be considered deductible for corporate income tax purposes.

\textsuperscript{49} Please note that Libor has been discontinued from 2022 onwards. However, LIBOR for US dollar deposits will continue to be released until June 2023. It is important to note that article 38-A, §9, of Normative Ruling No. 1,312/2012 establishes that LIBOR for US dollar deposits should be adopted in the absence of specific LIBOR for other currencies. Therefore, from a transfer pricing compliance standpoint, this rate will remain generally applicable to calculate the parameter price in case of specific contracts until June 2023. We understand that the Brazilian Federal Government should determine which rate will replace LIBOR after that date.
However, the decision is binding only on the taxpayer that filed the request for ruling. Therefore, this Private Ruling cannot be understood as a final and binding decision on this matter. In fact, the Federal Revenue Department has interpreted, in more recent requests for rulings, that cross-border cost-sharing agreements are services for tax purposes, and hence subject to the taxes applicable to import of services. This may represent a change to the Federal Revenue Department’s interpretation regarding the nonapplication of transfer pricing control to cost-sharing agreements, since, as a rule, intercompany services transactions (imports and exports) are subject to transfer pricing scrutiny in Brazil.

Audits

Sources for targeting and methods

There is no specific scheduling for audits. The tax authorities usually audit income taxes every five years due to the statute of limitations.

Current audits

Relevant TP tax audits have been focusing on specific industries. For the last several years, the pharmaceutical and automotive industries were more affected by TP audits, most specifically with regard to the applicability of the RPM in the case of inputs imported for application in the manufacturing process. However, the tax authorities are also focusing on large taxpayers in general, regardless of industry.

The tax audits are mainly focused on transactions with tangible goods. However, it is expected that the tax authorities will begin to focus more on financial transactions and on operations with services and intangibles.

Transactions under review

All cross-border intercompany transactions are reviewed by the authorities in TP audits.
Position of tax authorities

There is no room to negotiate with tax authorities in Brazil. The tax authorities have the obligation to draft a tax assessment with a 75% penalty if they understand that there is a tax infraction (or 150% in the case of fraud).

Opened cases

Brazil has several TP assessments that still have a pending final decision. A current relevant TP matter under discussion relates to the proper methodology for calculation of the RPM on the importation of inputs for manufacturing. In summary, the controversy is based on the fact that a normative instruction issued by the Federal Revenue Services at the end of 2002 introduced a methodology for calculation that is different from the one provided by the applicable law, resulting in a more burdensome adjustment for the taxpayer.

The Superior Chamber of the Administrative Court of Appeals (CSRF), the highest administrative level, has been supporting the methodology provided in Normative Ruling 243/02. According to the CSRF, Normative Ruling 243/02 only clarified the calculation of the parameter price established in Law 9,430/1996.

Therefore, one may conclude that the discussion is pacified at the administrative level and the position in the administrative courts is unfavorable to taxpayers, that is, it supported the legality of Normative Ruling 243/02. A final position on this matter will now be decided at the judicial level.

In fact, there are still few decisions at the judicial level and they do not demonstrate a consensus on the subject matter. On the one hand, there are favorable second-level decisions in the sense that the method foreseen in Normative Ruling 243 breached the provisions of Article 18 of Law 9,430 and, thus, could not be enforced against the taxpayer (e.g., case No. 5001100-48.2018.4.03.6144/SP, rendered by the Federal Court of the 3rd Region, on March 2021). On the other
hand, there are also second-level decisions unfavorable to taxpayers, supporting the full application of Normative Ruling 243 (e.g., case 5013244-89.2018.4.03.6100 rendered by the Federal Court of the 3rd Region, on October 2021).

In practical terms, the discussion has not yet reached a final end in the Higher Courts, thus, the case law is not settled, reason why it is not possible to estimate what will be the position that will be adopted by the Superior Court of Justice or Supreme Court on the matter.

The discussion reached the Superior Court of Justice (STJ) through AREsp 511.736-SP. In October 2021, judgment of the case at the Superior Court of Justice commenced but the rapporteur of the case requested more time to analyze the case and postponed the trial, pending the continuance of the judgment which may occur soon.

With the amendments to the TP rules made by Law No. 12,715/12 and the new regulation provided by Normative Ruling No. 1,312/12, the above-mentioned discussion would no longer be relevant for future transactions.

Managing the audit process

Audits will generally include on-site visits. A TP tax audit will generally include a review of all material intercompany transactions.

Litigation procedure

Any issue related to TP must be resolved at the administrative or at the judicial level.

Considering that there is no best method rule applicable in Brazil (except for commodities), taxpayers are free to choose the TP method that results in the lowest adjustment or none at all. In this regard, the Brazilian TP legislation does not provide a specific litigation appeal that may be invoked if tax authorities disregard a method elected by the taxpayer. However, if tax authorities understand that there is a tax
infraction and file a tax assessment, the taxpayer may file a defense at the administrative or judicial level.

**Revocation appeals**

It is possible to appeal to the judiciary if the taxpayer is not successful in an administrative proceeding.

**Tax amnesty**

The federal government usually enacts legislation creating programs for payment of federal tax debts in installments.

**Competent authority procedure**

Although Brazil is not a member of the OECD, most treaties that Brazil has entered into to avoid double taxation contain a clause comparable with Article 25 of the OECD model tax convention. However, from a practical perspective, the Brazilian authorities do not usually apply the treaties to avoid issues of double taxation caused by TP adjustments.

As mentioned, Brazil has actively participated in the discussions from which the BEPS Action Plan originated and has been adopting certain BEPS minimum standards. One such standard is the MAP, per Action 14. MAP was formally introduced in Brazil through Normative Ruling 1,669 that entered into force on 10 November 2016.\(^{50}\) Taxpayers domiciled in Brazil and foreign authorities may request the Brazilian tax authorities to provide answers regarding conflicts upon interpreting treaties.

Although some argue that the MAP described above may be used as an instrument to obtain an APA, there are no specific rules in this regard.

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\(^{50}\) Replaced by Normative Ruling No. 1,846/2018.
Countries with double taxation agreements

The following countries have signed treaties to avoid double taxation with Brazil:

1. Argentina  
2. Austria  
3. Belgium  
4. Canada  
5. Chile  
6. China  
7. Czech Republic  
8. Slovakia  
9. Denmark  
10. Ecuador  
11. Finland  
12. France  
13. Hungary  
14. India  
15. Israel  
16. Italy  
17. Japan  
18. Korea  
19. Luxembourg  
20. Mexico  
21. Netherlands  
22. Norway  
23. Peru  
24. Philippines  
25. Portugal  
26. South Africa  
27. Spain  
28. Sweden  
29. Switzerland  
30. Trinidad and Tobago  
31. Turkey  
32. Ukraine  
33. United Arab Emirates  
34. Venezuela  
35. Russia
It is worth mentioning that Brazil had a double taxation agreement with Germany. However, the agreement was terminated by the German government in 2006. According to the Ministry of Finance, termination had become unavoidable after Germany failed to have the agreement revised.

Additionally, there is also a treaty signed with Paraguay that is pending approval from the president.

General treaty rules and adjustments

The purpose of the treaties to avoid double taxation is to impose limitations on the right of the signatory states to tax. In this regard, Brazil adopts the wording of Article 9 of the OECD model tax convention. If a contracting state requires a TP adjustment and the relevant transaction is carried out with a company established in a treaty jurisdiction, it would be reasonable for the other contracting state to allow a corresponding negative adjustment (or an exclusion from taxable income equivalent to the amount of the adjustment in the other state). However, from a practical perspective, invoking the treaty for this matter may require the involvement of a due process provided in the treaties — the so-called competent authority process — but which the Brazilian authorities do not normally adopt.

As mentioned, Brazil has formally introduced the MAP through Normative Ruling 1,669, which entered into force on 10 November 2016 and was later replaced by Normative Ruling 1,846/18 in 2018. The taxpayer domiciled in Brazil and the foreign authorities may request the Brazilian tax authorities to provide answers regarding conflicts upon interpreting treaties. Even though this may be a good sign for taxpayers, its actual impact is still unknown because, to date, the authors are not aware of any mutual agreement procedures that have taken place.

Brazil adopts both the source principle and the residence principle for corporate income tax purposes. However, Brazilian legislation allows Brazilian legal entities to use the corporate income tax withheld
abroad upon revenues and the capital received to offset the corporate income tax due by the Brazilian legal entity in Brazil.

**Corresponding adjustments**

Brazil does not have rules on the recording of corresponding adjustments.

**Arbitration**

As a rule, arbitration and mediation procedures are not considered in resolving TP cases. Any issue related to TP is resolved at the administrative or judicial level.

**Court cases**

There are court cases involving TP issues especially related to the discussion of the applicability of the resale minus method for import of inputs to be used in the manufacturing process in Brazil, as mentioned above.

**Tax system**

Companies domiciled in Brazil, as well as branch offices, agencies and representative offices in Brazil of companies domiciled abroad, are subject to the Brazilian tax system and are taxed based on their worldwide income. Nonresidents are taxed by the source of income.

**Trends and perspectives**

Nowadays, tax assessments are no longer only focused on specific economic sectors but are still mainly concentrated on transactions with tangible goods.

Considering the changes to interest TP rules and the developments related to transactions with services and intangibles, taxpayers must be prepared to support the transactions from a TP standpoint. It is recommended that taxpayers pay more attention to the said
operations because tax authorities are expected to be more alert to them.

Taxpayers would do well to keep consistent supporting documentation updated and provide tax authorities with clear documents.

Moreover, as a signatory of BEPS, Brazil has been adopting certain minimum standards of the project (e.g., Country-by-Country Report, MAP, etc.). Brazil has also sent a request to become an OECD member, and during the last few years the Brazilian tax authorities (RFB) and the OECD have worked on a joint project to analyze the possibility of aligning Brazilian transfer pricing rules with OECD standards. The practical effects of those changes are still unknown, but it is possible to say Brazil is closer to OECD than it has ever been. If this current trend continues, which will also depend on political factors, one may expect changes to the Brazilian TP rules in due course.
Chile
Introduction

In 1997, Chile introduced transfer pricing (TP) statutory rules for the first time by adding four new paragraphs to Article 38 of the Income Tax Law (ITL). These rules adopted the arm’s length principle as Chile’s international TP standard, while retaining certain global formulary apportionment rules.

In September 2012, Law No. 20,630 replaced the old rules established in Article 38 of the ITL and introduced revised rules under the ITL’s new Article 41 E.

Later on, Tax Reform Law No. 20780 dated 27 September 2014 and Tax Reform Law No. 21210 dated 24 February 2020 introduced additional changes to the TP rules.

Finally, in order to fulfill with BEPS standards, the tax administration issued Exempt Resolution No. 101 in 2020 and Exempt Resolution No. 128 in 2021, which instructs the obligation to submit new annual sworn statements through forms No. 1950, called “Annual Sworn Statement Master File,” and form No. 1951, called “Declaration Local Archive Annual Sworn.”

Who is obliged?

The TP rules generally cover cross-border transactions between taxpayers domiciled, resident or established in Chile, as well as related parties located outside Chile.

The rules also cover business reorganizations or restructurings between taxpayers domiciled, resident or established in Chile, as well as related parties located abroad in cases where the tax authority finds that (i) the reorganization or restructuring resulted in the transfer of goods or activities capable of producing taxable income from Chile to a foreign country or territory; (ii) the goods or rights have been transferred; and (iii) the contracts have been entered into with, or the activities have been undertaken between, unrelated parties that have
agreed on arm’s length prices or prices different from those agreed upon.

Arm’s length prices, values or profit levels are defined as those that are or would be agreed upon or obtained by unrelated parties in comparable transactions and circumstances, considering, for example, the characteristics of relevant markets, the functions assumed by the parties, the specific characteristics of the goods or services contracted, and any other reasonably relevant circumstance. When such transactions have not been carried out at arm’s length prices, values or profit levels, the service may challenge them based on this article.

Economic bonding criteria / related parties

The concept of “related parties” includes the following situations:

a) One of the parties participates, directly or indirectly, in the management and control of capital, profits and/or receipts of the other party; or the same person or persons participate, directly or indirectly, in the management and control of capital, profits and/or receipts of both parties, all of which are regarded as related parties.

b) An agency, branch or any other form of permanent establishment is regarded as a related party to its head office, to other permanent establishments of the same head office, to any parties related to such head office, and to their permanent establishments.

c) Transactions are conducted with a resident party that is domiciled, established or organized in a country or territory regarded by Chile as a tax haven, unless such country or territory has a current agreement with Chile allowing for the exchange of tax information.

d) Individuals are considered as related parties when they are connected by marriage, when they are civil partners, or when they
are connected by blood or affinity, inclusive up to the fourth degree.

e) One party conducts one or more transactions with a third party, which in turn conducts with a party related to that former party — directly or indirectly — one or more transactions similar or identical to those conducted with that former party, whichever the position is of such third party and the other parties in the relevant transactions.

A key issue is that the Servicio de Impuestos Internos (SII), since June 2013, has required taxpayers to provide recent information on the return requirement, with respect to transactions from tax year 2012. This seems to broaden the concept of related parties, considering additional aspects such as i) exclusive contracts, (ii) joint venture agreements, (iii) preferential treatment, iv) financial or economic dependence, and v) deposit of trust.

The arm’s length principle

Arm’s length pricing

Arm’s length prices, values or profit levels are defined as “those that have or would have been agreed upon or derived by unrelated parties in comparable transactions and comparable circumstances.”

The Chilean concept of TP assumes that transactions are cross-border.51

Circular No. 29, issued on 14 June 2013, states that the concept of cross-border transactions is intended to apply the arm’s length principle to all kinds of related-party transactions, including those

51 Cross-border transactions are defined as any transaction between a taxpayer domiciled, residing or established in Chile with other related parties not domiciled, residing or established in Chile.
involving the transfer of all kinds of functions, assets or risks having value for unrelated parties in comparable circumstances.

As a general principle, which admits exceptions in the context of certain rollover basis reorganizations, taxpayers in Chile must apply the arm’s length standard in domestic transactions as well. Otherwise, these transactions are exposed to upward or downward adjustments by the tax administration, plus penalty taxes.

Therefore, the new rules recognize the arm’s length principle by empowering the tax authority to challenge the prices, values or profitability in cross-border transactions and business reorganizations and restructurings, when such transactions are entered into with related parties located outside Chile and are not made at “normal market prices, values or profitability.”

Comparability criteria

The new rules state that the arm’s length prices, values and profitability are those that would be charged or made by unrelated parties in comparable transactions and circumstances, considering, for instance, the characteristics of the relevant markets, the functions performed, the specific characteristics of the goods or services, and any other reasonably relevant circumstance.

The new rules under Circular 29, issued in June 2013, provide guidance for performing the comparability analysis, which matches the OECD Guidelines and takes the following aspects into consideration:

- Characteristics of the goods or services
- Functional analysis
- Contract clauses
- Economic circumstances
- Business strategies
Transfer pricing methodology

The new rules provide the following TP methods and definitions:

a) **Comparable uncontrolled price (CUP) method** — This method determines the normal market price or value of goods or services, considering the price or value agreed upon by or agreeable to uncontrolled parties in comparable transactions and circumstances.

b) **Resale price method (RPM)** — This method determines the normal market price or value of goods or services (purchased from a controlled party), considering the price or value at which such goods or services are resold or supplied by the purchaser to uncontrolled parties. For this purpose, it is necessary to subtract from the resale price or supply value the gross profit margin a reseller or service provider would have obtained in comparable transactions and circumstances. In turn, the gross profit is determined by subtracting the cost of sales or services from the revenues for sales or services derived in transactions between uncontrolled parties.

c) **Cost plus method (CPM)** — This method determines the normal market price or value of goods or services supplied to a controlled party by adding to the direct and indirect cost of production a (gross) profit markup that uncontrolled parties would have obtained in comparable transactions and circumstances, without considering the general expenses and operating expenses incurred by the supplier. The profit markup over costs is determined by dividing the gross profit derived in transactions between uncontrolled parties by the cost of sales or services. In turn, the gross profit is determined by subtracting from the revenues derived from transactions between unrelated parties the direct and indirect costs of production, transformation, manufacturing and similar costs, without considering general expenses and other operational expenses.
d) Profit split method (PSM) — This method determines the profit corresponding to each party to the relevant transactions by allocating between them the combined profit derived from the transactions. For this purpose, the combined profit is allocated in the manner that unrelated parties would have agreed upon in comparable transactions and circumstances.

e) Transactional net margin method (TNMM) — This method determines the net profit margin corresponding to each party to a transaction, by reference to the margin that unrelated parties would have obtained in comparable transactions and circumstances. For this purpose, profit level indicators will be used. Such indicators may be based on costs, revenues or other reasonable bases.

f) Residual methods — When it is not possible to use any of the aforementioned methods in the particular case and circumstances, the taxpayer will be permitted to determine the prices or values using other methods that would allow the reasonable determination or estimate of normal market prices or values that unrelated parties would have agreed upon in comparable transactions and circumstances. In these exceptional cases, the taxpayer will be required to justify that the special characteristics and circumstances of the transactions do not allow using the aforementioned specified methods.

Some of the profit level indicators, which the Chilean law states are the most often used in the previously mentioned methods, are as follows:

- Operating margin over costs and expenses
- Operating margin
- Return on assets
- Return on capital employed
• Berry ratio

Moreover, the selected financial indicator must be based on objective data (such as sales between unrelated parties) and not on data relating to the compensation in related-party transactions. Reliable and sufficient information must also be available to ensure its correct application.

The circular gives preference to internal comparables over external comparables.

Best method rule

There is no best method rule or rules providing for a hierarchy of methods. Instead, the new rules request that taxpayers use “the most appropriate method,” considering the characteristics and circumstances of the specific case.

The new rules do not provide any guidance on how to apply the TP methods and on the selection of the most appropriate method. Neither do such rules provide any force to the OECD Guidelines.

Use of statistical tools

The OECD-based Chilean rules state that statistical tools may be used to narrow the range by considering the central trend (such as the interquartile range or other percentiles), which may help improve the reliability of the analysis.

Adjustments

Although the new rules do not list the type and amount of adjustments allowed, capital adjustments are commonly used (inventories, accounts receivable and accounts payable) along with other adjustments that may arise in order to adequately ensure comparability.
In terms of the powers of the tax authority, when the taxpayer does not demonstrate that its related-party transaction or transactions are at normal arm’s length prices, values or profit levels (i.e., when the determination of prices or values in such transactions is not in accordance with the aforesaid methods), the law empowers the tax authority to constructively determine the prices, values or profit levels set in the respective transaction, applying the corresponding taxes or adjustments on any deficiencies assessed.

Selected and secret comparables

In 2006, the tax authority began random requests of information from taxpayers that enter into cross-border transactions, in order to populate a database used to determine if the prices and margins in related-party transactions are agreed upon at arm’s length.

In addition, both the taxpayers and the tax authority have used foreign comparables. The tax authority has also used information included in the taxpayers’ tax returns.

While the use of secret comparables is not openly regulated or discussed by the tax authority, there have been cases in which secret comparables have been used in practice.

Nevertheless, as the Chilean tax authority has said, court cases may be lost due to the use of secret comparables (information utilized from other taxpayers), given their lack of credibility and impropriety as valid evidence.

Moreover, the use of secret comparables puts the taxpayer in a state of defenselessness, especially since the use of such information may be challenged by the tax authority accordingly.

Financial information

While Chilean law does not provide an express definition of the financial information to be used, the regulations that provide how to
complete the informative return refer to the financial information obtained by the taxpayer in the fiscal year being reported.

In Chile, all of a company’s records and books of account must be maintained according to International Financial Reporting Standards (IFRS) since 2013.

**OECD interpretation sources**

The new rules do not provide any specific force to the OECD Guidelines. However, Chilean\textsuperscript{52} law refers to the OECD Guidelines to support the criteria followed, methodology and required information, among others. Therefore, it would not be improper to say that the Chilean tax authorities do in fact hold the OECD Guidelines to be a source of interpretation.

**Transfer pricing obligations**

**Requirements for international intercompany transactions**

Taxpayers domiciled, resident or established in Chile that enter into transactions with related parties located abroad, including business reorganizations or restructurings, are required to file an annual informative return (F.1907) to the tax authority, using a format and within a deadline both established by such authority. Also, since 2021 tax reforms, if the taxpayers meet the requirements, they will have to present the following declarations: Local File (LF), Master File (MF) and Country-by-Country Report (CbC) in Forms 1951, 1950 and 1937, respectively.

**Requirements for transactions with low-tax jurisdictions**

There are no special requirements for transactions undertaken with low-tax jurisdictions that are deemed controlled aside from complying with the arm’s length principle.

\textsuperscript{52} Member of the OECD since 2010.
Requirements for domestic intercompany transactions

Compliance with the arm’s length principle is required in domestic transactions involving the sale of mining products.

Contents of the transfer pricing documentation

Since June 2013, taxpayers that meet the requirements have the obligation of filing an informative return (“Informative Return No. 1907”), which includes, among others, information about transactions carried out with both related and unrelated parties, the TP methods used in those transactions, information related to the taxpayer’s related parties outside Chile, and other general information about the group. The taxpayer is allowed to request an extension of the term to submit the information return. The extension may be requested only once and the extension is up to three months.

According to Article 41 of the ITL, taxpayers must keep in their possession, for fiscal audit purposes, all invoices, contracts and other supporting documentation of their operations that back up the entries in the accounting records.

In addition, taxpayers must keep in the records for fiscal audit all documentation supporting the TP methods and the TP studies, if the taxpayer had any.

These requirements need to be complemented with Article 59 of the Tax Code, which rules that with three or six years opened for examination under the statute of limitations, the Chilean SII may examine tax returns filed by the taxpayer and, in case a fiscal audit is conducted, may request additional information from the taxpayers. Normally, the Chilean SII also uses data made available by the other party, focusing on the provider or beneficiary, as the case may be.

Language of the information to be included in the transfer pricing documentation

The TP report must be in Spanish.
Other documentation requirements

Contents of the transfer pricing informative returns

While Chile does not require the informative return to be filed along with the TP study, the items that the administration asks for in the informative return are quite broad, covering all aspects that could be initially addressed in a TP report. These items include the following:

- General information on the transactions and related parties
- Currency and amount of the transaction
- TP method
- Details of transactions involving tangible goods, such as comparable price, tested party, overall or segmented information, profit level indicator and result of the transaction
- Details on financial transactions carried out, such as amount, interest rate and type, benchmark interest rate, term, fees or other charges
- Details of transactions with intangibles, such as royalty calculation criteria, royalty rate and type of intangible
- Details of service transactions, including type of services, tested party, overall or segmented analysis, profit level indicator, result of the service price calculation (fixed percentage, fixed amount, other criteria) and service calculation rate
- Details of commission transactions, such as commission calculation criteria (percentage, fixed amount) and commission paid
- Details of bank account transactions (starting balance, ending balance, debts, credits, etc.)
- Details of the filer’s activity
• The result of the transaction (global financial figures)

• Indication of whether there were any TP adjustments and business reorganizations

This informative return must be filed by the following taxpayers, with respect to the transactions listed:

• Taxpayers that, as of 31 December of the reporting year, belong to the medium-sized or large business segments and within the year have engaged in transactions with related parties not domiciled or residing in Chile, pursuant to the rules of Articles 38 and 41 E of the Income Tax Law

• Taxpayers not classified in the above segment but that have transactions with persons domiciled or residing in a country or territory listed in Article 41 H of the Income Tax Law

• Taxpayers not included in the segments listed above and that in the corresponding period have engaged in transactions with related parties not domiciled or residing in Chile in amounts above CLP 500 million (approximately USD 625,000)\(^{53}\) or an equivalent amount according to the exchange parity between pesos and the foreign currency in which such transactions were carried out, as of 31 December of the reporting year, as published by the Central Bank of Chile

Contents of import and export informative returns between unrelated parties

Chile does not require the filing of import and export informative returns between unrelated parties beyond the normal procedures required for any import or export operation (introduction, VAT recovery, etc.).

\(^{53}\) The average exchange rate published by the Chilenean Central Bank for February 2022 was 1 USD=CLP 800.

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Filings: place and date of filing

The deadline for informative return filing is the last business day of June of each year, with respect to transactions carried out in the preceding fiscal year.

It is important to mention that the taxpayer can request, only once, an extension of up to three months of the term for the presentation of one or more of the aforementioned declarations, which must be requested before the expiration of the original term.

Transfer pricing informative returns and related documentation

In cases when the taxpayer only has the obligation to present the informative return (F.1907), it is advisable to also prepare and conserve the TP report, in case the Chilean SII requests it during an audit.

BEPS Plan - additional transfer pricing informative return

In accordance with Action 13 of the BEPS plan regarding TP documentation, the Chilean tax administration (IRS) has published Resolution No. 110 on 24 December 2015 and Resolution No. 126 on 27 December 2016 establishing a Global Tax Characterization Report (F.1913) and a new Transfer Pricing Affidavit (Form 1937) for purposes of Country-by-Country Reporting.

This resolution was complemented with Exempt Resolution No. 101 of 2020 and Exempt Resolution No. 128 of 2021, which instruct the obligation to submit new annual sworn statements through form No. 1950, called “Annual Sworn Statement Master File,” and form No. 1951, called “Declaration Local Archive Annual Sworn.”

Global Tax Characterization Report – Form 1913

This sworn statement seeks to obtain qualitative information on processes or operations that are of interest for the purpose of
characterizing large taxpayers within the framework of tax compliance management.

The F.1913 must be submitted to the IRS if the taxpayer, as of December 31 of the previous year of the reporting, was categorized by the IRS under the Large Companies Segment of Large Taxpayers Payroll.

In general terms, the information requested by this declaration are the following:

- Data referring to group or business holding
- Data referring to business reorganization
- Data referring to financial instruments and/or derivative contracts
- Data referring to results before tax
- Data referring to capital goods
- Data referring to international operations

The mention form must be sent to the IRS before filing the Annual Income Tax Declaration.

The omission or delay in the delivery of the information required by the Service in the F.1913 will be sanctioned in accordance with the provisions of Article 97 of the Tax Code. An infringement will be incurred in the event that the delivery of the required information is incomplete or erroneous, according to the provisions of Article 109 of the legal body.

Local File – Form 1951

The new TP rules, effective since fiscal year 2021, require that taxpayers prepare and submit TP studies (“Annual Affidavit Local File”) to support that transactions with related parties have been made at arm’s length.

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The Local File must be submitted to the Internal Revenue Service through Form No. 1951, if the taxpayer, as of December 31 of the reporting year, meets the following copulative conditions:

- The taxpayer belongs to the segment of Large Companies, according to the criteria established in SII Exempt Resolution No. 76 of 23 August 2017.

- Its parent or controlling entity of the multinational group (MG) of companies has had to present the Country-by-Country Report before the Internal Revenue Service or another tax administration for the respective tax year.

- That in said year they have carried out one or more operations with related parties that do not have domicile or residence in Chile, in accordance with the regulations established in Article 41 E of the Income Tax Law, for amounts greater than CLP 200 million or its equivalent according to the exchange parity between the national currency and the foreign currency in which said operations were carried out, in force as of December 31 of the reporting period, according to a publication made by the Central Bank From Chile.

In general terms, the information requested by this declaration are the following:

- Detailed description of the activity carried out and the business strategy followed by the local entity

- Description of the business reorganization operations, as well as the transfer of intangibles that have occurred during the reported period

- Main competitors

- Description of the functional and comparability analysis performed
Details of the comparability analysis, which include the selected method(s), part analyzed, comparison periods, search and selected comparables, adjustments made, conclusions of the analysis

- Financial information of the local entity
- Organizational structure
- Copy of agreements between the local entity and related companies
- Advance price agreements
- Financial information of the comparables used, if applicable

Additionally, these taxpayers must submit the Annex to Form No. 1951 on Descriptive Information of the Local File Annual Sworn Declaration and all the documents indicated in said annexes.

**CbC Report – Form 1937**

In accordance with Action 13 of the BEPS plan regarding TP documentation, Resolution No. 126 was published by the Chilean IRS on 27 December 2016, establishing a Transfer Pricing Affidavit (Form 1937) for purposes of Country-by-Country Reporting.

The deadline for that form is the last business day of June with respect to the preceding year’s operations. It is applicable for holding or controlling entities for multinational groups domiciled in Chile, whose consolidated income for the previous 12 months exceed EUR 750 million or a Chilean entity that integrates a multinational group (MG) that has been designated by the group as the only substitute of the parent entity.
Master File – Form 1950

The 1950 Affidavit comes into force in the modifications of Law No. 21,210 on Tax Modernization, adding to the new affidavits, such as Declarations 1947, 1948 and 1949.

The deadline for that form is the last business day of June with respect to the preceding year’s operations (with the possibility of an extension for three months).

It is applicable for holding or controlling entities for multinational groups domiciled in Chile, whose consolidated income for the previous 12 months exceed EUR 750 million, or a Chilean entity that integrates aMG that has been designated by the group as the only substitute of the parent entity for the presentation of the CbC Report.

The Form must provide, at least, the following information about the MG:

- Information on MG activities
- MG intangible assets
- MG financial activities
- MG corporate network
- Copy of agreements between MG-related parties and advance pricing agreements (APA)
- Consolidated annual financial statements
- MG transfer pricing policies

Unrelated parties’ informative returns

Not applicable
Penalties

Section 41 E, No 6 of the ITL establishes a fine ranging from 10 to 50 annual tax units (approximately USD 8,800 to USD 44,000) for failure or a delay in submitting Form 1907, Form 1937, Form 1951 or Form 1950. Also, Circular No. 32 of 19 May 2021, published by the SII, determined that the pecuniary sanction, as previously mentioned, may not exceed the higher limit between the equivalent of 15% of its own capital, determined in accordance with Article 41 of the ITL, or 5% of its effective capital.

The submission of a willfully false information return is subject to a fine ranging from 50% to 300% of the tax, and imprisonment ranging from 541 days to five years. In addition, TP adjustments can be accompanied with a fine of 5% of the tax difference.

Consequences derived from transfer pricing adjustments

If, as a result of an audit, the SII rejects the deduction of an expense and then increases the taxable revenue for income tax purposes, the adjustments will cause an extra amount of tax due (applying 40% of the adjustment).54

Additional regulations

Advance pricing agreements

The Chilean Income Tax Law, updated on 27 September 2012 under Article 41 Section E numeral 7, establishes that:

Taxpayers carrying out operations with related parties may, before the Tax Authorities, request an advance agreement as to the determination of the price, value or normal profitability of the market in the stated operations [...]
Resolution SII EX N 68, issued on 21 June 2013, establishes how the request should be presented.

Under the new rules, the Chilean tax authority is allowed to enter into APAs with a taxpayer for a renewable three-year term. In cases involving imports into Chile, the Chilean customs authority must also be a party to the APA. The Chilean tax authority is further allowed to enter into bilateral or multilateral APAs, where one or more foreign tax authorities can be a party.

Taxpayers seeking an APA must submit a request to the tax authority. The taxpayer must provide a description of the related-party transactions, their pricing policy and the proposed duration of the APA, accompanied with the relevant information and documents and a TP study based on the TP methods established in Article 41 E of the ITL. The tax authority must decide on the APA request within a six-month period. The tax authority’s decision not to enter into an APA with a taxpayer is incontestable. The tax authority can terminate the APA at any time when the data provided by the taxpayer is wrong or willfully false, or when there is substantial change in the circumstances. The taxpayer can also terminate the APA when there is substantial change in the circumstances.

It is important to mention that when an APA involves customs duties, it must also be signed jointly with the National Customs Service.

No fees are due when filing for an APA.

**Thin capitalization**

Thin capitalization rules do not affect the tax deductibility of interest paid on excessive indebtedness.

Instead, interest paid on excessive indebtedness (debt-equity ratio is 3:1) with related parties may, in addition to the reduced withholding tax rate of 4%, be subject to a 31% equalization tax.
Notwithstanding the foregoing, in order for interest expense incurred (owing) by a Chilean company arising from intercompany loans (i.e., granted by a related foreign taxpayer) to be tax deductible, it is required that: (i) interest actually be paid; and (ii) the Chilean withholding tax on such interest payments be satisfied. In other words, interest owing to a related foreign lender is no longer deductible on mere accrual basis.

Intangibles

Aside from the information requested in the informative tax return, there are no particular TP rules in Chile regarding intangibles.

Intragroup services

Aside from the information requested in the informative tax return, there are no specific TP regulations regarding intercompany services. However, cross-border payments for services between related parties are subject to TP rules.

There is no specific definition of services in the ITL, although the VAT Law definition (Article 2(2) of the VAT Law) is applicable. In this regard, a “service” is an action or activity, regardless of whether performed on an occasional or customary basis, for which the subject receives a commission or any other kind of payment, provided that the activity falls under those mentioned in paragraphs 3 or 4 of Article 20 of the ITL (commercial, industrial and construction services, including intermediation activities and most local leasing and licensing arrangements) and digital services. Furthermore, consultancy and other technical services rendered in Chile are also subject to corporate tax, although these may be exempt from VAT.

It is within this general scope that payments for cross-border services between related parties are subject to the TP rules.
Additionally, services must meet certain legal requirements (i.e., the payment must be a “necessary expense”) in order to constitute a deductible expense.

**Interests**

Aside from the information requested in the informative tax return, there are no specific TP regulations regarding interest.

Based on the information on financial transactions required in the informative return, it appears that the Chilean tax authorities will conduct more complex financial analyses, taking into account elements such as the principal, term, guarantees, creditworthiness and interest rate.

**Sales of stock**

There are no specific TP regulations regarding the sale of shares. One of the questions that needs to be answered in the informative tax return is related to reorganization, which only mentions the transfer of functions, assets or risks.

**Cost-sharing agreements**

There are no specific rules authorizing cost-sharing arrangements. However, the tax authority has issued at least three rulings in this respect. In one, it did not accept the cost allocation made by the foreign parent, arguing that there was a service rendered by the parent and not mere allocation of global costs. The other two rulings authorized the proposed allocation presented in each ruling but stated that such acceptance must be made on a case-by-case basis and may not be granted in anticipation by the tax authority.
Audits

Sources for targeting and methods

TP audits are mainly focused on companies in a position of loss or less profitable than other companies in the same industry.

During the first part of the audit process, the tax authority investigates, gathers information and requests documentation from the taxpayer being audited or from other authorities. As a result of the audit, the tax authority could issue a formal citation, under which the tax authority discloses particular objections to the taxpayer. The taxpayer has 30 days — extendable for up to another 30 days at most — to accept, clarify or contest the objections made by the tax authority. If after the taxpayer's response the objections are not solved, the tax authority will notify the taxpayer of tax assessments, which can be claimed by the taxpayer within a 90-day term. In addition, within the first 15 days of such period, the taxpayer may request an administrative review of the relevant audit and notified deficiency.

Current audits

TP examinations have focused on the automotive, chemical, mining, pharmaceutical, salmon and retail industries.

Authority faculties

Transactions under review

Transactions involving a buy-sell structure are normally reviewed.

Position of tax authorities in TP audits

When the price or value assigned to the object of alienation of a movable asset, whether tangible or intangible, or of service rendered is the base or one of the elements in the determination of tax, the SII, without prior summons (citation), may assess such price or value when it is significantly lower than those commonly found in the market.
or than those normally charged in transactions of a similar nature, considering the circumstances in which the transaction is performed.

The Chilean IRS will use all its legal authority to verify the veracity of tax returns filed by taxpayers and to obtain the information and supporting documentation relating to taxes due or that may be due.

The head officer of the relevant office of the Chilean IRS may summon the taxpayer to, within a term of one month, submit a tax return or rectify, clarify, extend or confirm the previous one. However, such citation must be issued in cases where the law sets it as a previous procedure. Upon request of the taxpayer, the SII officer may extend the term once, up to one additional month.

The summons will increase the terms of the statutes of limitations regarding taxes arising from the transactions specifically determined in the summons.

The approach adopted by the tax authority is taken on a case-by-case basis. It has been observed many times that the tax authority’s positions toward taxpayers are more flexible the first time it audits an industry compared to when it has already become familiar with a particular industry.

Opened cases

There is no publicly available information with regard to audit cases opened by the tax authority.

Managing the audit process

Since the tax authority examines on a case-by-case basis, it is recommended to have supporting documentation (such as agreements, account statements, transfers, etc.) that proves the arm’s length principle in intercompany transactions.
The inspection process is regional, which means that audits are divided by: i) regions, depending on the taxpayer’s tax domicile; or ii) the large taxpayer department, as applicable.

However, even if divided by regions, each region reports to the TP audit department that is responsible for managing, reviewing and coordinating the audit process as a whole.

Litigation procedure

Tax assessments issued by the tax authority can be challenged by the taxpayer by filing a claim with a tax judge.

Revocation appeals

Taxpayers may file an appeal with the competent court of appeals against the decision of a tax judge.

Competent authority procedure

The competent authority procedure is contemplated in tax treaties, but it has not been applied in practice.

Countries with double taxation agreements

Chile has tax treaties in force with the following countries:

1. Argentina
2. Australia
3. Austria
4. Belgium
5. Brazil
6. Canada
18. Korea
19. Malaysia
20. Mexico
21. New Zealand
22. Norway
23. Paraguay
In addition, Chile counts the following signed treaties, although they are not yet in force:

1. United States
2. India
3. United Arab Emirates
4. Netherlands

**Countries with exchange of information agreements**

Chile has Tax Exchange Information Agreements (TEIAs) in force with the following countries:

1. Guernsey
Additionally, in January 2016, Chile signed the Multilateral Agreement between Competent Authorities for the Exchange of Reports Country by Country, which is currently in force.

General treaty rules and adjustments

Primary adjustment – The taxpayer’s failure to comply with the arm’s length principle empowers the tax authorities to determine income differences or accruals and/or to reject previously authorized deductions, by either increasing or decreasing the taxpayer’s taxable income or loss declared in the corresponding tax return.

The Chilean tax law does not provide any additional rules regarding primary adjustments.

Secondary adjustment – Secondary adjustment is not considered in Chilean law.

Corresponding adjustments

According to Exempt Resolution No. 67 of 2013, the request for the rectification of a price, value or profitability of operations carried out with related parties upon the adjustment of transfer prices applied abroad must be presented in writing at the registry office of the national board of SII and addressed to the Department of International Audits.

The request must be accompanied by every document on which it is based, including a copy of the instrument that describes the adjustment practiced by other states. Notwithstanding the foregoing, the Chilean SII may request from the petitioner at any moment, if deemed necessary, any other document, translation or background
information regarding the institutions and transactions with regard to such request.

Exempt Resolution No. 67 of 2013 also stipulates that the amendment request must be filed within a period of five years from the legal expiration date on which results from transactions — where prices, values or profitability are to be rectified — should have been declared.

If necessary and appropriate, the Chilean SII will issue a resolution to establish the amount of the adjustment or the rectification of the prices, values or profitability of the transactions that must be accepted. Otherwise, the Chilean SII will issue the relevant resolution denying such request on good grounds.

According to the disposition of a double tax treaty, when a taxpayer requests to bring a new action by mutual agreement, with the purpose of proceeding with the applicable adjustment, the Chilean SII will analyze the merit and relevance of such request. If deemed relevant, the Chilean SII must communicate such situation to the petitioner and will proceed to contact the competent authorities from the other state, with the aim of starting the proceedings on a mutual agreement.

If, upon the adjustment, a difference appears in the taxes in favor of the taxpayer and leads to a refund, the taxpayer must present a refund request directly to the regional board or unit in the taxpayer’s area. This request must be accompanied by the resolution authorizing the adjustment of the transfer prices.

Audit procedure

The audit procedure in Chile follows the procedure for administrative and judicial tax litigations.

Arbitration

No arbitration is allowed in tax matters, including TP. The tax treaties in force in Chile do not authorize arbitration as a dispute resolution alternative.
Court cases
There are no court decisions on TP matters.

Safe harbors
There are no safe harbors in Chile.

Tax system
Companies and individuals residing or domiciled in Chile are subject to income tax on their worldwide income, while nonresident entities and individuals are taxed only on their Chilean-sourced income.

Trends and perspectives
It is expected that TP examination activity will continue to increase. The new internal services team under the TP group comes from the private sector and has begun to seek sufficient and effective information to heighten TP audit activities. Also, with the implementation of the new TP obligation and inspection risk programs, the Chilean tax authorities are expected to engage in more audits and have a greater likelihood of obtaining positive results.

Previously, Article 38 did not provide audits using transactional methods, mentioning only the traditional methods measuring the gross margin and not the operating margin.

Tax inspectors are also expected to become more skilled in this area, due to increasing training and experience. The TP audit department is training each regional agency, which in turn works with the regional bureau.
Colombia
Introduction

Transfer pricing (TP) regulations were incorporated into the tax bylaw in accordance with the criteria issued by the OECD effective since 2004.

The most recent changes to the TP regime in Colombia took place by means of a tax reform (Law 1819 of December 2016, Decree 1625 of 2016, and Decree 2120 of December 2017). This reform modified several TP regulations provided in Articles 260-1 to 260-11, including the methodology, formal duties, adoption of the BEPS Action 13, penalties and others.

As of 28 April 2020 Colombia is an acting OECD member.

Who is obliged?

Article 260-2 of the Tax Code sets forth that taxpayers carrying out transactions with related parties abroad or in tax havens are required to determine their ordinary and extraordinary income, costs and deductions, assets and liabilities, taking into account the prices and amounts that would be used with or between independent parties in comparable transactions.

These obligations also apply to: (i) permanent establishments; (ii) domestic taxpayers regarding the transactions performed with local related parties located in a free trade zone; and (iii) taxpayers having transactions with domestic related parties with regard to the foreign permanent establishment of one of them.
Economic bonding criteria / related parties

For Colombian purposes, a related party condition arises when a taxpayer meets one of the following criteria:

1. Subordinated enterprises

   An enterprise must be deemed subordinated or controlled when its decision-making power is subject to the will of (an) other person(s) in its parent or controlling company — either directly, in which case it will be called an affiliate, or with the participation or through the subordinates of the parent company, in which case it will be called a subsidiary.

   An enterprise will be subordinated when one or more of the following cases apply:

   o When more than 50% of the capital is owned by the parent company, either directly or through or with the participation of its subordinates or the subordinates of the parent company (For such purposes, shares with preferential dividends and with no right to vote must not be counted.)

   o When the parent company and the subordinates, either jointly or separately, have the right to issue votes constituting the minimum decisive majority in the stockholders’ meeting or in the assembly, or have the number of votes necessary to elect the majority of the members of the board of directors, if any

   o When the parent company, either directly or with the participation of subordinates, in connection with an act or business with the controlled company or with its partners, exercises dominant influence in the decisions of the administrative bodies of the company

   o When the control, according to the assumptions foreseen in this article, is exercised by one or several individuals or corporate bodies that are not partnerships, either directly or
with the participation of entities where they own more than 50% of the capital, or configures the minimum majority to make decisions or exercise dominant influence in the direction or decision-making of the entity

- When a person or entity has the right to receive 50% of the profits of the subordinated entity

2. Branches (with regard to its main office)

3. Agencies

4. Permanent establishments

5. Others

- When the transaction subject to tax takes place between two subordinates of the same parent company

- When the transaction takes place between two subordinates where their capital is owned directly or indirectly by the same individual, entity or corporate body domiciled or not domiciled in the country

- When the transaction takes place between two enterprises, of which one person or entity participates directly or indirectly in the administration, control or capital of both of them (i.e., having more than 50% of the capital or the capacity to control the business decisions of the company)

- When the transaction takes place between two companies where 50% or more of their capital is owned by persons related to each other by marriage or by kinship up to the second degree of consanguinity or affinity or sole civil degree

- In transactions between economic associates through third parties that are not related
o When more than 50% of gross revenues come from individual or joint partners or shareholders, community members, partners, subscribers or the like

o Where consortia, joint ventures, participation accounts and other forms of association do not give rise to legal persons

The arm’s length principle

Arm’s length pricing

The main requirement for taxpayers in Colombia is to carry out transactions with related parties residing abroad and with taxpayers, based on the arm’s length principle (Tax Code, Articles 260-2 and 260-7). This is also applicable to domestic taxpayers that have transactions with local related parties located in a free trade zone.

Comparability criteria

Colombian law specifies, in Article 260-4 of the Tax Code, the use of the five basic factors of comparability:

- Characteristics of goods and services
- Functions carried out, assets used and risks assumed in the transaction
- Contractual terms
- Economic or market circumstances
- Business strategies

Regarding the first comparability element, the reformed Article 260-4 and Decree 2120 state that for a particular case of financing transactions, whenever interests paid do not comply with the comparability elements stated in such article (principal, term, risk, guarantee, debtor’s solvency, interest rate), such interests will be
treated as nondeductible and will be characterized as dividends while the loan will be treated as capital.

Internal comparables have to be considered a priority when assessing the arm’s length principle.

Transfer pricing methodology

Similar to other Latin American TP legislations that follow the OECD criterion, the following are acceptable methods under the tax bylaws:

- Comparable uncontrolled price (CUP) method
- Resale price method (RPM)
- Cost plus method (CPM)
- Transactional net margin method (TNMM)
- Profit split method (PSM)
- Residual profit split method

Article 260-3 states that for the particular case of purchase/sale of nonpublicly traded shares or assets with difficulties in comparability, commonly accepted valuation methods have to be used to determine the arm’s length value (in particular, the discounted free cash flow), and under no circumstances would intrinsic value be accepted.

The comparable uncontrolled price method is defined as the most appropriate for commodities transactions, and requires taxpayers to substantiate the date upon which the reference price is used to set the intercompany pricing.55

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55 This was introduced in the law through Article 107 of Law 1819.

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**Best method rule**

There is no legal priority in the application of TP methods in Colombia. Hence, there is no best method rule in the body of the law. However, Decree 1625 states that taxpayers have to state in the TP documentation that the selected method is the most appropriate based on the characteristics of the transaction assessed, available information, comparability and reliability of adjustments.

**Use of statistical tools**

Article 260-3 of the Tax Code states that the application of any method may provide a range of prices or profit margins whenever there are two or more comparable transactions. This range, the total range, is deemed as the arm’s length range and may be adjusted by statistical methods, such as a percentile range or others whenever the taxpayer deems it appropriate in order to improve the reliability of the analysis.

In this regard, Decree 1625 states that taxpayers have to state in the TP documentation the technical reasons taken into account when selecting the arm’s length range or to adjust it with statistical tools.

**Adjustments**

Article 260-3 of the Tax Code establishes the possibility of applying reasonable adjustments to eliminate differences from comparable transactions or companies. Decree 1625 states that technical, economic or accounting adjustments can be used and have to be properly described and documented in the TP documentation.

**Selected and secret comparables**

Tax authorities accept foreign comparables data if there is not enough information from local comparables.

Secret comparables are not yet an issue, and the law does not provide any information about their utilization. However, it is
understood that if confidential or secret information is used for comparability purposes, the local tax authorities or Dirección de Impuestos y Aduanas Nacionales (DIAN) may challenge this practice. Information must be from a public source.

Financial information

Article 260-3 states that for purposes of applying TP methods, revenues, costs, expenses, operating profit, assets and liabilities have to be determined according to generally accepted accounting principles (GAAP) in Colombia. Conversion to International Financial Reporting Standards (IFRS) began in 2014 for large and mid-sized taxpayers, while it was be implemented in 2015 for small taxpayers.

Additionally, Decree 1625 states that the arm’s length test should be performed with the information of comparable companies that corresponds to the tax year under analysis. If more than one year of information is used, proper justification has to be provided (i.e., business cycle, etc.).

OECD interpretation sources

TP law in Colombia does not expressly contain reference to OECD TP Guidelines. Nevertheless, provisions set forth in the law follow these guidelines and, in practice, taxpayers and tax authorities consider them as a technical reference when preparing TP studies. Furthermore, it is expected that an express reference to OECD guidelines will be included in the law once Colombia completes its integration process into the OECD.

Transfer pricing obligations

Colombian taxpayers have five main TP obligations:

- To carry out transactions with (i) nonresident related parties; (ii) parties residing in low- or no-tax jurisdictions (tax havens); and (iii) resident related parties located in a free trade zone or a zone that
constitutes a permanent establishment, under the arm’s length principle

- To file an annual informative return for transactions with the aforementioned related parties
- To prepare and file annual TP documentation, for transactions with the aforementioned related parties
- To prepare, regarding permanent establishments and branches, an attribution of profits report
- To prepare and file both an informative TP return and TP documentation assessing the arm’s length nature of the Colombian taxpayer’s transactions with nonresident related parties

In relation to TP documentation, the new international standard for transfer pricing documentation, as proposed by the OECD in Action 13 of the BEPS’s project, was adopted through Article 108 of Law 1819 of 2016 and Decree 2120 of 2017. As a result, transfer pricing documentation in Colombia now consists of three elements:

**Local File**

This corresponds to what is currently known as the transfer pricing report, by means of which the arm’s length nature of each intercompany transaction is assessed in a report that is filed to the tax administration.

**Master File**

This report will include general information of the multinational group to which the Colombian taxpayer belongs.
Country-by-Country (CbC) Report

This is a report/return with information on the global allocation of revenues and taxes paid by the multinational group in each country where the group has operations, as well as indicators of economic activity.

Obligated taxpayers

Colombian taxpayers obliged to comply with the Local File and the Master File are those whose gross sales exceed 61,000 UVT\(^{56}\) (around USD 0.6 million), or a net worth that exceeds 100,000 UVT (around USD 0.9 million).

The CbC will have to be filed in Colombia, in the case of one of the following:

a) Parent companies of multinational groups that (i) are incorporated in Colombia; (ii) have subsidiaries overseas; (iii) are not a subsidiary of a foreign entity; (iv) are obliged to consolidate financial statements; and (v) have consolidated revenues higher than 81,000,000 UVT (around USD 735 million)

b) Colombian entities that are designated by the multinational group to file the CbC

c) When one or more entities of the multinational group that reside in Colombia meet the following: (i) their consolidated revenues account for 20% or more of the group’s revenues; (ii) the CbC report was not filed by the parent company in its country of incorporation; and (iii) the multinational group had consolidated revenues higher than 81,000,000 UVT (around USD 735 million) in the previous year

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\(^{56}\) Tax Value Unit (Unidad de Valor Tributario) in 2021 is equivalent to COP 36,308 (approximately USD 9).
Requirements for transactions with low-tax jurisdictions

Transactions performed between Colombian taxpayers and residents of low-tax jurisdictions are subject to TP provisions.

Requirements for domestic intercompany transactions

Formal TP rules (i.e., the preparation of a TP report and filing of an informative return) apply to Colombian taxpayers that have transactions with domestic related parties located in a free trade zone or that constitute a permanent establishment.

Contents of the transfer pricing documentation

Article 260-5 of the tax bylaw and Regulatory Decree 2120 establish that TP documentation must include the following:

Local File:

a) Executive summary – Scope, objective, content and conclusions

b) Functional analysis – Business strategies, intercompany contracts, functions of taxpayer and tested party, assets, risks, hedges, compensation payments, organizational and functional structure, etc. (if relevant to the assessed transactions)

When payment to a tax haven is performed, the TP documentation has to include a description of function risks and assets of the tax haven regarding the assessed transaction. Failure to comply is subject to a rejection of the deduction of such payments.

c) Market analysis – Industry description, substitute goods, special situations affecting intercompany transactions, etc. (if relevant to the assessed transactions)

d) Economic analysis – Description of transactions, method, tested party, comparable transactions, TP policy, adjustments, etc.
The documentation has to be accompanied by the following elements: (i) financial statements (consolidated and segmented); (ii) intercompany contracts; and (iii) contracts of changes of capital or shares transference.

The relevant segmented information that was used to assess the arm’s length principle has to be certified by auditors. In addition, when the tested party is the related foreign party, the financial information used has to be certified by an external auditor.

Master File:

a) Organizational structure
   - Multinational Group (MG) structure showing the legal structure, percentage of capital/shares, and geographic location of each entity

b) Description of the multinational group
   - Main profit drivers in the group’s business
   - Supply chain description of the top five groups’ products/services, as well as any other product/service that accounts for more than 5% of the group’s revenues (This description can be presented through a graphic or diagram.)
   - List and brief description of the five most important intercompany services agreements (other than R&D), including a description of: (i) the capabilities of the main services providers; and (ii) the TP policy used to define the costs of the services and the intercompany charges
   - Description of the main geographical markets of the products and services of the group
o Brief functional analysis, describing the contribution to value creation of each member of the multinational group (key functions, risks and assets)

o Description of the main restructures, acquisitions or divestments during the fiscal year

c) Intangibles of the multinational group

o Broad description of the group’s strategy of intangibles’ DEMPE functions, including the location of the main R&D centers and where the R&D direction/strategy is set

o List of the group’s intangibles that are relevant for transfer pricing purposes, and the entities holding the legal ownership

o List of the relevant intercompany contracts regarding intangibles, including licensing, R&D services and Cost Sharing Arrangement (CSA)

o General description of the transfer pricing policies regarding R&D and intangibles

o Description of any intangible transfer among related parties, including participating entities, countries and considerations

d) Financing activities of the multinational group

o General description of the group’s funding strategy, including the relevant funding contracts with nonrelated parties

o List of entities that perform centralized treasury functions, the country of incorporation and the effective place of management

o General description of the transfer pricing policies regarding intercompany financing

o Financial and tax positions of the multinational group
- Consolidated financial statements of the multinational group
- List and brief descriptions of APAs and other agreements with tax authorities regarding the distribution of profits between countries

Language of the information to be included in the transfer pricing documentation

Decree 2120 states that the Local File has to be prepared in Spanish. It also states that the tax administration may request that information included in the documentation that is written in a different language be translated into Spanish.

In the case of the Master File, this can be prepared and presented in English and its translation may be required by the tax authority.

Other documentation requirements

Taxpayers are obliged to maintain documentation that demonstrates an arm's length consideration in transactions that are not included in the TP documentation (transactions that amount to less than 45,000 UVT or around USD 0.4 million).

Contents of the informative return

The informative return must contain the following:

- Duly processed official forms and exhibits
- Taxpayer identification
- Name and tax identification of the related parties residing abroad with which intercompany transactions were performed
- Type and value of transactions carried out by the taxpayer with related parties domiciled abroad
TP method used to evaluate the arm’s length principle and its results (adjusted interquartile range of comparable companies)

In addition, the CbC notification is part of the informative return. This notification discloses which entity of the group files the CbC, its country of incorporation and filing date, when applicable, among others.

The informative return must be electronically signed by the taxpayer’s legal representative. If any penalty would apply for extemporaneous filing, for instance, the return should disclose this amount.

Filings: place and date of filing

Both informative returns and TP documentation have to be prepared and electronically filed by the dates determined by the government. For the obligations for FY 2021, the deadlines are as follows:

- Local File - September 2022
- Master File - December 2022
- Informative Return - September 2022
- CbC Report - December 2022

It is advisable for all taxpayers to fully comply with this requirement and to check in advance if their Unique Tax Registration (Registro Único Tributario or RUT) is updated in accordance with the acquired TP obligations, which are: (i) Code 18 (Transfer Pricing) and (ii) Code 26 (Individual Informative Return).

Penalties

Penalties apply to infractions, such as the delayed filing of an informative return and TP documentation (Local File and Master File), errors between the TP documentation and the informative return, and failure to submit the study when required by DIAN, among others.
In general terms, sanctions range from fixed amounts to a percentage of the amount of intercompany transactions. Most of them are capped at values that range from 313 UVT to 30,000 UVT (around USD 0.3 million). The precise amount depends mainly on the infraction incurred and the type of taxpayer.

In addition, re-incidence is sanctioned with an increase of 100% of the penalty.

The sanctions related to the CbC report are established in Article 651 of the Tax Code.

Exemptions and waivers

Taxpayers that are obliged to comply with formal TP duties (informative return and documentation) are the following:

- Taxpayers (domestic, foreign and permanent establishments) that have transactions with related foreign parties whose gross sales exceed 61,000 UVT or whose net worth exceeds 100,000 UVT as of 31 December of the previous year
- Taxpayers (domestic, foreign and permanent establishments) that have transactions with tax havens
- Domestic taxpayers that have transactions with domestic related parties located in a free trade zone whose gross sales exceed 61,000 UVT or whose net worth exceeds 100,000 UVT as of 31 December of the previous year

Exemptions

- Taxpayers that have no obligation to comply with formal requirements (informative return and documentation) are those that do not meet the aforementioned thresholds.
- The following are not obliged to prepare TP documentation:
Taxpayers having transactions with tax havens, if the amount of such transactions is less than 10,000 UVT (around USD 0.1 million)

Intercompany transactions that amount to less than 45,000 UVT, although this still needs to be disclosed in the informative return.

**Consequences derived from transfer pricing adjustments**

Adjustments derived from TP must be made in the income tax return. If the return has already been filed, the taxpayer will have to perform the adjustment, paying the amount of the omitted tax, plus a 10% penalty — for voluntarily amending the tax return or if the adjustment is determined by the Tax Office and is accepted by the taxpayer — plus applicable interests. A penalty applies if the adjustment is determined by the Tax Office and is challenged by the taxpayer.

Finally, if TP adjustments need to be or have been performed, the external auditor’s report should include a reference to this.

**Additional regulations**

**Advance pricing agreements**

In Colombia, advance pricing agreements (APAs) may be agreed upon for a five-year period.

- After the unilateral APA is requested, DIAN has nine months to analyze, request and receive modifications and clarifications of, and then eventually accept or reject, the request. The process must be completed within two years from the date of acceptance of the request.

- An APA may take effect in the taxable year of approval, the previous one and up to the succeeding three taxable periods, as agreed upon between the parties.
Article 112 of Law 1819 and Decree 2120 introduced changes to the APA procedure. These changes are mainly related to the application procedure and the cancellation or revocation of the agreement.

Thin capitalization

Deductions derived from interests (with domestic and foreign related parties) must not exceed the value of the net worth of the taxpayer of the prior year (2:1 debt-capital ratio). For deductibility purposes, the taxpayer must be in capacity to demonstrate to DIAN, through a sworn statement from related party lenders, that the loan is not a back-to-back or similar transaction by means of which another related party is substantially acting as lender.

Intangibles

Decree 2120 establishes the obligation to include in the TP documentation the details of assets used by the taxpayer. In the case of intangibles, the taxpayer should indicate the protection and duration of the respective rights. There is, however, no particular ruling on the treatment of intangibles under TP.

Nondeductibility for tax purposes applies for royalties paid to related parties (located abroad or in a FTZ) that (i) correspond to the exploitation of an intangible formed in the national territory or (ii) are associated with the acquisition of finished products.

Intragroup services

Beginning 2013, the law states that when assessing intercompany services, in addition to the arm’s length consideration, taxpayers have to demonstrate the effective provision of such services (benefits received).

Business restructures

Also beginning 2013, the law states that when a restructure takes place in the form of transference of functions and risks to related
parties abroad, an assessment of a market compensation payment for such transference has to be analyzed and determined, if applicable. Decree 1625 also includes additional guidelines with which to assess business restructures that are consistent with the OECD Guidelines.

**Interests**

The general rule for interest in Colombia is that the interest paid for financial products obtained abroad is deemed Colombian-sourced income and therefore subject to 15% income tax withholding.

Interest payments have to comply with comparability elements. Failure to comply would translate to a rejection of deductions and recharacterization of interests as dividends and the loan as capital.

**Sales of stock**

For TP purposes, the relevant market value must be determined based on commonly accepted methodologies (i.e., discounted free cash flow) and under no circumstances would book value be accepted.

**Cost-sharing agreements**

Decree 1625 introduces the definition of cost-sharing agreements and the possibility of deducting payments that are part of this type of agreement when they comply with the arm’s length principle. Particular information is requested to be included in the TP documentation when payments and contributions to these agreements are performed by a taxpayer.

**Audits**

**How long to keep records**

Taxpayers must keep their TP documentation for a period of five years following the tax year under assessment.
Managing the audit process

Preparing and maintaining all information regarding intercompany transactions that may be audited by DIAN as well as its supporting documentation is strongly recommended.

The general audit procedure applicable to tax and TP issues is as follows:

- As provided by Article 684 of the Tax Code, DIAN has jurisdiction to request from taxpayers any information it considers relevant for tax purposes.

- If DIAN considers it necessary to request information, it will issue an official request, which is a formal document through which the tax authority refers to any irregularity found during the FY under assessment and which also requires documentation. This tax notice takes legal effect on the date received by the taxpayer from such date, the taxpayer would have at least 15 calendar days to reply to the notice.

- To respond to this official request, the taxpayer may require a time extension.

- The taxpayer must file the information required by the due date, providing the information previously requested by the tax authority; otherwise, penalties may be imposed.

- Once the information is filed, DIAN, after analyzing the information filed, can decide to continue or conclude the audit proceeding.

- If DIAN decides to continue the audit, it will issue a special requirement where it will propose to modify the tax return, assessing higher taxes and penalties. Through the issuance of this document, the assessment proceeding will begin officially.

- The taxpayer has three months to file a response from the notification of the special requirement.
After the three-month deadline to file the response indicated above, DIAN has six months to issue the official assessment, through which it will formally modify the tax return, indicating the higher tax and the penalties due.

After the official assessment is issued, the taxpayer has two months to file a motion for reconsideration against such decision. Through this document, the taxpayer can file any type of evidence or documentation and include arguments defending its tax position from a legal point of view.

The administrative phase of this procedure will be concluded with the resolution that will decide on the motion for reconsideration. If DIAN maintains the challenges, the taxpayer can file a lawsuit against the decision.

Litigation procedure

The legal remedies that a taxpayer may execute against the assessments proposed by DIAN regarding TP challenges are as follows:

- Response to the special requirement
- Motion for reconsideration against the official assessment
- Lawsuit before the administrative judges

Statute of limitations

As a general rule, the statute of limitations for tax returns is three years after the deadline to file such tax returns (if filed on time). However, tax returns filed by taxpayers obligated to comply with the transfer pricing regime have a longer statute of limitations, which is six years from the deadline to file such returns.
Competent authority procedure

There is access to mutual agreement procedures since Colombia is now executing double taxation conventions, which include the OECD’s mutual agreement clause. Colombia also expects to have 20 more double taxation conventions to be held in the coming years. Currently, Colombia has double taxation conventions with Canada, Chile, Curacao, Mexico, Spain, Switzerland, Korea (Rep), Czech Republic\textsuperscript{57}, India, UK and Portugal. These conventions are in addition to Colombia’s treaty with the Andean Community of Nations (Bolivia, Ecuador, Peru and Colombia), which is already in force, although this is not based on the OECD Model Taxation Convention. Other treaties have been executed by the Colombian government but are not in force yet, such as the double taxation convention with Belgium.

Countries with double taxation agreements

Although Colombia has a very small and growing tax treaty network, more than 10 treaties are in the process of negotiation and ratification. The actual treaties in force are the following:

1. The Andean Community of Nations (\textbf{CAN})
2. Canada
3. Chile
4. India
5. Korea (Rep)
6. Portugal
7. Mexico
8. Spain
9. Switzerland
10. Czech Republic
11. United Kingdom
12. Italy
13. France

\textsuperscript{57} Effective from 1 January 2016.
Exchange of information agreements

Colombia has exchange of information agreements with the following:

1. United States of America
2. Barbados

In October 2014, the government of Colombia signed a Multilateral Agreement with 45 countries for the automatic exchange of tax information.

General treaty rules and adjustments

In general, Colombia’s treaties are drafted on the OECD model, as these refer to residences, permanent establishment, royalties, interests, business profits, dividends and capital gains, related parties, mutual agreement procedures, exchange of information, nondiscrimination, etc.

Corresponding adjustments

Colombia’s double taxation treaties include Article 9 of the OECD model regarding the application of this type of adjustment. In practice, however, corresponding adjustments have not yet been performed.

Arbitration

Specific arbitration and mediation procedures are not set forth by TP rules in Colombia. Thus, all TP controversies must be resolved by public judicial entities.

MAP

In 2019, a decree that regulates the procedure and conditions for a MAP request was issued. However, further guidance is expected.
Court cases

TP cases are usually handled in the traditional way, and there are no specific alternative dispute resolution vehicles available, except the APA rules.

Tax system

Resident companies are taxed on worldwide income. Permanent establishments and branches of foreign entities are taxed on their attributable worldwide income. Foreign companies without permanent establishment in Colombia are taxed only on their Colombian-sourced income.

Trends and perspectives

Taxpayers and advisers expect that in the near future, DIAN will follow the Latin American TP trend. The experience in other countries within the region shows how audits are generally initiated with information or additional requests by the administration and not by the systematic filing of requests demanding adjustments to the median.

Most transfer pricing controversies in the last couple of years have been focused around the following: intangible transactions, taxpayers with recurrent losses, losses booked in FY 2020, distribution entities assessing purchase transactions with the resale price method, substance elements in services transactions, and transactions with entities in tax havens and free trade zones.
Ecuador
Introduction

Transfer pricing (TP) rules were introduced in 2004 by amending the “Regulations for the Application of the Internal Tax Regime” (Reglamento para la Aplicación de la Ley de Régimen Tributario Interno or RALRTI), with effect from taxable year 2005.

In late 2007, TP acquired the hierarchy of a law, and since then, several resolutions were issued, including (i) the contents of TP documentation; (ii) the determination of tax havens and a list of tax havens; (iii) the obligation to file the informative return electronically; (iv) the deadlines for filing; (v) regulations for In-Advance Valuation Procedures (IAVP) of intercompany transactions, among many others.

Changes to the regime introduced in 2013 included thresholds for compliance, applicability of TP rules to intercompany transactions between local related companies, and additional information requirements in the economic analysis (i.e., comparable company searches and selection processes).

In 2014 and 2015, developments to TP rules were as follows:

- Additional information required in TP documentation (i.e., information that substantiates adjustments, IQ ranges, databases, comparables financial information, and open Excel sheets with formulations and calculations)
- Increase of thresholds that trigger the formal obligation to prepare and file TP documentation

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59 Official Resolution NAC-DGERCGC14-00001048.

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• Regulations for IAVP of intercompany transactions.\textsuperscript{60} Although the IAVP is not formally called an advance pricing agreement (APA), it has all the elements of an APA.

IAVPs became important as of 2015 since they represent an alternative to avoiding some deductibility limitations to intercompany payments of services and royalties imposed by Internal Revenue Service (SRI) in 2014.

• In 2014, Ecuador introduced a new tax reform that clarified how the deductibility for payments and reimbursements between taxpayers in Ecuador and related parties abroad are to be treated, as well as the income tax rate that companies and permanent establishments will be subject to according to their shareholders’ structure.\textsuperscript{61}

In 2016, additional regulations\textsuperscript{62} introduced a special transfer pricing analysis for commodities using the Comparable Uncontrolled Price (CUP) method. A summary of the main issues covered in the aforementioned regulations is below:

a) Priority and order of the application of the accepted transfer pricing methods

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\textsuperscript{60} Official Resolution NAC-DGERCGC14-00001048.

\textsuperscript{61} When shareholders are located in tax havens or low-tax jurisdictions and their participation does not exceed 50\% of the total shares of the company or permanent establishment, this portion will be subject to an income tax rate of 25\% while the remaining will be subject to an income tax rate of 22\%. The compound of these rates according to the aforementioned formula will correspond to the total income tax of the company or permanent establishment. Whenever the participation of shareholders located in tax havens or low-tax jurisdictions exceeds 50\% or when no information to support the shareholders’ structure is available, the company or permanent establishment will be subject to an income tax rate of 25\%.

\textsuperscript{62} Official Resolutions NAC-DGERCGC16-0532 and NAC-DGERCGC16-0531 issued in December 2016.
b) Correct use of profitability indicators in some transfer pricing methods

c) Restrictions regarding financial information of comparable companies used for transfer pricing analysis – year vs. year comparability, elimination of comparable companies with losses (unless an appropriate rationale is provided), and the limitation of using aggregated financial data

d) Instructions on the application of comparability adjustments

e) Modifications on the IAVP request process, particularly more information regarding countries and tax rates of the related companies to be potentially covered by the agreement, economic group details and structure, and high-level comparability and functional analysis for the intercompany transactions to be covered

f) Compulsory use of the CUP method for exports of some commodities, including methodology analysis standards for establishing comparable prices using customs information

In 2017, small changes modified previous TP regulations:

i) An extension of the date limits to use financial information of comparable companies in transfer pricing analysis, from February to April

ii) Limitations to use segmented information based on a simple proportional apportionment of the global accounting figures

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64 Crude oil, and metals such as gold, copper, silver and others considered as metal minerals.

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iii) Use of the local entity as the tested party as a priority, as well as the impossibility of using companies located in tax havens as tested parties.

iv) Deeper support for comparability adjustments on the quantitative effect they have on the margins under the transfer pricing analysis.

In 2018, although no developments were formally introduced in TP regulations, unofficial mentions of BEPS regulations started to be relevant, and the possibility of some elements of these regulations to be part of current TP rules were expected.

The Ecuadorian government issued a new guideline regarding the contents of the TP report for taxpayers, and on December 2019 a new tax reform that adopted some isolated BEPS measures:

a) Higher degree of explanation and information regarding intercompany transactions with intangible goods, including degree of benefits, specific market and exclusivity rights, exploitation, transmission and licensing characteristics of the transaction.

b) Deductibility cap for interests of intercompany loans of 20% of the EBITDA of the applicable tax year.

c) Recharacterization of interest as dividends whenever these payments do not comply with arm’s length of comparable commercial loans.

Thin capitalization ratio of 3:1 continues to be a limit for intercompany loans for companies in the financial sector.

BEPS Action 13 has not been implemented yet.

**Scope of the rules**

TP law applies to all Ecuadorian taxpayers carrying out transactions with related parties.
Economic bonding criteria/related parties

Article 4 of the Ecuadorian RALRTI considers, as related parties, individual or legal entities residing in Ecuador or abroad that directly or indirectly take part in the direction, management, control or capital of the other, or in which a third party, whether an individual or a legal entity, residing or not in Ecuador, directly or indirectly participates in the direction, management, control or capital of those entities.

In addition, the following constitute related parties:

i) Participation in the direction, management, control or capital through administrative bodies or boards

ii) Relationships of up to the fourth rank of partners or managers and even between persons with their trusts

iii) Passive entities performing transactions with companies established in a low-tax jurisdiction or tax haven

iv) Taxpayers purchasing or selling 50% or more of goods, services or other transactions with a person or entity domiciled or not in Ecuador

Finally, tax authorities may establish related parties by supposition when the performed transactions are not consistent with the arm’s length principle.

The arm’s length principle

Arm’s length pricing

The basis of TP is the arm’s length principle, as set forth in Articles 1 and 2 after Article 15 of the Ecuadorian Tax Law (Ley de Régimen Tributario Interno or LRTI), which requires that intercompany transactions be carried out as if they were between unrelated parties, and in the case these are not, such transactions will be adjusted.
Comparability criteria

The enumerated Article 3 after Article 15 of the LRTI provides that the following elements should be considered when determining comparability:

- Characteristics of goods and services
- Analysis of functions, assets and risks
- Contractual terms
- Economic circumstances
- Business strategies

Transfer pricing methodology

Ecuadorian rules, like most regulations in Latin American countries that follow the OECD criteria, provide six TP methods. Article 85 of the RALRTI, in particular, lists the six TP methods accepted in Ecuador as follows:

- Comparable uncontrolled price method
- Resale price method
- Cost plus method
- Profit split method
- Residual profit split method
- Transactional net margin method

With regard to the CUP method, Article 85 of the RALRTI specifies that, for import and export transactions, and in order to determine the Ecuadorian-sourced income, one of the following options will have to be considered as the best possible treatment:
1. Import and export transactions – If a public international and transparent market reference price is established, such price must be used unless it is stated otherwise.

2. Import and export transactions carried out through intermediaries – In the case of intercompany transactions dealing with any primary agricultural product, nonrenewable natural resources and goods with public quotes in transparent markets in general, in which an international intermediary participates and is not the final beneficiary of the goods, the price or quote of the goods in the transparent market on the day of the shipment must be used, whichever the transport is, without considering the agreed-upon price with the international intermediary. However, if the transparent market quote is lower than the agreed-upon price with the international intermediary, the latter will be considered when evaluating the transaction, unless the taxpayer demonstrates that the international intermediary complies with several requisites regarding residence, business management and legal issues, among others.

Best method rule

Ecuadorian law states in Article 86 of the RALRTI that taxpayers must determine the most appropriate method for evaluating transactions following a specific order. The CUP method will be tested first. If it is deemed inappropriate, then the resale price method will be tested. If RPM is still inappropriate, then the cost plus method will be used. The same holds true when considering the three remaining methods.

Use of statistical tools

Ruling NAC-DGER2005-0641 defines the interquartile range as the arm’s length range for applying the methodology. It states that the SRI’s website will eventually provide technical assistance to computing ranges.
Article 87 of the RALRTI also specifies the calculation of an arm’s length range.

Adjustments

Article 66.3 of the RALRTI provides that when applying comparability criteria, reasonable technical adjustments can be applied to improve comparability and obtain results that are more reliable.

Since 2015, the SRI has established that all comparability adjustments must be substantiated in detail (qualitative and quantitative elements that prove not only the necessity of their applicability, but also the impact to all the comparable companies included in the analysis of a particular transaction using such adjustment) and that no comparability adjustment can be considered as standard or routine.

These changes were made official through Resolution NAC-DGERCGC15-00000455. The Resolution also allowed SRI to issue a standardized technical guide, including a brief explanation of the interquartile range following formulas specified in Article 87, as well as limitations on adjustments to such range, including capital adjustments. This standardized technical guide included an outline and methodology to be used by taxpayers whenever capital adjustments are used in the TP analysis, including new elements such as an economic cycle (regarding accounts receivable, payable and inventories) and interest rates (by country and term).

The accepted methodology for capital adjustments is:

**Accounts receivable**

\[ AR = \text{Average AR} \times \{ i / [1+(i \times h)] \} \]

Where \( h = \text{Average AR/Sales} \)
Accounts payable

\[ AP = \text{Average AP} \times \left\{ i / \left[ 1 + (i \times h) \right] \right\} \]

Where \( h = \text{Average AP/COGS} \)

Inventories

\[ IV = \text{Average IV} \times i \]

For all cases, \( i \) would vary according to the estimated economic cycle and country for each comparable company. This means that if the economic cycle is negative (positive), the interest rate must be passive (active). In addition, according to the economic cycle, interest rates must use consistent terms (i.e., an economic cycle of + 53 days must use an active interest rate of 30 to 60 days).

The economic cycle is defined as the sum of the average days of inventory and accounts receivable, minus the average days of accounts payable.

Comparable companies

While Ecuadorian rules do not expressly address the use of internal or external comparable companies, in practice, both of them may be used to support the methodology employed to assess each type of transaction. The SRI allows and uses standard databases based on American or European companies that are listed in public markets. Normally, no local databases with sufficient and certified information are available, which makes it necessary to use foreign databases that provide certainty in the quality and availability of the information to be used for TP analysis.

In 2013, the SRI issued Resolution NAC-DGERCGC13-00859, which states the requirement of giving more detail regarding the comparable companies search process. In particular, the aforementioned resolution required the inclusion of the databases' screenshots used during the search and selection process of comparable companies.
Furthermore, in 2015, Official Resolution NAC-DGERCGC15-00000455 and the SRI’s standardized technical guide requested full and detailed information on all the search processes, including the previously requested screenshots and an additional sequential step-by-step exposition of the selection/discard process, with Excel files to be attached as support exhibits.

Secret comparable companies

Ecuadorian rules address the use of secret comparable companies in Article 90 of the RALRTI and provide the SRI with the authority to use its own information or information that is provided by third parties.

Financial information

According to Article 85 of the RALRTI, the use of international accounting rules (i.e., IFRS) for TP purposes is allowed, but only if they do not contradict official and locally accepted accounting rules. Starting 2013, the IFRS standard accounting rules were implemented for Ecuadorian enterprises, and as of 2016, all Ecuadorian companies are following this international standard.

In addition, Article 279 of the RALRTI mentions the obligation of external auditors to ensure, by an official opinion, the veracity and nature of financial information used by taxpayers, ensuring its compliance with current tax regulations.

Furthermore, Article 279 of the RALRTI includes the responsibility of external auditors to issue a formal opinion regarding TP methodology and adjustments carried out by taxpayers.

OECD interpretation sources

Article 89 of the RALRTI states the use of OECD Transfer Pricing Guidelines as a technical reference, as long as they are congruent with the LRTI and with the treaties negotiated by Ecuador.
Transfer pricing obligations

Taxpayers subject to the TP regime must comply with the following obligations:

1. To conduct transactions with related parties under the arm’s length principle

2. To prepare and file TP documentation for all transactions with related parties and tax havens (according to thresholds)

3. To prepare and file an annual TP informative return (according to thresholds)

Requirements for international intercompany transactions

The LRTI establishes the obligation to prepare and file a TP study (the so-called Informe Integral) assessing the arm’s length nature of Ecuadorian taxpayers’ transactions with related parties. The taxpayer should prepare and file the report with the SRI (according to established thresholds) no later than two months after the filing of its income tax return.

Requirements for transactions with low-tax jurisdictions

Companies engaged in transactions with enterprises located in low-tax jurisdictions or tax havens, as determined by the SRI, must demonstrate that the transactions are at arm’s length, since the tax administration may presume that they are related parties. The taxpayer must file the respective documentation with the SRI no later than two months after the filing of its income tax return.

Requirements for domestic intercompany transactions

Arm’s length values must be used in transactions with resident related parties, pursuant to Article 66.2 of the RALRTI, which provides that intercompany transactions (without distinction between foreign and domestic enterprises) must be at arm’s length. As of 2013, the
obligation to file a TP study and informative return applies to transactions with both domestic and nonresident related parties.

Contents of the transfer pricing documentation

Resolution NAC-DGERCGC15-00000455 defines the contents of the TP report and the informative return.

The TP study must contain an executive summary, a functional analysis (with a detailed description of the multinational group and the functions it performs; background of the taxpayer; its functions, risks and assets; and the details of all intercompany transactions carried out), an industry analysis and an economic analysis. The specific content and outline required is as follows:

I. Executive summary
   a) Scope and purpose
   b) Contents
   c) Conclusions

II. Intercompany transactions
   a) All transactions included must have economic support. The information to be provided for each transaction is listed below:
      ▪ Name of the related party
      ▪ Tax ID
      ▪ Country of residence/domicile
      ▪ Economic bonding criteria
      ▪ Type of transaction
      ▪ Brief description of the transaction
- Amount
- Applicable TP method

III. Functional analysis

a) General contents

- Detailed functions of the related parties – nature, frequency, risks involved and assets involved in each transaction
- Taxpayer information – multinational organization chart, background, structure, main activities, clients, competitors and general risks
- Description of the functional areas of the local company
- Shareholders
- Intercompany transactions’ detail – amounts, general description, related parties involved and country of residence

b) Structure

i) Multinational group background
   1. History and outlook
   2. Organizational and shareholders’ structure
   3. Business lines and products
   4. Other relevant aspects

ii) Functions performed by the group
   1. Research and development
2. Manufacturing
3. Distribution
4. Marketing and publicity
5. Sales
6. Other relevant functions performed

iii) Local company background
1. History and outlook
2. Organizational and shareholders’ structure
3. Business lines and products
4. Clients
5. Competitors
6. Other relevant aspects

iv) Functions performed by the local company
1. Research and development
2. Manufacture
3. Distribution
4. Purchases (local and abroad)
5. Sales (local and abroad)
6. Marketing and publicity
7. Financial transactions
8. Other relevant functions performed
v) Risks

1. Market risk
2. Property, plant and equipment risk
3. Research and development risk
4. Financial risk
5. Exchange rate risk
6. Interest rate risk
7. Credit risk
8. Other relevant risks

vi) Assets

vii) Intercompany transactions

IV. Contractual terms

a) Ecuadorian macroeconomic context

b) Industry analysis worldwide
   i) Market size, competition, etc.

c) Local industry analysis
   i) Market size, competition, etc.

d) Demand analysis (local and worldwide)

V. Economic analysis

a) Detail and amounts of intercompany transactions with related parties
b) Tested party

c) Method selection

d) Profitability indicator selection

e) Selected comparable companies
   i) Selection criteria
   ii) Adjustments and methodology description
   iii) Rejected comparable companies
   iv) Business description
   v) Financial statements of selected comparable companies
   vi) Official sources of information or databases
   vii) Screenshots of all the steps in the selection of comparable companies used in the search process in official databases

f) Adjustments (if applicable)

g) Rejected comparable companies

h) Accepted comparable companies

i) Median and interquartile range methodology

j) Financial information used for the TP analysis

k) Conclusions

l) Additional information
Language of documentation

TP formal obligations in Ecuador, both TP returns and studies, must be kept and filed in Spanish. In cases where TP documentation is in another language, the SRI has the right to request a formal translation of such documentation.

Other documentation requirements

Aside from TP formal obligations, Ecuadorian regulations do not expressly mention additional information that taxpayers must deliver. Moreover, the contents of the TP study are strictly determined and mentioned in detail by Official Resolution NAC-DGERCGC15-00000455 and the SRI’s standardized technical guide.

However, it becomes relevant for taxpayers to keep all work papers, analysis and other additional information in case of any controversy, so it can serve as supporting documentation for future audits.

Contents of the informative return

Taxpayers required to prepare a TP study must submit an informative return regarding transactions with related parties. Moreover, there may be taxpayers who have to file the informative return and not the TP study, due to legal applicable thresholds.

The return must be filed electronically through the SRI’s website and must contain (i) the taxpayer’s ID number; (ii) information about the main intercompany transactions; (iii) disclosure of each intercompany transaction carried out (information on the related parties, type of transaction, FOB amount for import of goods and their customs duty form number, amount of the transaction in the case of services); and (iv) TP methodology used, among others.

The informative return must contain the information listed in Article 2 of Resolution NAC-DGER2006-0640 and fulfill the requirements of Resolution NAC-DGERCGC15-00000455. It must be filed electronically and in “.xml” format, with all information fields filled out.
as required by the ruling, within two months following the income tax return filing date.

Filings: place and date of filing

Informative returns and transfer pricing documentation

According to Article 84 of the RALRTI, income taxpayers carrying out transactions with related parties must file, aside from their annual income tax return, both the TP study and the informative return (Anexo de Precios de Transferencia) before the SRI, in the event they meet the official thresholds within two months after the filing of the income tax return.

Penalties

Penalties in Ecuador are based on formal infractions. The maximum amount of penalties is USD 15,000. Types of infractions include the following:

- Extemporaneous filing of the TP study and informative return
- Errors or inconsistencies between the TP study, the informative return and the income tax return
- Failure to comply with the information required by Ecuadorian tax authorities

How long to keep records

According to Resolution NAC-DGERCGC15-00000455, the SRI may ask taxpayers, by official notice, to provide support documentation with regard to TP and compliance with the arm’s length principle at any time.

Taxpayers must be prepared to provide any information required by the SRI, and taking into account the statute of limitations, records must be preserved for at least six years from the end of the fiscal year.
under review. This would give taxpayers the necessary support in a possible tax audit.

Exemptions and waivers to the informative duties

Taxpayers carrying out transactions with foreign and/or domestic related parties in an amount higher than USD 3 million (within the same fiscal year) are obliged to file an informative return with the SRI.

On the other hand, taxpayers carrying out transactions with foreign and/or domestic related parties in an amount higher than USD 15 million (within the same fiscal year) will be obliged to file a TP study before the SRI.

In addition, Ecuador implemented a tax reform in 2009 that restricted TP compliance obligations for several taxpayers. Taxpayers that carry out transactions with related parties will not have to comply with TP regulations when they satisfy any of the following conditions:

- Has a tax higher than 3% of its taxable revenues
- Does not carry out transactions with residents in tax havens
- Does not have an agreement with the state to explore and exploit nonrenewable resources

Consequences derived from transfer pricing adjustments

The SRI may determine the cumulative revenue or authorized deductions of taxpayers that have not carried out their related-party transactions at arm’s length. This will result in a tax liability that includes the amount of unpaid tax as determined by tax authorities and the corresponding inflation, surcharges and applicable fines.
Additional regulations

APAs and in-advance valuation procedures (IAVPs)

In Ecuador, APAs with the tax authorities have been allowed since 2007, with a maximum duration of five years (that is, the year when the agreement was negotiated, the year prior to that and the following three fiscal years).

In 2014, the SRI issued Official Resolution NAC-DGERCGC14-00001048, in which detailed parameters and processes for negotiating IAVPs were made available for taxpayers that have intercompany transactions with related parties for TP purposes. Although IAVPs are not formally called APAs, they follow the same basic structure and fundamentals, including the following: i) covering all or some of the intercompany transactions; ii) being bilateral or multilateral; iii) having a binding nature; iv) being applicable for more than one fiscal year as well as their extension in the case of approval; and v) having a confidentiality policy, among others.

In addition, in August 2015, the SRI issued Official Resolution NAC-DGERCGC15-00000571, which describes the procedures and requirements to eliminate through IAVPs the deducibility restrictions applicable to intercompany transactions between related parties.

In 2016, the SRI issued Official Resolution NAC-DGERCGC16-0532, which included additional information to be provided by taxpayers when applying to an IAVP. Information regarding previous agreements or formal procedures with the SRI, a high-end summary of the proposed methodology, detailed information of related parties to be covered for the procedure, details of the group’s structure, as well as a deep functional and comparability analysis were included to ensure better outcome reliability for IAVPs in the future.

65 Intercompany transactions such as royalties, technical, administrative and consulting services, among others.
Thin capitalization

Article 10 of the Income Tax Law sets a thin capitalization ratio of 3:1 for intercompany loans of companies operating in the financial sector. For the rest of taxpayers, the law states a 20% of the EBITDA deductibility cap for interests of intercompany loans.

Intangibles

For TP purposes, the only rule referring to intangibles is Article 66.3, Section 1, subsection c) of the RALRTI, which provides that the characteristics of goods or services should include, for intangible goods, the following: (i) the type of operation, such as licensing or sale; (ii) the type of asset, such as a patent, trademark or knowhow; (iii) the duration and degree of protection; and (iv) the expected benefits of using the asset in question.

Intragroup services

There are no specific rules on intragroup services.

Interests

The only TP rule referring to interests is Article 66.3, Section 1, subsection e) of the RALRTI, which states that the characteristics of the goods or services to be considered should include, in the case of financing transactions: (i) the principal; (ii) term; (iii) guarantees; (iv) debtor solvency; (v) interest rate; and (vi) the economic essence of the transaction.

In addition, the Coding of the Internal Tax Regime (Codificación de la Ley del Régimen Tributario Interno or LRTI) states that interest on business debt is deductible if it is not higher than the rates authorized by the director of the Central Bank of Ecuador. If the interest is derived from external credit, it must be registered with the Central Bank. If the interest rate is more than the maximum rates set by the Central Bank, the corresponding withholding should be made on the excess in order for the payment to be deductible. Failure to report the
payment as required by the director of the Central Bank of Ecuador will lead to the loss of deductibility of the financial costs of the loan.

Finally, Resolution NAC-DGECCGC15-0013 issued by the SRI in 2015 establishes rules for commercial loans between related parties. According to this resolution, commercial loans between related parties will be deductible if they are made with the purpose to obtain, maintain or improve the taxable income in Ecuador if such loans are directly related to the business activity of the taxpayers. In the case of noncommercial loans that do not follow the aforementioned criteria, loans will be treated as advance dividends and must be levied the corresponding withholding tax.

Sales of stock

Regarding the sales of shares, Article 66.3, Section 1, subsection d) of the RALRTI establishes that the characteristics to be considered should include (i) the revalued equity of the issuer; (ii) capital; (iii) present value of profits or projected cash flows; or (iv) the stock quote recorded in the last transaction carried out with such shares.

Cost-sharing agreements

Ecuador does not have specific rules on cost-sharing agreements.

Tax audit procedures

Sources for targeting and methods

The SRI is the tax authority responsible for inspecting taxpayers in Ecuador. The SRI receives both the TP study and the informative return of taxpayers on a yearly basis and, as held by the Ecuadorian Tax Court (Tribunal Distrital de lo Fiscal), also has the power to require taxpayers to provide the necessary documentation for any review. Moreover, it has sufficient legal authority to regulate TP, thereby setting a precedent for inspection powers in the case of an audit. The burden of proof in TP cases generally falls on the tax authorities when the taxpayer has provided all the TP documentation.
In general, the information disclosed in the TP study and the informative return of taxpayers, as well as information about TP audits in other countries, is a valid source for targeting audits.

The SRI's TP team is focusing on the pharmaceutical industry as one of its main audit targets, and it is understood that it will perform in-depth audits and analysis of the price control regime that the industry faces in Ecuador. Nonetheless, the TP team also targets other industries, such as flower growers, and oil and gas.

Current audits

Some of the most relevant audits have affected pharmaceutical and exports companies, with proposed adjustments of up to USD 350 million. The SRI has one year to conclude its investigations based on the responses filed by taxpayers with regard to the audits.

Likewise, 2012 to 2016 were very active years, and SRI officials throughout Ecuador requested the following from several taxpayers:

(i) To provide clarifications on the initially disclosed information

(ii) To perform voluntary amendments to their returns or reports in case they found inaccuracies in what had been filed

(iii) To perform TP adjustments in those cases in which a very technical investigation had been performed by the SRI

An increasing number of audits and review procedures were carried out in 2017, 2018 and 2019 following the new requirements and changes in TP rules, as well as several requests of IAVPs.

The administrative stage of audits initiated in 2017 and previous years is being finalized, and some of them will follow the due process to court. SRI officials as well as closure positions show that pricing control (pharmaceutical industry), economic circumstances and other unique elements that may affect comparability are challenged by the tax administration.
Authority faculties

According to Article 1 of the RALRTI, tax authorities can perform and enforce TP adjustments when taxpayers do not comply with TP rules established in the Income Tax Law, RALRTI, and other official regulations issued by the government. Some of the most relevant audits have affected pharmaceutical and exports companies, with proposed adjustments of up to USD 350 million. The SRI has one year to conclude its investigations based on the responses filed by taxpayers with regard to the audits.

Transactions under review

TP rules include 25 types of income transactions, 18 types of expense transactions and 10 types of other transactions to be considered in the analysis and report submitted to the SRI. The main transactions include the following:

1. Export of produced inventories
2. Export of nonproduced inventories
3. Import of inventories for production
4. Import of inventories for distribution
5. Administrative and technical services
6. Commissions
7. Royalties
8. Interests
9. Shares
10. Fixed assets
However, there is no defined trend as to which transactions are more susceptible to being audited.

**Position of tax authorities**

The SRI has a dedicated TP team responsible for verifying taxpayer compliance with the rules. Its position has been very open, allowing audited taxpayers to disclose additional information regarding those audited transactions. In 2014 and 2015, the administrative phase for many audit processes had been or will be concluded and then a legal phase in court will begin. In addition, during 2017 and 2018, the SRI's TP team carried out several reviews and initial requests for information, and some of them resulted in transfer pricing audits or further requests for information.

Moreover, in the last few years, SRI officials have been more than open to meeting taxpayers, especially regarding new IAVPs requirements and regulations. The trend these days is to use this tool in order to provide taxpayers with fiscal stability and certainty.

**Opened cases**

Several TP audit cases have already been opened in Ecuador and the number has increased steadily. However, there are no official statistics as to how many of them have been filed, negotiated, etc.

The number of TP audits is expected to increase. Opened cases are about to conclude the administrative stage and will follow to court where technical expertise is an important element in substantiating the discussion’s technical elements.

**Managing the audit process**

Taxpayers are advised to prepare all requested documentation specified in the law and in the resolutions, as a matter of compliance. In addition, all information that supports intercompany transactions must be adequately stored and made available upon a review by the SRI.

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Litigation procedure

Ecuadorian law sets the following tax procedure:

1. Notification – This must occur within the following three years after the income tax return has been filed. Audits can take between six months to one year. The SRI issues a draft “Determination Act” (*Acta de Determinación*). Taxpayers have 20 days to file arguments of defense.

2. The SRI:
   a) Accepts and issues amended acts
   b) Does not accept and issues the final Determination Act as a definitive document

3. Taxpayers have 20 labor days to challenge the SRI’s final Determination Act by filing an administrative complaint with the SRI.

4. The SRI has 120 labor days to resolve the complaint.

5. The SRI must issue a Confirmation Resolution (*Resolución Confirmatoria*). If the SRI does not agree with the taxpayer, the taxpayer can file a Review Appeal (*Recurso de Revisión*) with the SRI’s general director. Yet, in practice, upon arriving at this instance, a taxpayer does not request a Review Appeal but rather files a lawsuit directly with the District Fiscal Court (*Tribunal Distrital de lo Fiscal*).

6. The SRI must issue an Administrative Resolution (*Resolución de Etapa Administrativa*).

7. If a suit (*Demanda Contencioso Tributaria*) is filed with the Tribunal Distrital de lo Fiscal, this stage could include the participation of expert witnesses (*Peritos*), although that has never happened in Ecuador for TP purposes.
Finally, if the taxpayer loses the lawsuit, they can file an appeal with the high courts (*Recurso de Casación*), such as with the National Court of Justice (*Corte Nacional de Justicia*), where only legal, not technical issues, will be discussed.

**Revocation appeals**

Taxpayers may revoke appeals before the competent authority.

**Tax amnesty**

No tax amnesty was offered to taxpayers in 2019.

**Competent authority procedure**

Most of Ecuador’s treaties to avoid double taxation include Article 25 of the OECD Model Convention with respect to the mutual agreement procedure or competent authority procedure. Thus, in the case of a TP audit, taxpayers may request a competent authority procedure if the other related party is located in a country with which Ecuador has a double taxation treaty that provides for such proceedings.

**Countries with double taxation agreements**

Ecuador has entered into double taxation treaties with the following countries:

1. Argentina
2. Belarus
3. Belgium
4. Brazil
5. Canada
6. Chile
7. Colombia
8. Costa Rica
9. Denmark
10. Finland
11. France
12. Italy
13. Japan
14. Mexico
15. Qatar
16. Romania
17. Russia

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66 Applicable only for air transportation.
General treaty rules and adjustments

In general, Ecuador’s treaties are similar to the OECD Model Convention since they also refer to residence, permanent establishment, royalties, interests, business profits, dividends, capital gains, related parties, mutual agreement procedures, exchange of information and nondiscrimination, among other things. Moreover, some of the treaties signed by Ecuador explicitly contemplate the possibility of applying a corresponding adjustment.

Corresponding adjustments

Corresponding adjustments involve amending the tax return of a company residing in another country when a primary adjustment is made to the income or deductions of a company in the first country. The adjustment may reduce or eliminate double taxation as part of a mutual agreement procedure. In the case of Ecuador, certain double taxation treaties have an article similar to Article 9 of the OECD Model Convention regarding the application of this adjustment.

Arbitration

International tax arbitration and mediation are acceptable under the treaties but have not been implemented or put into practice yet.

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67 Bolivia, Colombia and Peru.
Court cases

There are currently no TP cases in the courts of Ecuador. However, it is expected that many cases conclude the administrative stage and continue on to the judicial stage, which, in turn, will start the involvement of courts in TP matters in the near future.

In-advance valuation procedures

Procedure

Scope of an IAVP

The IAVP applies to income taxpayers carrying out intercompany transactions with related parties and those that are obliged to comply with TP rules in Ecuador.

IAVP – formal request draft

Taxpayers may present to the SRI an IAVP draft before filing the official request. The aforementioned draft should include the following:

a) Detailed information on related parties that will be engaged in the procedure

b) Brief description of the intercompany transactions subject to the procedure

c) Elements and basic analysis criteria of the IAVP to be implemented

d) Fiscal years of the intercompany transactions subject to valuation

This draft will serve for an initial review and comments from the SRI. It is a preliminary document and does not affect the official submission of the procedure to the SRI.
IAVP – official formal request and requirements

Taxpayers seeking to pursue an IAVP must submit a formal request to the SRI’s general director with at least the following information:

I. General Information

a) The SRI’s administrative office receiving the request

b) General information relating to the taxpayer (name, address, mailing address, tax ID, motivation and other information considered relevant)

c) Detailed intercompany transactions that will be included in the procedure

d) Scope of the IAVP (unilateral or bilateral\(^{68}\))

e) Information regarding other IAVPs or similar procedures (APAs or any other friendly procedures) currently in place that may affect, directly or indirectly, the intercompany transactions to be included in the procedure. If no affectation exists, a written notice must be included.

f) Brief summary of the methodology to be implemented in the valuation procedure – This information must include information regarding related parties to be potentially covered in the procedure, type of transaction and last annual registered amount, applicable method, and detail of comparable companies used for the analysis, among other specific details of the intercompany transactions to be covered in the IAVP.

\(^{68}\) In the case of bilateral procedures, information regarding anti-double taxation treaties, as well as tax authorities and foreign applicable law, must be included in the formal request.
II. **Specific information of the related parties and intercompany transactions submitted**

a) General information of the related parties engaged in the procedure (name, address, mailing address, tax ID and other information considered relevant)

b) Economic bonding criteria for tax purposes applied to each of the related parties engaged in the procedure

c) Detailed description of the intercompany transactions to be included in the procedure (basic elements, nature, other characteristics and amounts)

d) Information regarding tax jurisdictions, applicable law and other possible tax effects that may impact the intercompany transactions included in the procedure

e) General description of the organizational structure and shareholders of the companies engaged in the procedure

f) Comparability analysis according to Ecuadorian tax and TP regulations – This information must include functional analysis for the taxpayer as well as for each of the related parties engaged in the procedure.

g) Detailed information of the comparable companies’ search in databases and TP method selection

h) Intercompany agreements that may affect the intercompany transactions submitted in the procedure; cost-sharing agreements must be submitted if they apply.
i) In the case of tax audits or controversies, information regarding these audits for each of the related parties engaged in the procedure\(^{69}\)

j) Comprehensive financial statements of the last fiscal year for the taxpayer engaged in the procedure

k) Comprehensive financial statements of the last fiscal year for the related parties, and of selected comparable companies if applicable, engaged in the procedure

l) Any other relevant information or documentation that may affect the intercompany transactions included in the valuation procedure

III. **Proposed methodology and compliance with the arm’s length principle**

Taxpayers must submit a proposed methodology of analysis for the IAVP that complies with the arm’s length principle. The compliance of the arm’s length principle must follow Ecuadorian tax and TP rules.

IV. **Critical assumptions**

Taxpayers must highlight any critical assumptions that may have relevant economic impact on the intercompany transactions incorporated in the procedure in order to validate the TP methodology included as part of the IAVP analysis.

From the aforementioned information, II, III and IV must be submitted to the SRI in magnetic format (PDF) and signed by the legal representative of the company.

\(^{69}\) In cases of audits or controversy processes, status and likelihood of ruling must be included for the relevant companies.
Official acceptance of an IAVP formal request

An IAVP formal request is considered officially received once it complies with all the requirements in I to IV or once any shortage of information identified has been fulfilled within the terms granted by the SRI.

Once all the requirements of the formal request have been verified, the SRI will notify the taxpayer of its official reception.

Rejection of an IAVP formal request

When taxpayers do not fulfill all mandatory requirements of an IAVP formal request, the SRI will notify the taxpayer of the rejection in the following four months.

If rejected, taxpayers may submit a new IAVP formal request using the elements of previous requests.

Additional information

Notwithstanding the aforementioned, the SRI may request, at any time, additional information regarding intercompany transactions, methodology or anything else that seems necessary in order to assure its position upon the requested IAVP.

Taxpayers may submit additional information not formally required but considered relevant to the procedure.

Confidentiality

All the information provided by taxpayers will be treated as confidential by the SRI.

IAVP resolution term

The IAVP can be resolved in two years from the official reception date of its formal request. Its resolution can contain an approval or a denial of the pursued IAVP.
• **In the case of approval** – The resolution of the IAVP will formally establish the applicable fiscal years of its enforcement.

• **In the case of denial** – The SRI may or may not recommend an alternative analysis methodology. However, the SRI will disclose technical or legal arguments that motivated its denial and/or the alternative analysis methodology proposed to the taxpayer.

The binding nature of IAVPs

Once the IAVP’s resolution is officially notified to the taxpayer, provided that all the information and data is correct and truthful, the procedure will have a binding nature for the SRI.

IAVP resolution inapplicability or status loss

The IAVP resolution will not be applicable or will lose its effect in any of the following cases:

i) When inconsistencies in the information are found

ii) When significant variations in the critical assumptions take place. In this particular case, the applicability of the IAVP resolution will cease from the moment these variations took place.\(^{70}\)

iii) When the requirements disclosed in the official IAVP resolution are not met

iv) When the application report of the IAVP is not submitted in the provided term

Formal requirements

Taxpayers that accept an IAVP resolution from the SRI and that comply with all the requirements mentioned before will be exempt

\(^{70}\) This will not affect the possibility for the taxpayers to duly notify the SRI and adjust critical assumptions or the IAVP when they are identified.
from filing the annual formal TP requirements, but only in transactions included in the procedure for the fiscal years during which it is in force.

Moreover, the annual aggregated amounts of such transactions will not be added to the other intercompany transactions carried out by the taxpayer with related parties in determining its thresholds for formal requirements.

**Application report**

Annually, during the applicability of an IAVP, in a term that does not exceed two months from the filing of the income tax return, taxpayers must file an application report that supports the procedure. This report must include the following:

a) Intercompany transactions carried out in the fiscal year in place and to which the IAVP’s methodology is being applied

b) Prices, payments or profit margins derived from the application of the IAVP’s methodology

c) Variations/behavior of the critical assumptions of the IAVP and support of its compliance

d) Analysis and applicability of the IAVP’s methodology in the result for the fiscal year in place

**IAVP withdrawal**

Taxpayers undergoing an IAVP can withdraw at any time.

**IAVP control and verification**

The SRI can control and verify, at any time, any aspect of an IAVP in order to ensure that all requirements, critical assumptions, methodology and other elements of the procedure are being duly

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71 A transfer pricing study and a transfer pricing informative return.

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applied and the terms of the originally approved resolution are being complied with.

Significant variations of critical assumptions

Taxpayers must notify the SRI, within a month, of any significant variation of the critical assumptions that may have an impact on the analysis methodology applied in an IAVP. Likewise, taxpayers must inform the SRI of any relevant changes in assets characterizations, risks or TP rules that affect the transactions included in the IAVP.

IAVP inapplicability or status loss official notification

Notwithstanding the effects on previous fiscal years, the SRI may notify the taxpayers, and other tax authorities as applicable, of the inapplicability or status loss of the IAVP resolution. This notification will include all the arguments considered by the SRI for the inapplicability or status loss of the IAVP’s resolution.

Extension of an IAVP

Taxpayers can request before the SRI a formal extension of the term of an IAVP.

Fees

Fees are not applicable. There is no determined fee payable to SRI for obtaining an IAVP.

Tax system

Residents are taxed on worldwide income while nonresidents are taxed on Ecuadorian-sourced income.

Trends and perspectives

Action 13 and other BEPS-related measures are expected to be implemented.
Mexico
Introduction

The 2022 Tax Reform enacted by Congress includes several changes to provisions in Mexico’s Income Tax Law (MITL) that touch upon transfer pricing matters. The most noteworthy ones relate to additional burden for taxpayers in terms of compliance and documentation and the elimination of the advance pricing agreement (APA) program for the maquila industry.

Who is obliged?

The MITL requires that taxpayers conducting transactions with all related parties determine their taxable income and deductions by taking into consideration the prices or amounts that they would have agreed upon with nonrelated parties in comparable operations (Article 76, Section XII).

Under Article 76, Section IX of the MITL, all taxpayers have the obligation to prepare and keep contemporaneous documentation to prove that the transactions carried out with related parties, whether they are foreign or domestic or with companies residing in tax havens, are pursuant to the arm’s length principle. Each tax year, taxpayers must conduct a TP study that contains an evaluation by type of transaction and report transactions by related parties.

Economic bonding criteria/related parties

In Mexico, two or more individuals or legal entities are considered related parties when one of them has direct or indirect participation in the management, control or capital of the other, or when a person or a group of persons participates directly or indirectly in the management, control or capital of such person(s).

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72 For the Mexican Tax Administration, a jurisdiction represents a Tax Haven Regime if the income tax rate is below 75% of the applicable rate in Mexico.
73 Exceptions to these obligations are mentioned further in this chapter.
In addition, members of joint ventures, as well as permanent establishments for their central offices or other permanent establishments, have been considered related parties. This is in accordance with the provisions of Article 179 of the MITL.

Unless proven otherwise, Article 179 of the MITL assumes that any transaction conducted with companies residing in low-tax regimes, as defined in the MITL, is a transaction between related companies that is not at arm’s length values. The MITL further provides that payments made to tax haven residents are not deductible, unless the taxpayer proves that the price or consideration is at arm’s length.

The arm’s length principle

Arm’s length pricing

Article 179 of the MITL stipulates that taxpayers who carry out transactions with related parties are obliged to determine their taxable income and authorized deductions, considering the amounts or prices that would have been used with unrelated parties in comparable transactions (arm’s length principle). Otherwise, the tax authorities may adjust the income or deductions of taxpayers in accordance with the arm’s length principle.

Tax authorities are empowered to determine the taxable income or authorized deductions of taxpayers that have not carried out their related-party transactions at arm’s length. This will result in a tax liability that includes the amount of unpaid tax as determined by tax authorities and the corresponding inflation, surcharges, applicable fines and possible double taxation.

Transfer pricing obligations

Mexican taxpayers have three main TP obligations, as follows:
To carry out transactions with related parties and unrelated parties residing in low- or no-tax jurisdictions (tax havens) under the arm’s length principle

To file applicable, informative annual returns

To prepare a TP study

Article 76, Section IX of the MITL mentions that taxpayers, who, in the year immediately preceding the current fiscal year earned an income of less than MXN 13 million (approximately USD 634,146) from business activities or MXN 3 million (approximately USD 146,341) from the performance of services, are released from the obligation to prepare and maintain TP documentation as described in the MITL. These thresholds do not exempt taxpayers from the obligation of presenting the TP informative return.

Contents of transfer pricing documentation

TP documentation must contain the following information, according to Article 76 of the MITL:

a) Name of the related company

b) Information relating to the assets, functions and risks of all the parties involved per type of transaction (functional analysis)

c) Specification of each transaction carried out with related parties, including the type of transaction, amount and name of the related party

d) Method applied pursuant to Article 180 of the MITL as well as the specification of the comparable companies used in the assessment of each type of transaction

e) Exhaustive proof of the best method rule procedure used in each transaction
The MITL does not provide for any obligation to submit the TP documentation to tax authorities, unless the taxpayer is obliged to present the Local File, which is in essence a TP report.

Comparability criteria

Taxpayers should consider the following elements in determining comparability:

- Characteristics of the transactions
- Functional analysis
- Contractual terms
- Economic circumstances
- Business strategies

Article 179 obligates taxpayers to use by default information of comparable transactions corresponding only to the fiscal year under analysis and, exceptionally, the use of two or more fiscal years when the business cycle or commercial acceptance of the taxpayer’s product covers more than one fiscal year.

Transfer pricing methodology

Once the comparability factors are considered, the most reliable method must be applied, which, under the facts and circumstances, provides the most reliable measure of an arm’s length result. The six methods established in Article 180 of the MITL, which are the same methods included in the OECD TP Guidelines, are the following:

- Comparable uncontrolled price (CUP) method
- Resale price method (RPM)
- Cost plus method (CPM)
• Profit split method (PSM)
• Residual profit split method
• Transactional net margin method (TNMM)

Best method rule

In 2006, the MITL introduced a hierarchy for the application of TP methods. In particular, Article 180 of the MITL establishes that taxpayers may use another method only when the CUP method is not appropriate to determine the arm’s length nature of the tested transaction, in accordance with the OECD TP Guidelines.

The taxpayer must show that the method used is the most appropriate or most reliable pursuant to all available information, giving preference to the RPM or CPM over the PSM or TNMM.

Use of statistical tools

The 2022 Tax Reform incorporates into the text of the law the obligation to use the interquartile range, which is currently contained in Article 302 of the MITL regulations, when applying transfer pricing methods when two or more comparable transactions are available. In this regard, the proposed reform only considers two exceptions to the application of the interquartile range: (i) when the application of the method is agreed within the framework of a mutual agreement procedure indicated in the treaties to avoid double taxation; or (ii) when it derives from the application of the authorized method in accordance with the general rules issued by the Tax Administration Service (Servicio de Administración Tributaria or SAT).

Accepted adjustments

The MITL establishes the possibility of applying reasonable adjustments to eliminate differences among the comparable transactions or companies. Such adjustments must consider the comparability elements previously mentioned.
On 21 November 2018, the SAT published a list of six frequently asked questions about comparability adjustments.

This publication addresses the cases in which the SAT considers that comparability adjustments must be made for transfer pricing purposes, such as differences in accounts payable, accounts receivable and inventories, as well as the country risk adjustment.

The three types of comparability adjustment detailed in the frequently asked questions are:

- **Accounting comparability adjustments**: These attempt to equate the costs and expenses associated with divergent assets, functions and risks and their associated profitability between the companies or independent transactions and the analyzed part or transaction, as well as the search for consistency and presentation of the financial information, correcting differences due to the use of different accounting criteria that may be quantifiable, as in the case of costs and expenses for restructuring, deterioration of inventories and/or assets, amortization of goodwill and/or intangibles, among others.

- **Capital comparability adjustments**: These relate to accounts of the statement of financial position and generally focus on the items of accounts receivable, accounts payable and inventories, which are intended to equalize the timing and the implicit financial cost of said accounts, including the conditions of collection and payment that may be presented by companies or independent transactions with respect to the analyzed part or transaction.

- **Adjustment of comparability by country risk**: It tries to improve the comparability and with it the reliability of the results when there are differences in the economic circumstances existing between the market where the operation is performed or where the analyzed part is, and the ones corresponding to the circumstances of the potential comparable ones. For example, when considering potentially comparable companies that operate
in economies such as the United States, while the analyzed entity operates in Mexico.

Selected comparables

Public financial information for local comparables is limited in Mexico. Therefore, SAT allows taxpayers to use foreign comparable data. As a result, a taxpayer may hold that the use of foreign company data is acceptable in the absence of local reliable comparable data.

Secret comparables

Under Article 69 of the Federal Tax Code (Código Fiscal de la Federación or FFC), SAT may use confidential information obtained from third parties to determine the taxable income and authorized deductions of taxpayers that have not conducted their transactions under the arm’s length principle.

Article 48, fraction VII of the FFC establishes the rules by which, in an audit process, taxpayers may have access to review such information in SAT’s facilities and sign a confidential agreement.

In a somewhat similar matter as secret comparables, in 2020, Article 33 of the FCC was amended to state that tax authorities should:

> […] periodically provide taxpayers subject to income tax, reference data in regards to profit, deductible items or effective tax rates that other entities obtain from performing their activities, based on the economic sector or industry at which they belong.

Since then, the SAT has released five publications with reference data for years 2016 to 2019 of the effective tax rate for different activities within 21 economic sectors.

According to the same Article 33 of the FCC, the information will be published with the objective to measure tax risks. As part of a voluntary compliance program, the SAT may inform taxpayers when
supposed risks are detected based on the reference data, without initiating a formal audit. Finally, the article states that such voluntary compliance program is not mandatory for taxpayers.

Financial information

According to Article 180 of the MITL, when using financial information (e.g., revenues, costs and expenses) to demonstrate that intercompany prices are agreed upon at market prices, the taxpayer must prepare such information in accordance with the Mexican GAAP, Normas de Información Financieras (NIFs).

Tax returns

Annual tax return

The annual tax return forms indicate that all items in the income statement and certain balance sheet items must include the annualized amounts of transactions carried out with resident-related parties, nonresident-related parties and unrelated parties. Companies must break down sales and/or services into resident and nonresident and related and nonrelated parties. This requirement also applies to sales returns, discounts and rebates, net domestic and import purchases, labor, outsourced production/maquila expenses, indirect manufacturing expenses, operating expenses, interest, exchange gains and losses, results of monetary position, accounts and documents receivable, accounts and documents payable, customer prepayments, and financial transactions.

Report on the tax situation – Statutory Tax Audit Report (Dictamen Fiscal)

The tax reform published in November 2021 establishes that the Statutory Tax Audit Report is optional for taxpayers with more than MXN 140,315,940 (approximately USD 6,844,680) in taxable income in the immediately preceding year and for taxpayers with assets
valued at more than MXN 110,849,600 (approximately USD 5,407,297) or a minimum of 300 employees per month.

For taxpayers that elect to present the Dictamen Fiscal, external auditors file a report with the tax authorities on the taxpayer’s tax situation, stating that the company has complied with its tax obligations, including those relating to TP matters.

For 2022, the Statutory Tax Audit Report is an obligation for taxpayers with more than MXN 1,650,490,600 (approximately USD 80,511,736) in taxable income in the immediately preceding year and for taxpayers that at the close of the previous fiscal year have shares placed among the general public investor in stock exchange. The Statutory Tax Audit Report is due 15 May of the following year.

There is one main schedule to the Statutory Tax Audit Report that refers to TP issues, which requires information on transactions with related parties (by related party and type of transactions). Main entries include tax ID, country of residence, type of transaction, amount, method, analysis as to whether or not it complies with the arm’s length principle, and the indication of the corresponding adjustment in the event the transaction was not at arm’s length.

In addition, the last part of the Statutory Tax Audit Report includes a questionnaire that the external auditor should file, which includes a general TP diagnosis of the taxpayer's situation.

Transfer pricing informative return

Article 76, Section X of the MITL establishes that taxpayers must file relevant information regarding intercompany transactions carried out during the preceding tax year in the Multiple Informative Tax Return. This obligation is due by 15 May of the following year and does not apply to maquiladora operations. Amounts included in the informative return must match the information used in the TP documentation and in the Statutory Tax Audit Report.
The main information requested in the TP return per intercompany transaction is as follows: (i) name of related party; (ii) tested party; (iii) type of transaction; (iv) indication if internal comparables were used; (v) TP adjustment, if applicable; (vi) rate or percentage agreed upon; (vii) type of arm’s length range; (viii) values of interquartile range; (ix) number of comparable uncontrolled transactions; and (x) SIC codes used in the search for comparable transactions.

BEPS plan – additional transfer pricing informative return

In accordance with Action 13 of the BEPS plan regarding TP documentation, the MITL has, since 2016, included Article 76-A, which establishes that taxpayers must provide tax authorities with three TP informative returns, and these are as follows:

1. Master informative return regarding the multinational group containing the following information:
   a) Organizational structure
   b) Description of the business activity, of intangible assets, and financial activities with related parties
   c) Financial and tax position

2. Local informative return containing the following information:
   a) Description of local organizational structure, strategic and business activities, and transactions with related parties
   b) Financial information relating to the taxpayer and to the comparable companies selected for the analysis

3. Country-by-Country (CbC) Report containing the following:
   a) Information by tax jurisdiction regarding the global distribution of revenue and paid taxes
b) Information on the economic activities by tax jurisdiction, such as total revenue divided by revenue from third parties and revenue from related parties; income or loss before taxes; income tax paid; income tax accrued in the fiscal year; retained earnings or losses; number of employees; value of fixed assets

c) List of all entities that form the multinational group, including permanent establishments, and indication of its main economic activity and country of incorporation, in the event this is different from its tax residence

The local and master informative return must be filed by taxpayers with income tax higher than MXN 904,215,560 (approximately USD 44,108,076) in the previous fiscal year, taxpayers with stock in an exchange market, taxpayers that consolidate financial statements (régimen de grupos de sociedades) or foreign entities with a permanent establishment in Mexico (Fractions I to IV of Article 32-H FFC).

The 2020 Tax Reform amendments to article 76-A of the MILT expand the universe of taxpayers required to file the Local and Master Files. In particular, derived from the changes to articles 32-A (a new second paragraph) and 32-H (new section VI) of the Federal Tax Code, companies required to prepare a Statutory Tax Report (Dictamen Fiscal), and their related parties performing intercompany transactions, will be required to file these returns.

The CbC informative return must be filed by taxpayers that fall under any of the following:

a) It is the ultimate parent company, meaning:

   i. It is a resident of Mexico.

   ii. It has subsidiaries or permanent establishments.
iii. It is not a subsidiary of a foreign entity.

iv. It is obliged to elaborate, present and disclose consolidated financial statements according to Mexican financial rules (NIFs).

v. It must disclose the results of foreign entities in its consolidated financial statements.

vi. It must have obtained consolidated revenue above MXN 12 billion (approximately USD 585.4 million) for accounting purposes in the prior fiscal year.

b) It is a local entity or a foreign entity with a permanent establishment in Mexico that has been assigned by the ultimate parent of the multinational group as that responsible to submit the CbC Report.

Rules 3.9.11-3.9.17 of the Mexican Tax Regulations set the final guidance over what information the TP informative returns should include and when and how they should be presented.

The Master and CbC informative returns must be submitted by 31 December of the year immediately following the tax year concerned, while the local informative return must be submitted not later than 15 May of the year immediately following the tax year concerned.

Form 76 “Relevant Transactions”

In October 2014, SAT published Form 76 on its website, by which taxpayers are required to disclose information on 36 types of relevant transactions, in terms of the provisions of Article 31-A of the FFC. Taxpayers are not required to submit information on a relevant transaction if it does not exceed MXN 60 million (USD 2.9 million).

Five of the 36 transactions listed in the form provided by the tax authorities are associated with TP, specifically with regard to adjustments and payment of royalties.

Baker McKenzie
Rule 2.8.1.12 of the Mexican Tax Regulations published on 27 December 2021 establishes the following schedules to comply with in the filing of Form 76.

<table>
<thead>
<tr>
<th>Month</th>
<th>Due date</th>
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<tbody>
<tr>
<td>January, February, March</td>
<td>Last day of May of the relevant financial year</td>
</tr>
<tr>
<td>April, May, June</td>
<td>Last day of August of the relevant financial year</td>
</tr>
<tr>
<td>July, August, September</td>
<td>Last day of November of the relevant financial year</td>
</tr>
<tr>
<td>October, November, December</td>
<td>Last day of February of the following financial year</td>
</tr>
</tbody>
</table>

Penalties

If a taxpayer does not file the informative return, the authorities may seek to modify deductions with respect to payments to nonresident-related parties and may impose fines on informative returns erroneously filed or not filed on time.

**Penalties for failing to maintain documentation**

<table>
<thead>
<tr>
<th>Action</th>
<th>Penalty</th>
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<tbody>
<tr>
<td>Failure to maintain the supporting documentation referred to in Article 76, Section IX of the MITL at the moment of annual tax return filing</td>
<td>Possible rejection and/or modification of deductions associated with payments performed to related parties abroad, in the case of a TP tax audit</td>
</tr>
</tbody>
</table>
### Penalties – informative return – Article 76 Section X

<table>
<thead>
<tr>
<th>Action</th>
<th>Penalty</th>
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<tbody>
<tr>
<td>Erroneous filing of, or failure to file, the informative return</td>
<td>Fine ranging between MXN 86,050 and MXN 172,100 (approximately USD 4,197 and USD 8,395), pursuant to the provisions of Section XVII of Articles 81 and 82 of the FFC</td>
</tr>
</tbody>
</table>

### Penalties – informative return – Article 76-A

<table>
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<th>Action</th>
<th>Penalty</th>
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</table>
| Failure to carry out intercompany transactions at arm’s length values  | Fine ranging between MXN 172,480 and MXN 245,570 (approximately USD 8,413 and USD 11,979), pursuant to the provisions of Section XL of Articles 81 and 82 of the FFC  
Article 32-D fraction IV of the Tax Code states a prohibition to contract with the government and the Attorney General Office if a tax return has not been filed on time and that such rule applies to the provision of Article 76-A of the MITL. |
Penalties for failing to apply fair market values

<table>
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<tr>
<th>Action</th>
<th>Penalty</th>
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</table>
| Failure to carry out intercompany transactions at arm’s length values | Possible adjustment by tax authorities, together with the applicable fine (Article 179 of the MITL)  
Penalty of 55% to 75% of the omitted tax (Article 76 of the FCC) |

Reductions

Article 76 of the FCC establishes that fines may be 50% lower than those stipulated above if the TP study requirement has been met.

Special maquiladora features for Mexico

Maquiladoras

Maquiladora operations generally create a permanent establishment in Mexico for the foreign principal, which, in turn, will be subject to income tax in Mexico. Nevertheless, upon the compliance of the maquila with certain rules, the permanent establishment implications disappear and the maquiladora is considered to have complied with TP provisions. However, this benefit applies only to (i) residents of a country with which Mexico has entered into an income tax treaty to avoid double taxation; and (ii) residents that (1) comply with the requirements set forth in such treaty; (2) usually process in the country goods or merchandise held in the country by a foreign resident; and (3) use assets provided by a foreign resident or any other related party. In addition, the aforementioned benefit will be applicable only if the maquila meets the conditions described in Article 182 of the MITL.
Safe harbor

With the 2022 Reform, maquiladoras will only be able to comply with their transfer pricing obligations through Safe Harbor rules established in Article 182 of the MITL.

Maquila companies must generate a tax profit equal to the greater of 6.9% of the value of the assets used in their activity or 6.5% of the amount of ordinary costs and expenses of their operation.

If a taxpayer elects the safe harbor option, it has the obligation to annually present to the tax authorities (SAT) the tax return declaring that the taxable income obtained in the fiscal year is equal to the higher amount (6.9% or 6.5%) aforementioned. Taxpayers must file this document by the end of June of the following fiscal year.

Maquiladoras’ APAs

One of the most relevant aspects of the 2022 Tax Reform is that it eliminates the option that maquiladora companies currently have to obtain an APA agreement in order to comply with their transfer pricing obligations and maintain the tax benefits of the maquiladora regime.

Consistent with the foregoing, the reform to Article 183-bis of the MITL (maquiladora companies under the shelter modality) eliminates the APA option to determine the tax profit of each of its clients residing abroad.

Transfer pricing aspects in the Hydrocarbons Revenue Law

On 11 August 2014, the Federal Official Gazette published the Decree issuing the Hydrocarbons Revenue Law (LISH), which was submitted by the president, together with a number of projects, to amend, add and repeal several provisions of the Federal Law on Fees and the Fiscal Coordination Law, which were submitted to Congress within a package of secondary legislation derived from the recent constitutional reforms in energy matters.
Under Article 30 contained in Title Two of the LISH, which refers to revenues from contracts, a contractor conducting transactions with related parties — whether a sale or the commercialization of hydrocarbons or procurement of supplies, materials or services — must prove that it carried out such transactions under the arm’s length principle, in accordance with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as approved by the OECD in 1995, or those that may supersede these to the extent the same are consistent with the provisions of this law, of the MITL, and the treaties to which Mexico is a party.

It is worth mentioning that such provisions are relevant for determining the considerations in favor of the Mexican state and the contractors in each type of contract, and are additional to those established by the MITL for the purposes of calculating the taxable income of those taxpayers that conduct transactions with related parties.

In the case of sale or commercialization of hydrocarbons between related parties, the LISH establishes that the contractual value of hydrocarbons must be adjusted through mechanisms contained in each contract, in order for them to reflect possible differences in quality, sulfur content, API degrees, and costs of commercialization, transport and logistics, among others. These guidelines are relevant for contractors participating in production sharing and license contracts who receive as consideration the hydrocarbons in kind, as in such manner that they can market them through their related parties.

Furthermore, in the case of profit-sharing and production-sharing contracts where the operating profit for each period is determined as the result of subtracting from the hydrocarbons’ contractual value the amount of royalties actually paid by the contractor and the consideration corresponding to cost recovery, those items relating to expenses, costs and investments for the use of owned technologies can only be deducted if they have in place a TP study in terms of the applicable legislation. Moreover, the costs, expenses and investments above reasonable market benchmarks or prices, in accordance with
the provisions of the rules and bases for recording the costs, expenses and investments under the contract, cannot be deductible.

**Additional regulations**

**Advance pricing agreements**

**Who can apply for an APA?**

Any Mexican taxpayer involved in intercompany transactions to which the TP legislation applies can request a unilateral APA while taxpayers carrying out transactions in countries in which Mexico has a double taxation agreement can apply for bilateral and multilateral APAs.

**Fee for application**

According to Article 53, Section G of the Federal Rights Law, the authorities have to charge a fee equivalent to MXN 256,967.56 (approximately USD 12,535) per requested APA.

According to Article 37 of the FCC, the tax authority has an eight-month deadline for the resolution of APA requests. If a response is not obtained after this period, it should be considered a negative resolution.

**Information required**

The applicant has to provide the tax authorities with all the information they need to fully assess the tax situation. Usually, the information needed will be discussed with the tax authorities. However, it has to be noted that an APA is only binding to the extent the tax authorities were completely informed. If any undisclosed facts emerge later, the APA may be disregarded. Based on Mexican Tax Regulations ("Consultations on transfer pricing 102/CFF"), taxpayers must present, in a digital file, the main elements of the APA, including the following:
a) Tax ID and country of residence of the taxpayer, indicating if it has branches in Mexico

b) Name, tax ID, country of residence and address of all related parties that have a direct or indirect participation in the taxpayer’s equity, including its parent company (as defined in NIFs) and ultimate parent of the multinational group

c) Name, tax ID and address of all domestic related parties with which the taxpayer carries on business or contractual transactions

d) Name, tax ID, address and country of residence of all related foreign parties with which the taxpayer carries on business or contractual transactions

e) Name, tax ID, address and country of residence of any related party of the taxpayer that could be affected by the outcome of the APA

f) Start and termination date of the fiscal year of the related foreign parties related to the taxpayer having a contractual or business relationship with the aforementioned

g) Currency in which the principal transactions between the taxpayer and domestic or related foreign parties are agreed

h) Description of the business of the multinational group, including background, strategies and perspectives; key profit drivers; transfer pricing policies; consolidated financial statements; industry analysis; and financial arrangements

i) Description of the intangibles of the multinational group, including name and country of the legal owners; name, country and financial information of entities where the intangibles are booked; and name and country of entities that participate in the development, enhancement, maintenance, protection and exploitation of the intangibles
Name and country of entities that receive income from or pay expenses to third parties related to the main activity of the multinational group, specifying the amount of such income and/or expense

With regard to the transactions within the scope of the APA resolution, taxpayers must provide the following information:

a) Description of the functions or activities realized by the taxpayer and the foreign or domestic related parties, including a description of the assets and risk assumed by each party

b) Method or methods proposed by the taxpayer in order to determine the price or amount of related-party transactions, including the criteria considered to select such method

c) Accounting and tax financial information for the tax years for which the APA is requested, applying the selected TP method

d) Information of comparable companies or transactions indicating reasonable adjustments in order to eliminate differences according to Article 179 of the MITL

e) Information on the calculation of the profit level indicators for the tested party and the comparable companies

f) Description of factors that influence the tested transaction, such as other intercompany transactions and transactions with third parties; and economic, political or geographic factors

g) Information on whether related foreign parties are going through a TP audit or are challenging at court a TP assessment indicating the status of such audit or challenge

h) Any other documentation or information necessary in order to issue a resolution established in Article 34-A FFC
Finally, taxpayers must provide the following documentation:

a) Registered shares of the taxpayer, according to Article 128 of the General Law of Commercial Companies (Ley General de Sociedades Mercantiles)

b) Financial situation statements and income tax returns for the year an APA is requested, as well as for the previous three years, including details of costs and expenses incurred by the taxpayer and its related parties, and evidence of having submitted the annual tax return for the year the APA is requested as well as for the three previous years

c) Dates on which such Dictamenes Fiscales were filed with the tax authorities, for the year in which the APA is requested and the three previous ones, if a taxpayer chose to file the Dictamen Fiscal rather than provide the financial information described in the previous point

d) Copy of the agreements between the taxpayer and the foreign or domestic related parties in relation to the covered transactions

e) Organizational chart to identify the name and position of those in charge of the administrative and operational areas and a brief description of their activities

f) Description of the business strategy indicating any past or expected restructures affecting the taxpayer

g) List of main competitors

h) Copy of the APA fee receipt

i) TP reports of the taxpayer proving the arm’s length nature of the taxpayer’s intercompany dealings for the year the APA is requested and the three previous ones
Description of the main activities carried out by related parties, including the place or places in which such activities are carried out, describing the intercompany transaction between the taxpayer and these entities and an organization chart showing the share structure of the multinational group.

Rule 2.9.8 establishes that the tax authority that rules on taxpayers’ APA filings may carry out a functional analysis at the taxpayer’s tax domicile to determine and corroborate the functions performed, assets used and risks assumed in the respective related-party transactions. The functional analysis aims to provide the tax authority with the necessary elements to rule on the requested APA.

The functional analysis conducted under this rule should be limited to the circumstances relating to the requested file and will not be regarded as the exercise of inspection powers by the tax authority.

Term of an APA

According to Article 34-A of the FFC, an APA will be valid for a specified period covering the year the APA is filed, one fiscal year before, and three years after that.

Thin capitalization

Thin capitalization rules are established in Article 28, Section XXVII of the MITL, which states that the interest paid to related parties will not be deductible in amounts exceeding the 3:1 ratio of liabilities to the equity of the company. The rule does not apply to entities that are part of the financial system (as defined in the MITL), as well as to debt for the construction, operation or maintenance of infrastructure linked to strategic areas for the country or to generate electric power. Other exemptions and waivers regarding thin capitalization rules may apply. For example, taxpayers who obtain an APA for intercompany loan transactions are not subject to this limitation.
Intragroup services

Mexican TP rules indicate that the nature of the services and the required knowledge to provide them should be taken into account when analyzing intercompany services. Mexican tax authorities may disallow the deduction of intercompany services expenses if documentation proving that the service was rendered is not provided.

Although not specific to intercompany services, a provision that closely links to this matter relates to the prohibition in Section XVIII of Article 28 of the MITL, which states the prohibition to deduct pro rata expenses incurred abroad with persons who are not income taxpayers in Mexico pursuant to Titles II (legal entities) or IV (individuals) of the MITL.

The prohibition to deduct pro rata expenses to foreign parties, plus the absence of adequate guidelines relating to intercompany services, has kept taxpayers in Mexico uncertain of their position in this regard for many years. However, SAT published rule (3.3.1.27) with a list of requirements taxpayers must comply with in order to deduct pro rata foreign expenses. The rule is not entirely directed to intercompany services, but it sheds light as to what the authorities might expect in terms of documentation for service transactions with related parties.

Rule 3.3.1.27 states that pro rata expenses with foreign parties that are not income taxpayers in Mexico, pursuant to Titles II or IV of the MITL, will not be considered nondeductible when the following requirements are fully complied with:

1. The expense is strictly indispensable for the activity of the taxpayer.

2. The parties with whom foreign pro rata expenses are incurred are residents of a country that has a current agreement for exchange of information with Mexico.
3. There is proof that the service corresponding to the pro rata expense has been rendered.

Unless there is proof to the contrary, it will be considered that the service was not rendered in expenses made between related parties, if any of the following hypotheses holds true:

a) An unrelated party would not be willing to pay for such service or to provide it for itself, in similar conditions.

b) The expense relates to a service that a related party would perform solely because of its ownership interests in one or several of its related parties. This is in its capacity as a shareholder, as referred to in Chapter VI of the OECD TP Guidelines.

c) The expense relates to services performed by a related party, which involves the duplicity of a service that is performed by another related party or a third party.

d) The expense is duplicated or included in other costs, expenses or investments paid by the taxpayer for commissions, royalties, technical assistance, publicity and interests, among others.

In relation to this Section, Rule 3.3.1.27 indicates that in no case would the invoice and/or payment of the service be enough in itself to prove that the service was rendered.

4. If the expense was paid to a related party, there is proof that the price paid falls within the range of prices that would have been used with or between unrelated parties in comparable transactions.

5. A reasonable relationship between the payment and the received (or expected) benefit by the taxpayer that participates in the pro rata expense exists.
For these purposes, taxpayers that want to deduct a pro rata expense must have an agreement that establishes the basis for the pro rata, which, according to Chapter VII of the OECD TP Guidelines, should at least comply with the following conditions:

a) Each participant to the agreement must have access to the following: (i) the details of the transactions that will be performed; (ii) the forecast used to allocate the expenses and to determine the expected benefits; and (iii) the actual expenses that were allocated and the actual benefit received.

b) Participants should only be companies that can mutually benefit from the total deal or agreement.

c) The agreement must specify the nature and scope of the global and individual benefit obtained by the taxpayer’s group in relation to the expense incurred that was allocated to the taxpayer or allocated among the rest of the entities within the group.

d) The agreement must allow the expense to be properly allocated using a method that reflects the expense in relation to the benefits that are expected to be obtained from the deal.

e) The agreement must point out the scope of the specific transactions covered by the deal, as well as their term.

6. The following information and documentation with respect to each transaction whose expenses are paid on a pro rata basis are kept:

a) Name, country of incorporation, country of tax residence and of place for chief business management, tax address and tax ID of each related party that participated in the pro rata expense or that will use or exploit the results of the service

b) Type of transaction and contractual terms
c) Functions or activities carried on in the transaction by each party involved, the assets used and the risks assumed in the transaction.

d) Documentation that proves that the global expense was paid (This is to prove that the expense that has been allocated to the taxpayer was a real expense to the foreign entity.)

e) Details on how the expense that was allocated in a pro rata basis to the taxpayer was paid and the evidence of such payment.

f) The TP method applied and the application of such method to determine that the transaction complies with the arm’s length standard.

g) Information used to determine that, for each deal, the transactions or companies are comparable.

h) Support for the transactions that will be performed, the forecast used for the basis of the pro rata expense and for the expected benefits, as well as support for the pro rata expenses paid and the benefits received.

Finally, Rule 3.3.1.27 states that taxpayers should hold documentation that proves that the pro rata strategy was executed using tax and accounting objective elements, proving that there is a valid underlying business reason for the pro rata.

It is important to consider that while it may provide certain guidelines to document intercompany services, the objective of the new rule is to establish the grounds on which a taxpayer can deduct a foreign expense allocated on a pro rata basis and not to establish the necessary information to determine whether or not the price for an intercompany service can be considered at arm’s length.
Interests

The MITL TP rules for intercompany financing focus on the characteristics to consider in applying correct comparability with uncontrolled transactions. These characteristics include the principal amount, payment period, guarantees, debtor’s solvency and interest rate.

As part of the 2020 Tax Reform, a new limitation for interest deduction was incorporated in Article 28, fraction XXXII of the MITL; in alignment with Action 4 of the BEPS Action Plan.

The new limitation establishes that deduction of net interest is limited to 30% of adjusted taxable profits. New limitation is not applicable to the first MXN 20 million pesos of accrued interest, neither to interest derived from debt accrued to finance projects such as public infrastructure, construction, hydrocarbons, or those related to water and electricity.

Government companies and financial entities will not be subject to the foregoing new limitation.

Nondeductible net interest will be deductible during the next 10 fiscal years by adding such to each year’s net interest balance.

New limitation to the deductibility of interest coexists with the thin-capitalization limitation, with the limitation that is greater between the two prevailing.

Sales of stock

In the case of transactions related to sale or purchase of stocks, the taxpayer must consider elements such as (i) the equity value of the issuer’s stockholders as of the transaction date; (ii) the present value

74 The MXN 20 million exemption applies for all entities of the same enterprise group.
of its profits or cash flows; or (iii) the last published market price of the stock.

Cost-sharing agreements

Although there are no specific rules disallowing cost-sharing agreements, the MITL contemplates several rules that may represent arguments for the SAT to reject deductions derived from this structure. For example, the MITL explicitly rejects the deduction of foreign expenses calculated on a pro rata basis as mentioned above. However, from the perspective of Mexico’s international tax agreements, such structure is allowed.

Withholding tax

All the payments made to foreign related companies are subject to a specific withholding tax, depending on the existence of a tax treaty or the direct application of the MITL.

Nonbinding criteria

In 2018, two nonbinding criteria related to transfer pricing were published.

The purpose of the nonbinding criteria is to discourage taxpayers from carrying out a certain application of tax provisions that, from the point of view of the tax authority, are “undue,” and should not be used by the taxpayers in the analysis of their operations.

The first one is the 39/ISR/NV criterion, which is related to the prohibition of using companies as comparables when there are significant differences because of unique and valuable contributions or when these unique and valuable contributions are not recognized correctly.

The second one is the 40/ISR/NV criterion, which is related to the prohibition of performing any modification of prices, amounts of the transactions, or operative margins when they are already within the
interquartile range because, according to the tax administration, these modifications are not intended to comply with the tax regulations but are aimed at getting an undue benefit by increasing the deductions or decreasing the income.

**Tax Reform 2020**

On 30 October 2019, the Mexican Union Congress approved “Tax Reform 2020,” which represents a series of changes in tax treatments and concepts for the Mexican taxpayers and MNE Groups with operations in Mexico, considerably affecting the Mexican transfer pricing landscape. The following are the most relevant aspects of this tax reform in TP matters:

**Payments abroad**

- Modification to Article 28 of the MITL

- Payments made to related parties resident abroad or through a structured agreement\(^ {75} \) are deemed as nondeductible whenever the income for the payment recipient is deemed subject to a Tax Haven Regime. The nondeduction limitation is also applicable in case the recipient forwards the payment to another entity of the group for whom the income is deemed subject to a Tax Haven Regime or through a structured agreement. There is no exemption for transactions agreed at arm’s length dealings.

- The main exemption for the limitation is for cases where the income subject to a Tax Haven Regime derives from a business activity of the recipient, and said party holds the personnel and assets for the development of said business activity. The recipient must be incorporated in a country with which Mexico holds an information sharing agreement. The exemption would not apply if

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\(^ {75} \) Structured agreement is an agreement through which the payments are made to a Tax Haven Regime or have the purpose of favoring the taxpayer or a related party.
the payment abroad is deemed income subject to a Tax Regime due to a hybrid mechanism. The latter exists when the Mexican legislation and the legislation abroad differ in the characterization of a legal entity, a legal vehicle’s income or payment, resulting in the deductibility of the payment in Mexico and a nontaxable income abroad.

Reportable schemes

- Addition of Articles 197 - 202 of the FTC; alignment with Action 12 of the BEPS Action Plan

- The objective is to identify risk areas prior to the implementation of schemes. This reporting regime would add legal certainty, given that the position of the tax authority with regard to certain schemes is known in advance.

- Both, taxpayers and tax advisers\(^76\) are required to reveal the reportable schemes to the Mexican Tax Authorities. Tax advisers are required to report schemes implemented on and after 1 January 2020. Meanwhile, taxpayers are required to report schemes implemented in previous fiscal years, as long as they continue to be effective.

- Among others, the following transactions with related parties are considered reportable schemes:
  - Transfer of hard to-value intangibles
  - There is a restructure with no payment for the transfer of assets, functions or risks; or when because of the restructure, the Mexican taxpayer decreases its operating profit by more than 20%.

\(^{76}\) “Tax adviser” is a natural person or legal entity who performs tax advising activities or is involved in the design, commercialization, organization, implementation or management of the whole reportable scheme.
When the provision of services or leasing is not remunerated

There are no reliable uncontrolled comparable transactions because the transaction involves unique and valuable assets or functions.

Is covered by a unilateral APA by another jurisdiction

Anti-abuse rule

- Addition of Article 5-A to the FTC; has the objective to reinforce good practices in order to give economic substance to business restructures.

- Tax authorities are entitled to recharacterize legal acts due to the lack of business reason and that generate a greater direct or indirect tax benefit than those that correspond to the reasonably expected economic benefit to the taxpayer. The authorities are only entitled to exercise the provisions of Article 5-A during the exercise of their inspection faculties.

- The lack of business reason is presumable when the quantifiable tax benefit is greater than the economic benefit and when the expected economic benefit could have been achieved through the performance of a lower number of legal acts, and the tax effect of those acts is a higher burden for the taxpayer.

Permanent establishment

- Modification of Articles 2 and 3 of the MITL; alignment with Action 7, considering the changes to Article 5 of the OECD Model Tax Convention

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77 Any reduction, elimination or temporary deferral of a tax contribution is considered a tax benefit.

78 A reasonable expected economic benefit exists when the transactions of a taxpayer seek to generate income, reduce costs, increase the value of its property or improve its market position, among others.
A foreign company that acts in Mexico, through a person other than an independent agent, is considered to have a Permanent Establishment (PE) even without a place of business in Mexico if such person habitually concludes agreements or has the principal role that leads to the conclusion of agreements by the foreign party.

It is presumed that a person in not an independent agent if it acts exclusively or almost exclusively on behalf of related parties resident abroad.

Exemptions were narrowed by indicating that exempted activities should be of a preparatory and/or auxiliary nature, regarding the business of the foreign entity.

**Audits**

**Formal sources of information for audit**

The Mexican tax authority is empowered to perform tax audits, TP included, of taxpayers. According to Article 42 of the FFC, the tax authority could audit a taxpayer by requiring information or performing activities such as the following:

1. Rectification of arithmetic errors, omissions or other types of errors contained in annual tax filings
2. Formal requirements for the provision of accounting information
3. On-site visits to the taxpayer’s offices to review its accounting information
4. Review of the statutory tax report of the taxpayer
5. On-site visits to the taxpayer’s offices related to the review of authorized tax documentation (e.g., invoices) and information provided to the Federal Taxpayer Registry
6. Asset appraisals

7. Requests for public attester reports and data regarding their functions from employees of public institutions

8. Reviews of taxpayers by electronic means based on the analysis of information in the hands of the tax authorities

In the case of on-site visits and TP information requirements, the FFC establishes that such procedure cannot last more than two years once the taxpayer has been formally informed of the starting date of the process.

New SAT faculties

Article 177 of the MITL authorizes tax authorities to determine simulation for tax purposes without requiring a court finding of simulated acts. Therefore, the SAT may recharacterize transactions for tax purposes considering presumptive elements, but only for related-party transactions. The authority must provide appropriate grounds and reason for its actions, identifying the allegedly artificial act and quantifying it against the actual intent.

Trends in tax audits

In our experience, the SAT is likely to challenge the following tax strategies:

- Migration of intangible assets
- Debt pushdown
- Thin capitalization
- Management fees
- Domestic transactions, particularly when a company is undergoing a restructuring or reports operating losses
• Conversions from full manufacturer to contract manufacturer
• Marketing expenses, particularly when the company also pays a trademark royalty

Invitation Letters

Mexico continues to see an increase in audit activity through joint audits between SAT’s international tax and transfer pricing departments and through the so-called “Invitation Letters.”

SAT sends Invitation Letters to taxpayers who have shown irregular behaviors or discrepancies in the information declared (informative returns and tax returns). Through these letters, tax authorities request information to prove that the taxpayer has properly fulfilled its tax obligations or to correct its tax situation spontaneously. While tax authorities maintain that the invitation does not imply the start of an audit, it is part of a program of pre-taxation or fact validation, including omissions, irregularities or inconsistencies previously detected by the tax authorities.

Mexico’s tax authorities have been working on a risk assessment model to determine which taxpayers pose a bigger risk and to program their audit agenda. Some of the variables they observe and incorporate into the risk model include current tax losses, zero income tax paid in several years, decrease in tax profit, decrease in revenue, increase in interest payment, increase in sales or purchases with foreign related parties, increase in operating expenses, and purchase/sale of intangible assets.

Statute of limitations

There is no specific statute of limitations for the initiation of a tax and/or TP audit by the Mexican tax authority. However, according to Article 30 of the FFC, taxpayers must keep tax and accounting documentation for a maximum period of five years upon submission of
its annual income tax return. In some special cases, the taxpayer must keep the documentation for a longer period.

Litigation procedure

The defense procedures that a taxpayer may use to challenge a negative TP ruling by the SAT include the following:

- Administrative appeal
- Litigation appeal
- Competent authority procedure

Administrative appeal

Until 2014, the administrative appeal procedure involved filing a protest with the SAT Appeals Office (i.e., the Central Tax Counsel). The protest should contain arguments of form or substance, and the appeal must be filed within 45 business days after notification. However, with the tax reform, the only way to present it from 2014 onward would be through electronic media (buzón tributario) within 30 business days after notification.79

Litigation appeal

The litigation appeal procedure involves filing a petition with the tax court (the Federal Court for Tax and Administrative Justice). The suit must be filed within 45 business days after notification.

Few TP cases have proceeded to litigation. However, litigation activity is expected to increase further in the future.

Revocation appeals

Taxpayers may revoke appeals before the competent authority. According to Article 184 of the MITL, this procedure involves

79 Article 121 FFC.
exercising the right provided for in double taxation treaties between Mexico and the countries of residence of related parties with whom the transactions giving rise to the deficiency notice were carried out, in order to invoke the mechanism for negotiations between or among the tax authorities of the countries involved.

Through the 2022 Tax Reform, Articles 70-A and 74 of the FFC, which grant fines reductions if certain requirements are met, were modified to indicate that fines will not be granted for cases resolved through a Mutual Agreement Procedure (MAP).

In addition, Article 142 of the FFC now states that in order for taxpayers to request a MAP, they must guarantee the tax interest of the tax assessment to be reviewed by such procedure.

Countries with double taxation agreements

Mexico has entered into double taxation treaties with the following countries:

1. Australia
2. Austria
3. Argentina
4. Bahrain
5. Barbados
6. Belgium
7. Brazil
8. Canada
9. Chile
10. Colombia
11. Costa Rica
12. Denmark
13. Dominican Republic
14. El Salvador
15. Estonia
16. Finland
17. France
18. Germany
19. Greece
20. Guatemala
21. Honduras
22. Hong Kong
23. Hungary
24. Iceland
25. India
26. Indonesia
27. Ireland
28. Israel
29. Italy
30. Japan
31. Jordan
32. Kazakhstan
33. Kenya
34. Kiribati
35. Kuwait
36. Latvia
37. Lithuania
38. Luxembourg
39. Mexico
40. Monaco
41. Morocco
42. Netherlands
43. New Zealand
44. Nicaragua
45. Niger
46. Nigeria
47. Norway
48. Oman
49. Pakistan
50. Panama
51. Paraguay
52. Peru
53. Philippines
54. Poland
55. Portugal
56. Qatar
57. Romania
58. Russia
59. Rwanda
60. Singapore
61. Slovakia
62. Slovenia
63. South Africa
64. Spain
65. Sri Lanka
66. Sweden
67. Switzerland
68. Taiwan
69. Tanzania
70. Thailand
71. Turkey
72. UK
73. Ukraine
74. United Arab Emirates
75. United States of America
76. Uruguay
77. Venezuela
78. Vietnam
79. Zambia
80. Zimbabwe

80 http://www.sat.gob.mx
| 9. Chile       | 38. Panama  |
| 11. Colombia  | 40. Philippines |
| 12. Czech Republic | 41. Poland |
| 13. Denmark   | 42. Portugal |
| 14. Ecuador   | 43. Qatar   |
| 15. Estonia   | 44. Romania |
| 16. Finland   | 45. Russia  |
| 17. France    | 46. Republic of Malta |
| 18. Germany   | 47. Singapore |
| 19. Gibraltar | 48. Slovak Republic |
| 20. Greece    | 49. South Africa |
| 21. Hong Kong | 50. Spain   |
| 22. Hungary   | 51. Sweden  |
| 23. Iceland   | 52. Switzerland |
| 24. India     | 53. Turkey  |
| 25. Indonesia | 54. Ukraine |
| 26. Ireland   | 55. United Arab Emirates |
| 27. Italy     | 56. United Kingdom |
| 28. Israel    | 57. United States |
General treaty rules and adjustments

The majority of the treaties signed by Mexico contemplate the possibility of applying a corresponding adjustment.

Corresponding adjustments

TP adjustments determined in any country that modifies the taxable income or deductions authorized to a Mexican taxpayer may be performed solely by filing an amended complementary tax return, according to Article 184 of the MITL, provided that the adjustment has been accepted by the Mexican tax authorities and validated by a competent authority procedure under the signed tax treaty.

The Mexican Tax Regulations include Section 3.9.1.1 named “Of the Transfer Pricing Adjustments.” Among others, this section includes a definition of transfer pricing adjustments and the additional requirements for taxpayers if a transfer pricing adjustment increases its tax deductions.

These rules give taxpayers greater legal certainty with respect to the application and fiscal treatment to be followed in transfer pricing adjustments.

Secondary adjustments

According to Article 140 Section VI of the MITL, the modification of taxable income derived from the determination of taxable revenues and authorized deductions in transactions between related parties is deemed a dividend.
Arbitration

International tax arbitration and mediation are acceptable under the treaties but have yet to be implemented in practice from a Mexican standpoint.

Tax system

In Mexico, all taxpayers are subject to income tax by source of income. Nonresidents are taxed in Mexico only on their Mexican-sourced income.

Trends and perspectives

One of the most relevant aspects of the 2022 Tax Reform is that it increases burden to taxpayers by adding into the informative transfer pricing return (Anexo 9 DIM) the transactions with local related parties. In addition, many taxpayers are likely to be affected by the new regulation that requires related parties of an entity obligated to submit a statutory tax report, to submit the Local File and Master File.

The additional burden comes with less time to comply with the requirements by changing the due dates to submit the informative tax return and the Local File to 15 May.

Finally, the other very relevant change included in the 2022 tax return is the elimination of the APA option for the maquiladora industry, leaving only the safe harbor option to comply with the arm’s length principle. By eliminating the APA program for the maquiladora industry, the SAT is likely to have more resources for other matters such as expediting the APA process for other industries and transactions; or increase its audit activity.
Introduction

The obligation to conduct transactions under the arm’s length principle started in Peru on 1 January 2001, according to the provisions of Articles 32 and 32-A of Chapter V of the Peruvian Income Tax Law (PITL). Nevertheless, it was not until 1 January 2006 that formal obligations became enforceable, with the publication on 31 December 2005 of the Supreme Decree 190-2005-EF (Article 3), which incorporated Chapter XIX Transfer Pricing into the PITL Regulation. This new chapter also brought many clarifications and further details on all TP aspects of Article 32-A of the PITL. Moreover, in 2012, the Peruvian government issued a tax reform and Legislative Decrees 1112 and 1120 introduced some changes in Articles 32 and 32-A of the PITL.

In 2013, further clarifications on the Peruvian TP regime were implemented through superintendent resolutions. The most important, related to a new formal requirement, is the filing of a TP technical study. Moreover, on 31 December 2016, a Legislative Decree was enacted stating changes to the transfer pricing formal duties, including the standard set by Action 13 of the plan BEPS from the OECD. Following the Action 13 initiative introduced in 2016, a Supreme Decree was issued in November 2017 to provide guidance on the implementation of the Local File (LF), Master File (MF) and Country-by-Country Report (CbCR) under Peruvian tax and transfer pricing law. As the transfer pricing documentation of fiscal year 2016 was put on hold until the Action 13 standard was implemented, once the Supreme Decree was issued, it was clarified that fiscal year 2016 would be the first year for taxpayers to present an LF under the new OECD standard.

In 2018, the SUNAT issued two Official Resolutions explaining the filing process, electronic formats and thresholds of the new transfer pricing formal duties for taxpayers in Peru. The first of these resolutions, issued in January, was regarding the LF for fiscal years 2016 and 2017, as well as the general framework and thresholds for...
the MF and CbCR. The second one, issued in June 2018, explained in more detail the new formal duties related to the MF and CbCR.

In 2018, the Peruvian government also introduced new guidance on the application of the comparable uncontrolled price (CUP) method in commodities. In August 2018, a modification to the transfer pricing regulations was introduced, and in December 2018, a Supreme Decree detailed all procedures to be followed by taxpayers applying the CUP method for transactions involving commodities.

**Who is obliged?**

According to Section a) of Article 32-A of the PITL, TP regulations will apply to transactions made by taxpayers with related parties or those made from or through tax haven countries or territories.

However, the value that results from applying the TP rules will only be adjusted when the agreed value could determine a lower tax in the country than that which would be determined if TP rules are applied (the so-called tax damage), as provided in subsection c) of Article 32-A.

In this regard, taxpayers that carry out transactions with related parties or from, toward or through tax haven countries or territories must settle such transactions under arm’s length conditions and comply with the Peruvian TP regime.

In 2017, the Peruvian government issued a Supreme Decree adjusting TP regulations contained in Section g) Article 32-A of the PITL. The adjustments included definitions and applicable thresholds to new standard TP documentation, i.e., LF, MF and CbCR.

**Economic bonding criteria/related parties**

In Peru, two or more individuals, companies or entities are deemed related parties when one of them takes part, directly or indirectly, in the management, control or capital of the other, or when the same
individual or group of individuals take part, directly or indirectly, in the management, control or capital of various individuals, companies or entities. In addition, such relation is deemed to exist when a transaction is performed using interposed individuals with the purpose of concealing transactions between related parties.

Furthermore, Article 24 of the PITL Regulation sets forth that two or more individuals, companies or entities are related parties when any of the following situations occur:

1. When an individual or legal entity holds more than 30% of the capital stock of another company, directly or through a third party

2. When more than 30% of the capital stock of two or more companies is held by the same individual or legal entity, directly or through a third party

3. When in any of the aforementioned cases, the portion of capital stock indicated above is held by a husband and wife or by individuals who are second-degree blood relatives or second-degree relatives by marriage

4. When the capital stock of two or more companies is held, by more than 30%, by common partners among them

5. When the companies have common directors, managers, administrators or other directives that have a decision authority in the financial and commercial agreements to be adopted

6. When two or more companies consolidate financial statements

7. When a joint venture agreement with independent accounting exists, the agreement will be considered related to each of the contractual parties that participate, directly or through a third party, in more than 30% of the contract’s equity; or when any of the parties have a decision authority in the financial, commercial and operating agreements to be adopted for the development of
the contract; in which case, the contractual party that has the decision authority will be related to the contract.

8. When there is a joint venture agreement without independent accounting – For such cases, the relationship between each of the participating parties and the counterparty should be verified individually, applying any of the related-party criteria. The counterparty is an individual or legal entity with which the participating parties carry out any transaction in order to achieve the contract’s objective.

9. When there is an association participation contract and any of the associates, directly or indirectly, participate in more than 30% of the results or profits of one or various deals of the managing partner – In this instance, the managing partner will be related to each of the contributing partners. They will also be considered related when any of the contributing partners has a decision authority in the financial, commercial and operating aspects of one or various deals of the managing partner.

10. When a nonresident company has one or more permanent establishments in the country – In this case, there will be a relationship between the company residing abroad and each of its permanent establishments, and between or among the permanent establishments.

11. When a resident company in Peru has one or more permanent establishments abroad – In this case, there will be a relationship between the domiciled company and each of its permanent establishments.

12. When an individual or company has a dominant influence in the decisions of the administrative bodies of one or more companies or entities – In such a situation, the companies and entities influenced are related to each other and to the individual or company that exerts the influence.
13. When an individual, company or entity domiciled in Peru performs 80% or more of its sales of goods, provision of services or any other transactions with an individual, company or entity domiciled in Peru, or with individuals, companies or entities related with each other and domiciled in Peru, as long as such transactions represent at least 30% of the counterparty’s purchases or acquisitions in the same period.

The arm’s length principle

Arm’s length pricing

Under the general rule provided by Article 32 of the PITL, in cases such as sales, asset contributions and other forms of transfer of ownership, provision of services and any other kinds of transactions, the value assigned to goods, services and other benefits for tax purposes must be the market value. If the value assigned is different from the market value, whether it is overvalued or undervalued, the SUNAT must adjust it for both the acquiring party and the conveying party.

For TP issues, Section 4) of the same Article of the PITL provides that for intercompany transactions or transactions carried out from, toward or through tax havens, the market value is considered the price or consideration that unrelated parties in comparable transactions would have used under the same or similar conditions, in accordance with Article 32-A of the PITL.

Comparability criteria

According to Section d) of Article 32-A of the PITL, transactions between related parties or performed from, toward or through tax havens are considered comparable with those performed between nonrelated parties, in exact or similar conditions, under the following circumstances:
None of the existing differences between the transactions compared or between the characteristics of the participating parties can materially affect the price, consideration or profit margin.

Even when such differences do affect the price, consideration or profit margin, the differences can be eliminated by means of reasonable adjustments.

Therefore, in order to determine if the transactions are comparable, certain elements or circumstances that reflect to a greater extent the economic reality of the transactions will be taken into account, depending on the method selected and considering, among others, the following aspects:

1. Characteristics of the transactions
2. Functions or economic activities, assets used and risks assumed in the transactions of each of the parties involved
3. Contractual terms
4. Economic or market circumstances
5. Business strategies

Transfer pricing methodology

The TP methods allowed in Peru are the six globally accepted methods, as provided for in Section e) of Article 32-A of the PITL, which are as follows:

- Comparable uncontrolled price method

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81 According to Legislative Decree 1381 of 2018, import and export transactions for tradable goods with known and official market prices carried out between related parties must use a variation of the CUP method specifically applicable for commodities to prove the arm’s length nature of the transactions.
- Resale price method
- Cost plus method
- Profit split method
- Residual profit split method
- Transactional net margin method

When using the comparable uncontrolled price method applicable to commodities or assets, the comparable price must be determined with reference to international quotations and public market prices.

On 31 December 2016, through Legislative Decree No. 1312, changes in Section e) of Article 32-A of the PITL were incorporated. These changes relate to the application of the comparable uncontrolled price method for the assessment of transactions carried out for commodities.

Legislative Decree No. 1312, and furthermore Legislative Decree 1381 and Supreme Decree 340, stated the applicability of this method for export/import of goods with a market quotation and for products with a specific customs code.82

Best method rule

There is no best method rule. Even though there are recommendations on when to apply each method. Taxpayers in general have to use the method that best suits the economic reality of the transaction, as stated in Section e) of 32-A of the PITL.

82 Before these Decrees were issued, Section e) of Article 32-A stated that the comparable uncontrolled price method applies to the assessment of transactions of export and import of goods carried out between related parties involving an international intermediary other than the actual recipient of such goods or transactions carried out from, toward or through tax havens.

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Furthermore, Articles 113 and 113-A of the PITL Regulation provide more guidelines, namely, that the method should:

1. Be most compatible with the company’s business and commercial structures
2. Have the best quality and quantity of available information for proper application and justification
3. Consider the most suitable degree of comparability among parties, transactions and functions
4. Require the fewest adjustments to eliminate differences between comparable facts and situations

Use of statistical tools

Article 114 of the PITL Regulation provides for the use of a range of prices, considerations or profit margins in determining the arm’s length value through any of the TP methods. The range must be obtained when two or more comparable transactions exist.

This range must be adjusted by applying the interquartile method. If the value agreed upon by the related parties is within the range, then such value will be deemed at arm’s length. If, on the contrary, the agreed value lies outside of the range and, consequently, a lower income tax is determined in the respective fiscal year in the country, then the market value must be the median of the range.

With regard to the application of the comparable uncontrolled price method, if the transactions have a high level of comparability, the range will have (i) as minimum value, the one corresponding to the lower value of the prices or considerations of comparable transactions; and (ii) as maximum value, the one that corresponds to the highest value thereof. For this purpose, it is considered that the prices or considerations of the comparable transactions have a high level of comparability if the variation coefficient applied to the comparable transaction values does not exceed 3%.
The determination of the interquartile range and the median is explained in Article 115 of the PITL Regulation.

**Adjustments**

Reasonable adjustments under Article 111 of the PITL Regulation are applied to eliminate differences between (i) the transactions that are being compared; (ii) the parties that carry out such transactions; or (iii) the functions the parties perform. The following elements must be considered for this purpose:

- Payment term
- Negotiated amounts
- Advertising
- Cost of intermediation
- Conditioning, freight and insurance
- Physical nature and contents of goods

**Selected and secret comparable companies**

Section d) of Article 32-A of the PITL provides that in order to determine comparable transactions in cases where there is no domestic information available, taxpayers may use information from foreign companies in order to make the necessary adjustments to reflect the differences in the markets. Peruvian law does not include regulations regarding the use of secret comparable companies.

**Financial information**

According to Article 33 of the PITL Regulation, all taxpayers must keep records according to generally accepted accounting principles (GAAP) aligned with the International Accounting Standards (IAS) and the International Financial Reporting Standards (IFRS). Any adjustment may be implemented if there are differences between the
accounting records and the information provided by the taxpayers in their sworn informative returns.

OECD interpretation sources

According to Section h) of Article 32-A of the PITL, the OECD TP Guidelines are permitted to be an interpretative tool to the extent that they do not oppose the dispositions approved by Peruvian law.

Transfer pricing obligations

The TP obligations of Peruvian companies are as follows:

- Apply market values for transactions conducted with related parties and/or from, toward or through tax havens (PITL, Article 32, number 4).
- According to Peruvian TP regulations (PITL, Article 32-A, Section g)), taxpayers that exceed official thresholds would have

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83 Local File: Taxpayers with income exceeding 2,300 tax units in the applicable tax year.
- Taxpayers with intercompany transactions between 100 and 400 tax units will file a basic form of the LF, with general information of intercompany transactions.
- Taxpayers with intercompany transactions above 400 tax units will have to file a complete LF with supporting study and exhibits detailed in the SUNAT Resolution 014-2018.

Master File: Taxpayers with income exceeding 20,000 tax units in the applicable tax year and belonging to a Multinational Group (MG)

Country-by-Country Report: Headquarters of MGs with fiscal residence in Peru and with consolidated income equal to or above PEN 2.7 billion. Peruvian subsidiaries of a multinational group (with a consolidated income above PEN 2.7 billion) may also have to prepare and file a CbCR if any of the following conditions are applicable:
1) The headquarters was not obliged to file the CbCR in its corresponding fiscal residence.
to prepare and file an LF supporting transactions carried out with domestic and related foreign parties and from, toward or through tax havens.

- If taxpayers are part of an MG, they would also have to:
  
  o i) Prepare and file an MF containing, among others, organizational structure, business description, transfer pricing policies regarding intangibles and financing, and its fiscal position.
  
  o ii) Prepare and file a CbCR containing information regarding the global distribution of income within the group, taxes, business activities of all entities of the group, and other relevant information.

- Prepare and maintain, each year, documentation and information supporting the TP calculations (PITL, Article 32-A, Section g)) for a period of five years.

Requirements for intercompany transactions and transactions with low-tax jurisdictions

Subject to the Peruvian TP regime, taxpayers carrying out intercompany transactions and transactions with low-tax jurisdictions must prepare and file a Local File, pursuant to the second paragraph of Section g) of Article 32-A of the PITL. According to Superintendent Resolution 175-2013-SUNAT, the LF is required and must be filed by all resident taxpayers that earned an income above 2,300 tax units

2) The fiscal residence of the headquarters of the MG has an exchange of information agreement with Peru, but does not have a CbCR exchange of information between competent authorities in place.

3) The fiscal residence of the headquarters of the MG does have a CbCR exchange of information between competent authorities, but there is a systematic failure to exchange CbCR.

4) The Peruvian entity is designated by its headquarters to file the CbCR.
(approximately PEN 9 million and USD 2.42 million\textsuperscript{84}) in a tax year and are engaged in intercompany transactions and transactions carried out from, toward or through tax haven countries or territories with a value above 100 tax units (approximately USD 123,000). The same requirement applies to taxpayers who sell goods to related parties and/or from, toward or through tax haven countries or territories at market values below the tax basis.

Moreover, according to the second paragraph of Section g) of Article 32-A of the PITL, taxpayers must prepare and maintain documentation and information supporting TP calculations for a period of five years.

**Specific requirements for transactions**

Formal obligations apply only to transactions that generate taxable incomes and/or costs or deductible expenditures for the tax determination. A Local File, and documentation and information supporting TP calculations, are required for such transactions. The SUNAT may exempt taxpayers from the obligation to present such documents.

**Contents of the transfer pricing documentation**

Article 117 of the PITL Regulation specifies the minimum information to be included in the LF, MF and CbCR, when applicable, regarding the transactions that generate taxable income and/or costs or deductible expenditures for the tax determination. Among the most relevant information requested in the study are the following:

**Local File**

1. Regarding the taxpayer
   - Organizational structure description and chart

\textsuperscript{84} Based on an estimated exchange rate of PEN 3.71 per USD 1.
Hierarchical management personnel, country of residence and description of activities

Business lines description

Restructuring information

Main competitors

2. Regarding intercompany transactions

Intercompany transactions’ description

Benefit test information regarding intercompany transactions

Detailed amount both in currency of origin and local currency, when applicable

Information of relevant related parties

Detailed functional analysis per transaction

Transfer pricing economic analysis including method selection, tested party, comparable companies selection, main assumptions, comparability adjustments, arm’s length test and results

3. Regarding financial information of the taxpayer

Annual financial statements (audited if available)

Supporting work papers, financial information and other calculations used in the transfer pricing analysis

Summary of financial information of comparable transactions or companies

Master File

1. Organizational structure
2. Business description of the MG
   o Key value and benefit drivers of the business
   o Supply chain description including five main products or services (and products or services that represent more than 5% of the consolidated income for the MG)
   o Intercompany agreement details other than R&D
   o List of main geographic markets where main products or services are distributed
   o Functional analysis focusing on the value added for each entity of the group
   o Details of main restructuring operations

3. Intangible assets
   o DEMPE analysis
   o List and description of intangibles
   o Intercompany agreements regarding intangible assets
   o Transfer of intangibles assets' group policy
   o Relevant transfer of intangible assets carried out by the group

4. Financial activities of the MG
   o General description of the group’s financial strategy, including agreements with third parties
   o Description and identification (tax residence) of relevant entities within the group’s structure performing centralized financing or similar activities
   o Transfer pricing financing policies applicable within the group
5. Financial and tax position of the MG
   - Consolidated financial statements
   - Advance pricing agreement (APA) details and description

Country-by-Country Report:

1. General information per jurisdiction where the MG operates
   - Income, losses and profits (before and after tax)
   - Income tax, equity and shared profits
   - Number of employees, tangible assets different from cash

2. Fiscal residence of each entity within the MG

3. Any other additional information that may be relevant to understanding the information requested in 1 and 2

Language of documentation

TP formal obligations (LF, MF and CbCR when filed by a Peruvian taxpayer), as well as any other supporting documentation regarding intercompany transactions, must be in Spanish. In cases where these documents are in another language, Section g) of Article 32-A stipulates that such information must be translated into Spanish before its filing.

Other documentation requirements

With regard to the documentation and information that could support TP calculations, Article 116 of the PITL Regulation lists the following information to be kept for transactions that generate taxable income and/or costs or deductible expenditures for the tax determination:

- Information on related parties
- Information on transactions with related parties
• Financial statements
• Information on the economic group
• Factors that influence price fixation
• Working papers on adjustments and results

This information may be requested by SUNAT only from taxpayers that are obliged to prepare a transfer pricing technical study.

TP informative return

As of fiscal year 2016, the annual sworn informative return will be part of the preparation and filing of the LF. SUNAT’s Virtual Format No. 3560 was updated and now includes four different exhibits.

The information to be filed as part of the LF will vary according to the intercompany transactions’ amount carried out by the taxpayer. Below is a brief summary of each exhibit:

I. Exhibit I, which includes a general description of the taxpayer (name, address, tax ID, etc.); the related parties or third parties in low-tax jurisdictions (name, address, tax ID, economic linkage assumption according to law, country, etc.); and the intercompany transactions (amount, type as defined by the Peruvian regulations, currency of origin and of registration, interest and principal amount for loans)

II. Exhibit II, which includes the same information as in Exhibit I, with additional details regarding transfer pricing method applied for each transaction for the arm’s length test, tested party, profit level indicator, interquartile range of comparable companies/transactions, and profit/rate/price of the tested party

85 This information may be requested by SUNAT only from taxpayers that are obliged to prepare an LF.

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III. Exhibit III, which includes organizational chart/structure (number of employees, responsibilities, functions, location, and subordination to foreign entities, if applicable); business lines (clients, providers, competitors and business strategies); restructures or intangibles (transference and DEMPE); controlled transactions; functional analysis (functions, assets, risks by transaction); contractual terms; transfer pricing analysis (best method selection, comparable companies information, arm’s length test and compliance, results); APAs in force

IV. Exhibit IV, which is an .XLS file that includes the information and calculations used in the transfer pricing analysis and explained in Exhibit III (calculations for the profit level indicator of comparable companies, financial information of the tested parties and the selected comparable companies, including source, interquartile range calculations and adjustments including the formulas used).

Exhibit I is to be filed by:

- Taxpayers with intercompany transactions between 100 Unidad Impositiva Tributaria (UIT) (approximately USD 123,000) and 400 UIT (approximately USD 493,000)

Exhibits II, III and IV are to be filed by:

- Taxpayers with intercompany transactions above 400 UIT (approximately USD 493,000)

Filings: place and date of filing

**Transfer pricing formal obligations**

The second paragraph of Section g) of Article 32-A and Superintendent Resolution No. 014-2018-SUNAT establish the obligation to prepare and file an LF assessing the arm’s length nature of a Peruvian taxpayer’s transactions with related parties or with residents in tax havens in the Transfer Pricing Virtual Form No. 3560,
pursuant to the Tax Code. This obligation remains for a maximum of six years, during which tax authorities may request the LF at any time.

Taxpayers, who are part of an MG, must also file an MF on a year-to-year basis and a CbCR whenever they exceed official thresholds.

The transfer pricing formal obligations will be filed according to the due dates for the tax obligations of the May tax period (applicable in June) of the following year to which the return corresponds.

Since fiscal year 2016 was a transition year, filing dates were set in April 2018 according to the last digit of the Peruvian tax ID for taxpayers.

Penalties

The following penalties established in the Tax Code may apply under the Peruvian TP regime:

- **Article 176, Section 2**: Failure to file other returns or notices within the established deadlines – penalty of 0.6% of net income, not less than 10% of the tax unit, equal to PEN 3,950 (approximately USD 1,064 for 2021), but not greater than 25 UITs

- **Article 176, Section 4**: Filing of incomplete transfer pricing formal obligations or notices – penalty of 30% of the UIT

- **Article 177, Section 25**: Failure to submit or file LF supporting TP calculations pursuant to the law – penalty of 0.6% of net income, not less than 10% of the UIT but not greater than 25 UITs

- **Article 177, Section 27**: Failure to submit or file transfer pricing formal obligations and information supporting TP calculations pursuant to law, as indicated in the first part of the second paragraph of Section g) of Article 32-A of the PITL – penalty of 0.6% of net income, not less than 10% of the UIT but not greater than 25 UITs
 Nonetheless, there are discounts if the taxpayers utilize the gradual reduction regime for spontaneous corrections; that is to say, penalties can be reduced if the taxpayers make the respective amendments after failing to comply with TP obligations. The regime states the following for each of the penalties:

- **Failure to file other returns or notices within the established deadlines or filing of incomplete returns or notices** – The penalty is reduced by 100% if the taxpayer corrects the infraction voluntarily before receiving a notification from SUNAT (Sections 2 and 4 of Article 176).

- **Failure to submit or file the LF supporting TP calculations pursuant to law or failure to submit or file the documentation and information supporting TP calculations pursuant to law, as indicated in the first part of the second paragraph of Section g) of Article 32-A of the PITL** – Voluntary correction does not apply. Only an induced correction applies when the taxpayer, after receiving a notification from SUNAT, corrects the infraction within the given deadline. The penalty is reduced by 80% (Sections 25 and 27 of Article 177).

**Exemptions and waivers**

For taxpayers carrying out transactions with domestic and international related parties, certain minimum thresholds are prescribed for the preparation and filing of the transfer pricing formal obligations as previously explained.

Finally, the following taxpayers are exempted from the obligation to file transfer pricing formal obligations, as stated in Superintendent Resolution No. 014-2018-SUNAT:

- **Individuals, unsettled estates or joint-ownership marriages that elect to pay income taxes as such and generate no third-category income**
- Companies that, under Legislative Decree 1031, promote the efficiency of the commercial activity of the state, and are part of the commercial activity of the state, as well as state companies belonging to the local and regional governments to which the norm makes reference.

**Consequences derived from transfer pricing adjustments**

Section c) of Article 32-A of the PITL and Article 109 of the PITL Regulation establish the types of TP adjustments that may be performed. Correlative adjustments may also be performed according to the dispositions of the double taxation treaties executed by Peru.

**Specific requirements for transactions**

The obligation to submit the Local File will only be applied to transactions that generate taxable incomes and/or costs or deductible expenditures for the tax determination. Under certain circumstances, SUNAT may exempt taxpayers from the obligation to present such documents.

**Additional regulations**

**Advance pricing agreements**

Article 32-A, Section f) of the PITL allows only for the execution of APAs between the tax authority and resident taxpayers when the valuation of the different transactions subject to the TP regime will be determined. The characteristics and conditions of such agreements are provided in Article 118 of the PITL Regulation, as follows:

a) An APA request needs to be made, including all the information requirements specified in the law.

b) After the APA is requested, SUNAT will have 24 months to analyze, request and receive modifications and clarifications, as well as accept or reject the request. The period may be extended for 12 more months.
c) An APA may take effect in the taxable year of request and the next three taxable periods.

On 27 December 2013, additional guidance for the preparation and filing of APA applications was issued through Superintendent Resolution No. 370-2013-SUNAT. This resolution determines the documentation requirements and procedures to be followed in order to request an APA. In addition, the said resolution establishes the terms and conditions to conduct preliminary meetings in order to assess the viability of the APA before the submission of proposal.

According to the resolution, a Peruvian taxpayer should express in writing its intention to enter into an APA with SUNAT, including specific information for SUNAT’s review. SUNAT will respond within 15 business days from the filing of the notice, providing a date and hour to conduct the preliminary meetings, before the submission of an APA proposal. Nonetheless, taxpayers have the option to submit their final proposal for an APA without any preliminary meeting.

The notice, which expresses the taxpayer’s intention to negotiate an APA with the SUNAT, must contain at least the following information:

a) The taxpayer’s intention to submit an APA proposal

b) Name and tax identification number of the taxpayer and its legal representative

c) Name, tax identification number and tax address of the related parties conducting the intercompany transactions subject to the APA

d) Summary of the organizational structure of the group, financial information of the taxpayer, and information related to the functions, assets and risks associated with the transactions subject to the APA
e) Description of the transaction or transactions included in the APA proposal

f) Summary of the method proposed for the analysis of each of the transactions covered by the APA proposal, as well as the prices, price range, amount of consideration or profit margins. In cases where the transactional net margin method is selected for the analysis of a transaction, the profit level indicator must be specified.

g) Name and tax identification number of the persons authorized to represent the taxpayer in the preliminary meetings

h) Signature of the taxpayer or legal representative

The final APA proposal should be submitted 90 days after the last preliminary meeting. If this period expires, the taxpayer will have to initiate a new request to negotiate an APA or otherwise submit the final APA proposal without conducting any preliminary meeting.

For the final APA proposal, the taxpayer should present the following information:

a) Financial and economic justification for the APA submission

b) Description of the functions, assets and risks assumed by the taxpayer and the related parties involved in the transactions under review

c) Organizational structure of the group to which the taxpayer and related parties belong

d) Audited financial statements of the last three tax years prior to the submission of the APA proposal and forecasts of the financial statements for the next three years
e) Description of the transactions covered by the APA, including copies of the agreements related to the said transactions and their functional currency

f) Description of the transactions not covered by the APA proposal, explaining the reason why such transactions were not considered

g) Disclosure of any APA in force or in process in other jurisdictions involving the taxpayer or its related parties related to the transactions included in the APA proposal

h) Other relevant information

Taxpayers that negotiate APAs with the SUNAT must file, along with the LF, an annual report that details the intercompany transactions carried out during the applicable fiscal year, as well as the compliance of all clauses and conditions agreed in the approved APA in order to determine if any breach occurred.

To date, no APAs have been negotiated between taxpayers and SUNAT.

Thin capitalization

Article 37 of the PITL and Article 21 of the PITL Regulation provide thin capitalization rules.

Effective from 1 January 2021, these rules limit the net interest deduction for corporate income tax purposes to the extent that said net interest exceeds 30% of EBITDA (i.e., net income after offsetting losses plus net interest, depreciation and amortization) of the previous fiscal year. “Net interest” is defined as the difference between interest expense and interest income in a fiscal year.

The limitation does not apply to companies with net income equal to or lesser than 2500 tax units (approx. USD 3 million).
Any excess of net interest amount exceeding the 30% EBITDA threshold will be carried forward for the next four fiscal years.

These rules apply to both related and unrelated party transactions.

**Intangibles**

Article 117 of the PITL Regulation establishes that the LF and MF should include a description of the intangibles involved, their economic importance and their property when explaining the transactions with related parties or tax haven residents.

Nevertheless, there is no particular ruling as to the treatment of intangibles under the TP regime.

**Intragroup services**

According to Legislative Decree No. 1312, with respect to intragroup services, the taxpayer must comply with a benefit test and provide the documentation required in order to deduct the cost or expense. The deduction of the cost or expense for the service received will be determined on the basis of the sum of the costs and expenses incurred by the service provider, plus a profit margin.

In the case of low-value-added services, the profit margin cannot exceed 5%.

**Interest**

Article 26 of the PITL establishes that interest transactions with related parties are to be analyzed according to the Peruvian TP regime in order to achieve the arm’s length or market value.

In detail, Section a) of Article 108 of the PITL Regulation lists the comparability criteria for financial transactions:

- Principal amount (capital), term, warranty, interest rate, debtor’s solvency, risk spreads, currency, date, location of debtor and any
other relevant information that may have an impact on the financial analysis of market rates

Sales of stock

Article 32 of the PITL establishes the general definition of market value for different types of items and transactions. The second section of this article states that for securities, the market value will be the highest between the transaction value and the listed value, the equity value or other value established by the PITL Regulation, based on the nature of the securities.

Section e) of Article 110 of the PITL Regulation specifies elements to be considered on sales stock, such as equity value, market value, present value of profits and average value recorded in opening and closure of the stock exchange.

Cost-sharing agreements

No specific rules authorize cost-sharing arrangements in Peru. However, No. 2 under Section e) of Article 116 of the PITL Regulation mentions that cost-sharing agreements can be part of the documentation that can be used to support TP calculations.

Audits

Authority faculties

Section c) of Article 32-A of the PITL establishes the competence of tax authorities to perform and enforce TP adjustments whenever taxpayers do not comply with TP rules established in the PITL, PITL Regulation and official regulations issued by the Peruvian government.

Transactions under review

The informative return presents 22 income and 23 expense types of transactions, and all of them are subject to analysis by SUNAT.
SUNAT has been focusing on audits of services payment transactions, royalties, purchase and sale of commodities, interest, and purchases of inventories.

Position of tax authorities

Now that SUNAT has begun its TP audits, it is expected to focus its analysis more on the substance of the TP information than on the form of the technical study. Real TP adjustments can be performed and more tax collections can be achieved this way, rather than by applying sanctions on formal issues relating to the technical study and the informative return. SUNAT had been preparing extensively before it began the audits and is expected to take this position.

Managing the audit process

It is strongly recommended to prepare and maintain all information on intercompany transactions and transactions with tax haven residents that may be audited by SUNAT. Taxpayers should file only the exact requirements given by SUNAT, and not include any additional information.

The general audit procedure is as follows:

- Initial information request (*Requerimiento*) – SUNAT makes this written request the first time it approaches the taxpayer to request information. In issuing this notice, certain formalities must be followed.
- Request for further information – After a first *requerimiento*, the tax administration can always ask for additional information from the taxpayer.
- Results of the requirement — No specific time frame is necessary to comply with the information request. The time frame is generally stated in the document. Once all the information has been provided, the tax administration must issue a letter indicating whether it is satisfied with the information provided.
• Analysis and arguments for the requirement – In this process, the taxpayer can object to or disallow the points raised by SUNAT throughout the process. At this stage, the taxpayer can give all documentary evidence that proves and emphasizes the strength of the arguments raised in the defense.

• Letter signaling the start of the audit procedure – The audit procedure starts when the tax administration sends a letter to the taxpayer introducing the audit agent (agente fiscalizador) to the taxpayer and stating the periods and taxes subject to the audit. The audit typically lasts one year and starts running once the taxpayer has provided all the information requested. However, this term is not applicable to TP audits. In general, terms, audits are performed per type of tax. Therefore, for TP to be audited, the audit will have to be performed on the income tax. The amendments to the Tax Code have established differences between two types of audits: (i) partial and (ii) definitive. It will be partial when only some of the elements of the tax liability are subject to review. There is, however, no accurate judgment about its application. Under SUNAT’s discretion, and according to the situation, it is likely that SUNAT may conduct audits related only to TP.

• Official liquidation is a statement made by SUNAT indicating amounts and terms of payment on the transactions subject to adjustments by the taxpayer. The taxpayer must pay the amounts established in the statement, or exercise available resources under the applicable law (reconsideration appeal or invalidity action).

• Reconsideration appeal consists of using legal means that allow the taxpayer to bring legal defense and invoke the revocation of the official action.

• Groundwork – All legal acts must be based on a law that applies to each specific case.
Applicable exhibits are documents that will support the taxpayer's defense.

Statute of limitations

The statute of limitations is four years from 1 January following the year in which the income tax return is due (generally late March or early April of the year following the taxable period). This applicable term is six years if no income tax return was filed.

Litigation procedure

At present, there are few TP litigation procedures in Peru. Taxpayers may file for reconsideration and later on appeal to challenge any TP adjustment arising from an audit.

Revocation appeals

Taxpayers may file revocation appeals with the competent authority.

Tax amnesty

There are no rules regarding the abatement of debts due to failure to comply with TP obligations.

Competent authority procedure

Peru only has a few tax treaties, and the competent authority procedure applies to these treaties.

Countries with double taxation agreements

Peru has a low-tax treaty network and has treaties with the following countries:

1. Canada
2. Chile
3. Brazil
4. Andean Community member countries
5. South Korea
6. Portugal
7. Mexico
8. Switzerland
9. Japan

General treaty rules and adjustments

In general terms, Peru’s double taxation treaties define where the profits derived by individuals and entities may be taxed in different cases. The taxation of interest, dividends, royalties and other types of income is also addressed, as is the exchange of information between jurisdictions.

Corresponding adjustments

The double taxation treaties signed by the Peruvian government address the need for the mutual resolution of disputes regarding TP adjustments.

Arbitration

Double taxation treaties signed or being negotiated by Peru allow for the mutual agreement procedure as a dispute resolution mechanism. Arbitration is a last resort, if the competent authorities of both countries so agree. International tax arbitration is acceptable under the treaties but has yet to be implemented in practice.

Court cases

It is assumed that most TP cases will be settled administratively, and therefore will not proceed to litigation. TP cases are handled in the traditional way, and there are no specific alternative dispute resolution
vehicles available, except the APA rules. However, after the administrative process is concluded, it is possible to challenge the decision issued therein before the judiciary.

**Tax system**

Residents are taxed on worldwide income and nonresidents are taxed on Peruvian-sourced income.

**BEPS action plan**

Changes to Peru’s TP regulations reflect the recommendations made by the OECD through its BEPS action plan. Although some MGs have complained about the fact that TP regulations were approved and set in motion without a coordinated approach by the government to put in place necessary exchange of information agreements regarding the CbC R, the Peruvian government has been aware of this problem and has given several extensions for the filing of the CbC R in order to complete the necessary administrative processes for ensuring correct compliance of the all the new TP rules for fiscal year 2017 and the following years.

At the end of 2020, Peru accomplished compliance of the OECD’s Country-by-Country regulations and other standards that allowed the filing of CbC Reports from previous years.

Peru also joined the OECD’s exchange of information agreement for CbC Reports.

The latter allows Peruvian tax authorities, as well as tax administrations worldwide that are part of the agreement, to exchange information and assess high-level transfer pricing risks and other issues regarding base erosion and profit shifting.
Uruguay
Introduction

In December 2006, a tax reform measure was passed in Uruguay repealing and amending various rules. The reform was published in the Diario Oficial (Official Gazette) on 18 January 2007. The reform established — for the first time in Uruguay — a transfer pricing (TP) regime, applying the OECD Transfer Pricing Guidelines and introducing rules similar to those in place in other Latin American countries. The key characteristics of the new TP legislation are found in Chapter VII of Law No. 18,083 passed by the Senate and the Chamber of Representatives, applicable to all tax years beginning July 2007.

On 1 July 2007, Law No. 18,083 or the Tax Reform Act (“Act”) entered into effect, putting into force general transfer pricing rules in Uruguay.

The Act was implemented by Executive Branch Decrees No. 56/009 (26 January 2009), 392/009 (24 August 2009), and 393/019 (23 December 2019) (collectively, “Decrees”), followed by Tax Office Resolutions No. 2,084/009 (1 December 2009); 2,098/009 (3 December 2009); 818/010 (6 May 2010); 745/011 (6 May 2011); and 1/020 (2 January 2020) (collectively, “Resolutions”).

For general tax (noncustoms) purposes, the Act introduces comprehensive legislation, mainly patterned after the OECD TP Guidelines.

Pursuant to the Act, transactions between related entities will be deemed operations effected between nonrelated companies as long as the terms and conditions are in line with standard market practices for nonrelated enterprises (arm’s length).

TP rules apply to corporate income taxpayers (so-called IRAE taxpayers) and related nonresident companies, as well as to IRAE taxpayers and related companies established in low-tax jurisdictions or free zones.

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Who is obliged?

Transactions between related entities are deemed operations as effected between nonrelated companies as long as the terms and conditions are in line with standard market practices for nonrelated enterprises (arm’s length). As stipulated further in the Act, the parties to the transaction are considered related in cases where (i) one of them is a foreign entity (or operates under a special customs regime, the so-called “exclave aduanero”); and (ii) the parties to the transaction are subject to the direction or control of the same individuals or legal entities.

The Resolutions have further spelled out the notion of “relationship” to indicate that, for the purposes of the Act, the Decrees determine that TP rules apply to related entities that fall within any of the following categories: (a) IRAE taxpayers that perform operations with related parties incorporated, based, with residence or located abroad; and (b) those who perform operations with entities incorporated, domiciled, based, with residence or located in countries of null or low taxation or that benefit from a special regime of null or low taxation, including the operations performed with entities operating in free zones — even those that might be located inside the Uruguayan territory — and benefit from a regime of null or low taxation.

In the case of operations performed between IRAE taxpayers and entities operating in Uruguay free zones, both are jointly and severally liable for the IRAE, reassessed in accordance with transfer pricing rules, provided they are — directly or indirectly — subject to the direction or control of the same individuals or legal entities, or these same individuals or legal entities have the power to determine or orientate the activity of the IRAE taxpayer.

In accordance with the Decrees, countries of null or low taxation are those (i) where the Uruguayan-sourced income is subject to an effective tax rate lower than 12%; or (ii) which have no tax information exchange agreement in force with Uruguay, or having one, such
agreement is not fully applicable or fulfilled. The Resolutions include a list of 40 countries of null or low taxation, including Honduras, Fiji Islands, American Virgin Islands, Jamaica and Puerto Rico, among others. Such Resolutions set forth that countries that enter into tax information exchange agreements and that activate the mechanism of automatic exchange of financial information would be withdrawn from the list. Uruguay has entered into treaties aimed at avoiding double taxation with several countries, which include exchange of information obligations.

Economic bonding criteria/related parties

Parties are deemed related when an enterprise or taxpayer carries out transactions with nonresident persons, entities or establishments, and both are subject to the management, capital or control of the same persons.

The Resolutions have further established that companies are deemed to be “related” in cases where (i) one participates in the capital of the other at a percentage equal to or above 10%; (ii) one exercises “functional” influences over the other; (iii) a company controls 10% in both entities; (iv) one of the entities has the votes to control the other; (v) an entity benefits from the exclusive services of an agent or distributor; (vi) an entity participates in the definition of the business policies of another entity; and (vii) an entity assumes the losses or expenditures of another one.

The arm’s length principle

Arm’s length pricing

The base of the TP rules is the arm’s length principle, which requires intercompany transactions to be carried out as if they were between unrelated parties.
The arm’s length principle also applies to operations with foreign affiliates, permanent establishments and other types of related entities.

**Comparability criteria**

Transactions are deemed comparable in cases where there are no differences affecting the price, profit margin or the consideration. The comparison must consider the following aspects:

i) **Characteristics of transactions**

1. For financial transactions – amount of the loan, term, guarantees, rate of interest, etc.
2. For services – their nature or need, and whether they involve knowhow, intangible or technical services
3. For the transfer or use of intangibles – the characteristics of the goods and their relationship with the activity of the purchaser

ii) **The functions or activities** – such as design, manufacturing, assembly, research and development, purchase, distribution, marketing, publicity, transportation, financing, managerial control, post-sale services and risks taken by each of the parties (whether commercial risks or financial risks)

iii) **Contractual terms that may affect the price or margin** – such as distribution methods, payment conditions, agreement duration, guarantees or securities

iv) **Economic circumstances** – geographic location, size of the market, levels of offer and supply

Accordingly, for the application of the adjustment methods, for transactions where there are no differences affecting the price, the profit margin or the amount of the consideration should be considered
comparable, as is the case with transactions in which — if applicable — the differences can be eliminated by virtue of adjustments that allow a substantial degree of comparability.

Transfer pricing methodology

Uruguayan TP legislation allows the use of the five OECD TP methods and an additional method for intermediaries:

- Comparable uncontrolled price (CUP) method
- Resale price method (RPM)
- Cost plus method (CPM)
- Profit split method (PSM)
- Transactional net margin method (TNMM)

When an intermediary abroad who is not the effective recipient of the merchandise participates in import and export operations, the Act provides for the mandatory application of comparable pricing methods between independent parties for all operations completed between related parties that have, as an object, agricultural and livestock commodities (productos primarios agropecuarios) and other assets whose quotation is known in transparent markets.

In such a case, the comparable price to be applied is the quotation for the goods in a transparent market on the date of issuance of the bill of lading of the merchandise or of an equivalent document. If the sales agreement on the imported or exported goods is filed with an agreements registry established by the Decrees, the quotation for the goods in the transparent market that will be considered is the one on the date of such an agreement.

The Resolutions set forth that the authority in charge of the agreements registry will be the Chamber of Commerce of Products of the Country (Cámara Mercantil de Productos del País). It likewise sets
forth that the sales agreements that can be registered are those with terms under 240 days. In order for this filing to be effective vis-à-vis the Tax Office, it has to be registered within five working days of the month following its celebration. The Resolution includes a list of transparent markets corresponding to a list of products.

The above method is not applicable when it is demonstrated that the intermediary has a real economic presence and activity and meets certain other requirements set forth by the Act and the Decrees.

Best method rule

Uruguay does not have an explicit best method rule, but in general, the TP method that best reflects the economic aspects of the transaction should be regarded as the best method. Taxpayers must provide the necessary information to the tax authorities so that they can verify the application of the arm’s length standard. This information could include costs, profit margins and additional data that the authority might require.

Use of statistical tools

There are no express provisions in this respect.

Adjustments

If the arm’s length standard is not met, the Tax Office may validly reestablish the arm’s length price of the transaction (and reassess applicable taxes accordingly), in conformity with the rules set forth below.

For purposes of reviewing and adjusting the transaction price, the Act contemplates the application of the CUP method, the RPM, the CPM, the PSM and the TNMM.

When the application of any of the above adjustment methods determines the existence of two or more comparable transactions, the following criteria, depending on the case, could be applied: (i) the
prices' interquartile range; (ii) the amounts of consideration; or (iii) the profit margin.

If the price, the amount of consideration or the profit margin set by the taxpayer is located within the interquartile range, the transaction would be considered as agreed upon between independent parties. If they are not located within this range, the Decrees determine that the price, the amount of consideration or the profit margin that could have been used by independent parties is the one corresponding to (i) the median reduced by 5% — for cases in which the price or amount of consideration agreed upon or the profit margin obtained is lower than the value corresponding to the first quartile; or (ii) the median increased by 5% — in cases where the price or amount of consideration agreed upon or profit margin obtained is higher than the amount corresponding to the third quartile.

Selected and secret comparables

In principle, information in the possession of the Tax Office is confidential and could not be used by the Tax Office for any purpose other than those related to the proceedings through which such information was obtained. However, for TP purposes, the Tax Office could use (as evidence) confidential information pertaining to third parties.

OECD interpretation sources

There is no restriction in this respect, as sources have actually been already referred to in a court decision with Sentence Number 19/2005 (by the Tribunal de lo Contencioso Administrativo).

Transfer pricing obligations

Requirements for international intercompany transactions

Taxpayers subject to TP provisions must keep documentation and analytical data in their records in order to support the determination of
transfer prices, the amounts of consideration, or the profit margins allocated in the complementary annual return. Taxpayers who are subject to mandatory filing must present a TP study containing this analysis in order to support the amounts reported.

On 29 December 2016, Uruguayan parliament passed the so-called Tax Transparency Act. The Act entered into force on 1 January 2017, and introduced certain innovations in the field of transfer pricing rules. These innovations tend to align Uruguay with the OECD’s recommendations for Country-by-Country reports (CbC Report) and master file documentation (“Master File”). Such Tax Transparency Act was complemented by Decree No. 353/018 (26 October 2018) and Tax Office Resolution No. 94/019 (4 January 2019).

Only those companies that integrate a multinational group of large economic dimensions (whose total income, at a global level, exceeds EUR 750 million) are obliged to file the CbC Report. Companies are not required to file the CbC Report when another entity that integrates the same multinational group is obliged to submit the CbC Report with a foreign tax office of a country/jurisdiction that has an exchange of information agreement in force with Uruguay. Even in this case, a sworn statement must be filed in order to provide the following information: (i) name and fiscal residence of the entity that would submit the CbC Report on behalf of the multinational group; (ii) name and fiscal residence of the ultimate/final controlling entity of the same group; and (iii) name of other members of the group in Uruguay (if any).

Requirements for transactions with low-tax jurisdictions

When companies carry out transactions with individuals or entities established or created in countries with no or low taxation, such transactions will not be deemed at arm’s length. In these cases, the transactions will be assessed in accordance with TP regulations using the established methods. Therefore, in such cases, the same formal
obligations of filing TP returns and the study should be considered by the local taxpayer.

Requirements for domestic intercompany transactions

TP adjustment methods apply only to operations with nonresidents and companies based in low-tax jurisdictions (and free zones in Uruguay, under certain circumstances). That said, few rules contemplate domestic intercompany transactions. Probably the most relevant one establishes that for loans granted to taxpayers of noncorporate income tax, a presumed interest rate applies in cases where no interest rate has been established between the parties or in cases where the interest rate is below the one established by the executive branch.

Contents of the transfer pricing documentation

Annual information must be mandatorily filed by any local entity that — being “related” to another entity as defined above — meets any of the following conditions: (i) performs operations under tax pricing rules for an amount exceeding 50 million UI (Indexed Units),\(^8\) approximately USD 6 million,\(^7\) and (ii) has been duly notified of the filing obligation by the Tax Office.

Annual information to be submitted must include (i) a sworn statement detailing and quantifying the operations performed in the term that falls under TP rules; (ii) a copy of the balance sheet of the respective fiscal year, if this was not already provided by other provisions; and (iii) a TP study with the minimum content described below.

The TP study must include, as a minimum, the following information: (i) details of the activities performed; (ii) the risks assumed and assets used in order to perform these activities; (iii) details of the items,\(^8\)

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\(^8\) Indexed Unit is a unit of value that is readjusted according to inflation measured by the Consumer Price Index. In February 2022, the exchange rate was 1 UI = USD 0.12.

\(^7\) The figures in US dollars may vary depending on the exchange rate.
documentation, circumstances and facts considered for the preparation of the study; (iv) details and quantification of the operations included under TP rules; (v) identification of the entities that were part of the operations included under TP rules; (vi) method used for the determination of the prices of the operations, indicating the reasons and grounds justifying it as the most appropriate, as well as the reasons the methods not used were rejected; (vii) identification of each one of the comparables selected for the justification of the transfer price; (viii) identification of the information sources from which the comparables were obtained; (ix) details of the comparables selected, indicating the reasons why they were considered; (x) quantification and methodology used to practice the necessary adjustments over the selected comparables; (xi) determination of the median and the interquartile range; (xii) description of the business activity, characteristics of the business and other relevant elements of the comparable entities; and (xiii) conclusions of the study.

With the Tax Transparency Act, the CbC Report and the Master File could also be required. The CbC Report should provide the identification of all the members and permanent establishments of the multinational group, the place of tax residence, and a description of economic activities. More specifically, the CbC Report provides accounting and tax information of the entities belonging to the group, including (a) gross income; (b) taxed net income; (c) generated income tax; (d) income tax effectively paid; (e) share capital; (f) accumulated profits; (g) number of employees; and (h) intangible assets.

Meanwhile, the Master File should provide information on the multinational group regarding organizational structure, activities performed, functions developed, assets used, and risks assumed by the entities of the multinational group; intangible assets; intercompany financing; and financial and tax information. More specifically, the Master File provides an overview of the business group, including (a) organizational chart revealing the structure, ownership of the share capital and geographical location of all the group’s entities; (b) general
description of the main revenue sources of the business group; (c) description of the supply chain of: (i) the five main products/services of the business group, and (ii) all the other products/services that represent more than 5% of the group’s sales; (d) list and description of the main services agreements between the several entities of the group; (e) description of the policies used to determine intragroup prices; (f) identification of the main geographical markets of the products/services sold by the business group; (g) analysis of the main contributions made by the different entities of the group in terms of performed functions, assumed risks and used assets; (h) description of the main corporate restructuring operations (mergers, acquisitions, divisions); (i) description of the group’s global strategy in terms of development, ownership and exploitation of intangible assets (trademarks, patents, software, among others); (j) identification of the geographical location of the main research and development centers; (k) list of the main intangible assets owned by the group; (l) description of the assignments of property rights of intangible assets executed between the group’s entities; (m) description of the primary means available for the financing of the business group; (n) identification of the group’s entities that centralize such financing; (o) copy of the consolidated financial statements of the group; and (p) list and description of the advanced transfer pricing agreements executed by the group’s several entities with their corresponding tax offices.

As a matter of fact, only the CbC Report is currently being required by the Uruguayan Tax Office.

Other documentation requirements

Companies that are required to file annual information must keep the documents and evidence justifying the TP study for the statute of limitations term of the taxes (five or 10 years, as the case may be). No additional TP documentation is currently required to be prepared by taxpayers to support intercompany transactions.
Companies that do not have the obligation to submit annual information must keep evidence and justification of the transfer prices and the comparison criteria used for the statute of limitations term of the taxes, in order to demonstrate and justify the correct determination of these prices, the amount of consideration, or the profit margin declared.

Informative returns and transfer pricing documentation

Presentation of TP information (where the same must be mandatorily filed on an annual basis) must be effected within nine months counted from the end of the respective fiscal period.

Penalties

The Tax Office is entitled to adjust the taxable result of the taxpayers based on the TP methods established by local laws. Any balance arising from the mentioned adjustment will trigger a penalty of up to 20% of the balance, plus surcharges capitalized every four months.

Failure to comply with TP requirements triggers (i) a reassessment of tax liabilities (i.e., obligation to pay the balance arising from adjusting the revenues/expenses allocated in order to better reflect the Act guidelines); (ii) a 20% penalty for any unpaid taxes; plus (iii) surcharges (recargos) capitalized every four months.

TP infringements also entail a monetary penalty for violation of formal obligations. The maximum amount of this penalty is about USD 250,000, a thousand times higher than the penalty provided for in the general regime.

Exemptions and waivers

Any transaction with entities based in Uruguay’s free zones is exempted when this transaction refers to goods or services transferred from the Uruguayan territory (out of the free zones) and destined to be utilized exclusively within Uruguay’s free zones (Tax Office Resolution 745/11). The Tax Office received an inquiry about
the application of TP rules to financial transactions between a Uruguayan branch and its head office or other branches abroad, when such transactions are the only operations of the branch with related companies.

The Tax Office concluded that those financial transactions are not subject to TP rules. The Tax Office grounded its conclusion on the fact that financial transactions between a foreign entity and its Uruguayan branch are deemed to be capital accounts (cuentas de capital), which generate neither an income nor an expenditure. Therefore, to the extent there is no income at stake, the Tax Office cannot adjust the value of such transactions.

Report on the tax situation – tax report

The Act does not contemplate the obligation for external auditors to file a report with the Tax Office on the taxpayer’s compliance with TP requirements. External auditors are not required by law to prepare TP support documentation.

Safe harbors

The Tax Office is authorized to establish special regimes in order to determine presumed profits (safe harbors) for import and export operations that refer to goods with international prices publicly known through transparent markets, stock exchanges or similar methods. Such regime must be optional and must not exceed three fiscal periods counted from their entry into force.

Consequences derived from transfer pricing adjustments

No express consequences are contemplated. Applicable consequences previously mentioned are the following: (i) price adjustment (in accordance with the adjustment methods indicated above); and (ii) application of taxes and regular penalties as appropriate.
Additional regulations

Advance pricing agreements

The Tax Office is authorized to enter into advance pricing agreements (APAs). Such APAs must be entered into prior to the transactions to be effected. The term of such APAs must not exceed three fiscal periods. The Tax Office has yet to establish the conditions and formalities of such APAs.

The Tax Transparency Act has also authorized the government to sign APAs with foreign tax offices, under double taxation agreements in force between Uruguay and third countries.

Thin capitalization

There are no particular TP rules regarding thin capitalization.

Intangibles

There are no particular TP rules regarding intangibles.

Intragroup services

There are no specific TP regulations regarding intercompany services.

Interests

There are no specific TP regulations regarding interest.

Sales of stock

The sale of stock generates a taxable income, regardless of whether the seller is a local or a foreign resident.

Cost-sharing agreements

There are no specific rules authorizing cost-sharing arrangements.
Audits

The Tax Office has conducted audits on TP and has made adjustments that have been resolved administratively, without a judicial process.

Sources for targeting and methods

The number of TP audits conducted by the Tax Office would not be sufficiently significant to detect any “typical” TP issues. Nevertheless, certain difficulties have been seen at the time of identifying comparable transactions. Especially in the framework of the transactional net margin method, certain difficulties have been seen when adequating the selected comparable transactions to the reality of the local market.

Current audits

The Tax Office has conducted TP audits and challenged intercompany prices and profit margins with the subsequent reassessment of corporate income tax. In general, tax audit activities are conducted both at the Tax Office and at the taxpayer’s premises. Nevertheless, no judicial rulings in the field of TP have been made publicly available.

Transactions under review

Under the tax secrecy prevailing in Uruguay, no access to information about the operations that are being analyzed by the Tax Office has been obtained.

Position of tax authorities

The Act does contemplate simultaneous audits with foreign Tax Offices with which Uruguay may have entered into an agreement for tax information exchange.
The Tax Office has been training its members for TP purposes. However, the accuracy or depth of their training programs is currently unknown. The Tax Office maintains its own databases for general audit purposes.

Opened cases

As previously mentioned, there is no public information about judicial processes related to TP.

Managing the audit process

No such doctrine has been developed in Uruguay yet.

Litigation procedure

There are no particular rules provided, so general litigation procedure will be followed in the event of a TP audit dispute.

Revocation appeals

Any decision by the Tax Office will be subject to administrative appeals and eventually to court reviews (by the Tribunal de lo Contencioso Administrativo).

Tax amnesty

There are no specific rules authorizing tax amnesties.

Competent authority procedure

Uruguay has signed some double taxation treaties. All these treaties contemplate amicable dispute resolution proceedings if a taxpayer deems the treaty not properly applied and the competent authority in the taxpayer’s domicile believes the claim is grounded.
Countries with double taxation agreements

1. Germany
2. Hungary
3. Mexico
4. Spain
5. Portugal
6. India
7. Liechtenstein
8. Malta
9. Finland
10. Switzerland
11. Romania
12. Ecuador
13. South Korea
14. Belgium
15. Vietnam
16. United Arab Emirates
17. Luxembourg
18. Singapore
19. United Kingdom
20. Chile
21. Paraguay
22. Argentina
23. Japan
24. Italy
## Countries with exchange of information agreement

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<td>South Africa</td>
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Uruguay has also signed the Convention on Mutual Administrative Assistance in Tax Matters.

On 30 June 2016, Uruguay also signed the Multilateral Agreement between Competent Authorities for the Exchange of Country by Country reports.

### General treaty rules and adjustments

In general terms, such treaties follow the OECD Model.

### Corresponding adjustments – mechanisms to avoid double taxation

Uruguayan Tax Law does not contain any provisions establishing correlative or secondary adjustments or mechanisms to avoid double taxation (other than the provisions contained in the double taxation treaties).
Arbitration

The existing treaties do not contemplate arbitration. Arbitration is admissible under Uruguayan general procedural laws, but it is of minor incidence in tax matters.

Court cases

The High Administrative Court (Tribunal de lo Contencioso Administrativo or TCA) has issued its first ruling on TP rules.

In *Philips v. Uruguay’s Tax Office*, the TCA ruled in favor of the company. Philips promised to sell one of its business lines to a related company at the price of (approximately) USD 2.5 million. The Tax Office estimated that the real market price of such transaction amounted to (approximately) USD 5 million, and so consequence Corporate Income Tax should be reassessed. However, the TCA did not share the Tax Office’s opinion.

That said, the same ruling addresses an additional issue regarding the scope of the TP rules in Uruguay. In accordance with the opinion of the Tax Office (shared by the TCA), all transactions executed by Corporate Income Tax payers with related entities are subject to such TP rules, even where such related entities are located within the Uruguayan customs territory.

Also, at the end of 2020, the TCA, Case 786/2019, ruled in favor of the Tax office on a dispute for the payment of royalties for the use of trademarks by a Uruguayan entity to its Swiss parent company.

The brands that originate royalty payments were originally under the control of the taxpayer, which approximately 30 years ago transferred them to its parent company at a symbolic value of USD 1 (prior to the existence of local regulation on Transfer Pricing). Since then, the local entity continued paying royalties for the brands that the tax office declared to be artificially separated between “local brands” and
“international brands,” but the functions performed by the taxpayer were the same for both.

The TCA argued that it is not disputed that the property of the trademarks belongs to the parent company located in Switzerland, but it cannot be ignored that it is the local taxpayer who performs the functions; uses assets; assumes risks; develops, improves, protects and exploits the intangible. In this sense, for the purposes of TP, the right to retain the income obtained from the use of the intangible is not granted to the owner of the trademark, but to the person who develops such activities and so Corporate Income Tax should be reassessed accordingly.

Tax system

For corporate income tax purposes, Uruguay maintains the principle of the source, that is, only Uruguayan-sourced income (including business income, investment income, capital gains and all other forms of income) is subject to corporate income tax.

Nonresidents are subject to income taxation in Uruguay only over their Uruguayan-sourced income, except for technical services income. In cases where the technical services are provided for the benefit of a corporate income tax taxpayer in Uruguay, the technical services performed abroad are also taxed.

Trends and perspectives

TP regulations are in place and a full set of rules, including deadlines, penalties and specific documentation requirements, among others, have been laid down in order to put them into effect pursuant to the OECD TP Guidelines.

The Tax Office has created a specific department dedicated to the implementation of such rules.
The main challenges over the next few years will be the implementation of the OECD recommendations under the BEPS Plan, and the coordination of the exchange of information related to TP with third countries that have signed bilateral or multilateral agreements with Uruguay.

While the current regulations permit the conclusion of APAs, the Uruguayan Tax Office has not executed a significant number of those.
Venezuela
Introduction


Another important regulatory modification took place in 2011, when the Venezuelan government issued the Law of Fair Costs and Prices. This law empowers the National Office of the Superintendent for the Defense of Socio-Economic Rights (SUNDDE) to adjust the prices of products and services sold by entities in Venezuela if it considers that such prices are higher than the fair price. For products and services for which SUNDDE has not yet established a fair price, the maximum profit margin is 30% for producers and 20% for importers. From the end of 2011 until 2016, SUNDDE has applied this law and has requested companies from the food, personal care and pharmaceutical industries to file detailed information on costs and expenses. SUNDDE analyzes the information to determine which taxpayers are likely to receive an adjustment on their prices.

The Law of Fair Costs and Prices produced changes in the business models of multinational companies in Venezuela. TP for Venezuelan purposes is becoming even more relevant.

Who is obliged?

In substance, taxpayers contracting with related parties must determine income, costs and deductions based on arm’s length

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88 Income Tax Law, Official Gazette No. 6,210 Ext. of 30 December 2015.
transactions in comparable operations by using the methodology in the Income Tax Law.

**Economic bonding criteria / related parties**

Persons are related if one participates, directly or indirectly, in the management, control or capital of the other or if one person or group of persons participates, directly or indirectly, in the management, control or capital of such persons. The TP rules will also apply to transactions carried out by an interposed party who does not qualify as related but operates with another party abroad who qualifies as a related party.

There is a rebuttable presumption under which transactions between individuals or companies resident or domiciled in Venezuela and individuals, companies or agencies located or domiciled in low-taxation jurisdictions will be presumed to have been carried out between related parties.

**Arm’s length pricing**

Article 111 of the Income Tax Law establishes that taxpayers carrying out transactions with related parties must determine income, costs and deductions by considering the prices or amounts that would have been used with or between independent parties in comparable transactions.

**Comparability criteria**

Taxpayers should consider the comparability criteria when analyzing and comparing the transactions with related parties against similar transactions carried out with independent parties. An independent transaction may compare to a related-party transaction if this transaction complies with at least one of the following two conditions:

i) None of the differences, if any, between compared transactions or between companies that carry out these compared transactions will materially affect the price or margin in the free market.
ii) Reasonably accurate adjustments may be made to eliminate the material effects of these differences.

To determine the differences between the transactions, the factors required under the method used will be considered, among which are:

i) The characteristics of the transactions

ii) The functions or activities, including the assets used and risks assumed in the transactions, of each party involved in the operation

iii) Contractual terms

iv) Economic circumstances

v) Business strategies, including those related to the penetration, permanence and expansion of the market

Transfer pricing methodology

The method used in applying the arm’s length principle is essential, since such method leads to determining the income or deductions applicable to the transaction being evaluated.

All methods used for applying the arm’s length principle are based on the concept that independent parties consider the terms of the options available in the transactions and will only accept the best option. The five methods established in the Income Tax Law, which are the same methods in the OECD TP Guidelines, are:

- Comparable uncontrolled price (CUP) method
- Resale price method (RPM)
- Cost plus method (CPM)
- Profit split method (PSM)
• Transactional net margin method (TNMM)

Best method rule

Although there is no best method rule, the Income Tax Law states that taxpayers must consider the CUP method as the first option when evaluating transactions regarding goods, services or rights.

Arm’s length range

To determine the price that independent parties would use, taxpayers should use a price or profit-margin rank resulting from a method with different comparable transactions or from applying different methods. In December 2010, the National Integrated Service of Customs and Tax Administration (“Revenue Service”) issued guidelines indicating the procedure to determine an arm’s length range, including the lower limit, the median and the upper limit. The guidelines also indicated that the arm’s length range is the median.

Selected and secret comparables

The Revenue Service accepts foreign comparables data since there is not enough information from local comparables. It is important to perform adjustments to account for the differences between comparables and the Venezuelan taxpayer. The Revenue Service has not issued regulations regarding using internal data.

The Revenue Service has not yet resorted to using secret comparables in TP cases. There is no provision in the Income Tax Law about their use.

Financial information

Under the Income Tax Law, as part of the TP documentation, financial statements must be prepared according to generally accepted

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OECD interpretation sources
The OECD Transfer Pricing Guidelines for multinational companies and tax administrations may be applied for anything that is not specified in the Income Tax Law.

Transfer pricing obligations
Taxpayers in Venezuela have three TP obligations:

- Conduct the transactions performed with related parties under the arm’s length principles.
- Prepare documentary support every year (TP study) for the transactions performed with related parties residing abroad, under the TP rules.
- File the informative tax return of related parties every year.

Documentation for international intercompany transactions
Article 112 of the Income Tax Law states that the determination of costs and deductions of imported goods and services, and the taxability of export-derived revenues regarding transactions conducted with related parties, will be performed considering the TP methodology established in the Income Tax Law.

Taxpayers must prepare and keep, during the statute of limitations, the documentation describing the accurate application of the TP regulations, including elements such as a description of assets used to generate income, a description of business activities, and a detailed list of intercompany transactions and methodologies.
Taxpayers must prepare the TP documentation and provide it when the Revenue Service requests it. Although there is no specific deadline for its completion, taxpayers should have it ready by the time they have the obligation to file the informative return.

Requirements for domestic intercompany transactions

There are no specific TP rules for transactions between domestic related parties. According to Article 117, however, TP documentation requirements and rules apply to those transactions carried out through domestic or foreign intermediaries considered independent parties if these independent parties, in turn, carry out transactions with a foreign company considered a related party.

Contents of the transfer pricing documentation

Taxpayers must prepare and keep, during the statute of limitations, documentation describing the accurate application of the TP regulations, including among others:

- A list of the fixed assets used in the income production classified by concept, including some details of information
- Commercial, financial, production and commercialization risks, and any other inherent risk to the business activity
- Organizational scheme of the company and/or group
- Names and last names, denomination and/or trade name, tax identification number, domicile and country of residence of the Venezuelan taxpayer, and documentation supporting its bonding status
- Information regarding transactions carried out with related parties, date, amount and currency used
- Activities performed by each company of the multinational group, the place where they are carried out, the transactions carried out
between them, the shareholder structure distribution, and agreements about relevant changes in the company structure

- Financial statements of the taxpayer
- Contracts and agreements negotiated between the taxpayer and the related parties located abroad
- Information on the commercial strategy, trading volume, credit policy, method of payment and quality processes, among others
- Production cost statements and cost of the merchandise and/or services sold, as applicable
- Method or methods used for the TP determination, indicating the criteria and objective elements considered to determine that the used method is the most appropriate for the transaction or company
- Information regarding the transactions of the comparable companies, indicating the comparable concepts and amounts, to eliminate the overvaluation or sub-estimation of the amount that may be affected
- Specific information about tax processes or tax disputes in TP matters, in which the related parties residing abroad are or have been involved
- Information about the monthly control of the entries, output and goods, indicating the method used to control and value inventories
- As applicable, chronological book mentioning the details of the international financing transactions performed in the open market
- Any other information considered as relevant by the Revenue Service
Language of the information to be included in the transfer pricing documentation

TP documentation must be prepared in or translated into Spanish.

Contents of the informative return

Companies must file an informative return before the Revenue Service of any transaction performed with related parties during the fiscal year by means of an “Informative Return of Transactions Performed with Related Parties Abroad (PT-99 Form).”

The return must contain (i) information about the taxpayer; (ii) details of the transactions with related parties abroad, and the date and kind of transaction, exchange rate and currency, transaction amount, country code, name of the related party, bonding code, applied method code, profit or loss of the transaction, margin and percentage obtained from the transaction (Exhibit A); (iii) profit and loss statement (Exhibit B); (iv) profit and loss statement of taxpayers focused on the financial sector (Exhibit C); (v) profit and loss statement of taxpayers focused on the insurance activities (Exhibit D); and (vi) the cost of sales analysis (Exhibit E).

The return should include every transaction entered into with related foreign parties, always indicating the annual amounts. In addition, taxpayers should file similar or identical transactions separately if there were significant differences in the assets, functions and risks assumed at the moment they were carried out.

Filings: place and date of filing

Taxpayers that carry out transactions with related foreign parties and with a fiscal year equivalent to the calendar year should file the informative return in June after its fiscal year was closed. Taxpayers with a fiscal year different from the calendar year should file the informative return in the following six months as of the close of the fiscal year. Taxpayers should file such informative return before the
relevant Revenue Service’s office according to the taxpayer’s tax domicile; with special taxpayers, in the Revenue Service’s Special Taxpayers office that corresponds to its tax domicile.

There is no obligation in the Income Tax Law to file TP documentation.

Penalties

Noncompliance sanctions

If the Revenue Service finds, in a tax audit, that the taxpayer is not compliant with TP obligations, it may: (i) disallow the tax deductions of payments to related foreign parties; and (ii) issue a deficiency tax assessment resulting from the adjustments to income, costs and deductions, plus fines and interest. Under the Organic Tax Code (“Tax Code”), sanctions for noncompliance are as follows:

Sanctions for not complying with the arm’s length principle

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<th>Action</th>
<th>Sanction</th>
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<tr>
<td>Deficiency income tax</td>
<td>From 100% to 300% of the deficiency tax, plus late payment interest calculated at 1.2 times the prime rate of the six biggest commercial banks. Under the 2020 Tax Code, fines corresponding to the fiscal year that commenced before 28 February 2020, which are established in percentage ranges, will be calculated at the highest currency according to the exchange rates published by the Venezuelan Central Bank on the date of the infraction and will be payable at the exchange rate on the day of the payment.</td>
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### Sanctions of verifying documentation

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<th>Action</th>
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<tr>
<td>Not using the established methodology for TP</td>
<td>Closure of the establishment for 10 consecutive days and a fine of 1,000 TUs</td>
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| Tax fraud over 2,000 TUs                    | The 2014 Code establishes six months to seven years in prison. The payment of the deficiency tax, fines and interest within 25 business days from the service of the Assessment Resolution will stop the criminal prosecution. If, however, the taxpayer has a record of conviction for prior tax fraud, it may not benefit from the payment option to extinguish the criminal action. Under the 2020 Code, the term to accept the deficiency assessment and  

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91 The TU is a referential value created for tax purposes as a measure that allows an annual update for inflation (according to the National Consumer Price Index issued by the Venezuelan Central Bank) of the amounts that represent the bases for taxes, exemptions and penalties, among others. Taxpayers must pay the fines according to the value of the TU on the date of payment. Although this means, in theory, that fines increase exponentially, especially when several years usually pass between the moment of the infraction and the moment the Revenue Service audits the taxpayer and imposes the fine, the increase of the TU sometimes does not equal the annual inflation rate. As a result, in practice, the increase of the fines may be lower than the inflation rate.
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<td>pay the taxes, fines and late payment to extinguish criminal action is reduced to 10 business days, and an increased 500% sanction will be applicable.</td>
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**Informative return sanctions**

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<tr>
<td>Nonfiling</td>
<td>Closure of the establishment for 10 consecutive days and a fine of 150 TUs.</td>
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<td>Under the 2020 Code, the TUs are no longer the referential value for the adjustment of fines. The 2020 Code establishes that fines calculated in TUs corresponding to fiscal years commencing after 28 February 2020 will be adjusted to the highest currency (i.e., euro) according to the exchange rates published by the Venezuelan Central Bank on the date of the infraction and will be payable at the exchange rate on the day of the payment.</td>
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<tr>
<td>Late or incomplete filing</td>
<td>100 TUs. For all fiscal years commencing after February 2020, the fine would be approx. EUR 100.</td>
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<td>Please also see comments on Nonfiling in the previous section.</td>
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</table>
Exemptions and waivers

There are no exemptions, *de minimis* rules or waivers in the Income Tax Law for applying TP rules.

Consequences derived from transfer pricing adjustments

The consequences of TP adjustments are similar to any other tax deficiency assessment (i.e., deficiency tax, penalties, interests, surcharges, etc.). Regarding TP, however, a corresponding adjustment may follow.

Additional regulations

Advance pricing agreements

The Income Tax Law allows taxpayers to propose to the Revenue Service an advanced valuation of the transactions to be performed with related parties.

The procedure in applying for an advance pricing agreement (APA) is:

- Prior to an APA request, interested taxpayers must file before the Revenue Service certain general information about the entities to be included, transactions covered and a summary of the proposal.

- The Revenue Service has 30 days to require additional information. If the Revenue Service issues no answer, the taxpayer may submit the proposal, including all the elements required by law.

- After the taxpayer requests an APA, the Revenue Service has 12 months to analyze, request and receive modifications and clarifications, and to eventually accept or reject the request.

- An APA may enter into effect in the taxable year of request and continue to be valid through the next three taxable periods. However, the period could be longer if the APA results from a
mutual agreement procedure with a country with which a tax treaty is in force.

Thin capitalization

As of 2007, the thin capitalization concept is included in the Income Tax Law to limit the deductions of interest derived from financing transactions carried out between Venezuelan taxpayers and their related parties. According to this rule, deductions derived from interest with related parties must not exceed the value of the taxpayer’s net worth (1:1 debt-capital ratio). This limit to deductions is the most restrictive one within Latin American countries, where taxpayers generally maintain a 3:1 debt-capital ratio.

Intangibles

TP rules regarding intangibles in the Income Tax Law only focus on the characteristics that taxpayers must consider to apply a correct comparability with nonrelated-party transactions. These characteristics include, among others, the property (industrial or intellectual), level of protection and expected benefit.

Intragroup services

TP rules regarding intercompany services in the Income Tax Law focus only on the characteristics that taxpayers must consider to apply a correct comparability with nonrelated-party transactions. These characteristics are the nature and duration of such services.

Interests

The thin capitalization rules of the Income Tax Law specify several elements to assess if interest payments to related parties are performed at fair market value, such as the amount of debt, interest rate, debtor’s solvency, guarantees, etc.
Sales of stock

There are no specific rules regarding stock sales, although general TP rules may apply.

Cost-sharing agreements

Although no specific rules disallow cost-sharing agreements, the Income Tax Law contemplates several rules that could provide arguments to the Revenue Service for rejecting the deductions derived from this structure. According to the Income Tax Law, if the deduction is to be allowed, cost-sharing payments would be subject to base withholding tax depending on the agreement. This could be challenged under tax treaties.

Statute of limitations

The statute of limitations in Venezuela is six years following the term for filing the return. This term is extended to 10 years in certain specific cases of noncompliance, nonfiling or foreign-sourced income.

Audits

Sources for targeting and methods

Taxpayers from different industries continue to receive TP information requests and tax assessments. Furthermore, the Revenue Service has also been requesting information on customs duties, which it may use to compare taxpayers’ transfer prices.

Current audits

TP tax assessments with adjustments have been ongoing in the telecommunications, pharmaceutical, automotive, oil and gas, and food industries.

It is expected that TP audits will continue to increase both in number and technical depth.
Transactions under review

No information is available regarding the transactions that the Revenue Service aims to audit, although intangibles and services are expected to be the main subjects.

Opened cases

No public information is available regarding audits in progress.

Managing the audit process

There is no doctrine that provides guidance in TP inspections. The general recommendations will apply.

Litigation procedure

The procedure that the Revenue Service must follow on TP matters and the means for taxpayers to challenge the assessment are similar to those available for other tax proceedings. However, the corresponding periods are longer for TP matters. On TP matters, the Revenue Service must follow the general audit procedures established in the Tax Code for national taxes. When the Revenue Service issues an Assessment Report, taxpayers have 15 business days to correct tax returns and pay the deficiency tax. The Revenue Service will then determine penalties and late payment interest. If the taxpayer chooses not to pay within the 15-day period: (i) the taxpayer will have 15 business days to designate a maximum of two representatives to access the information the Revenue Service used to make the Assessment Report; and (ii) a five-month period begins for the taxpayer to file written arguments against the Assessment Report (Escrito de Descargos).

After the five-month period ends, the taxpayer will have 15 business days to file the evidence that supports its arguments; the Revenue Service may extend this period for 15 additional business days, if necessary. Also, after the five-month period ends, a two-year period begins for the Revenue Service to issue the Final Assessment.
Resolution that should include the tax liability, penalties and late payment interest accrued, as it deems appropriate. This concludes the administrative proceedings. Upon receiving service of the Final Assessment Resolution, the taxpayer must pay the amounts stated therein or challenge it, which includes:

i) Filing an administrative tax appeal before the Revenue Service

ii) Filing an administrative tax appeal with a subsidiary judicial tax appeal before the Revenue Service

iii) Filing a judicial tax appeal directly with the Superior Tax Courts

Different terms and requirements apply, depending on the option exercised. A tax litigation procedure, including the administrative and judicial phases, normally takes seven to 12 years on average.

Revocation appeals

If the Superior Tax Court decision is unfavorable, the taxpayer may file an appeal before the Supreme Court of Justice, whose decision is final.

Tax amnesty

Under the Tax Code, tax amnesty programs can only be established by law passed by the National Assembly. Under amnesty programs, taxpayers may normally benefit from reductions of taxes, fines, interest, surcharges and litigation expenses.

Competent authority procedure

Competent authority cases of double taxation can be accessed according to the tax treaties signed by the Venezuelan government.

Countries with double taxation agreements

Venezuela has entered into double taxation treaties with 33 countries.
1. Austria 18. Barbados
3. Brazil 20. Canada
5. China 22. Denmark
6. France 23. Germany
7. Indonesia 24. Iran
8. Italy 25. Korea
10. Norway 27. Palestine
11. Portugal 28. Qatar
12. Russia 29. Saudi Arabia
13. Spain 30. Sweden
14. Switzerland 31. Netherlands
15. Trinidad & Tobago 32. United Arab Emirates
16. United States 33. United Kingdom
17. Vietnam

General treaty rules and adjustments
The majority of the treaties signed by Venezuela contemplate the possibility of applying a corresponding adjustment.
Corresponding adjustments

Article 114 of the Income Tax Law allows Venezuelan taxpayers to file a complementary annual income tax return following a TP adjustment in countries with which Venezuela has negotiated international tax treaties to avoid double taxation. However, the Revenue Service should approve the adjustment.

Secondary adjustments

The Income Tax Law does not regulate secondary adjustments. However, the Tax Code establishes the authority of the Revenue Service to waive any accessories (fines, interest and surcharges) derived from a TP adjustment, only if such waiver derives from a competent authority agreement over reciprocity bases. The agreement must be with a country with which Venezuela has a tax treaty, and provided that that country’s authorities have refunded the corresponding tax without interest.

Arbitration

The Tax Code specifies the provision for arbitration or mediation procedures.

Court cases

There is no public information regarding current TP audits being discussed in court. The first TP case resolved in a court in Venezuela occurred in 2013.

Tax system

Resident companies are taxed on worldwide income at a general 34% corporate rate. Higher rates apply to specific activities, such as oil and gas, mining, insurance, reinsurance, and banks and financial institutions. Foreign companies and branches of foreign companies are taxed only on their Venezuelan-sourced income. Permanent
establishments are taxed on the foreign and Venezuelan-sourced income attributable to the permanent establishment.

Dividends distributed by resident companies are subject to a dividend tax on the portion of income not subject to income tax liability at the corporate level. A similar branch profits tax applies to branches of foreign companies. Tax treaties can reduce the dividend and branch profits tax.
Final words

This book has provided you with the most recent and relevant topics regarding TP obligations, trends, suggestions and perspectives for taxpayers to consider throughout the Latin America region.

We hope our effort provides value-added knowledge, combined with expertise that can benefit you, your company, and your TP policies and business decisions.

In case you require an in-depth analysis of any issue addressed in this book, please do not hesitate to contact us in any of our offices. We will be at your full availability.
## Exhibit I

Transfer pricing requirements throughout Latin America

<table>
<thead>
<tr>
<th>Country</th>
<th>Start of TP Rules</th>
<th>TP reports and returns</th>
<th>Arm’s Length</th>
<th>Tax Havens(1)</th>
<th>Thresholds (3)</th>
<th>Safe Harbor(4)</th>
<th>Audits</th>
<th>OECD(5)</th>
<th>Thin Cap</th>
<th>Unilateral APAs</th>
<th>Bi – multilateral APAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>1998</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>-</td>
<td>High</td>
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<td>2:1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Bolivia</td>
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<td>✓</td>
<td>✓</td>
<td>-</td>
<td>-</td>
<td>Low</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
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<td>X</td>
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<td>✓(6)</td>
<td>✓</td>
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<td>2:1 or 0.3:1</td>
<td>-</td>
<td>-</td>
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<td>Canada</td>
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<td>✓</td>
<td>✓</td>
<td>-</td>
<td>-</td>
<td>High</td>
<td>✓</td>
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<tr>
<td>Chile</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>Medium</td>
<td>✓</td>
<td>3:1</td>
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<tr>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>Medium</td>
<td>✓</td>
<td>2:1</td>
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<td>-</td>
</tr>
<tr>
<td>Costa Rica</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>Medium</td>
<td>✓</td>
<td>2:1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>2012</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>-</td>
<td>Low</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>Medium-High</td>
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<td>✓</td>
<td>✓</td>
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<tr>
<td>El Salvador</td>
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<td>✓</td>
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<td>-</td>
<td>Low</td>
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<td>-</td>
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<tr>
<td>Guatemala</td>
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<td>✓</td>
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<td>-</td>
<td>-</td>
<td>✓</td>
<td>-</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Honduras</td>
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<td>-</td>
<td>-</td>
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## Transfer Pricing Requirements

<table>
<thead>
<tr>
<th>Country</th>
<th>Start of TP Rules</th>
<th>TP reports and returns</th>
<th>Arm’s Length</th>
<th>Tax Havens(1)</th>
<th>Thresholds (3)</th>
<th>Safe Harbor(4)</th>
<th>Audits</th>
<th>OECD(5)</th>
<th>Thin Cap</th>
<th>Unilateral APAs</th>
<th>Bi – multilateral APAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
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<td>✓</td>
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<td>-</td>
<td>✓</td>
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<td>-</td>
<td>1.5:1</td>
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<td>✓</td>
</tr>
<tr>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>Medium</td>
<td>✓</td>
<td>3:1 or APA</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>2017</td>
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<td>✓</td>
<td>-</td>
<td>✓</td>
<td>-</td>
<td>✓</td>
<td>-</td>
</tr>
<tr>
<td>Panama</td>
<td>2011</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>✓</td>
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</tr>
<tr>
<td>Peru</td>
<td>2001</td>
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<td>✓</td>
<td>✓</td>
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<td>Low</td>
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<td>3:1</td>
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<tr>
<td>Puerto Rico</td>
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<td>-</td>
<td>-</td>
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<tr>
<td>Uruguay</td>
<td>2006</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>Low</td>
<td>✓</td>
<td>-</td>
<td>✓</td>
<td>-</td>
</tr>
<tr>
<td>Venezuela</td>
<td>1999</td>
<td>✓</td>
<td>✓</td>
<td>✓ (7)</td>
<td>-</td>
<td>-</td>
<td>Medium</td>
<td>✓</td>
<td>1:1</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>


2. A list of tax havens has yet to be issued by the government.

3. “Thresholds” refers to all taxpayers and transactions subject to analysis, depending on revenues, net worth, etc.

4. “Safe harbor” refers to local legislations allowing safe harbor regimes.

5. “OECD” refers to countries adopting OECD TP Guidelines as basis.
6. For export transactions, there is a possibility for Brazilian taxpayers to apply the imperfect safe harbor that allows them to demonstrate compliance with TP rules through export documents only, subject to certain conditions.

7. Presumptions of a related party can be eliminated if evidence showing the contrary is presented.

8. ✧ This symbol indicates the obligation to present the TP study to tax authorities.
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