

Global Tax Alert

News from EY Americas Tax

OECD releases Colombia Stage 1 peer review report on implementation of BEPS Action 14 minimum standard

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Executive summary

The Organisation for Economic Co-operation and Development (OECD) released, on 24 October 2019, the sixth batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms.¹ Colombia was among the assessed jurisdictions in the sixth batch.² Colombia requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying best practices report.³

Overall, the report concludes that Colombia meets less than half of the elements of the Action 14 minimum standard. In the next stage of the peer review process, Colombia's efforts to address any shortcomings identified in its stage 1 peer review report will be monitored.

Detailed discussion

Background

In October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14 on *Making Dispute Resolution Mechanisms More Effective*.⁴ The Terms of Reference translated

the Action 14 minimum standard into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking a peer review and monitoring in two stages. In Stage 1, a review is conducted of how a member of the Inclusive Framework (IF) on BEPS implements the minimum standard based on its legal framework for Mutual Agreement Procedure (MAP) and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the IF member on BEPS takes to address any shortcomings identified in Stage 1 of the peer review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.⁵ In summary, Stage 1 consists of three steps or phases:

- (i) Obtaining inputs for the Stage 1 peer review
- (ii) Drafting and approval of a Stage 1 peer review report
- (iii) Publication of Stage 1 peer review reports

Input is provided through questionnaires completed by the assessed jurisdiction, peers (i.e., other members of the FTA MAP Forum) and taxpayers. Once the input has been gathered, the Secretariat prepares a draft Stage 1 peer review report of the assessed jurisdiction and sends it to the assessed jurisdiction for its written comments on the draft report. When a peer review report is finalized, it is sent for approval of the FTA MAP Forum and later to the OECD Committee on Fiscal Affairs' to adopt the report for publication.

Minimum standards peer review reports

The report is divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each part addresses a different component of the minimum standard.

The report includes a number of recommendations relating to the minimum standard. Overall, Colombia meets less than half of the elements of the Action 14 minimum standard.

Preventing disputes

A.1 Include Article 1425(3), first sentence, of the OECD Model Tax Convention (MTC) in tax treaties

Article 1425(3), first sentence, of the OECD MTC relates to resolving by mutual agreement any difficulties or doubts arising as to the interpretation or application of tax treaties.

Of the 14 Colombian tax treaties,⁶ with 16 jurisdictions,⁷ subject to review, only one tax treaty (the Andean Community Decision) does not contain a provision that is equivalent to Article 1425(3), first sentence. This treaty will not be modified by the Multilateral Instrument (MLI) to include the required provision. In this regard, Colombia is currently pursuing an internal review of the relevant treaty to include said provision, which will be prioritized in its plan for bilateral tax treaty negotiations. In addition, Colombia reported it will seek to include Article 1425(3), first sentence, of the OECD MTC in all of its future tax treaties.

A.2 Provide roll-back of bilateral advance pricing arrangements (APAs) in appropriate cases

An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g., method, comparables and appropriate adjustment thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.

The methodology to be applied prospectively under an APA may be relevant in determining the treatment of comparable controlled transactions in previous filed years. The "roll-back" of an APA to these previous filed years may be helpful to prevent or resolve potential transfer pricing disputes.

Colombia reported that roll-back of bilateral APAs is not available and that it does not anticipate any modifications on this regard. The report recommends that Colombia should, without further delay, introduce this possibility, and in practice provide for roll-back of bilateral APAs in appropriate cases.

Availability and access to MAP

B.1 Include Article 1425(1) of the OECD MTC in tax treaties

B.1 requires that jurisdictions should ensure that their tax treaties contain a MAP provision which provides that when the taxpayer considers that the actions of one or both of the Contracting Parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer, may irrespective of the remedies

provided by the domestic law of those Contracting Parties, make a request for MAP assistance - first sentence of Article 1425(1) - and that the taxpayer can present the request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty - second sentence of Article 1425(1).

First sentence of Article 1425(1)

Of Colombia's 14 tax treaties subject to review, 11 contain a provision, allowing taxpayers to submit a MAP request to the competent authority of the state in which they are resident. In addition, two of Colombia's tax treaties contain a provision allowing taxpayers to submit a MAP request to the competent authority of either state. Only one tax treaty (the Andean Community Decision) does not contain a provision that is equivalent to Article 1425(1), first sentence of the OECD MTC, and this treaty will not be modified by the MLI. Colombia reported that it is currently pursuing an internal review of the Andean Decision and that if the decision is revoked by consensus, Colombia will prioritize bilateral tax treaty negotiations with each of the three signatories.

With the MLI it is expected that four of the tax treaties will allow submission of a MAP request to the competent authority of either state.

Second sentence of Article 1425(1)

Eleven of Colombia's tax treaties include a provision allowing taxpayers to submit a MAP request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty. The other tax treaties have either no MAP provision (the Andean Community Decision), no filing period for a MAP request (Chile),⁸ or the filing period for a MAP request is only for a period of one and a half years (Mexico).

The treaty with Chile that does not contain a filing period for MAP requests, as well as the treaty with Mexico that provides a period shorter than three years will be modified by the MLI to incorporate the second sentence of Article 1425(1) of the OECD MTC.

B.2 Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

Out of Colombia's 14 tax treaties, 12 do not contain a provision equivalent to Article 1425(1) of the OECD MTC as changed by the Action 14 final report, allowing taxpayers

to submit a MAP request to the competent authority of either treaty partner. However, as discussed above, four of Colombia's tax treaties should introduce such change once the MLI is applicable.

For those treaties that will not be amended by the MLI, Colombia indicated that it will introduce a bilateral notification process where its competent authority considers an objection raised in a MAP request as being not justified. Furthermore, Colombia will accept all bilateral consultation requests from another competent authority within six months of the notification of the denial of MAP access.

It is important to note that after the OECD's review, on 28 December 2018, Colombia enacted tax reform (Law 1943) which included a specific rule that helped in the articulation of the MAP with the domestic law.⁹ Under such rule, the Government recently issued a regulation (Resolution 53 of 13 August 2019). Resolution 53 of 2019 includes the notification process and consultation requests mentioned above.

B.3 Provide access to MAP in transfer pricing cases

Although Colombia reported that it will provide access to MAP in transfer pricing cases, it did not receive any MAP request for such cases during the Review Period.

B.4 Provide access to MAP in relation to the application of anti-abuse provisions

Colombia reported that it has granted access to MAP in eligible cases concerning whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty. One MAP request of this kind during the review period was reported by Colombia.

B.5 Provide access to MAP in cases of audit settlements

Colombia reported it has not denied access to MAP in cases where the tax authority and the taxpayer have entered into an audit settlement. However, its competent authority, did not receive any MAP requests of this kind from taxpayers during the review period.

Even though there is no a permanent audit settlement programs available in Colombia, such programs are usually introduced from time to time in Colombia for a limited period. In this case, Colombia noted that recent audit settlements (based on the 2018 tax reform) will be treated as final judicial

rulings and that would only provide access to MAP to seek relief from its treaty partner to the extent of relieving the double taxation in question.

B.6 Provide access to MAP if required information is submitted

Colombia reported that it has not limited access to MAP in eligible cases when taxpayers have complied with Colombia's information and documentation requirements for MAP requests. At the time of the review, Colombian MAP guidance was not finalized. However, Colombia indicated that its competent authority has 45 calendar days from the initial date of receipt of the taxpayer's materials to request further information or documentation, and that the taxpayer should provide this information no later than 45 calendar days from the date the request for further information or documentation was made. Colombia further reported that it would follow up with the taxpayer at least once before the expiration of this 45-day limit. Recently, such process and time limits to submit information were included in Resolution 53 of 2019.

B.7 Include Article 1425(3), second sentence, of the OECD MTC in tax treaties

The second sentence of Article 1425(3) sets forth that competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

Of Colombia's 14 tax treaties, 6 do not contain a provision that is equivalent to Article 1425(3), second sentence, of the OECD MTC. Four of these treaties are expected to be modified by the MLI to include the required provision upon entry into force for the treaties concerned. Regarding the remaining two tax treaties, Colombia reported that it is currently pursuing an internal review to include said provision.

B.8/B.9 Publish clear and comprehensive MAP guidance and make such guidance available and easily accessible, including publishing a MAP profile

At the time of the review Colombia reported that it had released its draft MAP guidance for public comments. Colombia reported that its draft MAP guidance contained information on (among others):

- a. Contact information of the competent authority or the office in charge of MAP cases

- b. The manner and form in which the taxpayer should submit its MAP request
- c. The specific information and documentation that should be included in a MAP request
- d. How the MAP functions in terms of timing and the role of the competent authorities
- e. Information on availability of arbitration
- f. Relationship with domestic available remedies
- g. Access to MAP in transfer pricing cases, anti-abuse provisions, cases of multilateral MAPs and for multi-year resolution of cases
- h. Rights and role of taxpayers in the process
- i. Suspension of tax collection
- j. Interest charges, refunds and penalties

As mentioned above, after the review, Colombia enacted tax reform (Law 1943) which included a specific rule that coordinates the MAP with the domestic legislation. Under such rule, recently issued Resolution 53, in general terms, addresses the matters mentioned above.

B.10 Clarify in MAP guidance that audit settlements do not preclude access to MAP

Colombia reported that its MAP guidance, to be published at the time of the review, should address the effect of the outcome of such audit settlements on the MAP process. However, as mentioned in B.5 above, Colombia reported that such settlements will be treated as final judicial rulings and that it would only provide access to MAP in order to seek relief from its treaty partner to the extent of relieving the double taxation in question. Such approach was included in Resolution 53 of 2019.

Resolution of MAP cases

C.1 Include Article 1425(2), first sentence, of the OECD MTC in tax treaties

The first sentence of Article 1425(2) of the OECD MTC requires that the competent authority who receives a MAP request from the taxpayer, shall endeavor, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement, with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

Of Colombia's 14 tax treaties, only 1 does not contain a provision that is equivalent to Article 1425(2), first sentence, of the OECD MTC. This treaty (Andean Community Decision) will not be modified by the MLI to include the required provision. Therefore, as mentioned above, Colombia is currently pursuing an internal review of the relevant treaty to include said provision.

C.2 Seek to resolve MAP cases within a 24-month average timeframe

Colombia reported that the inventory of pre-2016 MAP cases consisted of one case, which was an attribution/allocation case, this case was still outstanding at the end of the Statistics Reporting Period.

In relation to post-2015 cases, there was only one case started in March 2018. No post-2015 cases were reported for 2016 and 2017.

As Colombia did not close any MAP cases during the Statistics Reporting Period, the average timeframe for both pre-2016 cases and post-2015 cases is not applicable in this regard.

Colombia indicated that it intends to implement an annual monitoring process that will take place the first quarter of each calendar year, beginning in 2019.

C.3 Provide adequate resources to the MAP function

The report considers that while the level of resources seems sufficient as compared to the number of pending MAP cases, Colombia should ensure that the reasons why the only pending MAP case initiated in 2013 has not yet been closed will not act as an obstacle to resolving current pending and future MAP cases in a timely, efficient and effective manner.

Colombia reported that it will monitor its MAP cases on an annual basis to keep track of how long it takes to resolve MAP cases as well as the number of MAP cases in its inventory. Colombia further reported that it will also monitor how many face-to-face meetings occur each year, as well as the time taken to process MAP requests.

C.4 Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty

Colombia should continue to ensure that its competent authority has the authority and uses it in practice to resolve MAP cases without being dependent on approval or direction from the tax administration personnel directly involved in the adjustment at issue.

C.5 Use appropriate performance indicators for the MAP function

Colombia reported that its staff are evaluated based on weighted qualitative criteria such as the time taken to resolve each case; behavioral skills, such as independence from tax treaty policy considerations (10%); and evaluation of management. Staff in charge of MAP are not evaluated on the basis of the material outcome of MAP discussion. The report recommends that, as done thus far, Colombia should continue to use appropriate performance indicators.

C.6 Provide transparency with respect to the position on MAP arbitration

Colombia's MAP profile states that Colombia's Law 1563 of 2012 expressly forbids arbitration on tax matters, but that it can be overridden by any ordinary law including a law to approve a double taxation agreement. Colombia noted that this prohibition on arbitration was in accordance with a very well embedded opinion among Colombia's judiciary, according to which only the judiciary itself is able to rule on tax disputes. Colombia reported that its Constitutional Court is reviewing the constitutionality of Colombia's arbitration clause for one tax treaty that has not yet gone into effect.

In this regard, despite eventual domestic law limitations regarding arbitration with respect to tax matters, Colombia has incorporated an arbitration clause in 2 of its 14 treaties as a final stage to the MAP.

Implementation of MAP agreements

D.1 Implement all MAP agreements/D.2 Implement all MAP agreements on a timely basis

As there was no MAP agreement reached during the review period that required implementation by Colombia, it was not yet possible to assess whether Colombia would have implemented all MAP agreements thus far.

D.3 Include Article 1425(2), second sentence, of the OECD MTC in tax treaties or alternative provisions in Article 149(1) and Article 147(2)

Jurisdictions should either: (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law - Article 1425(2), second sentence); or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an

adjustment pursuant to Article 149(1) or Article 147(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

Of Colombia's 14 tax treaties, 3 contain neither a provision that is equivalent to Article 1425(2), second sentence, nor any of the alternative provisions provided for in Article 149(1) and Article 147(2) of the OECD MTC.

Out of these three: i) one is expected to be modified by the MLI to include the required provision upon entry into force for the treaty concerned (Chile); and ii) two (Mexico and the Andean Community Decision) will not be modified by the MLI. Regarding the latter treaties, Colombia reported that it is currently pursuing an internal review of the relevant treaty to include said provision, which will be prioritized in its plan for bilateral tax treaty negotiations.

Best practice peer review reports

BP.1 Implement bilateral APA programs

Colombia reported that it has implemented an APA program, which can be requested by taxpayers in writing to the General Commissioner of the Tax Authority (DIAN) or his deputy. Colombia further reported that unilateral requests for APAs are usually processed within nine months, whereas the timeline for evaluation, negotiation and signing stages of bilateral or multilateral APA requests can be different and are jointly determined by the relevant competent authorities. Once it has agreed to a bilateral APA it would be applied to the year before the agreement was signed, and up to three years after such signature. However, it was reported that Colombia has not yet entered into a bilateral APA, although one request was received in 2014 and is still pending.

Peers did not provide input relating to this particular best practice.

BP.2 Publish mutual agreements of a general nature

B.2 requires that jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as the interpretation or application of their tax treaties in appropriate cases.

Colombia reported that its tax administration has occasionally issued opinions of a general nature related to the application and implementation of double tax treaties, which were published on DIAN's website.

Peers did not provide input relating to this particular best practice.

BP.3 Provide guidance on APAs

Colombia reported that it has implemented a bilateral APA program but had not published MAP guidance, and its draft MAP guidance that was under consideration at the time of review did not contain any specific APA guidance. However, Colombia's MAP profile contained links to its domestic legislation in Spanish that governs its APA program. Peers did not provide input relating to this particular best practice.

The domestic rules regarding the MAP were issued via Resolution 53 of 2019.

BP.4 Develop "global awareness" of the audit/examination functions

BP.4 requires jurisdictions to develop the "global awareness" of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration's "Global Awareness Training Module" to appropriate personnel.

Colombia reported that the DIAN has a specialized division in charge of providing continuing training to its tax officials. Such training is not restricted to domestic law and also focuses on issues relating to tax treaties. In addition, the tax administration staff is exposed to a variety of trainings and workshops, some of which are sponsored by several international organizations, and sometimes include representatives from the private sector.

Peers did not provide input relating to this particular best practice.

BP.5 Implement appropriate administrative measures to facilitate recourse to MAP

Colombia reported that a taxpayer may request MAP assistance at any time once it has received notification of a proposed adjustment in writing, so long as the filing period as stipulated under the tax treaty has not expired. Colombia further reported that a taxpayer is allowed to file a request for MAP assistance at any time prior to a final judicial ruling issued by Colombia's competent court. In such cases, the taxpayer would be requested to join Colombia's withdrawal of the related claims within 15 business days. Furthermore, if a MAP request involves a taxable period where a final judicial decision has already been rendered, Colombia reported that its competent authority will only consider a taxpayer's request for assistance to alleviate double taxation in the foreign contracting state and that it would neither take

any action to worsen the taxpayer's situation in light of the final judicial ruling nor undertake any actions that would otherwise change the final judicial decision.

Peers did not provide input relating to this particular best practice.

BP.6 Provide access to MAP for bona fide taxpayer-initiated foreign adjustments

Colombia reported that its current domestic legal framework does not address the issue of bona-fide taxpayer initiated adjustments. However, Colombia noted that its tax administration is of the opinion that there is nothing in Colombia's tax law that prevents its competent authority from giving access to MAP in double taxation cases resulting from bona fide taxpayer initiated foreign adjustments where appropriate.

Peers did not provide input relating to this particular best practice.

BP.7 Provide guidance on multilateral MAPs

Colombia has no rules and/or procedures to address multilateral MAPs. However, Colombia reported that its draft MAP guidance currently under consideration, contains information on multilateral MAPs. Peers did not provide input relating to this particular best practice.

Resolution 53 of 2019 expressly mentions the possibility of multilateral MAP requests.

BP.8 Provide for suspension of collection procedures for pending MAP cases

Colombia reported that at the time of the review, the suspension of collection was not yet available but that it intended to provide for the suspension of collection procedures during the period a MAP case is pending. Peers did not provide input relating to this particular best practice.

Resolution 53 of 2019 provides an express rule that collection procedures should be suspended in relation to matters subject to a MAP.

BP.9 Permit taxpayers to request multi-year resolution of recurring issues through the MAP

Colombia reported that its current practice is to allow taxpayers to request the multi-year resolution of recurring issues through MAP. However, according to Colombia's

MAP profile, there are currently no rules and/or procedures to address whether taxpayers may request multi-year resolution of recurring issues through MAP with respect to filed tax years. Peers did not provide input relating to this particular best practice.

Resolution 53 of 2019 expressly includes the possibility of multi-year MAP requests.

BP.10 Publish explanation of the relationship between the MAP and domestic remedies

At the time of the review, Colombia had not published an explanation of the relationship between MAP and domestic remedies. Peers did not provide input relating to this particular best practice.

Resolution 53 of 2019 addresses such relationship and coordination between the MAP and domestic remedies.

BP.11 Provide guidance on consideration of interest and penalties in MAP

Colombia reported that, in practice, it takes interest and/or penalties into consideration in a MAP.

Apart from what is available in Colombia's MAP profile, at the time of the review there was no information publicly available on the consideration of interest and penalties in MAP by Colombia. Colombia's MAP profile noted that although no domestic tax rules and/or procedures existed regarding the consideration of interest and penalties in a MAP case, the view of Colombia's tax authority is that interest and penalties resulting from adjustments made pursuant to a MAP agreement may be waived or dealt with as part of MAP. Peers did not provide input relating to this particular best practice.

Resolution 53 of 2019 states that interest and penalties could be reduced as part of a MAP agreement, to the extent such interest and penalties are related to taxes covered within the scope of the relevant tax treaty.

BP.12 Include Article 149(2) of the OECD MTC in tax treaties

All of Colombia's 14 tax treaties under review contain a provision equivalent to Article 149(2) of the OECD MTC requiring their competent authorities to make a correlative adjustment if a transfer pricing adjustment is made by the treaty partner. Peers did not provide input relating to this particular best practice.

Next steps

Colombia is already working to address deficiencies identified in its peer review and will now move on to Stage 2 of the process, where Colombia's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Under the peer review program methodology, Colombia shall submit an update report to the FTA's MAP Forum within one year of the OECD Committee on Fiscal Affairs' adoption of the Stage 1 peer review report.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Colombia's peer review report represents the continued recognition and importance of the need to achieve tax certainty for cross-border transactions for MNEs. While increased scrutiny is expected to significantly increase the

risk of double taxation, the fact that tax authorities may be subject to review by their peers should be seen by MNEs as a positive step to best ensure access to an effective and timely mutual agreement process.

Furthermore, the peer review for Colombia provides insights to taxpayers on the availability and efficacy of MAP. With additional countries continuing to be reviewed, the OECD has made it known that taxpayer input continues to be welcomed on an ongoing basis.

With stakeholder feedback in mind, businesses are encouraged to share their views with the OECD on the peer review for Colombia and any other jurisdictions, and to perhaps comment on whether the next iteration of the OECD's assessment of tax administration's MAP performance warrants greater feedback from taxpayers as the primary source. Feedback from the international tax community is the logical next step after peer review, which may help to further validate the current favorable result.

Endnotes

1. See EY Global Tax Alert, [OECD releases sixth batch of Stage 1 peer review reports on Action 14](#), dated 25 October 2019.
2. OECD (2019), Making Dispute Resolution More Effective - MAP Peer Review Report, Colombia (Stage 1): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/7182ca92-en>.
3. OECD (2019), BEPS Action 14 MAP Peer Review Report: Best Practices - Colombia (2019), OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-colombia-2019.pdf.
4. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
5. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.
6. The review included comprehensive double tax treaties signed by Colombia at the time of the review, even though some of them are not yet in force. It did not include the tax treaty signed with Japan on 18 December 2018.
7. Among the tax treaties reviewed is the Andean Community Decision (578) which includes Bolivia, Ecuador and Peru.
8. Colombia reported that in the absence of a filing period in a tax treaty it would apply the same filing period as the OECD MTC, which is three years from the notification of the action resulting in taxation not in accordance with the treaty.
9. On 16 October 2019, the Colombian Constitutional Court declared unconstitutional the Law 1943 of 2019 due to flaws in its approval process. However, the Court determined that the provisions of the law should be in force until the end of 2019. The Colombian Government has already submitted to the Congress a proposal to reenact the provisions Law 1943, including the article related to MAP. It is not clear at this point what would be the outcome in the Congress of this proposal to reenact Law 1943.

For additional information with respect to this Alert, please contact the following:

Ernst & Young S.A.S., International Tax and Transaction Services, Bogotá

- ▶ Luis Orlando Sánchez luis.sanchez.n@co.ey.com
- ▶ Juan Sebastián Torres juan.s.torres@co.ey.com
- ▶ Andrés Millán andres.millan.pineda@co.ey.com

Ernst & Young LLP (United States), Latin American Business Center, New York

- ▶ Zulay Andrea Arevalo zulay.arevalo@co.ey.com
- ▶ Ana Mingramm ana.mingramm@ey.com
- ▶ Enrique Perez Grovas enrique.perezgrovas@ey.com
- ▶ Pablo Wejcman pablo.wejcman@ey.com

Ernst & Young LLP (United Kingdom), Latin American Business Center, London

- ▶ Jose Padilla jpadilla@uk.ey.com

Ernst & Young Tax Co., Latin American Business Center, Japan & Asia Pacific

- ▶ Raul Moreno, *Tokyo* raul.moreno@jp.ey.com
- ▶ Luis Coronado, *Singapore* luis.coronado@sg.ey.com

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