

VAT on Digital Services and B2C Transactions: Experiences in the Latin American and Caribbean Region

Globalization and new technologies have encouraged new markets to emerge along with new ways of trading goods and services with no physical presence required. Based on the OECD recommendations, countries around the world have started to adapt their VAT legislations to tax cross-border digital transactions supplied by non-residents. Countries in the Latin American and Caribbean region have started to amend their VAT systems to follow this international trend. In this article, the authors provide a general outline of the recent developments with regard to VAT applicable in B2C transactions in the region, summarizing the countries' experiences and providing their own reflections.

1. Introduction¹

In a digital and technological era, perhaps the biggest challenge worldwide on domestic tax systems is to find a good balance between the exponential growth of goods and services traded online and an appropriate amount of tax collection over them. The non-collection of VAT on digital cross-border transactions² supplied by non-residents has resulted in significant losses of tax revenue for countries, as well as significant competitive disadvantages for domestic providers of goods, services and intangibles, since non-resident suppliers in several countries have traditionally not been obliged to account for VAT on their sales of goods and services to customers located in other jurisdictions. At the same time, the increasing interest in acquiring digital services and goods from non-resident suppliers who do not have a physical presence in the market jurisdictions and the exponential growth of business models wherein various intermediaries intervene, aggravate the situation. VAT means to tax consumption expenditure and not strictly speaking "value addition", so the willingness to levy the VAT in the juris-

dition where the consumer resides makes sense.³ Countries in the Latin American and Caribbean region started to deal with these issues a few years ago by amending their VAT framework and adopting measures to include goods and services traded online within their VAT scope and to acquire taxing rights regarding cross-border digital supplies made by non-residents. Notably, in 2020 and 2021, the COVID-19 crisis made the urgency of addressing the indirect taxation of cross-border digital transactions even more evident.

Since 2006, the OECD has been working on an international standard, the International VAT/GST Guidelines,⁴ to ensure the consistent application of VAT to international trade. Since 2015, these Guidelines have become the reference point for the development of fiscal policies and legislation in a large number of countries worldwide regarding the indirect taxation of cross-border digital supplies. This also applies to the Latin American and Caribbean (LAC) region.⁵ These Guidelines focus on trade in services and intangibles (business-to-business (B2B) and business-to-consumer (B2C) transactions) and establish the destination principle (determining that those transactions shall be taxed in accordance with the rules of the jurisdiction of consumption)⁶ as the most appropriate rule for allocating taxing powers and rights. The destination principle is preferred over the origin principle because of the following main advantages⁷: (i) assurance that the tax is levied ultimately in the jurisdiction where the final consumption occurs; and (ii) the avoidance of distortions of competition. In terms of tax collection, the International VAT/GST Guidelines mostly recommend using non-resident suppliers' registration systems.

Most recently (in June 2021), the OECD, in partnership with the World Bank Group, the Inter-American Centre of Tax Administrations (CIAT) and the Inter-American Development Bank (IDB), published the VAT Digital Toolkit for Latin America and the Caribbean to offer

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1. This is the first of a series of articles analysing the introduction of new rules about the VAT treatment of digital services and the allocation of taxing rights regarding cross-border supplies of services in different regions across the globe. The second part will be about the South-east Asia-Pacific region.
2. These transactions include not only e-commerce, but also sales of low-value goods, the provision of services provided via electronic media, transactions via intermediation platforms oriented towards the collaborative and sharing economy, cryptocurrency exchange, gambling, social media activities, sales of digital assets, electronic books, music, audio-visuals and software, and digital advertising, amongst others.

3. M. Lamensch, *Value Creation and VAT*, in *Taxation and Value Creation*, sec. 3.5.1., p. 85 (W. Haslechner & M. Lamensch eds., IBFD 2021).
4. *OECD International VAT/GST Guidelines* (12 Apr. 2017) [hereinafter *International VAT/GST Guidelines*], available at <https://doi.org/10.1787/9789264271401-en> (accessed 11 July 2021).
5. From 23 June 2021, the *International VAT/GST Guidelines* are also available in Spanish on the OECD's website; see <https://www.oecd.org/tax/consumption/directrices-internacionales-sobre-iva-ibs-9a6341e2-es.htm> (accessed 23 June 2021).
6. *International VAT/GST Guidelines*, *supra* n. 4, at Guideline 3.1.
7. However, as Lamensch says, *supra* n. 3, at sec. 3.5.1., pp. 86-87, an issue with the destination-based systems is that substantive and enforcement jurisdictions are not aligned in cross-border situations and the lack of enforcement jurisdiction is a well-known problem in the area of VAT.

timely and valuable assistance to tax authorities in the LAC region for the effective collection of VAT revenues from e-commerce activities.⁸

In this article, the authors provide a general outline of the recent developments in indirect taxation in the LAC region, specifically with regard to VAT applicable in B2C transactions. In section 2., the authors recall the context of the digital economy and describe the VAT challenges that are specific to the LAC region. In section 3., the legislations of LAC countries that have enacted laws in this area are examined. Section 3.1.4.3. provides a high-level flow chart to briefly explain how digital and financial intermediaries behave in digital transactions in the LAC region. In addition, an overview summarizing the main features is provided at the end of section 3.1.7.6. Section 4. summarizes the experiences within the region and the lessons learned by these countries. Section 5. shows the latest developments and emerging trends in this area. The authors finalize the article with their reflections and conclusions in section 6.

2. Context and Challenges in LAC Countries

According to the Economic Commission for Latin America and the Caribbean (ECLAC), the trend in the region since 2018 has been the growth of the digital economy.⁹ Nonetheless, there is still a long road to follow regarding the development of the digital economy in the region, mainly due to social, economic and technological barriers. Recently, due to the COVID-19 pandemic, businesses in the region saw the advantageous opportunity to reach more consumers through online platforms. According to ECLAC, between April and May 2020, there was an 800% increase in online transactions in Colombia and Mexico and a 360% growth in Brazil and Chile.¹⁰

The CIAT estimated that the income of the digital economy in the LAC region would grow 28% annually in 2021 as compared to 2020. The CIAT explained that the digital economy has become increasingly important in Latin America and the Caribbean, representing approximately 3.4% of worldwide revenues in 2021, while the e-commerce of goods represents 2.8% of sales in the region.¹¹ Similarly, according to the United Nations Conference on Trade and Development (UNCTAD), in 2019, the LAC region accounted for 11% of the world's Inter-

net users, estimating that 21% of its population shopped online, which corresponds to about 6% of the worldwide number of online shoppers. Only Uruguay and Brazil were above the world average, while the percentage of the adult population that shopped online in El Salvador, Haiti, Honduras and Nicaragua was less than 3%.¹²

With new business models emerging and with the adoption of new technologies with characteristics such as mobility, data usage, network effects, interactions through platforms, economies of scale and volatility giving rise to the digital economy, two challenges for the collection of VAT were identified as regards B2C transactions by the OECD:¹³ (i) the provision of digital services and intangibles by non-resident suppliers to final consumers; and (ii) exemptions for the importation of low-value goods.

Considering that VAT is a territorial tax (which means that transactions outside the territory of a particular country are out of its scope), in order to impose VAT on goods and services purchased online from non-resident suppliers to private consumers, some countries in the region have adjusted their VAT systems to adopt rules that allow them to connect non-resident suppliers with domestic consumers. Some years ago, the place-of-supply rules in those countries referred to the country where service providers were located to establish that connection, and the purchase of services from non-resident suppliers was treated as an importation of services. However, it was rapidly recognized that the supplier location is no longer appropriate in a digital context, as it is unlikely to point out the place of consumption (which is the place that the OECD recommends to allocate the taxing rights in cross-border transactions on services, since VAT is levied on consumption). The focus thus changed to the consumer's location, and the place-of-taxation rules started to be adjusted, seeking to levy the tax where the final consumers reside.

Moreover, the OECD has recommended that non-resident suppliers should be responsible for collecting and remitting VAT in digital supplies made to customers located in other jurisdictions, via simplified registration mechanisms for non-resident suppliers. These mechanisms have to be sufficiently clear and accessible for non-resident suppliers in order to comply with them. Other approaches are technically possible, but not per se preferable (for example, relying on intermediaries).¹⁴ In this article, the authors refer to financial and digital intermediaries as an additional mechanism for countries within the LAC region to

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8. OECD/WBV/CIAT/IDB, *VAT Digital Toolkit for Latin America and the Caribbean* (OECD 2021), available at <https://www.oecd.org/tax/consumption/vat-digital-toolkit-for-latin-america-and-the-caribbean.htm> (accessed 11 July 2021).
 9. UN Economic Commission for Latin America and the Caribbean, *Fiscal Panorama of Latin America and the Caribbean* (LC/PUB.2020/6-P), ch. 3, p. 103 (2020) [hereinafter *ECLAC Report 1*], available at https://repositorio.cepal.org/bitstream/handle/11362/45731/S2000153_en.pdf?sequence=5&isAllowed=y (accessed 20 July 2021).
 10. *ECLAC Report, Universalizing access to digital technologies to address the consequences of COVID-19*, Special Report No. 7 (August 2020). [hereinafter *ECLAC Report 2*], available at <https://repositorio.cepal.org/handle/11362/45939> (accessed 20 July 2021).
 11. J.P. Jiménez & A. Podestá, *Indirect taxation on the digital economy and its potential revenue in Latin America: Leveling the playing field in times of crisis*, CIAT Working Papers 02/2021, pp. 14-15 (2 Apr. 2021), available at https://www.ciat.org/Biblioteca/DocumentosdeTrabajo/2021/WP_02_2021_Jimenez_Podesta.pdf (accessed 26 Apr. 2021).

12. United Nations Conference on Trade and Development (UNCTAD), *UNCTAD B2C E-commerce Index 2020: Spotlight on Latin America and the Caribbean*, UNCTAD Technical Notes on ICT for Development No. 17, p. 8 (2021), available at https://unctad.org/system/files/official-document/tn_unctad_ict4d17_en.pdf (accessed 11 July 2021).
 13. OECD/G20, *Addressing the Tax Challenges of the Digital Economy – Action 1: 2015 Final Report* pp. 82-85 and 119-129 (OECD 2015), Primary Sources IBFD, also available at <http://dx.doi.org/10.1787/9789264241046-en> (accessed 11 July 2021).
 14. OECD, *Mechanisms for the Effective Collection of VAT/GST: Where the Supplier Is Not Located in the Jurisdiction of Taxation* para. 60 (OECD 2017) [hereinafter *Mechanisms VAT/GST*], available at <https://www.oecd.org/tax/consumption/mechanisms-for-the-effective-collection-of-vat-gst.htm> (accessed 11 July 2021).
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enforce and collect VAT in their jurisdictions (see section 3.1.4.3.).

Exemptions for the importation of low-value goods refer to purchases of tangible goods from a non-resident supplier, which are usually treated as imports from the customer's perspective (exports from the supplier's view), taxed with VAT in the country in which the customer resides, with the majority of the tax collected by the customs authorities of the customer's country at the time at which the merchandise enters the country. This VAT exemption finds its justification in the fact that administrative expenses to collect VAT from these transactions could be greater than the net tax to be collected. Recently, these types of imports have grown exponentially, along with the cost associated with them, mainly because thresholds for the exemption differ amongst countries. An additional issue refers to unfair competition to suppliers residing in the consumer's country, who are obliged to sell the same products with VAT included, which means at an increased price. To solve this problem, the OECD has recommended the reduction or elimination of these thresholds and a drastic simplification of the VAT return procedures for these imports. Further, it has urged countries to require non-resident suppliers to register as taxable persons for VAT purposes in the jurisdictions where consumers are located in order to become the ones who collect and remit the tax. This mechanism limits or eliminates the need for customs authorities to intervene in the collection of VAT for the importation of low-value goods, since the tax is collected directly from the supplier or digital platform. An analysis of these challenges is not included in this article.

3. VAT in Digital Services: Experiences in the LAC Region

Due to the jurisdictional rupture in the VAT collection process chain that cross-border supplies create, there is a tax collection concern when the supplier is not located in the jurisdiction where the consumption takes place, which should be recognized as the place of taxation. Therefore, the International VAT/GST Guidelines recommend making a distinction between "on the spot supplies" and "other supplies". For the former, the place of taxation should be the jurisdiction in which the supply is physically performed,¹⁵ and for the latter, it should be where the customer has its usual residence.¹⁶

Within the LAC region, the countries that adapted their VAT legislation to tax supplies by non-resident suppliers are Argentina, the Bahamas, Barbados, Chile, Colombia, Costa Rica, Ecuador, Mexico, Paraguay and Uruguay. The pioneer jurisdiction was the Bahamas in 2015.¹⁷ The following countries were Uruguay, Argentina and Colombia in 2018.¹⁸ The next year, in 2019, Barbados and Costa

Rica¹⁹ joined in, and the Bahamas enacted additional legislation to include online marketplaces providing holiday home rentals.²⁰ In 2020, Chile, Ecuador and Mexico were the next ones to follow suit, and Paraguay joined in 2021.²¹ (See Table 1.) Additionally, during 2020, the Dominican Republic,²² Panama²³ and Peru²⁴ presented draft laws to their legislature and parliament bodies on the same topic. In October 2020, Honduras made an announcement about the intention of the tax authority to extend VAT to electronic platforms,²⁵ and Bolivia is also considering levying a tax on digital platforms.²⁶ El Salvador, Guatemala, Nicaragua and Venezuela are not yet considering introducing VAT on digital supplies, due to their limited access to new technologies.²⁷ Lastly, although Brazil does not have a federal VAT system similar to other countries

19. Costa Rica introduced a new VAT system effective as from 1 July 2019 by enacting Law 9635 (Strengthening public finances), by which Law 6826 (General Sales Tax Law) of 8 November 1982 was comprehensively reformed; see http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=87720 (accessed 11 July 2021). However, additional rules regarding VAT imposed on digital services acquired for consumption in Costa Rica were originally intended to be effective on 1 August 2020; see <https://www.presidencia.go.cr/comunicados/2020/06/servicios-digitales-transfronterizos-pagan-13-de-iva-a-partir-del-01-de-agosto/> (accessed 11 July 2021). The collection was postponed to start from 1 October 2020.
20. Commonwealth of the Bahamas, *Budget Communication 2019/2020*, pp. 36-37, available at <https://www.bahamas.gov.bs/wps/wcm/connect/8f7bfd5d-58b5-4b0e-b9cf-95c588c3b1f6/Final+Budget+Communication.pdf?MOD=AJPERES> (accessed 20 July 2021).
21. PY: Decree 2787/2019 art. 1(5), available at <http://digesto.senado.gov.py/archivos/file/decreto%203107-2019.PDF> (accessed 12 July 2021); and PY: Decree 3107/2019 art. 4, available at <http://digesto.senado.gov.py/archivos/file/decreto%203107-2019.PDF> (accessed 12 July 2021), which established that these rules were supposed to enter into force on 1 July 2020. However, PE: Decree 3667/2020 art. 3 indicates that the implementation of the rules was postponed until 1 January 2021 due to the COVID-19 pandemic; see <https://www.set.gov.py/portal/PARAGUAY-SET/Home/Normativas?folder-id=repository:collaboration:/sites/PARAGUAY-SET/categories/SET/Normativas/decretos/2020> (accessed 12 July 2021).
22. The new rules proposing to tax digital services provided by non-residents in the Dominican Republic were included in the Draft Budget Bill for 2021 in October 2020. However, the budget was enacted without including them, as President Luis Abinader decided not to include new tax rules during 2021.
23. The parliament of Panama accepted a draft bill in early 2020 considering to apply VAT to digital services provided by non-residents, which would be withheld by financial intermediaries. See KPMG, *Taxation of the digitalized economy: Developments summary* (updated 31 Mar. 2021), available at <https://tax.kpmg.us/content/dam/tax/en/pdfs/2021/digitalized-economy-taxation-developments-summary.pdf> (accessed 13 Apr. 2021).
24. Since 2003, Peru has included a definition of "digital services" in its Tax Law only for income tax purposes. In addition, the scope of the rule is limited to B2B (i.e. not B2C) transactions and to digital services (i.e. not digital goods).
25. Servicio de Administración de Rentas, Press note RRPP SAR 039-2020 (19 Oct. 2020), available at <https://www.sar.gob.hn/2020/10/ministradel-sar-pide-a-la-poblacion-exigir-su-factura-y-a-los-comercios-que-emitan-el-comprobante-fiscal/> (accessed 20 July 2021).
26. *ECLAC Report 1*, *supra* n. 9, at p. 103. The Bolivian government is looking to modify Law 843 to extend the scope of VAT and include digital services provided through non-resident digital platforms, available at <https://www.economiayfinanzas.gob.bo/el-gobierno-busca-que-las-empresas-digitales-que-prestan-servicios-del-exterior-paguen-el-iva-al-igual-que-las-empresas-nacionales.html> (accessed 20 July 2021).
27. And a lack of online connection, according to *ECLAC Report 2*, *supra* n. 10.

15. *International VAT/GST Guidelines*, *supra* n. 4, at Guideline 3.5.

16. *Id.*, at Guideline 3.6.

17. BS: Value Added Tax Act, 2014, available at <https://inlandrevenue.finance.gov.bs/wp-content/uploads/2015/10/BVAT14Final.pdf> (accessed 20 July 2021).

18. All of them having implemented it over the course of 2018, in January, June and July, respectively.

Table 1 – Overview of the VAT on digital services and B2C transactions in Latin America and the Caribbean region

Country and year legislation amended	Standard rate (section 3.1.1.)	Taxable event and digital services definitions (section 3.1.2.)	Taxable persons (section 3.1.3.)	Registration system (section 3.1.4.1.)	Registration thresholds (section 3.1.4.1.)	Simplified registration and collection regime (section 3.1.4.2.)	Withholding obligations (section 3.1.4.3.)	Non-resident suppliers list (section 3.1.5.)	Criteria for determining the place of consumption (section 3.1.6.)	Additional considerations (section 3.1.7.)
Argentina (2018)	21%	Defined, broad scope	Financial intermediaries, final consumer	✓			✓	✓	CC-SIM, IP address, bank account, user billing address	– National currency – Quarterly tax return
Bahamas (2015)	12%	Defined, limited scope	Non-resident supplier, final consumer	✓	BBD 100,000			✓		– Tax return weekly or every 3 weeks
Barbados (2019)	17.5%	Defined, broad scope	Non-resident supplier	✓						– Special rules for electronic invoicing – Quarterly tax return – Refund VAT mechanism – Sanction
Chile (2020)	19%	Not defined, limited scope	Non-resident supplier, intermediaries			✓	By financial intermediaries, if no registration*		IP address, means of payment	– Allows foreign currency – Monthly or quarterly tax return
Colombia (2018)	19%	Not defined, broad scope with exemptions	Non-resident supplier, financial intermediaries			✓	Optional for non-resident suppliers*	✓	CC-SIM, IP address, bank account, user billing address	– Allows foreign currency – Bi-monthly tax return
Costa Rica (2019)	13%	Defined, broad scope	Non-resident supplier, financial intermediaries			✓	✓	✓	Fixed landline, CC-SIM, bank account or any element reliable for the tax authority	– Special rules for electronic invoicing – Monthly tax return – Refund VAT mechanism
Ecuador (2020)	12% (0%)*	Defined, broad scope	Non-resident supplier, financial intermediaries, final consumer	✓			✓	✓		– Explicit declaration of non-permanent establishment – Monthly tax return – Refund VAT mechanism

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Mexico (2020)	16%	Not defined, limited scope	Non-resident supplier	√			√	√	Address in Mexico, payment through financial intermediaries, IP address, CC of the telephone number	– Special rules for electronic invoicing – Explicit declaration of non-permanent establishment – Quarterly tax return – Sanction
Paraguay (2021)	10%	Defined, broad scope with exceptions	Financial intermediaries, ground transport intermediaries	√			√		CC-SIM, IP address, bank account, user billing address	
Uruguay (2018)	22%	Not defined, limited scope	Non-resident supplier			√	√		IP address, customer's billing address, means of payment	– Allows foreign currency

* Explanation is given in the section mentioned in the table heading.

in the region,²⁸ amendments have been made to its indirect tax system, which are briefly analysed in section 3.2.

Amongst the amended rules in the region are:

- the introduction of new taxable events (referring to the provision of digital services from abroad), including definitions of what should be understood as “digital services”;
- the expansion of the scope of taxable persons (to include non-resident suppliers);
- the adoption of registration systems for non-resident suppliers (as recommended by the OECD);
- collection rules involving intermediaries (financial or digital);
- withholding mechanisms;
- lists of non-resident suppliers (for easy identification);
- criteria for determining the location of the consumer; and
- sanctions.

3.1. Technical aspects of VAT in digital services

3.1.1. Standard rates

In general, the VAT rate applicable to the taxable amount and the VAT to be withheld on cross-border transactions and payments associated with non-resident suppliers is the standard rate.²⁹

The standard rates within the examined countries range from 10% in Paraguay, to 12% in the Bahamas and Ecuador, 13% in Costa Rica, 16% in Mexico, 17.5% in Barbados, 19% in Chile and Colombia, 21% in Argentina and 22% in Uruguay. These rates have not suffered any alteration due to the inclusion of digital services provided from non-resident suppliers in the scope of their VAT systems. However, some jurisdictions have included exceptions to this general rule. Argentina determined that the access to and/or downloading of e-books shall be exempt from VAT.³⁰ Ecuador decided that services related to the supply of domains of webpages, servers (hosting) and cloud computing shall be taxed at a rate of 0%.³¹ Colombia has also explicitly exempted services related to virtual education for the development of digital content, the supply of webpages, servers (hosting) and cloud computing, the remote maintenance of programs and equipment and the acquisi-

tion of software licences for the commercial development of digital content.³²

Regarding the VAT to be withheld on cross-border transactions and payments associated with non-resident suppliers, countries usually apply the standard VAT rate. Nevertheless, Mexico³³ and Uruguay³⁴ have established special rules in these cases.

3.1.2. Taxable event and digital services definitions

As for the services subject to VAT, countries within the LAC region introduced new taxable events, referring to the provision of digital services by non-residents in their jurisdictions. This means adding definitions of e-commerce or digital services to their legislations or expanding the VAT base. It is important to note that each country has autonomy and sovereignty to make these definitions according to their preferences and include in those definitions as many elements as they consider necessary. As explained below, the majority of countries take a broad approach, but some also go for a targeted approach.

In Argentina, digital services are defined as services provided through the Internet or any adaptation or application of the protocols, platforms or technology used via the Internet or another network through which equivalent services are provided that, due to their nature, are basically automated and require minimal human intervention.³⁵ A non-exclusive list of digital services subject to VAT is included in the Argentinian VAT Law,³⁶ including, amongst others:

- the supply and storage of websites and webpages;
- the supply of digitized products;
- data storage with remote or online access;
- online reporting and publicity services;
- software;
- access to and/or downloading of images, text, data, video, music and games, including casino games;
- online club services and dating websites; and
- long-distance learning.

The Bahamas was the first country to establish that the provision, by a person domiciled outside its territory, of e-commerce for the use, enjoyment, benefit or advantage of persons within the Bahamas is a taxable supply of services made therein or a taxable activity carried on by such

28. The country has a very complex indirect taxation system, including federal, state and municipal levels of taxation.

29. *International VAT/GST Guidelines*, supra n. 4.

30. AR: Decree 280/1997, Ley de Impuesto al Valor Agregado, sustituido por el artículo 1° de la Ley No 23,349 y sus modificaciones [VAT Law] art. 7(h), numeral 29 (1997), available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/40000-44999/42701/texact.htm> (accessed 20 July 2021) [hereinafter Argentinian VAT Law]. Section incorporated by art. 91 of Law No. 27,430 of 29 Dec. 2017, available at: <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=305262> (accessed 20 July 2021).

31. EC: *Ley Orgánica de Simplificación y Progresividad Tributaria – Servicio de Rentas Internas* [Internal Tax Regime Law and the Organic Law of Simplification and Tax Progressivity] art. 56(26) (2020), available at <https://www.sri.gob.ec/ley-organica-de-simplificacion-y-progresividad-tributaria> (accessed 13 Apr. 2021).

32. CO: Ley 1819 de 2016 “Por medio de la cual se adopta una reforma tributaria estructural, se fortalecen los mecanismos para la lucha contra la evasión y la elusión fiscal, y se dictan otras disposiciones” [Law 1819 of 2016 “Through which a structural tax reform is adopted, the mechanisms for the fight against tax evasion and avoidance are strengthened, and other provisions are enacted”, art. 187, available at <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=79140> (accessed 13 Apr. 2021). See also the modified art. 476 of CO: *Estatuto Tributario Nacional* [National Tax Statute] (2016), available at <https://estatuto.co/?o=44> (accessed 13 Apr. 2021).

33. MX: Ley del Impuesto al Valor Agregado [VAT Law], art. 18-J(II) (1978), available at <https://www.sat.gob.mx/normatividad/12883/leyes> (accessed 12 July 2021) [hereinafter Mexican VAT Law].

34. UY: Ley No. 19535 [Law No. 19535], arts. 246-247 (2017), available at <https://www.impo.com.uy/bases/leyes-originales/19535-2017> (accessed 12 July 2021).

35. Art. 3, item e), sec. 21, para. m) Argentinian VAT Law.

36. Id.

person.³⁷ This means that taxable supplies are services provided by resident suppliers, but also by non-resident suppliers if the service is enjoyed or the benefit is received in the Bahamas.³⁸ The Bahamas defines e-commerce as business transactions taking place through the electronic transmission of data over communication networks such as the Internet,³⁹ including:

- web hosting;
- remote maintenance of programs and equipment;
- software and updates;
- political, cultural, artistic, sporting, scientific, and entertainment broadcasts and events; and
- remote teaching.⁴⁰

More recently, the Bahamas included advertisement services (irrespective of where the business is physically located) and holiday home rentals through online marketplaces as taxable events.⁴¹

Barbados amended its VAT Law to define goods and services purchased online as “consumption in Barbados”, which implies the consumption or use of the goods or services in Barbados, including the performance of services. “Online” implies the purchase of goods or services by electronic means on the Internet using payment facilities provided by a financial institution or payment processors. “Payment processors” are any businesses or platforms that facilitate payment for e-commerce transactions, including third-party processors, and “tax collecting agents” are the persons with whom the government of Barbados enters into an agreement for the collection of tax on goods or services purchased online.⁴²

In Chile, in principle, VAT on services supplied by non-resident providers was imposed a long time ago, as the VAT Law established that services rendered or used in Chilean territory, regardless of whether the corresponding remuneration was paid in Chile or abroad, would be understood as having been provided within its territory when the activity that generated the service was developed in Chile, regardless of the place where it was used.⁴³ However, the payment to non-resident suppliers was VAT exempt due to domestic income tax rules or the application of a treaty to avoid double taxation.⁴⁴ This practical dilemma

led to the amendment of the VAT Law in February 2020⁴⁵ to include B2C supplies of digital services within the scope of VAT. The Chilean VAT Law does not provide a definition of “digital services”. It only was amended to include four cases in which services provided by non-resident suppliers are subject to VAT, as follows:

- intermediation services rendered in Chile (whatever their nature) or sales made in Chile or abroad, provided that they give rise to an import in Chile;
- the supply of digital entertainment content, such as videos, music or games, through downloading, streaming or other media, including texts, magazines, newspapers and books;
- the provision of software, storage, platforms or computer infrastructure; and
- advertising, regardless of the means through which it is delivered or performed.⁴⁶

During 2020, the tax authority issued additional instructions and rules on the topic.⁴⁷

In Colombia, services provided and intangibles acquired or licensed from abroad are considered to be provided in Colombian territory when the user or recipient has their tax residence, domicile, permanent establishment or headquarters of their economic activity located therein, with the exception of those explicitly excluded.⁴⁸

Costa Rica defines digital services⁴⁹ as those that are provided through the Internet or a digital or technological network or platform and are, by nature, basically automated and require minimal human intervention, such as purchases of digital content (downloading music, e-books, videos, applications, games, etc.), the provision of subscription-based content (e.g. news, music and online games) and the provision of software and maintenance services (e.g. antivirus software and digital data storage). Costa Rica defines cross-border digital services⁵⁰ as digital services and intangible goods acquired by a final consumer or a taxable person from a digital service provider that is domiciled outside the national territory in order to be consumed or used within the national territory.

37. BS: VAT Law sec. 2(3)(a) and (b) (1 Jan. 2015), available at <https://inlandrevenue.finance.gov.bs/wp-content/uploads/2015/10/BVAT14Final.pdf> (accessed 13 Apr. 2021) [hereinafter Bahamian VAT Law].

38. According to BS: Department of Inland Revenue of the Ministry of Finance, *The Bahamas General VAT Guide* (1 July 2018), available at <https://inlandrevenue.finance.gov.bs/wp-content/uploads/2018/07/2018-07-01-The-Bahamas-General-VAT-Guide-2.pdf> (accessed 13 Apr. 2021).

39. Sec. 2(3)(c)(ii) and (d) Bahamian VAT Law.

40. *Id.*, at sec. 2(3)(d).

41. *Budget Communication 2019/2020, supra* n. 20.

42. BB: Value Added Tax Act, Cap. 87 sec. 2 (18 Feb. 2019), available at https://www.barbadosparliament.com/uploads/bill_resolution/cd1364275cbe0137d722d804710a4f8c.pdf (accessed 12 July 2021) [hereinafter Barbadian VAT Act].

43. CL: Decreto Ley 825, Ley sobre Impuesto a las Ventas y Servicios [Law on Sales and Services Tax] No. 825 art. 5 (27 Dec. 1974), available at <https://www.bcn.cl/leychile/navegar?idNorma=6369> (accessed 12 July 2021) [hereinafter Chilean VAT Law].

44. *Id.*, at art. 12(E)(7).

45. CL: Ley 21210, Moderniza la Legislación Tributaria [Law No. 21,210 Modernizing Tax Legislation] (24 Feb. 2020).

46. *Id.*, at art. 8(n).

47. CL: Circular 42 (11 June 2020) also defined terms such as “intermediation”, “digital entertainment” and “digital content” and determined that VAT will be applied to advertising services provided by non-residents, regardless of the means used to provide the services. See https://www.sii.cl/vat/circular_42_esp.pdf (accessed 13 Apr. 2021).

48. See CO: Law 1819 art. 173 (2016), through which a structural tax reform was adopted, mechanisms for the fight against tax evasion and avoidance were strengthened and other provisions were enacted, available at <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=79140> (accessed 12 July 2021), by which article 420(3), CO: *Estatuto Tributario Nacional* [National Tax Statute] (1989) [hereinafter Colombian National Tax Statute] was amended (see <https://estatuto.co/> (accessed 12 July 2021)).

49. CR: *Reglamento de la Ley del Impuesto sobre el Valor Agregado* [Value Added Tax Law Regulation] No. 41779 art. 1, para. 47 (7 June 2019), available at http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=18&nValor2=88953 (accessed 12 July 2021) [hereinafter Costa Rican VAT Regulation].

50. *Id.*, at art. 1, para. 46.

Ecuadorian VAT law defines digital services⁵¹ as those provided and/or contracted through the Internet or any other network through which similar services are provided that, by nature, are basically automated and require minimal human intervention, regardless of the device used to download, display or use them. The VAT law provides a non-exhaustive list⁵² that includes, among other services:

- the hosting of computer sites and webpages;
- the supply of computer programs;
- the downloading of digital books, designs, components, patterns, reports, financial data;
- remote technical support;
- the storage of data;
- online clubs and dating websites;
- blogs;
- remote learning; and
- online transportation and accommodation booking services.

Mexico adopted a targeted approach and decided to include only certain services within the scope of the VAT system, without providing a definition of what digital services are.⁵³ The limited list includes services such as downloading digital content (downloading or accessing images, movies, information, videos, audio, music and games), services rendered through digital platforms, access to online clubs and dating sites and remote learning. Mexico does not include digital advertising services, and it is established in the VAT Law that downloading or accessing electronic books, newspapers and magazines are out of the VAT scope.

The Paraguayan VAT Law defines digital services as those that are made available to the user through the Internet or through any adaptation or application of the protocols, platforms or technology used via the Internet or any other network through which services are provided, characterized by being essentially automated and not viable in the absence of information technology.⁵⁴ The list of digital services subject to VAT as from 1 January 2021 includes:

- the digital distribution of multimedia content (games, movies, music, videos, etc.);
- the processing and storage of data in general;

51. EC: Reglamento para la Aplicación de la Ley de Régimen Tributario Interno [Regulation for the Application of the Internal Tax Regime Law] art. 140.1, first para. (2010).

52. Id., at art. 140.1, secs. 1-15.

53. Art. 18-B Mexican VAT Law.

54. PY: *Ley de Modernización y Simplificación del Sistema Tributario Nacional* [Law on Modernization and Simplification of the National Tax System] No. 6380 art. 81(2)(i) (2019), available at <https://www.bacn.gov.py/leyes-paraguayas/9332/ley-n-6380-de-modernizacion-y-simplificacion-del-sistema-tributario-nacional> (accessed 13 Apr. 2021) [hereinafter *Paraguayan Modernization and Simplification Law*]; and PY: Resolución General No 76 Por la cual se Reglamentan las Disposiciones Relativas a la Retención del Impuesto a la Renta de No Residentes (INR) y la Percepción del Impuesto al Valor Agregado (IVA) al Momento de la Adquisición de Servicios Digitales de Proveedores del Exterior [General Resolution No. 76 of 28 December 2020 regulating the VAT in the acquisition of digital services from foreign suppliers] art. 1(h), available at https://www.set.gov.py/portal/rest/jcr/repository/colaboration/sites/PARAGUAY-SET/documents/2020/normativas/resoluciones/RESOLUCION%20GENERAL%20N%C2%B0%2076_2020_SERVICIOS%20DIGITALES.pdf (accessed 13 Apr. 2021).

- the provision, development or updating of software or applications in general;
- cable and satellite television;
- marketing and advertising;
- games of luck, chance and betting; and
- educational services provided through technological platforms.⁵⁵

Activities related to call centres, contact centres or business process outsourcing (BPO) are also deemed digital services,⁵⁶ as long as they cannot be supplied without information technology.

Lastly, in Uruguay, transport services and tourist accommodation provided by the use of technological applications were the first ones to be included in the scope of VAT.⁵⁷ Afterwards, audio-visual content transmission services (including those made through the Internet, technological platforms, computer applications or other similar means, such as accessing and downloading movies) and intermediation services through digital platforms provided through the same means were also added as taxable events,⁵⁸ without a proper definition of those services.

3.1.3. Taxable persons

A major adjustment has been introduced regarding the taxable persons (i.e. those who carry out the taxable activities) and those persons with a compliance role (i.e. liable to collect and remit VAT) in B2C transactions made by non-residents suppliers. The OECD has recommended⁵⁹ countries to consider non-resident suppliers as the taxable persons liable for the collection and remittance of VAT to the tax authorities, by registering in the countries in which they are or will be operating, ideally by a simplified system.

Some countries have followed the OECD's recommendation and amended their VAT legislations to establish that the taxable person is the non-resident supplier providing digital goods and services. Other countries have opted to consider the digital and financial intermediaries liable for collecting and remitting VAT, for example Barbados, Chile, Costa Rica, Colombia, Mexico and Uruguay.

The Chilean VAT Law establishes that initially the responsibility of collecting and remitting VAT is with the non-resident supplier, except in the case of medical services, in respect of which a specific rule applies. For these medical services, the electronic platforms that connect doctors

55. Id., at art. 12.

56. In accordance with Decree 3107/2019, *supra* n. 21, at annex, by which the VAT established in Law 6380/2019 is regulated.

57. UY: Ley No. 19355, Presupuesto Nacional de Sueldos Gastos e Inversiones. Ejercicio 2015-2019 [National Budget of Salaries, Expenses and Investments: Financial Year 2015-2019] (No. 19,355) art. 731 (19 Dec. 2015), available at <https://www.impo.com.uy/bases/leyes/19355-2015> (accessed 12 July 2021).

58. UY: Decree 144/018 art. 1 (22 May 2018), by which some other decrees referring to services provided through the Internet, technological platforms, computer or similar applications were modified, available at <https://www.presidencia.gub.uy/normativa/2015-2020/decretos/decretos-05-18> (accessed 12 July 2021).

59. *International VAT/GST Guidelines*, *supra* n. 4, at sec. C.3.2., Guideline 3.6.

and patients are obliged to register as taxable persons and collect VAT on the commission to be charged, considering that bringing patient inflows to doctors constitutes an intermediary activity.⁶⁰ Colombia offers the non-resident suppliers to choose between VAT registration and VAT being withheld by the financial intermediaries.

Other countries, such as Argentina, the Bahamas and Ecuador – in addition to considering non-resident suppliers and financial intermediaries as those in the compliance role – include final consumers (on whom the economic burden falls) as the ones liable to remit the VAT; as long as the non-resident suppliers fail to register, the financial intermediaries are not required to withhold the VAT or just to be jointly liable as is the case in the Bahamas.⁶¹ Ecuador considers that VAT from supplies of digital services by non-resident suppliers can be collected in two ways: (i) the non-resident supplier registers with the Internal Revenue Service and acts as a collection agent; or (ii) if the non-resident supplier does not register, the final consumer is liable for the remittance of VAT, unless an intermediary is involved in the transaction and acts as the withholding agent.⁶²

Lastly, Paraguay establishes that the financial intermediary is liable for collecting and remitting VAT, unless it relates to ground transport intermediation services where the non-resident supplier is liable for collection and remitting the VAT over its commission.

Although the majority of countries have designated the non-resident as the taxable person and the liable person to collect and remit the VAT, Latin American and Caribbean experiences show that it is not easy to just follow the OECD recommendation and they needed to implement combined mechanisms that facilitate the effective collection of the tax.

3.1.4. VAT collection mechanisms

In the words of the OECD, an effective collection mechanism is a regime that is simple to administer and comply with from a non-resident supplier perspective and has appropriate safeguards to protect VAT revenues for the tax authorities, thus maximizing the VAT revenues that jurisdictions generate.⁶³

The International VAT/GST Guidelines have repeatedly recommended countries to implement a “registration-based” collection mechanism for non-resident suppliers.⁶⁴ In its Mechanisms VAT/GST report, the OECD pointed out that appropriate simplification of the registration-based collection mechanism is particularly important in order to facilitate compliance for businesses faced with obligations in multiple jurisdictions and sug-

gested adopting a “simplified registration and collection regime”.⁶⁵ The goal of the simplified registration and collection regime is to ensure that the right amount of tax is collected and remitted from non-resident suppliers to the tax authorities of the countries in which they operate and might not have any jurisdictional relationship with. By simplifying the system, a balance between non-resident suppliers’ compliance and revenue income levels for the tax authorities must be sought.

Countries within the LAC region have expressly mentioned their intention to follow the OECD’s recommendations. Chile, Colombia and Uruguay have somehow made it possible. However, for the rest of the countries, their own social and economic realities, as well as their scarce resources, have made them adjust their approaches and simply try to adapt this mechanism to their own legal frameworks in the best possible way.⁶⁶

3.1.4.1. Registration-based collection mechanism

This mechanism was suggested by the OECD to collect VAT from B2C transactions in which suppliers not located in the jurisdiction of consumption were involved, mainly because the tax authority of that jurisdiction may have limited power to enforce collection obligations.

Although it is true that many countries have adopted registration systems to facilitate the compliance of non-resident suppliers, they have not always ended up being so simplified, and each country has adopted special features that correspond to its local reality.

In Argentina, non-resident suppliers may opt to register. If the non-resident supplier does not register, the financial intermediary involved in the payment abroad to certain suppliers (provided in a list) is obliged to withhold the VAT. If no financial intermediary is involved in the payment or the supplier is not listed, the VAT Law considers the final consumer located in the Argentinian territory to be responsible for the remittance of VAT. This affects the way in which the tax operates because non-resident suppliers are not obliged to register.

The Bahamas’ registration system,⁶⁷ applicable since 2014, did not change due to the inclusion of VAT on digital transactions and operates through a threshold system for businesses meeting the following criteria: (i) they carry on any continuing activity mainly concerning the supply of goods or services; (ii) this activity is made in return for consideration; and (iii) goods and services are supplied or provided in the Bahamas. The registration is mandatory for businesses exceeding the VAT registration threshold

60. CL: ORD. 1401 (22 July 2020), available at http://mpgt.cl/images/docs/06/1401-22_07_2020.pdf (accessed 10 Mar. 2021).
 61. Part II, sec. 5(1)(c) Bahamian VAT Law.
 62. EC: *Ley Orgánica de Simplificación y Progresividad Tributaria* [Organic Law of Simplification and Tax Progressivity] available at <https://www.sri.gob.ec/ley-organica-de-simplificacion-y-progresividad-tributaria> (accessed 12 July 2021).
 63. OECD/WBV/CIAT/IDB, *supra* n. 8, at p. 70.
 64. *International VAT/GST Guidelines*, *supra* n. 4, at para. 3.131.

65. *Mechanisms VAT/GST*, *supra* n. 14, at para. 87.
 66. The core features of a simplified registration and collection regime are: registration, input tax recovery or refunds, returns, payments, record keeping, invoicing, availability of information, use of third-party providers. See *International VAT/GST Guidelines*, *supra* n. 4, at para. 3.136; and OECD/WBV/CIAT/IDB, *supra* n. 8, at p. 77.
 67. BS: Ministry of Finance/The Department of Inland Revenue, VAT Guidance on Registration (8 Oct. 2014), available at <https://inland.revenue.finance.gov.bs/wp-content/uploads/2017/03/2017-01-01-VAT-Guide-on-Registration.pdf> (accessed 13 Apr. 2021) [hereinafter Bahamian VAT Guidance on Registration].

and is voluntary for those that do not meet the threshold but still wish to register as taxable persons. The tax authority can oblige businesses that meet the threshold to register.

As from 2019, non-resident suppliers of digital services to final consumers in Barbados are obliged to collect and remit VAT to the Barbados Revenue Authority. The collection mechanism requires the government of Barbados to enter into agreements with suppliers, keep international standards and best practices⁶⁸ and issue licences authorizing the collection of the tax. If the government enters into an agreement, the tax collected shall be remitted under the agreed terms.

Ecuador established an optional registration system with two alternatives to collect VAT on digital services: (i) if the non-resident supplier chooses to register with the Internal Revenue Service, or (ii) if the non-resident supplier does not register, VAT will be withheld through credit or debit card-issuing companies, which are considered withholding agents, as long as the cards are used to pay for the digital service. If no financial intermediary is involved in the payment, the final consumer is responsible for remitting the VAT to the tax authority. In these cases, the customers will see the VAT due for these transactions in their account statements.⁶⁹

Mexico is not following the OECD's recommendation to establish a simplified regime and instead is requiring non-resident suppliers to abide by many rules that are highly complex and, in the opinion of the authors, contrary to the simplified purpose, as they create compliance and administrative burdens that are disproportionate to the expected revenues. Some of these rules are as follows:⁷⁰

- to register with the federal registry of taxable persons within 30 days from the first time that digital services are provided to a customer located in Mexico;
- to obtain a Mexican tax ID;
- to calculate VAT on a monthly basis and follow the Mexican rules for the general VAT regime regarding the day of payment;
- to issue and send electronic invoices;
- to report transactional data on a quarterly basis;
- to appoint a legal representative;
- to provide an address in Mexico; and
- to obtain an advanced electronic signature to submit the VAT returns.

There is an easier way to comply with these rules if the services are provided through digital intermediaries and VAT is withheld by these intermediaries.⁷¹

68. Art. 32E(1), insertion of Part IVA into Cap. 87 Barbadian VAT Act.

69. See <https://www.sri.gob.ec/detalle-noticias?idnoticia=767&marquesina=1> (accessed 10 Apr. 2021). Ecuador has also published some Guidelines in English called *Registration, declaration and payment of non-resident service providers acting as VAT collection agents*, available at <https://www.sri.gob.ec/registro-declaracion-y-pago-del-iva-prestado-res-de-servicios-digitales-no-residentes> (accessed 10 April 2021).

70. Art. 18-D Mexican VAT Law.

71. *Id.*, at art. 18-D, last para. and art. 18-J(II). This provision entered into force in 2021.

Chile, Colombia, Costa Rica and Uruguay have introduced a simplified registration and collection regime as recommended by the OECD (see section 3.1.4.2.).

Registration thresholds

Registration thresholds are often used in registration-based collection mechanisms. In the words of the OECD, a threshold refers to a level of supplies, measured in the currency of the jurisdiction of taxation, below which a non-resident supplier is relieved of the requirement to register, collect and remit the VAT on these supplies in that jurisdiction.⁷² Thresholds are seen as tools to find a balance between administrative burdens for tax authorities and non-resident suppliers, on one hand, and the collection and remittance of VAT, on the other hand.

The Bahamas is, so far, the only country within the LAC region that has established a threshold linked to the registration system for non-resident suppliers, set at BBD 100,000, which is the same threshold that applies to resident suppliers, as it requires non-resident suppliers to register as taxable persons under the VAT Act.⁷³

The decision to introduce a threshold and determine its level is up to each jurisdiction and requires a careful evaluation of whether the potential reduction in compliance costs is sufficient in respect of the level of trade in order to have positive effects on the efficiency and effectiveness of the tax authority.⁷⁴

3.1.4.2. Simplified registration and collection regime

A simplified registration and collection regime is the OECD's recommended solution for the effective collection of VAT on B2C transactions made by non-resident suppliers.⁷⁵ Under this regime, non-resident suppliers are required by law to register for VAT purposes in the jurisdiction where their customers have their usual residence and remit the VAT in that jurisdiction, applying in general, the standard VAT rate in accordance with the rules of that jurisdiction.⁷⁶ Such simplified regime is based on relatively basic electronic processes, which have become increasingly accessible to most tax administrations, including those with limited administrative capacity, and limits compliance obligations to what is strictly necessary for the effective collection of VAT.⁷⁷

Chile, Colombia, Costa Rica and Uruguay have amended their legislation systems to be in line with the OECD's recommendations. Chile adopted the simplified VAT regime, allowing non-resident suppliers to register in a simpler way. Among other things, this regime:

- does not grant non-resident suppliers the right to deduct input VAT;

72. *Mechanisms VAT/GST*, *supra* n. 14, at para. 72.

73. Bahamian VAT Guidance on Registration, *supra* n. 67, at p. 3.

74. *Mechanisms VAT/GST*, *supra* n. 14, at paras. 73-75.

75. OECD/WBV/CIAT/IDB, *supra* n. 8, at p. 70.

76. *Id.*

77. *Id.*

- releases suppliers from the obligation to issue tax documents for their transactions or keep books and other records required by the general regime;
- establishes the option to declare and remit VAT monthly or quarterly; and
- enables non-resident suppliers to provide information to the tax authority in languages other than Spanish.

Colombia establishes the obligation for non-resident suppliers to register in the Single Tax Registry administered by the tax authority, as well as to declare and remit the tax bimonthly. A particularity of Colombia is the optional withholding alternative to non-resident suppliers with respect to certain digital services, which is briefly analysed in section 3.1.4.3.

In Costa Rica, the registration system is voluntary for non-resident suppliers. This means that if they register with the tax authority, they are responsible for collecting and remitting VAT. However, in cases in which non-resident suppliers are not registered or opt to de-register, “issuers of debit/credit cards”⁷⁸ are considered to be withholding agents.

Perhaps Uruguay is the country of the LAC region whose system is the one that most closely resembles the OECD’s suggestion. The Uruguayan tax authority’s strategy was the reduction of administrative obligations in favour of non-resident suppliers and encouraging them to register and pay taxes voluntarily by developing a close relationship with them. The system allows validity to be given to the tax documentation issued under the rules of the non-resident supplier’s country of residence in order to facilitate the payment of VAT by allowing it to be filed jointly with the annual income tax declaration, to admit the VAT payment in foreign currency (USD) and to pay it on a quarterly basis. In addition, non-resident suppliers are not obliged to appoint a representative in the country, but are only required to delegate the simplified registration system to an attorney-in-fact, as the procedure must be carried out in person. In this regard, the Uruguayan VAT Law provides that this obligation can be waived when non-resident suppliers have the exclusive purpose of providing digital services without a physical presence in the national territory.

3.1.4.3. Withholding obligations

VAT withholding systems are relevant as mechanisms for collecting VAT from non-resident suppliers. According to the OECD,⁷⁹ these systems are a variation of the customer-based mechanisms for collecting VAT from non-resident suppliers, which require customers to withhold and remit VAT on behalf of the supplier. This is common in B2B transactions, and it has the same effect as the reverse charge mechanism (which requires the customer rather

than the supplier to remit the VAT). For B2C transactions, in the LAC region, the withholding system applicable to digital services operates through means of payment and digital platforms, and some countries have adopted it with particular features. For example, the system is optional in Colombia.

The OECD has pointed out that a problem with the VAT withholding system is that it can give rise to improper charges due to the difficulty of identifying whether the payment actually corresponds to a digital service and whether said service is consumed in a certain jurisdiction. Some countries have established systems to refund improperly charged VAT (*see* section 3.1.7.5.).

In Chile, in the event that non-resident suppliers do not follow the simplified regime, the tax authority may order the issuers of payment cards or other payment systems (financial intermediaries) to partially or totally withhold VAT with respect to the transactions carried out by them.

Colombia introduced an alternative withholding system in which financial intermediaries are liable to collect and remit VAT on digital services provided by non-resident suppliers. Non-resident suppliers who do not want to register under the simple registration regime can choose to inform the tax authority that they opt for the withholding system. The tax authority publishes a list of non-resident suppliers that chose to apply for this option. To opt for this alternative, the non-resident supplier must meet certain conditions: (i) they must exclusively perform one or more of the activities that are considered taxable events;⁸⁰ (ii) they must provide those services to users in Colombia; (iii) they must not be required to participate in the bimonthly VAT declaration system (i.e. they must voluntarily opt for this alternative tax payment system); and (iv) the value invoiced and collected must correspond to the taxable base for VAT purposes for digital services. The possibility of opting for this alternative system can only be exercised once. However, those who have opted for it can later resign to return to the simplified VAT procedure (*see* section 3.1.4.2.).

Financial and digital intermediaries

It has been recognized by the OECD that the appointment of a third party to act on behalf of non-resident suppliers to carry out certain activities can be beneficial to suppliers, but also to tax authorities.⁸¹ These third parties may be fiscal representatives, financial actors or online platforms acting as intermediaries involved in the supply chain. For the purposes of this article, these will be referred to as “digital intermediaries”. Mexico is the only country within the LAC region that has established within its legal framework the obligation for non-resident suppliers to appoint fiscal representatives.

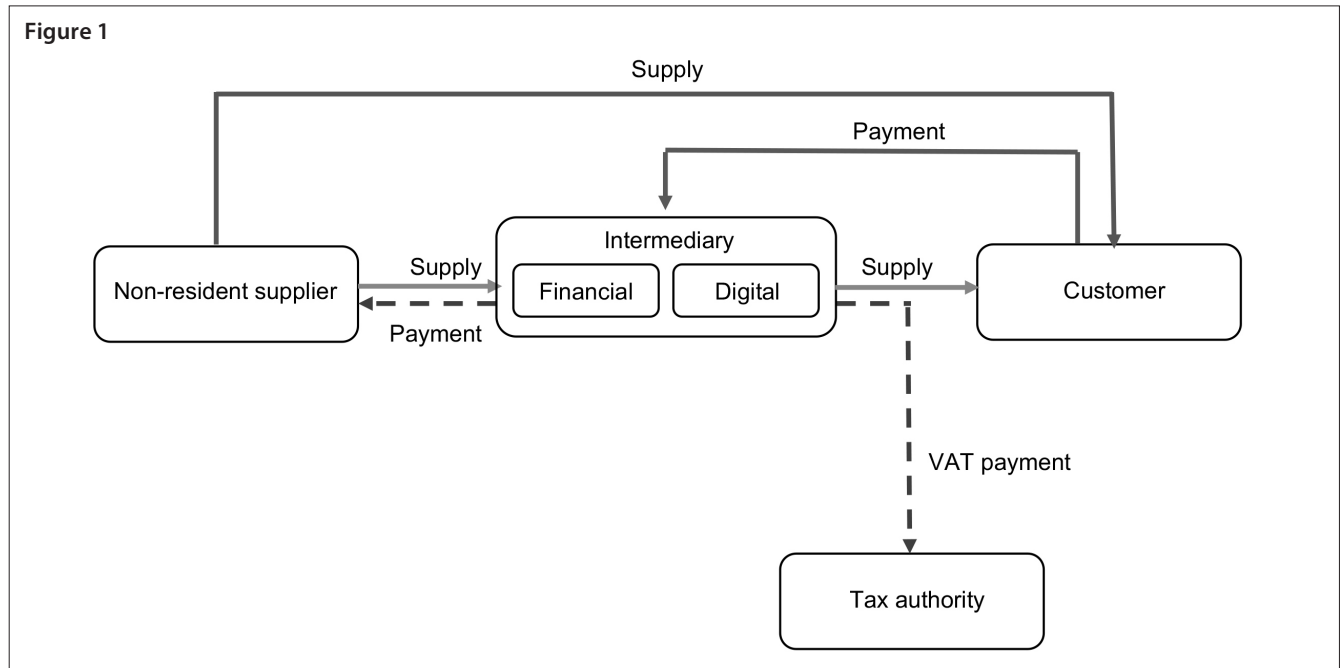
Financial intermediaries are entities resident in a country that facilitate or administer payments abroad and must settle and remit the tax in cases in which the suppliers

78. The Costa Rican VAT Law and Regulation define “issuers” as entities that issue or trade with credit and debit cards. *See* https://www.hacienda.go.cr/docs/606f7678f214d_Servicios%20Digitales%20Transfronterizos%2024%2003%202021.pdf (accessed 12 July 2021).

79. *Mechanisms VAT/GST, supra* n. 14, at paras. 53-56.

80. Art. 420(3) read jointly with art. 476 Colombian National Tax Statute.

81. *Id.*, at paras. 76-78.



are not located in the countries in which the goods and services are being consumed. Digital intermediaries – mainly, online platforms – act as both retailers and providers of digital marketplaces that bring buyers and sellers together online, and they facilitate interactions between them for the sale/purchase of either digital or physical products, a phenomenon known as a “multi-sided market” (see Figure 1). Countries in the LAC region have incorporated these third parties as withholding agents, with special features to be considered.

In Argentina, VAT on digital services provided by non-resident suppliers is collected through financial intermediaries that facilitate payments abroad, acting as withholding agents by charging VAT at the standard rate if the user of the service is not a taxable person for VAT purposes.⁸² If there is more than one financial intermediary involved, the intermediary with the closest connection to the digital services provider is the one obliged to collect the VAT. However, if there is no financial intermediary involved in the payment, the final consumer is obliged to remit the applicable VAT.⁸³

Barbadian VAT law defines a “payment processor” as any business or platform that facilitates payment for e-commerce transactions on the Internet, specifying third-party processors, special payment providers and “tax collecting agents” as the persons with whom the government of Barbados enters into an agreement for the collection of tax on goods or services purchased online.⁸⁴

The Chilean VAT Law empowers the director of the tax authority to enable issuers of payment systems and digital

intermediaries,⁸⁵ with respect to all or part of the transactions carried out, to act as withholding agents of non-resident suppliers that are not registered under the simplified tax regime.⁸⁶ This norm constitutes a safeguard for the tax authorities of the fiscal interests regarding non-resident suppliers that do not comply with their tax obligations.

In Costa Rica, intermediaries are all individuals, legal entities or entities not domiciled in Costa Rica that, through the Internet or any other digital platform, intervene in a transaction carried out between a non-resident supplier and a consumer of a digital service or intangible good for use or consumption in Costa Rican territory.⁸⁷ “Collection agents” are public or private entities, mainly issuers of debit or credit cards, when their cardholders, in their capacity as final consumers, make purchases of cross-border digital services through the Internet or any other digital platform that are consumed in the national territory, or entities that facilitate payments to the account of a non-resident supplier.⁸⁸ “Issuers” are entities that issue credit and debit cards for national or international use.⁸⁹ In Costa Rica, collection agents and issuers are the financial intermediaries. For collection purposes, virtual cards, secure payment accounts (PayPal or similar), cryptocurrencies and any other recurring payment systems are deemed financial intermediaries. In the event that non-resident suppliers or intermediaries do not register as taxable persons under the simplified regime, financial intermediaries or digital intermediaries are obliged to act

82. F. Annacondia, *Cross-Border B2C Digital Services: A New Way to Collect VAT?*, 29 Intl. VAT Monitor 5 (2018), Journal Articles & Opinion Pieces IBFD.
 83. AR: *Decreto 354/2018, Reglamentación IVA: Servicios Digitales* [Decree 354/2018, VAT Regulation: Digital Services] (23 Apr. 2018), available at <https://www.argentina.gob.ar/normativa/nacional/decreto-354-2018-309281/texto> (accessed 12 July 2021).
 84. Amendment of sec. 2 of Cap. 87 Barbadian VAT Law.

85. Circular 42, *supra* n. 47.
 86. CL: [VAT Law] art. 3, seventh para. [hereinafter Chilean VAT Law].
 87. Art. 2(2) DGT-R-13-2020, Resolución sobre cobro y percepción del impuesto sobre el valor agregado sobre servicios digitales transfronterizos [Resolution on collection and perception of value added tax on cross-border digital services], available at [https://www.hacienda.go.cr/docs/5ee402127f7e2_DGT-R-13-2020%20-%20Resolucion%20Servicios%20Digitales%20Transfronterizos%20\(VF%2011-06-2020\)%20\(1\).pdf](https://www.hacienda.go.cr/docs/5ee402127f7e2_DGT-R-13-2020%20-%20Resolucion%20Servicios%20Digitales%20Transfronterizos%20(VF%2011-06-2020)%20(1).pdf) (accessed 12 July 2021).
 88. *Id.*, at art. 2(3).
 89. *Id.*, at art. 2(4).

as collection agents.⁹⁰ Intermediaries must calculate the VAT according to the rules established in the VAT Law.⁹¹

Mexico has established additional compliance rules for digital intermediaries⁹² by stating that Mexican residents and non-residents providing these services (i) need to separately publish the price or add the legend “VAT is included” in the receipt; (ii) are obliged to disclose the corresponding VAT on their websites, apps or online platforms; and (iii) have transactional monthly data-reporting obligations. In the case of lodging services, they must also (i) provide the address of the real estate; (ii) register as withholding agents; and (iii) withhold 50% of the VAT, which means taxing the services at the rate of 8% (as the standard VAT rate is 16%). When digital services are offered jointly with other digital services not covered in the Mexican VAT Law, the VAT is calculated by applying the standard VAT rate (only to the services that are considered subject to VAT),⁹³ provided that they are identified separately in the invoice and their respective considerations are not provided jointly. If that separation is not made, it is considered that 70% of the amount paid for the services corresponds to services subject to VAT under the VAT Law.⁹⁴ Moreover, Mexico has established sanctions in the case of failure to comply with these obligations (see section 3.1.7.6.).

Another country establishing a particular set of rules is Paraguay, which establishes that financial intermediaries (banks, financial entities, exchange houses, cooperatives, payment processors or similar entities) must act as withholding agents when remitting payments for digital services to non-resident suppliers. The financial intermediaries are responsible for the collection and payment of the tax, in the form and under the conditions established by the tax authority.⁹⁵ The non-resident supplier is not obliged to comply with any formal obligation, to file any report or to make any tax assessment as the responsibility of the collection and remittance of the tax relies on the financial intermediaries. A particular feature of the Paraguayan regime is that telephone companies are considered intermediaries if they intervene in the supply of digital services.⁹⁶ However, non-resident suppliers providing ground transport intermediation services are obliged to register as taxable persons and collect and remit the VAT over their commission.

The Uruguayan VAT Law points out that intermediation activities are those that, by nature, are basically automated, require minimal human intervention and are not viable without information technology. In addition, it establishes that when suppliers and consumers are in Uruguayan territory, the intermediation service is 100% taxed with VAT, while if one of the parties is not in Uruguayan territory, the intermediation service is taxed only with 50% of the standard VAT rate (22%), meaning that the effective rate is 11%.⁹⁷ It is also established in the VAT Law that entities, whether residents or not, that intervene, directly or indirectly, in the supply of passenger land transport services carried out by any means, including computer applications, must withhold the following percentages monthly: (i) 25% of the standard VAT rate during the first fiscal year; (ii) 50% of the standard VAT rate during the second year; and (iii) 100% of the standard VAT rate from the third year onwards.⁹⁸

3.1.5. Non-resident suppliers' lists

Another measure that countries within the LAC region have adopted refers to the lists of non-resident suppliers (usually companies) that are considered to fall within the VAT scope. These lists can refer either to non-resident suppliers already registered for VAT purposes or to non-resident suppliers from whom intermediaries are obliged to withhold VAT when remitting payments abroad. These lists are issued by the tax authorities, and they are challenging to keep regularly updated and sufficiently comprehensive, as they rely on the non-resident suppliers' participation.

The Argentinian VAT Law establishes the publication of two lists: (i) list A, including non-resident suppliers that only provide digital services; and (ii) list B, including suppliers that either simultaneously provide services and sell products or are online platforms through which payment includes the commission received by the platform plus the payment to the supplier resident in Argentina.⁹⁹ The Bahamas publishes, on a monthly basis, a list of registered non-resident suppliers.¹⁰⁰ In Colombia, the published list is linked to the alternative withholding system, establishing the obligation for the tax authority to issue a list of non-resident suppliers to whom the respective withholding is applied. The legislation in Costa Rica also obliges the tax authority to issue a list of non-resident suppliers to which the withholding applies. As for Ecuador, the list of non-registered, non-resident suppliers from which financial intermediaries (such as credit card issuers) must with-

90. Art. 47 Costa Rican VAT Regulation.

91. Art. 8 DGT-R-13-2020, *supra* n. 87.

92. Art. 18-J Mexican VAT Law. Due to the complexity and the many requirements to be fulfilled by non-resident suppliers (which are almost the same or even more strict than those set out for residents) some companies are evaluating the possibility of opening a Mexican branch instead of operating as non-resident suppliers. Netflix was the first of those companies. It opened its Mexican branch in March 2021, and now pays taxes in Mexico as any other resident. This is the reason why the digital platform will stop appearing on the list of non-resident suppliers that the Mexican tax authority is obliged to publish on its website.

93. *Id.*, at art. 18-B.

94. *Id.*, at art. 18-H.

95. Art. 97 Paraguayan Modernization and Simplification Law.

96. Decree 3107/2019, *supra* n. 21, at art. 31, which regulates the VAT established in the Paraguayan Modernization and Simplification Law.

97. Law 19535, *supra* n. 34, at art. 246.

98. UY: Fijacion De Medidas para la Formalizacion de la Actividad de Transporte Terrestre de Pasajeros. Aportacion de Iva e Irae [Decree 48/017 Setting Measures for the Formalization of the Activity of Land Transportation of Passengers, Contribution of VAT and Income Tax] (20 Feb. 2017), available at <https://www.impo.com.uy/bases/decretos/48-2017> (accessed 12 July 2021).

99. Annex II, sec. A of General Resolution (AFIP) 4240/2018, published in the Official Gazette of 14 May 2018, available at: http://biblioteca.afip.gob.ar/pdfp/RG_4240_AFIP_A2.pdf (accessed 20 July 2021).

100. The Bahamian VAT Registrants List is available to the public and includes the details of the current registered suppliers in Bahamas, available at <https://inlandrevenue.finance.gov.bs/wp-content/uploads/2021/01/Tax-payer-Registration-List-as-of-January-1-2021.pdf> (accessed 13 Apr. 2021).

hold VAT needs to be issued and published periodically by the tax authority¹⁰¹ on its website.¹⁰² Likewise, Mexico establishes that the tax authority has the obligation to create and publish, both on its website and in the Official Gazette, the list of non-resident suppliers providing digital services to consumers located in Mexico once they have registered in the federal taxable person's registry.¹⁰³

3.1.6. Criteria for determining the place of consumption (proxy)

The most efficient and used link to determine the place of consumption and, therefore, the place of taxation is the customers' usual residence. Additional indicia for determining the customers' usual residence suggested by the OECD and used by LAC countries are the IP address of the device used by the customer, the country code of the SIM card (CC-SIM), any geolocation system, the consumer's address, the address registered with the financial institution used for payment and the place of issuance or registration of the card or means of payment, among others.

In Argentina, Colombia and Paraguay, indicators of effective use or exploitation in those countries include the CC-SIM or the IP address of the electronic devices, the bank account used for the payment or the customer's billing address on file with the bank or financial institution issuing the credit or debit card with which the payment is made.

In Chile,¹⁰⁴ it is presumed that a service is supplied in Chilean territory if, at the time of contracting it or making the payment, it occurs that the IP address of the device used by the consumer or another geolocation mechanism indicates that it is in Chile, or if the card used for the payment is issued or registered in Chile.

In Costa Rica, the supplier can determine the location of the consumer by identifying the location of the fixed landline of the consumer, the CC-SIM, the address linked to the bank account used for the payment or any other element that is considered sufficiently reliable and verifiable for the tax authority.¹⁰⁵

In Mexico, criteria for determining whether a customer is located in Mexican territory include the indication of an address located in Mexico, a payment made through a Mexican financial intermediary, the verification of the IP address of the electronic device used by the customer or the country code of the telephone number provided to the service provider.¹⁰⁶

According to the Uruguayan VAT Law, a service is considered to be supplied in Uruguay by verifying the IP

address of the device used for contracting the service or verifying that the billing address of the customer is located in Uruguay. If it is not possible to verify either of these conditions, the transaction is considered to take place in Uruguay if the payment was made through electronic means administered by the Uruguayan authorities.¹⁰⁷

3.1.7. Additional considerations

3.1.7.1. Currency

Regardless of the currency in which transactions are made, most of the LAC countries, including Argentina, have determined that VAT payments must be made in the national currency.¹⁰⁸ Other countries, such as Chile, allow VAT payments in foreign currency, as long as they follow some rules established by the tax authority. Colombia accepts the payment of VAT to be made from outside the country through the Electronic Computer Service of the tax authority, which generates a screen with the value to be paid in USD and its equivalent in COP, as well as a payment reference number. Likewise, Uruguay allows the payment to be made in USD.

3.1.7.2. Electronic invoicing

Rules regarding electronic receipts or invoices vary from country to country. In Barbados, an electronic invoice shall be issued to the consumer at the time of payment, and the invoice shall indicate the amount of VAT paid.¹⁰⁹ In Costa Rica, the legislation exempts non-resident suppliers and financial intermediaries from the obligation to issue electronic invoices and instead allows the use of bank statements as a backup if they separately record the amount of the transaction and the VAT charged. In Mexico, electronic invoices are required to include information such as the name of the consumer, the federal taxable person registration number¹¹⁰ (used for income tax purposes) of both the supplier and consumer, the value of the goods and services and VAT showed separately, the date of the transaction and a description of the goods or services.

3.1.7.3. Permanent establishment

While non-resident suppliers are most likely compelled to register within the countries of the LAC region, that does not constitute a permanent establishment in the country

101. Art. 140.I, second paragraph Regulation for the Application of the Internal Tax Regime Law, *supra* n. 51; art. 9 Resolution No. NAC-DGER-CGC20-00000055, 4 Sept. 2020, available at <https://www.sri.gob.ec> (accessed 20 July 2021)

102. See the Digital Service Non-Resident Suppliers cadastre, available at <https://www.sri.gob.ec/registro-declaracion-y-pago-del-iva-prestado-res-de-servicios-digitales-no-residentes> (accessed 12 July 2021).

103. Art. 18-D(I) Mexican VAT Law.

104. Art. 5, third subpara., numerals i-iv Chilean VAT Law, as amended.

105. Art. 7 DGT-R-13-2020 *supra* n. 87.

106. Art. 18-C Mexican VAT Law.

107. Decree 144/018, *supra* n. 58, at art. 1, which modified art. 65 bis of UY: Decree 150/007 (2018). See https://medios.presidencia.gub.uy/legal/2018/decretos/05/mef_1835.pdf (accessed 12 July 2021).

108. Decree 354/2018, *supra* n. 83, at art. 4.

109. Art. 28D(1), insertion of Part IIIA into Cap. 87 Barbadian VAT Act.

110. The Federal Taxable Persons Registry, better known as the RFC (*Registro Federal de Contribuyentes*), is an alphanumeric code used to identify individuals and legal entities that practice some economic activity in Mexico. The code is made up of 13 characters for individuals and 12 characters for legal entities. It is issued once, never changes and is used for all taxation purposes, including income tax, VAT, excise taxes and customs duties.

where they are registering. Ecuador¹¹¹ and Mexico¹¹² have explicitly declared this.

3.1.7.4. Tax returns

The remittance of VAT collected usually takes place through a VAT return. Each jurisdiction sets their own conditions under which they would like to receive the payment of the tax.

In the words of the OECD, in order for tax authorities to be able to verify compliance by non-resident suppliers of digital transactions, if the country has adopted a simplified registration and collection regime (like Chile, Colombia, Costa Rica or Uruguay), a simplified VAT return only needs to include (i) the supplier's registration number; (ii) the tax period; (iii) the currency (and, where relevant, the exchange rate used); (iv) the taxable amount at the standard rate; (v) the taxable amount at the reduced rate(s), if any; and (vi) the total VAT due.¹¹³

For the countries that have not adopted a simplified registration and collection regime, requirements can be more extensive, and there is no limit as to what a jurisdiction may request in order to verify compliance and remittance of VAT.

As for the frequency of filing the returns, the OECD recommends filing returns on a quarterly basis, which should help keep compliance and administrative burdens at an appropriate level for tax authorities and non-resident suppliers and allow non-resident suppliers or intermediaries to process the necessary data.¹¹⁴

3.1.7.5. Refund mechanism regarding improperly charged VAT

Some countries (for example, Barbados) establish a refund for the final consumer if VAT was improperly charged.¹¹⁵ Costa Rica grants the possibility to the consumer to request a refund of the amounts withheld when it can be demonstrated that the payments on which the withholdings were made do not correspond to purchases of services taxed and used in Costa Rican territory. Ecuador also deals with this problem and establishes¹¹⁶ that undue or excess payments of VAT on the importation of digital services allows the final consumer to submit a refund request of overpayment or a claim for undue payment to the tax authority when the withholding was made on a digital

service subject to a 0% VAT rate, or if the VAT withheld was already partially or totally paid by any other means.

3.1.7.6. Sanctions

Concerning sanctions, Barbados and Mexico¹¹⁷ are the only two countries that establish them in the case of failure to collect VAT or to comply with the obligations of non-resident suppliers or intermediaries. In both countries, the sanction consists of temporarily blocking access to the Internet and telecommunications network for the supplier that breached the obligations. In Barbados, if the non-resident or payment intermediary fails to remit the tax as agreed, the tax authority may block them, within a specific timeframe, from entering into the Internet jurisdiction of Barbados or the Barbadian Internet market.¹¹⁸ In Mexico, the sanctions are to temporarily block access to the Internet and telecommunications network for the supplier in breach, to cancel their Mexican tax ID and to eliminate the non-resident supplier from the list of names of registered non-resident suppliers that the tax authority publishes on a quarterly basis.¹¹⁹

3.2. Brazil

Indirect taxation in Brazil includes different levels of taxation: federal, state and municipal. At the federal level, there is an excise tax called *imposto sobre produtos industrializados* (IPI), which is levied on sales or transfers of industrialized products. States can impose *imposto sobre circulação de mercadorias e serviços* (ICMS), which is a VAT type of tax on the circulation of merchandise and the provision of interstate transportation and communication services.¹²⁰ Since 1 April 2018, this tax has also applied to digital goods,¹²¹ including, inter alia, applications, electronic books, software and games, and it is paid in the state where the download or transmission takes place and where the consumer who makes the purchase is located. This rule does not apply to non-residents. However, not all states have chosen to tax software, and only Goiás, Paraíba, Piauí, Rondonia and São Paulo have introduced this rule.¹²² Since 2017, municipalities can impose *imposto sobre serviços* (ISS), a services tax that can also be applied to certain digital services and also only applies to resident suppliers.¹²³ There were several judicial procedures related to software licences because it was not clear if this type of transaction should be taxed with ISS or ICMS. On 24 February 2021, the Brazilian Federal Supreme Court held, in

111. EC: Reglamento para la Aplicación de la Ley de Registro Único de Contribuyentes, RUC [Regulation for the Application of the Single Taxable Persons Registry Law] art. 6.1 (2006) establishes that non-resident service providers in Ecuador may register and that that registry will not constitute a permanent establishment in the country, available at https://www.gob.ec/sites/default/files/regulations/2021-03/CompletosSinConcordanciaspdf162_-_REGLAMENTO_PARA_LA_APLICACION_DE_LA_LEY_DE_REGISTRO_UNICO_DE_CONTRIBUYENTES.pdf (accessed 20 July 2021).

112. Art. 18-E Mexican VAT Law.

113. *Mechanisms VAT/GST*, *supra* n. 14, at para. 125.

114. *Id.*, at paras. 128-129.

115. Art. 32D, insertion of Part IVA into Cap. 87 Barbadian VAT Act.

116. Resolution NAC-DGERCGC20-00000053, 22 Aug. 2020, available at <https://www.sri.gob.ec> (accessed 20 July 2021).

117. Art. 18-H BIS Mexican VAT Law.

118. Art. 32E(1), insertion of Part IVA into Cap. 87 Barbadian VAT Act. There is also a mechanism to object to that action included in the Act.

119. Art. 18-H BIS Mexican VAT Law.

120. D. Rodrigues Prado de Castro, *Digital Economy and Indirect Taxation: Developments in Brazilian Legislation*, 31 Intl. VAT Monitor 3 (2020), Journal Articles & Opinion Pieces IBFD.

121. Authorized by Convention 106/2017, issued by Brazil's National Finance Policy Council, implemented by Decree 63,099/2017 and with further guidance included in Ordinance CAT 24/2020. Convention 106/2017 was constitutionality questioned in ADI 5958 and is still pending before the Brazilian Federal Supreme Court; see <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5484103> (accessed 12 July 2021).

122. KPMG, *supra* n. 23, at p. 78.

123. *Id.*, at p. 77.

Direct Actions of Unconstitutionality ADI 5659¹²⁴ and ADI 1945,¹²⁵ that only the ISS – not the ICMS – can be levied on software licensing.

In 2019, a proposal for a comprehensive reform of the Brazilian system for the taxation of goods and services was presented with Bill PEC 45/2019,¹²⁶ by which the Brazilian Constitution would be amended and five taxes would be replaced (IPI, ICMS, ISS, *contribuição para o financiamento da seguridade social* (COFINS) and *programa de integração social* (PIS)) with a single goods and services tax (*imposto sobre bens e serviços*), with the characteristics of VAT.

In 2020, there was a legislative proposal, Bill 131/2020, to amend Law 10,833/2003 to establish a differentiated regime for the COFINS levied on the gross revenue earned by legal entities with high revenue using digital platforms.¹²⁷ The proposal (COFINS-Digital) established a rate of 10.6% for legal entities that use digital platforms and have monthly revenue above USD 20 million for services provided worldwide, regardless of their location. It would apply to services such as electronic communications and digital interfacing, which provide for interaction between users regarding the delivery of goods or the provision of services and marketing to advertisers or agents to place targeted advertising messages on a digital interface based on user data.¹²⁸

Also in 2020, there was another proposal to establish a single VAT on goods and services, called *contribuição sobre bens e serviços* (CBS), which would be a type of tax levied on supplies of goods and services at a uniform rate of 12% for companies in general. It would replace the PIS and COFINS consumption taxes. The proposal defines “digital platforms” and grants them the possibility to act as intermediaries and collect CBS on transactions carried out through them in the case that the supplier does not register the transaction by issuing an electronic tax document.¹²⁹ If approved, non-resident suppliers would be required to register with the Brazilian tax authorities to collect the CBS on transactions involving Brazilian consumers.¹³⁰

124. Decision available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5132886> (accessed 12 July 2021).

125. Decision available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=1747607> (accessed 12 July 2021).

126. The bill is still at the Brazilian Chamber of Deputies; see <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2196833> (accessed 12 July 2021).

127. The bill is still pending approval at the Brazilian Federal Senate; see <https://www25.senado.leg.br/web/atividade/materias/-/materia/142074> (accessed 12 July 2021).

128. KPMG, *supra* n. 23, at p. 78; and KPMG, *Brazil: Proposed COFINS regime for digital sector taxpayers* (7 July 2020), available at <https://home.kpmg/us/en/home/insights/2020/07/tnf-brazil-proposed-cofins-regime-digital-sector-taxpayers.html> (accessed 20 Apr. 2021).

129. Arts. 5-6 Bill 3887/2020, which is still at the Brazilian Chamber of Deputies; see https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1914962&filename=PL+3887/2020 (accessed 12 July 2021).

130. KPMG, *supra* n. 23, at p. 79.

4. Experiences in the LAC Region

Countries within the LAC region are currently dealing with the challenge of taxing cross-border supplies of digital services with VAT in one of two ways (and in some cases, both): (i) by establishing a simplified registration mechanism for non-resident suppliers to collect and remit the VAT to the tax authority of the country where their consumers are located (following the OECD’s recommendation); and/or (ii) by establishing withholding systems through financial and digital intermediaries. In the authors’ view, the countries that have not yet amended their legislation might choose to implement the mandatory simplified VAT registration system for non-resident suppliers and withholding obligations supported by digital or financial intermediaries only in transactions with suppliers that fail to comply with the obligation to register, as in Colombia.

As for the extension of the scope of VAT to cover digital services, considering that it can be broad or targeted, the OECD’s recommendation is to include a broad concept of digital services,¹³¹ such as the ones that Argentina, Barbados, Colombia, Costa Rica, Ecuador and Paraguay have incorporated into their legislations. In the authors’ view, it is necessary that a definition of digital services and a non-exhaustive, but illustrative, list of services are given by the tax authorities. The authors also consider that digital advertising should not be left outside the VAT scope, as it is one of the most profitable services. If specific VAT exemptions for certain digital services will be included, it is important to ensure that such exemptions are also extended to national providers in order to avoid unfair competition, but it is most important that they are revised periodically to evaluate their effectiveness. In the authors’ view, the inclusion of exemptions distorts the collection of the VAT and must be avoided as much as possible. A relevant note on the targeted approach (which limits the scope of B2C supplies of services and intangibles) is that even when its inclusion may be motivated by the effective collection of VAT on supplies in respect of which the risk of avoidance is considered critical (as it happens in Mexico) and its objective is to increase revenues coming from these supplies. It must be observed that introducing differences in tax treatment can create challenges for tax authorities and non-resident suppliers, and increase risks of uncertainty, complexity and possible disputes that may arise. A targeted definition may be more difficult in terms of capturing new types of services and intangibles than a broad definition. A targeted definition may also be difficult to operate over time, and might not capture new technologies and new business models. There may be risks of uneven treatment between supplies that are in and out of the VAT scope, and of a negative effect on compliance levels because of misclassification and the growing complexity confronting suppliers with VAT obligations in multiple jurisdictions in a globalized digital economy. In the long term, this means revenue losses, negative

131. *Mechanisms VAT/GST*, *supra* n. 14, at paras. 96-99.

effects on compliance levels and increased administrative burdens for the tax authorities.¹³²

Enforcement is a key aspect, and it is essential that tax authorities carefully identify the non-resident suppliers that should be registered, in a list that must be updated periodically. Argentina, the Bahamas, Colombia, Costa Rica, Ecuador and Mexico have imposed this obligation on their tax authorities. If registration does not occur, a withholding from the payment abroad can be made through digital or financial intermediaries. In cases in which withholding is implemented, it is also important to establish effective procedures to refund the VAT if it is wrongly withheld.

The non-collected revenues that countries of the LAC region are missing because rules are not yet amended to tax digital services provided by non-resident suppliers will become more critical with the advancement of the digital economy. The CIAT developed a methodology to estimate the potential collection of VAT on digital services in countries that have not yet applied this tax to the sector, such as Bolivia, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Peru.¹³³ The methodology considers information from seven of the biggest digital suppliers (Uber, Netflix, Apple, Spotify, Amazon, Google and Airbnb) and financial reports with information from 2018, 2019 and 2020. This shows revenue loss estimations of USD 184 million for 2018, USD 227 million for 2019 and USD 255.4 million for 2020 in these countries for not expanding the scope of VAT to digital services provided by non-resident suppliers. The most profitable services were digital advertising and services with audio-visual content, such as Netflix, Spotify, Amazon Prime, YouTube Premium and YouTube TV, especially during the COVID-19 pandemic.

5. Latest Developments and Emerging Trends

5.1. OECD toolkit for Latin America

The OECD, in partnership with the World Bank Group, the CIAT and the IDB, developed a “toolkit” for the LAC region,¹³⁴ which aims to assist tax authorities in the LAC region with the design and implementation of a comprehensive VAT strategy to help governments secure significant VAT revenues and ensure a level playing field between domestic and non-resident online suppliers.

The toolkit is directed towards all types of e-commerce and takes account of the specific circumstances in LAC countries. It includes detailed guidance on designing policy and legislation, the administration of effective collection mechanisms and a comprehensive audit and enforcement strategy.¹³⁵

132. Id., at para. 100.

133. Jiménez & Podestá, *supra* n. 11, at pp. 42-51.

134. OECD/WBV/CIAT/IDB, *supra* n. 8.

135. See <https://www.oecd.org/tax/consumption/new-toolkit-to-strengthen-value-added-taxes-on-e-commerce-in-latin-america-and-the-caribbean.htm> (accessed 24 June 2021).

5.2. Digital Economy Compliance tool

The CIAT, in cooperation with the government of Norway, is receiving financial support from the Norwegian Agency for Development Cooperation to develop a digital tool – the Digital Economy Compliance (DEC) tool¹³⁶ – that will allow tax authorities with limited financial resources to carry out the effective implementation of mechanisms for the application of indirect taxation – particularly, VAT – to transactions within the digital economy. According to the CIAT, if the level at which technology is influencing countries in the LAC region, the size of their economies and the standard VAT rate are considered, the annual resources that could be obtained in countries where the tax is not yet applied range from USD 6 million in Nicaragua to USD 113 million in Peru.¹³⁷

In June 2021, the Handbook version 1.0 of the DEC system was published, and it explains how the legal frameworks of countries that are in the process of adapting their tax systems or have already incorporated rules to establish VAT in the digital economy can be adjusted, as well as the functional specifications and technical features of the system and the steps to be implemented.¹³⁸

5.3. Sharing and gig economy

Alternative business models have emerged in the digital environment, usually in the form of platforms that provide access or connect people rather than the ownership of resources. Traditional legal frameworks do not contemplate these models, since they are not adapted to them. The sharing economy relies on a basic premise: why buy goods and services when they can simply be rented for temporary use and at a lower price when they are needed?¹³⁹ Taxing these novelty transactions has been on the international tax agenda for some years now, and its economic impact on VAT has been a priority for the OECD.

In light of this, the OECD recently released a report¹⁴⁰ showing the explosive growth of the sharing/gig economy and the challenges and opportunities that this economy presents. The sharing economy refers to activities notably involving the temporary substitution of ownership of underutilized assets/resources as opposed to the transfer of ownership (such as sharing an apartment for short-term rental/vacation purposes), while the gig economy relates to activities aimed at providing opportunities to a skilled labour force or professional services in the context of a labour market characterized by the prevalence of short-

136. M.F. Verdi, *The Digital Economy, the Norwegian Cooperation and CIAT: An Essential Tool*, CIAT (24 Mar. 2021), available at <https://www.ciat.org/ciatblog-the-digital-economy-the-norwegian-cooperation-and-ciat-an-essential-tool/?lang=en#comments> (accessed 14 Apr. 2021).

137. Jiménez & Podestá, *supra* n. 11, at p. 9.

138. CIAT, *DEC system – Digital Economy Compliance: Handbook/2021* (CIAT/NORAD 2021), available at https://biblioteca.ciat.org/opac/book/5772?utm_source=Biblioteca&utm_medium=Actigcampaign&utm_campaign=Handbook-DEC&utm_content=june2021 (accessed 24 June 2021).

139. I. Grlica, *How the Sharing Economy Is Challenging the EU VAT System*, 28 Intl. VAT Monitor 2 (2017), Journal Articles & Opinion Pieces IBFD.

140. OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration* (OECD 2021), available at <https://doi.org/10.1787/51825505-en> (accessed 12 July 2021).

term or freelance work as opposed to permanent jobs and standard labour contracts (such as cleaning, gardening, web design and IT services). The report shows that the two main characteristics of this economy are the use of information technology and the little or almost zero interaction between the parties involved in the transactions due to that technology.

The sharing/gig economy has challenged VAT in various ways: (i) by eroding its base, since many jurisdictions have chosen to exempt individuals and micro-businesses from the registration, charging and collection of VAT; (ii) by distorting the role and status of the parties involved in the transactions associated with their compliance obligations; (iii) by making the treatment that activities of this type should receive unclear; (iv) by including (or not) the possibility to deduct input VAT; and (v) by confronting the tax authorities with large numbers of potential new taxable persons with a small turnover and minimal knowledge of how to operate.

The possible steps towards policy development in the words of the OECD are, firstly, to understand the size and growth of the sharing/gig economy at a national level, which means that each country needs to start realizing the size of it within its own territory. Secondly, the need to adjust their frameworks (most likely with a high affirmative response) must be assessed. Thirdly, an appropriate policy must be determined and implemented. This last step is the intricate part, and the main question remains “how”, considering that these economies are changing almost every day.

5.4. Emerging trends

Technological progress will further change business development and consumer preferences. Nowadays and after the impact of COVID-19, uncertainty is the most prevalent, and it is hard to tell what the future will bring. Nonetheless, amongst the potential technological developments are (i) artificial intelligence and data analytics; (ii) the application of blockchain to different sectors and transactions (besides cryptocurrencies); (iii) the Internet of Things; (iv) 3D printing; and (v) advanced robotics.¹⁴¹

6. Reflections and Conclusions

The authors analysed the experiences of the countries within the LAC region that have imposed VAT on B2C transactions supplied by non-resident suppliers. While it is true that countries in this region share some similarities and have adopted parallel solutions that allow for some level of comparison, it is also true that the LAC region is very diverse, and it is hard to acknowledge a unique policy in these terms.

Regardless of the social, economic and technological barriers of the region, the tendency has been the growth of the digital economy. The COVID-19 pandemic made it evident in 2020 (and so far in 2021) that consumption patterns keep changing, that non-resident businesses

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141. OECD/WBV/CIAT/IDB, *supra* n. 8, at p. 32.

will continue to expand in the region, most likely through online platforms, and that tax authorities need to adapt more quickly in order to be able to capture all of these novel transactions within the indirect taxation scope.

Some countries in the region have already started obliging non-resident suppliers to collect VAT when offering digital services to their residents. The Bahamas, Uruguay, Argentina, Colombia, Barbados, Costa Rica, Chile, Ecuador, Mexico and Paraguay (in chronological order) have enacted laws to amend their legislations and, although the policies look alike, they highly differ in their collection mechanisms and the liability of the tax, referring to the person responsible for collecting, withholding and/or remitting the tax.

Some features of those new rules are that standard rates (which range from 10% to 22%) did not change and are applicable to digital transactions. Some countries have incorporated special rules; for example, Argentina exempts e-books, and Ecuador decided that some services should be taxed at a 0% rate. The general rule amongst the analysed countries is to consider non-resident suppliers the taxable persons responsible for the collection and remittance of VAT to the tax authorities, but some foresee a fallback option in the case of non-registration. Argentina, Costa Rica, Ecuador and Paraguay explicitly mention, in respect of the definition of “digital services”, that those services are essentially automated and require minimal human intervention. Chile, Ecuador and Paraguay have decided to include advertising services within the VAT scope. VAT collection systems are characterized by including a (simplified) registration system that requires non-resident suppliers to register with the tax authorities, as well as the inclusion of intermediaries (either digital or financial) to collect and remit VAT in the absence of registration. Colombia included an optional withholding mechanism that transfers the obligation to collect and remit VAT to financial intermediaries (card issuers) to ensure the effective collection of the VAT. Tax authorities have the obligation to issue and update lists of non-resident suppliers.

It can be said that some countries in the LAC region (Barbados, Colombia, Mexico and Uruguay) follow the OECD recommendations regarding who to define as taxable persons or persons liable to remit VAT, i.e. the non-resident suppliers. Others adopt their own rules, such as pointing at the final consumer as responsible to remit the VAT, under certain circumstances (Argentina and Ecuador). Still others make the financial intermediaries responsible for remitting the VAT (Paraguay) or divide the liability between the non-resident suppliers and/or financial intermediaries (the Bahamas, Chile and Costa Rica). It should also be noted that the countries following the OECD recommendations on the collection mechanisms, even when applying the simplified registration system, are adopting their own mix of policies to better adjust their VAT framework (Chile, Colombia, Costa Rica and Uruguay).

Certainly, the digital economy is a challenge for Latin American and Caribbean countries, just as it is world-

wide. Countries in this region have several economic and social limitations, but also great potential to acclimate to the new digital reality. The amended rules are still insufficient to collect the appropriate amount of VAT coming from digital services provided by non-resident suppliers, as the countries' legislations have some loopholes that allow certain levels of inapplicability. The unstoppable growth of business models seems an enormous issue to address. However, these rules are a good step towards facing the challenges that the digital economy brings,

particularly for VAT, as they allow countries within the LAC region to adapt their sources of revenue and start collecting VAT from these transactions. Things will keep changing; the COVID-19 crisis has confirmed it. Hopefully, stakeholders in the digital economy will adapt at an acceptable pace and will participate in favour of all, as somehow, we all are connected to digital services, either by providing them (directly or indirectly), acquiring them, using them or promoting them.



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