

## Law and Business Review of the Americas

Volume 21

Summer 2015

Number 3

### International Tax Cooperation, Taxpayers' Rights and Bank Secrecy: Brazilian Difficulties to Fit Global Standards

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#### I. INTRODUCTION

Recent developments in international tax cooperation reveal it to be one of the most crucial topics at the beginning of this century.<sup>1</sup> Not only international organizations, but also individual countries have constantly been discussing this theme to tackle harmful tax competition effectively.<sup>2</sup> As a result, transparency and the exchange of tax information have been valued too highly as relevant issues in the cooperative approach.

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1. See, e.g., International Tax Cooperation: OECD Standard for Automatic Exchange of Financial Account Information, **Sullivan & Cromwell** 12–13 (Feb. 27, 2014), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_International\\_Tax\\_Cooperation\\_02\\_27\\_2014.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_International_Tax_Cooperation_02_27_2014.pdf).

2. Id. at 5–13.

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Nevertheless, obtaining cross-border information might not be an easy task. Barriers like domestic laws, uncertainty over administrative procedures, and a cultural tendency towards secrecy in some societies could threaten the flow of information.<sup>3</sup>

In this sense, bank secrecy becomes a major obstacle for tax authorities. The way in which some countries tend towards a broader openness whilst others stringently protect bank secrecy is intriguing. As a result of this situation, there is some uncertainty about how efficiently a state could comply with an exchange of information request.<sup>4</sup>

Until recently, the internationally agreed upon standard for transparency was the exchange of tax information upon request.<sup>5</sup> But members of the Organization for Economic Co-operation and Development (OECD) have been encouraging a movement to change that standard to one of automatic information exchange independent of recurrent tax avoidance, evasion or fraud cases, and this could clash with taxpayers' fundamental rights.<sup>6</sup>

Since 1998, tax cooperation has definitely been included on the OECD agenda.<sup>7</sup> At that

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3. *Id.* at 12–13.

4. Tony Anamourlis & Les Nethercott, *An Overview of Tax Information Exchange Agreements and Bank Secrecy*, 63 *Bull. for Int'l Tax'n*, 616, --- (2009).

5. *International Tax Cooperation: OECD Standard for Automatic Exchange of Financial Account Information*, *supra* note 1, at 2; *see also* Org. for Econ. Cooperation & Dev. [OECD], *Model Agreement on Exchange of Information in Tax Matters* art. 5 (2002), *available at* <http://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf>.

6. Pasquale Pistone, *Exchange of Information and Rubik Agreements: the Perspective of an EU Academic*, 67 *Bull. for Int'l Tax'n*, 216, --- (2013).

7. *See* Emily Wang, Note, *The Opaque Future of Tax Information Sharing Between the United States and China: An Analysis of*

time—and on the basis that globalization prevents countries from individually controlling the tax effects of cross-border transactions—the OECD released both a Report on Harmful Tax Practices, urging members and non-members to intensify their cooperation, through recommendations on domestic legislation, tax treaties and coordinated programs of tax cooperation; and a Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as an effective means to combat tax fraud.<sup>8</sup>

But the OECD is not alone in these efforts. The European Union (EU) has also enacted rules against privacy both inside its frontiers and in the relations of its member states with third-party countries.<sup>9</sup> On this track, intensive debates led the EU Commission to issue an Action Plan in

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Bank Secrecy Laws and the Likelihood of Entrance into a Tax Information Exchange Agreement, 35 *Hastings Int'l & Comp. L. Rev.* 411, 418–19 (2012).

8. Id. A summary of the post-2000 OECD works to promote tax cooperation could be listed as follows: Improving Access to Bank Information for Tax Purposes Report (2000); Global Forum on Transparency and Exchange of Information for Tax Purposes (2000); Tax Information Exchange Agreement Model (TIEA) (2002); Update to Article 26 of the Model Convention (2005); Tax Co-operation: Towards a Level Playing Field (2006); Manual on Exchange of Information (2006); Peer Review Process by the Global Forum on Transparency and Exchange of Information for Tax Purposes (2010); Amendment to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (2010); Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes (2012); Update to Article 26 of the Model Convention (2012); A Step Change in Tax Transparency: Report for the June G8 Lough Erne Summit (2013); OECD Declaration on Automatic Exchange of Information in Tax Matters (2014); Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014); and Tax Transparency: Report on Progress (2014).

9. See, e.g., Council Directive 2014/48, 2014 O.J. (L 111) 50; Council Directive 2011/16, 2011 O.J. (L 64) 1.

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December 2012 aiming to more effectively combat tax evasion and avoidance.<sup>10</sup> From now on, a new global standard for transparency is being set, one that is capable of providing rapid answers to tax authorities. Accordingly, the current standard based on information exchange upon request is being replaced by the automatic model.

The United States is similarly committed to transparency, and has enacted the Foreign Account Tax Compliance Act (FATCA), a rule amending sections 1471 to 1474 of the Internal Revenue Code and under which foreign financial institutions are required “to report information on financial accounts of US persons and foreign entities with significant US ownership (US accounts) directly to the Internal Revenue Service (IRS) beginning in 2015.”<sup>11</sup> Those foreign financial institutions that do not report due information will be subject to essentially a thirty percent withholding tax—a true penalty to encourage them to disclose data from US account holders.<sup>12</sup>

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10. Press Release, European Commission, Clamping Down on Tax Evasion and Avoidance: Commission Presents the Way Forward (Dec. 6, 2012), available at [http://europa.eu/rapid/press-release\\_IP-12-1325\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1325_en.htm).

11. Itai Grinberg, Taxing Capital Income in Emerging Countries: Will FATCA Open the Door?, **Georgetown Public Law Research Paper No. 13-031**, 7 (2013), <http://ssrn.com/abstract=2256587> (last visited July 13, 2015) (internal punctuation marks omitted); see also 26 U.S.C. §§ 1471–74 (2010).

12. Grinberg, supra note 11, at 31. The thirty percent withholding tax applies to: (1) “any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States”; and (2) “any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.” 26 U.S.C. § 1473.

Working closely with the OECD to expand tax cooperation, the G20<sup>13</sup> also endorsed the automatic exchange of information for tax matters as the new global standard during the annual meeting of the Global Forum on Transparency in Berlin on October 29, 2014.<sup>14</sup> This is definitely a large step towards transparency because fifty-one jurisdictions should effectively put into practice the automatic exchange of information on the basis of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as of September 2017.<sup>15</sup>

Rather than simply replacing the standard for exchanging tax information, international taxation could be moving into a new phase. The system's core, previously based on bilateral tax treaties, is now being reshaped into a "globally coordinated complex legal system" whose main characteristic is multilateralism.<sup>16</sup> For that reason, it is a real possibility that countries will remain

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13. The world's twenty largest economies, the G20 represents around eighty-five percent of global gross domestic product, over seventy-five percent of global trade, and two thirds of the world's population. G20 countries account for 85% of global GDP, 75% of world trade, **Times of India** (June 15, 2015, 6:05 AM), <http://timesofindia.indiatimes.com/business/international-business/G20-countries-account-for-85-of-global-GDP-75-of-world-trade/articleshow/47670497.cms>.

14. Major new steps to boost international cooperation against tax evasion: Governments commit to implement automatic exchange of information beginning 2017, **OECD** (Oct. 29, 2014), <http://www.oecd.org/newsroom/major-new-steps-to-boost-international-cooperation-against-tax-evasion-governments-commit-to-implement-automatic-exchange-of-information-beginning-2017.htm>.

15. Id. Other OECD and G20 members are expected to run the automatic standard in September 2018. Id. Brazil is in this group since the Multilateral Convention on Mutual Administrative Assistance in Tax Matters is pending congressional approval and not yet in force.

16. Pasquale Pistone, Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law, 6 **World Tax J.** 1, 3–9 (2014).

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committed to expanding tax cooperation with developing countries, which have often been used as part of multinationals' tax planning for avoiding or evading taxes.

Since the 2008 crisis, cross-border tax planning that diverts profits to low- or no-tax jurisdictions has been recognized as a global problem that requires a global solution.<sup>17</sup> To that end, the OECD and the G20 launched the Action Plan against Base Erosion and Profit Shifting (BEPS), which mobilized a number of developing countries to ensure that profits are taxed in the jurisdiction in which the economic activities producing those profits are performed and value is created.<sup>18</sup>

That tendency in international taxation, which is led by the OECD but also supported by other players such as the EU and the G20, has affected states' sovereignty and even suggests that regionalism should yield to multilateralism. This paper intends to analyze, from a Brazilian perspective, the rapid expansion in international tax cooperation without neglecting the study of taxpayers' safeguards, particularly bank secrecy, which has not yet been developed in the same way.

In fact, the new international tax scenario expands the investigative powers of tax authorities without a clear corresponding consideration of the basic rights of taxpayers. Brazil has followed the OECD's general directions by, for instance, signing Tax Information Exchange Agreements

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17. See, e.g., Press Release, European Commission, Taxation of Savings: The European Commission Proposes Changes to Eliminate Tax Evasion (Nov. 13, 2008), [available at](http://europa.eu/rapid/press-release_IP-08-1697_en.htm?locale=en) [http://europa.eu/rapid/press-release\\_IP-08-1697\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-08-1697_en.htm?locale=en).

18. For more details on BEPS, visit: <http://www.oecd.org/tax/strategy-deepening-developing-country-engagement.pdf>.

(TIEAs), expanding the scope of Article 26 of double tax treaties, and signing the OECD Multilateral Convention. Moreover, Brazil is a G20 member and part of the OECD's enhanced engagement program, through which the OECD forges closer relationships with the BRICS<sup>19</sup> countries (except Russia) with a view towards eventual membership.<sup>20</sup> As to the Global Transparency Forum, Brazil performs a relevant role in both the Steering Group and the Peer Review Group, which are in charge of accelerating the implementation of standards for the exchange of tax information.<sup>21</sup> That said, it is unclear how and to what extent taxpayers' safeguards—especially bank secrecy—will be respected in this expanded transparency landscape.

## II. INTERNATIONAL TAX COOPERATION: MOVING FROM A BILATERAL TO A MULTILATERAL APPROACH

To encourage cooperation, the OECD suggested the creation of the Global Forum on Transparency and Exchange of Information for Tax Purposes.<sup>22</sup> The Forum started its work in 2000 by releasing its first list of thirty-five jurisdictions that it threatened to define as non-cooperative tax havens if they did not give commitments about the exchange of information in

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19. An acronym for Brazil, Russia, India, China and South Africa.

20. *International Tax Cooperation: OECD Standard for Automatic Exchange of Financial Account Information*, *supra* note 1, at 7; *STAN Bilateral Trade Database: Documentation*, **OECD** 1 (2009), <http://www.oecd.org/industry/ind/44624896.pdf>.

21. *Steering Group*, **OECD**, <http://www.oecd.org/tax/transparency/steeringgroup.htm> (last visited July 20, 2015); *Peer Review Group*, **OECD**, <http://www.oecd.org/tax/transparency/peerreviewgroup.htm> (last visited July 20, 2015).

22. *See Global Forum on Transparency and Exchange of Information for Tax Purposes*, **OECD**, <http://www.oecd.org/tax/transparency/about-the-global-forum/> (last visited August 21, 2015).

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tax matters.<sup>23</sup> The creation of a new international standard for transparency and exchange of information for tax, however, did not come about until 2002, when the OECD Committee on Fiscal Affairs initiated a comprehensive review of Article 26 of the Model Convention, which governs the exchange of information, to consider the then recent developments emerging from the Report on Improving Access to Bank Information for Tax Purposes (2000) and the Model Agreement on Exchange of Information on Tax Matters (2002).<sup>24</sup> At that time, a new phase in tackling tax evasion had just begun due to concerns about enlarging the scope of Article 26 and its Commentaries with a view towards exchanging tax information and accessing bank data effectively.<sup>25</sup> Another update that was adopted by the United Nations (UN) Model Tax Convention took place in 2005.<sup>26</sup>

With the establishment of internationally accepted standards on tax matters, the OECD divided jurisdictions into three groups: (1) those that have not given a commitment to implement the internationally agreed tax standards (blacklist); (2) those that have given a commitment to implement the standards, but have not yet substantially done so (gray list); and (3) those that

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23. Jeffrey Owens, *Towards World Tax Cooperation: Is the OECD Against Tax Competition?*, **OECD Observer**, [http://www.oecdobserver.org/news/archivestory.php/aid/271/Towards\\_world\\_tax\\_co-operation.html](http://www.oecdobserver.org/news/archivestory.php/aid/271/Towards_world_tax_co-operation.html) (last visited Aug. 21, 2015).

24. *Update to Article 26 of the OECD Model Tax Convention and Its Commentary*, **OECD** 1 (July 17, 2012), [http://www.oecd.org/ctp/exchange-of-tax-information/120718\\_Article%2026-ENG\\_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf).

25. *See id.* at 2–4.

26. *OECD publishes a new, updated version of its Model Tax Convention*, **OECD** (July 9, 2005), <http://www.oecd.org/general/oecdpublishesanewupdatedversionofitsmodeltaxconvention.htm>.



have substantially implemented the standards (white list).<sup>27</sup> The Global Forum currently has more than 120 members who are working towards the effective implementation of the international standards for transparency and the exchange of information for tax purposes.<sup>28</sup> All members are monitored and reviewed in a two-step approach: “phase 1” is dedicated to assessing the quality of a country’s legal and regulatory framework for the exchange of information; and “phase 2” looks at the practical implementation of that framework.<sup>29</sup> In addition, non-member jurisdictions may be reviewed if considered relevant for the work of the Global Forum.<sup>30</sup>

The Global Forum therefore performs peer reviews that analyze certain characteristics in accordance with international tax standards. Those standards could be detailed as follows: (1) availability of relevant information, e.g., ownership and identity information, accounting records, and banking information; (2) access to information, i.e., competent authorities’ ability to obtain and provide information in a timely fashion, notification requirements, and rights and safeguards; and (3) effective exchange of information, i.e., mechanisms for exchange of information with all relevant partners, confidentiality, rights and safeguards of taxpayers and third parties, and

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27. See A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, **OECD** (Apr. 2, 2009), <http://www.oecd.org/ctp/42497950.pdf>.

28. Global Forum on Transparency and Exchange of Information for Tax Purposes, **OECD**, <http://www.oecd.org/tax/transparency/> (last visited July 13, 2015).

29. Jack Grocott, OECD unveils peer review schedule, **Int’l Tax R.** (Jan. 19, 2010), <http://www.internationaltaxreview.com/Article/2612985/OECD-unveils-peer-review-schedule.html>.

30. Id.

timeliness of responses to requests for information.

The Global Forum works dynamically to address recent developments on the international tax scene. For that reason, standards for transparency and exchange of information will need to be updated in step with progress on the fight against harmful tax competition. To illustrate, the recently launched OECD Action Plan against BEPS aligns with a new trend in international taxation, previously indicated by the Multilateral Convention on Mutual Assistance, which moves from bilateralism to multilateralism.<sup>31</sup> A collection of many bilateral arrangements for the automatic exchange of tax information is arguably less effective than a multilateral framework for the same goal because the multilateral framework allows countries to effectively engage in wider international mutual assistance.

#### A. Enhancing International Cooperation Through Bilateral Tax Treaties

Annet Wanyana Oguttu argues that countries are not commonly entitled to free exchange of tax information because they need a legal instrument or mechanism to do so.<sup>32</sup> Consider, for instance, the following examples of tax information exchange, each of which contains a legal component: bilateral exchange through bilateral tax treaties or TIEAs; multilateral exchange through multilateral agreements; regional exchange through regional instruments that permit information

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31. About BEPS, OECD, <http://www.oecd.org/tax/beps-about.htm> (last visited July 20, 2015).

32. Annet Wanyana Oguttu, A Critique on the Effectiveness of 'Exchange of Information on Tax Matters' in Preventing Tax Avoidance and Evasion: A South African Perspective, 68 *Bull. for Int'l Tax'n* 2, 2–19 (2014).

exchange; and unilateral exchange through domestic legislation that allows such disclosure.<sup>33</sup>

Global economic considerations in particular increase signatory states' interest in the reciprocal supply of information. As a result, Article 26 of the OECD Model Tax Convention and its Commentaries have been updated since 2002 to reflect modern international tax standards, including exchange of tax information to the widest possible extent. In line with that policy, 2005 update amended Paragraphs One and Two, and added Paragraphs Four and Five. The last update, on July 17, 2012, again amended Paragraph Two and further developed the interpretation of the Convention. After updates, the final text reads as follows:

Article 26-EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.<sup>34</sup>

The OECD Model Article 1 deals with residence, while Article 2 addresses taxes covered by the Convention. Thus, neither residence status nor taxes on income or capital should restrict the exchange of information. The phrase “foreseeably relevant”—inserted as a replacement for “necessary”—was included to clarify that Contracting States are not obliged to provide information for fishing expeditions or “speculative requests that have no apparent nexus to an

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33. *Id.*

34. *Update to Article 26 of the OECD Model Tax Convention and Its Commentary*, *supra* note 24, at 1 (emphasis added).

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open inquiry or investigation.”<sup>35</sup>

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.<sup>36</sup>

It is worth noting that the use of tax information is restricted by the requesting state’s own domestic rules regarding secrecy. Although Brazil is not an OECD member, it follows the OECD Model Convention when signing double tax treaties. To that end, Article 198 of the Brazilian Tax Code forbids the Treasury and its agents from disclosing information obtained by virtue of their knowledge of a taxpayer or third party’s financial condition or the nature and state of its business or activity, without prejudice to criminal law provisions.<sup>37</sup>

The last part of this paragraph (“Notwithstanding the foregoing, information . . . such use”), added by 2012 update, gives rise to a controversial issue: the use of tax information for purposes not related to taxation. With that in mind, Paragraph Two expressly mentions “under the laws of

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35. *Id.* at 4.

36. *Id.* at 1 (emphasis added).

37. Lei No. 5172, de 27 de Outubro de 1966, **Código Tributário Nacional** [C.T.N.] de 25.210.1966 (Braz.).

both States.”

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.<sup>38</sup>

Irrespective of whether it has an interest in the requested information, the requested State is bound to apply its information gathering measures to obtain the information asked for by the other signatory State. This provision resulted from the 2005 update to the Model.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.<sup>39</sup>

But the 2005 update’s impact did not end there. Another provision means that bank secrecy should not be a barrier to transparency and the exchange of tax information. Bank secrecy, one of the many different aspects of privacy, might arguably be treated as a fundamental right protected by the constitution, depending on the domestic law of the relevant country. As discussed below in Section IV, this is the case in Brazil, where bank secrecy is a key issue in the conflict between privacy and transparency as to tax matters.

OECD Commentary 9 to Model Article 26 provides three avenues for information exchange:

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38. Update to Article 26 of the OECD Model Tax Convention and Its Commentary, *supra* note 24, at 1 (emphasis added).

39. *Id.* at 2 (emphasis added).

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(1) “on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;”(2) “automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State;” and(3) “spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.”<sup>40</sup>

**B. A Multilateral Approach to Tax Cooperation**

As a result of integrated action taken by the OECD, accompanied by the G8<sup>41</sup> and the G20, the automatic exchange of information has become the international standard in place of the previous “upon request” system. In fact, a Multilateral Competent Authority Agreement signed by fifty-one states on October 29, 2014 covers the automatic exchange of information based on Article 6 of the Multilateral Convention.<sup>42</sup> From now on, source countries should periodically send taxpayer information to residence countries concerning different categories of income, including, *inter alia*, dividends, interests, royalties and salaries.

The United States has also brought in innovations for tackling tax evasion and enhancing

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40. *Id.* at 7.

41. The world’s eight most industrialized economies. Russia, however, was asked to leave the group in March 2014 because of the crisis in the Ukraine. So it might now be more correct to refer to the G7.

42. *Automatic Exchange of Information*, OECD, <http://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm> (last visited July 20, 2015).

transparency. To access U.S. taxpayers' data abroad, the United States has launched FATCA, which has a wider automatic scope than the rules in force for some income categories under the EU's jurisdiction, where the "upon request" rule still applies. Reflecting an intense discussion between European authorities, on June 12, 2013 the EU Commission issued a Proposal for amending Directive 2011/16/EU to make mandatory the automatic exchange of information for combatting tax fraud and tax evasion.<sup>43</sup>

From the EU standpoint, adopting automatic exchange of information would avoid possible discrepancies in effectiveness caused by different situations in the twenty-seven Member States. In fact, the most favored nation (MFN) clause was a prime reason for the EU proposal in favor of automatic information exchange insofar as various EU Member States had been directly negotiating a Foreign Account Tax Compliance Act (FATCA) with the United States.<sup>44</sup> Without

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43. Proposal for a Council Directive 2013/0188, amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, 1 (Dec. 6, 2013), available at [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/tax\\_cooperation/mutual\\_assistance/direct\\_tax\\_directive/com\\_2013\\_348\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/com_2013_348_en.pdf).

44. There have already been two EU provisions about the exchange of information: (1) the EU Savings Tax Directive (EUSD), which allows automatic exchange of information on non-residents' interest earned on savings in their jurisdiction and investment funds, pensions, innovative financial instruments, and payments made through trusts and foundations; and (2) the Directive on Administrative Cooperation (DAC), which prescribes the automatic exchange of information among Member States, from 1 January 2015, if available, about five categories of income and capital: employment, directors' fees, life insurance products (not covered by other Directives), pensions and income from immovable property. The most recent proposal adds to the scope of the DAC dividends, capital gains, any other financial income and account balances, but instead of depending on availability of the information, makes the exchange of information in these categories mandatory. Memorandum from European

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this proposal, the FATCA scope would be broader than that prescribed by EU law, which could result in undesirable MFN claims among Member States, supported by the discrimination criteria.<sup>45</sup>

Although not related to the MFN clause, FATCA produced a similar effect in Brazil. Previously, Brazil's TIEA with the United States was primarily based on exchange of information upon request.<sup>46</sup> But on September 23, 2014, the two countries agreed on the automatic exchange standard through an Intergovernmental Agreement (IGA), whose main goal was to expand the TIEA's scope to coalesce with FATCA.<sup>47</sup> Despite the fact that it was not the first law to deal with the automatic exchange of information—the EU Savings Tax Directive has been in force since 2005—the U.S. FATCA played the fundamental role of accelerating “upon request” information exchange's replacement by automatic exchange as the international standard.

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Commission on Automatic exchange of information: frequently asked questions (June 12, 2013), [available at](http://europa.eu/rapid/press-release_MEMO-13-533_en.doc) [http://europa.eu/rapid/press-release\\_MEMO-13-533\\_en.doc](http://europa.eu/rapid/press-release_MEMO-13-533_en.doc).

45. Accordingly, on 9 April 2013, Germany, France, the United Kingdom, Italy and Spain announced their pilot multilateral exchange facility, which allows them to exchange the same type of information amongst themselves as they will exchange with the United States under FATCA. This pilot project should extend to another 12 EU Members (Belgium, the Czech Republic, Denmark, Finland, Ireland, the Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, and Slovakia) and should make it unnecessary for any most favored nation (MFN) claims to be made.

46. Decreto No. 8003, de 10 de Maio de 2013, *Diário Oficial da União* [D.O.U.] de 5.10.2013 (Braz.).

47. *Brazil and United States Sign Agreement on Exchange of Tax Information*, U.S. Diplomatic Mission to Brazil (Sep. 23, 2014), <http://brazil.usembassy.gov/brasileuaagreementtaxinfo2.html>.



The next step is the accompanying BEPS, which is described by the OECD as “a global problem which requires global solutions. BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.”<sup>48</sup> The Plan includes fifteen actions, Number Five of which is meant to “[c]ounter harmful tax practices more effectively, taking into account transparency and substance.”<sup>49</sup>

### III. TAXPAYER PROTECTION-A MATTER OF FUNDAMENTAL RIGHTS

The OECD’s efforts to expand transparency and the exchange of tax information have not been accompanied by an impulse to protect taxpayers’ fundamental rights because there is no clear and structured plan to develop taxpayer safeguards based on human rights at the international level. Taxation entails an even stricter relationship between the taxpayer and the tax administration because the latter is legally entitled to access the former’s assets.<sup>50</sup>

From the OECD perspective, one could cite the standards for the protection of rights and

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48. About BEPS, *supra* note 31.

49. Id.

50. Cécile Brokelind, The Role of the EU in International Tax Policy and Human Rights: Does the EU Need a Policy on Taxation and Human Rights?, in *Human Rights and Taxation in Europe and the World* 113–128 (Kofler et al. eds., 2011). In highlighting which human rights a taxpayer could rely with respect to the European Union’s jurisdiction, the author asserts that the protection of taxpayers’ rights is neither organized systematically nor clearly defended as a policy within international organizations. Id. This stands in stark contrast to the European Union’s fundamental rights of the citizen, on the sole basis of which taxpayers may obtain a remedy.

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safeguards of taxpayers and third parties as analyzed by the Global Forum Peer Review Reports, item C4 or Article 26(3) of the Model Tax Convention, which states as follows:

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
  - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
  - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).<sup>51</sup>

A similar provision is encountered in Article 7 of the Tax Information Exchange Agreement (TIEA) Model, which also covers confidentiality in an attorney-client relationship.<sup>52</sup>

Besides the OECD provisions, taxpayers are also protected by other international sources such as the Universal Declaration of Human Rights (UN Convention), which justifies breaches of privacy in some instances and expressly states that the right to privacy is not absolute.<sup>53</sup> On the contrary, one's right to privacy may be freely exercised but can be limited by others' rights, to preserve morality and maintain public order, or for the general welfare of a democratic society.<sup>54</sup>

51. Update to Article 26 of the OECD Model Tax Convention and Its Commentary, *supra* note 24, at 1 (emphasis added).

52. "The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement . . . ." Agreement on Exchange of Information on Tax Matters, OECD, art. 7 (Apr. 18, 2002), <http://www.oecd.org/ctp/harmful/2082215.pdf>.

53. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

54. Id.

Brazil is a founding member of the UN.<sup>55</sup> In 1992 Brazil ratified and promulgated, by Decree 678, the American Convention on Human Rights.<sup>56</sup> Accordingly, to the extent that Brazilian taxpayers are bound by such treaties, they must also observe domestic laws. From this perspective, taxpayer protection should start with constitutional rules, particularly Article 5, where the source of individual and collective protection can be found.<sup>57</sup>

Among those human rights prescribed by the Brazilian Constitution, the following clauses can be highlighted:

Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

...

X—the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured;

...

XII—the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts.<sup>58</sup>

Brazil has been seen as one of the cooperative jurisdictions from the OECD's standpoint, which means that the country is implementing international standards of transparency and

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55. Founding Member States, United Nations, <http://www.un.org/depts/dhl/unms/founders.shtml> (last visited July 11, 2015).

56. Decreto No. 678, de 6 de Novembro de 1992, D.O.U. de 9.11.1992 (Braz.).

57. **Constituição Federal [C.F.] [Constitution]** art.5 (Braz.).

58. Id.

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exchange of information for tax purposes, as concluded by the Global Forum Peer Review Report Phase 2.<sup>59</sup> That said, “[i]n some instances the competent authority has been unable to answer all requests in a timely manner due to a lack of resources and insufficient monitoring of timeframes for obtaining and providing information.”<sup>60</sup>

In addition to being a member of the UN,<sup>61</sup> Brazil is a member of the G20,<sup>62</sup> the Financial Action Task Force (FATF),<sup>63</sup> and the Global Forum Steering Group.<sup>64</sup> Additionally, Brazil has already negotiated clauses on the exchange of information in thirty-four tax agreements—thirty-three double tax treaties and one TIEA, with a further eight not yet in force—and also signed a Multilateral Convention on Mutual Administrative Assistance for Tax Matters in November

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59. See also Global Forum on Tax Transparency: New reports review jurisdictions' information exchange, **OECD** (July 31, 2013), <http://www.oecd.org/tax/globalforumontaxtransparencynewreportsreviewjurisdictionsinformationexchange.htm>.

60. *Id.*

61. *Founding Member States*, *supra* note 55.

62. *G20 Member Map*, **G20**, <https://g20.org/about-g20/g20-member-map/> (last visited July 11, 2015).

63. *Countries*, **FATF**, <http://www.fatf-gafi.org/countries/> (last visited July 15, 2015); see generally **FATF**, <http://www.fatf-gafi.org/> (last visited July 10, 2015). The Financial Action Task Force is a policy-making body composed of 33 states; its goals are to set standards and implement legal, regulatory and operational measures for tackling money laundering, terrorism and threats to the international financial system. *Id.*

64. See generally, *Steering Group*, *supra* note 21. The Global Forum Steering Group was set up to guide and prepare future works of the Global Forum on Transparency and Exchange of Information for Tax Purposes. Currently, its members are Bermuda, Brazil, Cayman Islands, China, France, Germany, India, Indonesia, Japan, Isle of Man, Kenya, Singapore, South Africa, Spain, Switzerland, the United Arab Emirates, the United Kingdom, and the United States. *Id.*

2011.<sup>65</sup> Furthermore, Article 26 of the last of the Brazilian double tax treaties, which was promulgated with Turkey in November 2013, includes the wording of Paragraph Five of the Model, which is an innovation for Brazil.<sup>66</sup> Brazil has therefore expressly agreed that bank secrecy is not an obstacle to the exchange of tax information within the scope of this treaty.<sup>67</sup>

These facts confirm that Brazilian tax policy is in line with OECD, G20 and G7 requirements for tackling tax evasion. In turn, Brazil would be recommended to set mechanisms to provide rapid and effective solutions against any arbitrariness of the tax authorities as prescribed by the domestic and international rules.

As well as implementing policies that are effective to ensure the protection of taxpayers' rights, tax administrations should strive for healthier relationships with taxpayers. Building such a relationship goes beyond the formal enforcement of the law and encourages voluntary compliance, and this should not be neglected with the increasing prevalence of self-assessment across the world. As a consequence, tax administrations struggle to strike a balance between encouraging voluntary compliance and penalizing abusers of the tax system. Currently, globalization and technological advances are bringing new challenges for tax authorities. E-commerce, cross-border transactions and bank secrecy are good examples of issues that

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65. Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Informational Brief, **OECD** (Nov. 2013), available \_\_\_\_\_ at [http://www.oecd.org/ctp/exchange-of-tax-information/MAC\\_Background\\_Brief\\_for\\_Journalists\\_November\\_2013.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/MAC_Background_Brief_for_Journalists_November_2013.pdf).

66. Decreto No. 8.140, de 6 de Novembro de 2013, D.O.U.de 18.11.2013 (Braz.).

67. See id.

challenge tax officials to maintain sufficient levels of tax income while simultaneously satisfying societal interests. Intentional tax evasion schemes are difficult to combat and tax administrations should not disregard the benefits of accessing those powerful bad actors' bank data.<sup>68</sup>

#### IV. BANK SECRECY AND INTERNATIONAL TRENDS

Bank secrecy is a crucial and polemic privacy issue. Scholars and judges have divided opinions about the constitutionality of lifting bank secrecy solely by a tax authority's proceedings. This controversy is centered on fundamental rights. On one hand, there is an argument that accessing personal data held by banks is a breach of privacy and consequently a violation of the taxpayer's human rights. On the other hand, it is reasonable that right to privacy should be viewed as relative and counterbalanced by the interests of society as a whole.

The Brazilian Supreme Court's (STF) jurisprudence on bank secrecy is vast. Until 1969, the judges protected professional secrecy, including accountants' activities. That said, the right to secrecy was not absolute. With that in mind, the Supreme Court has allowed bank secrecy to be lifted in the face of a relevant public interest, but not by the manipulation or arbitrary acts of

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68. "[A]ggressive tax planning...is widely recognized as a growing risk to revenue in countries around the world. At its extremes it blurs into evasion of taxes and fraud. The latter remain significant threats to the revenue, particularly in the context of corruption, organized crime and money laundering activities." **Duncan Bentley, Taxpayers Rights – Theory, Origin and Implementation** 314–16 (2007).

public officials.<sup>69</sup>

Currently, Article Six of Complimentary Law 105 allows federal, state and local tax authorities access to taxpayers' bank information provided that such data are indispensable to the conclusion of a prior administrative or tax procedure or a fiscal audit.<sup>70</sup> The Supreme Court has previously considered this law and in 2010 decided by a five-to-four vote that only judicial authorities are permitted to breach bank secrecy.<sup>71</sup> That decision, however, did not lay the issue to rest. The Supreme Court will again have to rule on the same topic, but this time in the course of Direct Unconstitutionality Suit 2390 (and others appended), which entails erga omnes effects, so the decision will apply generally and not just to the litigants involved.

Although the ruling is not definitive, the Supreme Court has already upheld the so-called judicial reserve clause on access to taxpayers' financial data, based on privacy protection provided by Article 5 of the Constitution.<sup>72</sup> In so doing, though, the court divided itself into two different camps, as set out below.

Justices Marco Aurélio, Ricardo Lewandowsky, Gilmar Mendes, Celso de Mello, and Cezar Peluso have accepted the extraordinary appeal, basically relying on the argument that the

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69. See **Humberto Ávila**, *Sistema Constitucional Tributário* 406 (2012) (discussing limits on the power of taxing authorities and the rights of personality in the Brazilian Constitution).

70. Lei Complementar No. 105, de 10 de Janeiro de 2001, D.O.U. de 11.1.2001 (Braz.).

71. S.T.F., Ap. Civ. No. 389808.2129315, Relator: Min. Marco Aurélio, 15.12.2010, Diário do Judiciário Eletrônico [D.J.e.], 10.05.2011 (Braz.).

72. **C.F.**, [Constitution] art.5 (Braz.).

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tax administration is not a neutral party. Instead, the tax administration is a party with a true interest that would not be harmed because it could request the judicial authorities to grant access to all necessary data if there were reasonable grounds. Moreover, the breach of confidentiality would require extreme legal significance or true exceptionality.

On the other side, Justices Dias Tófoli, Carmen Lúcia, Ayres Britto, and Ellen Gracie have refused the extraordinary appeal on the grounds that the tax administration, with due respect for individual rights and under the terms of the law, is entitled to identify the property, income and economic activities of every taxpayer, as prescribed by Article 145, §1º of the Federal Constitution.<sup>73</sup> For this side of the argument, both constitutional requirements were met because there would be no lack of respect for the rights of individuals, to the extent that bank data are kept by private institutions that are neither related to nor even part of the state. Thus, Complimentary Law 105 would have prescribed rules in accordance with the legal order, but would have done so in an incorrect way in Article 10, which mentions “breach of secrecy” but should instead refer to “transfer of the duty of secrecy to.”<sup>74</sup> Furthermore, a logical consideration should be observed: as the tax administration is entitled to a greater right (having access to information on all assets in the annual tax return), so it is also entitled to a lesser one (having

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73. “Whenever possible, taxes shall have an individual character and shall be graded according to the economic capacity of the taxpayer, and the tax administration may, especially to confer effectiveness upon such objectives, with due respect to individual rights and under the terms of the law, identify the property, the incomes and the economic activities of the taxpayer.” **C.F. [Constitution]** art.145 (Braz.).

74. Lei Complementar No. 105, de 10 de Janeiro de 2001, D.O.U. de 11.1.2001 (Braz.).



access to bank data).

It is worth looking particularly at the reasons given by Justice Ayres Britto for rejecting the appeal. Invoking Article 37 of the Federal Constitution,<sup>75</sup> the judge starts from item XII of Article 5, interpreting it to mean that the Federal Constitution protects the illegal interception, intrusion, and leakage of the contents of data and not the access to data itself.<sup>76</sup> Finally, he concludes that the constitutional law applies to “data of being” because these should be seen as personal assets. Conversely, “data of having” should be viewed as accessible to authorities. In the future, only data of being will be preserved because of transparency, a pillar of democracy.<sup>77</sup>

The first side of the argument, in allowing the appeal, treated access by the tax administration to taxpayers’ banking data as a breach of secrecy. In this sense, it seems logical to extend the protection of privacy because the tax administration would not be viewed as impartial, but as a truly interested party. But Article 6 of Complimentary Law 105 states that tax authorities are able

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75. “[T]ax administrations of the Union, of the States, the Federal District, and the Municipalities, whose activities are essential for the operation of the state and are exercised by employees of specific careers . . . shall work in an integrated manner, including the sharing of tax roles and fiscal information, under the terms of the law or of a covenant.” C.F. [Constitution] art. 37 (Braz.).

76. See Ricardo L. Torres, *Tratado de Direito Constitucional Financeiro e Tributário-Valores e Princípios Constitucionais Tributários*, v.2 258 (2005) (rejecting the argument that the protection of bank secrecy is prescribed by Article 5, XII of the Brazilian Constitution, and stating that this provision solely authorizes the lifting of secrecy in cases related to telephonic communications.).

77. See also Farhan Hameed, *Fiscal Transparency and Economic Outcomes* (Int’l Monetary Fund, Working Paper No. 05/225). Transparency is also relevant because of its impact on the control of corruption. “After controlling certain geographical, economic, and demographic factors, the results show that countries that are more transparent also have better control over corruption.” *Id.*

to access taxpayers' bank information only if such data are indispensable for concluding an inspection procedure that has previously been started.<sup>78</sup> This provision should not be viewed as giving carte blanche to the tax administration, whose purposes must not be personal but compatible with its own institutional mission of tackling tax evasion. In sum, one could argue that not only are tax authorities strictly bound by the law but also that privacy rights are not absolute under the law.

Klaus Tipke, when referring to the protection afforded by the combination of Articles 1 I and 2 I of the German Fundamental Law (Grundgesetz), concludes that general personal rights grant to individuals a kind of inviolable sphere of private life. Nevertheless, this private sphere must yield to tax law when personal data are included in the scope of relevant tax facts that fall within the duties of the tax administration. Basically, the protection of the person does not forbid the examination of private features, but provides the manner in which the assessment should be made, as well as a prohibition against exceeding of those powers.<sup>79</sup>

The institutional duties of the tax administration therefore naturally result from the features of taxation. In other words, the activities of the tax authority should be prepared, oriented and performed to obtain the means to ensure the existence of the state, which is a necessary condition

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78. Decreto No. 3.724, de 10 de Janeiro de 2001, D.O.U. de 11.1.2001 (Braz.). The Brazilian legislation defines an Inspection Procedure as the fiscal procedures referred to in Art. 7 and following Decreto No. 70.235, de 6 de Março de 1972, D.O.U. de 7.3.1972 (Braz.), which encompasses fiscal audits, seizure of goods, customs clearance and, after the impugnation of a taxpayer in accordance with Art. 14, administrative-tax procedures. Id.

79. Klaus Tipke & Joachim Lang, *Direito Tributário* 263–65 (Luiz Dória Furquim trans., 2008).

for the maintenance of law and the consequent protection of individual rights.

Institutionally, the tax administration should act not for itself, but for the benefit of all individuals. It should be understood, both internally and externally, as a public service available to taxpayers and non-taxpayers whose performance goes far beyond tax assessment. To illustrate, consider the principles of assistance and provision for special needs—tax authorities are committed to providing assistance for taxpayers in spite of budgetary restraints and other limitations on resources. Bentley concurs: “It is important . . . the principle of assisting all taxpayers is expressly articulated as fundamental to any tax administration.”<sup>80</sup>

In particular, tax law is part of the proper legal order of the rule of law, and consequently its goal is to promote tax justice. Using this approach, the rule of law requires more than authorities observing the rules and courts ensuring compliance with the law. It is crucial that a sense of fairness is developed; tax justice simultaneously depends on the morality of imposition (besteuerungsmoral) and the morality of the taxpayers (steuerzahler). The state’s financial activity depends on the income necessary to uphold the economic and legal order, thus protecting individuals and offering them an institutional framework for developing their personal lives. So the higher the state’s financial needs, the fairer the distribution of the tax burden must be. Taxes, then, are the price for state protection and institutional safety, and are a true condition for the private economy.<sup>81</sup>

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80. Bentley, *supra* note 68, at 311.

81. Tipke & Lang, *supra* note 79, at 51–56.

It should also be noted that the inspection procedures in question are strictly related to the research phase. The Brazilian Tax Code states more than once that fiscal action must be fully required by law.<sup>82</sup> Therefore, in accessing bank data, tax agents are not entitled to do anything differently from what has already been established in the constitutional system, including the general provisions prescribed by the Tax Code. Moreover, this investigative step must fulfill all legal requirements (in material, jurisdictional, temporal, personal, and quantitative aspects) to result in an eventual tax assessment.

The duties of the tax administration must neither be performed under any kind of bias or prejudice, nor be presumed in advance to be a particular interest of the state. We have seen before that this reflects an institutional role being performed not with discretionary acts but in strict accordance with the law. If this were not the case, all taxpayers' fundamental rights and all the legal obligations expressly limiting the actions of the tax administration, both constitutional and prescribed by infra-constitutional rules, would presumably be understood as having been revoked. Consequently, instead of the previous presumption, one could argue that it is preferable to curb the arbitrary, partial, or invasive conduct of the tax administration by invoking binding provisions enacted by law.

On the other hand, the fact that taxpayers' fundamental rights are constitutionally protected is

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82. Lei No. 5.172, de 25 de Outubro de 1966, **Col. Leis Rep. Fed. Brasil**, 7:292, 27.10.1966 (Braz.). Tax is all compulsory monetary payment in currency or the value of which can be expressed, which does not constitute sanction of illegal acts, established by law and charged by fully bound administrative activity. *Id.* Administrative activity of tax assessment is bound and compulsory, under penalty of functional responsibility. *Id.*

not sufficient to ensure that those rights are fully respected by the tax administration in a concrete case. How taxpayers can deal with any deviation, abuse, or arbitrariness by public officials is crucial to effective protection. Globalization complicates this scenario insofar as data could be sent to or revealed in another jurisdiction without a given taxpayer's participation.

Federalism also challenges the balance of privacy and transparency. Brazil is a peculiar country because it is divided into three governmental spheres: one federal union, twenty-seven states, and 5,570 municipalities.<sup>83</sup> All of these federal entities have sufficient autonomy to run their own tax administrations and would also be entitled to access taxpayers' banking data if such access met the indispensability requirement. As a consequence, taxpayers' protection could be seriously threatened in the face of risks derived from political interference with fiscal activities.

It is very doubtful whether any of the finance secretariats of the country could access or exchange tax information without any limitation other than those pillars of tax justice recognized by the rule of law.<sup>84</sup> The situation worsens if one considers that the great majority of municipalities, and many states, have chronic budget deficits and weak administrative and technological capacity. This is a federal problem that has no short-term solution and supports the

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83. Brazil: States and Municipalities, **Brazil**, <http://www.brazil.org.za/states-and-municipalities.html> (last visited July 20, 2015).

84. **Luís Eduardo Schoueri & Mateus Calicchio Barbosa**, Da antítese do sigilo à simplicidade do sistema tributário: os desafios da transparência fiscal internacional, *Transparência fiscal e desenvolvimento* 512–14 (Eurico M. D. de Santi et al. eds., 2013).

caution represented by the judicial reserve clause.<sup>85</sup>

It goes without saying that constitutional systems have not always been able to safeguard taxpayers' fundamental rights, particularly in cases where the tax authorities act under political influence. The risks and uncertainty are even higher if taxpayers' data are handled by more than one jurisdiction, and especially if tax information has been exchanged automatically.<sup>86</sup>

Judges in favor of the judicial reserve clause have also argued that the tax administration would not suffer any harm if it requested information through the judiciary. This argument is unconvincing to the extent that analysis by the courts is very time-consuming in Brazil and, in many cases, the success of a tax investigation could be completely dependent on opportunity and, consequently, timing. Besides, there are increasingly sophisticated international tax avoidance structures whose assessment requires time and skill. In sum, tax actions would be simultaneously threatened by complexity and temporal issues such as time limits or delay. This

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85. Brazil has already seen important breach of secrecy cases related to electoral or political interests instead of public ones. For example, in 2010 Verônica Serra, daughter of presidential candidate José Serra, had her personal tax information illegally revealed. Before that, in 2006, Minister of Finance Antônio Pallocci lost his job because of an illegal breach of bank secrecy by a caretaker, Francenildo Costa, which involved important state institutions, such as the Secretariat of Finance and Federal Public Savings.

86. S. Van Thiel, Is There a Need for International Enforcement of Human Rights in the Tax Area?, **Human Rights and Taxation in Europe and the World** 174–80 (Georg Kofler et al. eds. 2011) (citing different examples of the violation of taxpayers' fundamental rights that have occurred in Chile, Russia, Ecuador and other countries under the jurisdiction of the European Court of Justice to support the argument that there is a real need for international enforcement mechanisms to ensure the full application of human rights in the tax area).

scenario will certainly be worse in the near future because there will be an increase in exchange of information requests as international standards develop.

Finally, for those judges who allowed the appeal, a breach of confidentiality should be permitted only if there is extreme legal significance or true exceptionality. This has to be shown by the tax administration requesting access to a taxpayer's banking data. Article 6 of Complimentary Law 105 requires a showing that the information is indispensable for the fiscal procedures in question.<sup>87</sup> It is reasonable to presume that "indispensable" means that the absence of the information would frustrate the inspection procedures. Thus, the only reasonable ground for accessing banking data comes in exceptional situations in which indispensable information concerning the taxpayer cannot be found. Examples are offshore accounts and investments or even the deliberate intention of hiding information about revenues or assets from the tax authorities.

According to Anamourlis and Nethercott, irrespective of the immense volume of wealth held offshore, "it is extremely difficult to obtain information on the nature and amount of offshore investments that are undertaken through offshore tax havens, owing to the fact that bank secrecy and confidentiality laws inhibit the ability of revenue authorities and enforcement agencies to gain access to information on the affairs of taxpayers who have offshore accounts or offshore investments."<sup>88</sup>

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87. Lei Complementar No. 105, de 10 de Janeiro de 2001, D.O.U. de 11.1.2001 (Braz.).

88. Anamourlis & Nethercott, *supra* note 4, at 617–18.

## V. PROSPECTS FOR EXCHANGING TAX INFORMATION AUTOMATICALLY IN A GLOBAL SCENARIO

Encouraged by the same goal of engaging in the automatic exchange of information, in 2013 Brazil and fifty-three other members of the Global Forum on Transparency and Exchange of Information for Tax Purposes—along with the Commonwealth Secretariat, the European Commission and the World Bank Group—set up the Automatic Exchanging of Information Global Forum, whose principal objectives are to monitor and review the implementation of the automatic exchange of information standard and to help developing countries benefit from that standard.<sup>89</sup>

Together with forty-eight other countries, Brazil also signed the Declaration on Automatic Exchange of Information in Tax Matters, which was adopted on May 6, 2014.<sup>90</sup> In pertinent part, the Declaration: (1) declares that the signatories “are determined to tackle cross-border tax fraud and tax evasion and to promote international tax compliance through mutual administrative assistance in tax matters and a level playing field;” (2) confirms “that automatic exchange of financial account information will further these objectives particularly if the new single global standard, including full transparency on ownership interests, is implemented among all financial centers;” and (3) states that the signatories have determined “to implement the new single global standard swiftly, on a reciprocal basis,” and that they “will translate the standard into domestic

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89. Automatic Exchange of Information, OECD, <http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm> (last visited July 20, 2015).

90. Declaration on Automatic Exchange of Information in Tax Matters (May 6–7, 2014), available at <http://www.oecd.org/mcm/MCM-2014-Declaration-Tax.pdf>.



law, including to ensure that information on beneficial ownership of legal persons and arrangements is effectively collected and exchanged in accordance with the standard.”<sup>91</sup>

Although the Global Forum Report concluded that “Brazil’s legal framework and its practical implementation ensure that ownership, accounting and bank information is available and tax authorities have access powers to obtain the requested information,” the judicial reserve clause contradicts that finding.<sup>92</sup> As mentioned above, the tax administration would have to be authorized by the judicial authorities to access taxpayers’ personal banking data. Moreover, such a request could be denied or delayed to the point that it would become unnecessary or ineffective to send the information to another state or even for the Brazilian tax authorities to examine it.

Whereas international organizations such as the OECD, G7, and G20 have worked hard to implement the automatic exchange of information as a new global standard, the effects of the Brazilian judicial reserve clause would depend on the type of tax information in which the tax administration has an interest. Article 146 of the Federal Constitution prescribes that complimentary laws regulate the constitutional limitations on the power to tax.<sup>93</sup> Article 6 of Complimentary Law 105 therefore restricts the tax administration’s access to personal banking data.<sup>94</sup> This limitation is likely to reduce the scope of automatic exchanges of information given

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91. *Id.*

92. *Global Forum on Tax Transparency: New Reports Review Jurisdictions’ Information Exchange*, *supra* note 59.

93. “A complimentary law shall: . . . regulate the constitutional limitations on the power to tax . . . .” **C.F. [Constitution]** art.146 (Braz.).

94. Lei Complementar No. 105, de 10 de Janeiro de 2001, D.O.U. de 11.1.2001 (Braz.).

the lack of available data in the absence of inspection procedures that are already taking place.

But Article 5 of Complimentary Law 105 authorizes the Executive Branch to regulate the criteria according to which the financial institutions must inform the tax administration of the Union about the transactions made by the users of their services. Information under this provision will be restricted to the identification of the holders of such transactions and the global amounts handled every month for each user— any evidence that could identify the origin or nature of the expenses is prohibited.<sup>95</sup> As can be seen, this provision fits better with the reach of the automatic exchange of information standard.

Consequently, data on financial transactions governed by Article 5 could be exchanged automatically by the tax authorities more easily than personal data about taxpayers governed by Article 6. Whereas the former flows from the banks on a regular basis, the latter is protected by legal constraints and could soon be the target of the judicial reserve clause. Brazil therefore risks violating international public law by either not observing the treaty clauses about the timely exchange of information or, alternatively, ignoring international human rights protection (and also constitutional rules) depending on the manner in which the tax administration deals with a taxpayer's personal data when it sends them to another state.

As to the manner in which the tax administration deals with taxpayers's personal data under domestic law, Schoueri and Barbosa suggest that Brazil should enact legislation to ensure both the participation of the taxpayer prior to the exchange of information and the full observance of

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95. Decreto No. 4.489, de 28 de Novembro de 2002, D.O.U. de 29.11.2002 (Braz.).

the due process of the law. This encompasses, among other things, official publication of administrative acts, rights to communication, submission of closing arguments, production of evidence and the right to appeal. Moreover, taxpayers are also entitled to have knowledge of the administrative procedures in which they are interested, be able to examine records and obtain certificates, and be informed about judgments.<sup>96</sup>

One could argue that the judicial reserve clause reduces the scope of the automatic exchange of information, but this standard for transferring data has not yet proven to be an effective means of detecting illicit cross-border transactions. To be effective, a system through which information is exchanged automatically requires a high investment in technological and administrative structures. For this reason such a standard is generally set by developed countries but not by developing ones.

As a result, doubts arise about the effectiveness of the flow of information between developing and developed countries. Additionally, risks of breaches of confidentiality remain, irrespective of the judicial reserve clause, because “there is concern that when information is exchanged automatically, the potential for error in exchanging large quantities of taxpayer information globally possesses risks of breaching the confidentiality provisions.”<sup>97</sup>

## VI. CONCLUSIONS

The international community has valued transparency and the exchange of information too

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96. Schoueri & Barbosa, *supra* note 84, at 516-19.

97. Oguttu, *supra* note 32, at 5-6, 9.

highly as an effective means of tackling tax competition. Countries have been brought together to cooperate with each other because, by themselves, they are not capable of dealing with all of the implications of globalization, particularly harmful tax practices. This led, ultimately, to the BEPS Action Plan of 2014. These aspects have also been considered by international organizations, headed by the OECD, which have been working to establish the automatic exchange of information for tax purposes as a global standard.

Brazilian tax policy is moving towards this sense of openness, in line with the international order, as can be seen with the recently signed TIEAs or the inclusion of Article 26(5) of the Model Tax Convention in the double tax treaty with Turkey. The country was also reported to be a reliable and cooperative partner by the Global Forum on Tax Transparency, which stated that the Brazilian tax authorities have power to obtain information on request and that banking information is available.

But doubts arise about the possibility of the Brazilian tax administration systematically and periodically sending taxpayers' data to another jurisdiction, as required by the international standards for the automatic exchange of information. In addition to the non-judicial issues, such as the necessary investments in technology and manpower to set up a successful structure for exchanging information automatically, Article 6 of Complimentary Law 105 is at risk of again being judged unconstitutional by the Supreme Court. If this decision is made, the tax administration would not have direct access to a taxpayer's personal banking data, even if the legal requirements are met, due to the judicial reserve clause.

Although the judicial reserve clause does not prevent a fiscal investigation, it will probably

dampen the enthusiasm of the tax authorities for accessing taxpayers' information. The sluggishness of the judicial system and the difficulties of creating tax courts throughout the country could temporarily interfere with the effectiveness of the tax inspection procedures. As a result, the country may not respond to a request in a timely manner.

Extending the concept of confidentiality so far seems problematic when one considers that the rule of law must protect not only individual but also collective rights. If individuals or corporations evade taxes, tax collection will certainly not decrease, as someone else will bear that burden. Beyond the question of tax, there are also economic-legal consequences because free competition and free initiatives have to be protected by the state. It should also be noted that inspection procedures are strictly required by law to be covered by a veil of secrecy. There is no ability for the tax administration to reveal any data relating to a taxpayer, and consequently it is difficult to identify a breach of confidentiality when tax duties are performed in the interest of society as a whole, which is after all the true addressee of public policies and services.

On the other hand, there have been extensive incentives to enhance transparency, but nothing that overrides the rules requiring the fundamental rights of taxpayers to be observed. It is crucial to strike a balance between the investigative powers of tax administrations and mechanisms for the rapid and effective protection of taxpayers' fundamental rights. Cases of overactive tax authorities abound worldwide and Brazil is no different.

In relation to this, because taxpayers' banking data are accessible not only to the Brazilian Federal Revenue Service but also to thousands of subnational state and municipal tax authorities, doubts arise about the expected protection of human rights, particularly if one considers the

possibility of political influence on tax duties. Furthermore, the prior knowledge and participation of interested taxpayers must be observed by the tax authorities when they access, collect and exchange personal banking data, according to the due process of the rule of law.

Therefore, beyond the clash between transparency and privacy, it is crucial that relevant issues are addressed so that an effective fiscal policy is created that is capable of developing a sense of fairness, which involves the morality of both the tax administration and the taxpayers.

Naturally, action must be taken against fraud and tax evasion schemes, taking into consideration that privacy is a relative right. Difficulties remain about the manner in which transparency is handled when satisfying the domestic jurisdiction and other requesting states because banks should not act in bad faith as shelters for taxpayers. In the same manner, the absence of rapid and effective internal and international mechanisms to safeguard human rights must not allow tax authorities to act in an arbitrary way. In sum, exchanging tax information can be an obstacle to the global impetus, especially when developing countries are supposed to provide tax or bank information in a timely manner.