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Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System[1]

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Abstract

While aggressive tax planning gained the media spotlight, the OECD Action Plan acknowledged the developments undertaken by the Global Forum on Transparency and Exchange of Information for Tax Purposes and joined the increasingly strong call for tax transparency. Although suggesting a "holistic approach" to the matter, the wording of the Action Plan soon reveals that the proposal is one-way oriented: by requiring only the taxpayer to be transparent, the OECD leaves aside the much broader meaning transparency can take. This article, after presenting some deserved criticisms of this biased movement both from the perspective of developing countries and general basic taxpayers' rights, investigates the origins of the notion of tax transparency, where it relates to good governance, to suggest that the concept, in addition to requiring transactions to be disclosed, should be extended to cover the tax administration, the state itself and the tax system as a whole.

1. Introduction

The global call for transparency is no longer a crusade which is exclusive to tax administrations. As has been extensively reported by the media, entities and activists from the third sector have recently also taken up the cause, demanding from multinationals wide and public disclosure of information concerning the structures adopted and the corresponding amount of taxes collected in an attempt to draw society's attention to an alleged undertaxation derived from international legal arbitrage, labelled as "unfair" in times of general economic downturn.[2] Interestingly enough, it does not seem to be possible to reach a clear view as to the extent of this undertaxation; its importance is estimated rather through indirect empirical evidence which, for example, compares the amount of direct investment received or made by some smaller jurisdictions (Barbados,

[1] This article is inspired by the work carried out within the ambit of the Development, Sustainability, Taxation and Transparency Research Project (DeSTaT), gathering together the University of Oslo (Norway), the Vienna University of Economics and Business (Austria), the University of São Paulo (Brazil), the University of the Republic (Uruguay), the Colombian Institute of Tax Law (Colombia), the University of Cape Town (South Africa), and the East African School of Taxation (Uganda). Fostered by the Research Council of Norway, the Project investigates, among other matters, taxpayers' rights in connection with transparency, considers the active involvement of taxpayers in tax procedures and traces a way to achieve sustainable tax governance for developing countries.

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[2] For an analysis of the rise of this movement towards transparency, see A. Christians, "Tax activists and the global movement for development through transparency" in Y. Brauner and M. Stewart (ed.), *Tax, Law and Development* (Cheltenham: Edward Elgar Publishing Ltd, 2013), 288–315.

Bermuda and British Virgin Islands) with the amounts reported by larger economies (such as Germany or Japan).[3] Although several factors may explain these differences, it is fair enough to believe that taxes are one of the main factors underpinning such movements.

This political onslaught towards tax planning has put taxpayers under severe scrutiny in many countries, while the June 2013 Communiqué, agreed to by the G8 leaders at the Lough Erne Summit, and welcoming "the OECD work on addressing Base Erosion and Profit Shifting (BEPS)", commits to ensuring that international tax rules "do not allow or encourage any multinational enterprises to reduce overall taxes paid by artificially shifting profits to low-tax jurisdictions" and praises the exchange of information between jurisdictions as "a critical tool in the fight against tax evasion."[4]

This is the very scenario in which the OECD launched, on July 19, 2013, the *Action Plan on Base Erosion and Profit Shifting* (Action Plan), which, when setting the actions, timing and methodologies for the BEPS project to be addressed, acknowledges the work on transparency made by the Global Forum on Transparency and Exchange of Information for Tax Purposes and calls for the improvement of data collection and for taxpayers to "disclose more targeted information about their tax planning strategies."[5]

If no doubt remains that taxpayers ought to be transparent in their transactions, in such a way that illicit and harmful behaviours do not remain concealed from the authorities, the current debate towards global tax transparency, as proposed and carried on by governments, international organisations and even NGOs, seems somehow biased and certainly one-way oriented: by focusing only on the perspective of tax administrations, the notion of transparency has ended up corresponding to authorities having wide access to personal data belonging to taxpayers. In other words, although the OECD's Action Plan itself calls for a "more holistic approach"[6] to the matter, the terms of the document and of the debate as a whole still indicate that the taxpayer seems to be the only one who is effectively required to be transparent. "Transparency" is thus seen as a mere path towards exchange of information, which leaves aside the much broader meaning the term can take.

This perspective becomes particularly relevant when it is realised that, whilst this unilateral transparency enables a jurisdiction to clearly sight the businesses and transactions undertaken by its taxpayers elsewhere, the taxpayers themselves are frequently faced at home with an outrageously large set of rules. The very complexity of these rules, in preventing laymen from gaining access to general tax information and making it extremely hard for companies to comply duly with their tax obligations, constitutes a serious lack of transparency on the part of the state itself.

After putting the developments towards transparency proposed by the OECD's Action Plan in the context of the works undertaken within the ambit of the Global Forum, this article will

[3] See M. Brittingham and M. Butler, "OECD Report on Base Erosion and Profit Shifting: Search for a New Paradigm or is the Proposed Tax Order a Distant Galaxy Many Light Years Away?" in *International Transfer Pricing Journal* (Amsterdam: IBFD, July/August 2013), 238–242.

[4] Prime Minister's Office, 10 Downing Street + 6 others, 2013 Lough Erne G8 Leaders' Communiqué (June 18, 2013), paras 23–26, available at: *https://www.gov.uk/government/publications/2013-lough-erne-g8-leaders-communique* [Accessed November 7, 2013].

[5] OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD Publishing, 2013), 21.

[6] Action Plan, above fn.5, 21.

present some deserved criticisms of this movement both from the perspective of developing countries and general basic taxpayers' rights. The authors then suggest that the notion of tax transparency, in addition to requiring transactions undertaken by the taxpayers to be disclosed, should be extended to cover the state itself and the tax system as a whole.

After all, the common notion whereby tax havens exist only in so far as tax hells are to be found elsewhere[7] indicates that multinational enterprises (MNEs) are not the only ones to blame for the alarming scenario presented as background by the Action Plan. While aggressive tax planning is encouraged by aggressive tax competition undertaken by states themselves,[8] elusive behaviours are also accompanied by much opaqueness on the part of the latter. In other words, although no acknowledgment as such can be derived from the wording of the Action Plan, governments also have a lot to do with the circumstances under which the BEPS project was conceived.

2. The BEPS and the Global Forum: transparency as opposed to secrecy

From New Zealand—where the December 2012 *Official Report on Taxation of Large MNEs* had already stated that the Minister of Revenue's intention was to tackle the issue by co-operating with the OECD BEPS project[9]—to Finland—where the OECD *Report on Addressing Base Erosion and Profit Shifting* (BEPS Report) has put transfer pricing issues at the centre of the political debate[10]—, the OECD work on BEPS has attracted much attention worldwide since the publication, on February 12, 2013, of the BEPS Report, commissioned by the G20[11] and promptly welcomed and supported by the Council of the European Union[12] and the Forum of Tax Administrations.[13]

[7] Quoting Kurtz's observation, Orlov notes that "to see a tax haven there should be tax hell nearby (the same holds true for the opposition of tax oasis and tax wasteland)." See M. Orlov, "The concept of tax haven: a legal analysis" (2004) 32 *Intertax* 97.

[8] See J. Owens, "The taxation of multinational enterprises: an elusive balance" in *Bulletin for International Taxation* (Amsterdam: IBFD, 2013), 443.

[9] See "Developments Report" in *Asia-Pacific Tax Bulletin* (Amsterdam: IBFD, 2013), 58.

[10] OECD, *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013), 42, available at: *http://www.oecd.org/ctp/beps.htm* [Accessed November 20, 2013]. See J. Waal, "Assessment of first year of transfer pricing programme" in *International Transfer Pricing Journal* (Amsterdam: IBFD, 2013), 271.

[11] On the occasion of the 2012 Los Cabos Declaration, the G20 Leaders reiterated "the need to prevent base erosion and profit shifting" and committed to "follow with attention the ongoing work of the OECD in this area". See the 2012 Los Cabos G20 Leaders' Communiqué, *G20 Leaders Declaration* (June 19, 2012), para.48, available at: *http://www.g20mexico.org/images/stories/docs/g20/conclu/G20_Leaders_Declaration_2012.pdf* [Accessed November 7, 2013].

[12] On May 14, 2013, the EU Council declared its support to "further efforts at OECD level on Base Erosion and Profit Shifting (BEPS)" and recalled "the need for close cooperation with the OECD and the G20 to develop internationally agreed standards". See the Presse 185 PR CO 24, *Press Release on the 3238th Council Meeting, on economic and financial affairs* (Brussels May 14, 2013), available at: *http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/137122.pdf* [Accessed November 7, 2013].

[13] The FTA is a forum under the auspices of the OECD which is intended to foster cooperation between revenue bodies and is comprised of top officers from G20 members and selected non-OECD member countries. The Final Communiqué of its 8th Meeting, held in Moscow on May 16–17, 2013, welcomes "the OECD's work on Base Erosion and Profit Shifting (BEPS) that will shortly propose a comprehensive action plan intended to modernise international tax instruments and standards to respond effectively to, and counter, BEPS, notably in the areas of international taxation, transfer pricing and the digital economy, in an effective and appropriate manner", available at: *http://www.oecd.org/site/ctpfta/FTA-2013-Communique.pdf* [Accessed November 7, 2013].

Whilst some may reasonably refer to the OECD BEPS project as "incredibly ambitious" and disbelieve the general consensus required for the effective implementation of the proposed Action Plan, the reasons and circumstances for its advent seem undisputed to the international community: it would have been engendered as a "comprehensive solution" derived from the intense political pressure placed on the OECD to combat aggressive tax planning after the financial crisis that peaked in 2008.[14]

Indeed, the General Report delivered on the occasion of the 2013 International Fiscal Association's (IFA) 67th Congress summarises the context in which the OECD launched its BEPS project by highlighting the sudden public attention being paid to MNEs engaging in "international tax planning and arbitrage" in order not to pay taxes "in countries where they have substantial operations."[15] The same feeling prevailed among the panelists of Seminar F: when inquiring about the origins of the OECD's initiatives on BEPS, references were made by the panel to the financial crisis, the public debate on the "fair share of tax", the parliamentary hearings and the media coverage of the cases concerning notorious MNEs seemingly paying little tax.[16]

Perhaps this overall reigning climate which inspired the BEPS project may explain the general tone adopted by the Action Plan when addressing the need to ensure transparency.

If the document recognises that the obtaining of "timely, comprehensive and relevant information on tax planning strategies" should be followed by the implementation of mechanisms to "provide business with the certainty and predictability they need to make investment decisions", without which "the actions implemented to counter BEPS cannot succeed"[17] the Actions proposed under the cause for transparency seem not to address the latter as carefully as they deal with the former.

Accordingly, whilst Action 11 is concerned with the identification of the types of data which taxpayers should provide to authorities and the methodologies for their assessment, Action 12 recommends the "design of mandatory disclosure rules for aggressive or abusive transactions" and Action 13, although it takes into account the "compliance costs for business", is mainly intended to "develop rules regarding transfer pricing documentation to enhance transparency for tax administration", requiring that "MNE's provide all relevant governments with needed information".[18]

As a matter of fact, the only proposal inserted by the OECD under the call for "ensuring transparency" which does not sound to be meeting the inspection needs of tax administrations primarily and which somehow bears a more direct link to the legitimate interests of taxpayers in being provided with "certainty and predictability for business" is to be found in Action 14.

[14] "There is enormous political pressure on the OECD to come up with a comprehensive solution. (…) Politically, it is just not sustainable for governments that banks are bailed out, budget deficits rise from these bailouts, and that all of this is paid for by the public at large, while the notion exists that big business can avoid tax by clever structuring". See S. van Weeghel and F. Emmerink, "Global developments and trends in international anti-avoidance" (2013) 76 (8) *Bulletin for International Taxation* 434.

[15] See M. Dahlberg and B. Wiman, "General report", in *Cahiers de Droit Fiscal International*, v. 98a, (the Hague: IFA, 2013), 24.

[16] See B. Michel, IFA 67th Congress in Copenhagen,—Seminar F: IFA/OECD—Base erosion and profit shifting (BEPS), in *News IBFD* (August 28, 2013), available at: *http://online.ibfd.org/document/tns_2013-08-28_ifa_1* [Accessed November 7, 2013].

[17] See Action Plan, above fn.5, 14.

[18] Action Plan, above fn.5, 21–23.

This Action claims that efforts shall be made to improve the effectiveness of mutual agreement procedures under tax treaties in order to enable countries to solve treaty-related disputes in a better way. As is known, the mutual agreement procedure is a relevant remedy granted by treaties to taxpayers whereby the latter may present their individual cases to the competent authorities. It can be argued, however, that the procedure is also much in the interests of tax administrations themselves, especially in relation to inviting and authorising authorities to consult together outside formal diplomatic channels to resolve difficulties in the interpretation and application of particular treaties.

The terms of the aforementioned Actions, presented as they are under the rubric of "ensuring transparency while promoting increased certainty and predictability", are prone to give the reader the impression that, notwithstanding that "transparency at different levels" is suggested by the Action Plan, all of the Actions remain essentially linked to the prevention of base erosion and profit shifting through planning and structures adopted by the taxpayers—which is, in fact, the ultimate purpose of the project.

That is to say, if "different fronts" were opened by the Action Plan on the movement towards transparency, the goal envisaged by this crusade led by the OECD seems to remain one and only one: make the taxpayer transparent to the widest possible extent to tax administrations worldwide.

At the end of the day, the "more holistic approach" proposed by the Action Plan, by comparison with what some of its terms may lead one to believe, fails in convincing that a transparency other than the transparency of taxpayers' *vis-à-vis* authorities is being dealt with effectively. Neither does this approach seem to transcend, by any means, the spirit of the works already carried out within the ambit of the Global Forum on Transparency and Exchange of Information for Tax Purposes, the standards of which continue to steer the cause for transparency.

The internationally agreed tax standard

When announcing, in April 2009, that "the era of bank secrecy is over", the Communiqué issued on the occasion of the G20 London Summit set the tone of the posture that would be assumed, from that moment on, by developed countries and gave transparency the aura of a protagonist in pursuit of international development and stability. Imbued with such a spirit, the G20 and the EU started to regard themselves as bodies supporting the so-called "internationally agreed tax standard", developed within the OECD Global Forum.[19]

The works undertaken by the Global Forum, developed from parameters such as the "availability of information", "appropriate access to information" and "existence of exchange of information mechanisms", managed to draw clear and well defined contours around the notion of tax transparency: the wide access of tax authorities to taxpayers' personal data.[20] From an international perspective, the intention is that a taxpayer whose transactions make it subject to more than one jurisdiction should not take advantage of one of the systems involved in order to

[19] See M. Wenz, A. Linn, B. Brielmaier and M. Langer, "Tax treaty application: cross-border administrative issues (including exchange of information, collection of taxes, dispute settlement and legal certainty in tax treaty application)" in F. Barthel, et al., *Tax Treaties: Building Bridges between Law and Economics* (Amsterdam: IBFD, 2010).

[20] See Global Forum on Transparency and Exchange of Information for Tax Purposes, *Terms of reference to monitor and review progress towards transparency and exchange of information for tax purposes* (Paris: OECD Publishing, 2010), 3.

shield itself and thereby avoid compliance with its tax obligations in the other jurisdiction; transparency would in this way enable a jurisdiction to "sight" the taxpayer in the other state.[21]

Tax transparency and developing countries

In opposition to the OECD's efforts towards transparency through exchange of information there are two main criticisms which are usually made from the perspective of developing countries.

The first criticism relates to the imbalance which exists between the information needs of a developed country when compared to those of a developing country. Such a disparity, indeed, was already a concern at the 11th Meeting of the UN Ad Hoc Group of Experts on International Cooperation in Tax Matters, held at Geneva in 2003. As Spencer pointed out in a paper submitted to the Meeting, "OECD countries would obtain tax information from cooperative tax haven jurisdictions, instead of cooperative tax haven jurisdictions' obtaining information from OECD countries",[22] in what could be described as a virtually unilateral flow of information which was in the sole interest of developed countries.

An example of such a debate took place in Brazil when the Tax Information Exchange Agreement (TIEA) was concluded with the US in March, 2007, and finally entered into force in May, 2013.[23] Parliamentary approval was delayed because the TIEA met with stiff resistance led by Senator Francisco Dornelles—former Minister of Economy and Chief of the Revenue Service. In Senator Dornelles' opinion the TIEA, in addition to offending the constitutional data secrecy guarantee, also went far beyond tax issues by allowing exchange of information on the ownership of companies and settlors of foundations thereby, violating commercial secrecy rules.

Following Presidential Decree No.8,003/13, which gave Brazil its first (and, to date, only) TIEA in force, concerns were raised which questioned whether the TIEA would correspond effectively to a relevant instrument for the Brazilian tax administration or whether it would be a tool which resulted in the tax authorities being obliged to meet countless and burdensome requests from the IRS, assuredly more prepared and used to this kind of requesting.

The second criticism generally raised by developing countries in relation to the OECD's transparency relates to the supposedly high costs to be borne by a state in implementing an effective tax information collection system which would, moreover, be much more in the interests of the requesting state than in its own. The issue is well observed by Stewart, who, when evaluating the legitimacy of transnational tax information networks, questions "how is the exchange of information to be funded for small and poor countries" and claims for "special arrangements for cost sharing."[24]

The TIEA concluded between Brazil and the US may offer, once more, an example of the debate when it, following the Commentaries to the OECD Model TIEA, provides in its Article

[21] See Marcos Aurélio Pereira Valadão, "Transparência fiscal internacional" in Heleno Taveira Tôrres (coord.), *Direito Tributário Internacional Aplicado*, v. 6 (São Paulo: Quartier Latin, 2012), 201.
[22] See D. Spencer, *Tax treatment of cross-border interest income and capital flights: recent developments*, document No. ST/SG/AC.8/2003/L.10 from the 11th Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, United Nations Secretariat, July 2003.
[23] The Tax Information Exchange Agreement (TIEA) negotiated between Brazil and the US in 2007 and enacted by Decree 8003/13 on May 16, 2013.
[24] See M. Stewart, "Transnational tax information exchange networks: steps towards a globalized, legitimate tax administration" in *World Tax Journal* (Amsterdam: IBFD, 2012), 178.

9 that, unless otherwise agreed between the states, the "ordinary costs" incurred in the assistance shall be borne by the requested state, whilst "extraordinary costs" shall be attributed to the applicant state. When one considers the expected imbalance between the information flows between the two countries and that no further clarification is given by the treaty on which costs would be comprised under each category, then the complaints of those who question the financial costs of maintaining the information exchange framework become understandable.

However, although the first mentioned criticism is likely to be convincing, the second argument is largely based in the assumption that information has to be collected and determined by the tax authorities at the budget expense of the states. This assumption, though, deserves to be questioned in light of the current globalised bank system; nowadays one should expect banks to already have the information requested by tax authorities, thereby relieving the latter of the burden of collecting the data. Claims on costs should, therefore, only be considered when bank secrecy rules prohibit banks from providing the tax administration with the information they need and so force the administration to find a another way of providing the information requested by the other state.

In this context, budgetary matters should not be deemed to be the main issue raised by tax transparency, but rather questions surrounding the basic rights of the taxpayers.

The right to secrecy and privacy

A minimum and relevant safeguard for taxpayers against this eagerness for transparency, the individual's privacy, is secured internationally. At this level, the protection of individual privacy dates back to the 1940s, when the Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations. Article 12 of the Universal Declaration in providing that "one shall not be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation", being ensured "the right to the protection of the law against such interference or attacks",[25] consolidates a general fundamental privacy right.

Within the Organization of American States (OAS), the American Convention on Human Rights, clearly inspired by the provisions of the 1948 UN Declaration, established, in its Article 11, a right to privacy providing that "no one may be the object of arbitrary or abusive interference with his private life", also ensuring the "the right to the protection of the law against such interference or attacks."[26]

In the era of globalisation and mobility of capital, secrecy issues have drawn the attention of the OECD, whose Committee on Fiscal Affairs released, in 2000, a Report on *Improving Access to Bank Information for Tax Purpose* (the 2000 Report), describing the positions of Member countries towards access to bank information and suggesting measures to improve access to such information for tax purposes.[27] The 2000 Report followed the 1985 Report on *Taxation and the Abuse of Bank Secrecy*, which had already suggested a relaxation of secrecy towards tax

[25] Universal Declaration of Human Rights Art.12, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948.
[26] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica* (November 22, 1969), available at: *http://www.refworld.org/docid/3ae6b36510.html* [Accessed November 7, 2013].
[27] See OECD, *Improving access to bank information for tax purposes* (Paris: OECD Publications Service, 2000).

authorities.[28] This movement is especially relevant if several other aspects concerning secrecy, including international criminal matters (money laundering, terrorism financing, etc.) are taken into account.

The main concern of the 2000 Report was the extent to which secrecy could allow taxpayers to hide illegal activities from authorities and favour tax evasion. Although the Report ends up recommending a relaxation of secrecy rules, it tries not to diminish their importance by stressing that access to information by tax authorities "should not be unfettered" and that the disclosure should always be "coupled with stringent safeguards", such as the existence of a "judicial or other formal process for obtaining the information".[29]

From the OECD's "internationally agreed tax standard" perspective, the indirect access to information by means of judicial authorisation is to be accepted, but only in so far as it does not imply a substantial limitation or a delay on the provision of information.

Secrecy should not be regarded as an absolute guarantee, since in addition to ensuring privacy it can also leave room for tax evasion and criminal activities. On the other hand, it seems both unreasonable and worrying to have to accept that authorities have wide access to bank data regardless of whether or not the body authorising such access is able to verify the existence of the evidence backing the authorities' request and the link of relevance to the authorities' investigations. In so far as it is able to intervene, the judiciary gains in importance when secrecy is relaxed.

Exchange of information and sovereignty

Another aspect relating to the exchange of information is not being discussed by scholars and should also be considered. If the disclosure of taxpayers' data to their own state's administration is questionable in itself, a far more serious perspective arises from the provision of the said information to another state's administration, when, in addition to secrecy, issues of sovereignty may also come into play.

Although wide access to taxpayers' information is questionable in light of secrecy and privacy guarantees, it is undisputed that the taxpayers, as citizens subject to the jurisdiction of their respective states, do not have an unrestricted right to secrecy; indeed, one does not question that, under judicial authorisation, personal data may be obtained by the relevant state's administration. It is the notion of sovereignty itself, reflected as it is in the exercise of jurisdiction, which justifies the access of the state to its citizens' personal data. Be that as it may, whenever a state, for political reasons of any kind, concludes a TIEA, it delivers the privacy of its citizens to the other contracting state.

Thus the intriguing question: if one accepts the reasoning that a taxpayer may not oppose a requirement made by the state to whose jurisdiction it is subject, this does not immediately imply that such submission will extend to similar requirements made by the other state. After all, it does not seem to be disputed that the citizen who is concerned about his privacy may just leave a state which oppresses him; by choosing to live in a certain community, a person must obey

[28] Concerns with secrecy may also be noted in OECD, *Harmful tax competition: an emerging global issue* (1998), which recommends that countries should remove impediments to the access of banking information by tax authorities.
[29] See the 2000 Report, above fn.27, 19.

the laws therein, even if they are contrary to his interests. Exchange of information, however, takes this a step further, since the citizen-taxpayer's state gives to a third party (the other state) information which the former obtained through the legitimate exercise of its jurisdiction.

While in the first case the citizen-taxpayer submitted itself to such an exercise of jurisdiction, the obtaining of the same information by a third party state does not derive from any jurisdiction that the latter exercises over the citizen-taxpayer concerned. Rather, the obtaining of such information derives from the mere bargain between citizen-taxpayer's state and the third party state. It does not seem to be appropriate that a state may give away to another state the information it has obtained by virtue of the exercise of its jurisdictional power, without the consent and participation of the citizen-taxpayer concerned.

A parallel with the case of extradition could be drawn so as to evince the magnitude of the question. For reasons of sovereignty, the Brazilian Constitution, just like several other Constitutions around the world, prohibits the extradition of Brazilian nationals.[30] Although Brazilian criminal law may be applied against crimes committed by Brazilians worldwide, in case a Brazilian is found guilty in another jurisdiction, Brazilian courts will not agree to the extradition of Brazilians. Such a rule can be interpreted in several ways, but one thing is clear and that is the guarantee given to Brazilians by their state.

Similar concerns should reasonably come into play as regards the provision of the personal data of Brazilian citizens to another state's administration. In other words, even if it is considered that citizens should not oppose their own tax authorities intruding upon their privacy, this does not mean that they should agree to their privacy being intruded upon by the tax authorities of third part countries. It sounds legitimate to argue that the state should protect one's privacy and not allow it to be intruded upon by another state. The fact that the right to intrude upon a citizen-taxpayer's privacy is not granted to their own tax authority would be based on the circumstance that the latter represents a state to which the taxpayer is subject, either as a citizen, a resident or a national. The same relationship, it could be argued, does not exist as regards a third party country.

The question is somehow reflected in the TIEA concluded between Brazil and the US,[31] Article 2 of which establishes that the exchange of information shall be undertaken

> "regardless of the fact that the person to whom the information refers, or the person who holds it, is a resident or national of a party."

Moreover, if the power of the state over its citizens is limited by the state's Constitution, the state may not be allowed to reduce a constitutional protection enjoyed by its citizens on entering in to a treaty with another state. In other words, if the extradition of Brazilians is against the Brazilian Constitution, then no treaty may be ratified which would allow the practice. In the same way, if one's privacy is protected, the fact that such protection may be relaxed *vis-à-vis* one's own tax authority does not mean that a treaty for exchange of information with another State would be immediately constitutional.

[30] See V. de Oliveira Mazzuoli, "Algumas questões sobre a extradição no direito brasileiro" in *Revista dos Tribunais*, n.787 (2001), 438.
[31] Above fn.23.

Exchange of information and participation of the taxpayers

Another aspect of exchange of information to which due attention is not being given concerns the notification and participation of the taxpayer concerned in the procedure.

In this respect, the Brazilian experience is symptomatic: although the country has been concluding tax treaties which provide for the exchange of information, until very recently there was no concrete evidence that the procedure is effective.

Until then, it could be thought that the clauses which have been repeatedly inserted in the treaties by negotiators did not have any practical application. That is to say, notwithstanding their presence in the treaties, the existence of such clauses would have been innocuous for decades, since no exchange procedure would have taken place to trigger their implementation.

Interestingly enough, the recent confirmation that Brazil has been engaging in exchange of information with other countries came from the OECD itself rather than by way of any formal notice from the Brazilian authorities. Indeed, in the Peer Review Report Phase 2, the Global Forum has ascertained that Brazil not only exchanges information, but also receives more requests than it sends.[32]

The fact that such procedures are being undertaken by authorities regardless of any knowledge or participation from the taxpayers is worrying, since it prevents the latter from controlling the information which is given to foreign administrations. The possibility of exchange of information without the previous participation of the interested taxpayer does not seem to be consistent with the Rule of Law and the due process of law.

The hypothesis under which the taxpayer has legitimate reason to oppose the exchange of information is not merely theoretical. This is what happened, for instance, in *Aloe Vera of America, Inc., et al v USA* (*Aloe Vera*), when Aloe Vera of America complained about the fact that the North American Government gave information to the Japanese tax administration inappropriately, since the information exchanged was inaccurate and was further disclosed by the Japanese authorities.[33] In this case, the court handed down that "the IRS may lawfully disclose any return information that is pertinent to preventing tax fraud or fiscal evasion",[34] is relevant to the case, logically linked to it and able to prove the matter concerned; in order to be pertinent to the fight against tax evasion, the information should tend to prove that tax fraud or evasion has effectively occurred.[35]

[32] The Report states that, from 2009 to 2011, Brazil received eighty nine requests while four were sent. See OECD, *Brazil Peer Review Report Phase 2: implementation of the standard in practice* (Paris: OECD Publication, 2013), 89.

[33] See United States Court of Appeals for the Ninth Circuit, *Aloe Vera of America, Inc. et al v United States of America* No.10-17136, judged on November 15, 2012.

[34] Circuit Judge Thomas in *Aloe Vera*, above fn.33, No.10-17136 at 6.

[35] As stated by Reporting Judge Thomas, "(…) under the Tax Treaty, the IRS may lawfully disclose any return information 'pertinent' to 'preventing [tax] fraud or fiscal evasion'. The IRS argues that even false information may be 'pertinent' and therefore protected under the exception. (…) In this case, the simultaneous tax examination by both countries was pertinent to the Tax Treaty's purpose of avoiding tax evasion, and the investigation of potentially fraudulent commissions was equally pertinent. The question is whether a knowing provision of false information can be 'pertinent' to 'preventing fraud or fiscal evasion.' (…) Thus, to be pertinent to fighting tax fraud, information must tend to prove or persuade that tax fraud or evasion has actually occurred. Thus, to be pertinent to fighting tax fraud, information must tend to prove or persuade that tax fraud or evasion has actually occurred. Knowingly false information cannot tend to prove tax fraud. Such information does not lead to useful evidence, and it is certainly not competent

An interesting example to be followed is the Uruguayan legislation. In that country, Decree No.313/11 ensures that taxpayers have the right to view the information before the enactment by the authorities of a resolution providing for its exchange,[36] and provides for the possibility of the taxpayer seeking to oppose the procedure, when the guarantees of the administrative review, ruled by Decree No.500/91, shall be applied.

The participation of the taxpayer seems to be regarded in the same way in the European context. *Soprope-Organizacoes de Calcado Lda v Fazenda Publica* should be considered in this context, and in particular within the ambit of the EU in which the rights of the defence are included among the fundamental rights, and are understood to be separate from the guarantee of a fair procedure within a reasonable period of time.[37] It is not difficult to extend this reasoning to the right to be heard before the exchange of information is carried out.

As a matter of fact, a relevant and harmful outcome may result from the absence of any previous notification of the taxpayers concerned as to the content of the information about to be exchanged with the other state. As mentioned by Brodzka and Garifi, the protection of confidentiality has not been sufficiently addressed in practice, since an objection to the transmission of information shall only be invoked before a domestic court after the breach has occurred and treaties (including TIEAs) do not provide for the right of taxpayers to oppose a request.[38]

In fact, once the exchange of information has been undertaken under the provisions of a treaty duly concluded and ratified by both contracting states (even in case no protection has been granted to the taxpayer and no regard has been paid to the latter's rights), there are no effective remedies against the use of such information by the requesting state which can assist the taxpayer once it is discovered that the information so provided was exchanged illegally or unconstitutionally. Accordingly, the requesting state can arguably claim that information was granted under the terms of a TIEA in force and that the TIEA itself does not require the requesting state to confirm whether or not the information was obtained by the providing state in accordance with due process of law. This outcome in itself is sufficient to show that taxpayers' rights do not seem to have been duly taken into consideration during the development of TIEAs.

evidence in its own right. Thus, information known to be false cannot be subject to protection as 'pertinent' information under the Tax Treaty."

[36] "*Artículo 10º.- Vista Previa. No se dictará resolución disponiendo el envio de información a una autoridad competente requirente, sin otorgarse vista de las actuaciones administrativas al titular de la información por el término de cinco dias hábiles*".

[37] See *Soprope-Organizacoes de Calcado Lda v Fazenda Publica* (C-349/07) ECR I-10369. The court handed down that: "observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual. In accordance with that principle, the addresses of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. Accordingly, respect for the rights of the defence implies that, in order that the person entitled to those rights can be regarded as having been placed in a position in which he may effectively make known his views, the authorities must take note, with all requisite attention, of the observations made by the person or undertaking concerned".

[38] See A. Brodzka and S. Garufi, "The Era of Exchange of Information and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters" in *European Taxation* (Amsterdam: IBFD, 2012), 406.

3. Transparency as the measure for a tax system's clarity, simplicity and reliability

Although much attention has been given lately to "transparency" understood as the antithesis of tax secrecy, and which allows tax evasion or base erosion to be effectively fought, the term "transparency" should be given a broader meaning. In other words, instead of it relating solely to the disclosure of the taxpayers' transactions, the notion of transparency should rather be extended to the state itself and to covering the tax system as a whole.

This point is well observed by Brazilian scholar Ricardo Lobo Torres, whose concept of transparency, being assigned both to the state and society, indicates that the "financial activity must develop itself according to the requirements of clarity, access and simplicity"; being linked not only to clarity, but also to simplicity, it would be a mechanism to minimise the so-called "tax risks."[39]

Though limiting the concept to the ambit of the relationship between taxpayers and authorities, the need for state transparency was somehow addressed by the OECD itself. As can be seen in Working Paper 6 from its Tax Intermediary Studies, the Organization, presenting transparency as the "the general relationship framework" in which "individual acts of communication" take place between taxpayers and authorities, correctly recognised that "taxpayers will want the openness and transparency expected of them" to be "reciprocated by revenue bodies", in a way that would achieve an "enhanced relationship."[40] Nevertheless, as observed by Soler Roch, some scepticism may be necessary in relation to the OECD's proposal for a transparent "enhanced relationship", as the Organization's real goal with the said proposal would be the "need to solve the problems created by aggressive tax planning" rather than the restoration of mutual trust.[41]

Also the World Bank seems to adopt a broader concept of transparency, which is not limited to the mere opposition to tax secrecy. If the World Bank's approach to a sustainable development back in 1992 is considered, one could find the requirement for an

> "efficient and accountable management by the public sector and a predictable and transparent policy framework (which would be) critical to the efficiency of markets and governments, and hence to economic development."[42]

Two years before that, the United Nations had already published a study which also related good governance to several items, which included transparency, as well as items such as participation, the rule of law, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability and strategic vision. In such a context, transparency was defined as

[39] See R.L. Torres, "O princípio da transparência no direito financeiro" in *Revista de direito da Associação dos Procuradores do novo Estado do Rio de Janeiro*, n.8 (Rio de Janeiro: Lumen Juris, 2001).
[40] *OECD Tax Intermediaries Study: Working Paper 6—The Enhanced Relationship* (2007), available at: *http://www.oecd.org/tax/administration/39003880.pdf* [Accessed November 7, 2013].
[41] M.T. Soler Roch, "Tax administration versus taxpayer—a new deal?" (2012) 4(3) *World Tax Journal* 282.
[42] See World Bank, *Governance and Development* (April 1992), p.v (Foreword), available at: *http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101911081228/Rendered/PDF/multi_page.pdf* [Accessed November 7, 2013].

> "free flow of information, what would mean that processes, institutions and information (would be) directly accessible to those concerned with them, and enough information (should be) provided to understand and monitor them."[43]

This relationship between transparency and good governance, which seems to have been clear two decades ago, is surprisingly not considered in relation to BEPS. This is especially remarkable, if it is considered that as recently as 2010, the OECD still insisted on the relationship between transparency and governance:

> "Awareness and transparency are basic requirements for building public engagement and trust; without some degree of both, taxation is likely to be characterised by conflict rather than co-operation. Citizens must be aware of the taxes they are paying and be educated about the system of taxation and budgeting, while government must be transparent about tax collection and public spending."[44]

These references seem to be enough reason to suggest that the unilateral approach to transparency should be reviewed, and that the holistic treatment of the theme should be included in the Action Plan, if one really believes in transparency as a mechanism for the creation of a mature relationship between state and citizen, which seems to be a better approach to making sure that taxpayers feel part of the community and therefore involved on the process of granting states the means for their activities.

Transparency of the tax system

As a matter of fact, the notion of transparency as a key characteristic of an ideal tax system dates back to Adam Smith who believed that taxes should be crystalline, that is, their amount should be clear and evident to the taxpayer, and their collection should involve the lowest cost possible to the latter.[45] Despite the fact that these ideas were developed in the era of liberalism, they do not deviate from what is still understood by scholars today; indeed, Stiglitz points out that political responsibility, which requires the tax system to be transparent, is a characteristic of an optimal tax system.[46]

Essentially, a state's tax transparency implies a knowledge of who is paying taxes and who is benefiting from them. The public agents' desire to hide who effectively is paying the taxes can be seen in a quote attributed to Colbert, who, as Minister of Finance under the rule of King Louis XIV, stated that "the art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing."[47] It is common ground that governments, imbued with such a spirit, introduce taxes on legal entities in order to make one

[43] United Nations, *Governance for sustainable human development: A UNDP policy document—Good governance and sustainable human development* (1997), available at: *http://mirror.undp.org/magnet/policy/chapter1.htm* [Accessed November 7, 2013].
[44] OECD, *Citizen-State relations. Improving governance through tax reform* (2010), 11, available at: *http://www.oecd.org/dac/governance-development/46008596.pfd* [Accessed November 7, 2013].
[45] See A. Smith, *The Wealth of Nations*, Book V (Oxford: Capstone Publishing Ltd, September 2010), Ch.II, second part.
[46] See J.E. Stiglitz, *Economics of the public sector*, 3rd edn (New York: W.W. Norton, 1999), 457–458.
[47] See Stiglitz, above fn.46, 467.

believe that it is these entities, and not individuals, which bear the tax burden. Similarly, the taxation of the seller hides the burden which is expected to be transferred to consumers.

This is where transparency meets political responsibility: the citizen who is conscious of the taxes he pays tends to demand greater responsibility from his governors. Nevertheless, as already pointed out, nowadays tax transparency goes beyond such political effect; it is a condition of the tax system's efficiency in this context that investors are free to decide where to make their investments. Notwithstanding the fact that opaque tax systems may attract, initially, anxious short term investments, an economic system which intends to attract and keep productive long term investments should offer its potential investors full clarity in relation to the costs to be incurred, thereby allowing the entrepreneur to make a conscious decision.

Hence, despite the fact that taxpayer transparency has been occupying the international agenda, as can be seen from recent developments in the OECD's BEPS project which are directly linked to the notion of transparency conceived by the Global Forum, there is no doubt that the much less debated state transparency is a key feature in boosting economic relations worldwide.

Taking the notion of "transparency" as a remedy against taxpayers who "hide income and assets from the tax authorities by taking advantage of bank secrecy or other impediments to information exchange", Owens praises the work carried out by the OECD and the G20 as a "revolution in the tax world."[48] Transparency as a measure of a tax system's clarity, simplicity and reliability should be discussed with as much seriousness as is given to the idea of relaxing tax secrecy. Only then will there be a true revolution in the tax world.

Transparency of tax administration

Another aspect of state transparency is the attitude of tax administrations towards taxpayers. In this sense, it is interesting to note that the focus on tax secrecy and exchange of information seems to be a distortion of the original idea which underpinned the term "transparency" in international tax literature. If one looks at the works carried out by the OECD itself back in 2001,[49] one derives therefrom a tautological definition (that could be summarised as the "lack of non-transparent features of a given jurisdiction"), which is nevertheless clear enough to include rules that depart from established laws and practices within one jurisdiction, including the so-called "secret" tax rulings and other forms of negotiation of tax due.[50]

Accordingly, Owens reports an interesting experience carried on by the Australian Tax Office (ATO), which decided to develop a compliance pyramid, dividing taxpayers according to their behaviour. It is, therefore, correct to say that there are:

1. those who do not wish to comply;
2. others who tend not to comply but will do so if they believe that the tax administration is at their heels;

[48] J. Owens, "Moving towards better transparency and exchange of information on tax matters" in *Bulletin for International Taxation* (Amsterdam: IBFD, 2009), 557.
[49] See *OECD's Project on Harmful Tax Practices: the 2001 Progress Report*, available at: *http://www.oecd.org/ctp/harmful/2664438.pdf* [Accessed November 20, 2013].
[50] See A. Brodzka and S. Garufi, "The Era of Exchange of Information and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters" in *European Taxation* (Amsterdam: IBFD, 2012).

3. those who try to comply but do not always succeed; and
4. finally, those who are willing to do the right thing and will do so.[51]

Transparency, in this case, means knowing which criteria are employed by a tax administration in order to classify taxpayers into each of the groups. It also means knowing which types of behaviour will be expected of the taxpayer by the tax administration as evidence that the taxpayer is entitled to be treated in the same way as the next group. Moreover, a tax administration should clarify the advantages which a taxpayer could receive if they are included in a different group. Such advantages should include a more enhanced relationship, reflected in a less burdensome cost of compliance with tax formalities. In other words, tax administrations should provide a clear incentive for voluntary co-operation.

From the perspective of a taxpayers' protection, transparency of tax administration also means ensuring that the Principle of Equality is being applied, since better treatment of taxpayers should not be considered as a privilege, but rather as a prize, which is available to all those who achieve clearly stated landmarks.

Special attention should be given, however, to avoidance of taxpayer opacity consequent upon relaxation of taxpayer, especially on the fulfillment of the taxpayer's tax obligations. Accordingly, the Principle of Equality referred to above requires that taxpayers believe that they are paying fair taxes, that is, a taxpayer should be sure that their neighbour is not being granted a privilege which allows him/her not to pay taxes which are due. As the OECD recalls, "taxpayers are very unlikely to improve compliance if they doubt that existing taxes are enforced equitably."[52] In this sense, whenever a tax administration enters into special agreements with taxpayers, there is the risk that the feeling of equal and fair treatment may be jeopardised. Should this happen, then all efforts to protect the tax base may be in vain. Transparency of tax administration requires therefore that tax agreements be public (or at least public enough to be controlled).

It should therefore be concluded that, although a more confident relationship between taxpayers and tax administration is to be praised, special care should be taken as regards the transparency of tax administration. A positive step towards protecting the tax base would be to provide taxpayers with incentives to co-operate. Such incentives could include: 1. defining different groups of taxpayers according to clear standards; 2. making publicly known the treatment granted to each group and which landmarks are required for moving into a better group; 3. including among the incentives a more oriented treatment, which would allow taxpayers to reduce their compliance costs; 4. never allowing special treatments to be hidden, or at least making sure that there is enough publicity to make sure that the community can see that no privilege has been granted.

4. Conclusion

BEPS is a global issue and there seems to be no doubt that states are not alone in claiming a fair and equitable provision of resources to enable them to carry out their own surveillance. When one examines the much anticipated Action Plan, it is to be noted that, in spite of making reference

[51] See J. Owens, "The Role of Tax Administrations in the Current Political Climate" in *Bulletin for International Taxation* (Amsterdam: IBFD, 2013), 158.
[52] OECD, above fn.44.

to an inspiring "holistic approach", some measures have adopted a clear unilateral treatment. This is the case with transparency, which is seen as a mere opposition to tax secrecy. In such a scenario, the Action Plan is directed to exchange of information, giving the impression that the latter is sufficient to achieve transparency.

If one considers exchange of information, it is not difficult to see that little attention has been given to taxpayers' rights. Privacy does not seem to be a relevant issue in the Action Plan. The participation of taxpayers has not been presented as a condition for states to provide their partners with information about their own citizens. The Action Plan seems to put states in the position of allies in a war against the evil represented by tax avoidance.

This approach does not seem to be consistent with the change in attitude claimed by Jeffrey Owens in a recent and inspiring article, in which he presents an analogy which seems very appropriate to this theme. According to Owens, in the latter half of the 20th century, the traditional approach adopted by tax administrations to tax compliance was based on a military strategy, which involved identifying the target (evaders) and destroying them. Tax administrations would act as the police in the system and audits would have a confrontational approach. Owens claims that this militaristic approach is changing and developing into a more behavioural response to compliance, shifting towards prevention rather than just detection and non-compliance.[53]

Using Owens' analogy, the Action Plan still reveals a prevailing militaristic approach. The target is tax secrecy and transparency (peace) will be achieved when the enemy is eradicated. As with military strategy, this action brings no guarantee of a long-lasting peace. Peace requires enemies to become friends and friendship demands effort from all parties concerned.

In this sense, it is interesting to return to the original concept of transparency, which was not limited to taxpayers, but was, rather, very much related to the state itself. Transparency as a concept appears in the context of good governance and thereby extends to the tax system, including the tax administration.

Base erosion can be looked at from different perspectives. It can be viewed as a result of bad guys who must be critically punished. This approach considers tax as something which is hated by society and which can therefore only be enforced by a very strong state. This approach ignores the fact that most people usually pay their taxes. Such people deserve to be treated with dignity. State transparency seems to be the clear response to this and shows that states respect their citizens. The unilateral approach to transparency in the Action Plan should be reconsidered in order to give the BEPS project a long lasting result.

[53] Owens, above fn.51.

Developing countries; OECD; Privacy; Tax avoidance; Tax havens; Tax information exchange agreements; Tax planning; Tax policy; Transparency