International

The Rights of Multinationals in the Global Transparency Framework: McCarthyism?

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Issue: Derivatives & Financial Instruments, 2016 (Volume 18), No. 1
Published online: 18 February 2016

1. Introduction

The role of corporations and their contribution to society have changed in the last two decades. In principle, corporations were carrying out their business activities aiming to provide a deemed return on investment to the shareholders. Thereafter, and mainly due to the "failure of corporate governance and questionable accounting treatments",[1] for instance in the *Enron* case, corporations were required to introduce internal control mechanisms on their financial reporting.[2]

More recently, due, to some extent, to the financial crisis in 2008 and to the appeal by civil society for payment of their "fair share"[3] by multinationals, countries and international organizations have introduced unilateral and international measures to tackle tax avoidance. The aim is to address not only harmful tax practices,[4] but also tax avoidance – including abusive and aggressive tax practices.[5]

According to the OECD, globalization impacts the ability of countries' tax authorities to collect tax revenue and to ensure compliance. The OECD has also observed that multinational enterprises have been able to greatly minimize their tax burden by means of exploiting tax arbitrage opportunities and by going beyond the boundaries of acceptable tax planning. The result is thus that multinationals have become more confident in taking aggressive tax positions.[6]

Among the instruments developed by the OECD following the political mandate of the G20[7] are multilateral instruments to exchange information (including the introduction of automatic exchange of information as the global standard) and the Actions of the Base Erosion Profit Shifting (BEPS) Project. Countries have also introduced provisions in tax treaties to tackle treaty abuse and aggressive tax planning. More recently, the United Kingdom has introduced the diverted profit tax. These instruments and measures are explained in section 2.

These developments have resulted in a new era of transparency and "fair share" that should be addressed from a tax risk management perspective.[8] Corporations need to search for strategies to manage their tax risk, reputational risk,

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1. J.D. Reardon, *The Enron Bankruptcy: What Went Wrong?*, 4 Derivs. & Fin. Instrums. 5 (2002), at 158, Journals IBFD.
2. This was triggered by the circumstances surrounding Enron, WorldCom and Tyco International. The result was the enactment of the US Sarbanes Oxley Act. Reardon, *supra* n. 1.
3. The debate regarding international tax justice has been addressed by Essers, who states that there are "some unjust, unfair and misleading aspects of the debate on international tax justice that could have a significant impact on public opinion and on the responsible politicians who ultimately have to take the decision". Essers also mentions some examples of civil society organizations (e.g. Tax Justice Network, Christian Aid and Oxfam International). P. Essers, International Tax Justice between Machiavelli and Habermas, 68 Bull. Intl. Taxn. 2 (2014), at 54, 58, Journals IBFD.
4. Harmful tax practices in the form of tax havens and preferential tax regimes were first addressed in the 1998 OECD Report on Harmful Tax Competition. According to this report, harmful tax practices "affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally". OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD 1998), at 3, 8. This Report defines the factors to be used in identifying harmful tax practices and goes on to make wide-ranging recommendations to counteract such practices.
5. For a definition of abusive tax practices and aggressive tax practices, *see* section 3.3.1.
6. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013), at 7, 8, International Organizations' Documentation IBFD.
7. G20 summits in Los Cabos (Mexico), Washington D.C. (United States), London (United Kingdom) and Pittsburgh (United States); G8 summits in L'Aquila and Lecce (Italy), Hokkaido (Japan) and St. Petersburg (Russia).
8. On 26 Mar. 2015, the *Confédération Fiscale Européenne* (CFE) held its 2015 Forum in Brussels. The topic for discussion was "Tax Governance and Tax Risk Management in a Post-BEPS World".

operational tax risk and tactical tax risk in accordance with these new developments.[9] In the management of these risks, corporations should enhance disclosure of their tax schemes and facilitate exchange of information, while also developing new models of corporate social responsibility[10] that include more transparency in terms of disclosure and tax reporting.[11] As stated by Ring, transparency includes the understanding by the tax authorities of the taxpayer's activities, and disclosure implies the need of a country to have access to the necessary information regarding the taxpayer's activities.[12]

This new era of transparency also brings some challenges for tax authorities in their relationship with taxpayers. Transparency from the perspective of tax authorities requires the drafting of tax rules to be clear for the tax authorities to enforce and for taxpayers to rely on. Therefore, this article calls for tax authorities to develop a new relationship based on transparency, certainty and respect for taxpayer rights in order to enhance mutual trust and voluntary compliance by the taxpayer.[13] As rightly stated by Bentley in respect of the rise of soft law – but also applicable to these developments:

> revenue administrators have been placed where they have to engage with and understand taxpayers as much as they can. To do this effectively they have to protect taxpayers and set up the frameworks that provide effective rule of law both under the law and through the daily operation administration of the law.[14]

In this context, the overall aim of this article is to analyse the rights of corporations (mainly multinationals) when dealing with tax authorities in this new era of transparency and "fair share". The article addresses two questions: First, what are the rights and obligations of corporations as taxpayers in these developments? Second, what should countries (including the tax authorities and judiciary thereof) do (i) to guarantee that the rules to implement exchange of information protect the confidentiality, privacy and participation of the taxpayer in the exchange and (ii) to guarantee that the rules to implement the BEPS Actions, as well as domestic and treaty anti-avoidance rules to tackle abusive and aggressive tax planning, are clear, easy to apply and reliable?

This article will address the international instruments and domestic measures introduced to tackle tax evasion, harmful tax practices and abusive and aggressive tax planning (section 2.), and some problems in the application of these instruments and rules will be presented. Section 3. will first analyse the rights of a corporation to confidentiality and privacy, and the right to be notified, to be heard and to appeal against the exchange of information; the second part will analyse the rights of a corporation to certainty and transparency in terms of the availability, clarity, simplicity and reliability of tax rules. Finally, section 4. will provide some conclusions and recommendations.

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9. For instance in the Netherlands, Gribnau stated that due to horizontal monitoring, multinational corporations are moving from aggressive tax planning towards tax risk management and certainty in the Netherlands. For Gribnau, this change in attitude by multinationals is mainly due to horizontal monitoring – which means that, on "the basis of trust and transparency, the tax authorities are prepared to respond to the multinationals' need for certainty". H. Gribnau, *Soft Law and Taxation: The Case of the Netherlands*, 1 Legisprudence 3 (2007), at 325.
10. For a consideration of the nexus between corporate social responsibility and taxation, *see* H. Gribnau, *Corporate Social Responsibility and Tax Planning: Not by Rules Alone*, 24 Soc. & Leg. Studies 2 (2015), at 225. *See also* T. Bender & D.M. Broekhuijsen, *The Relationship between CRS and Tax Avoidance*, in *Corporate Social Responsibility for Future International Business Lawyers* (not yet published).
11. The present author has argued elsewhere that for BEPS Action 12, the OECD should develop an instrument to provide disclosure of aggressive tax planning transactions. This instrument may be developed following, for instance, examples from reporting and transparency initiatives such as the Extractive Industry Transparency Initiative and country-by-country reporting with a broader scope than that presented in BEPS Action 12, taking into account the proposal of the European Union for the extractive and fisheries industries. I.J. Mosquera Valderrama, *The BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead*, 43 Intertax 10 (2015), at 627.
12. D. Ring, *Transparency and Disclosure*, Papers on Selected Topics in Protecting the Tax Base in Developing Countries (United Nations Sept. 2014), available at http://www.un.org/esa/ffd/wp-content/uploads/2014/09/20140923_Paper_TransparencyDisclosure.pdf. The Final version of the paper is also available in the UN Handbook on Selected Issues in Protecting the Tax Base of Developing Countries (June 2015), available at http://www.un.org/esa/ffd/wp-content/uploads/2015/07/handbook-tb.pdf.
13. Taxpayers are more likely to comply voluntarily when tax authorities (i) adopt a service-oriented attitude toward taxpayers, and educate and assist them in meeting their obligations, (ii) create strong deterrents to non-compliance through effective audit programmes and consistent use of penalties and (iii) are transparent and seen by the public to be honest, fair, and even-handed in their administration of tax laws. A. Okello, *Managing Income Tax Compliance through Self-Assessment*, IMF Working Paper WP/14/41 (Mar. 2014).
14. D. Bentley, *The Rise of "Soft Law" in Tax Administration: Good News for Taxpayers?*, 14 Asia-Pac. Tax Bull. 1 (2008), at 38, Journals IBFD.

2. International Instruments and Domestic Measures to Tackle Tax Evasion, Harmful Tax Practices and Abusive and Aggressive Tax Planning

2.1. Multilateral instruments

The 2008 economic crisis increased the need for countries to raise revenue. As a result, the OECD – following the political mandate from the G20 – has introduced a forum and instruments to exchange information in order to tackle tax fraud and tax evasion, namely the Global Forum on Transparency and Exchange of Information for Tax Purposes, the multilateral Convention on Mutual Administrative Assistance in Tax Matters and its 2010 Protocol (a joint project of the Council of Europe and the OECD), the Common Reporting Standard on automatic exchange of financial account information, and the multilateral Competent Authority Agreement to automatically exchange Common Reporting Standard information.[15] These have been adopted by both OECD and non-OECD countries.[16] With the Common Reporting Standard and the Competent Authority Agreement, the OECD has introduced automatic exchange of information as the new global standard.[17]

Furthermore, and in order to tackle base erosion and profit shifting, the OECD – following the G20's mandate[18] – launched the BEPS project and the BEPS Action Plan.[19] In the BEPS Action Plan, the OECD calls for "fundamental changes to the current mechanisms and the adoption of new consensus-based approaches, including anti-abuse provisions, designed to prevent and counter base erosion and profit shifting".[20] The BEPS Action Plan aims to tackle tax base erosion and profit shifting by introducing rules to deal with, for example, transfer pricing, harmful tax regimes, tax treaty abuse and hybrid mismatches.

Moreover, in Action 15 the OECD introduces a multilateral (binding) instrument to modify bilateral tax treaties in respect of the changes adopted in the BEPS Project.[21] The multilateral instrument will be developed by an international conference with a mandate for two years. At the time of writing, more than 80 countries (including G20, OECD and non-OECD countries) have committed to participate in the inaugural meeting of the Multilateral Instrument Ad Hoc Group to develop the BEPS Multilateral Instrument.[22]

The global standard of automatic exchange of information (including the automatic exchange of rulings proposed in BEPS Action 5) has also been adopted by the European Union.[23] More recently, the European Union has introduced several

15. For consideration of these instruments, including the participation of non-OECD countries and taxpayers, *see* I.J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 World Tax J. 3 (2015), Journals IBFD.
16. As of 3 Dec. 2015, 130 countries are members of the Global Forum on Transparency and Exchange of Information for Tax Purposes; 92 countries have ratified the OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters and 75 countries have signed the multilateral competent authority agreement.
17. More recently, in Aug. 2015, three new reports were released by the OECD to help countries and financial institutions to implement the new global standard, namely the *Standard for Automatic Exchange of Financial Information in Tax Matters: Implementation Handbook*, the *Update on Voluntary Disclosure Programmes: A Pathway to Compliance* (practical experience of 47 countries in relation to voluntary disclosure programmes), and the model protocol to the model tax information exchange agreement that provides a basis for jurisdictions wishing to extend the scope of their existing tax information exchange agreements to also cover the automatic and/or spontaneous exchange of information. For more information and to download these documents, *see* OECD, *The OECD Takes Further Steps to Putting an End to Offshore Tax Evasion*, http://www.oecd.org/ctp/exchange-of-tax-information/the-oecd-takes-further-steps-to-putting-an-end-to-offshore-tax-evasion.htm.
18. The BEPS Project and the Action Plan were endorsed at the G20 meetings in Mexico (June 2012) and St. Petersburg (Sept. 2013), respectively (G20 Leaders Declaration in St. Petersburg of 6 Sept. 2013). *See* in particular, para. 50 of the Declaration ("In a context of severe fiscal consolidation and social hardship, in many countries ensuring that all taxpayers pay their fair share of taxes is more than ever a priority. Tax avoidance, harmful practices and aggressive tax planning have to be tackled […]".). *See* https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf.
19. OECD, *Action Plan on Base Erosion and Profit Shifting*, *supra* n. 6.
20. OECD, *Action Plan on Base Erosion and Profit Shifting*, *supra* n. 6, at 13 ("BEPS issues may arise directly from the existence of loopholes, as well as gaps, frictions or mismatches in the interaction of countries' domestic tax laws. These types of issues generally have not been dealt with by OECD standards or bilateral treaty provisions. There is a need to complement existing standards that are designed to prevent double taxation with instruments that prevent double non-taxation in areas previously not covered by international standards and that address cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it. Moreover, governments must continue to work together to tackle harmful tax practices and aggressive tax planning.").
21. *See* http://www.oecd.org/ctp/beps.htm.
22. The list of countries (as of May 2015) is available at http://www.oecd.org/tax/treaties/work-underway-for-the-development-of-the-beps-multilateral-instrument.htm.
23. A clear example of this, is the outcome of the EU ECOFIN (Economic and Financial Affairs Council) meeting of 6 Oct. 2015, stating that it reached agreement on the draft of a Directive to introduce automatic exchange of cross-border tax rulings and advanced pricing tax agreements. *See* http://www.consilium.europa.eu/en/meetings/ecofin/2015/10/06.

measures to tackle tax avoidance and to facilitate automatic exchange of information within the European Union,[24] and it has repealed the Savings Directive and replaced it with the Administrative Cooperation Directive.[25]

In the development of (i) instruments to enhance exchange of information and (ii) the BEPS Project, one of the problems is that taxpayers have not participated in the drafting of the content of the instruments to exchange information, including the introduction of automatic exchange of information as the global standard and measures to tackle abusive and aggressive tax planning under the BEPS Project. This author has argued elsewhere that the lack of participation and representation will influence the legitimacy of these instruments vis-à-vis taxpayers and that, therefore, the participation of taxpayer associations, tax advisers, business representatives and civil society are needed, as these instruments should also provide a solution to taxpayers' problems and respect their rights.[26]

2.2. Bilateral agreements to tackle abusive and aggressive tax planning

Until now, countries have concluded bilateral tax treaties that contain rules to prevent treaty abuse, such as limitation on benefits provisions, the main purpose test,[27] subject-to-tax clauses and switch-over from a tax exemption of foreign income to relief by credit.[28] Furthermore, some countries have introduced a provision in their tax treaties allowing the application of any domestic law or measure to prevent, discourage, avoid or counteract improper use of the treaty.[29]

In addition to bilateral tax treaties, some countries have opted to conclude tax information exchange agreements, mainly to provide for the exchange information (on request) with low-tax jurisdictions.[30] A recent development in this regard is the signing by countries of bilateral competent authority agreements to exchange financial accounting information (e.g. the bilateral competent authority agreement concluded by Argentina and Mexico in November 2015).[31]

2.3. Domestic measures to tackle abusive and aggressive tax planning

Some countries have introduced a specific tax to deal with profits that are being shifted to other jurisdictions. Perhaps this is best illustrated by the UK diverted profit tax. This tax was a response to multinationals that diverted profits by avoiding

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24. The EU introduced several measures to tackle tax avoidance. These measures promote tax transparency including the automatic exchange of tax rulings and the introduction of disclosure requirements for multinationals. More recently, the European Union has introduced an anti-tax avoidance package including the proposal of a Directive with measures to prevent aggressive tax planning ("anti-BEPS Directive"). *See* http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm.
25. At the EU level, these actions include the recently (2014-2015) approved amendments to the Merger Directive, the Interest and Royalties Directive and the Administrative Cooperation Directive. In Mar. 2015, the EU Commission presented a proposal to repeal the Savings Directive which was approved by the Council on 10 Nov. 2015.
26. This argument is further developed by this author elsewhere. Mosquera Valderrama, *supra* n. 15, at 364.
27. The main purpose test is found in the Protocol of the Netherlands-Qatar Income Tax Treaty (2008). According to Dutch reporters at the 2010 IFA Congress, this test seeks to ensure that "treaty benefits are not granted if the relevant structure is set up with the sole or predominant reason of gaining the treaty benefits. Most of those provisions are found in the articles concerning dividends, interest and royalties, but main purpose tests are also used to counter mala fide emigration of corporations" (*see* Protocol III to article 4(4) of the Netherlands-Qatar treaty (2008) and article 34(2) of the tax arrangement for the Kingdom of the Netherlands). F. Peters & A. Roelofsen, *The Netherlands*, in *Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions* (IFA Cahiers 2010 Vol. 95A), at 573, Online Books IBFD.
28. For an overview of the application of these clauses in the Dutch tax treaty policy memorandum, *see* I.J. Mosquera Valderrama, *Dutch Tax Treaty Policy Regarding Latin American Countries*, Tax Notes Intl. (29 July 2013).
29. Examples of this provision include art. 27 of the Netherlands-Panama Income Tax Treaty (signed Oct. 2010 and in force as from 1 Dec. 2012) and art. 27 of the Hong Kong-Netherlands-Income Tax Agreement (2010). Art. 27 of the Netherlands-Panama Income Tax Treaty (2010) states: "Nothing in this Convention shall prejudice the right of each Contracting Party to apply any of its domestic laws and measures for preventing, discouraging, avoiding or counteracting the effect of any transaction, arrangement, or practice that has the purpose or effect of improperly conferring a tax benefit to any person. The Contracting States shall designate by mutual agreement the domestic laws and measures concerned".
    Art. 27 of the Hong Kong-Netherlands Income Tax Agreement (signed Mar. 2010 and in force as from 24 Oct. 2011) also includes that clause, although it is a little more extensive than that in the treaty with Panama. It states: "1. Nothing in this Agreement shall prejudice the right of each Contracting Party to apply its domestic laws and measures concerning tax avoidance, whether or not described as such. 2. For the purposes of this Article, 'laws and measures concerning tax avoidance' includes laws and measures for preventing, discouraging, avoiding, or counteracting the effect of any transaction, arrangement, or practice that has the purpose or effect of conferring a tax benefit on any person. 3. For the purposes of this Article, 'laws and measures concerning tax avoidance' includes for the Netherlands in any case: Article 17, paragraph 3, subparagraph b, in connection with article 17a, paragraph 1, subparagraph c, of the Corporate Income Tax Act 1969, or any identical or substantially similar provisions replacing these Articles". *See* Mosquera Valderrama, *supra* n. 28, at 466.
30. However, in 2015, the OECD Committee on Fiscal Affairs approved a model protocol to the tax information exchange agreement. This model protocol would extend a tax information exchange agreement to include automatic and spontaneous exchange of information. *See* http://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm.
31. This agreement was signed in accordance with art. 28(6) of the OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters and its 2010 Protocol. Argentina; Mexico - Competent authority agreement for automatic exchange of information between Argentina and Mexico signed (6 Nov. 2015), News IBFD.

a taxable presence in the United Kingdom. The diverted profit tax may operate based on reasonable presumptions of tax inspectors.[32] This tax applies to situations involving entities or transactions that lack economic substance.[33]

Other countries have focused on the introduction of domestic anti-avoidance provisions to tackle abusive and aggressive tax planning. Examples include general anti-avoidance provisions (e.g. substance over form, abuse of law) and specific anti-avoidance measures (e.g. transfer pricing, thin capitalization). However, these measures may have problems related to the delayed implementation of these rules and the use of retrospective legislation. The result is less transparency and certainty in the application of these rules. These problems will be addressed in section 3.3.1.

The discussion below will address taxpayer rights and obligations which, in the author's opinion, may be negatively affected by the new developments regarding transparency and "fair share". These rights will address the right of the taxpayer to confidentiality, the right to privacy, the right to participate the exchange of information (to inspect the file, to be informed, to be heard and to appeal) and the taxpayer right to certainty and to transparency from tax authorities.

3. Rights and Obligations of the Taxpayer and Tax Authorities in the Area of Transparency and "Fair Share"

3.1. General issues

In the last decade, the rights and obligations of the taxpayer have received more attention from international organizations. For instance the OECD has introduced instruments such as the 2003 practice note "Taxpayers' Rights and Obligations"[34] and the report "Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies.[35] In respect of exchange of information, the OECD released a report in 2012 on the protection of confidentiality of information exchanged for tax purposes,[36] as well as guidelines in 2013 on the protection of privacy and transborder flows of personal data.[37]

The 2015 OECD report on tax administration identified the following taxpayer rights and obligations in relation to taxation.[38] Taxpayer rights are (i) the right to be informed, assisted and heard, (ii) the right of appeal, (iii) the right to pay no more than the correct amount of tax, (iv) the right to certainty, (v) the right to privacy and (vi) the right to confidentiality and secrecy. These rights imply also obligations, such as to be honest, to be cooperative, to provide accurate information and documents on time; to keep records; and to pay taxes on time.[39]

Countries and scholars[40] have also given attention to taxpayer rights and obligations. Examples include taxpayer charters and/or taxpayer declarations in Australia, Canada, Hong Kong and the United States.[41] Furthermore, the

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32. UK: HMRC, *Diverted Profits Tax*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385741/Diverted_Profits_Tax.pdf ("The first rule is designed to address arrangements which avoid a UK permanent establishment (PE) and comes into effect if a person is carrying on activity in the UK in connection with supplies of goods and services by a non-UK resident company to customers in the UK, provided that the detailed conditions are met. The second rule will apply to certain arrangements which lack economic substance involving entities with an existing UK taxable presence. The primary function is to counteract arrangements that exploit tax differentials and will apply where the detailed conditions, including those on an 'effective tax mismatch outcome' are met".).
33. UK: Part 3, sec. 78 Finance Act 2015, available at http://www.legislation.gov.uk/ukpga/2015/11/part/3/enacted.
34. OECD, Centre for Tax Policy and Administration, *Practice Note – Taxpayers' Rights and Obligations* (OECD 2003).
35. OECD, *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies* (OECD Publishing 2015), at 19. These rights were identified by the OECD in the Report on Tax Administration in the OECD and other Advanced and Emerging Economies. The choice of countries for this report takes into account OECD members, OECD accession countries, G20 countries that are non-OECD members and non-OECD members that are observers of the Committee on Fiscal Affairs, or the revenue body of which has worked closely with the OECD over recent years, and some countries to increase the geographical coverage (e.g. Morocco and Thailand).
36. OECD, *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (OECD Publishing 2012).
37. OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (OECD Publishing 2013). For more information, *see* http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm.
38. OECD, *Taxpayers' Rights and Obligations – Practice note* (2003), OECD, chap. 9 in *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies* (2015). These rights and obligations were identified by the OECD in the 1990 document, "Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries", published by the OECD Committee on Fiscal Affairs, Working Party Number 8.
39. OECD, chap. 9 in *Tax Administration* (2015), *supra* n. 38.
40. D. Bentley, *Taxpayers Rights: Theory, Origin and Implementation*, Series on International Taxation 31 (Kluwer Law International 2007); A. Cockfield, *Protecting Taxpayer Privacy Rights under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights*, 42 Univ. Brit. Col. L. Rev. 2 (2010); A.P. Dourado, *Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies*, European University Institute, Working Paper RSCAS 2013/11 (2013).
41. P. Pistone & P. Baker, *General Report*, in *The Practical Protection of Taxpayers' Fundamental Rights* (IFA Cahiers Vol. 100B, 2015), at 57-60, Online Books IBFD. *See also* OECD, chap. 9 in *Tax Administration* (2015), *supra* n. 38.

Confédération Fiscale Européenne[42] recently published a Model Taxpayer Charter in cooperation with the Society of Trust and Estate Practitioners (STEP) and the Asia-Oceania Tax Consultants' Association (AOTCA).[43] However, in the author's opinion, one of the drawbacks of the OECD instruments and the charters of the various countries is that these instruments are not mandatory, and therefore it is up to the countries to apply them – or not. In some cases, these instruments are merely guidance for tax authorities.

In the context of this article on transparency and "fair share", it is submitted that the instruments described in section 2. will change the relationship between taxpayers and tax authorities.[44] For taxpayers, more transparency and disclosure will be required on the structure of their business activities and payment of taxes, for instance by disclosing aggressive tax schemes (BEPS Action 12) and by exchanging country-by-country reporting, including the master file (BEPS Action 13). However, for taxpayers to voluntary comply with these new requirements, the tax authorities should also guarantee the right to confidentiality and the right to privacy, as well as ensure the taxpayer right to be heard and to be informed if information is being exchanged with other tax authorities.

Furthermore, it is submitted that the tax authorities should be transparent in terms of certainty, clarity and reliability in the implementation of the measures (both domestic and BEPS project related) to deal with abusive and aggressive tax planning. Requirements for taxpayer disclosure of aggressive tax planning may benefit both tax authorities and taxpayers, as on the one hand, tax authorities will receive information on how taxpayers operate, and on the other hand, taxpayers will receive approval of their tax planning structure and confirmation as to whether such structures can be characterized as aggressive tax planning. The problem is the lack of trust, on the one hand by taxpayers in tax authorities that these disclosures will not result in more audits; and on the other hand, by tax authorities in taxpayers, specifically as to whether business decisions taken by taxpayers are not merely for aggressive tax planning purposes.

The discussion below will address taxpayer rights, specifically the right to be informed, to be heard and to appeal, the right to confidentiality, the right to privacy, and the right to transparency in terms of certainty, reliability and clarity in light of the application of domestic anti-avoidance measures and rules to implement BEPS Actions.

3.2. Taxpayer rights in exchange of information

3.2.1. Taxpayer right to inspect the file, to be informed, to be heard and to appeal

The taxpayer rights addressed in this section are procedural rights, such as right to inspect files, to notification, to be heard, to object and to appeal against the exchange of information. These rights should offer the taxpayer an active role to prevent situations that may result in a breach of confidentiality or misuse of personal and business data exchanged.[45]

Following the analysis of the rights and obligations provided in the OECD Report on Tax Administration (*see* section 3.1.), it is submitted that one of the reasons to afford the taxpayer certain rights during the gathering of information to be exchanged, is that these rights are linked to obligations. As these obligations are also applicable to taxpayers before, during and after the tax procedure, the logical consequence is that the rights to be informed, to be heard and to appeal are also granted to taxpayers during exchanges of information.[46]

Another argument in support of granting rights to taxpayers in the exchange of information, is that such exchange may result in an assessment or in the draft of a new tax assessment, fines or criminal prosecution. Therefore, and taking into account that the taxpayer's interest will be affected by the exchange, the taxpayer should have a right of standing (i.e. *locus standi*) to review the accuracy of the information, including the right to inspect the files, to be heard and to appeal against such exchange of information.[47] This taxpayer right of standing is available, for example, in Switzerland (but, in that case, limited to tax procedures).[48]

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42. The Confédération Fiscale Européenne is an umbrella organization that includes 26 national organizations from 21 European countries, representing more than 100,000 tax advisers.
43. The charter is available at http://www.cfe-eutax.org/node/3134.
44. For a discussion of this changing relationship between taxpayers and tax authorities and the problems, *see* M.T. Soler Roch, *Tax Administration versus Taxpayer: A New Deal?*, 4 World Tax J. (2012), Journals IBFD.
45. For this argument, *see also* I. Burgers, *Taxpayers' rights in het gedrang?*, Nederlands Tijdschrift voor Fiscaal Recht 2015/2867.
46. These rights will be addressed by the author in the *Instituto Colombiano de Derecho Tributario* (ICDT) panel report on Taxpayer's Rights in Exchange of Information at the 40th Conference of the Colombian Tax Institute that will take place in Feb. 2016.
47. For taxpayer standing, *see* B. Dearinger, *The Future of Taxpayer Standing in Establishment Clause Tax Credit Cases*, 92 Ore. L. Rev. 2 (2013).
48. CH: art. 48(1) Federal Act on Administrative Procedure (*Loi fédérale sur la procédure administrative*). The taxpayer has the right to appeal if he has not participated in the proceedings before the tribunal of lower instance, or if he has been specifically affected by the contested ruling, and if he has an interest that is worthy of protection. *See* http://www.admin.ch/opc/en/classified-compilation/19680294/index.html.

It is submitted that even though the multilateral instruments on exchange of information (the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, the Common Reporting Standard, and the Multilateral Competent Authority Agreement) have left the protection of taxpayer rights to domestic legislation, one could argue that the peer review of the standard of transparency by the Global Forum on Transparency and Exchange of Information for Tax Purposes, specifically as regards compliance of Forum member countries with the standard of transparency, has reduced taxpayer rights in the exchange of information. According to the terms of reference of the peer review, exchanges of information should be timely and efficient. Therefore, countries should expect to receive the information requested within 90 days or an update report on the status of the request.

The 2013 IFA General Report addressed the reason why some countries afford the taxpayer the right to be informed, to be heard and to appeal during an exchange of information. The general reporter stated that (at that time) there were mainly two different views among countries. The first was that exchange of information is “fact gathering” and thus the taxpayer has no rights during an exchange of information. The second was that exchange of information is part of the tax procedure and thus the taxpayer has rights also during exchanges of information.[49]

Presently, in the author’s opinion, the consequences of the above-mentioned peer reviews have resulted in countries’ repealing taxpayer rights during exchange of information, regardless of whether the exchange of information is regarded as fact gathering or as part of a tax procedure. In this regard, the 2015 IFA General Report stated that because of the peer reviews by the Global Forum on Transparency and Exchange of Information for Tax Purposes, countries have changed their domestic law mainly to repeal or reduce the rights to notification and to challenge the exchange of information. The report stated that, according to the branch reports for Austria, Liechtenstein, the Netherlands, Portugal, Switzerland and Uruguay, procedures to notify the taxpayer (including the possibility to challenge the exchange of information):

> have been removed entirely or cut down. In all cases, the removal of the right to notification and to challenge came about as a result of pressure from the OECD Forum on Transparency and Exchange of Information and as a result of a threat to give a lower peer review rating to the countries concerned.[50]

To sum up, due to the developments of the peer reviews, including the timely exchange of information (i.e. 90 days) and the introduction of automatic exchange of information as the global standard, taxpayer rights during exchange of information have been reduced. As a consequence, and in respect of the exchange of information, several questions need to be posed to taxpayers and to tax authorities: How will the confidentiality and privacy of the taxpayer be protected? And what is the role of the taxpayer in the exchange of information? How will the tax authorities use the information?[51] And what safeguards can be introduced to protect the confidentiality and privacy of the exchange of information? The protection of the right of confidentiality, the right of secrecy and the right to privacy will be addressed below.

3.2.2. Taxpayer right to confidentiality and secrecy

The author has argued elsewhere that not all countries have the financial resources, administrative capacity and/or technological infrastructure to process taxpayer information and ensure that such information will be secured and protected.[52] Therefore, one of the challenges for tax authorities is to protect the taxpayer right to confidentiality when an exchange of information may create a risk for the taxpayer’s business, for instance in the event of a leak to the press or third parties, or in situations where the information is being requested for other motives such as political persecution.

The first situation may arise where the country receiving the information does not have proper safeguards to guarantee the confidentiality of the information exchanged, or where the country lacks the technological infrastructure and resources

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49. X. Oberson, *General Report*, in *Exchange of Information and Cross-Border Cooperation between Tax Authorities* (IFA Cahiers Vol. 98b, 2013), at 19-20, Online Books IBFD.
50. Pistone & Baker, *supra* n. 41, at 62.
51. For this argument, *see also* M.B.A. van Hout, *Gedeeld geheim, verloren geheim*, Tijdschrift Formeel Belastingrecht (2015/6). Van Hout rightly states that the confidentiality provisions in tax law are overruled by an almost uncountable number of legal provisions which require that tax authorities provides information on taxpayers to other – mainly governmental – entities. Furthermore, taxpayers are generally not informed if the tax authorities are required to provide information to others. Therefore it is impossible for taxpayers to oversee what eventually happens with the information that they provide to tax authorities.
52. Mosquera Valderrama, *supra* n. 15, at 367.

to ensure that (i) the information will be received by the appropriate office within the tax authorities,[53] (ii) the information will be encrypted[54] and (iii) access to the information will be monitored.

Some countries, such as Canada, have introduced safeguards in their tax treaties to protect the confidentiality of exchanged information. As a result, Canada will exchange information only with countries that have sufficiently secure and compatible data encryption technology.[55] Other countries, such as the United States, have developed an electronic monitoring system to protect against unauthorized access.[56]

However, not all countries offer these safeguards, and even where safeguards do exist, it is difficult to guarantee that the other country will offer the same protection. Consider the example of *Aloe Vera*,[57] where there were serious financial consequences for the taxpayer due to a leak to the press of false data by the tax authorities of the country receiving the information (i.e. Japan). Aloe Vera claimed civil damages from the US tax authorities due to the unauthorized disclosure in the Japanese news of the information exchanged under the Japan-United States Income Tax Treaty(2003).

The second situation is seen, for example, where the country receiving the information has an underlying political motive, such as expropriation of the assets of a regime's political opponents. This situation may arise in some countries where the members of the opposition are being "politically" targeted under criminal charges of corruption. For instance in the *Yukos Oil* case (*see* section 3.3.3.), the majority of the shareholders of Yukos "alleged that Russia forced Yukos into bankruptcy through allegedly inflated tax claims in a vendetta against its formed CEO".[58]

In order to protect the confidentiality of exchanged information, the 2015 IFA General Report introduced the following as one of the minimum standards to ensure the practical protection of fundamental taxpayer rights: "No disclosure of confidential taxpayer information to politicians, or where it might be used for political purposes".[59] According to the General Reporters, disclosures to members of parliament is not a generally permissible exception and, therefore, the General Reporters considered as best practice that "the data should be disclosed to independent officials, subject to confidentiality obligations, who report to the Parliament".[60]

In this author's opinion, another situation that should be carefully monitored is the exchange of information with some Latin American and African countries in which there is higher incidence of corruption and kidnapping.[61] The monitoring should protect the confidentiality of the information exchanged, as well as the use of a taxpayer's personal and business information only by the persons authorized by law and for the purposes for which the information is exchanged.

Based on the need to protect the confidentiality and the reasons to request the information, it is recommended that the OECD and countries introduce safeguards to protect the exchange of information and to ensure that the information is being requested free from ideological or political motivation, and that the disclosure is being made to the competent tax authority that will be obliged to respect the confidentiality of the information exchanged. For this purpose, the author recommends that the OECD monitor the effective application of the purpose-specification principle in respect of exchanges of information. This principle has been developed in article 9 of the 2013 OECD Guidelines Governing the

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53. For instance in Colombia, Phase 2 of the peer review stated that one of the problems in the delay of exchange of information was that the three requests from the treaty partner were "inadvertently sent directly to the competent authority for exchange of customs information (RILO office)" (para. 403). In respect of these requests, "the Commissioner being the competent authority for the exchange of information on request, was neither aware of these request or of the information being sent to the treaty partner" (para. 404). Therefore, Colombia was recommended "to implement an organizational and formal process for the exchange of information and to closely monitor its EOI processes to ensure all requests are processed in a clear, communicative and efficient manner". OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Reviews: Colombia 2015: Phase 2: Implementation of the Standard in Practice* (OECD Publishing 2015).
54. Examples of these electronic systems include the Common Communication Network, TLW Mail Systems, Electronic Forms, Encrypted CDs and Track and Trace Emails. Oberson, *supra* n. 46, at 37-38.
55. *IFA Cahiers 2013*, *supra* n. 49, Canada, at 172.
56. US: Internal Revenue Code sec. 7431. *See also* OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: United States 2011: Combined: Phase 1 + Phase 2, (OECD Publishing 2011), para. 228, at 81.
57. US: DC Ariz., *Aloe Vera of America et al. v. U.S.*, case 2:99-cv-01794. The author has analysed the *Aloe Vera* case elsewhere stating: "Aloe Vera claimed damages based on the duty of the tax administration in the United States to ensure that the confidentiality of the exchange of information should be protected. The Arizona Federal Judge awarded the plaintiffs USD 1,000 each in statutory damages. The claim by the plaintiffs was USD 52m". Mosquera Valderrama, *supra* n. 15, at 368.
58. P.K. Sidhu, *Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?*, 68 Bull. Intl. Taxn. 11 (2014), at 602, Journals IBFD. The CEO, Mikhail Khodorkovsky, was opposed to the political regime of Putin (the Russian President). *See* S. Walker, *Mikhail Khodorkovsky on Life After Putin*, The Guardian (26 Dec. 2014).
59. The General Report also refers to India, stating that in Poland disclosure to the members of the Parliament is allowed. Pistone & Baker, *supra* n. 41, at 61.
60. Pistone & Baker, *supra* n. 42, at 30.
61. Mosquera Valderrama, *supra* n. 15, at 370.

Protection of Privacy and Transborder Flows of Personal Data (OECD Privacy Guidelines), resulting in the stipulation that the purpose for which the data may be exchanged be made at the time of the data collection, and that the subsequent use of the data be only for that purpose.[62]

3.2.3. Taxpayer right to privacy

The multilateral instruments have left the protection of the right to privacy (including personal data) to the domestic rules of countries.[63] However, in the author's opinion, the OECD instruments should also provide safeguards to ensure the protection of personal and business data of individuals (including shareholders) and legal entities. The OECD instruments do not address the type of personal data that can be provided. In this context, it could be safely argued that all types of personal data may be exchanged, such as date and place of birth, tax identification number, personal address, bank accounts, nationality and any data that can be also regarded as sensitive data by some countries.[64]

Questions will then concern what is the legal basis for allowing the exchange of personal data. What are the remedies available for the taxpayer if the personal data are leaked to the press or to third parties? Another relevant issue that should be taken into account concerns what would happen if there were a mistaken identity and personal data have been already exchanged.

All these questions need to be addressed by the OECD when dealing with exchange of information. These questions will be even more relevant in the context of automatic exchange of information, as it will be more difficult and burdensome for tax authorities to ensure the accuracy and protection of information exchanged. In automatic exchange, not only specific information, but also a bulk of general information will be exchanged, and therefore countries should take into account that – due to the fast pace in which such exchanges will take place – the result may be less control in the accuracy and use of the information by the receiving and supplying authorities.

The protection of taxpayer rights in automatic exchanges of information has also been addressed by the EU Article 29 Data Protection Working Party in respect of the introduction of the Common Reporting Standard and the Multilateral Competent Authority Agreement. The Working Party stated:

> while the exchange of information is legitimately regarded as an essential tool in the fight against tax evasion, it is nevertheless necessary to ensure that such an objective of general interest is pursued with full respect for individuals' fundamental rights, in particular the right to private life and the protection of personal data as required by European and international legal instruments.[65]

The Working Party also stated that in order to ensure adequate data protection, it is necessary to include in domestic laws and international instruments, substantive provisions that put in place adequate data protection safeguards.[66]

Therefore, and in line with the recommendation of the Working Party, the author recommends that the OECD monitor the effective implementation of the principle of safeguarding security as developed in the 2013 OECD Privacy Guidelines.

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62. OECD, *The OECD Privacy Framework* (OECD Publishing 2013), Part I: The OECD Privacy Guidelines, Chapter 1: Recommendations of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, available at http://www.oecd.org/sti/ieconomy/privacy.htm. Para. 9 of the OECD Privacy Guidelines states that "[t]he purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose".
63. Examples include the Privacy Act of Canada, the Federal Act on Data Protection of Switzerland (*Loi fédérale sur la protection des données*), the Dutch Personal Data Protection Act (*Wet bescherming persoonsgegevens*) and international instruments such as the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980), the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its Additional Protocol of 8 Nov. 2001. *See* sec. 3.1.
64. For example Canada and Switzerland have defined sensitive personal data in their privacy legislation. Canada provides for a broad spectrum of information relating to individuals, such as race, ethnicity, marital status, personal opinions and views on a wide range of topics (CA: Privacy Act (1985), sec. 3), whereas Switzerland provides for religious, ideological, health, and racial origin (CH: Federal Protection Act (1992), art. 3).
65. European Commission, Article 29 Data Protection Working Party, *OECD Common Reporting Standard*, letter to the OECD, Ares(2014)3066381 (18 Sept. 2014), at 2, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140918_letter_on_oecd_common_reporting_standard.pdf.pdf. The Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy.
66. The Working Party refers to Case C-293/12 (*Digital Rights Ireland Ltd.*) and Case C-594/12 (*Landesregierung, Seitlinger, Tschohl and others*). These cases were jointly decided on 8 Apr. 2014 by the Grand Chamber of the ECJ. The Court stressed the need for legislation to provide access for the competent national authorities to personal data and their subsequent use for purposes of prevention, detection or criminal prosecutions. The Court required objective criteria determining the limits for such operations, given the extent and seriousness of the interference with the fundamental rights as enshrined in arts. 7 and 8 of the Charter of Fundamental Rights of the European Union. Id. at 4, 5.

Under this principle, personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.[67]

3.3. Taxpayer right to certainty and transparency of the tax authorities

3.3.1. Definition of abusive and aggressive tax planning

From a tax policy perspective, it is critical that countries establish specific boundaries between acceptable tax avoidance and unacceptable tax avoidance (e.g. abusive and aggressive tax planning). The author has recommended elsewhere that, in order for abusive and aggressive tax planning to be both understood and regulated, domestic legislation should provide definitions of abusive and aggressive tax planning.[68] For this purpose, the guidance provided by the OECD and the European Union can be helpful.

In BEPS Action 6, the OECD has defined abusive tax practices as aiming to claim tax benefits (under either a treaty or domestic law) in situations where these benefits were not intended to be granted. This would include treaty shopping and any other case of abuse which may give rise to double non-taxation.[69] The European Commission has stated that aggressive tax planning exploits the differences in the tax systems.[70] Therefore, multinational companies may, for example, use holding companies or conduit companies to take advantage of a country's tax treaty network or to take advantage of low-tax jurisdictions so as to reduce their tax liability.

However, it is not clear what the boundaries are between abusive and aggressive tax planning,[71] as countries are still in the process of creating a framework that indicates the division between acceptable tax avoidance and unacceptable tax avoidance. One may consider that abusive and aggressive tax planning deals with the taxpayer activities; however, these activities – even though within the boundaries of the law – may be regarded as unethical[72] by some stakeholders in society.[73]

The discussion below will address the taxpayer right to legal certainty and transparency in terms of the availability, clarity, simplicity and reliability of tax rules. This analysis will be made in respect of domestic anti-avoidance measures and measures that implement the BEPS Actions.

3.3.2. Taxpayer right to transparency of the tax authorities in the application of domestic measures to tackle treaty abuse, as well as abusive and aggressive tax planning practices

3.3.2.1. A plea for legal certainty and transparency

As rightly argued by Owens, the notion of transparency should include clarity, simplicity and reliability.[74] Furthermore, Owens correctly states that "greater transparency between the taxpayer and the tax authorities is a good thing as it will lead to fewer disputes, greater mutual understanding and a relationship based on cooperative compliance".[75]

Scholars have argued in the past that tax rules need to be drafted with a great level of legal certainty. However, certainty "does not mean tax rules must be configured with a maximum level of legal certainty with regard to their effects, so that there is not 'room for interpretation at all'".[76] Along the same lines, Gribnau argues that "some uncertainty about the

67. *OECD Privacy Guidelines*, *supra* n. 62, at 15.
68. I.J. Mosquera Valderrama et al., *Tools Used by Developing Countries to Counteract Aggressive Tax Planning in the Light of Transparency*, working paper, Sustainable Tax Governance in Developing Countries Through Global Tax Transparency project (Development, Sustainability, Taxation and Transparency, DeSTaT). A paper containing the main findings of this research for the selected countries will be available soon at the website of the DeSTaT project, http://www.jus.uio.no/ior/english/research/projects/global-tax-tranparency/.
69. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 5 Oct. 2015), at 13, International Organizations' Documentation IBFD.
70. As indicated in the European Commission Recommendation of 6 December 2012 on Aggressive Tax Planning C (2012)8806 Final, at 2 ("it exploits the differences in tax systems by taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability".).
71. On this argument, *see also* Essers, *supra* n. 3, at 62, 63.
72. *See* e.g. the approach of Gribnau, stating that aggressive tax planning "moves way from this legal distinction between tax evasion and tax avoidance". Thereafter, the author provides a definition of aggressive tax planning as given by Lannis and Richardson. For Gribnau, since the recent affairs of Google, Starbucks and Facebook have shown that even though these corporations acted in accordance with the law, these corporations should not have "morally" used the gaps in the law (loopholes). The analysis of this definition of aggressive tax planning by Gribnau focuses on the question as to whether companies should include ethical considerations in their decision-making framework. Gribnau, *supra* n. 10, at 227.
73. For a discussion on developments in this respect, *see* Bender & Broekhuijsen, *supra* n. 10.
74. J. Owens, *Moving Towards Better Transparency and Exchange of Information on Tax Matters*, 63 Bull. Intl. Taxn. 11 (2009), at 557, Journals IBFD.
75. J. Owens, *International Tax Transparency: The "Full Monty"*, 68 Bull. Intl. Taxn. 9 (2014), Journals IBFD.
76. I.J. Mosquera Valderrama, *The International Tax Treaty Policy of Colombia*, 67 Bull. Intl. Taxn. 4/5 (2013), at 289, Journals IBFD.

meaning of the law is inevitable".[77] Furthermore, Gribnau properly addresses the difficulties for law-makers in balancing the inevitability of change and the need for legal certainty.[78]

In this context, in the author's opinion, countries should ascertain ways to maintain the balance between the need for jurisdictions to enforce their tax rules and the taxpayer right to have certainty as regards the tax rules applicable to their business activities. Up until now, countries have requested disclosure by taxpayers of their business activities and schemes; however the tax authorities have not been clear in the application of domestic anti-avoidance rules. This problem has been exacerbated in developing countries in Latin America and Africa where the tax authorities lack technical knowledge and administrative resources to deal with abusive and aggressive tax planning.[79]

The author calls for legal certainty and transparency on the part of tax authorities in terms of availability, clarity, simplicity and reliability of rules, including those containing anti-avoidance provisions.[80] To date, there is no certainty and transparency in the application of rules for taxpayers. A legislature may either introduce anti-avoidance rules with presumptions that will be later further fleshed out by the tax authorities, may change the rules retrospectively in order to tackle specific transactions, or may use anti-avoidance rules to justify expropriation for political reasons. Examples of these situations will be presented below in respect of Colombia, India and Russia, respectively.

3.3.2.2. The problematic cases of Colombia, India and Russia

In Colombia, the 2012 tax reform introduced a general anti-abuse provision regarding abuse of law, under which there is a presumption of abuse of law if three of five specified criteria are met.[81] In all cases of abuse, the burden of proof rests with the taxpayer. Despite the introduction of this provision, the scope of application and practical implications of these criteria have been left to the tax authorities. Some interpretative rulings (*conceptos*) issued by the tax authorities regarding the application of the abuse of law doctrine have been issued, and such rulings continue to be (at the time of writing in December 2015) issued.[82] As this provision is still new and in the process of being implemented, there has not yet been any litigation. However, in light of its broad scope, one can expect that this provision may well give rise to litigation in future.

In India, there was problematic application by the judiciary of transfer pricing rules in the *Vodafone International Holdings B.V.* case. The tax authorities tackled a holding company structure by applying a limitation on benefits provision through judicial interpretation in order to subject the taxpayer to withholding tax in India on the capital gains arising from an indirect transfer of shares. The Indian Supreme Court ruled in favour of the taxpayer on 20 January 2012, stating that this indirect transfer of shares was outside the tax jurisdiction of the Indian tax authorities and was thus not subject to any withholding tax in India.[83] Despite this ruling, the Indian government introduced retrospective amendments to its tax law that would have resulted in the Vodafone transaction's being subject to tax in India.[84] However, this retrospective amendment, which would have an effect of countering the Supreme Court ruling, has raised concern in the business

77. For an argument for the need of legal certainty in taxation, *see also* H. Gribnau, *Legal Certainty: A Matter of Principle* (8 Jan. 2013), Tilburg Law School Research Paper 12/2014, at 82, available at http://ssrn.com/abstract=2447386.
78. Gribnau, *Legal Certainty: A Matter of Principle*, *supra* n. 77, at 83.
79. This is line with the argument of the present author in another article, stating that not all countries in Latin America and Africa will be affected by the BEPS Project and that the problems of these countries may be others that can be deal with, for instance, by following the transparency initiatives of the Extractive Industry (EITI). Mosquera Valderrama, *supra* n. 11, at 627.
80. Transparency in respect of anti-avoidance rules has been argued by the author in *Tools Used by Developing Countries to Counteract Aggressive Tax Planning in the Light of Transparency*, *supra* n. 68. The countries analysed therein are Brazil, Colombia, South Africa, Uganda and Uruguay. The following issues are addressed: domestic anti-abuse rules to tackle aggressive tax planning, policy issues of the selected countries regarding international tax arbitrage, the regime (if any) regarding holding companies, the existence (or not) of enhanced relationships between taxpayers and multinationals, and issues such as conduit structures, foreign direct investment and administrative cooperation.
81. In Colombia, with the 2012 Tax Reform, the legislature introduced in article 869 of the Tax Code specific criteria to regulate abuse of law. In Colombia, abuse for tax purposes refers to the use or implementation, by means of one transaction or a series of transactions of any entity, legal act or procedure that aims to change, disguise or modify artificially the tax consequences that would otherwise arise for the taxpayer or related parties, shareholders or real beneficiaries. Under article 869-1 of the Tax Code, there will be a presumption of abuse of law if any three of the following five criteria are met: (i) the transaction is between related parties, (ii) the transaction makes use of tax havens, (iii) the transaction includes a special entities regime or a tax-exempt entity, (iv) the price agreed differs by more than 25% from the arm's length price and (v) the conditions agreed by the parties would have not been agreed by third parties in similar circumstances. I. Mosquera Valderrama, *Sweeping Tax Reforms Takes Effect*, Tax Notes Intl. (4 Feb. 2013), at 433.
82. A good example is the Aug. 2013 interpretative ruling by the tax authorities addressing the interpretation of the criteria that must be met for the presumption of abuse of law to take place. CO: DIAN (Tax Administration), *Concepto* (Ruling) 054120 of 28 Aug. 2013. More recently, another example is the Nov. 2015 interpretative ruling 25473 by the tax authorities (13 Nov. 2015).
83. IN: SC, 20 Jan. 2012, *Vodafone International Holdings B.V.*, Tax Treaty Case Law IBFD. *See also* S. Sanghvi, Supreme Court Ruling in case of Vodafone – Details (26 Jan. 2012), News IBFD.
84. P. Gupta, *Circular on Taxability of Dividends Declared by Foreign Companies under Section 9 of ITA* (7 Apr. 2015), News IBFD.

community, including among foreign investors. Following a failed conciliation between the tax authorities and Vodafone,[85] proceedings for arbitration under the bilateral investment agreement between the Netherlands and India were initiated by Vodafone.

In Russia, a problematic example is the expropriation of the Yukos Oil Company which was regarded by some scholars as expropriation carried out for political reasons.[86] This case has been discussed by scholars and Courts from a tax perspective[87] as well as from an investment perspective.[88]From a tax perspective, the European Court of Human Rights (ECtHR) rejected the allegations by Yukos on the reasonability and foreseeability of the interpretation of Russian tax legislation taking into account that "in view of the complexity of the relevant field of regulation, corporate entities, as opposed to individual taxpayers, may be required to act with additional caution and diligence by consulting competent specialists in this sphere".[89]

The analysis of this case has been further made by Calderón Carrerro and Quintas Seara who concluded that Yukos:

> challenged the interpretation of Russian tax legislation as not reasonable or foreseeable. In particular, the taxpayer had argued that the tax proceedings conducted by the Russian authorities were contrary to the property clause as set out in the ECHR, as the existing legal basis did not cover the tax assessment and also breached the established administrative practice. The ECtHR, with regard to the circumstances of the case and as the taxpayer was a large company, also held that the taxpayer's duty of diligence was greater and that, in addition, advice should have been sought on its operations to assess the risks of the tax scheme that was implemented. Accordingly, the ECtHR considered that the tax assessments were acceptable insofar as the legal basis was sufficiently clear, such that a diligent taxpayer could have foreseen what behaviour would have fallen within the concept of tax fraud.[90]

For Calderón Carrerro and Quintas Seara, *Yukos* "constitutes another leading case regarding unforeseeable interpretations of tax regulations that significantly affects the rights of taxpayers".

From an investment perspective, the Arbitral Tribunal (Arbitration Institute of the Stockholm Chamber of Commerce) applied a case-by-case, fact-based enquiry and concluded that there had been unfair treatment and expropriation, and ordered Russia to pay more than USD 50 billion to the former majority shareholders in Yukos.[91]

3.3.2.3. Are bilateral investment agreements the solution?

Some of the consequences of the use of bilateral investment agreements in tax matters, including the arbitration clause for indirect expropriation, were addressed by Sidhu, who stated that the mutual agreement procedure under tax treaties does not work and that, therefore, other alternatives (such as mediation and arbitration) should be considered.[92]

However, no reference has been made to the use of bilateral investment agreements in respect of domestic measures to prevent aggressive tax planning.[93] The question is whether the provisions of an investment agreement may used in response to a measure by a government that aims to prevent aggressive tax planning. These issues will most likely be

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85. This follows the failed non-binding conciliation that was proposed by the Indian Cabinet on 4 June 2013. P. Gupta, *Indian Cabinet Clears Proposal for Non-Binding Conciliation to Resolve the Vodafone Tax Dispute* (17 June 2013), News IBFD.
86. P.B. Stephan, *Taxation and Expropriation: The Destruction of the Yukos Oil Empire*, 35 Houston J. Intl. L. 1 (2013).
87. *See* J.M. Calderón Carrero & A. Quintas Seara, Transfer Pricing Disputes, Abusive Tax Schemes and the Protection of the European Convention on Human Rights against Oppressive Tax Actions: The Yukos Case, 67 Bull. Intl. Taxn. 6 (2013), Journals IBFD.
88. *See* Stephan, *supra* n. 86. For details of the case from an investment perspective, *see* C.S. Gibson, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: A Classic Case of Indirect Expropriation*, 30 ICSID Review: Foreign Investment L.J. 2 (2015), at 303.
89. ECtHR, 20 Sept. 2011, Application 14902/04, *Oao Neftyanaya Kompaniya Yukos v. Russia*, para. 559.
90. Calderón Carrero & Quintas Seara, *supra* n. 87, at 283.
91. *See* for an analysis of this case P.K. Sidhu, *Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?*, 68 Bull. Intl. Taxn. 11 (2014), at 602, Journals IBFD.
92. Sidhu, *supra* n. 91, at 602.
93. Some bilateral investment agreements have carved out taxation. However, where it is not excluded, countries have initiated investment disputes dealing mainly with issues of taxation and indirect expropriation. Up until now, to the author's knowledge, there have been no studies that consider data on the number of cases dealing with taxation, nor recent studies (except the 2009 study mentioned below) dealing with the topic of taxation and investment in the context of indirect expropriation. The only data available are from either arbitral awards or reports on investment cases published by organizations such as the International Institute for Sustainable Development (IISD). For a study of the relationship between tax and investment, *see The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (K. Sauvant & L.E. Sachs eds., Oxford University Press 2009).

invoked by corporations in the future. Perhaps the best illustration of this is seen in the international arbitration under the bilateral investment agreement in the Indian *Vodafone* case (discussed above).

To date, the issue of certainty in bilateral investment agreements has been dealt with by arbitral tribunals on a case-by-case basis. One of the reasons considered by an arbitral tribunal is the existence of a stabilization clause; in such case, the investor will have a legitimate expectation and its breach may be considered expropriation.[94] In general, stabilization clauses have been agreed by countries in Latin America and Africa in order to protect investors from the changes in tax rules.[95] These clauses effectively guarantee that legislative changes (mainly an increase in the tax rate or repeal of tax exemptions) will not be applicable to the taxpayer for the period of the contract/clause (i.e., five, ten or twenty years). Such stability clauses have previously applied to the extractive industry (e.g. in Ghana, South Africa and Zambia) and to specific economic sectors (e.g. Chile, Colombia until 2012 and Peru).[96]

However, as the cases dealt with in Colombia, India and Russia would not be covered by a stabilization clause, in the author's opinion it will not be possible to argue that bilateral tax treaties may provide some answer to deal with the lack of transparency and certainty of a country's rules aimed at tackling aggressive tax planning.

Another issue that needs to be considered in respect of legal certainty for investors is the EU approach to State aid in respect of the rulings issued by the Netherlands to Starbucks and by Luxembourg to Fiat.[97] These cases may bring uncertainty to all the rulings that have been granted by tax authorities in Europe and that may be regarded as State aid by the European Commission. The question will then be whether the tax authorities can guarantee legal certainty in their rulings/agreements issued to taxpayers.

In principle, following the two decisions by the European Commission, countries and taxpayers may argue that the purpose of the rulings (i.e. to offer certainty) is being taken away by the State aid rules in the European Union. However, this issue cannot be addressed by the legitimate expectations in investment agreements, but by the European Court of Justice, as in this case the decisions regarding Starbucks and Fiat will need to address the interpretation of State aid rules in EU treaties. The Netherlands and Luxembourg have given notice that they will appeal the decisions of the Commission regarding Starbucks[98] and Fiat,[99] respectively.

It is submitted that this situation of uncertainty in respect of State aid may be an opportunity to create a new system of rulings in the European Union based on mutual trust and transparency between the taxpayer, the tax authorities and the EU authorities.[100] By means of these rulings, the taxpayer discloses its tax planning arrangements in order to learn whether those arrangements could be considered as aggressive tax planning.[101] The main issue is then that the tax authorities may provide their opinion in respect of tax planning arrangements by means of an advanced tax ruling. Such a ruling should be respected by the parties (the taxpayer, tax authorities and EU authorities) based also on the principles of legal certainty and mutual trust.

Furthermore, and in order to achieve transparency, these rulings will need to be made available to the public (i.e. taxpayers other than those involved in the ruling), so that no 'good and secret deals' are being made by some

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94. Sidhu, *supra* n. 91, at 600 (dealing with the *AES Summit Generation Limited* and *Alpha Projektholding* cases).
95. One of the problems regarding these clauses is the lack of information on stability clauses (e.g. in Sub-Saharan Africa), which leads to less transparency and accountability on the part of investors and governments regarding the potential benefits of such clauses. In fact, the Tax Justice Network in Africa argues that these clauses "prevent future governments from renegotiating contract provisions, possibly including limits to length of the contracts" and therefore reduce governments' bargaining power in international negotiations. *The Nairobi Declaration on Tax and Development*, made at the Pan-African Conference on Taxation and Development, 25-26 Mar. 2010. For information on the Tax Justice Network, *see* www.taxjusticeafrica.net.
96. Mosquera Valderrama, *supra* n. 11, at 622, 623.
97. European Commission, *Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands are Illegal under EU State Aid Rules* (21 Oct. 2015), press release, available at http://europa.eu/rapid/press-release_IP-15-5880_en.htm.
98. M. Schellekens, *Dutch Government of Appeal Commission's Decision in Starbucks* (30 Nov. 2015), News IBFD.
99. Luxembourg announced on 4 Dec. 2015 that it will appeal the decision of the EU Commission in order to seek clarity and foreseeability on the practice of tax rulings. According to the Ministry of Finance, "the vast majority of EU member states use tax rulings to provide legal certainty for the taxpayer. In its decision, the Commission has used unprecedented criteria in establishing the alleged State aid, thus putting into jeopardy the principle of legal certainty. In particular, the Commission has not established in any way that Fiat received selective advantages within the meaning of article 107 TFEU". LU: *Luxembourg to Appeal the Commission's Fiat Decision*, press release (4 Dec. 2015), available at http://www.gouvernement.lu/5497651/04-luxembourg-fiat.
100. The use of rulings has been also argued by Bentley, who states that "the proliferation of ruling regimes provides a significant source of assistance to taxpayers in the assessment process, particularly in relation to complex or uncertain areas of the tax law". Bentley, *supra* n. 14, at 33.
101. This approach follows BEPS Action 12, which provides for mandatory disclosure of aggressive tax schemes. However, in the author's opinion, the element of mandatory disclosure should also provide an element of certainty and guarantee that the information provided will be confidential and treated as secret by the tax authorities.

taxpayers.[102] In this author's opinion, in this new system of rulings, the European Commission should also be transparent in the way that State aid rules are applied, and guarantee that the automatic exchange of rulings has sufficient safeguards to protect the confidentiality, secrecy and privacy of the information exchanged.

3.3.3. Taxpayer right to transparency in respect of the BEPS Actions

The BEPS Action Plan provides for new standards that will be most likely implemented by the 44 countries participating in the OECD's BEPS project,[103] as well as by countries that are participating at the inaugural meeting of the Multilateral Instrument Ad Hoc Group.[104] In the context of the BEPS project, one question for taxpayers concerns how to ensure proper disclosure, including the filing of country-by-country reporting. And for tax authorities, the question concerns how to implement the BEPS Actions in rules that are clear, as well as reliable for taxpayers to apply and for tax authorities to enforce.

To date, it is not clear how the multilateral instrument will be developed. There may be a risk that countries will fail to reach consensus on the provisions of the multilateral instrument or that several reservations to such agreement will be made by countries that seek to make implementation of the provisions of the agreement more difficult for OECD and non-OECD countries, including developing countries.[105]

In terms of transparency, the OECD, and the countries participating in the international conference need to provide more information to taxpayers – for instance regarding which rules will be implemented, and how tax authorities will guarantee that rules implementing the BEPS Actions are clear, easy to apply and reliable. One of the problems with the introduction of the BEPS Actions is that it is not clear how these rules will be applicable in practice, including how these rules will modify bilateral tax treaties. Most likely, tax authorities will provide further regulations that will further develop these rules. At the time of writing, it is not clear how this implementation will take place, even though the OECD has already announced that a monitoring group will be created to review the implementation of the BEPS Actions.[106] This situation will bring more uncertainty to the taxpayer's position.

4. Conclusions and Recommendations

This new era of transparency and "fair share" calls not for McCarthyism, but for the drafting of tax rules that should be clear for tax authorities to enforce and for taxpayers to rely on.

The word "McCarthyism" is used to illustrate the practice of making accusations without proper evidence. In this article, this word is used to argue that even though transparency calls for payment of fair share and exchange of information, multinationals should also have rights. These rights include the right to have transparent rules, the right to confidentiality and privacy, the right to participate before, during and after the exchange of information. The current developments enhance more transparency of multinationals, but these developments should also enhance transparency of the tax administration and the protection of taxpayers' rights.

In this context, the main conclusion of this article is that the search for transparency and "fair share" calls for a new balance and the need for jurisdictions to enforce their tax rules and to guarantee the rule of law, legitimate expectations and the protection of taxpayer rights.

Due to the peer review by the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as the introduction of automatic exchange of information as the new global standard, there are fewer safeguards, and therefore there is a risk that (i) an exchange may result in a leak to the press or third parties of business and personal data and (ii) situations will arise where the tax exchange is motivated by political or ideological reasons. In this context, protection of taxpayer rights is called for, including the rights to confidentiality, to privacy and to participate (to inspect,

102. This is achieved by the automatic exchange of rulings that has been introduced by the European Union. *Supra* n. 24.
103. The OECD Committee on Fiscal Affairs, which is the steering body for the BEPS Project, brings together 44 countries on an equal footing: all OECD members, the BEPS associates (8 non-OECD-G20) and OECD accession countries (Argentina, Brazil, China, Colombia, India, Indonesia, Latvia, Russia, Saudi Arabia and South Africa). OECD, *Information Brief: 2014 Deliverables*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2014).
104. At the time of writing, more than 80 countries have committed to participate in the inaugural meeting of the Multilateral Instrument Ad Hoc Group; *see* http://www.oecd.org/tax/treaties/work-underway-for-the-development-of-the-beps-multilateral-instrument.htm.
105. For this argument, *see* Mosquera Valderrama, *supra* n. 15, at 381, 382; R. Eicke, *A BEPS Multilateral Instrument: Practical Solution or Elusive Pipe Dream?*, Tax Notes Intl. (10 Nov. 2014), at 528.
106. The 2015 Final Report on Action 15 states that "in 2016 OECD and G20 countries will conceive an inclusive framework for monitoring, with all interested countries participating on an equal footing". OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report*, at 3, International Organizations' Documentation IBFD.

be notified, be heard and appeal) in the exchange of information. Furthermore, an international (mandatory) instrument should be developed to address taxpayer rights in an exchange of information and to introduce safeguards, including the security and purpose safeguard to be applicable to exchanges of information between countries.

In respect of abusive and aggressive tax planning, more certainty and transparency are called for, – in terms of availability, clarity, simplicity and reliability of the rules – from the tax authorities. The protection of the rights of multinationals by tax authorities is necessary in order to improve the relationship between taxpayers (multinationals) and tax authorities, and to enhance voluntary compliance by taxpayers. This relationship should be based on mutual trust and legitimate expectations between taxpayers and tax authorities.