Going, Going, Gone . . . Global: A Canadian Perspective on International Tax Administration Issues in the "Exchange-of-Information Age"

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Avec l'arrivée du 21e siècle, la mondialisation est dorénavant un fait accompli. La maxime est devenue réalité : le monde ne connaît plus de frontières. L'internationalisme actuel soulève une foule de questions intéressantes à caractère politique, idéologique environnemental, culturel, financier et fiscal. Le présent article examine toutefois les répercussions de l'interdépendance économique mondiale sur la gestion de l'impôt à l'échelle mondiale.

Lorsque nous évaluons l'incidence de la mondialisation sur la gestion de l'impôt, il est important de tenir compte du rôle fondamental que l'information a toujours joué à cet égard. Pour les gestionnaires fiscaux, l'information se situe au cœur des régimes de conformité et d'exécution. Sans une circulation systématique de l'information sur les activités des contribuables, les administrations fiscales nationales ont beaucoup de difficultés à repérer et à vérifier les opérations. Ce type d'obstacle nuit à son tour à une évaluation adéquate de l'impôt à payer et à une perception efficace des recettes fiscales.

Sur le plan interne, un certain nombre d'administrations se fient dans une plus ou moins large mesure à une certaine forme de divulgation volontaire de la part des contribuables. L'autocotisation n'est cependant plus efficace si les administrations fiscales ne sont pas en mesure de recueillir l'information et d'en vérifier la conformité de façon indépendante. Les administrations fiscales disposent donc d'une panoplie d'outils de vérification et d'enquête qui leur permettent de recueillir les renseignements fiscaux et de les examiner.

Bien que les sources internes d'information représentent une partie essentielle des renseignements fiscaux, leur efficacité est essentiellement limitée par leur origine dans la législation fiscale. En concluant des accords de coopération internationale, les administrations fiscales ont dû surmonter les restrictions territoriales apportées à leurs pouvoirs de vérification et d'exécution. Ces efforts se sont surtout traduits par la conclusion de traités bilatéraux contenant des dispositions sur l'échange d'information.

Alors que les administrateurs fiscaux ont toujours eu à fonctionner tant à l'échelle nationale qu'internationale, l'environnement mondial actuel a modifié les règles du jeu

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pour les contribuables. Pour illustrer ce point, l'auteur se penche sur deux facettes précises de la mondialisation, à savoir le commerce électronique et la compétition fiscale dommageable. Ces phénomènes témoignent d'une tendance croissante aux opérations transfrontalières incorporelles, décentralisées et anonymes, combinées à une diversion du numéraire et autres capitaux mobiles semblables vers des territoires sans impôt ou à taux d'imposition peu élevé. Il est cependant clair que l'accès accru à l'information a ouvert des possibilités pour les contribuables en leur offrant davantage de choix et un contrôle plus direct de leurs affaires. Entre-temps, les administrations fiscales constatent qu'il devient de plus en plus difficile de conserver le contrôle de la circulation de l'information et, en particulier, de recueillir et de vérifier les renseignements fiscaux essentiels. C'est ce paradoxe entre, d'une part, la disponibilité générale de l'information d'et, d'autre part, l'absence d'information fiscale transnationale qui se situe au cœur des défis qui se posent aux administrateurs fiscaux aujourd'hui.

Pour combler cette lacune de l'information, les administrations nationales ont mis l'accent sur l'amélioration de la coopération administrative internationale. En particulier, ils ont travaillé à faciliter l'accès aux renseignements fiscaux et son partage. Le présent article examine les diverses orientations de ces efforts. Certaines initiatives reposent sur les formes traditionnelles d'échange de l'information, tandis que d'autres font davantage appel à des moyens plus détournés, mais chacune a, directement ou indirectement, élargi la portée de l'échange d'information. Pour cette raison, ce qui constitue un « échange d'information » aujourd'hui devrait être interprété et compris dans le sens le plus large.

ABSTRACT

As the 21st century gets underway, globalization is firmly entrenched as the status quo. The mantra has come true: it really is a small world after all. The present internationalism raises a host of interesting political, ideological, environmental, cultural, financial, and tax issues. This article, however, looks specifically at the implications that global economic interdependence has for international tax administration.

When we explore the impact of globalization on tax administration, it is important to recognize the pivotal role that information has always played in that regard. Tax administrators use information as the lynchpin of their compliance and enforcement systems. Without a systematic flow of information on taxpayers' activities, national authorities have great difficulty in identifying and verifying transactions. This kind of impediment in turn hinders the proper assessment of tax liabilities and the efficient collection of tax revenues.

In the domestic context, a number of jurisdictions maintain their fiscal regimes by relying to a greater or lesser degree on some form of voluntary disclosure on the part of their taxpayers. Self-assessment, however, falls short if revenue authorities are unable to gather information and verify compliance independently. Accordingly, tax administrators have at their disposal a wide array of audit and investigative tools that enable them to access, inspect, and collect tax information.

While domestic sources of information form an essential part of tax administration, their effectiveness is inherently limited by their genesis in national legislation. Tax authorities have had to overcome the territorial restrictions placed on their verification and enforcement powers by entering into cooperative international arrangements. Such efforts have predominantly taken the form of bilateral treaties providing for exchange of tax information.

While tax administrators have always had to operate on both a domestic and an international level, the current global environment has created a whole new playing field for taxpayers. To illustrate the point, this article examines electronic commerce and harmful tax competition as two specific facets of globalization. These phenomena show a growing trend toward anonymous, decentralized, intangible, cross-border transactions, coupled with the diversion of financial and similarly mobile capital to low-tax or no-tax jurisdictions. It is clear that increased access to information has opened up opportunities for taxpayers by giving them more choices and more direct control over their affairs. Meanwhile, revenue authorities are finding it increasingly difficult to maintain control over the flow of information, and in particular to gather and verify essential tax information. It is this paradox between the general availability of information on the one hand and a lack of transnational tax information on the other that lies at the heart of the challenges facing tax administrators today.

To tackle this information deficiency, national authorities have concentrated on improving international administrative cooperation. They have worked in particular on facilitating access to and sharing of tax information. This article explores the various directions their efforts have taken. While some initiatives have built on traditional forms of information exchange and others have employed more circuitous routes of assistance, each has, directly or indirectly, opened up the scope of information exchange. For this reason, what constitutes "exchange of information" today should be interpreted and understood in the broadest sense.

KEYWORDS: INFORMATION EXCHANGE ■ TAX ADMINISTRATION ■ GLOBALIZATION ■ TAX TREATIES ■ ELECTRONIC COMMERCE ■ HARMFUL TAX PRACTICES

INTRODUCTION

A few years ago, electronic commerce was touted as "the most consequential tax issue of the new millennium."[1] Likewise, the increasing use of tax havens was heralded as "one of the most important phenomena of the last half-century."[2] Such proclamations naturally prompt further inquiry about the interplay of these developments in the field of taxation. This article delves beneath the rhetoric and makes that connection by relating these issues to the new information technology and situating them within the broader context of globalization. This linkage is used deliberately as a means of exploring the impact of globalization on international tax administration.

Globalization generally refers to the extensive integration of world economies stemming from increased international trade and competitiveness. It is the product of a variety of developments over the last few decades, including the removal of legislative controls on foreign investment, liberalization of exchange controls, innovations in financial market transactions, high mobility of capital, and rapid technological change.[3] With respect to the last factor, the Internet can be viewed as one of the key facilitators of globalization.

In terms of tax administration, the most significant aspect of the electronic medium lies in its globalization of information. In this respect, it has been pointed out that the fundamental importance of the Internet is the facility with which information can be exchanged, whether that information takes the form of a personal photograph or a billion dollars.[4] An increasing number of things that traditionally have had a physical presence are now manifesting themselves as information; technology is capable of transforming them into bits of data and transferring them as such.[5] The Internet has also removed both time and distance as impediments to the flow of information.[6]

The notion of what constitutes "information" has clearly expanded. Moreover, information is playing a larger and more valuable role both in the economy and in society generally.[7] Revenue authorities have long recognized the particular importance of information in the area of tax administration. Tax intelligence has been described as one of the cornerstones of an effective tax system.[8] In other words, tax administrators rely on a systematic flow of information in order to ensure that taxpayers are complying with their tax obligations.[9] Lack of control over tax information disables verification and enforcement mechanisms and hence can jeopardize the entire administrative order.

The paradox created by globalization is that at the same time as the communications revolution is providing the world with unparallelled access to information, tax authorities are finding it harder to obtain sufficient information about taxpayers' activities. For example, the Internet has enabled taxpayers to conduct cross-border transactions with much greater ease and flexibility than ever before. It has also given them access to the tax-related incentives offered by certain offshore jurisdictions. However, in opening up opportunities for taxpayers to transact business globally, the technology has shifted control over the flow of information away from national tax administrations. Electronic commerce therefore makes it potentially difficult or impossible for revenue authorities to obtain information or enforce collection.[10]

The thesis of this article is that economic globalization, as reflected in rapid technological change and a competitive tax environment, has mandated an unprecedented level of international cooperation and assistance in tax matters, as revenue authorities attempt to respond to the greatest challenge facing tax administration today: lack of information. Not surprisingly, the reaction of tax authorities to the verification and enforcement issues arising in the current "age of information" has been to enhance the exchange of information between tax jurisdictions. Tax administrations are not only building on traditional forms of exchange, but also developing new means of obtaining and reciprocating information. Thus, what constitutes "exchange of information" today must be considered in the broadest sense. The consequences of broadening and intensifying internationally coordinated administrative efforts also require consideration, since such developments will inevitably impinge on taxpayers' rights. Nevertheless, it appears that the globalization of information-gathering mechanisms is both necessary and unavoidable in today's globalized world.

The discussion that follows is divided into six main sections. The first examines the impact of globalization on tax administration, focusing specifically on the challenges posed by electronic commerce and harmful tax competition in order to highlight the kinds of problems currently confronting tax authorities. A common factor underlying these problems is a lack of information. In considering the causes of this deficiency, the second section reviews domestic administrative structures, and the third section outlines traditional forms of international cooperation and assistance. The fourth section then describes a number of recent initiatives designed to enhance access to and exchange of information. The fifth section considers how the new administrative measures may affect taxpayers' rights. Finally, the sixth section presents some concluding thoughts on the future direction of international tax administration.

THE IMPACT OF GLOBALIZATION ON TAX ADMINISTRATION

New Pressure Points

One of the most significant effects of globalization on tax administration is that national authorities have a greater need than ever before for information about taxpayers' activities. Paradoxically, revenue authorities find it increasingly difficult to obtain such information, even though globalization has also provided unparallelled access to and use of information generally. The paradox stems from an inverse correlation between the authorities' ability to gather and verify information, and the receipt and exploitation of information by taxpayers directly. Loss of control over the flow of information therefore represents the key challenge facing tax administrators in the current global environment.

In order to explore how this challenge came about, two specific phenomena will be considered. The first is the impact of technology on economic relations and on ways of transacting business, as exemplified by the advent of electronic commerce. The second is the growth in tax competition among countries seeking to attract foreign investment in light of the increased mobility of capital. Clearly there are a number of other contributors to or aspects of globalization that have significant tax implications. However, an examination of the international tax compliance issues raised by electronic commerce and harmful tax competition will underscore the ramifications that economic globalization has for tax administration in general. It will also help to explain why revenue authorities are struggling with a deficiency of tax information in particular.

Electronic Commerce

In one very basic definition, electronic commerce is defined simply as conducting business with the assistance of telecommunications and telecommunications-based tools.[11] However, while electronic commerce may encompass transactions that take place by telephone, facsimile, or other automated means, the term more commonly refers to supplies made over the Internet.[12] As the Internet represents the fastest-growing mass medium ever seen,[13] its commercial usage has spawned a variety of tax issues with which national revenue authorities are currently grappling. The characteristics of electronic commerce that present the greatest challenges to tax administrators fall under four general labels: anonymity, accessibility, intangibility, and disintermediation.

With respect to the first characteristic, the potential for electronic commerce transactions to be carried out anonymously represents a fundamental problem for revenue authorities. Tax administrators need to be able to determine the identities and locations of parties to a commercial transaction in order to assess tax.[14] However, they may have greater difficulty identifying taxpayers engaged in electronic commerce because the taxpayer's Internet identity need not correspond to that person's real-life identity.[15] Likewise, the highly decentralized nature of the Internet may make it impossible to determine the exact location of a person operating a particular Web site, or the specific pathway that information travels.[16] Moreover, taxpayers may establish themselves in tax haven jurisdictions in order to shield both their identity and their electronic activities even further.[17] In essence, the mechanics of electronic commerce jeopardize the authorities' ability to obtain and verify the information needed to determine the correct tax liabilities of taxpayers.[18] Tracing, let alone taxing, such transactions is further complicated if payment is made using electronic money.[19]

Electronic commerce is also problematic for tax administrators because it makes international markets readily accessible. Accessibility in this sense refers to the fact that the underlying technology provides taxpayers with the means of communicating cheaply and virtually instantaneously with others around the world. The Internet has allowed small and medium-sized businesses to reach overseas customers in an efficient and cost-effective manner, thereby enabling them to compete with larger enterprises on a global scale. The electronic medium has also opened up investment and commercial opportunities for individual taxpayers. In short, electronic commerce has increased the number of cross-border transactions, facilitated offshore transactions, and diversified the sources of foreign income earned by taxpayers. As a consequence, revenue authorities have more international compliance issues and jurisdictional disputes to deal with regarding the imposition of income and transactional taxes. They are also faced with an increased risk of tax avoidance and/or evasion, which in turn may endanger the national tax base.

Intangibility is another aspect of electronic commerce that creates difficulties for revenue authorities, particularly in terms of tax collection and enforcement. One feature of today's world economy is that a substantial amount of international trade consists of the supply of services and other intangibles.[20] Advances in communications technology coupled with the growing trade in intangible products mean that an increasing range of business transactions can now be conducted without the need for any physical presence in the relevant jurisdiction. The electronic delivery of intangible products thus poses a significant threat to traditional tax collection methods, since revenue authorities can no longer rely on taxing tangible items when they cross national borders. Similarly, services that once required personnel to be physically present at the location of the customer may now be performed remotely by electronic means.[21]

A final characteristic of electronic commerce transactions that has implications for tax administration is that the Internet enables producers to deal with consumers directly. This interactivity, paired with the intangible nature of electronic/digital supplies, eliminates the need for intermediaries, such as retailers or local distributors, who have traditionally collected information and withheld taxes on behalf of revenue authorities. The process whereby third-party sources of information disappear as a result of direct, online dealings between vendors and purchasers is referred to as "disintermediation." By removing traditional taxing points, disintermediation forces administrators to collect smaller amounts of revenue directly from a larger number of unsophisticated taxpayers.[22]

In light of the foregoing, the main threat that electronic commerce presents to tax administrations lies squarely in its elimination of many traditional methods of verification and collection. Probably the most alarming aspect of Internet technology from the perspective of national revenue authorities is that it permits interactive, real-time, anonymous, global transactions, which are potentially untraceable. Thus, the very characteristics that make electronic commerce transactions attractive to taxpayers make those transactions problematic for tax administrators. Since tax intelligence is crucial in ensuring taxpayer compliance, the danger that electronic commerce poses in terms of disappearing information sources, vanishing audit trails, and declining collection points threatens to cripple the proper administration of national fiscal systems.

Tax Competition

The Internet has provided many more people with access to offshore financial centres. As a result, taxpayers are now able to obtain offshore banking services or establish offshore entities with relative ease.[23] With the aid of technology, many investors and traders may find it advantageous to carry out their activities from low-tax or no-tax jurisdictions.[24] Consequently, the development of electronic communication has been identified as a main cause of international tax competition.[25] The implications of electronic commerce for international tax administration should therefore be viewed in conjunction with this second aspect of globalization,[26] and in particular with the phenomenon known as "harmful tax competition."

Harmful tax competition generally refers to practices engaged in by some jurisdictions that are designed to encourage non-compliance with the tax laws of other countries and to erode their national tax base. Such practices result in higher enforcement and administrative costs for those other countries, as well as lost tax revenues. They also jeopardize taxpayer confidence in the integrity and fairness of tax systems, and distort investment and financing decisions. The issue of harmful tax competition rose to prominence in 1998 when the Organisation for Economic Co-operation and Development (OECD) published its seminal report on the subject.[27]

Although harmful tax competition has existed for some time, economic globalization has contributed significantly to its higher profile in recent years. The OECD observed in its 1998 report that the globalization of trade and investment stemming from the removal of non-tax barriers to international commerce fundamentally altered the relationship among domestic tax systems, owing to the resulting integration of national economies.[28] In other words, as a result of globalization, domestic tax policies are having an unprecedented impact on other economies such that countries are constantly reforming their tax systems to encourage capital and financial flows.[29] From the OECD's perspective, this situation has had the negative side effect of "opening up new ways by which companies and individuals can minimise and avoid taxes and in which countries can exploit these new opportunities by developing tax policies aimed primarily at diverting financial and other geographically mobile capital."[30]

The OECD appears to have premised much of its work on harmful tax competition on the position that tax havens are by definition inherently evil. According to the OECD, such jurisdictions have no interest in trying to stop the "race to the bottom" (that is, the cycle of competitive reductions in tax rates) since they impose no or nominal taxes on income themselves.[31] Moreover, by enacting special provisions designed to lure capital and financial flows away from other countries, tax havens actively contribute to the erosion of tax revenues in other jurisdictions.[32] In short, the OECD sees tax havens as existing solely for the purpose of poaching on other countries' tax bases and/or facilitating the avoidance of other countries' taxes.

The OECD's view of tax havens and the concept of tax competition associated with them is not, however, universally accepted. The main complaint of the targeted jurisdictions is that the OECD's conclusions reflect certain biases held by the organization and the self-interest of its members. There are even member countries within the OECD that disagree with the majority's position.[33] For example, in withholding its approval of the 1998 report, Switzerland took the position that the OECD's work was partial and unbalanced in that it unacceptably protected countries with high levels of taxation and ignored the structural diversities of existing tax regimes.[34]

While the precise role that tax havens play in the international tax order is open to debate, it cannot be denied that certain of their practices do have a deleterious effect on tax administration. Such regimes commonly feature laws or administrative practices that guarantee financial confidentiality and/or bank secrecy. For example, a jurisdiction may allow taxpayers to maintain anonymous accounts that preclude financial institutions from providing information about investors to tax authorities.[35] Such practices prevent any meaningful exchange of information with other countries and thus effectively shield taxpayers' affairs from the scrutiny of revenue authorities outside the tax haven jurisdiction.[36]

To date, the OECD's work has focused on exposing those jurisdictions that are engaged in harmful tax practices and getting them to bring their fiscal systems in line with the changes proposed by the OECD.[37] In general, these proposals call for more transparent features and increased access to and exchange of banking and financial information within the impugned regimes. Originally, the OECD had identified four key aspects of unfair tax competition.[38] However, it later decided to seek commitments from tax havens only with respect to transparency and exchange of information.[39] In this respect, the OECD considers the establishment of a legal mechanism for effective exchange of information as integral to its defensive measures against harmful tax competition.

The issue of harmful tax competition is thus inextricably tied up with the question of information exchange. Indeed, the most "harmful" aspect of unfair tax practices appears to be not having a framework for effective exchange of information. Like electronic commerce, harmful tax competition is problematic for tax authorities in that it tends to obfuscate sources of tax information. Accordingly, it has been suggested that the issue at the heart of the OECD's work on harmful tax competition is the need to increase the global flow of tax information.[40]

TAX ADMINISTRATION IN THE DOMESTIC CONTEXT

The ability to collect and verify information about taxpayers is crucial to proper tax administration. However, as discussed above, certain technological and competitive offshoots of economic globalization have made it more difficult for tax administrators to ensure that they have all the information necessary for the smooth operation of their fiscal systems. One of the main reasons why the present internationalism has created such problems for tax authorities is that tax administration, like other aspects of taxation, is limited to the territorial unit where the legislative competence to tax resides.[41]

Since tax administration originates with the nation state, any discussion of the issues brought on by globalization requires some consideration of domestic verification and enforcement mechanisms. Clearly, the constraints under which national authorities operate make international cooperation in the form of exchange of information all the more imperative. The following overview of the Canadian system, and for purposes of comparison that of other jurisdictions, highlights the nature and scope of such internal measures as well as their inherent limitations.

Canadian Measures

Canada has been described as having a self-assessment income tax system.[42] Self-assessment in the Canadian context means that taxpayers are responsible for determining their tax payable for each taxation year, filing an annual return, and remitting payment for any tax due under the Income Tax Act[43] (ITA). In addition to this basic filing requirement, taxpayers engaged in certain prescribed transactions are expected to file annual reports providing the Canadian government with much more detailed information about their activities.[44] Voluntary compliance is thus the cornerstone of the Canadian system.[45]

It would, however, be extremely unrealistic to assume that no taxpayers ever attempt to take advantage of this self-reporting regime in order to avoid their full tax liability. Canada has therefore incorporated into its tax system certain measures designed to detect and penalize those who do not respect their legal obligations. Responsibility for the administration and enforcement of the system falls to the Canada Customs and Revenue Agency (CCRA), formerly known as Revenue Canada. It has been observed that a key feature of the Canadian system is "the breadth of Revenue Canada's power to compel taxpayers to provide information about their income tax affairs."[46]

The ITA contains a number of provisions that enable the CCRA to carry out its audit and investigative functions. As a starting point, subsection 230(1) requires every person carrying on business and every person required to pay or collect taxes to maintain such records and books of account as will enable their tax liabilities to be determined. The term "record" is very broadly defined and includes anything that contains information, whether in writing or in any other form.[47] Taxpayers must retain their books and records for six years from the end of the taxation year to which they relate, along with every account and voucher necessary to verify the information contained therein.[48] Where electronic records are kept, they must remain in an electronically readable format throughout the prescribed period of retention.[49] Failure to keep adequate records can lead to prosecution under ITA subsection 238(1).

Concomitant with these record-keeping requirements are the CCRA's extensive powers under ITA section 231.1 to inspect, audit, or examine a taxpayer's books and records. The CCRA is also entitled to review any other document of the taxpayer or another person that relates to information contained in the taxpayer's books and records, or that otherwise relates to any amount payable under the ITA. Thus, this provision provides the CCRA with access to a wider range of material than a taxpayer is obliged to retain under subsection 230(1). For these purposes, the CCRA is entitled to enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business, or any books or records are or should be kept. The CCRA can also require the owner or manager of the property or business being inspected to give all reasonable assistance and to answer all proper questions relating to the administration or enforcement of the ITA.

ITA section 231.2 takes the CCRA's ability to compel taxpayer cooperation even further. Under this provision, the CCRA may, for any purpose related to the administration or enforcement of the statute, serve notice on any person requiring that person to provide any information or any document within such reasonable period of time as is stipulated in the notice. Such a requirement can thus extend to the professional advisers, former employees, and business associates of the taxpayer. The only restriction that applies is the need for prior judicial authorization where the CCRA demands information or documentation on unnamed persons from third parties.[50] Failure to comply with a demand issued under section 231.2 may constitute an offence under the ITA punishable by fine and possibly imprisonment.[51] The CCRA appears to be invoking section 231.2 more and more frequently as a means of obtaining information and documentation for the purpose of reviewing a taxpayer's affairs.

Section 231.6 extends the powers set out in section 231.2 where the CCRA seeks information or documentation available or located outside Canada. Under section 231.6, the CCRA may require any person resident in Canada or any non-resident person carrying on business in Canada to provide any foreign-based information or document that may be relevant to the administration or enforcement of the ITA.[52] Where the CCRA has served notice of a requirement to provide foreign-based information in accordance with the prescribed procedure, the person on whom the notice is served has 90 days to apply for judicial review of the requirement.[53] The judge hearing the application has the power to confirm or vary the requirement, or, on being satisfied as to its unreasonableness, to set the requirement aside.[54] Interestingly, subsection 231.6(6) expressly states that no requirement shall be considered unreasonable for this purpose simply because the foreign-based information or document is under the control of or available to a non-resident person not controlled by the person served with the notice, so long as the two are at least related persons.

Finally, ITA sections 231.3 and 231.4 further augment the CCRA's audit and verification arsenal. Under section 231.3, the CCRA enjoys various search and seizure powers for use in investigating tax offences. In instances where either the taxpayer or third parties are otherwise unwilling to provide information, section 231.4 sets out a procedure by which the CCRA can hold an "inquiry" before a hearing officer appointed by the Tax Court of Canada requiring them to do so.

Although voluntary taxpayer cooperation is a key component of the Canadian system, the CCRA clearly has a variety of measures at its disposal to verify the information provided by taxpayers and to obtain from them whatever additional information may be necessary for enforcement purposes. Third parties also represent an important source of information for the CCRA. As noted above, the provision of information by a third party may be in response to a specific demand made by the CCRA about a particular taxpayer.[55] In other cases, third parties will automatically transmit taxpayer information to the revenue authority.[56]

Other Jurisdictions

Other jurisdictions employ similar methods of tax administration and enforcement at the domestic level. By way of comparison, taxpayers in the United States also are obliged to calculate their income tax liabilities, submit an annual tax return, and remit any amount payable therewith. Like the CCRA, the Internal Revenue Service (IRS) has extensive verification and enforcement powers pursuant to which it can require taxpayers to provide relevant information and documentation, inspect and audit taxpayers' books and records, and obtain information from third parties.

The relatively recent introduction of self-assessment in the United Kingdom has meant that more taxpayers are now responsible for computing their own tax liabilities and filing a tax return.[57] With respect to administration and enforcement, the Inland Revenue's powers under the Taxes Management Act 1970[58] (TMA 1970) are similar to those of its Canadian and US counterparts and fall generally into four categories.[59] First, the Inland Revenue can require taxpayers to provide information or documentation within their own possession or power.[60] Second, the Inland Revenue can require equivalent information or documentation from any other person.[61] Third, the Inland Revenue has the power to require third parties to make documents relating to another person available for inspection.[62] Finally, the Inland Revenue has the power to call for the papers of a tax accountant.[63] While these administrative powers are subject to various substantive and procedural rules, they apply not only for purposes of UK tax liability, but also in respect of liability to tax arising under the law of another member state of the European Union.[64]

Limitation of Domestic Powers

The foregoing overview of the information-gathering powers employed by national authorities in administering their respective tax systems reveals that tax administrations use various means to obtain information from both taxpayers and third parties for purposes of verifying compliance with tax obligations. Nonetheless, although revenue authorities generally enjoy a broad range of domestic powers, their ability to gather information from outside their respective jurisdictions is much more restricted. For example, as noted above, the CCRA has the power to serve on both residents and non-residents of Canada a requirement to provide foreign-based information or documentation.[65] However, it has been noted that in practice the CCRA "may use Canadian residents as conduits in order to obtain information that it would have more difficulty obtaining directly from non-residents."[66] The CCRA's practice reflects the reality that it is much easier for Canada to enforce such requirements against its own residents.

This reality exists because as a matter of customary international law, taxation is strictly territorial—that is, a state can collect and enforce tax only within its own jurisdiction as an aspect of its sovereignty. A related rule of international law provides that one state will not, directly or indirectly, enforce the revenue laws of another.[67] The operation of these rules therefore prevents national tax authorities like the CCRA from exercising their statutory powers of investigation in an international context.

One consequence of these jurisdictional limitations is that taxpayers may try to avoid tax due in one country by bringing themselves and their assets within another jurisdiction. National revenue authorities have attempted to address this problem by establishing international cooperative arrangements to extend the scope of tax administration and enforcement. Traditionally, these arrangements have taken the form of exchange-of-information provisions in bilateral tax treaties and other multilateral agreements.[68]

TAX ADMINISTRATION IN THE INTERNATIONAL CONTEXT

Bilateral Exchange of Information

Exchange of information generally refers to the process by which one national tax authority obtains information in the possession of a foreign state's authority or requests that foreign authority to obtain the required information on its behalf. Arrangements for the international exchange of information are generally found in double taxation conventions.[69] In this respect, most bilateral tax treaties contain provisions dealing with exchange of information based on article 26 of the OECD's model tax convention.[70]

Paragraph 1 of article 26 provides that

> the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of

> every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.

This wording reflects recent amendments that have expanded the scope of information that may be exchanged.[71]

The purposes for which information may be exchanged often vary from treaty to treaty. Consequently, the scope of information that contracting states may demand may be broader or narrower depending on the specific treaty. For example, some exchange-of-information provisions are limited to the application of the relevant treaty, whereas others permit information to be exchanged for purposes of applying domestic tax laws.[72]

There are also certain limitations on exchange of information built into article 26. Under paragraph 1, information will be exchanged only if taxation under the domestic laws concerned is not contrary to the convention itself. Paragraph 2 provides that a contracting state, in the course of complying with a request for information, is not obliged to go beyond its own laws or normal administrative practices, or those of the other state. Moreover, a competent authority is not required to disclose any information if such disclosure would be contrary to public policy or would reveal any trade, business, or other secret information. A further restriction lies in the general rule that a state may not use its treaty partner as a conduit to obtain information via the partner's tax treaty network that the state could not obtain through its own treaty network.[73]

The commentary on article 26 of the OECD model tax convention specifies three forms that exchange of information may take: on request, automatic, and spontaneous.[74] Exchange on request involves a specific request made by one contracting state to the other for information on a particular taxpayer. Automatic exchange refers to the routine or systematic transmission of information about one or various categories of income from the state that is the source of such income to the state in which the income is received. Spontaneous exchange occurs when a contracting state voluntarily passes on to its treaty partner information that it considers would be of interest to the other state.

Under individual treaties, contracting states may also agree on other techniques for obtaining and exchanging information. These include a simultaneous audit program, under which each state in its own territory examines the affairs of a particular taxpayer in which both states have a common interest; tax examination abroad, whereby tax officials carry out investigations in a foreign territory; and industry-wide exchange of information concerning a specific economic sector.[75]

Multilateral Assistance

Exchange of information also occurs through frameworks other than bilateral tax treaties. For example, on December 19, 1977, the European Council adopted Directive 77/799/EEC to provide for mutual assistance in the field of direct taxation among the member states of the European Union.[76] In laying down a basic framework for exchanging information in respect of intra-Community transactions, the directive outlined four ways in which such exchange could occur: exchange on request, automatic exchange, spontaneous exchange, and tax examination abroad.

The European Council also worked with the OECD in drawing up the convention on mutual administrative assistance in tax matters in 1988.[77] The convention provides for far-reaching administrative cooperation in connection with levying and collecting direct and indirect taxes, including such measures as assistance in recovery of tax claims and service of documents. It also contains exchange-of-information provisions incorporating the four means of exchange set out in Directive 77/799/EEC and an additional mechanism allowing for simultaneous tax examination in the case of common investigative interests.

In addition, some countries have negotiated regional multilateral agreements on mutual assistance. For example, the Nordic Convention on Mutual Assistance in Tax Matters provides for extensive administrative cooperation in respect of both direct and indirect taxes.[78]

Existing Barriers to Effective Information Exchange

Regardless of the form adopted, exchange of information is necessary for two main purposes.[79] First, in a narrower sense, it is essential for the correct application of tax treaties since it assists revenue authorities in ascertaining the facts in relation to which a particular convention is to be applied. Second, in a broader sense, it provides information relevant to the implementation of domestic tax legislation, thereby minimizing opportunities for tax avoidance and evasion on the part of taxpayers involved in cross-border transactions.

At a theoretical level, therefore, exchange of information is an extremely important concept for tax administration purposes. However, the effectiveness of information exchange in practice is less certain. A lack of statistics or other data describing exchange-of-information efforts makes it difficult to determine the number and type of information requests being made, let alone evaluate the adequacy of the responses provided, or quantify the tax results achieved on the basis of the information received.

Even in the absence of quantifiable data, it is clear that there are several barriers to effective information exchange. One of the main obstacles is that nations are not always willing to cooperate with one another. Some countries may be reluctant to pass on information obtained by their own authorities, and other countries may have little motivation to seek information from taxpayers if their own fiscal interests are not at stake.[80] In other cases, the lack of political appetite to gather and provide information, taken to an extreme, might even lead to outright refusals to supply information, or the erection of barriers to the flow of information as "part of the fiscal strategy of a country to attract foreign investors."[81]

In such extreme cases, there will be no tax treaty in place. This absence highlights another shortcoming of traditional exchange-of-information mechanisms: to date, information exchange has relied predominantly on the existence of a comprehensive treaty network. Countries that attract capital investment by virtue of their tax policies, notably tax havens, often fall outside the treaty network and hence do not participate in the exchange-of-information process. Unfortunately, it is often from these very jurisdictions that many tax administrations would like to obtain information in connection with taxpayers' foreign-source income.

Where there is a tax treaty in place, the provisions governing exchange of information will most likely be based on article 26 of the OECD model tax convention. In this respect, it should be noted that article 26 expresses the commitment to exchange information in binding terms: "the Contracting States shall exchange such information." However, in spite of this language, the obligation to exchange information remains subject to, and therefore weakened by, the three conditions described in paragraph 2 of article 26. Accordingly, a country need not go beyond its own internal laws or administrative practices to meet an information request, nor is it obliged to take any measures beyond those permitted in the requesting state. A potential consequence of these limitations is that treaty partners may end up exchanging very little or no information if their respective information systems are structured very differently.[82]

In carrying out its exchange-of-information obligations, a country is also not required to supply secret information, or information the disclosure of which would be contrary to public policy. The OECD commentary indicates that the aim of this stipulation is to protect information concerning the vital interests of the state.[83] Nonetheless, what a country may consider to be a matter of public policy is an open question. Hence, a country reluctant to provide requested information could always fall back on this rationale to justify its decision not to release the information. The requesting country would have difficulty finding grounds on which to challenge a refusal based on public policy.

With respect to the various ways in which exchange of information may occur, it has been stated that the obligation to gather and provide information is strongest where a request for specific information on a particular taxpayer is made.[84] However, even in the case of a specific request, a state may simply lack the resources necessary to fully comply. The question of allocating adequate resources (both funding and personnel) to ensure the proper functioning of an information exchange program raises two related issues. The first is whether a minimum revenue threshold should be required in order for exchange of information to be considered cost-effective.[85] The second is whether, and to what extent, countries should share or reimburse costs incurred in the process of exchanging information.[86]

These practical issues underscore the fact that although article 26 of the OECD model tax convention sets out the general principles to be used for purposes of information exchange, both the text and the commentary are silent on what actual procedure should be followed in exchanging information. In other words, the competent authorities of the contracting states have no guidance on such basic matters as how to phrase an information request and what language should be used for the response in order to avoid communication and interpretation problems.[87] Rather, the authorities are left to their own devices in determining the appropriate procedural arrangements. Likewise, no guidelines exist to indicate whether competent authorities are obliged to notify taxpayers when an information request concerning them has been made, or whether taxpayers should have the right to challenge the exchange.[88]

Finally, implementation of exchange of information is primarily a matter of internal law and thus may differ from country to country. Effective information exchange may therefore be impeded by inconsistent treatment at the domestic level. A further concern is that countries may be able to circumvent the application of the tax treaty provision mandating exchange of information by adopting "unilateral and domestic limits which hinder the machinery for administrative cooperation."[89]

INTENSIFICATION OF INFORMATION EXCHANGE EFFORTS

The Need for Greater International Cooperation

From the preceding review, it is clear that a number of gaps exist in the conventional structures used by revenue authorities for domestic and international tax administration. Moreover, these gaps appear to be widening as economic globalization brings new pressures to bear on existing tax systems.

As noted earlier, electronic commerce and tax competition are only two manifestations of a growing global economic interdependence. However, these phenomena illustrate how, on a more general level, the process of globalization has changed the conditions for tax administration and revenue collection. On the one hand, as seen in the context of electronic commerce, the internationalization of economic relations is rendering national tax authorities increasingly impotent since taxation, as a derivative of national sovereignty, is essentially a domestic matter. On the other hand, as indicated by studies of harmful tax competition, globalization has greatly increased the international spillover effects of domestic tax policies. Accordingly, tax administrations must carefully coordinate their efforts in response to the changed environment or risk losing tax revenues overall.

The need for greater collaboration in tax matters thus reflects the changing nature of international trade and investment. In a world where cross-border transactions are commonplace, where barriers to the movement of capital have largely disappeared, where technology has accelerated the pace of communication, and where mobile financial and service activities have become an increasingly important part of the economy, tax systems have to adapt in order to remain viable. Revenue authorities are fully aware of the pivotal role that information plays in their efforts to keep pace with globalization. They have found, however, that traditional sources of information are no longer adequate, and they are being forced to seek out new ways of obtaining tax intelligence. Accordingly, initiatives aimed at boosting international cooperation in the tax field have predominantly taken the form of enhanced information exchange.

The new forms of information exchange are many and varied. Some initiatives merely reinforce existing international arrangements; others build upon or supplement traditional mechanisms for the exchange of information. Certain initiatives, particularly the anti-money-laundering legislation enacted in various countries, are less obvious forms of information exchange but nonetheless constitute indirect ways of gathering and reciprocating tax information. These various strategies are discussed below.

Treaty and Legislative Developments

One of the primary ways to tackle international tax compliance issues is to strengthen treaty provisions. As previously discussed, most bilateral tax conventions contain provisions dealing with exchange of information. Article 26 of the OECD model tax convention provides for a standard form of information exchange. However, both the scope of information subject to exchange and the breadth of assistance given vary considerably depending upon the particular terms of a specific treaty.

For example, a very high degree of cooperation and sharing of tax information can be found in the Canada-US income tax convention (1980),[90] resulting from three amendments introduced by the third protocol, signed on March 17, 1995. Two of these amendments affected the application of article XXVII (exchange of information). The first authorized wider dissemination of the information obtained pursuant to a request under the convention. The country requesting information is entitled to disclose it to any political subdivision or local authority that imposes substantially similar taxes to the income and capital taxes imposed federally.[91] The second amendment broadened the scope of taxes subject to information exchange by making the provisions of article XXVII apply to all taxes imposed by the contracting states, as opposed to just those covered by article II of the convention.[92] As a catchall, the amendment also sanctioned exchange of information with respect to any other taxes to the extent relevant for purposes of the convention, thereby leading to "a completely free flow of information across the border with respect to taxes collected by . . . either Canada or the United States."[93]

The third amendment was the introduction of article XXVI A, pursuant to which Canada and the United States agree to lend assistance in collecting each other's taxes. In this respect, each country is required to treat its treaty partner's revenue claim as its own and collect the claim as it would domestic taxes. Furthermore, the assistance in collection is not limited to the taxes to which the convention applies, but rather applies to all categories of taxes collected by or on behalf of the signatory states.[94]

Although this collection provision does not deal with exchange of information per se, it still relates to information exchange in the sense that it represents the next logical step in tax administration. If, as a result of an information request, a country discovers that a taxpayer with outstanding tax liabilities has brought himself or his assets, or has an income source, within a treaty partner's jurisdiction, that country will require additional administrative assistance in recovering its revenue claim. Article XXVI A clearly bolsters effective tax administration by superseding the common law rule regarding the non-enforcement of foreign revenue claims.

Canada now appears to be fostering with other countries the kind of cooperative relationship it enjoys with the United States. For example, article 26 of the new Canada-Germany double taxation agreement[95] widens the scope of taxes subject to information exchange to encompass all taxes imposed by the signatory states. The previous agreement had authorized exchange of information only in connection with the specific taxes covered by the agreement. Article 26 of the new agreement also authorizes the disclosure of information received by a contracting state to its political subdivisions and local authorities. In addition, Canada and Germany have agreed for the first time to provide assistance in collecting each other's taxes and related claims. In this respect, article 27 of the new agreement requires each country to enforce its treaty partner's revenue claims in accordance with its own collection laws.

The provisions for greater administrative assistance seen in Canada's treaties with the United States and Germany may forecast a general trend in international agreements toward enhanced exchange of information and fuller cooperation in collecting taxes.[96] Even the United Kingdom appears to be changing its position on this issue, despite having long maintained that it is not obliged to obtain information for a foreign authority if its own taxes are not at stake.[97]

For example, the new UK-US double taxation convention[98] expands the previous level of administrative cooperation between the countries. Article 27 of the new convention provides that a contracting state must obtain requested information in the same manner and to the same extent as if its treaty partner's tax were its own, notwithstanding that the state may not need such information for domestic purposes. The significance of this change lies in the fact that, as a general rule, the United Kingdom's tax treaties do not require the contracting states to exchange information that they do not already have on hand.[99] The diplomatic notes accompanying the new convention also clarify that each state's competent authority has the power to obtain information held by financial institutions, nominees, agents, or fiduciaries, as well as information relating to the ownership of legal persons.

The United Kingdom's willingness to obtain for the United States tax information not required for its own purposes seems incongruous for a country where previously "not collecting information solely for others, apart from the European Union countries where we were forced into it, had been something of an article of faith."[100] However, this movement toward greater international cooperation was foreshadowed to some extent by the United Kingdom's enactment in 2000 of a number of domestic provisions facilitating information exchange.

For example, although the provisions introduced by the Finance Act 2000[101] (FA 2000) accomplish a variety of purposes, all relate generally to information exchange.[102] Most important, what is now section 815C of the Income and Corporation Taxes Act 1988[103] (TA 1988) expressly authorizes the United Kingdom to negotiate and enter into exchange-of-information agreements with any other country. Such agreements are to have effect "notwithstanding anything in any enactment." The only restriction is that the Inland Revenue shall not disclose any information without first being satisfied that the other country observes rules of confidentiality that are no less strict than those applying in the United Kingdom with respect to tax information.[104] Before this legislation was enacted, the United Kingdom could entertain exchange-of-information arrangements only in the context of a double taxation convention made pursuant to section 788 of TA 1988.[105]

Another important aspect of section 815C is that it enables the Inland Revenue to use the powers given to it under section 20 of TMA 1970 to collect tax information for a foreign authority with which the United Kingdom has either a tax treaty or an exchange-of-information agreement. By allowing the Inland Revenue to exercise domestic information-gathering powers on behalf of another country, this provision clearly paved the way for the enhanced administrative assistance seen in the 2001 UK-US convention and bodes well for future cooperative efforts on the part of the United Kingdom.

Section 145 of FA 2000 should also be noted, since it repealed the rules in sections 17 and 18 of TMA 1970 that had previously allowed persons who were not ordinarily resident in the United Kingdom to prevent banks from providing the Inland Revenue with information about interest paid to them. By facilitating access to such information, this provision will likely have the effect of further strengthening the global exchange of information. The significance of this amendment is linked to recent international work in the areas of bank secrecy and taxation of cross-border savings income, discussed below.

The treaty developments and legislative initiatives described above indicate that countries are taking steps to bolster their existing exchange-of-information mechanisms. Enhancing information exchange in the traditional tax treaty context is the most obvious way of countering globalization's deleterious effects on tax administration. It appears that a number of countries both individually and collectively have come to this realization. In this respect, the OECD's Committee on Fiscal Affairs has mandated its Working Party on Tax Evasion and Avoidance to undertake a fundamental review of article 26 of the model tax convention.[106] In addition, the OECD has proposed to add a new article 27 to the model tax convention providing for mutual assistance in the collection of taxes.[107] Such administrative cooperation can be regarded as an extension of the recent exchange-of-information developments, since access to and disclosure of information are integral to the transnational enforcement of tax liabilities.[108]

The present emphasis on exchange of information through international agreement is all the more evident in the recent release of the OECD's *Agreement on Exchange of Information on Tax Matters*.[109] The agreement contains two model instruments, a bilateral and a multilateral version, for countries to follow in negotiating the exchange of tax information.

The release of the OECD's model agreement represents a significant advance for tax-related information exchange for several reasons. First, the agreement provides a legal framework for exchange of information that does not require the contracting parties to enter into a comprehensive tax treaty. Second, the multilateral version facilitates information exchange by enabling countries simply to adhere to the agreement, rather than negotiating bilaterally with each of the contracting parties. The flexibility of the multilateral agreement allows a country to specify those signatories to which it wishes to be bound; thus, the agreement is enforceable only among those parties that have mutually identified one another in their instruments of ratification. Third, and most important, the provisions for information exchange in the model agreement go beyond the requirements of article 26 of the OECD model tax convention. For example, where a competent authority receives a request for information not in its possession, paragraph 2 of article 5 of the new model agreement requires the authority to use all its powers to obtain the information requested, notwithstanding that it may not need such information for domestic purposes. Paragraph 4 of article 5 also requires each state to ensure that its competent authority has the ability to obtain information held by financial institutions, agents, nominees, and trustees, as well as information regarding the ownership of companies, partnerships, trusts, and other such entities. Both of these requirements strengthen exchange of information by removing lack of access to and availability of information as obstacles to effective exchange. Neither is expressly included in article 26 of the OECD model tax convention.

Interestingly, the model agreement on information exchange resulted directly from the OECD's work in the area of harmful tax competition.[110] As noted above, the OECD regards lack of effective exchange of information as one of the key criteria to be used in identifying harmful tax practices. The model agreement was therefore drafted on the basis of commitments made to the OECD by certain tax haven jurisdictions to incorporate transparency and exchange of information into their tax systems.

The current focus on exchange of information is clearly interwoven with concerns about harmful tax competition and other problematic aspects of economic globalization that impede the flow of information among national tax authorities. Accordingly, the present trend to enhance information exchange through unilateral, bilateral, and multilateral measures must be viewed in light of this overarching interrelationship.

Other International Initiatives

Access to Bank Information

The impetus for greater information exchange has also materialized in the form of another major international initiative: access to bank information for tax purposes. This initiative was spearheaded by a report prepared by the OECD's Committee on Fiscal Affairs on ways to improve the tax-related exchange of information in the possession of banks and other financial institutions ("the bank information report").[111]

It is no coincidence that the issue of bank secrecy has appeared on the global tax agenda at the same time that harmful tax competition and electronic commerce have pushed international tax compliance issues to the forefront. While acknowledging the legitimate role that bank secrecy plays in protecting taxpayers' rights to privacy and confidentiality with respect to their financial affairs, the OECD's concern is that bank secrecy toward governmental authorities enables taxpayers to hide illegal activities and to escape tax.[112] In this respect, access to records held by financial institutions is considered imperative to the effective administration and enforcement of many laws and regulations. Moreover, the bank information report highlights a number of specific problems that bank secrecy poses for tax authorities in particular:

> Denying tax authorities access to banking information can have adverse consequences domestically and internationally. Domestically, it can impede the tax authorities' ability to determine and collect the right amount of tax. It also can foster tax inequities among taxpayers. Some taxpayers will use technological and financial resources to escape taxes legally due by using financial institutions in jurisdictions that protect banking information from disclosure to tax authorities. This distorts the distribution of the tax burden and may lead to disillusionment with the fairness of the tax system. Lack of access to bank information for tax purposes may result in some types of income escaping all taxation, thus producing inequities among different categories of income. Mobile capital may obtain unjustified advantages as compared to income derived from labour or from immovable property. Further, lack of access to bank information may increase the costs of tax administration and compliance costs for taxpayers. Internationally, lack of adequate access to bank information for tax purposes may obstruct efficient international tax cooperation by curtailing tax authorities' ability to assist its [sic] treaty partners which in turn may lead to unilateral action by the country seeking the bank information. It also may distort capital and financial flows by directing them to countries that restrict tax authority access to bank information.[113]

The bank information report recognizes that economic globalization has only exacerbated existing problems. The factors behind globalization, such as the elimination of foreign exchange controls and the advances in communications technology giving rise to electronic commerce, have made international banking more accessible to a wide range of taxpayers and have facilitated rapid growth in cross-border financial transactions.[114] Consequently, the potential for abuse has also increased: taxpayers have greater opportunity to take advantage of the more restrictive bank secrecy jurisdictions and to hide their assets and activities through the use of foreign entities and accounts.[115] Moreover, the decision by one jurisdiction to deny or restrict access to bank information for tax purposes is more likely than ever before to have a negative impact on the tax administrations of other countries, especially since other traditional sources of information on cross-border transactions, such as exchange controls, have now been removed.[116]

The OECD is accordingly of the view that enhanced international cooperation is required to cope with the global challenges presented by "banking without borders." Ideally, countries should give revenue authorities maximum access to bank information for all tax purposes.[117] However, the survey of state practices included in the bank information report shows that very different levels of access to bank information currently exist across the various jurisdictions. The report therefore suggests that certain incremental measures be taken as a first step toward improving such access for tax purposes. The recommendations include the adoption of measures to prevent financial institutions from maintaining anonymous bank accounts; a re-examination of laws or practices that prevent tax authorities from providing information to a treaty partner that they are otherwise able to obtain for domestic tax purposes; and a re-examination of policies and practices that do not permit tax authorities to access and exchange bank information for purposes of criminal tax prosecutions.[118]

The second proposal, calling for a re-examination of any features preventing a tax authority from obtaining information for a treaty partner if there is no domestic interest at stake, recalls the FA 2000 provisions introduced in the United Kingdom to broaden the scope of information exchange there. The timing of the announcement of the United Kingdom's statutory amendments just a few days before the publication of the bank information report is not considered to have been coincidental.[119]

While the bank information report focuses primarily on improving access to and exchange of banking information pursuant to a specific request related to a particular taxpayer, it nonetheless recognizes that exchange of information can take several forms.[120] In this respect, the report notes that the Committee on Fiscal Affairs is considering ways to improve the automatic exchange of bank information as part of its ongoing study of the use of withholding and/or exchange of information to enhance the taxation of cross-border interest flows.[121]

Cross-Border Savings Income

The OECD's work on improving access to bank information coincides with another major initiative forming part of the current global trend toward enhanced information exchange for tax purposes. This initiative considers how automatic reporting of bank information can deal with the specific problem of taxing individuals' cross-border interest flows.

Unreported cross-border savings income has always been a serious problem for certain European countries, such as Sweden and Germany.[122] However, with the formation of the European Monetary Union and the introduction of the euro, tax authorities throughout Europe have become increasingly concerned about the issue.[123]

The European Commission responded to this problem with the release of a draft savings directive in 1998. The original proposal set out a two-pronged approach for dealing with interest income on bank savings, bonds, and similar financial instruments, paid in one member state to an individual resident in another member state. It called for the member state in which the interest was paid either to inform the tax authorities of the beneficiary's residence state when interest was paid out, or to require the payer of such interest to withhold 20 percent tax, which would be creditable in the state of residence. However, no agreement was reached on the directive as proposed, mainly because the United Kingdom insisted on exempting eurobonds from the system.[124]

As a result of this lack of consensus, the European Commission put forward a revised draft savings directive in July 2001.[125] The amended directive calls for the adoption of an exchange-of-information system like the one proposed in the original directive and also provides for a seven-year transitional period, during which Austria, Belgium, and Luxembourg would be able to withhold tax on interest paid rather than reporting it to the investor's country of residence. At the end of the transition period, however, all member states would be obliged to provide information about cross-border savings income to the revenue authorities of the beneficiary's home state. This transformation of the European Commission's draft savings directive into essentially an exchange-of-information directive was precipitated by the OECD's work on improving access to bank information for tax purposes.[126]

Whether or not the proposed savings directive will actually become law is another matter. In this respect, Austria, Belgium, and Luxembourg have indicated that they will agree to mandatory information exchange only if certain other jurisdictions, such as the United States, Switzerland, Liechtenstein, Monaco, Andorra, and San Marino, adopt equivalent measures in respect of cross-border savings income.

In terms of getting the non-EU jurisdictions to adopt similar reporting rules for savings income, the European Commission appears optimistic that it will be able to convince the United States to implement a comparable exchange-of-information regime.[127] It is less certain how the Swiss will receive the European Commission's efforts, in light of Switzerland's long history of banking secrecy.[128]

Anti-Money-Laundering Regimes

Certain international developments, such as those discussed above, are explicit exchange-of-information arrangements aimed directly at tax administration issues. However, countries have also engaged in more circuitous means of collecting and reciprocating tax information. The primary example of this kind of collateral information-gathering mechanism is the global proliferation of anti-money-laundering legislation.

Background

Money laundering generally refers to the process by which proceeds of crime are "cleansed" of their illegal origin. It is generally associated with organized crime and the profits derived from such criminal activities as drug trafficking and prostitution. However, financial crimes such as embezzlement, fraud, and extortion also generate illegal funds that need to be laundered for legitimacy. Tax evasion is increasingly viewed as the type of financial crime that constitutes a predicate offence to money laundering.[129]

One of the undesirable effects of economic globalization has been a sharp rise in international financial crime,[130] which in turn has led to increased concerns over the global scale of money laundering. In 1989, an intergovernmental body called the Financial Action Task Force on Money Laundering (FATF) was established to develop and promote global anti-money-laundering policies.

While the FATF, in conjunction with other international and regional bodies (including the International Monetary Fund and the Caribbean Financial Action Task Force), coordinates anti-money-laundering measures on a supranational level, individual countries have also taken steps to counter the problem domestically. The United States is a leader in this field, having enacted a wide array of anti-money-laundering legislation. Generally speaking, US law in this area falls into two categories: legislation that makes it a criminal offence to launder proceeds of crime, and legislation that imposes reporting obligations on financial intermediaries.[131] The purpose of the latter kind of legislation is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[132] This statement is interesting in that it expressly links anti-money-laundering measures with tax inquiries.

The passage of the USA PATRIOT Act[133] in October 2001 has refocused US anti-money-laundering efforts on the disruption of terrorist financing. The new initiatives call for, inter alia, enhanced scrutiny of jurisdictions that offer bank secrecy or regulatory advantages, as well as improved information sharing between government entities and financial institutions.[134] The IRS will continue to play a key role in the administration of these anti-money-laundering programs. In this respect, the US Treasury department recently prepared a report pursuant to the USA PATRIOT Act that reiterates the IRS's expertise in processing the financial information obtained from reports filed under the statutory regime.[135] The report also confirms that the IRS makes frequent use of the information so collected for its own tax investigation purposes.[136]

Like the United States, other countries also are tightening up their anti-money-laundering regimes. The European Union has issued a directive proposing to extend the coverage of its existing anti-money-laundering legislation and impose additional record-keeping obligations on a wider range of persons, including auditors, accountants, and tax advisers.[137] The directive also addresses the specific problem of criminals who present their affairs as tax-related and use offshore jurisdictions to disguise proceeds of crime.[138] In this respect, it warns solicitors to be especially vigilant about providing tax advice to persons who operate out of tax havens, since those persons may take advantage of bank secrecy or confidentiality laws to obscure their true identity.

The United Kingdom has already moved in the direction of all-crimes money-laundering legislation. On April 1, 1994, the amended Criminal Justice Act 1988 came into force encompassing all crimes, including both domestic and international tax evasion.[139] The 2002 Proceeds of Crime Bill[140] consolidates various existing laws on confiscation and money laundering into a single piece of legislation. It also empowers a new agency to exercise the Inland Revenue's tax functions in relation to income, gains, and profits resulting from criminal conduct.[141]

Canada is currently phasing in its Proceeds of Crime (Money Laundering) and Terrorist Financing Act[142] (PCMLTFA). The PCMLTFA has three main objectives. The first is to require various persons to report all suspicious financial activities and certain other prescribed financial transactions.[143] The second objective is to require automatic reporting of any cross-border movements of cash and monetary instruments exceeding Cdn$10,000.[144] The persons subject to these reporting requirements include financial entities, life insurance companies, securities dealers, money service businesses, realtors, and legal and accounting professionals. The third objective of the legislation is to establish the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), an independent agency responsible for collecting and analyzing financial information, and, in certain circumstances, disclosing such information to law enforcement agencies.[145]

The PCMLTFA has been the subject of considerable controversy in Canada. It has met with particular opposition from the Canadian legal community. The contention centres on the conflict between the onerous reporting obligations that the statute imposes on legal counsel, and the professional responsibilities and ethical duties that lawyers owe to their clients. The implications that this aspect of the Canadian legislation has for solicitor-client confidentiality, the independence of the bar, and the administration of justice will be discussed further below in the section dealing with taxpayers' rights.

Connection with Tax Administration

The same factors that have facilitated global financial crime—namely, increased capital mobility and advances in communications technology—are also conducive to tax-related offences.[146] Moreover, money laundering and tax evasion share certain operational characteristics, including concealment of the financial trail of income, the use of sophisticated techniques to disguise the source and nature of funds, and perpetuation of these activities through offshore jurisdictions.[147] In either case, national authorities tend to scrutinize cross-border transactions involving the use of tax havens or jurisdictions that offer the protection of bank secrecy or confidentiality of financial information.

The correlation between factors indicating money laundering and those pointing to tax evasion makes the information collected pursuant to the reporting obligations featured in all anti-money-laundering regimes clearly relevant for tax administration purposes. Consequently, both in the domestic context and in cooperative international initiatives, national authorities have often taken an integrated approach to tax and non-tax enforcement:

> [L]aw enforcement and regulatory authorities [may] combine international tax and counter-money-laundering enforcement by: (1) ensuring that obligations to report transactions relating to suspected criminal offenses apply even when the transactions are believed to involve tax offences; and (2) permitting money-laundering authorities to forward information to their tax authorities to support the investigation of tax-related crimes, and communicating that information to other jurisdictions so that it can be used by their tax authorities.[148]

A Canadian example will illustrate this coordination of activities. In Canada, FINTRAC is the central repository for all information collected about suspected money-laundering activities. Although FINTRAC is structurally independent from other government agencies, the nature of its mandate presupposes a close working relationship with the Canadian revenue authorities. For instance, if FINTRAC reasonably suspects that information reported to it may be relevant to a tax evasion offence, it is obliged to disclose that information to the CCRA.[149] The legislation also contemplates FINTRAC's passing such information on to foreign authorities.

It appears to be entirely within FINTRAC's discretion to conclude that information in its possession may relate to the commission of a tax offence. Officers of the agency will undoubtedly be aware that as traditional audit trails disappear, tax administrators will welcome access to this kind of information. Furthermore, it seems unlikely that taxpayers would challenge any such disclosure since the legislation prevents the subject from even knowing that a suspicious transaction report was originally filed.

The connection between tax administration and anti-money-laundering efforts is also apparent in the Canadian reporting requirements under the PCMLTFA applicable to every importer or exporter of cash and/or monetary instruments above the prescribed threshold.[150] Reports on all such cross-border transactions must be made directly to the CCRA. Furthermore, the CCRA is responsible for enforcing the PCMLTFA. Accordingly, its officers have powers to search and seize persons and property, including the power to retain and open mail, if they suspect that any transfers have gone unreported.[151]

Thus, Canada's new anti-money-laundering legislation allows information on a variety of financial transactions to be released to the CCRA, or in some circumstances collected and compiled by the CCRA itself. Accordingly, while the stated objective of the PCMLTFA is to combat money laundering, it has at least an ancillary effect of providing another source of information to the CCRA for use in enforcing Canada's tax laws.

It is not certain that the creators of anti-money-laundering legislation deliberately set out to construct information-gathering devices that would serve tax administration purposes as well. Nonetheless, it would be infinitely preferable if governments were more candid about the interaction between the two. Taxpayers would then be better equipped to scrutinize the government's actions and consider their consequences. Such scrutiny is important since the various initiatives in which countries are currently participating may have a negative impact on the rights of individual taxpayers.

IMPLICATIONS FOR TAXPAYERS' RIGHTS

The disintegration of traditional borders and boundaries—national, physical, and technological—that previously regulated the flow of trade and investment has made international cooperation in the area of taxation inescapable. Some of the more recent cooperative efforts have been discussed above. However laudable their purpose, though, widening the scope and nature of information exchange has the potential to infringe taxpayers' rights. The question thus raised is, how far should these new measures go?

Taxpayers' Rights Generally

In democratic societies, taxpayers appear to enjoy certain basic rights.[152] First, taxpayers have the right to know how the tax system operates and how tax is assessed, as well as the right to be informed of their rights. Second, taxpayers have the right to appeal decisions made by tax authorities in accordance with an established grievance procedure. Third, taxpayers are entitled to a high degree of certainty as to the tax consequences of their actions; they are also entitled to pay no more tax than is required by the legislation. Fourth, taxpayers have the right to expect that revenue authorities will not intrude unnecessarily upon their privacy, whether in obtaining information from third parties or in entering and searching premises. Fifth, taxpayers are entitled to have the information provided to tax authorities kept confidential by tax authorities and not used for any purposes other than those specified in the tax legislation.

If taxpayers perceive that the tax system is fair and respects their rights, they are more likely to cooperate with revenue authorities. The cooperation of taxpayers in turn benefits and supports the tax regime. Governments therefore try to protect the interests of taxpayers and counterbalance the wide powers of verification and enforcement given to tax authorities, by specifically providing for taxpayers' rights either in legislation or in administrative rulings and practices. Certain countries have even consolidated these protective measures into a taxpayers' charter or declaration of taxpayers' rights.[153]

While many countries have made taxpayers' rights an express part of their national tax system, taxpayers' entitlements also arise in the broader context of international human rights. In this respect, taxpayers are increasingly raising human rights issues in tax proceedings. This trend is evidenced, for example, in the burgeoning number of cases involving the application of the European Convention on Human Rights (ECHR) to tax matters.[154]

Certain provisions of the ECHR are more relevant to taxation than others. Taxpayers have tended to rely on the following in bringing forward their complaints: article 1 of the first protocol, the right to peaceful enjoyment of property; article 6, the right to a fair trial; article 8, the right to respect for private and family life; article 9, freedom of thought, conscience, and religion; and article 14, prohibition of discrimination.[155] In terms of governments' information-seeking activities, taxpayers have tended to raise article 8 where the powers of the authorities are broad and not accompanied by adequate judicial safeguards.[156]

Aside from multilateral conventions on human rights, there are also national instruments that may offer taxpayers some protection from the unchecked actions of revenue authorities. For example, in Canada, a number of fundamental human rights and freedoms are enshrined in the Canadian Charter of Rights and Freedoms[157] ("the Charter"), including rights against self-incrimination[158] and the right to be secure against unreasonable search and seizure.[159] Such Charter rights generally come into play in the tax context where the CCRA is investigating alleged tax evasion or another income tax offence.[160] It appears that in cases involving penal sanctions, taxpayers are entitled to procedural safeguards akin to those normally available in criminal investigations.[161]

Injurious Effects

Taxpayers' rights have an increasingly important role to play in today's society, parallelling the heightened complexity of tax legislation and growth in government regulation. As discussed above, different facets of globalization have brought certain pressures to bear on tax administration, and national revenue authorities have responded with various initiatives aimed at opening up access to information and improving methods of information exchange. However, in focusing on internationally coordinated verification and enforcement mechanisms, tax administrators must take care not to lose sight of individuals' domestic rights. While the current emphasis on information exchange may spring from the understandable desire of countries to strengthen and protect their respective tax regimes, it may nonetheless have an injurious effect on taxpayers.

Privacy Rights

One obvious concern is the conflict between enhanced exchange of information and individual privacy rights.[162] There is clearly a need to guard against overly broad information exchanges in the absence of adequate safeguards for the protection of privacy. In terms of treaty requests for information, most treaties include provisions that guarantee the confidentiality of the information provided; restrict the disclosure of such information to persons involved in tax assessment, collection, enforcement, or prosecution; limit the use of the information to those purposes; and protect trade, business, industrial, and other secrets from release. However, these protections are somewhat illusory because revenue authorities in most countries do not notify taxpayers when an information request is made to or received from a foreign government.[163] Without prior notice of a proposed exchange, taxpayers have no chance to raise any of the points enumerated above as grounds for challenging the exchange, despite their obvious interest in the matter. In this respect, it is difficult to see, for example, how a tax official would know what information the taxpayer considers a trade secret. Furthermore, while revenue authorities are not obliged to exchange highly sensitive information, they remain at liberty to do so. This lack of prior notification becomes increasingly problematic as the number and scope of information exchanges grow.

The need to uphold taxpayers' rights in light of intensifying exchange-of-information efforts is particularly compelling if the exchange takes place as a result of a specific request. A foreign administration will generally seek information on a particular taxpayer in the course of investigating potential tax offences. Since revenue authorities may make use of specific requests to obtain information in furtherance of a tax prosecution, in such circumstances taxpayers should be entitled to the enhanced protections available in criminal or quasi-criminal investigations.

By contrast, there is less potential for infringement of taxpayers' rights where information on a particular category of income is systematically exchanged between states on a regular basis. This kind of automatic exchange may occur pursuant to a tax treaty or under an initiative like the European Commission's proposed savings directive. There are two main reasons why automatic exchanges of information pose fewer problems in terms of taxpayers' rights. First, the routine transmission of information is a type of verification tool that allows tax authorities to collect data that are used for general audit purposes. It does not correspond to a specific inquiry on a known taxpayer and hence has no particular investigative function. As the Canadian jurisprudence indicates, a clear distinction is made between an audit and an investigation, and tax administrators enjoy much broader latitude to exercise their powers in connection with the former.[164] Second, the kind of information subject to automatic exchanges is generally uncontroversial in nature and likely to be reported by taxpayers in any event. For example, US banks annually report to the IRS all interest payments made to Canadian-resident depositors;[165] the IRS then forwards the information to the CCRA. This type of automatic exchange is unproblematic in the sense that the nature of the information provided is fairly generic: it does not contain any sensitive personal material, nor does it reveal any trade or business secrets. Moreover, most taxpayers will not try to hide such income since it is generally known that revenue authorities routinely exchange such information.

Applicability of Domestic Protections to Foreign Administrations

Opening up exchange of information raises another concern, namely, whether domestic provisions designed to protect taxpayers will also apply in a foreign jurisdiction. In the tax treaty context, the general rule is that a state is not bound to go beyond its own internal laws and administrative practices in order to comply with an information request from a treaty partner.[166] Moreover, in providing the information, the requested state is not obliged to take any measures that are not permitted under the laws and practices of the requesting state.[167] However, individual countries often take different approaches.

For example, in the United States, the IRS is able to obtain more information pursuant to a treaty request than it can for purely domestic purposes. In this respect, US courts have held that the recipient of a summons issued by the IRS in connection with a treaty request for information does not benefit from the constitutional safeguards provided under US law that would otherwise apply in a non-treaty context.[168] Accordingly, a US resident cannot refuse to provide information requested by a foreign administration on the basis of US law.[169] Conversely, where a foreign tax authority gathers information about a US-resident taxpayer on behalf of the United States, the US resident is entitled to US constitutional and procedural protection. Accordingly, if the way in which a treaty partner obtains information falls short of US standards, such information is not admissible as evidence in US court proceedings.[170]

Canada's approach differs from the US approach regarding the protection of citizens' constitutional rights where a foreign government gathers information for domestic use. The Canadian position is articulated in the Supreme Court of Canada's decision in *Schreiber v. Canada (AG)*.[171] In that case, the respondent was a Canadian citizen with an interest in several Swiss bank accounts. After receiving a request from Canada for assistance in connection with a Canadian criminal investigation, the Swiss authorities seized certain records relating to the Swiss accounts. The respondent challenged the seizure on the basis that no search warrant had been obtained in Canada before the Canadian government's request for assistance. However, the majority of the Supreme Court of Canada held that the Canadian standard for the issuance of a search warrant did not have to be satisfied in the circumstances.

In reaching this decision, the majority pointed out that the rights and freedoms enumerated in the Charter are guaranteed only against interference from actions taken by the federal or provincial governments of Canada.[172] Therefore, while section 8 of the Charter provides a constitutional guarantee against unreasonable search and seizure, in this instance the search and seizure took place outside Canada by persons not under the authority of the Canadian government. Accordingly, the seizure of the respondent's financial records without prior judicial authorization did not violate section 8 of the Charter. Furthermore, the majority held that the mere act by the Canadian government of requesting assistance from the Swiss authorities did not by itself engage the Charter.[173]

Although *Schreiber* was not a tax case, the decision is still relevant to tax-related information exchange because it shows that where Canada requests information from another jurisdiction, neither the actions of the foreign administration nor the laws authorizing those actions are subject to Charter scrutiny. The Canadian approach is problematic in that it allows the government to indirectly violate domestic constitutional protections by hiding behind a foreign regime. The ramifications of this position must also be viewed in light of the growing international emphasis on exchange of information through tax treaties and otherwise. If countries intensify their cooperative efforts without considering how foreign authorities go about obtaining requested information, what will happen to domestic rights to privacy and security against unreasonable search and seizure? With the globalization of tax administration, governments should aim for some measure of consistency in how taxpayers should be treated. Otherwise, taxpayers' rights may fall between the cracks created by incongruent national approaches to information exchange. This danger has already been seen in the Canada-US context.[174]

Legal Privilege

The sanctity of the lawyer-client relationship is axiomatic in a democratic society.[175] In the context of tax-information exchange, the special relationship between taxpayers and their legal counsel was specifically recognized by the Supreme Court of Bermuda in *Re Application by Braswell*.[176] In that case, the United States had requested information on a US taxpayer from Bermuda under the USA-Bermuda Tax Convention Act 1986; however, the material relied upon by the IRS and leading to the investigation had been based on the unauthorized disclosure of privileged information. The court denied the US request for information on the basis that it had been tainted by the earlier breach of privilege. In reaching its decision, the court held that

> legal professional privilege is a fundamental human right protected by the ECHR which applies to Bermuda, that it is much more than an ordinary rule of evidence, that it is a fundamental condition on which the administration of justice as a whole rests.[177]

Despite the clear statement in *Braswell*, the recent implementation of sweeping anti-money-laundering measures calls into question the role of legal counsel in protecting taxpayers' rights. As discussed above, initiatives designed to combat money laundering and other financial crimes focus on the mandatory, third-party reporting of financial transactions and other prescribed information. All data are compiled and analyzed by a central body having the discretion to pass information along to revenue authorities. The indirect effect of such arrangements is to widen the extent of information available to tax administrators. The implications for taxpayers' rights lie in the fact that in most countries, the statutory reporting requirements are extended to lawyers vis-à-vis their clients' activities.

For example, the new Canadian anti-money-laundering legislation provides that every lawyer commits a crime if he or she fails to report to FINTRAC any information that has raised suspicion in the course of the lawyer's dealing with his or her client.[178] There are a number of problems with this provision. First, it may be difficult for legal counsel to determine what does and what does not constitute reportable behaviour in each case. According to FINTRAC, some "common indicators" of suspicious transactions include "client presents confusing details about the transaction," "client insists that a transaction be done quickly," and "client appears to be living well beyond his or her means in light of his or her employment, profession or business."[179] Such factors are overly broad, and lawyers may unnecessarily report transactions in order to avoid running the risk of criminal sanctions. Second, any report that is filed with FINTRAC must include the extensive information detailed in the Suspicious Transaction Reporting Regulations. Third, lawyers are prohibited from disclosing to their clients even the fact that they have made a suspicious transaction report.[180] These last two requirements infringe upon the well-established principles of solicitor-client confidentiality and independence of the bar.

Section 11 of the PCMLTFA states that in reporting suspicious transactions, lawyers are not required to disclose any communication that is subject to solicitor-client privilege. However, the scope of protection afforded by solicitor-client privilege is narrower than the coverage provided by solicitor-client confidentiality, which protects the right of clients to communicate in confidence with legal counsel.[181] Moreover, the rules of professional conduct throughout common law jurisdictions generally require lawyers to hold all client-related information in the strictest confidence. Accordingly, the reporting obligations imposed by the PCMLTFA place lawyers in a direct conflict of interest with their professional duties and ethical responsibilities.

Members of the Canadian legal community have therefore challenged the application of the PCMLTFA to lawyers on the basis that the legislation threatens the constitutionally protected right to an independent bar. Although the independence of the bar is not specifically set out in the Charter, the argument is that it constitutes an unwritten constitutional norm or fundamental principle of justice that underlies the enumerated Charter rights. In other words, such constitutional guarantees as the right to life, liberty, and security of person in section 7 of the Charter, and the right to legal counsel in section 10(b), would be meaningless without an independent bar. On the basis of these constitutional arguments, the Supreme Court of British Columbia granted interlocutory relief exempting lawyers in that province from the PCMLTFA's recording and reporting requirements.[182] Following that decision, the Federation of Law Societies of Canada and the federal government reached an agreement whereby all Canadian lawyers would be exempt from part 1 of the PCMLTFA pending a final determination of the constitutional issues on their merits.[183]

The Canadian example demonstrates one government's willingness to intrude upon the traditional solicitor-client relationship in the course of seeking information. Although the anti-money-laundering measures do not deal directly with information exchange for tax purposes, this kind of intrusion warns of the need for vigilance as states take further steps to consolidate their information-gathering powers and encroach upon citizens' legal rights in the process. A parallel can be drawn between Canada's legislation and other initiatives such as the European Commission's proposed savings directive and the OECD's work in the area of bank secrecy: all revolve around governments' opening up new avenues to information sources. Consequently, as access to and exchange of information increase among national authorities, in both the tax field and other related areas, it is crucial that the role of legal counsel in protecting taxpayers' rights not be diminished.

Potential for Abuse

As a final point, expanding the scope of information exchange is problematic in another, more general sense. The broader the powers of governments to obtain and pool information on taxpayers, the greater is the potential, or temptation, for abuse. The danger of unauthorized access is heightened by the fact that information is often stored in central computerized databases, networked or linked electronically between jurisdictions. Accordingly, "criminal access can occur at the weakest point of entry, multiplying the risks associated with unauthorized disclosure."[184]

It is therefore crucial to ensure that adequate safeguards are in place to protect taxpayer information; it is also necessary to prevent overly broad or unnecessary information exchanges. In this sense, national authorities should not engage in exchange of information without first satisfying themselves that the requested information will not be used for improper purposes.

By way of example, when the United States proposed new reporting regulations that would allow the IRS to forward to foreign authorities information collected on interest paid by US banks to non-resident accountholders, one of the main objections raised by US financial institutions was concern over the security of the information once exchanged. In this respect, one bank warned that owing to public corruption, there was no assurance that sensitive financial information would remain strictly confidential in the hands of a Latin American government.[185] Another bank made the point that many of its clients had placed deposits in the United States because of political and economic instability in their home countries.[186] Those clients would consider any transfer of banking information as a threat to their personal safety, since the information might be filtered to criminal elements and used for kidnapping and extortion purposes.

Accordingly, as national authorities experiment with new means of gathering and sharing information, they must take care to protect taxpayers' affairs from misuse both at home and abroad. In this respect, greater access to information should be coupled with greater government transparency. It is hoped that such transparency will lead to increased government accountability.

CONCLUSION

Summary

Information has always played a pivotal role in tax administration. Without a systematic flow of information, revenue authorities have great difficulty in identifying and verifying taxable transactions, which in turn hinders the proper assessment of liabilities and the efficient collection of revenues.

Economic globalization has heightened the pace, mobility, availability, and global nature of information. Electronic commerce and harmful tax competition, two facets of the current global interdependence, reveal a growing trend toward anonymous, decentralized, intangible, cross-border transactions, coupled with the diversion of mobile capital to low-tax or no-tax jurisdictions. Taxpayers have clearly taken advantage of having better access to information. Tax authorities, meanwhile, find themselves losing traditional information sources and scrambling to maintain control over the flow of tax intelligence. It is this paradox between the globalization of information on the one hand and a lack of transnational tax information on the other that lies at the heart of the challenges facing tax administrators today.

In tackling this information deficiency, national authorities have concentrated their efforts on improving international cooperation. They have worked in particular on facilitating access to and sharing of tax information. Certain initiatives have built on traditional forms of information exchange; others have been more ambitious, while some have pursued more circuitous routes of assistance. Regardless of the specific form, however, exchange of information has clearly emerged as the cornerstone of international tax administration today.

Future Directions

The reality of global economic interdependence has removed much of the political opposition to information exchange, leaving governments in a position to work on its technical side. Thus, in terms of future developments, revenue authorities will probably make use of technology themselves as a means of enhancing international cooperation. Technological advances have already facilitated intergovernmental communications by allowing for, inter alia, the networking of tax information databases and the automatic, electronic exchange of information. Other potential applications of technology include the use of global taxpayer identification numbers to track cross-border transactions, as well as the development of software to police Internet activities electronically.

Despite this technical progress, the danger remains that countries, in focusing on the macro level, may lose sight of how their collaborative efforts affect individuals at the micro level. One of the hardest challenges for governments may be to alleviate concerns about taxpayers' rights, particularly rights to privacy and confidentiality. If tax administration has gone global, perhaps the time has come for taxpayers' rights to follow suit, in the form of an international charter of taxpayers' rights.

What are the alternatives to cross-border information exchange? Retreating behind national borders and adopting an isolationist response to global tax issues are not viable options.[187] Such an approach would be antithetical to the forces of globalization. Moreover, a new kind of international tax order is already rising, as reflected in the emergence of international and regional organizations, the increasing attention paid to their agendas, and the growing influence of their tax policies.[188] Along the same lines, there have been calls for a global tax authority[189] or at least a world tax dialogue.[190] In such an environment, national isolation cannot thrive.

A second alternative that would better reflect the nascent international tax order would be to harmonize tax systems and have some kind of global tax code. However, harmonization would require governments to give up one of their most basic sovereign rights, namely, "the right to tax in a way that best suits the political realities, economic needs and social and cultural values within each country."[191] In light of such diversity, there appears to be little likelihood of obtaining a consensus on the objectives or general features of a harmonized tax system, let alone actually designing and implementing one. Moreover, even if harmonization were politically acceptable, it would not be feasible without effective information exchange.[192]

Thus, it appears that greater international cooperation in the form of information exchange is here to stay. The effectiveness of the new administrative efforts remains to be seen and, of course, turns on the particular objectives of those efforts. The OECD, for instance, sees exchange of information as playing an integral role in counteracting unfair tax practices. Individual countries are presumably looking to protect their national tax bases from erosion. However, judging effectiveness purely in terms of revenue levels may not make sense. Success in the long run might be most appropriately measured in terms of finding the right balance between efficient tax administration and respect for taxpayers' rights.

As a final comment, although this article has looked primarily at information exchange as a practical response to the interaction between globalization and tax administration, it is interesting to consider whether the administrative issues raised will have any impact on the development of substantive rules of international taxation. In this respect, various aspects of globalization remain fundamentally problematic for tax administrators, since the traditional paradigm of fiscal jurisdiction is based on territoriality. The proliferation of borderless electronic/digital transactions, for example, presents a significant challenge to the reigning tax concepts of source and residence. In determining how to deal with the jurisdictional questions raised by constant business innovation and technological advancement, countries may be forced to concede to the practicalities of administering and enforcing any new substantive laws. Recent debate on the adoption of formulary apportionment as a method of cross-border income allocation might, in part, reflect the new administrative reality.[193]

It remains to be seen whether administrative difficulties in procuring taxpayer information and using that information to enforce tax statutes will find parallel expression in new delimitations of tax jurisdiction. For the time being, however, globalization in general and the new transactional methodologies in particular have provided a strong impetus for enhanced information exchange. In this sense, international tax administration has clearly entered the exchange-of-information age.

NOTES

1 "E-Tax 2000—The Most Consequential Tax Issue of the New Millennium," IIR Conference, London, October 30-31, 2000.

2 Brian J. Arnold, "Controlled Foreign Corporation Rules, Harmful Tax Competition, and International Taxation," in *Report of Proceedings of the First World Tax Conference: Taxes Without Borders*, 2000 World Tax Conference Report (Toronto: Canadian Tax Foundation, 2000), 17:1-26, at 17:4.

3 Gary L. Zed and Sandra M. Goldberg, "Death, Taxes and Competent Authority: The Third Inevitable," in Brian Arnold and Jacques Sasseville, eds., *Special Seminar on Canadian Tax Treaties: Policy and Practice* (Kingston, ON: International Fiscal Association, Canadian Branch, 2001), 7:1-47, at 7:2.

4 Anne Fairpo, "The Impact of the Internet on International Taxation and Vice Versa" (2000) vol. 2, no. 2 *Tax Planning International E-Commerce* 3-4.

5 For example, the process of digitization has allowed the sale of books, magazines, music, movies, and computer software to take place entirely online. The direct provision of services over the Internet represents another major use of the medium's ability to transmit information.

6 Vern Krishna, "International Income Taxation of Electronic Commerce" (1999) vol. 9, no. 4 *Canadian Current Tax* 33-48, at 34.

7 Richard L. Doernberg, Luc Hinnekens, Walter Hellerstein, and Jinyan Li, *Electronic Commerce and Multijurisdictional Taxation* (The Hague: Kluwer Law International, 2001), 389.

8 Jose M. Calderón, "Taxpayer Protection Within the Exchange of Information Procedure Between State Tax Administrations" (2000) vol. 28, no. 12 *Intertax* 462-75, at 463.

9 Doernberg et al., supra note 7, at 388: "Effective administration relies on the tax authorities' power and means to obtain information in order to assess a taxpayer's tax liability by identifying taxpayers, identifying and verifying transactions, and establishing a link between the taxpayer and the transactions."

10 Ibid.

11 Canada Customs and Revenue Agency, *GST/HST and Electronic Commerce: A Discussion Paper for Public Comment on the Administration of the Goods and Services Tax/Harmonized Sales Tax in an Electronic Commerce Environment* (Ottawa: CCRA, Excise and GST/HST Rulings, Policy and Legislation, November 2001), 2, available on the Web at http://www.ccra-adrc.gc.ca/tax/technical/discussion-e.pdf.

12 Ibid.

13 Fairpo, supra note 4, at 3: "[I]t took television 38 years to reach the same number of people that the WWW reached in four years."

14 Alex Easson, "Taxing Electronic Commerce: Enforcement Problems Must Be Addressed" (1998) vol. 9, no. 3 *Canadian Current Tax* 21-23, at 22.

15 Doernberg et al., supra note 7, at 389. See also Julian J.B. Hickey, "The Fiscal Challenge of E-Commerce" [2000] no. 2 *British Tax Review* 91-105, at 94: "There is no way in which tax administrations can currently check the identity of e-commerce traders operating through computer systems. For instance there are difficulties in matching domain names with the names of registered companies."

16 Pierre J. Bourgeois and Luc Blanchette, "Income_taxes.ca.com: The Internet, Electronic Commerce, and Taxes—Some Reflections: Part 1," International Tax Planning feature (1997) vol. 45, no. 5 *Canadian Tax Journal* 1127-49, at 1133.

17 Doernberg et al., supra note 7, at 389.

18 For further discussion of the different techniques and services that have been developed to make Internet activities anonymous, such as the multifunctional smart card, see Jan Grijpink and Corien Prins, "New Rules for Anonymous Electronic Transactions? An Exploration of the Private Law Implications of Digital Anonymity" [2001] no. 2 *Journal of Information, Law and Technology*, available on the Web at http://elj.warwick.ac.uk/jilt/.

19 Charles E. McLure Jr., "Globalization, Tax Rules and National Sovereignty" (2001) vol. 55, no. 8 *Bulletin for International Fiscal Documentation* 328-41, at 335. See also Walter Szyc, "Revenue Canada's Perspective on Electronic Commerce," in *Report of Proceedings of the Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998), 53:1-14, at 53:12: "Electronic cash is an emerging payment form. It can be outside the banking system and as anonymous as cash. Stored-value cards such as Mondex can accommodate direct transfers between cards. We are concerned that electronic cash/Net money will be used in tax evasion and other criminal activities contributing to the growth of the underground economy."

20 McLure, supra note 19, at 334. See also Joseph H. Guttentag, "Key Issues and Options in International Taxation: Taxation in an Interdependent World" (2001) vol. 55, no. 11 *Bulletin for International Fiscal Documentation* 546-56, at 547: "Services now constitute the single most important element in many of our economies. The new technologies expedite tremendously the cross-border capabilities, for example, of financial service organizations, as compared with manufacturers."

21 *GST/HST and Electronic Commerce*, supra note 11, at 3.

22 Doernberg et al., supra note 7, at 390.

23 Bourgeois and Blanchette, supra note 16, at 1141.

24 Hickey, supra note 15, at 94.

25 Sven-Olof Lodin, "International Tax Issues in a Rapidly Changing World" (2001) vol. 55, no. 1 *Bulletin for International Fiscal Documentation* 1-7, at 2.

26 Along with electronic commerce, the Canada Customs and Revenue Agency (CCRA) has identified the use of tax havens by Canadian taxpayers as a major tax issue in Canada. Over the last 10 years, Canadian direct investment in tax haven jurisdictions has increased by some 432 percent. The number of offshore investment funds in tax havens is also increasing by approximately 22 percent a year. The CCRA is currently monitoring these activities and developing strategies to address this concern. See William V. Baker, "Current Compliance Initiatives," in *Report of Proceedings of the Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002), 41:1-10, at 41:7.

27 See Organisation for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998). This report was followed by two progress reports, the first in June 2000 entitled *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (Paris: OECD, 2000), and the second in November 2001 entitled *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* (Paris: OECD, 2001).

28 *Harmful Tax Competition*, supra note 27, at paragraph 21.

29 Ibid.

30 Ibid., at paragraph 23.

31 Ibid., at paragraph 43.

32 Ibid., at paragraph 29.

33 Luxembourg and Switzerland abstained from endorsing the 1998 report as well as the follow-up work in 2000 and 2001. Belgium and Portugal likewise declined to endorse the 2001 progress report.

34 *Harmful Tax Competition*, supra note 27, at annex II, statement by Switzerland.

35 Ibid., at paragraph 53.

36 Ibid., at paragraph 52.

37 *The 2001 Progress Report*, supra note 27, introduction.

38 Ibid., at paragraph 4. The OECD employs the following criteria in identifying harmful tax practices: no or nominal taxes in the case of tax havens, and no or low effective tax rates in the case of preferential regimes; lack of effective information exchange; lack of transparency; and no substantial activities in the case of tax havens, and ring fencing in the case of preferential regimes.

39 Ibid., at paragraphs 36 to 42.

40 Guttentag, supra note 20, at 555.

41 Since the jurisdiction to tax derives from the sovereignty of nations, the state is the primary taxing unit. For a theoretical discussion of fiscal jurisdiction, see Rutsel Silvestre J. Martha, *The Jurisdiction To Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction* (Deventer, the Netherlands: Kluwer Law and Taxation, 1989), 11-41.

42 See *R v. McKinlay Transport Ltd.*, [1990] 1 SCR 627, at 636; and *Jarvis v. The Queen*, 2002 DTC 7547, at paragraph 49 (SCC).

43 RSC 1985, c. 1 (5th Supp.), as amended, subsection 150(1).

44 For example, ITA section 233.2 sets out various reporting requirements in connection with non-resident trusts and foreign investment entities.

45 See *Jarvis*, supra note 42, at paragraph 51: "It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness."

46 Joanne E. Swystun, "The Role of Investigations in Tax Audits: A Practitioner's Perspective," in *Report of Proceedings of the Fiftieth Tax Conference*, 1998 Conference Report (Toronto: Canadian Tax Foundation, 1999), 30:1-12, at 30:1.

47 The definition of "record" is contained in ITA subsection 248(1).

48 ITA subsection 230(4).

49 ITA subsection 230(4.1).

50 ITA subsection 231.2(2).

51 ITA subsection 238(1).

52 This provision is theoretically significant in that it empowers the CCRA to obtain foreign-based information from non-residents of Canada. However, it has been pointed out that its usefulness is severely limited in practice by the CCRA's lack of jurisdiction to enforce its statutory powers of investigation beyond Canada's boundaries. See Pierre A. Lessard and Charles C. Gagnon, "International Tax Compliance," in *Report of Proceedings of the Forty-Eighth Tax Conference*, 1996 Conference Report, vol. 2 (Toronto: Canadian Tax Foundation, 1997), 39:1-34, at 39:3. This point will be discussed further below in the context of the limits of domestic powers in the area of tax administration and enforcement.

53 ITA subsection 231.6(4).

54 ITA subsection 231.6(5).

55 The application of the various domestic provisions to access taxpayer information is increasingly problematic, as evidenced by growing litigation in this area. For example, in connection with section 231.2 requirements, see *R v. Van Egmond*, 2002 DTC 7073 (BCCA); *Henry Bernick v. The Queen*, 2002 DTC 7167 (Ont. SCJ); *Fraser Milner Casgrain et al. v. MNR*, 2002 DTC 7310 (FCTD); and *Tower et al. v. MNR et al.*, 2002 DTC 7315 (FCTD). Further discussion of this issue is beyond the scope of this article.

56 For example, ITA subsection 153(1) requires employers to provide information on amounts paid to employees in the course of remitting tax on employment income deducted at source.

57 The Finance Act 1994 (UK), 1994, c. 9, established the framework for self-assessment, while succeeding Finance Acts provided further details. However, the Inland Revenue still does not issue self-assessment forms to employees, who constitute the bulk of the tax-paying population in the United Kingdom. Instead, employees in the United Kingdom fall under the "PAYE" system, which involves the cumulative withholding of tax at source. Thus, as in the Canadian and US systems, employers in the United Kingdom are legally obliged to supply the Inland Revenue directly with information on emoluments received by taxpayers from their employment, as well as account for the tax deducted at source.

58 Taxes Management Act 1970 (UK), 1970, c. 9.

59 This categorization appears in John Tiley, *Revenue Law*, 4th ed. (Oxford: Hart Publishing, 2001), 79.

60 TMA 1970 section 20(1).

61 TMA 1970 section 20(2).

62 TMA 1970 section 20(3).

63 TMA 1970 section 20A.

64 Finance Act 1990 (UK), 1990, c. 29, section 125. See also European Council Directive 77/799/EEC of December 19, 1977.

65 ITA section 231.6.

66 Al Meghji, Gerald Grenon, and Edward Rowe, "Does Procedure Matter?" in *Report of Proceedings of the Fifty-First Tax Conference*, 1999 Conference Report (Toronto: Canadian Tax Foundation, 2000), 15:1-42, at 15:29.

67 See, for example, *Government of India v. Taylor*, [1955] AC 491 (HL). For further discussion of the general rule of non-enforcement of foreign revenue claims, see Philip Baker, "Transnational Enforcement of Tax Liabilities," in Malcolm J. Finney and John C. Dixon, eds., *Tolley's International Tax Planning*, 2d ed. (Croydon, UK: Tolley, 1993), 10.1.

68 Organisation for Economic Co-operation and Development, *Tax Information Exchange Between OECD Member Countries: A Survey of Current Practices* (Paris: OECD, 1994), 23.

69 Outside the realm of tax treaties, there are also some bilateral agreements dedicated to the exchange of information, such as those between the United States and certain Latin American and Caribbean countries. In general, these agreements are concluded where one country needs information from another country in order to enforce its domestic tax laws, but does not find it appropriate to enter into a full-blown tax treaty. That country therefore offers certain inducements or provides certain benefits to the other country in return for such information. See Vito Tanzi and Howell H. Zee, "Taxation in a Borderless World: The Role of Information Exchange" (2000) vol. 28, no. 2 *Intertax* 58-63, at 60-61.

70 Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital* (Paris: OECD) (looseleaf) (herein referred to as "the OECD model tax convention").

71 Previously, paragraph 1 of article 26 had only authorized the exchange and use of information in relation to taxes on income and capital. In 2000, the paragraph was amended to allow for exchange of information for purposes of the application of taxes not specifically covered under article 2 of the convention.

72 Meghji, Grenon, and Rowe, supra note 66, at 15:32. By way of example, Switzerland has expressed a reservation at paragraph 24 of the commentary on article 26 indicating that exchangeable information is limited to that which is necessary for the application of the tax convention. This position is reflected in article XXV of the Convention Between Canada and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, signed at Berne on August 20, 1976.

73 Meghji, Grenon, and Rowe, supra note 66, at 15:33.

74 See paragraph 9 of the commentary on article 26 of the OECD model tax convention.

75 These techniques are fully described in *Tax Information Exchange*, supra note 68.

76 As extended to value-added tax by European Council Directive 79/1070/EEC of December 6, 1979. With respect to indirect taxes, Council Regulation (EEC) no. 218/92 of January 27, 1992 provides for the exchange of large quantities of tax information on supplies of goods and services within the European Economic Community by means of a computerized network. On June 18, 2001, the European Commission proposed to extend the scope of mutual assistance provided for in Directive 77/799/EEC, supra note 64, to tax on insurance premiums.

77 OECD/Council of Europe Multi-National Convention on Mutual Administrative Assistance in Tax Matters. The convention, which became effective on April 1, 1995, currently has nine signatories: Belgium, Denmark, Finland, Iceland, the Netherlands, Norway, Poland, Sweden, and the United States.

78 Applicable to Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway, and Sweden.

79 *Tax Information Exchange*, supra note 68, at 10-11.

80 Francisco Alfredo García Prats, "Exchange of Information Under Article 26 of the UN Model Tax Convention" (1999) vol. 53, no. 12 *Bulletin for International Fiscal Documentation* 541-48, at 542.

81 Ibid.

82 See paragraph 18 of the commentary on article 26 of the OECD model tax convention.

83 Ibid., at paragraph 19.

84 *Tax Information Exchange*, supra note 68, at 25.

85 Canada apparently has a policy to limit its requests for information to situations where "a significant amount and/or principle" is involved. See Byers Casgrain, *Comparative Analysis of Exchange of Information and Mutual Assistance Between Canada and U.S. Enforcement Authorities* (Ottawa: Industry Canada, Competition Bureau, February 1, 2000), available on the Web at http://strategis.ic.gc.ca/SSG/ct01695e.html.

86 United Nations, *International Cooperation in Tax Matters: Report of the Ad Hoc Group of Experts on International Cooperation in Tax Matters on the Work of Its Sixth Meeting* (New York: United Nations, 1992), 11, where it is suggested that these matters should be considered as part of the treaty negotiations.

87 Ibid., at 6.

88 Philip Baker, *Double Taxation Conventions and International Tax Law*, 2d ed. (London: Sweet & Maxwell, 1994), 446.

89 Prats, supra note 80, at 542.

90 The Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the

protocols signed on June 14, 1983; March 28, 1984; March 17, 1995; and July 29, 1997 (herein referred to as “the Canada-US convention”).

91 Ibid., at article XXVII(1).

92 Ibid., at article XXVII(4).

93 Meghji, Grenon, and Rowe, supra note 66, at 15:35.

94 Canada-US convention, at article XXVI A(9).

95 Agreement Between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and Certain Other Taxes, the Prevention of Fiscal Evasion and the Assistance in Tax Matters, signed in Berlin on April 19, 2001 (herein referred to as “the Canada-Germany agreement”). This treaty entered into force on March 28, 2002.

96 However, Canada recently signed new tax treaties with Belgium and Italy that do not achieve the heightened level of cooperation found in the Canada-Germany agreement.

97 See paragraph 21 of the commentary on article 26 of the OECD model tax convention.

98 Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, signed in London on July 24, 2001, as amended by the protocol signed on July 19, 2002 (herein referred to as “the UK-US convention”). The new treaty will enter into force upon formal ratification by both governments.

99 See, for example, article XXIV of the Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland with Respect to Taxes on Income and Capital Gains, signed in London on September 8, 1978, as amended by the protocols signed on April 15, 1980 and October 16, 1985.

100 John F. Avery Jones, “Information Exchange—Sections 145-147,” Finance Act Notes [2000] no. 5 *British Tax Review* 529-36, at 531.

101 Finance Act 2000 (UK), 2000, c. 17.

102 Ibid., sections 145 and 146.

103 Income and Corporation Taxes Act 1988 (UK), 1988, c. 1.

104 Ibid., section 816(2ZA).

105 Section 147 of FA 2000 introduced similar provisions specifically in relation to inheritance tax. What is now section 220A of the Inheritance Tax Act 1984 (UK), 1984, c. 51, enables the Inland Revenue to make agreements to exchange information regarding inheritance tax with other countries and to collect information domestically for purposes of such international agreements.

106 See supra note 71 and the accompanying text regarding the amendments already made to article 26 to widen the scope of information exchange.

107 See Organisation for Economic Co-operation and Development, *Draft Contents of the 2002 Update to the Model Tax Convention* (Paris: OECD, October 2, 2001), available on the Web at http://www.oecd.org/pdf/M00018000/M00018559.pdf.

108 For instance, draft UK legislation dealing with the recovery of taxes due in other EU member states stipulates that no obligation of secrecy imposed by statute or otherwise precludes a UK tax authority from disclosing information to another tax authority in connection with a request for enforcement. See clause 131 of Finance Bill 2002 (Bill 125-I), introduced in the House of Commons on April 23, 2002.

109 Organisation for Economic Co-operation and Development, *Agreement on Exchange of Information on Tax Matters* (Paris: OECD, April 17, 2002), available on the Web at http://www.oecd.org/pdf/M00028000/M00028528.pdf.

110 Ibid., introduction.

111 Organisation for Economic Co-operation and Development, *Improving Access to Bank Information for Tax Purposes* (Paris: OECD, 2000).

112 Ibid., at paragraph 2.

113 Ibid., at paragraph 7. Chapter III of the report elaborates on the adverse implications of lack of access to bank information for tax purposes.

114 Ibid., at paragraph 10.

115 Ibid., at paragraph 11.

116 Ibid.

117 Ibid., at paragraph 20.

118 Ibid., at paragraph 21.

119 Avery Jones, supra note 100, at 532, suggests that the bank information report had drawn embarrassing attention to the United Kingdom's discriminatory bank secrecy practices.

120 *Improving Access to Bank Information*, supra note 111, at paragraph 5.

121 Ibid., preface.

122 Sven-Olof Lodin, "What Ought To Be Taxed and What Can Be Taxed: A New International Dilemma" (2000) vol. 54, no. 5 *Bulletin for International Fiscal Documentation* 210-17, at 210-11.

123 Ibid., at 210.

124 Ibid., at 211.

125 See European Commission, "Proposal for a Council Directive To Ensure Effective Taxation of Savings Income in the Form of Interest Payments Within the Community," July 18, 2001, COM/2001/0400 final.

126 See Avery Jones, supra note 100, at 531: "Having dealt with bank secrecy, the need for the European Union draft savings directive to provide for withholding tax has been removed and this has already become a sensible proposal for exchange of information."

127 See Matthew King cited in Chuck Gnaedinger, "ECOFIN Addresses Savings Tax, E-Commerce VAT" (2001) vol. 24, no. 13 *Tax Notes International* 1251-53, at 1252. The EU Commission's optimism may have stemmed from the fact that in January 2001, the IRS proposed regulations (REG-126100-00, 2001-11 IRB 862) that would have required every bank operating in the United States to report annually all interest paid to non-resident alien individuals. This requirement would have enabled the IRS to pass such information on to the United States' treaty partners. While the proposed US reporting regulations are currently being held in abeyance, they may be resuscitated in light of the European Union's agenda to exchange information on cross-border savings income.

128 Gnaedinger, supra note 127, at 1252.

129 Bruce Zagaris, "Developments in International Tax Enforcement: A Brave New World at the Millennium" (2001) vol. 23, no. 8 *Tax Notes International* 991-97, at 994.

130 Joseph J. Aronica, Madhuri Mukhtyar, and Jennifer E. Coon, "Globalisation of Law Enforcement Efforts" (2001) vol. 4, no. 4 *Journal of Money Laundering Control* 320-32, at 320-21.

131 Guy Fortin, "Strangers in Strange Lands: The Hidden Traps of Offshore Trusts," in the 1999 Conference Report, supra note 66, 40:1-68, at 40:44.

132 This statement and most of the reporting rules are contained in title II of the Bank Secrecy Act of 1970, as amended, and related regulations.

133 Pub. L. no. 107-56, enacted on October 26, 2001.

134 Further information about these initiatives can be obtained from the US Treasury department's Web site at http://www.ustreas.gov/.

135 United States, Department of the Treasury, *A Report to Congress in Accordance with §357 of the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism of 2001 (USA PATRIOT Act)*, report 3048 (Washington, DC: Department of the Treasury, April 26, 2002), available on the Treasury Web site, supra note 134.

136 Ibid., at 12.

137 See European Commission, "Proposal for a European Parliament and Council Directive Amending Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering," July 14, 1999, COM(1999)352 final.

138 Jonathan Fisher, "Recent Developments in the Fight Against Money Laundering" (2002) vol. 17, no. 3 *Journal of International Banking Law and Regulation* 67-72, at 68.

139 There has been some debate about whether the legislation applies to tax evasion offences, particularly foreign tax evasion. For the conclusion that the UK law applies whether the tax evasion took place within or outside the jurisdiction, see Ben Brandon, "Tax Crimes Money Laundering and the Professional Adviser" (2000) vol. 4, no. 1 *Journal of Money Laundering Control* 37-43, at 43.

140 Proceeds of Crime Bill (HL Bill 97), as amended on June 25, 2002.

141 Ibid., part 6.

142 SC 2000, c. 17.

143 PCMLTFA part 1. See also the Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations, SOR/2001-317 (2001) vol. 135, no. 19 *Canada Gazette Part II* 1927-32, as amended. In addition to suspicious transactions, mandatory reporting is in place for all cash transactions and certain electronic funds transfers of Cdn $10,000 or more. See the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184 (2002) vol. 136, no. 7 *Canada Gazette Part II* 1-37, as amended.

144 PCMLTFA part 2. See also the Cross-Border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412 (2002) vol. 136, no. 15 *Canada Gazette Part II* 1-9. The term "monetary instruments" is defined in the regulations as including stocks, bonds, debentures, treasury bills, bank drafts, cheques, promissory notes, and money orders.

145 PCMLTFA part 3.

146 See, generally, Steven Philippsohn, "The Dangers of New Technology—Laundering on the Internet" (2001) vol. 5, no. 1 *Journal of Money Laundering Control* 87-95.

147 Jean Spreutels and Caty Grijseels, "Interaction Between Money Laundering and Tax Evasion: Belgian and International Measures in the Fight Against Money Laundering" (2001) vol. 10, no. 1 *EC Tax Review* 3-12.

148 Zagaris, supra note 129, at 994.

149 PCMLTFA section 55(3)(b).

150 PCMLTFA section 12.

151 PCMLTFA sections 15 to 18.

152 For a description of these rights, see Organisation for Economic Co-operation and Development, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (Paris: OECD, 1990), 12-14.

153 For example, the Canadian government has issued a declaration entitled "Your Rights," which pledges the CCRA's commitment to taxpayers' rights and fair treatment. An explanatory guide with the same title advises taxpayers of their rights in dealing with the CCRA in a wide range of situations.

154 For a thorough discussion of the jurisprudence in this area, see Philip Baker, "Taxation and the European Convention on Human Rights" [2000] no. 4 *British Tax Review* 211-377.

155 Ibid.

156 Ibid., at 213.

157 Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11, which came into force on April 17, 1982.

158 Ibid., sections 7(1), 11(c), and 13.

159 Ibid., section 8(2).

160 The Canadian courts have distinguished between purely regulatory inquiries and criminal or quasi-criminal investigations. See, for example, *McKinlay Transport*, supra note 42, in which the Supreme Court of Canada held that a statutory provision requiring taxpayers to produce books and records did not violate section 8 of the Charter since the CCRA used the information only for regulatory purposes. Accordingly, in these regulatory circumstances such a requirement did not constitute an unreasonable search and seizure. Contrast this decision with that in *The Queen v. Norway Insulation Inc. et al.*, 95 DTC 5328 (Ont. Gen. Div.), where the predominant purpose of the CCRA's searches was to gather evidence for use in criminal proceedings. In *Jarvis*, supra note 42, the Supreme Court of Canada characterized the ITA as a regulatory statute, but drew a distinction between the audit and investigative powers granted to the minister of national revenue thereunder.

161 *Jarvis*, supra note 42, at paragraph 99: "When, in light of all relevant circumstances, it is apparent that CCRA officials are not engaged in the verification of tax liability, but are engaged in the determination of penal liability under s. 239, the adversarial relationship between the state and the individual exists. As a result, Charter protections are engaged."

162 Bruce Zagaris, "Initiatives by OECD, Financial Action Task Force on Money Laundering at Critical Junctures" (2001) vol. 22, no. 25 *Tax Notes International* 3087-93, at 3090.

163 *Taxpayers' Rights and Obligations*, supra note 152, at 16.

164 See supra note 160.

165 Internal Revenue Code of 1986, as amended, reg. section 1.6049-8(a).

166 See article 26(2) of the OECD model tax convention, and related commentary.

167 Ibid.

168 Meghji, Grenon, and Rowe, supra note 66, at 15:36, citing *US v. Manufacturers and Traders Trust Co.*, 83-1 USTC 9263 (2d Cir. 1983) and *US v. Stuart, Sr.*, 89-1 USTC 9185 (Sup. Ct. 1989).

169 Ibid.

170 Ibid., citing *United States v. Wolf*, 601 F. Supp. 435 (ND Ill. 1984) and *US v. Phillips*, 79-2 USTC 9732 (DC Fla. 1979).

171 [1998] 1 SCR 841.

172 Ibid., at 858.

173 Ibid., at 860.

174 See Meghji, Grenon, and Rowe, supra note 66, at 15:40: "Canada does not offer constitutional protection where the information is obtained outside Canada but used in Canada, and the United States does not offer constitutional protection where the information is obtained in the United States to be used outside the United States. Thus, it is very possible that neither constitution applies to a request of information from the United States."

175 See, for example, *R v. Special Commissioners ex p Morgan Grenfell*, [2002] UKHL 21, in which the House of Lords stated, at paragraph 8, that legal professional privilege "is a fundamental human right long established in the common law."

176 (2001), 4 ITLR 226 (Bermuda SC).

177 Ibid., at 241.

178 PCMLTFA sections 7 and 75 and the Suspicious Transaction Reporting Regulations, supra note 143, at section 5.

179 Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), *Guideline 2: Suspicious Transactions* (Ottawa: FINTRAC, September 12, 2001).

180 PCMLTFA section 8.

181 See Jack Giles, "The Independence of the Bar" (2001) vol. 59, part 4 *The Advocate* 549-54, at 550: "It is important to understand the difference between the evidentiary rule of privilege and the principle of confidentiality. To begin, all information that is privileged is confidential; however, the reverse is not true. Not everything confidential is necessarily privileged. This is because all information acquired by a lawyer from and about a client in the course of the retainer is confidential while only the information directly related to seeking, formulating and giving legal advice is covered by the rule of privilege."

182 See *The Law Society of BC v. AG Canada; Federation of Law Societies v. AG Canada*, 2001 BCSC 1593.

183 However, lawyers remain subject to the statutory requirements concerning the reporting of cross-border transfers of currency and monetary instruments, effective January 6, 2003.

184 Richard Hay, "Information Exchange and the Offshore Financial Centres: Part 1" [2002] no. 2 *Private Client Business* 88.

185 Marshall Langer, "New EU, U.K. and U.S. Reporting Rules on Bank Deposit Interest Paid to Nonresidents" (2002) vol. 25, no. 4 *Tax Notes International* 403-11, at 410.

186 Ibid.

187 Jeffrey Owens, "Taxation in a Global Environment" [March 1, 2002] *OECD Observer*, available on the Web at http://www.oecdobserver.org/news/printpage.php/aid/650/.

188 Guttentag, supra note 20, at 548.

189 See United Nations, *Report of the High-Level Panel on Financing for Development* (New York: United Nations, 2001), available on the Web at http://www.un.org/reports/financing/.

190 See "Developing the International Dialogue on Taxation, A Joint Proposal by the Staffs of the IMF, OECD and World Bank," March 13, 2002, available on the Web at http://www.oecd.org/pdf/M00027000/M00027259.pdf .

191 Owens, supra note 187.

192 See Julie Roin, "Competition and Evasion: Another Perspective on International Tax Competition" (2001) vol. 89, no. 3 *The Georgetown Law Journal* 543-604, at 594-97.

193 For general background on this debate and a discussion of interjurisdictional income allocation, see Jinyan Li, "Global Profit Split: An Evolutionary Approach to International Income Allocation" (2002) vol. 50, no. 3 *Canadian Tax Journal* 823-83.