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WHEN DATA COMES HOME: NEXT STEPS IN INTERNATIONAL TAXATION'S INFORMATION REVOLUTION

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Over the last decade, there has been a revolution in cross-border tax information exchange and reporting. While this dramatic shift was the product of multiple forces and events, a fundamental reality is that politics, technology, and law intersected to drive the shift to the point where nation-states will now transmit and receive from each other significant ongoing flows of taxpayer information. States can now expect to accumulate large stashes of data on cross-border income, assets, and activities on a scale and level of comprehensiveness unmatched by previous information exchange regimes.

This article examines the pressing follow-up question of how this data will be used and what issues nation-states will confront when data comes home. Although concerns about data protection and use have been raised in critiquing the new cross-border information exchange regimes, a systematic examination of how governments might use or fail to use data and when those uses will pose unacceptable risks has yet to be undertaken. This article analyzes how domestic politics, priorities, and institutions are likely to affect tax enforcement and data usage at the nation-state level going forward. We argue that despite the dominant focus on global developments, domestic politics and technological constraints will likely play an equally if not more significant role in data use and protection as countries receive data and decide what to do with it. The mere fact that collective political will on a global level produced the information revolution does not prevent domestic forces from either derailing the revolution in practice or redirecting data to other uses. This article maps the potential risks and examines the extent to which individual nation-states will have the capacity or inclination to conduct enforcement, protect taxpayer privacy, and attend to distributional outcomes and risks. We ultimately articulate a framework for understanding the country-level factors likely to affect outcomes and pathways when data comes home.

Au cours de la dernière décennie, une révolution s'est produite en matière de rapports et d'échanges transfrontaliers de renseignements fiscaux. Bien que ce changement spectaculaire soit le produit de forces et d'événements multiples, c'est fondamentalement le croisement de la politique, de la technologie et du droit qui a guidé ce changement vers la transmission et la réception par les États de flux importants d'information concernant les contribuables. Désormais, les États peuvent s'attendre à accumuler de vastes réserves de données par rapport aux revenus, activités et actifs transfrontaliers, et ce, à une échelle et à un niveau d'exhaustivité inégalés par les précédents régimes d'échange d'informations.

Cet article examine la question urgente de l'utilisation de ces données et les problèmes auxquels les États seront confrontés lorsqu'elles leur parviendront. Bien que des préoccupations relatives à la protection et l'utilisation de ces données aient été soulevées pour critiquer les nouveaux régimes transfrontaliers d'échange d'information, un examen systématique de la manière dont les gouvernements pourraient utiliser ou non ces données et des moments où ces utilisations poseraient des risques inacceptables n'a pas encore été entrepris. Cet article analyse la manière dont la politique intérieure, les priorités et les institutions étatiques sont dorénavant susceptibles d'affecter l'application de la législation fiscale et l'utilisation de ces données à l'échelle étatique. Il soutient qu'en dépit de l'importance accordée aux développements mondiaux en la matière, la politique intérieure et les contraintes technologiques joueront probablement un rôle tout aussi important, sinon plus, dans l'utilisation et la protection de ces données à mesure que les pays les recevront et décideront de leur utilisation. Le simple fait que la volonté politique collective globale ait produit une révolution de l'information n'empêche pas les forces politiques intérieures de faire dérailler la révolution en pratique ou de rediriger ces données vers d'autres utilisations. Cet article cartographie les risques potentiels de cette révolution et examine dans quelle mesure les États auront la capacité ou la volonté de la faire appliquer, de protéger la vie privée des contribuables et de s'afférer aux résultats et aux risques liés à cette diffusion de ces données. Enfin, il définit un cadre permettant de comprendre les facteurs nationaux susceptibles d'influencer les conséquences et les parcours de ces données lorsqu'elles parviendront aux États.

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Introduction

In the last decade, there has been a revolution in cross-border tax information exchange and reporting.[1] A combination of shifting political dynamics, increasing technological capabilities, and countries' ability to harness international politics to force legal changes at the nation-state level has led to a new order in which many countries will now transmit and exchange significant ongoing flows of taxpayer information.[2] As a result, many states can now expect to accumulate large stashes of data on the cross-border income, assets, and activities of taxpayers on a scale and level of comprehensiveness unmatched under previous information exchange regimes.

This symposium article examines the pressing follow-up question of how country-level characteristics will shape the path of the tax information revolution when data "comes home" to various nation-states. Concerns about how tax data will be used are not new; they emerged in early critiques of the new information exchange regimes.[3] However, a deeper and more systematic delineation of the specific pathways and risks has yet to receive sufficient attention. This article highlights how domestic politics, priorities, and institutions—not just technology and laws agreed upon at a global level—are likely to affect the use of exchanged tax data and the future of enforcement. Despite the disproportionate attention to technological changes, political shifts, and legal outcomes at the global

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1 See Susan C Morse, "Ask for Help, Uncle Sam: The Future of Global Tax Reporting" (2012) 57:3 Vill L Rev 529 [Morse, "Ask for Help"]; Itai Grinberg, "Taxing Capital Income in Emerging Countries: Will FACTA [sic] Open the Door?" (2013) 5:3 World Tax J 325 at 327; Itai Grinberg, "Beyond FATCA: An Evolutionary Moment for the International Tax System" (2012) Georgetown Law Faculty Working Paper No 160, online: <scholarship.law.georgetown.edu> [perma.cc/GL8T-CQ2S].

2 See Shu-Yi Oei & Diane Ring, "Leak-Driven Law" (2018) 65:3 UCLA L Rev 532 (explaining how technology-enabled leaks of tax data influenced cross-border enforcement choices); Lukas Hakelberg, "The Power Politics of International Tax Co-operation: Luxembourg, Austria and the Automatic Exchange of Information" (2015) 22:3 J European Public Policy 409.

3 See e.g. US, *Foreign Bank Account Reporting and Tax Compliance: Hearing Before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means*, 111th Cong, 1st Sess, No 111-35 (Washington, DC: United States Government Printing Office, 2011) at 108–09 (statement of Investment Fund Institute of Canada, citing cybersecurity and data breach concerns) [*Foreign Bank Account Reporting Hearing*]; *ibid* at 61–62 (statement of Dirk JJ Suringa). See also OECD, *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (Paris: OECD, 2012), online: <www.oecd.org> [perma.cc/DKR7-G2JJ] (articulating a framework for the protection of exchanged tax data).

level, the distinct realities of each country's domestic sphere will drive substantive outcomes to a large degree and should not be ignored. This article maps the specific modes through which domestic politics, priorities, and institutions will likely exert effects, identifies factors likely to shape domestic uses of and attitudes toward data, and outlines the likely outcomes and pathways forward. Ultimately, an appreciation for the important political, economic, cultural, institutional, and legal differences between differently situated nation-states will be essential in managing risks and outcomes once exchanged tax data comes home.

Part I sets the stage by outlining the global information needs of a modern tax system and the basic mechanisms by which those needs can be satisfied. Part II maps the interplay of technology and politics at a global level that sparked the tax information revolution and led to global changes in information exchange. It then reviews the most prominent products of this information revolution—automatic information exchange under the United States' *Foreign Account Tax Compliance Act* (FATCA), the OECD Common Reporting Standard (CRS), and the OECD Base Erosion and Profit Shifting (BEPS) project country-by-country (CbC) reporting requirements. Part III considers what will actually happen when the information revolution turns inward and when country-level tax administrations receive information and make decisions about its use. Specifically, Part III flags a number of key risks and outcomes, identifies the factors that are likely to shape these risks and outcomes, and maps the potential pathways by which other countries might react or respond.

I. Tax Information Across Borders: Sources, Uses, and Traditional Constraints

We first review the importance of information in cross-border taxation, highlighting its uses and sources and the traditional limitations on its availability and application.

A. Uses

Tax administration requires information about taxpayers.[4] In the absence of adequate information, tax determinations and enforcement will

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4 See Leandra Lederman & Joseph C Dugan, "Information Matters in Tax Enforcement" (2019) Indiana University Maurer School of Law Legal Studies Research Paper No 396, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3325598>; Leandra Lederman, "Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?" (2010) 78:4 Fordham L Rev 1733 at 1734–35. *Cf* Wei Cui, "Taxation Without Information: The Institutional Foundations of Modern Tax Collection" (2018) 20:1 U Pa J Bus L 93; Michael Keen & Jenny E

be inaccurate, unsuccessful, or unprincipled. As is well acknowledged in the literature, tax compliance increases if information is corroborated by third-party reporting but decreases if information cannot be corroborated (e.g., in the case of cash businesses).[5]

Specifically, information plays a direct role in determining taxpayer liability. For example, information provided by third-party reporters can help taxpayers and governments calculate tax owed, match amounts reported by taxpayers, and implement withholding systems. Information also plays a crucial role in guiding audit and investigation of tax returns by letting the government know where to allocate scarce enforcement resources.[6]

Finally, information is important for tax policy analysis and development. In the United States, for instance, the IRS engages in a wide range of studies and analyses, some annual, others as part of specific programs, and still others on an as-needed basis. For example, the IRS publishes an annual "Data Book" providing statistical data.[7] The IRS Advance Pricing Agreement Program[8] is required by Congress to publish a public report annually on the operations of the program.[9] Outside of the IRS, other

Ligthart, "Information Sharing and International Taxation: A Primer" (2006) 13:1 Intl Tax & Public Finance 81.

5 See Joel Slemrod et al, "Does Credit-Card Information Reporting Improve Small-Business Tax Compliance?" (2015) National Bureau of Economic Research Working Paper No 21412, online: <www.nber.org/papers/w21412> [perma.cc/782K-MDB7]; Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, "Cash Businesses and Tax Evasion" (2009) 20:1 Stan L & Pol'y Rev 37; Jonas Andersson, Fred Schroyen & Gaute Torsvik, "The Impact of International Tax Information Exchange Agreements on the Use of Tax Amnesty: Evidence from Norway" (2019) NHH Department of Economics Discussion Paper 16/2019, online: <openaccess.nhh.no> [perma.cc/62UR-PZSS].

6 But see Annet Wanyana Oguttu, "The Role of International Cooperation in Preventing Tax Evasion: A Critique on 'Assistance in the Collection of Taxes'—A South African Perspective" (2014) 68:9 Bulletin for Intl Taxation 1 (arguing that data alone is inadequate and that assistance in collecting taxes will be critical).

7 See e.g. US, Department of the Treasury, *Internal Revenue Service Data Book 2017*, (Washington, DC: Internal Revenue Service, 2018), online (pdf): <www.irs.gov> [perma.cc/5ZEN-3XQM].

8 Now known as the Advance Pricing and Mutual Agreement Program.

9 See *Ticket to Work and Work Incentives Improvement Act of 1999*, Pub L No 106-170, § 521(b), 113 Stat 1860 (requiring the Secretary of the Treasury to publish annual reports). For a recent advance pricing agreement report, see e.g. "Announcement and Report Concerning Advance Pricing Agreements" (27 March 2017), online (pdf): *IRS* <www.irs.gov> [perma.cc/474Z-F8UB].

governmental bodies, such as the Congressional Budget Office,[10] as well as academic researchers,[11] rely on tax data to evaluate tax policy issues, including tax compliance, tax burdens, tax gaps, tax expenditures, and the impact of taxes on investment. Tax administrations in other countries engage in similar sorts of information analysis as well.

B. Sources

Tax information can come from five basic sources: (1) taxpayers themselves;[12] (2) third parties with reporting obligations, such as employers and other payors; (3) whistleblowers, the media, non-governmental organizations, and similar actors;[13] (4) audits and investigations by a country's own tax administration; and (5) tax administrations and actors in other countries. The first can be unreliable reporters about their own affairs. The second source has historically been difficult to mandate in the cross-border context, because third parties abroad may not be subject to reporting obligations imposed by another country. Moreover, the third source is idiosyncratic and difficult to deploy in a systematic way,[14] and the fourth is often subject to significant resource constraints.

In light of these difficulties, turning to tax administrations of other countries for information is a logically appealing way for countries to obtain the information necessary to collect taxes.[15] Yet, as discussed in Part

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[10] For a review of CBO projects and reports assessing the tax system and federal revenues, see "Taxes" (last visited 2 April 2019), online: *Congressional Budget Office* <www.cbo.gov/topics/taxes> [perma.cc/FG6T-W8B6].

[11] See e.g. Katharine G Abraham et al, "Measuring the Gig Economy: Current Knowledge and Open Issues" (2018) National Bureau of Economic Research Working Paper No 24950, DOI: <10.3386/w24950> (integrating census and tax data to assess the gig economy).

[12] See e.g. Mohammed Amidu, William Coffie & Philomina Acquah, "Transfer Pricing, Earnings Management and Tax Avoidance of Firms in Ghana" (2019) 26:1 J Financial Crime 235 (advocating expanded reporting by multinational corporations on related-party transactions based on an empirical study of transfer pricing and tax avoidance in Ghana).

[13] See e.g. Oei & Ring, *supra* note 2; Shu-Yi Oei, "The Offshore Tax Enforcement Dragnet" (2018) 67:4 Emory LJ 655 at 671 (describing how whistleblower leaks of prior years' misconduct led to 2008 US tax enforcement initiatives).

[14] For example, information obtained from whistleblowers or through data leaks may surface many years after the tax return in question has been filed.

[15] See e.g. Diane M Ring, "Corporate Migrations and Tax Transparency and Disclosure" (2017) 62:1 Saint Louis ULJ 175 [Ring, "Corporate Migrations"] (arguing that increased transparency and disclosure requirements are the result of increased business cross-border flexibility in the last two decades of the twentieth century). *Cf* Miltiadis Makris, "International Tax Competition: There Is No Need

IC, prior to the recent cross-border information revolution, governments and tax authorities faced challenges in cross-border tax enforcement due to limitations on the ability to secure information from foreign tax administrations and third-party reporters.[16] Paired with limited resources to audit taxpayers themselves and limited availability of information from other sources, this lack of third-party corroboration meant enforcement of tax obligations in cross-border and offshore matters was difficult. As Part II will describe, increasing technological capabilities and shifts in international politics since 2008 created conditions more conducive to information sharing, thus leading to the global tax information revolution.[17]

C. Limits

Tax administrations have traditionally faced multiple limitations in accessing cross-border tax information, primarily due to legal, political, and technological constraints.

Legal Constraints. Government techniques for finding, seizing, and using information pertaining to a taxpayer's potential tax return and tax obligations are necessarily subject to legal limits. In the domestic context, a warrant might be required before the tax authority may enter taxpayer premises and seize documents. In the cross-border context, legal rules and regimes have also traditionally cabined government cross-border tax information gathering efforts. Such rules are sometimes located in domestic legislation,[18] but in other cases they may result from treaties or other international agreements that set limits on information sharing.[19] For ex-

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for Cooperation in Information Sharing" (2003) 11:3 Rev Intl Economics 555 (model showing that information exchange does not matter for equilibrium outcomes).

16 For example, tax information exchange agreements (TIEAs) entered into by the United States provide for exchange of information only upon request. See Diane Ring, "Article 26: Exchange of Information" in Richard Vann et al, eds, *Global Tax Treaty Commentaries* (Amsterdam: International Bureau of Fiscal Documentation, 2017), §§ 2.1.4, 3.1.3 [Ring, "Article 26"]. *Cf* OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Paris: OECD, 2014), online: <www.oecd-ilibrary.org> [perma.cc/3RUC-9NPM] [OECD, *Standard for Automatic Exchange*].

17 See *supra* note 1.

18 For example, Switzerland during the twentieth century developed strong bank secrecy laws that significantly shaped the country's participation in exchange of tax information. See e.g. Bradley J Bondi, "Don't Tread on Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?" (2010) 30:1 Nw J Intl L & Bus 1 (providing history and overview of Swiss bank secrecy rules).

19 Tax information exchange agreements, for example, typically provide for information exchange on request (see *supra* note 16). In contrast, a recent example of international agreements delineating parameters for more consistent information sharing are the in-

ample, constraints on cross-border information sharing have traditionally been imposed by assorted features of existing tax treaty networks, domestic criminal laws of various jurisdictions, a patchwork of tax information exchange agreements, and rather ineffectual laws governing cross-border tax information flows.[20] Thus, the terms under which information crossed borders were cumbersome and heavily negotiated, and information available to tax authorities was therefore limited.

As we discuss in Part IIB, the global information revolution has resulted in the introduction of new laws and regimes that increase the ease of information exchange, including FATCA in the United States and its implementing intergovernmental agreements (IGAs) signed with other countries, as well as a broader emerging multilateral framework for information exchange.[21] This combination of new domestic legislation and bilateral commitments has resulted in increased access for tax authorities to cross-border financial and tax data.

Political Constraints. Political constraints have traditionally also played a central role in dictating a tax administration's access to information, and these dynamics can be exacerbated with respect to cross-border information. For example, while some countries were interested in greater information and transparency regarding the offshore activities of their taxpayers, other jurisdictions had vested interests in maintaining secrecy.[22] As a result, prior to the recent information revolution, the impe-

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tergovernmental agreements (IGAs) signed against the backdrop of the US *Foreign Account Tax Compliance Act* legislation and discussed below in Part IIB. See e.g. Susan Morse, "Why FATCA Intergovernmental Agreements Bind the U.S. Government" (2013) 70:3 Tax Notes Intl 245 [Morse, "FATCA Intergovernmental Agreements"].

20 See e.g. Oei, *supra* note 13 at 668–71 (describing pre-2008 cross-border tax enforcement initiatives); J Richard (Dick) Harvey Jr, "Offshore Accounts: Insider's Summary of FATCA and Its Potential Future" (2012) 57:3 Vill L Rev 471 at 475–76 (discussing problems with the pre-FATCA Qualified Intermediary system); Reuven S Avi-Yonah & Gil Savir, "Find It and Tax It: From TIEAs to IGAs" (2015) University of Michigan Public Law and Legal Theory Research Paper No 443, DOI: <10.2139/ssrn.2567646> (discussing the evolution of IGAs); Allison Christians, "The Dubious Legal Pedigree of IGAs (and Why It Matters)" (2013) 69:6 Tax Notes Intl 565 (placing IGAs in legal context) [Christians, "Legal Pedigree of IGAs"].

21 See e.g. Morse, "FATCA Intergovernmental Agreements", *supra* note 19. See also Part II.B., *below*.

22 See generally Nicholas Shaxson, "Tackling Tax Havens: The Billions Attracted by Tax Havens Do Harm to Sending and Receiving Nations Alike" (2019) 56:3 Finance & Development 6 (discussing the dollar flows through tax havens and some of the winners and losers).

tus toward tax information sharing was limited and slow to expand in the cross-border context.[23]

As we discuss in Part IIA, a mix of factors—political and otherwise—combined during the first decade or so of the twenty-first century to produce the dramatically new tax information landscape that we see today, one in which many tax administrations now have potentially extensive and timely access to information about taxpayers and their cross-border income and assets. Moreover, political forces are continuing to press for changes in global tax information regimes—some advocates urge increased information reporting and transparency to the public, while others express serious reservations about the benefits of reporting and transparency, noting their potential risks.[24] These forces will shape the future trajectory of the information revolution.

Technological Constraints. Finally, information in the tax system has always been a function of technology. In a digitized and computerized world, taxpayer data can be readily transmitted, processed, utilized in enforcement, and stored. By contrast, in the earlier paper-dominated world, ad hoc requests for information (for example, by bilateral agreement or treaty) were a more plausible mechanism than requiring consistent and ongoing exchange of large swaths of taxpayer information.

The rise of computerization in the twentieth century has fundamentally shifted the realistic options for collecting and using information in the tax system, as it has done in other areas of the economy, including cross-border commerce itself.[25] With the rise of computerization and digitization, the ability to implement tax information reporting and sharing on a large scale—for example, through reporting obligations imposed on third parties, financial institutions, or foreign governments—has become increasingly realistic and has made possible the global tax information revolution.

In short, all along the way, technological capabilities have dictated the degree to which tax administrations can efficiently integrate information

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23 See Ring, "Article 26", *supra* note 16; Oei, *supra* note 13 at 668–71 (describing pre-2008 cross-border tax enforcement initiatives); Harvey, *supra* note 20 at 475–76 (discussing problems with the pre-FATCA Qualified Intermediary system).

24 See e.g. Allison Christians & Arthur Cockfield, "Submission to Finance Department on Implementation of FATCA in Canada: Submission on Legislative Proposals Relating to the Canada–United States Enhanced Tax Information Exchange Agreement" (10 March 2014) [unpublished, archived at SSRN], DOI: <10.2139/ssrn.2407264> (discussing risks of FATCA IGAs, including violations of the *Charter* and of international law); Lee A Sheppard, "FATCA Is a Drone: What to Do About Compliance" (2011) 64:1 Tax Notes Intl 10 at 12–13; Oei, *supra* note 13 at 691–93.

25 See Ring, "Corporate Migrations", *supra* note 15.

into their existing systems and tax enforcement practices. Of course, to the extent jurisdictions currently lack access to such technology due to resource or capacity constraints, the new transparency and disclosure requirements may result in notable resource demands and burdens.

II. The Global Tax Information Revolution

The latter half of the twentieth century saw a significant increase in cross-border activity. As such, tax administrations' pressing need for better access to information in order to enforce cross-border tax compliance gradually took centre stage. Ultimately, a variety of factors resulted in a tipping point, with the global tax information revolution as the end result. This Part briefly describes the interaction of political, social, and technological forces that combined to produce the information revolution and identifies the most significant results of this revolution to date.

A. The Path to Revolution: Key Historical Events

A brief, non-exhaustive tour of some of the key historical moments that have propelled global tax transparency and disclosure forward reveals how politics, technological advances, and legal changes interacted and eventually shaped policy priorities and outcomes, resulting in the new global reality of tax transparency and information exchange.

1. From Harmful Tax Competition to Transparency and Information Exchange

As has been outlined elsewhere in the literature,[26] tax competition[27] became the subject of much debate internationally in the 1990s. Tax com-

[26] See e.g. Diane Ring, "Who Is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World" (2010) 33:3 Fordham Intl LJ 649 at 702–15 [Ring, "International Tax Policy"]. See also Thomas F Field, "Tax Competition in Europe and America" (2003) 29:13 Tax Notes Intl 1235; Julie Roin, "Competition and Evasion: Another Perspective on International Tax Competition" (2001) 89:3 Geo LJ 543 at 546–49 (appreciating the relationship between reduced business taxation and investment and describing the general practices of the United States and Europe); Adam H Rosenzweig, "Harnessing the Costs of International Tax Arbitrage" (2007) 26:3 Va Tax Rev 555 ("[t]ax competition arises from the intentional use of tax rates or special tax regimes by states, such as 'ring fencing' and secrecy laws, to attract capital" at 587, n 60); Yoram Margalioth, "Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries" (2003) 23:1 Va Tax Rev 161 at 187–90 (defining tax incentives as a particularized deviation from a baseline and providing examples).

[27] See e.g. Gary Clyde Hufbauer assisted by Joanna M van Rooij, *U.S. Taxation of International Income: Blueprint for Reform* (Washington, DC: Institute for International Economics, 1992) (positing that "[t]ax competition often starts when one country

petition broadly refers to a country's use of its tax system to attract investment or capital flows away from other countries, often through low rates or narrow tax bases. At its core, the debate drew attention to the question of whether such tax competition could, under certain circumstances, be appropriately characterized as harmful, and if so when.

As an outgrowth of the tax competition debates and at the prompting of several countries,[28] the OECD published a report[29] on tax competition in 1998. The report attempted to map out those versions of tax competition that should be considered "harmful" in the sense that they would trigger a race to the bottom in terms of tax rates and ultimately revenue collection and tax base erosion. (Notably, base erosion was a topic to which the OECD returned in 2013 with its Base Erosion and Profit Shifting project.)[30]

Once adopted by the OECD, the harmful tax competition report faced backlash from the business community,[31] which complained that it had had inadequate input into the report's analysis, drafting, and recommendations. Subsequently, the Center for Freedom and Prosperity (CFP)—a US non-profit organization with a mission to "preserve jurisdictional tax competition, fiscal sovereignty, and financial privacy"[32]—used a two-

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lowers its tax rates in an effort to attract outside investment" at 29); Mitchell A Kane & Edward B Rock, "Corporate Taxation and International Charter Competition" (2008) 106:7 Mich L Rev 1229 at 1233–34 (acknowledging that jurisdictions often exploit differentials in tax systems in order to attract capital); David C Elkins, "The Merits of Tax Competition in a Globalized Economy" (2016) 91:3 Ind LJ 905 (arguing that international tax competition is inevitable and, if part of a system of free and fair tax competition, can maximize global welfare).

28 See e.g. Reuven S Avi-Yonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" (2000) 113:7 Harv L Rev 1573 at 1603 (identifying France and Japan as the primary players); Jacqueline B Manasterli, "OECD, EU, U.S. Representatives Discuss Tax Haven Initiatives" (1999) 18 Tax Notes Intl 2383 at 2383 (quoting Richard M Hammer, Chair of the Business and Industry Advisory Committee (BIAC) Taxation and Fiscal Committee, as referencing rumours that the US Treasury led the initiative).

29 See OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998), online (pdf): <www.oecd-ilibrary.org> [perma.cc/49CP-EXNM].

30 See "The OECD Work on Base Erosion and Profit Shifting" (4 February 2013) at 1, online (pdf): *OECD* <www.oecd.org> [perma.cc/6Z6Q-VEN4] (discussing political attention paid to base erosion issues in 2012).

31 See Manasterli, *supra* note 28 at 2383 (quoting Chair of the BIAC Taxation and Fiscal Committee, Richard M Hammer); Business and Industry Advisory Committee to the OECD, "A Business View on Tax Competition" (June 1999), reprinted in (2000) 40:9 European Taxation 421. A copy of the report can also be found in (1999) 19 Tax Notes Intl 277 at 281.

32 "About CF&P" (last visited 25 July 2019), online: *Center for Freedom and Prosperity* <freedomandprosperity.org> [perma.cc/L5FN-7YC6].

prong strategy of engaging with the members of the US Congress (including the US Congressional Black Caucus)[33] and tax havens (the targets of the OECD report) to convince them to resist the OECD tax competition policy and to withdraw US support from the tax competition work.[34] The CFP's strategic actions took place against a backdrop of other organizations challenging the value of OECD tax competition efforts for the United States.[35]

The OECD's work on harmful tax competition in the 1990s did help expand the participation of non-OECD countries and encourage the elimination of problematic tax regimes within EU member states.[36] More notably for the purposes of this discussion, however, as a result of CFP lobbying and the complaints of business interests, the OECD shifted its focus away from criticizing tax competition per se and toward promotion of transparency and exchange of information.[37] To be sure, the information agreements that were promoted and executed prior to the more recent information revolution were not automatic information exchange agree-

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[33] Congressional Black Caucus members directed their objections to the negative effects on low-income nations (especially US neighbours in the Caribbean) of the OECD's attack on harmful tax competition. See e.g. Field, *supra* note 26 (noting that the Caucus "was induced to speak out against the OECD plan, on the basis of solidarity with people of color living in Caribbean tax havens" at 1242). See also Cordia Scott, "Congressional Black Caucus Says OECD Tax Move Unfairly Blasts Developing Nations" (2001) 22:14 Tax Notes Intl 1600 at 1600 (twenty-six of the thirty-eight members of the caucus addressed a letter to Secretary of the Treasury Paul O'Neill reiterating this concern); Ring, "International Tax Policy", *supra* note 26 at 709, n 296.

[34] See Ring, "International Tax Policy", *supra* note 26 at 709; Diane M Ring, "What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State" (2008) 49:1 Va J Intl L 155 at 187–89, 195–96. The CFP's success could be tracked through subsequent statements and letters from members of Congress. For example, Majority House Leader Richard K. Armey, the first major member of Congress to challenge the tax competition project, urged the then Secretary of the Treasury Lawrence Summers to withdraw US support for the harmful tax competition project. See also Robert Goulder, "New Coalition Strikes Back at OECD Tax Haven Campaign" (2000) 21 Tax Notes Intl 2650 at 2653 (reporting interviews with CFP founders Mitchell and Quinlan, who outlined the CFP plan to stop the OECD tax competition project).

[35] See e.g. Daniel J Mitchell, "A Tax Competition Primer: Why Tax Harmonization and Information Exchange Undermine America's Competitive Advantage in the Global Economy" (20 July 2001), online: *The Heritage Foundation* <www.heritage.org> [perma.cc/L9LW-UA5A].

[36] See OECD, "Promoting Transparency and Exchange of Information for Tax Purposes" (19 January 2010) at para 25, online (pdf): *OECD* <www.oecd.org> [perma.cc/9GH3-CPRU] [OECD, "Promoting Transparency"].

[37] See *ibid*. See also Hugh J Ault, "Reflections on the Role of the OECD in Developing International Tax Norms" (2009) 34:3 Brooklyn LJ 757 at 759, 770–71; Martin A Sullivan, "Lessons from the Last War on Tax Havens" (2007) 116 Tax Notes 327.

ments but rather were standard tax information exchange agreements (TIEAs) or income tax treaty provisions calling for exchange generally on request.[38] However, the roots of our contemporary automatic information exchange and global transparency and disclosure regimes can be seen in the earlier shift from substantive critiques of harmful tax competition toward promotion of transparency and disclosure, due to lobbying and related challenges.[39]

2. Tax Leaks and Tax Publicity

Another important driver of the global transparency and disclosure initiatives was significant leaks of tax data and the activities of tax whistleblowers and hackers.[40] While the existence of offshore tax evasion by individuals had long been known, the issue was arguably made more salient by a series of high-profile tax data leaks starting around 2008.[41] Similarly, tax leaks in Luxembourg and the Bahamas illuminated the cross-border structuring activities of entity and business taxpayers as well, and revealed the roles played by tax haven jurisdictions in allowing such structuring to flourish.[42]

These leaks, which were made possible by the growing computerization, digitization, and storability of taxpayer data, highlighted the magnitude of offshore tax avoidance and evasion by high-net-worth individual

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38 In 2009, almost 200 TIEAs and 110 double taxation conventions were concluded or revised with language committing its signatories to engage in transparency and exchange of information. See OECD, "Promoting Transparency", *supra* note 36 at para 9.

39 Notably, the 1990s effort to identify and respond to harmful tax competition also ultimately re-emerged in the Harmful Tax Practices project of Action 5 of the BEPS framework. See e.g. Lilian V Faulhaber, "The Trouble with Tax Competition: From Practice to Theory" (2018) 71:2 Tax L Rev 311. See also Miranda Stewart, "Global Tax Information Networks: Legitimacy in a Global Administrative State" in Yariv Brauner & Miranda Stewart, eds, *Tax, Law and Development* (Cheltenham: Edward Elgar, 2013) 316 (noting earlier moves toward administrative co-operation among national tax agencies).

40 See e.g. Allison Christians, "Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time" (2014) 76:12 Tax Notes Intl 1123 at 1123–25.

41 See e.g. Randall Jackson, "Swiss Bank Official Detained by U.S. Authorities" (2008) 50:6 Tax Notes Intl 473 at 473–74; Lynnley Browning, "Banking Scandal Unfolds Like a Thriller", *The New York Times* (14 August 2008), online: <www.nytimes.com> [perma.cc/L4QH-DSGH] [Browning, "Banking Scandal Unfolds"].

42 See e.g. Omri Marian, "The State Administration of International Tax Avoidance" (2017) 7:1 Harv Bus L Rev 1 (examining a dataset of advance tax agreements in Luxembourg and their role in facilitating cross-border tax avoidance); Oei & Ring, *supra* note 2 at 563.

taxpayers and businesses.[43] The leaks provided broad political impetus for the enactment of FATCA in the United States, for the OECD Common Reporting Standard information exchange initiatives, for the setting up of programs in various countries to catch and punish offshore tax cheats, and for the development of BEPS CbC reporting.[44]

Related in part to the leaks but providing their own distinct imprint on the public conversation about the need for tax transparency were hearings in countries such as the United States and the United Kingdom about multinationals and their tax conduct. For example, the US Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs conducted a series of hearings focusing on prominent US multinationals, including Microsoft, Hewlett Packard,[45] and Apple.[46] These hearings publicly highlighted the tax planning strategies of multinationals and the success of these strategies in greatly reducing the tax liabilities of these corporations over a period of years. Later, the European Commission state aid investigations into Apple and its arrangements with Ireland specifically cited the US Senate hearings as a source of its data on Apple.[47] Across the Atlantic during this same period (2012–2013), the United Kingdom similarly pursued publicly critical inquiries into the tax conduct of multinationals, most famously US multinationals Google and Starbucks.[48]

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[43] See Oei & Ring, *supra* note 2; Oei, *supra* note 13 at 659.

[44] See the discussion in Part II.B., *below*.

[45] Microsoft and Hewlett-Packard were the subject of the first US hearing. See US, *Offshore Profit Shifting and the U.S. Tax Code–Part 1 (Microsoft and Hewlett-Packard): Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, United States Senate*, 112th Cong (20 September 2012) (Washington, DC: United States Government Printing Office, 2013), online (pdf): <www.govinfo.gov> [perma.cc/Z89M-64PM].

[46] See US, *Offshore Profit Shifting and the U.S. Tax Code–Part 2 (Apple Inc.): Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, United States Senate,* 113th Cong (21 May 2013) (Washington, DC: United States Government Printing Office, 2013), online (pdf): <www.govinfo.gov> [perma.cc/E5ZU-JLJZ].

[47] See EC, *State aid SA.38373 (2014/C) (ex 2014/NN)—Alleged aid to Apple*, [2014] OJ, C 369/22 at 27 (letter from the European Commission to Ireland regarding the Apple case, 11 June 2014, noting the role of the US Senate hearings). See also Chris William Sanchirico, "As American as Apple Inc.: International Tax and Ownership Nationality" (2015) 68:2 Tax L Rev 207 at 208–09, n 1 (citing the extensive media coverage of the tax practices of major multinationals); Jesse Drucker & Simon Bowers, "After a Tax Crackdown, Apple Found a New Shelter for Its Profits"*, The New York Times* (6 November 2017), online: <www.nytimes.com> [perma.cc/77DZ-ZG89] (detailing Apple's evolving international tax planning).

[48] See e.g. UK, Committee of Public Accounts, *Tax Avoidance—Google*, Ninth Report of Session 2013–14 (London, UK: The Stationery Office, 2013), online: <publica-

3. Financial Crisis

Finally, calls for increased tax transparency, disclosure, and exchange of information—as well the broader package of OECD base erosion and profit shifting tax reforms—gained traction in part due to the financial crisis that hit the United States and global markets beginning in 2008. The public governmental inquiries of 2012–2013 discussed above were part of a broader wave of "tax shaming" directed at multinationals accused of avoiding their corporate tax responsibilities. The shift toward widespread and sustained public attention to multinational taxation has been partially attributed to the great recession.[49] Multinationals' growing recognition of the reputational risk posed by public perceptions of their tax conduct, including boycotts and social media posts, went some way toward blunting opposition to international tax reforms.[50]

B. End Products of the Revolution

By this point, the events and developments described above have culminated in no less than a global tax information revolution, the main components of which are automatic information exchange regimes and enhanced reporting for multinationals.

1. Automatic Information: CRS, FATCA, and Beyond

Historically, bilateral treaty-based exchange served as the primary solution to the need for cross-border tax information.[51] But treaty-based in-

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tions.parliament.uk> [perma.cc/9WMU-FBK9] (discussion of the Google Parliament hearings of November 2012 and subsequent analysis and recommendations); "Starbucks, Google and Amazon Grilled over Tax Avoidance", *BBC News* (12 November 2012), online: <www.bbc.com> [perma.cc/B4CW-NHBB]; Simon Bowers & Rajeev Syal, "MP on Google Tax Avoidance Scheme: 'I Think That You Do Evil'", *The Guardian* (16 May 2013), online: <www.theguardian.com> [perma.cc/9Y5N-PX2R].

49 See e.g. Vanessa Barford & Gerry Holt, "Google, Amazon, Starbucks: The Rise of 'Tax Shaming'", *BBC News Magazine* (21 May 2013), online: <www.bbc.com> [perma.cc/HPN8-AW7Q]; "Tax Havens & Financial Crisis" (last visited 7 April 2019), online: *Tax Justice Network* <www.taxjustice.net> [perma.cc/9U5P-NG9K]; Helen Miller, "Tax Avoidance: Problem Solved or Solutions Just Beginning?", *Tax Journal* (14 October 2016), online: <www.ifs.org.uk> [perma.cc/TN67-2FG6] (observing at 10 that "[i]n the wake of the recession, a broad consensus emerged: multinationals were shifting too much profit into low tax jurisdictions, in some cases managing to avoid tax altogether, and this should be stopped" and that the BEPS project emerged as the path to meeting this goal).

50 See Oei & Ring, *supra* note 2 at 547–48, 556–57; Ruth Mason, "The Transformation of International Tax" (2020) 114:3 Am J Intl L 353 at 364–66.

51 As of the 1930s, the standard double tax treaty began to include an exchange of information provision, resulting in the establishment of exchange on request as a vir-

formation exchange had its limits. Some treaties, like the US–Swiss treaty, did not contain robust information exchange provisions. Even in treaties with more expansive information exchange language, treaty provisions primarily emphasized information exchange on request,[52] which means that the requesting state already had to have a sense of the underlying tax offence and the missing information.[53] Additionally, particularly prior to a round of TIEAs executed in the 2000s, the number of agreements covering states beyond OECD members and wealthier nations was quite limited.[54] Taxpayers skilled in hiding their offshore activities and deflecting enforcement attention frequently found that their information

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tually universal feature of the tax treaty world: see e.g. Diane Ring, "Developing Countries in an Age of Transparency and Disclosure" (2016) 6 BYUL Rev 1767 at 1774–75; Xavier Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Cheltenham: Edward Elgar, 2015) at 4–5. Further enshrining this mode of information acquisition, both the OECD and the UN Model Treaties have long included an Article 26, which calls for exchange of information on request and specifies the prerequisites for making a request and the limits on use of the information: see e.g. OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (Paris: OECD, 2017) at 45–46, online: <www.oecd-ilibrary.org> [perma.cc/T5HA-V8XF]; UN, *Model Double Taxation Convention Between Developed and Developing Countries* (New York: UN, 2011) at 32–33, online: <www.un.org> [perma.cc/6EUX-N62M].

52 Although automatic exchange of information appeared in the Draft Model Convention of the League of Nations, exchange of information in the OECD Model Double Taxation Convention of 1963 "relied on exchange of information on request ... [although it included] various forms of exchange of information, including automatic exchange" (Oberson, *supra* note 51 at 165). Automatic exchange is still included in the OECD Model, but is not compulsory (see *ibid*). For example, the *United States Model Technical Explication Accompanying the United States Model Income Tax Convention of November 15, 2006* noted that "the competent authorities of the Contracting States may develop an agreement upon the mode of application of the Article" ((2006), art 26, para 9, online (pdf): *IRS* <www.irs.gov> [perma.cc/FF7U-76HK]). However, the 1942 Canada–US Income Tax Treaty provided that each country should forward "as soon as practicable after the close of each calendar year the following information relating to such calendar year: The names and addresses of all persons whose addresses are within [the partner state] and who derive from sources within [the other partner state] dividends, interest, rents, royalties, salaries, wages, pensions, annuities, or other fixed or determinable annual or periodical profits and income, showing the amount of such profits and income in the case of each addressee" (*Convention and Protocol between Canada and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the case of Income Taxes*, 4 March 1942, Can TS 1942 No 2, art XX, paras 1–2 (entered into force 15 June 1942)).

53 See Ring, "Article 26", *supra* note 16, § 1.2.5.3.

54 For a listing of bilateral tax information exchange agreements, see "Tax Information Exchange Agreements (TIEAs)", online: *OECD* <www.oecd.org> [perma.cc/KJB8-R5TG]. The original OECD model was released in 2002 (see *ibid*). See also Katarzyna Bilicka & Clemens Fuest, "With Which Countries Do Tax Havens Share Information?" (2014) 21:2 Intl Tax & Public Finance 175.

was safely outside any exchange process because no request would ever be generated.

Although exchange of information on request continues to have a valuable role in tax enforcement, the major revolution in tax information reporting and exchange has been a shift to *automatic* delivery of large quantities of data.[55] Rather than waiting for countries to identify problematic taxpayers and transactions and then make an information request, tax authorities across the globe have now moved to a system where information is automatically collected by financial institutions in each country and pushed out to tax authorities in other countries. This represents a sea change in how information is exchanged.

The two most prominent examples of such automatic information regimes are automatic exchange of information pursuant to the OECD's Common Reporting Standard and the United States' FATCA regime (together with related variants of FATCA-like laws in other countries).

Common Reporting Standard. Responding to a 2013 G20 mandate, the OECD released in 2014 the first part of its project on automatic information exchange: the Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard.[56] Shortly thereafter, the OECD released a companion piece, the Standard for Automatic Exchange of Financial Account Information in Tax Matters.[57] The second report provided extensive implementation guidance, including (1) a Model Competent Authority Agreement (CAA) that states could sign to initiate the system of exchange with a treaty partner; (2) the Common Reporting Standard itself (that is, details on the exchange process, definitions, reporting expectations, and due diligence); and (3) commentary on implementation.[58] In 2018, the OECD released an updated Handbook on the Standard for Automatic Exchange of Financial Account Information in Tax Matters.[59]

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55 See Oberson, *supra* note 51 at 11–13; Hakelberg, *supra* note 2.

56 OECD, "Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard" (2014), online (pdf): *Public Eye* <www.publiceye.ch> [perma.cc/DT5V-YS8V].

57 See OECD, *Standard for Automatic Exchange*, *supra* note 16.

58 See *ibid* at 14–17. In 2016, Canada revised its *Income Tax Act* to help implement the Common Reporting Standard (see *Income Tax Act*, RSC 1985, c 1 (5th Supp), part XIX).

59 See OECD, *Standard for Automatic Exchange of Financial Information in Tax Matters: Implementation Handbook*, 2nd ed (Paris: OECD, 2018), online (pdf): <www.oecd.org> [perma.cc/N2HQ-5VMM].

The system of automatic exchange under CRS seeks to require designated financial institutions—such as depository institutions, custodial institutions, investment entities, and insurance companies—to report required financial account information of non-residents to the tax authorities of their own countries. The information required includes personal identifiers (such as the taxpayer's name, address, tax identification number, and account number) as well as account details (including gross interest paid, gross dividends paid or credited, gross sales proceeds, account balances, and values regarding covered accounts).[60]

Ultimately, for ease of rapid execution of CAAs with a large number of treaty partners, the OECD encouraged states to sign a multilateral CAA under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters—an instrument to facilitate entering into bilateral treaties between nation-states—which opened up to all countries in 2011.[61] States began signing on to the multilateral CAA in 2014, and as of 2019, 106 states had joined.[62] Some signatories committed to being early adopters (2017), while others had target implementation dates of 2018, 2019, or later.[63] In this manner, the CRS was adopted by a large number of nation-states.

United States FATCA Reporting. In the United States, the *Foreign Account Tax Compliance Act* enacted in 2010 introduced a version of automatic third-party information reporting by financial institutions, as well as a self-reporting requirement for taxpayers.[64] Although US law did have earlier versions of third-party reporting regarding foreign financial accounts of US taxpayers (such as the "qualified intermediary" reporting regime),[65] much information escaped the system entirely due to gaps in

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60 See *ibid* at 99–102.

61 See *ibid* at 41–43. See also OECD, *Standard for Automatic Exchange*, *supra* note 16 at 13.

62 See OECD, "Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date" (25 June 2019), online (pdf): *OECD* <www.oecd.org> [perma.cc/UVZ4-H5QE] [OECD, "Signatories of the MCAA"].

63 See OECD, "Joint Statement by the Early Adopters Group" (October 2014), online (pdf): *OECD* <www.oecd.org> [perma.cc/P3UX-QSC3]; Global Forum on Transparency and Exchange of Information for Tax Purposes, "AEOI: Status of Commitments" (November 2018), online (pdf): *OECD* <www.oecd.org> [perma.cc/TN82-V363].

64 See IRC §§ 1471–74, 6038D (2012).

65 See US, Government Accountability Office, *Report to the Committee on Finance, US Senate: Tax Compliance–Qualified Intermediary Program Provides Some Assurance That Taxes on Foreign Investors Are Withheld and Reported, but Can Be Improved*, GAO-08-99 (Washington, DC: GAO, 2007).

required information. By contrast, FATCA now obliges foreign financial institutions to identify US account holders and to report their identities and detailed information on their financial assets and accounts to the United States.[66] Failure to do so subjects the foreign financial institutions to an onerous withholding tax on their *own* US investment income, which disadvantages them competitively.[67]

The new reporting obligations introduced by FATCA were not only potentially burdensome on foreign financial institutions, but they also risked placing complying institutions in violation of domestic laws regarding privacy and disclosure of client information.[68] Ultimately, this tension was resolved at the national level through the negotiation of intergovernmental agreements with many jurisdictions.[69] These IGAs detailed a process by which foreign financial institutions could satisfy FATCA automatic reporting obligations without violating their domestic law.[70] Like the CRS, FATCA represents a fundamental overhaul in how taxpayer financial information is shared between countries and how US taxpayers are required to self-report their foreign financial assets.

Other Countries' Mini-FATCAs. Other countries, having engaged in the IGA negotiations with the United States, sought to institute their own version of FATCA and obtain information on their own taxpayers' foreign assets and accounts.[71] For example, the United Kingdom signed such an agreement with Jersey, effective 2014.[72] Eventually, however, the

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66 See IRC § 1471(c).

67 See *ibid*, § 1471(b)(3).

68 See Christians, "Legal Pedigree of IGAs", *supra* note 20; Christians & Cockfield, *supra* note 24.

69 See Morse, "FATCA Intergovernmental Agreements", *supra* note 19 at 245–46. In the case of Canada, the tax law was amended to include the new Part XVIII of the *Income Tax Act* to implement the FATCA provisions: see *Income Tax Act*, *supra* note 58, part XVIII (Enhanced International Information Reporting). See also "How to Complete and File a Part XVIII Information Return: International Exchange of Information on Financial Accounts Slips and Summary" (last modified 29 June 2020), online: *Government of Canada* <www.canada.ca> [perma.cc/YFG5-V7ZH].

70 For a list of IGAs in force and the links to the IGAs, see US Department of the Treasury, "Foreign Account Tax Compliance Act (FATCA)" (last modified 26 June 2019), online (pdf): *US Department of the Treasury* <www.treasury.gov> [perma.cc/H5BY-Q26G].

71 See Joshua D Blank & Ruth Mason, "Exporting FATCA" (2014) 142:11 Tax Notes 1245.

72 See *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jersey to Improve International Tax Compliance*, 22 October 2013, online (pdf): <www.gov.je> [perma.cc/XG76-HLEP]. For other similar agreements signed by the United Kingdom, see HM Revenue &

United Kingdom transitioned from the pursuit of FATCA-like IGAs toward the OECD CRS.[73]

2. Enhanced Corporate Reporting: CbC

Another fundamental transformation in the world of tax transparency and disclosure has been the implementation of the country-by-country reporting obligation for multinationals under the OECD Base Erosion and Profit Shifting project.[74] CbC reporting is a key component of the OECD BEPS project, which has now expanded into an "Inclusive Framework" involving over 130 countries collaborating and coordinating on measures to reduce base erosion and profit shifting by multinationals.[75] At its core, the goal of BEPS CbC reporting is to provide tax administrations of various countries with more complete information about the tax and business

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Customs, "Automatic Exchange of Information Agreements: Other UK Agreements" (8 September 2014), online: <www.gov.uk> [perma.cc/2GBA-7D8X]. In 2015, Switzerland signed an automatic exchange agreement covering financial account information with the EU and signed a similar agreement with Australia. See EC, *Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments*, [2015] OJ, L 333/12; Swiss Confederation Federal Department of Finance & Federal Tax Administration, Press Release, "Switzerland and Australia Sign Joint Declaration on Introduction of Automatic Exchange of Information in Tax Matters" (3 March 2015), online: *State Secretariat for International Finance* <www.sif.admin.ch> [perma.cc/56CK-55P4].

73 See Government of Jersey, "UK FATCA: The Inter-governmental Agreement (IGA) with the UK" (last visited 16 July 2019), online: *gov.je* <www.gov.je> [perma.cc/D3G3-PS5N] (outlining the history of the UK and Jersey negotiation of an IGA and the eventual move to CRS compliance as their agreed mechanism for automatic exchange).

74 See OECD, "Country-by-Country Reporting" (last visited 17 July 2019), online: *OECD* <www.oecd.org> [perma.cc/6BWK-KMTW]. See also OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD, 2015) at 20–21, online: <www.oecd-ilibrary.org> [perma.cc/MND5-N7JT] [OECD, *Action 13 Final Report*].

75 See e.g. OECD, "OECD/G20 Inclusive Framework on BEPS" (last visited 9 June 2020), online (pdf): *OECD* <www.oecd.org> [perma.cc/N8FY-G4EB] (providing an overview of the Inclusive Framework in the context of BEPS); OECD, "Members of the OECD/G20 Inclusive Framework on BEPS" (December 2019), online (pdf): *OECD* <www.oecd.org> [perma.cc/H5NX-64GS]; OECD, "OECD/G20 Base Erosion and Profit Shifting Project: Public Consultation Document: Review of Country-by-Country Reporting (BEPS Action 13)" (6 February 2020–6 March 2020), online (pdf): *OECD* <www.oecd.org> [perma.cc/B3LA-R5YT] (noting that this consultation document is part of the process put in motion by the Inclusive Framework in 2018 in order to assess CbC reporting).

activities of multinational enterprises (MNEs) operating across borders.[76] In particular, CbC reporting is designed to provide tax authorities with a full, global picture of the MNE's business, as well as detailed information about related-party transactions entered into between entities in the corporate structure.[77]

First debuted in Action 13 of the OECD BEPS Action Plan and formalized with the OECD's final report in 2015,[78] CbC reporting includes three documents prepared by the taxpayer annually: (1) a master file (a high-level blueprint of the business that identifies its organizational structure, business categories, intangibles, intercompany financial activity, and its tax and financial situation); (2) a local file (a more detailed look at the MNE's activities in a particular jurisdiction, with a focus on data connected to related-party transactions); and (3) a country-by-country template.[79]

The country-by-country template is the most controversial element[80] of BEPS CbC reporting and consists of a schedule documenting eight basic categories of information for the MNE in that particular jurisdiction.[81] A country in which the MNE had operations would receive the master file, the local file for that jurisdiction, and the CbC template. Although the master file and local file would be delivered directly, the general expectation is that the CbC template would be prepared and delivered by the MNE parent to its home jurisdiction, which would then share the report with other jurisdictions in which the MNE operates, pursuant to competent authority agreements governing the exchange of reports.[82]

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76 See OECD, "Country-by-Country Reporting", *supra* note 74; OECD, *Action 13 Final Report*, *supra* note 74 at 16. See generally Arthur J Cockfield & Carl D MacArthur, "Country-by-Country Reporting and Commercial Confidentiality" (2015) 63:3 Can Tax J 627.

77 See OECD, *Action 13 Final Report*, *supra* note 74.

78 See *ibid*.

79 See *ibid* at 14–16.

80 See e.g. OECD, "Public Comments Received, Volume I—Letters A to C: Discussion Draft on Transfer Pricing Documentation and CBC Reporting" (23 February 2014), online (pdf): *OECD* <www.oecd.org> [perma.cc/HJ68-RSEP].

81 The categories include in-country revenue, earnings before taxes, cash tax, current year tax accruals, state capital, accumulated earnings, employee headcount, and tangible assets (see OECD, *Action 13 Final Report*, *supra* note 74 at 29).

82 Canada revised its *Income Tax Act* in 2016 to help implement country-by-country reporting: see *Income Tax Act*, *supra* note 58, s 233.8. See generally Oladiwura Ayeyemi Eyitayo, "Profit Shifting by Canadian Multinational Corporations: Prospects of Reversal Under Canada's Country-by-Country Reporting Rules" (2018) 26 Dal J Leg Stud 79.

3. Other Reporting Requirements

Although automatic exchange of information (through CRS and FATCA) and the BEPS CbC have been the most high-profile products of the marked shift in tax transparency and disclosure, other reforms should be noted as well.

Tax Rulings. In 2015, the EU introduced automatic exchange of cross-border tax rulings and advance pricing agreements (APAs).[83] The new disclosure rules served as an acknowledgement that jurisdictions can provide advantages to taxpayers indirectly by issuing private tax rulings.[84] Although not a new concern, heightened attention to the problem of "secret rulings" had followed the Lux Leaks scandal in November 2014,[85] in which the unsanctioned release of Luxembourg tax rulings confirmed that the government had offered rulings to multinational taxpayers, enabling them to minimize their taxes in other countries through techniques widely viewed as inappropriate tax minimization.

EU Amending Directives issued in 2014 and 2015 were direct responses to these concerns.[86] In particular, pursuant to the EU Amending Directive of 2015, member states committed to the automatic exchange of advance cross-border tax rulings and APAs issued, amended, or renewed after December 31, 2016. The commitment to exchange rulings also included a plan for the European Commission to establish a secure central depository for the exchanged information that would be accessible by the Commission and by member states. The European Commission published a report in December 2018 on automatic exchange of tax information, noting that "[a]lmost 18,000 rulings were recorded in the central directory in 2017."[87]

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83 See EC, *Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation*, [2015] OJ, L 332/1 at 6 [EU Amending Directive (2015)].

84 The current discussion takes place against the backdrop of the EU Code of Conduct.

85 See e.g. Finbarr Bermingham, "Lux Leaks: Juncker Defends Role in Tax Avoidance as Pressure Mounts on President to Resign", *International Business Times* (12 November 2014), online: <www.ibtimes.co.uk> [perma.cc/MD5F-ZV6D]. See generally Oei & Ring, *supra* note 2 at 555–58. For more on the specific Lux Leaks documents released, see Marian, *supra* note 42.

86 See EU Amending Directive (2015), *supra* note 83 at 1; EC, *Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation*, [2014] OJ, L 359/1.

87 EC, European Commission, *Report from the Commission to the European Parliament and the Council on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation*, COM(2018) 844 final

Under OECD BEPS Action 5, which is concerned with addressing harmful tax practices,[88] participating countries have agreed to exchange tax rulings, including those related to preferential regimes.[89] This Action item is one of the four BEPS minimum standards that all members of the BEPS Inclusive Framework have committed to implement as part of their membership. By December 31, 2018, almost 30,000 tax rulings had been exchanged, with 9,000 exchanged in 2018.[90]

Disclosures by Intermediaries or Advisors. More recently, the EU introduced another strand of transparency and disclosure reform, this one at the intermediary (advisor) level. In 2018, the EU economic and finance ministers adopted a disclosure directive requiring intermediaries that provide or design cross-border arrangements bearing specified markers of aggressive tax planning to report certain information regarding the taxpayer's tax planning activities to tax authorities.[91]

Beneficial Ownership Registries. Globally, the transparency and disclosure trend has continued to put pressure on countries to require reporting of information on who really controls an entity,[92] which would be collected into a "beneficial ownership registry." In 2014, G20 leaders released a set of "High-Level Principles on Beneficial Ownership Transparency" at their Brisbane summit.[93] Following the summit, some countries began to develop their own plans for achieving transparency regarding

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(Brussels: European Commission, 17 December 2018) at 11, online: <ec.europa.eu> [perma.cc/S5WL-HBRB].

88 See "Action 5 Harmful Tax Practices" (2019), online: *OECD* <www.oecd.org> [perma.cc/J4UG-RJEL].

89 See OECD, *Harmful Tax Practices—2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS; Action 5*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD, 2019), online (pdf): <www.oecd.org> [perma.cc/PG4L-2UMZ].

90 See *ibid* at 13.

91 See EC, *Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements*, [2018] OJ, L 139/1; Taxation and Customs Union, "Transparency for Intermediaries" (last visited 18 July 2019), online: *European Commission* <ec.europa.eu> [perma.cc/BJ7V-DWN6]. See also Council of the European Union, Press Release, 288/18, "Corporate Tax Avoidance: Transparency Rules Adopted for Tax Intermediaries" (25 May 2018), online: <www.consilium.europa.eu> [perma.cc/WSK2-JY8C].

92 Such beneficial ownership reporting envisions that the ownership or control of an entity would look beyond any nominal owners and would identify ultimate owners.

93 See "G20 High-Level Principles on Beneficial Ownership Transparency" (2014), online (pdf): *G20 Information Centre* <www.g20.utoronto.ca> [perma.cc/JVN4-FB3R].

beneficial ownership.[94] Success in implementing a beneficial ownership reporting regime is a prong in the Global Forum's peer review process, which evaluates countries' transparency and disclosure regimes.[95]

Separate from but related to commitments by jurisdictions to collect and share information regarding beneficial ownership is the ongoing debate over the degree to which such information should and will be made public via a beneficial ownership registry, as opposed to only being provided to tax authorities of various countries or to other more circumscribed audiences. The United Kingdom has been an especially strong advocate of beneficial ownership reporting requirements and the establishment of public registries. For example, having been the first EU and OECD member state to require beneficial ownership reporting through a public registry in April 2016,[96] the United Kingdom sought—in a somewhat controversial move—to extend comparable reporting obligations to British overseas territories through the *Sanctions and Anti-Money Laundering Act* in 2018 (with actual implementation planned for 2020).[97]

At the EU level, the 2015 Fourth Anti-Money Laundering (AML) Directive gave EU members two years to satisfy several beneficial ownership requirements, including the establishment of a national beneficial ownership registry by June 2017.[98] While the AML provided some details

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94 In November 2015, the United Kingdom released a plan to implement these goals primarily through its Money Laundering Regulations: see Cabinet Office, HM Revenue & Customs & Prime Minister's Office, "UK Implementation of the G20 High Level Principles on Beneficial Ownership Transparency" (16 November 2015), online (pdf): *GOV.UK* <assets.publishing.service.gov.uk> [perma.cc/Q6Q7-AARL]. Also in 2015, both the United States and Italy released plans for their respective compliance with beneficial ownership goals. See Caroline Atkinson, "The U.S. Action Plan to Implement the G-20 High Level Principles on Beneficial Ownership" (16 October 2015), online: *The White House* <obamawhitehouse.archives.gov> [perma.cc/QVJ5-4TXR]; "Italy Action Plan to Implement the G20 High-Level Principles on Beneficial Ownership Transparency" (last visited 25 July 2019), online (pdf): *Dipartimento del Tesoro* <www.dt.tesoro.it> [perma.cc/TZ9P-YH7D].

95 See OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes: Japan 2018 (Second Round)*, Peer Review Report on the Exchange of Information on Request (Paris: OECD, 2018) at 25, online (pdf): <www.oecd-ilibrary.org> [perma.cc/N59K-7P3A].

96 See *The Register of People with Significant Control Regulations 2016* (UK), SI 2016/339.

97 See *Sanctions and Anti-Money Laundering Act 2018* (UK), s 51. See also Stephanie Soong Johnston, "U.K. Lawmakers Urge Action on Public Registries in Territories" (2019) 93:8 Tax Notes Intl 885.

98 See EC, *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*, [2015] OJ, L 141/73.

on access to the required registry, the Fifth AML, adopted in 2018,[99] provides for access by various actors, including tax authorities, professionals with "know your client" duties, and the public, in the case of companies (for a fee, but with information limited for privacy reasons).[100]

Non-governmental organizations have advocated for public access to beneficial ownership registries as a necessary component of effective regimes for transparency, disclosure, and exchange of information.[101] For example, the Extractive Industries Transparency Initiative (EITI), a non-profit that seeks to improve governance and set standards in the extractive industry, has been a force for transparency in the extractive industry. In 2016, the EITI board specifically tackled the issue of beneficial ownership by adopting a new standard that sets a timeline for its member countries to implement a publicly available beneficial ownership registry for companies in the extractive sector.[102]

EITI member countries have made some progress under the new EITI standards. For example, in Nigeria, two parallel projects are underway. The first, a joint effort of the EITI and the Nigerian government, is seeking to directly implement the EITI guidelines. The second, a product of

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99 See EC, *Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*, [2018] OJ, L 156/43 at 59.

100 See also Marc Quaghebeur, "Belgium Publishes Decree on Ultimate Beneficial Owner Register", *Tax Notes Today International* (6 September 2018), online: <www.taxnotes.com/worldwide-tax-daily/compliance/belgium-publishes-decree-ultimate-beneficial-owner-register/2018/09/06/28dd6>.

101 See Robert Goulder, "Beneficial Ownership and Political Sovereignty: What's a Tax Haven to Do?" (2018) 91:1 Tax Notes Intl 97 at 98. For a sampling of the efforts of these organizations to press for various tax changes, including increased transparency on beneficial ownership, see PwC, "Increasing Role of NGOs" (last visited 25 July 2019), online: *PwC* <www.pwc.com> [perma.cc/E8P7-WH77]. These organizations continue to track the developments globally in the move toward transparency and disclosure of beneficial ownership. See e.g. Andres Knobel, Moran Harari & Markus Meinzer, "The State of Play of Beneficial Ownership Registration: A Visual Overview" (27 June 2018), online (pdf): *Tax Justice Network* <taxjustice.net> [perma.cc/8PSY-7E2U].

102 The first prong requires countries to generate a roadmap of their plans by January 1, 2017, and the second requires that they establish the registries by January 1, 2020. Reflecting the specific concerns of the industry, the registries must include all companies that engage in bidding, operating, or investing in extractive assets, and the reported data must include ownership levels and details about the mechanisms by which owners exert their ownership or control. Finally, given the political and corruption-related risks with extractive industries, the government must include the identity of political figures with ownership interests in any extractive activities. See Nana Ama Sarfo, "Beneficial Ownership Update: Developing Country Edition" (2018) 90:13 Tax Notes Intl 1365 at 1366.

the Nigerian government's Corporate Affairs Commission, resulted in Nigeria's joining the Open Government Partnership in December 2016, establishing a National Action Plan to require registration by December 2019, and exploring reforms to corporate law to permit public registries.[103] Questions remain, however, including how and whether the reporting regimes will be integrated and how and to what degree corporate compliance will be enforced.[104]

Ghana too has committed to the EITI standard and the Open Ownership Initiative and has introduced new laws that compel companies in Ghana to provide ownership and control information. The laws also require that data to be released in a public registry. Although the new laws were passed in 2016, they have not yet been implemented.[105] Kenya similarly enacted legal reforms to require a beneficial ownership registry.[106]

Aspirations to transparency have not, however, been universally embraced. Unlike Ghana and Nigeria, Kenya did not join the EITI.[107] Brazil, another significant extractive industries jurisdiction, is similarly not part of EITI. Brazil does have a registry, but access is limited to government authorities, and there are no plans for the registry to be made available to the public.[108] On the issue of beneficial ownership registries, results and commitments also vary by country. The United States, for example, lags behind the United Kingdom and others on the issue of public beneficial ownership registries,[109] and this comparative lack of transparency has led to criticism that the United States is now an appealing tax haven.[110]

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103 See *ibid* at 1367.

104 See *ibid*.

105 See *ibid* at 1367–68.

106 See e.g. Mahesh Acharya & Faith Chebet, "Kenya's New Companies (Beneficial Ownership Information) Regulations" (20 March 2020), online: *mondaq* <www.mondaq.com> [perma.cc/39BF-4UUJ].

107 See Sarfo, *supra* note 102 at 1368. See also Victor Amadala, "New State Registry to Expose Owners of Shadowy Companies", *The Star* (13 November 2018) 15, online: <www.the-star.co.ke> [perma.cc/CU5K-9DP5] (commenting on the forthcoming beneficial ownership registry in Kenya).

108 See Sarfo, *supra* note 102 at 1368; OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes: Brazil 2018 (Second Round)*, Peer Review Report on the Exchange of Information Request (Paris: OECD, 2018) at 45–58, online: <www.oecd-ilibrary.org> [perma.cc/RM3A-LD47].

109 See e.g. Sarfo, *supra* note 102 at 1366; Ken Silva, "Push for Beneficial Ownership Register Gaining Steam in the US" (2019) 56 Cayman Financial Rev 12.

110 See e.g. Letter from John Penrose MP, Prime Minister's Anti-Corruption Champion, to Senators Mike Crapo and Sherrod Brown (4 June 2020) reprinted in "U.K. Calls on U.S. Lawmakers to Implement Company Beneficial Ownership Register", *Tax Notes Today International* (4 June 2020), online: <www.taxnotes.com/tax-notes-today-

C. Politics, Technology, and Law: Intersecting Forces in the Information Revolution

The foregoing discussion identified some of the key historical events and actors that facilitated the transformation from a world in which information exchange on request combined with weak third-party reporting and taxpayer self-reporting was the norm, to one in which automatic exchange and extensive global and ongoing corporate reporting now take centre stage. As noted, these revolutionary changes are expected to profoundly impact tax compliance and enforcement.

Our account highlights how the tax information revolution was made possible through the confluence of technological and political shifts, both of which were necessary in generating legal transformation. Computerization and digitization were certainly necessary prerequisites; however, while important in the story, it is unlikely that these advances alone would have been adequate to lead to global transformation. The mere capacity to gather, process, store, share, and use data and information does not inherently provide the incentive and commitment to do so. Instead, changing political forces, both on national and global levels, were also instrumental in bringing about the information revolution and reconstituting a different vision of how information sharing and tax administration might be done between and among nation-states.[111]

More specifically, the move to information exchange, transparency, and disclosure required that information and transparency in the interests of tax enforcement become policy priorities relative to competing interests such as allowing economic competition using nation-states' tax systems (i.e., tax competition) or protecting taxpayer privacy. The latter two interests are not trivial, so this reshuffling of political priorities was

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international/information-disclosure/uk-calls-us-lawmakers-implement-company-beneficial-ownership-register/2020/06/08/2cllj?highlight=John%20Penrose> (urging the United States to implement a beneficial ownership register and citing benefits the United Kingdom experienced from its new register).

[111] That said, the underlying technical infrastructure and its coordination are an essential component of the envisioned global practice of the creation, reporting, and sharing of information under the CbC mechanism. For example, in September 2017, the OECD updated the standardized electronic format for exchange of CbC reports between jurisdictions to enable reporting MNEs to clarify, among other items, which entities are stateless and which income is stateless. The OECD CbC reporting system also includes a "CbC Status Message XML Schema" that enables the competent authority to report file and/or correction-related record errors and to provide status updates to the MNEs filing a CbC report. See OECD, *Country-by-Country Reporting Status Message XML Schema: User Guide for Tax Administrations* (Paris: OECD, September 2017), online (pdf): <www.oecd.org> [perma.cc/K2M4-UHNX].

no easy feat. As the preceding discussion showed, reshuffling was able to occur due to three major factors.

First, the obstacles encountered by the OECD's tax competition project in the 1990s and early 2000s (and, in particular the widespread rejection of a minimum tax rate as a policy solution) were important in initially framing exchange of information as a more palatable and feasible response compared to the harmful tax competition frame. Second, a series of high-profile leaks and hacks of tax information between 2008 and 2016 helped generate the political awareness and outrage necessary for enforcement to become a priority. As we have argued elsewhere, these tax leaks were widely acknowledged and referred to by tax officials and policy makers as key drivers of major tax transparency and disclosure reforms such as FATCA, CRS, and BEPS CbC reporting.[112] Third, the impetus for reform was further fuelled by financial crisis. These factors together impelled and enabled governments and international organizations to press for reforms and the introduction of automatic information exchange, widespread taxpayer disclosure obligations under threat of significant penalties, and extensive corporate reporting. While the core ideas in each of these reforms were not entirely new, the political momentum to push them forward was. And, while we do not claim that these were the only factors creating the political shift or that any one factor was necessarily pivotal, what is clear is that a threshold level of political will was necessary for the shift to take hold. Even when it did, it took over a decade for the end results of the information revolution to solidify.

Importantly, these shifts in political will and momentum were facilitated by robust traditional news reporting offering vivid details of tax evasion scandals and tax minimization schemes.[113] They were also nudged along by efforts by non-governmental organizations—such as the Tax Justice Network and Oxfam—to frame the conversation in terms of

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112 See Oei & Ring, *supra* note 2; Oei, *supra* note 13 at 671–73. See also US, Senate Permanent Subcommittee on Investigations, 110th Cong, *Staff Report on Tax Haven Banks and U.S. Tax Compliance* (17 July 2008), online: <www.hsgac.senate.gov> [perma.cc/K7AR-2ZU3].

113 See e.g. Browning, "Banking Scandal Unfolds", *supra* note 41; Lynnley Browning, "Ex-Banker from UBS Is Indicted in Tax Case", *The New York Times* (14 May 2008), online: <www.nytimes.com> [perma.cc/9M6G-GVRF]. Several months earlier, the IRS announced that it was commencing enforcement actions against more than one hundred taxpayers with accounts in a Liechtenstein bank (see IRS, News Release, IR-2008-26, "IRS and Tax Treaty Partners Targeting Liechtenstein Accounts" (26 February 2008), online: <www.irs.gov> [perma.cc/8ZB4-2CBY]; Randall Jackson, "The Mouse that Roared: Liechtenstein's Tax Mess" (2008) 49:9 Tax Notes Intl 707).

tax abuse and tax justice.[114] Widespread and continuing coverage of individual tax abuse and corporate tax minimization and elimination strategies provided fodder for accounts of tax planning excess and tax injustice. Organizations of journalists (such as the International Consortium of Investigative Journalists) also played an active role in curating, shaping, editorializing, and reporting on the leaks and their implications.[115] The end result was that countries found themselves under scrutiny and in need of a response.[116] Countries already in favour of enhanced tax transparency and disclosure reforms seized the opportunity to advocate for legal changes that turned their ideas into functioning law.[117] For political and other reasons, and through the coordinating work of organizations like the G20 and OECD, other countries found themselves swept along for the ride.

The resulting mix of legal reforms took place on both a national and an international level in a way that was deeply intertwined. Some domestic reforms appeared to focus on benefiting the enacting nation-state. For example, the 2010 US FATCA legislation imposed requirements on foreign financial entities and threatened undesirable US tax consequences for failure to comply.[118] However, even this seemingly self-contained regime ultimately required international cooperation and the signing of bilateral IGAs to be effective.[119]

Other legal reforms took the form of automatic exchange regimes implemented through the acceptance and adoption of universal substantive and technical standards. The OECD's development of the CRS, and the CRS's formal incorporation into the tax regimes of many jurisdictions

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[114] See e.g. "Financial Secrecy Index" (last visited 6 March 2019), online: *Tax Justice Network* <www.financialsecrecyindex.com> [perma.cc/U9P2-4BN3]; "The Politics of Poverty: Tax" (last visited 6 March 2019), online: *Oxfam* <politicsofpoverty.oxfamamerica.org> [perma.cc/A6SM-HHMH] (various analyses of the effects of international tax avoidance on poverty).

[115] See International Consortium of Investigative Journalists, online: <icij.org> [perma.cc/L4MF-E7CY] (detailing various leak-driven investigations).

[116] See Oei & Ring, *supra* note 2 at 590–600 (detailing different responses of various countries to tax leaks).

[117] See *ibid.* An adjacent question raised by the pressures that some countries experienced to adopt various reforms is the role and reality of tax sovereignty in today's world of international tax. For an exploration of this topic, see Sergio André Rocha & Allison Christians, eds, *Tax Sovereignty in the BEPS Era* (Alphen aan den Rijn: Wolters Kluwer, 2017).

[118] See IRC §§ 1471–74.

[119] See e.g. Jaime Arora & Shamik Trivedi, "FATCA Reporting Said to Require Compliance Expertise" (2012) 68 Tax Notes Intl 466. See generally Morse, "Ask for Help", *supra* note 1.

(more than one hundred as of June 2019) through their participation in the CRS Multilateral Competent Authority Agreement is an example.[120] Similarly, the OECD BEPS project and its action on CbC reporting is an example of legal change effectuated through an agreed-upon multilateral standard.

In short, a confluence of technological and political change has led to a series of reforms tantamount to a revolution in tax transparency and information exchange. Through a combination of laws adopted at the nation-state level, bilateral treaties effectuating these laws, and universal standards set by international organizations that are multilaterally adopted, countries and international organizations are now making tax administration and enforcement decisions against the backdrop of a vastly changed information landscape. While there is no reason to presume that the tax information revolution is complete,[121] the crucial next question is what countries will do with all of the new data and information the revolution has generated or will soon generate.

III. From Global Information to Domestic Enforcement

We now consider what is likely to happen as the revolution turns inward and data "comes home." The theoretical tax-centric aspiration is, of course, that all countries will be better able to enforce the tax law (because they will now have the information necessary to audit and hold accountable non-compliant taxpayers about whom information was previously lacking) and to identify taxpayers and transactions not previously on the radar of tax authorities. But things are unlikely to be that simple. Once tax data comes home, a different mix of political, legal-institutional, and technological factors are likely to shape country-level responses to and uses of that data. Part IIIA first discusses key concerns surrounding country-level uses that are likely to result in divergent domestic trajectories. Part IIIB then identifies eight key country-level factors and characteristics expected to influence the paths countries take going forward, and Part IIIC maps the most likely reactions and responses from other countries.

A. Key Concerns When Data Comes Home

There are two dominant concerns with respect to country-level uses of exchanged tax data. First, data must be processed and safeguarded, and this is a function of technological and technical capabilities, which are not

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[120] See OECD, "Signatories of the MCAA", *supra* note 62.

[121] For example, additional work on beneficial owner registries remains on the table.

uniform. Second, domestic political forces have the capacity to derail, warp, or stymie data uses.

1. Technical Factors: The Multiple Aspects of Data Use

While certain aspects of information exchange may be automatic, the ability to use tax data is not. Once a jurisdiction receives tax information, it must process and integrate that information into its domestic tax information, assessment, and enforcement systems, which requires technical capacity.[122] New data must be interpreted and evaluated, again in conjunction with existing data. Then, audit and enforcement choices must be made in light of new information. Tax policy analysts readily acknowledge this reality.[123]

While some information received may be seamlessly translated into immediate audit action, other types of information will defy automatic enforcement. For instance, information gathered from a CbC report does not necessarily identify specific transfer pricing problems or suggest the most appropriate legal analysis.[124] Assuming jurisdictions comply with their stated commitments not to take the CbC information and directly assert underpayment of tax, and to instead use the information to launch a transfer pricing analysis of the taxpayer,[125] the tax administration's audit capacity is critical. In transfer pricing matters, for example, auditors must be able to unravel related-party transactions reported on the tax return and to work comfortably with multiple transfer pricing methodologies. Auditors must also have access to adequate comparable arms' length transactions to legitimately challenge related-party transactions. Meeting these thresholds will be an issue for tax administrations in developing

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[122] A related and important issue here is the burden that new transparency and disclosure regimes may place on developing countries—particularly to the extent that the primary beneficiaries of the regimes could be developed countries.

[123] See e.g. Morse, "Ask for Help", *supra* note 1 (discussing how to expand co-operation of non-US governments in FATCA enforcement); *Foreign Bank Account Reporting Hearing*, *supra* note 3 at 60–63 (statement of Dirk JJ Suringa); Thomas Neubig, "Global Tax Administration Initiatives Addressing Tax Evasion and Avoidance" (2018) 91:11 Tax Notes Intl 1137 at 1141–44 (describing global tax enforcement initiatives that involve capacity building, knowledge sharing, and use of analytics to strengthen tax administration).

[124] See OECD, *Action 13 Final Report*, *supra* note 74 at 16.

[125] See e.g. OECD, *BEPS Action 13 on Country-by Country Reporting: Guidance on the Appropriate Use of Information Contained in Country-by-Country Reports*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD, September 2017) at 5, online (pdf): <www.oecd.org> [perma.cc/LD7E-ARE6] (noting that the "ability of a jurisdiction to obtain and use CbC Reports is conditional upon it using CbCR information appropriately").

countries but will likely be challenging for more developed countries as well.

Likewise, much of the information received by tax authorities concerning individual taxpayers will not translate into automatic tax return adjustments. For example, information received about financial accounts and assets says nothing directly about actual income, merely hinting at potential gaps in the taxpayer's reporting and pointing to possible lines of inquiry.[126] Here again, a tax administration will need legal expertise and other sources of information to meaningfully evaluate the information received.

Tax authorities will also need sufficient resources to enforce the tax law, particularly where taxpayers are well-represented enough to challenge tax authorities at every step of the process. If a tax authority is unable to widely enforce against large numbers of taxpayers on the basis of the new information flows, it will need to select enforcement targets. While selective enforcement is a tactic already utilized domestically in light of resource constraints, its risks may be more pronounced in this new information world.[127] For example, selective enforcement may lead to disproportionate harms to certain demographic groups or questionable exercises of power.[128] Of course, a tax authority's need for enforcement resources may be somewhat reduced by the deterrence effect of automatic information receipt. The positive impacts of third-party reporting on tax compliance is a well-recognized reality in tax administration; thus, information may deter non-compliance even without further enforcement action.[129]

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[126] See e.g. Lederman, *supra* note 4 at 1751; Slemrod et al, *supra* note 5 at 26. Both point out problems with gross receipts reporting in the domestic context.

[127] See generally Andres Knobel & Markus Meinzer, "Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption" (June 2014) at 11–12, online (pdf): *Tax Justice Network* <www.taxjustice.net> [perma.cc/K3HZ-KM7X] (advocating automatic exchange of information as an important tool for developing countries in curbing corruption and tax evasion and contending that broader transparency of tax data can help ensure proper use of the data).

[128] See Part III.A.2.c., *below*. See e.g. National Taxpayer Advocate, "2013 Annual Report to Congress: Volume One" (31 December 2013) at 229, online (pdf): *National Taxpayer Advocate* <taxpayeradvocate.irs.gov> [perma.cc/H9GW-KBPV] (contending that the IRS's offshore voluntary disclosure program is "a good deal for 'bad actors' but not for 'benign actors'"). But see Nicholas Shaxson, "Five Myths about Tax Havens", *The Washington Post* (15 April 2016), online: <www.washingtonpost.com> [perma.cc/P4J8-B45H] (resisting arguments that tax havens protect taxpayers against "despotic" governments).

[129] See Morse, Karlinsky & Bankman, *supra* note 5 at 39–40 (noting the expectation that taxpayers are more likely to report income for which there is a clear paper trail).

Finally, decisions must be made regarding how newly available data is safeguarded against breach or other misuse. Data protection is the product of resources, process, and commitments, and is susceptible to weaknesses in any of the three.[130] While data protection is certainly already an issue in within-country tax administration, the global nature of the new information reporting and the multiple different parties collecting, transmitting, and storing information creates heightened risks and infuses the conversation with greater urgency.

Not surprisingly, the major initiatives in the global information revolution—CRS, FATCA, and CbC reporting—have been accompanied by extensive discussion of how to safeguard data and have resulted in the inclusion of rules and procedures to accomplish this. For example, in CbC information exchange, the MNE's home jurisdiction undertakes to exchange the CbC report provided by the MNE with jurisdictions with which it has signed a competent authority agreement to exchange CbC reports.[131] The most common vehicle for these competent authority agreements has been reliance on the exchange of CbC reports under the Multilateral Convention on Mutual Administrative Assistance (MCMAA), which has been signed by eighty-six jurisdictions as of July 23, 2020.[132] Among the agreed terms of the CbC MCMAA is a provision guaranteeing that "[a]ll information exchanged is subject to the confidentiality rules and other safeguards provided for in the Convention, including the provisions limiting the use of the information exchanged."[133] In addition, the CbC MCMAA provides limits on the use of the exchanged information, anticipating likely abuses, including abuses by tax authorities them-

130 See e.g. Michael Hatfield, "Cybersecurity and Tax Reform" (2018) 93:4 Ind LJ 1161 (reviewing a range of factors at issue in tax administration cybersecurity in the United States).

131 See OECD, *Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD, 2015) at 6, online (pdf): <www.oecd.org> [perma.cc/JY7B-WXL7]. As a first step, multinational corporations are required to submit their CbC reports to the home jurisdiction of the parent entity pursuant to domestic CbC legislation enacted by that jurisdiction.

132 See OECD, "Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and Signing Dates" (last modified 23 July 2020), online (pdf): *OECD* <www.oecd.org> [perma.cc/6WTX-MDZG]. Note that the multilateral CAA for exchange of the CbC reports is separate from the multilateral CAA with respect to exchange of financial account information (part of the Common Reporting Standard).

133 *Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports*, s 5(1), online (pdf): <www.oecd.org> [perma.cc/6MC7-2EJL] [*CbC MCAA*].

selves.[134] For example, in light of taxpayer concerns that tax authorities receiving the exchanged information will use it as the basis for an almost automatic transfer pricing tax adjustment, the CbC MCMAA specifies that exchanged information must only be used for high-level assessments of transfer pricing risk, and that any tax adjustments should be the result of further individualized analysis of the taxpayer's transactions, including a complete functional analysis and a "full comparability analysis."[135]

Whether countries are willing and able to fully comply with these commitments remains to be seen. Moreover, there may be disagreement as to what constitutes sufficient and appropriate compliance. While data and information exchange risks were certainly present prior to CbC reporting, the volume, type, and organization of the information exchanged via the CbC reporting mechanism is likely to result in heightened risks of breach and misuse.

What is clear from the preceding discussion is that all of these actions—data processing and integration, enforcement action, and data safeguards—will require reliance on various procedures and protocols, and that all of this demands a mix of technological sophistication, technical infrastructure, and ongoing dialogue and coordination with other information sources. Shortages or weaknesses in any of these aspects can block or diminish effective data use. While the challenges faced by developing countries may be particularly acute, these nation-states will not be the only ones experiencing resource and infrastructure constraints in tax administration. More developed economies may also struggle with some or all of these elements. A big unanswered question going forward is to what degree tax administrations are capable of meeting this challenge.

2. Domestic Politics in the Implementation Phase

A second category of factors affecting domestic implementation are the realities of domestic politics. Politics affects available technological and technical capacities and resources and also shapes national priorities, public opinions, and outcomes. Notably, international commitments to provide and deliver information impose no duty on the state itself to *use*

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[134] See e.g. Mark Nehoray, Jeroen Lemmens & Yoshihiro Adachi, "Transfer Pricing Documentation and Country-by-Country Reporting" (November 2015) at 3–4, online (pdf): *Deloitte* <www2.deloitte.com> [perma.cc/YYV3-XA7K].

[135] *CbC MCAA*, *supra* note 133, s 5(2). See also OECD, *BEPS Action 13 Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment* (Paris: OECD, September 2017) at 49, online (pdf): <www.oecd.org> [perma.cc/ZEW8-4UN5]; Alison Lobb & Christa Silverthorne, "First Automatic CbC Report Exchanges to Trigger Tax Authority Risk Assessments", *International Tax Review* (13 August 2018), online: <www.internationaltaxreview.com> [perma.cc/NRW8-RQUD].

the data. Therefore, there is significant room for politics and national priorities to shape how information is used in different jurisdictions and for domestic outcomes to vary dramatically.

Three potentially concerning outcomes that may arise when data comes home to various countries are domestic resistance to data use (which might occur for various reasons), politicized uses of data, and unfairness and targeting in how data is used.

a. *Domestic Resistance*

There are two related features of how the global tax information revolution unfolded that suggest that the possibility of divergent domestic trajectories should not be wholly surprising. First, it cannot be emphasized enough that the tax information revolution was at least partially driven by outrage over illegal tax avoidance and excessive tax minimization behaviours revealed through data leaks and hacks, with economic and financial crisis heightening such outrage. In light of this, the political and legal responses culminating in the information revolution inevitably contained an expressive and reactive component. As a result, it is not unreasonable to think that some countries may have enacted or agreed to frameworks, treaties, and domestic laws in part because they felt compelled, pressured, or shocked into responding, rather than due to any inherent longstanding commitments to the information project.

Second, and relatedly, much of the response was driven by countries for whom preserving the tax base (at least in terms of optics) was a priority. The United States, for example, employs worldwide taxation of the income of US persons (generally citizens, permanent residents, and others meeting a substantial presence threshold), including income generated from assets wherever held, and irrespective of the individual's residence. Thus, detecting and taxing offshore assets and income was a US policy priority. Similarly, the ability to tax the income of US and other multinationals has been a priority for several EU countries. These powerful developed countries were able to deploy their position within international economic, political, and cultural networks to get other countries to accept the global information revolution (for example, by linking cooperation to banking access or other resources).

The confluence of these two related factors suggests that a variety of countries that may have been less concerned with tax base preservation, may have had less interest in obtaining tax data, or may have had differing levels of tax administrative capacity and ability to safeguard information now find themselves in the position of having signed on to the informational and transparency framework despite relative disinterest or even countervailing or conflicting interests. It would therefore be naïve to imagine that data uses would not vary among these differently situated countries when data comes home. In short, the mere fact that the collective effect of political will on a global level produced the information revolution does not imply uniform agreement with the agenda and does not prevent domestic political and other forces from derailing the revolution in practice or from redirecting data to unintended uses or non-uses.

Domestic resistance may manifest in a number of ways. First, there may be domestic resistance to data collection and usage. The possibility of such resistance was previewed by the fact that various constituencies have already objected as the international community worked its way toward putting in place the new regimes.[136] The primary objections articulated,[137] directly or indirectly, include (1) a desire to limit "big" government, (2) an emphasis on privacy,[138] (3) an emphasis on taxpayer rights, (4) a lack of confidence in government, and (5) a desire to minimize taxes. There is every reason to believe that these actors, having lost the battle on the global stage, will revisit their arguments and strategies at the domestic implementation stage.

Not all strands of domestic resistance are necessarily negative. For example, one emerging issue is taxpayer rights.[139] The concept of taxpayers having rights vis-à-vis the government in the context of imposition and collection of taxes is certainly not new.[140] However, a trend has

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136 See e.g. Jason J Fichtner & Adam N Michel, "The OECD's Conquest of the United States: Under the Costs and Consequences of the BEPS Project and Tax Harmonization" (March 2016) at 30–31, online (pdf): *Mercatus Center* <www.mercatus.org> [perma.cc/2YTR-NEF4] (reviewing a wide range of objections to the OECD BEPS project, including particular objections to CbC reporting).

137 See e.g. *ibid*; William G Gale, "Don't Buy the Sales Tax" (1 March 1998), online: *Brookings* <www.brookings.edu> [perma.cc/5PKS-AEZ4] (noting the appeal to some taxpayers of any system that could eliminate the need for an income tax and the IRS); Arthur J Cockfield, "Cross-Border Big Data Flows and Taxpayer Privacy" in Robert F van Brederode, ed, *Ethics and Taxation* (Singapore: Springer, 2020) 379 at 387–88 [Cockfield, "Cross-Border"] (detailing an array of privacy concerns with information exchange, including kidnapping, political reprisals, and access to data by national competitors).

138 In this regard, ongoing debates about privacy and emerging norms in an era of widespread data may collaterally influence debates about tax information and tax transparency and disclosure.

139 See Irma Mosquera Valderrama et al, "The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries" (2017) WU International Taxation Research Paper Series Working Paper 2017-10, online: <ssrn.com/abstract=3034360>.

140 For example, many of the elements outlined for the practical protection of taxpayers' rights include elements familiar in many tax systems, such as confidentiality, audit rules, and appeals processes: see IBFD, "Observatory on the Protection of Taxpayers' Rights: 2018 General Report on the Protection of Taxpayers' Rights" (2019) at 26, online (pdf): *International Bureau of Fiscal Documentation* <www.ibfd.org> [perma.cc/X845-GMXY].

emerged in recent years focusing on protection of taxpayer rights, triggered in part by concerns over governments' growing investigative, data collection, and enforcement powers in the global effort to curb tax evasion and tax avoidance. For example, the International Bureau of Fiscal Documentation launched its "Observatory on the Protection of Taxpayers' Rights."[141] This platform builds[142] on minimum standards and best practices for taxpayer rights protection articulated during the 2015 International Fiscal Association Congress on "The Practical Protection of Taxpayers' Rights."[143] In part, research and advocacy regarding taxpayers' rights frame the analysis in terms of human rights and work to develop principles, minimum standards, and best practices[144] and to monitor their status through national reports.[145]

The concern with taxpayers' rights is connected to taxpayer privacy concerns, and a number of scholars have evaluated the risks of the new initiatives through a taxpayer rights and privacy lens.[146] Prescriptive solutions stemming from a taxpayer rights perspective may, however, look a bit different. For example, they have included recommendations for a multijurisdictional taxpayer bill of rights.[147]

Importantly, there is no inherent clash between taxpayers' rights or taxpayer privacy movements and the revolution in cross-border tax information exchange. In fact, a widely adopted and universally supported

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141 See "Observatory on the Protection of Taxpayers' Rights" (last visited 30 July 2020), online: *International Bureau of Fiscal Documentation* <www.ibfd.org> [perma.cc/9M2Y-4DQL] [IBFD, "Observatory"].

142 See "National Reports for the Observatory for the Protection of Taxpayers' Rights" (last visited 6 August 2020), online: *International Bureau of Fiscal Documentation* <www.ibfd.org> [perma.cc/8BNV-9J8H] [IBFD, "National Reports"] (noting the role of the IFA Congress).

143 "IFA 2015 Congress Basel, Switzerland", online: *International Fiscal Association* <ifa.nl/congresses/ifa-2015-basel> [perma.cc/QRQ2-8YJR] (Subject 2 of the Scientific Programme examined "[t]he practical protection of taxpayers' fundamental rights").

144 See IBFD, "Observatory", *supra* note 141.

145 See IBFD, "National Reports", *supra* note 142.

146 See e.g. Arthur J Cockfield, "How Countries Should Share Tax Information" (2017) 50:5 Vanderbilt J Transnat'l L 1091; Arthur J Cockfield, "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights" (2010) 42:2 UBC L Rev 419 [Cockfield, "Protecting Taxpayer Privacy"]; Allison Christians, "Taxpayer Rights in Canada" in César Alejandro Ruiz Jiménez, ed, *Derecho Tributario y Derechos Humanos: Diálogo en México y el Mundo* [Tax Law and Human Rights: Dialogue in Mexico and the World] (Mexico City: Tirant lo Blanch, 2016) 485; Niels Diepvens & Filip Debelva, "The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights Under Pressure" (2015) 24:4 EC Tax Rev 210.

147 See e.g. Cockfield, "Protecting Taxpayer Privacy", *supra* note 146.

set of taxpayer rights protection standards could reduce concerns about taxpayer privacy that might otherwise foment domestic resistance to exchange of information. Nonetheless, in some political settings, movements associated with taxpayers' rights and privacy concerns could ultimately shift the balance of support for global transparency and information initiatives, and may impact domestic uses and implementation.

Another possibility is that governments may simply be disinterested in acting on received data and information, perhaps viewing cross-border enforcement as a low priority, or perhaps for other reasons. This has certainly occurred in the past. For example, in the case of leaked data concerning HSBC Swiss private bank clients that was originally obtained by France in 2009, some governments initially failed to act despite the data's availability.[148] The leaked data was originally received and decrypted by the French government in 2009, revealing information regarding 127,000 accounts and 79,000 individuals from across the globe.[149] France made the data available to a number of countries, but not all acted swiftly on the data. For example, Denmark did not request the HSBC Swiss data from France, despite knowing that its own taxpayers' hidden accounts were on the list, until the data was published by the International Consortium of Investigative Journalists on their website on February 8, 2015.[150] The next day, the Danish tax authorities announced that they were requesting the names of Danish taxpayers with HSBC Swiss accounts from France.[151] Danish tax authorities also confirmed that they had not previously sought the data from France (despite the fact that France had shared the HSBC lists with other countries) and launched an investigation into why the information had not been requested by Denmark earlier.[152]

Regardless of the reasons for resistance, the levers of domestic political influence are the same: resources and law. Most obviously, the impact of information flows can be blunted by limiting the resources available to

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148 See Oei & Ring, *supra* note 2 at 548–50.

149 See Randall Jackson, "France to Investigate Possible Tax Cheats Listed in Stolen HSBC Data", *Tax Notes Today International* (20 April 2010), online: <www.taxnotes.com/tax-notes-today-international/assets-wealth-taxation/france-investigate-possible-tax-cheats-listed-stolen-hsbc-data/2010/04/20/193f6> [Jackson, "France to Investigate"].

150 See e.g. "Denmark Ignored Hidden Swiss Fortunes for Years," *The Local* (9 February 2015), online: <www.thelocal.dk/> [perma.cc/MMD5-T2EE] (Danish tax minister quoted as saying he did not understand why his predecessor did not act on the HSBC information available from the French government but that he was now acting).

151 See "Denmark Seeks Names of HSBC Swiss Account Holders", *Reuters* (9 February 2015), online: <www.reuters.com> [perma.cc/CY72-NPJ3].

152 See *ibid*; "Denmark Ignored Hidden Swiss Fortunes for Years", *supra* note 150.

the tax administration in budget allocations. In jurisdictions such as the United States, where the tax enforcement agency has been under political siege for almost two decades, domestic actors eager to limit the power of information exchange can tap into an existing political narrative to restrict agency funding and ensure limited enforcement. Even in jurisdictions where the tax enforcement agency has not been the subject of such recent critiques, efforts to increase funding to address what are likely to be enhanced needs for resources can be the object of intense lobbying. The new world of more institutionalized data transmission raises the stakes of such lobbying. Ultimately, domestic political efforts to defund enforcement can have virtually the same effect as not having the information at all.

b. Politicized Uses and Non-Uses

There is also potential for politicized or inappropriate use or non-use of data. Opponents of expanded global information reporting have regularly identified the risk of inappropriate data use by jurisdictions as a major risk accompanying the new data flows.[153]

The most obvious example would be the use of data for illegitimate political or economic purposes by those in power—for instance, to persecute or undermine opponents. The most egregious opportunities for such conduct may be constrained by both domestic and international rules. On the domestic side, rules barring disclosure of and access to taxpayer data without a legitimate enforcement purpose may limit such abuse.[154] On the international side, there are rules embedded within the new information regimes that limit information exchange to jurisdictions that demonstrate a satisfactory commitment to standards of data use and protection identified by the global community.[155] But even with such rules, there are still risks of inappropriate uses, for example in democracies "at the edge"—that is, those countries able to currently meet global standards for participating in the information revolution but that nonetheless present clear risks of misuse and misappropriation of tax data.

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[153] See e.g. Fichtner & Michel, *supra* note 136 at 31; Cockfield, "Cross-Border", *supra* note 137 at 387–88 (detailing an array of privacy concerns with information exchange including kidnapping, political reprisals, and access to data by national competitors).

[154] See e.g. IRS, "IRS Privacy Policy" (last modified 31 January 2020), online: *IRS* <irs.gov> [perma.cc/8YF2-389L]; IRS, "Disclosure & Privacy Law Reference Guide," Pub 4639 (2012), online (pdf): *IRS* <irs.gov> [perma.cc/M936-RNQG]; *CbC MCAA*, *supra* note 133, ss 5(1)–(3) (imposing requirements on countries to address concerns regarding confidentiality, safeguarding of data, appropriate uses of exchanged information).

[155] See e.g. the text accompanying notes 133–35.

Perhaps more pervasive is the risk that governments will use information in ways that are legal, yet advance political or other interests beyond tax enforcement. In these contexts, it may be difficult to draw lines between legitimate and illegitimate uses. For example, the United States has long been familiar with the option of relying on criminal tax enforcement as a tool to indict and punish individuals whose more notorious crimes lie beyond the tax system. In a widely known example dating to the 1930s, the United States relied on the tax system to imprison notorious organized crime leader Al Capone.[156] As characterized in a July 1931 letter from three internal revenue agents to the agent in charge in Chicago, Capone was "the boss of the so-called Cicero syndicate which carried on a very lucrative business in manufacturing and selling beer and alcohol, operating gambling houses, and houses of prostitution."[157] Capone had avoided arrest and prosecution for this assortment of criminal activities, allegedly due to successful efforts at bribing local police.[158] Ultimately, Capone was charged and convicted on five counts of tax evasion and was sentenced to eleven years in prison (of which he served eight).[159] Although novel at the time, the use of tax prosecutions as a backstop for failed convictions on other substantive criminal charges (referred to by some as "pretextual criminal tax prosecutions") has become a familiar, though contested, enforcement practice.[160]

Most recently, the conviction of President Donald Trump's campaign chair, Paul Manafort, for filing false tax returns and for failing to file a foreign bank account report has been characterized by the president as an example of pretextual tax prosecution, with Manafort being treated worse than Al Capone.[161] The counterargument, of course, is that Manafort's ac-

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156 See e.g. "Historical Documents Relating to Alphonse (Al) Capone, Chicago" (last modified 9 November 2018), online: *IRS* <www.irs.gov> [perma.cc/8MSN-7RQ2].

157 Letter from Internal Revenue Agents WC Hodgins, Jacque L Westrich & HN Clagett to the Internal Revenue Agent in Charge, Chicago, Ill (8 July 1931) at 1, online: <www.irs.gov> [perma.cc/MFS9-FEZF].

158 *See ibid* at 2.

159 See Joseph J Thorndike, "Trump Compared Paul Manafort to Al Capone: Here's Why" (2018) 160:8 Tax Notes 1069 at 1073.

160 See e.g. Daniel C Richman & William J Stuntz, "Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution" (2005) 105:2 Colum L Rev 583; Harry Litman, "Pretextual Prosecution" (2004) 92:6 Geo LJ 1135; Scott D Shimick, "Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of *Breaking Bad*'s Notorious Anti-Hero" (2014) 50:1 Tulsa L Rev 43.

161 See Donald J Trump, "Looking back on history, who was treated worse, Alfonse Capone, legendary mob boss, killer and "Public Enemy Number One," or Paul Manafort, political operative & Reagan/Dole darling, now serving solitary confinement - although convicted of nothing? Where is the Russian Collusion?" (1 August

tivities were connected to elections, political processes, and collusion with a foreign government, all serious matters of national interest.

Outside the United States, the potential for politics to intersect with tax-related prosecutions can be seen in the recent convictions of former Pakistani Prime Minister Nawaz Sharif, who was fined and sentenced to ten years in prison in 2018 on corruption charges that stemmed from the Panama Papers data leak revealing his family's offshore holdings.[162] In part, Sharif "failed to disclose the source of funds used to purchase luxurious London properties and had not reported them to tax authorities."[163] Following the convictions, Sharif and his family members (some of whom were also convicted) contended that the charges were "politically motivated."[164]

These examples illustrate the ways in which tax prosecutions can move into the political arena. The question is at what point we might become concerned that such tax prosecutions could constitute an inappropriate use of the tax enforcement power and an illegitimate use of tax data. Perhaps an even more serious issue is not whether the Manafort or Sharif convictions are problematic, but rather whether we can envision circumstances in which tax information and enforcement are used as inappropriate political leverage. Although this possibility has long existed, the risk may prove greater in an era in which much more data is much more readily available and encompasses a far greater number of taxpayers. To the extent that some level of a tax "smoking gun" could be found in such volumes of tax data, the risk of inappropriate use increases, and the need to identify the boundaries between appropriate and inappropriate use correspondingly intensifies.

Another possibility is that political considerations may drive *non-use* of data. An example of this sort of politically driven procedural impropriety can be seen in the example of leaked data concerning HSBC Swiss private bank clients that was originally obtained by the French government in 2009.[165] As discussed above, France shared the data with a number of countries, including Greece, providing then Finance Minister George Pa-

2018 at 8:35), online: *Twitter* <twitter.com> [perma.cc/2RH9-PF2X]. See also Thorndike, *supra* note 159 at 1069.

162 See Scilla Alecci, "Former Pakistan PM Sharif Sentenced to 10 Years over Panama Papers", *International Consortium of Investigative Journalists* (6 July 2018), online: <www.icij.org> [perma.cc/23KP-AMNS].

163 Reuters, "Pakistan Court Sentences Ex-PM Sharif to 10 Years in Prison for Corruption", *NBC News* (6 July 2018), online: <www.nbcnews.com> [perma.cc/6URQ-6U8X].

164 See Alecci, *supra* note 162.

165 See Jackson, "France to Investigate", *supra* note 149; Oei & Ring, *supra* note 2 at 548–50.

paconstantinou with a list (known as the "Lagarde list") of Greek taxpayers and their information.[166] Later investigations revealed that Papaconstantinou first scrubbed the data of the names of family members before sending the list on to the Greek finance ministry's Financial and Economic Crime Unit.[167] Ultimately, Papaconstantinou was convicted for having deleted his family members' names from the Lagarde list.[168] This episode illustrates the risk that those in power may act to ensure personally beneficial outcomes, and it also serves as a reminder that the fact that data might be available does not guarantee that all cases will be pursued.

c. *Unfairness or Mistargeting*

Another potential outcome when data comes home is the enactment of laws or development of enforcement policies that are unfair or distributively problematic, even if such policies are legally permissible. At its core, a significant change in global transparency and exchanged information is an information shock that will necessarily have distributive consequences. On the one hand, to the extent that sophisticated and high-net-worth taxpayers are held more accountable for tax compliance, we may see fairer and more distributively just outcomes. On the other hand, there are countervailing risks, such as risks of unintended populations bearing the brunt of stepped up enforcement, or risks that among taxpayers whose data is contained in the new pool of tax information, those who are less sophisticated may be disproportionately targeted. In this way, even though there may be enforcement and compliance gains in light of more transparency and information, the enforcement impacts may hold regressive elements.

For example, it is well known that following tax leaks in 2008, the United States enacted the new FATCA legislation and tax administration programs geared toward punishing taxpayers who had hidden assets in foreign jurisdictions.[169] As part of its enforcement strategy, the United States enacted significant new reporting requirements and engaged in enhanced enforcement of new and existing reporting requirements.[170] Relatedly, the IRS introduced the Offshore Voluntary Disclosure Program

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[166] See Randall Jackson, "Tax Evasion Scandal Erupts Amid Revenue Shortfall" (2013) 69:2 Tax Notes Intl 147 at 148 (the list included 2,509 Greek taxpayers with "secret" offshore holdings in HSBC totalling up to $1.95 billion).

[167] See *ibid*.

[168] See Teri Sprackland, "German State to Train Greek Tax Collectors" (2016) 81:4 Tax Notes Intl 307 at 307.

[169] See Oei, *supra* note 13 at 674ff.

[170] See Oei & Ring, *supra* note 2 at 601–603.

(OVDP), which allowed eligible taxpayers who had failed to properly report their offshore accounts to come clean and pay penalties but avoid any criminal charges.[171]

While the FATCA legislation and associated enforcement initiatives have certainly had the effect of holding offshore tax cheats more accountable for their tax crimes, the evidence also suggests that some of these programs had unintended collateral effects on expatriates and immigrants and may have disproportionately punished less sophisticated taxpayers.[172] As various commentators have noted,[173] the new reporting regimes and enforcement initiatives cover not only classic offshore evaders (that is, wealthy Americans living in the United States but hiding significant financial assets offshore to evade taxes), but also Americans actually living abroad and immigrants coming from abroad (who may hold offshore accounts in their countries of residence or home countries for less sinister reasons), as well as accidental Americans who may have never lived in the United States but who hold US citizenship. Although these latter types of taxpayers were not the animating target behind the reforms, they are required to comply with the new rules (a costly effort), and their failure to do so puts them at risk of paying high penalties. Moreover, heightened enforcement of existing rules in light of newly available cross-border data has impacted these taxpayers, for example, subjecting them to extremely high penalties that, while perhaps appropriate for egregious and willful tax evasion, may be disproportionate for less willful tax offences and errors.

Just as concerning, if not more so, is the fact that the OVDP "relief" programs actually favoured more sophisticated taxpayers and disadvantaged less savvy taxpayers, who are less likely to have engaged in egregious conduct. A study by the National Taxpayer Advocate reported that the OVDP programs operating in 2009 and in 2011 generated regressive outcomes: taxpayers with fewer offshore assets and who lacked the advice of counsel ultimately paid disproportionately higher penalties than those taxpayers with more offshore assets or who enjoyed the advice of counsel in navigating the OVDP process.[174] Thus, while there may have been

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171 See Oei, *supra* note 13 at 676–79.

172 See e.g. Oei & Ring, *supra* note 2 at 603–606.

173 See e.g. Oei, *supra* note 13 at 694–96; Oei & Ring, *supra* note 2 at 604–606; Christians & Cockfield, *supra* note 24 at 36–37.

174 See National Taxpayer Advocate, *supra* note 128 at 228–29. The report notes that for taxpayers in the 2009 OVDP, those with the smallest accounts paid offshore penalties nearly six times the median unpaid tax (eight times for unrepresented taxpayers), whereas those with the largest accounts paid only three times the unpaid tax.

overall offshore enforcement gains, the distributive impacts associated with achieving those gains have been problematic.

These types of outcomes serve as a warning about how countries can get it both right and problematically wrong when obtaining more accurate information. Receipt of large quantities of data brings the opportunity to target abusive taxpayers and incentivize compliance through expansive audits and high penalties.[175] Data thus brings more occasions for governments to "get it right." But it also brings the risk of outsized burdens and penalties on taxpayers who may have committed less egregious offences or made unintentional mistakes. And to the extent enforcement leads to regressive outcomes or a focus on unfair or inefficient prioritization of enforcement targets, there is also a risk of getting it wrong. Governments should therefore think carefully about their enforcement approaches. More nuanced regimes, including those with low maximum penalties for low-income taxpayers and limited windows for audit or look-back for certain violations or high penalties, may be useful in carefully directing enforcement toward the right taxpayers.[176]

B. A Framework for Considering Country-Level Differences

Thus far, Part III has argued that certain features of the global information revolution suggest tensions and disagreements at the heart of the project. It has also argued that when data comes home, the ways in which it is used will be a function of technical/technological and political drivers, and that these may be intertwined.

We now take the analysis a step further by identifying eight particular political, institutional, and economic characteristics and factors that are likely to affect domestic outcomes and pathways when data comes home. Some of these characteristics are directly related to tax, while others relate to broader background features and priorities that influence outcomes, such as attitudes toward data and information or the characteristics of underlying legal institutions. Moreover, as we will return to later in this article, some of these factors are likely to work in tandem and cut in the same direction, while others may pull in opposite directions. Together, these factors make up the political, legal-institutional, and technological landscape that will shape outcomes when data comes home. Identification and analysis of these factors can help with predicting and evaluating the path ahead and for anticipating problems and concerns.

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[175] See e.g. Nathan J Richman, "Tax Prosecutors Like Digging in Data Too" (2019) 165:9 Tax Notes Federal 1504.

[176] See e.g. Tessa Davis, "The Tax-Immigration Nexus" (2017) 94:2 Denver L Rev 195 at 244–46.

1. Level of Interest in Tax Revenues and Base Preservation

Different countries have different tax bases and levels of revenue extraction, and different levels of interest in expanding such bases and extraction. Some countries impose tax on a territorial basis, while others tax worldwide income of their domestic taxpayers. For example, in the years leading up to the US 2017 tax reform (which some view as shifting the US to a more territorial system for business taxation), it was common to argue that the United States was the remaining major economy pursuing worldwide taxation.[177] Moreover, different countries impose different tax levels, irrespective of whether they exert worldwide or territorial taxation. A survey of top effective tax rates across forty-one OECD and EU member jurisdictions found that the rates ranged from 29–76 per cent.[178] A 2020 survey of individual statutory income tax rates across more than 150 countries revealed rates that ranged from zero to 56.95 per cent, with a global average of 31.16 per cent and an OECD average of 41.22 per cent.[179]

These differences will impact countries' degree of interest in and potential use for data. As an obvious example, a country that only taxes the domestic-source interest income of its domestic taxpayers will probably not find exchanged information regarding that taxpayer's foreign bank account interest to be very interesting, at least not for tax purposes. Likewise, a country that imposes low taxes on multinational enterprises (perhaps as an incentive to get those enterprises to do business in the country) may be less enthused about receiving CbC reports regarding business activities, at least from a tax perspective. As discussed below, this is not to say that such countries would not be interested in the information for other purposes, such as for anti-corruption purposes, national security, or economic competition purposes. A tax-disinterested country may, in fact, be very interested in exchanged tax data for other reasons.

The key point is that the tax levels and tax base of a country are likely to affect the nature of its interest or lack thereof in exchanged tax information and the utility of such information for tax enforcement purposes

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[177] See Kimberly Clausing, "Beyond Territorial and Worldwide Systems of Taxation" (2015) 15:2 J Intl Finance & Economics 43 at 43–44. See also Rosanne Altshuler, Stephen Shay & Eric Toder, "Lessons the United States Can Learn From Other Countries' Territorial Systems for Taxing Income of Multinational Corporations" (21 January 2015), online (pdf): *Tax Policy Center* <www.taxpolicycenter.org> [perma.cc/JFJ4-ATXD].

[178] See Jacob Lundberg & Gustav Fritzon, "Taxing High Incomes: A Comparison of 41 Countries" (October 2019), online (pdf): *Tax Foundation* <taxfoundation.org> [perma.cc/D6Z4-BQDC].

[179] See "Individual Income Tax Rates Table" (2020), online: *KPMG* <home.kpmg> [perma.cc/4VKC-3FSS].

(which, after all, is the original intended use of such information).[180] If a country is tax disinterested but interested in exchanged data and information for non-tax purposes, this would perhaps warrant a conversation about whether such non-tax uses are justifiable given the original parameters and intent of the global tax information exchange project.

2. Strength of Tax Administrative Capacity

It has been well recognized, including by the OECD and G20 countries, that the capacity to collect and administer taxes varies significantly among countries.[181] Notably, the Platform for Collaboration on Tax, a joint project of the OECD, the United Nations, the World Bank, and the IMF, has focused attention on capacity building programs.[182] Additionally, the African Tax Forum pursues an agenda of technical assistance aimed at "increas[ing] domestic resource mobilization," developing African expertise, and establishing and meeting member country needs.[183] Differential capacity, unsurprisingly, has implications for the pathway forward with respect to domestic uses of data as well. Countries with weaker infrastructure for the administration of taxes are likely to be less well equipped to store, process, utilize, and safeguard data. Thus, weak state capacity should be an indicator of heightened risks.

Of course, as with all of these factors, the degree of administrative capacity is not necessarily the only factor determining outcomes. For example, even a state with relatively weak tax administrative capacity may be effective in safeguarding data if there are offsetting institutional and cultural commitments to privacy and data protection. Even in the face of re-

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[180] Even countries that are interested in cross-border enforcement and revenue may have incentives to pursue some types of enforcement and not others. See e.g. Thomas R Tørsløv, Ludvig S Wier & Gabriel Zucman, "Externalities in International Tax Enforcement: Theory and Evidence" (2020) National Bureau of Economic Research Working Paper No 26899, online: <www.nber.org/papers/w26899> [perma.cc/SG7Y-KVAY] (noting incentives for high-tax countries to focus enforcement on profits booked to other high-tax countries, rather than on profit shifting to tax havens).

[181] There is a broader question of "state capacity" more generally, a concept that is alternately defined as (1) capacity to extract revenue (i.e., tax rates and size of tax base); (2) administrative capacity to audit and enforce taxes; or (3) bureaucratic capacity more broadly. See Elissa Berwick & Fotini Christia, "State Capacity Redux: Integrating Classical and Experimental Contributions to an Enduring Debate" (2018) 21 Annual Rev Political Science 71; Dina Pomeranz & José Vila-Belda, "Taking State-Capacity Research to the Field: Insights from Collaborations with Tax Authorities" (2019) 11 Annual Rev Economics 755.

[182] See "What We Do" (last visited 4 August 2020), online: *Platform for Tax Collaboration* <www.tax-platform.org> [perma.cc/H8T6-HYF3].

[183] "Technical Assistance" (last visited 19 June 2020), online: *African Tax Administration Forum* <ataftax.org> [perma.cc/B2FQ-SE9N].

source scarcity, we might still see those scarce resources being directed toward data protection if that is deemed a national priority. It is also important to note that tax administrative capacity may be subjected to different measurement, and there may be disagreement regarding the extent of such capacity.[184]

3. Extent of Commitment to Data-Based Regulation Methods

Moving away from tax, another hard-to-quantify metric is a country's more general level of interest in using data to perform a regulatory function. It is increasingly recognized that some countries may be more likely than others to employ data-based methods of regulating national security, fighting crime, suppressing unrest, detecting money laundering, or enforcing taxes. In a 2019 study, the OECD looked at tax administrations across 58 countries, including a mix of advanced and emerging economies, and tracked their use of data. The OECD's report noted that tax administrations are increasingly using "large and integrated data sets" and that "[m]ost tax administrations employ data scientists and many others are now pursuing recruitment strategies aimed at increasing the number of analysts and other specialists into tax administration."[185] Despite this trend, countries nonetheless vary in their extent and mix of data usage. For example, in assessing tax administrations' reliance on particular types of third-party data, the study reported that of the 58 jurisdictions, the following numbers used each of these types of data sources: employer wage and salary information (53); financial institutions (50); other government agencies (56); international exchange (50); insurance companies (42); immovable property sales (47); online trading (16); asset leasing (21); prescribed contractors with reported payments to subcontractors (21); VAT invoices (39); and other (20).[186] Differences may be a function of population size, geopolitical location, resources, existing bureaucratic capabilities, and culture more generally.

By way of example, recent debates and discussions regarding tracing for COVID-19 reveal striking variations among countries' comfort level in

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[184] See generally Neil A Englehart, "State Capacity, State Failure, and Human Rights" (2009) 46:2 J Peace Research 163 (observing in the context of a study on state capacity and human rights that "[t]here is no generally accepted way of measuring state capacity. The concept itself is multidimensional, and no single summary measure is satisfactory" at 167).

[185] OECD, *Tax Administration 2019: Comparative Information on OECD and Other Advanced and Emerging Economies* (Paris: OECD, 2019) at 23, online (pdf): <www.oecd-ilibrary.org> [perma.cc/BKS7-YBFP].

[186] See *ibid* at 47; "Figure 1.4 Use of Third Party Data, 2017" (last modified 2 August 2019), online: *OECD* <read.oecd-ilibrary.org> [perma.cc/DMX9-M69B].

using different types of data and tracking methods. Some jurisdictions have mandated use of tracker apps to grant users access to regions, cities, buildings, and transit systems, or to ensure compliance with quarantines.[187] Others rely on comprehensive access to cellphone data, credit card histories, and surveillance cameras as part of a system of comprehensive testing and tracing.[188] In still other jurisdictions, privacy concerns have prompted resistance to extensive use of data collection in the effort to control the pandemic. As countries in Europe have begun introducing tracing apps upon opening up their borders, they have generally turned to voluntary participation in app tracing, with these decisions reflecting both legal constraints and public sentiment.[189]

More generally, countries that are more habituated in the use of data-driven methods of law enforcement and regulation may be more likely to find tax and non-tax uses for data shared through the new modes of tax information exchange. Of course, this may shift over time as countries accumulate more data or build more institutional or bureaucratic systems that are able to easily make use of data.

4. Level of Commitment to Privacy and Data Protection

Relatedly, the general level of a country's commitment to privacy and data protection also matters and can shape outcomes when data comes home.[190] Countries with high levels of commitment to data privacy may

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[187] See e.g. Kari Soo Lindberg & Jinshan Hong, "People in China Need a Green Light From Alipay App to Move Around the Country", *Bloomberg* (23 March 2020), online: <bloomberg.com> [perma.cc/2CZ8-AWDG] (reviewing requirement of app tracking for those seeking access and movement around the city and country); Heather Murphy, "14 Days With a Quarantine Tracker Wristband: Does It Even Work?", *The New York Times* (20 July 2020), online: <nytimes.com> [perma.cc/6R2B-KQCX] (Hong Kong required tracking bracelets for mandatory quarantine for everyone arriving from abroad, though their technical efficacy has been questioned).

[188] See e.g. Anthony Kuhn, "South Korea's Tracking of COVID-19 Patients Raises Privacy Concerns", *National Public Radio* (2 May 2020), online: <npr.org> [perma.cc/L5LS-UB22]; Aylin Woodward, "South Korea Just Flexed Its Contact-Tracing Power: After Partiers With the Coronavirus Went to Nightclubs, It Found and Tested 46,000 Exposed People", *Business Insider* (22 May 2020), online: <businessinsider.com> [perma.cc/766M-BZTT].

[189] For example, Italy's minister for technology innovation, Paola Pisano, observed that countries are different and that, despite the technical ability for "military GPS [to] give me precision to three millimeters," the government's goal was to strike the right balance for Italy, which "is not South Korea." See Jason Horowitz & Adam Satariano, "Europe Rolls Out Contact Tracing Apps, With Hope and Trepidation", *The New York Times* (16 June 2020), online: <nytimes.com> [perma.cc/8W93-YGSC].

[190] See e.g. Allison Christians, "Canada" in Eleonor Kristoffersson et al, eds, *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law* (Frankfurt: Peter

prove more likely to be strongly committed to safeguarding data and using it in circumscribed ways—for example, by erecting firewalls between tax and non-tax uses. Of course, evaluating levels of commitment can be complicated. A country's commitment to privacy may manifest differently with respect to tax and non-tax privacy. Moreover, some countries might be committed to privacy from government while others might view it acceptable for government to know information but demand privacy between taxpayers. Such background differences in countries' conceptions of privacy and their views on government infuse policy conversations ranging from taxation to national security to public health.

The level of a country's commitment to privacy is likely to change over time. As with the other factors we have listed, it may also vary and exist in tension with other factors and commitments. For example, privacy commitments may conflict with an interest in raising revenue or safeguarding the tax base, leading to indeterminate outcomes.

5. Availability of Existing Data Sources

Another potentially under-appreciated metric along which countries might be analyzed concerns access to existing data sources. If a country already has access to much of the data that is being newly exchanged, then the incremental new data might not have that much of an impact, or may simply confirm existing knowledge. Conversely, for other countries, new data troves may represent a significant increase in information. Notably, this factor matters both with respect to tax and non-tax enforcement, though the mechanisms by which it comes into play may differ for each.

The availability of existing data sources may be related to the extent of a country's commitment to using data-based regulation methods. Or, put differently, if a country is already used to using data to regulate behaviour, collect taxes, or fight crime as a cultural or institutional matter, this may mean that a lot of existing data has already been accumulated and that new data is not very interesting or useful. It is worth noting, however, that it is possible that a country has a lot of existing data about certain types of taxpayers (e.g., individuals) but not a lot of data about others (e.g., corporations). In such cases, the receipt of new data of a certain type may reshuffle costs and the feasibility of enforcement, and may thus reshape enforcement priorities.

Lang, 2013) 209 at 209 (exploring the balance in Canada between tax privacy or confidentiality and the availability of adequate information to enforce Canadian tax law and participate in information sharing).

6. Data Importers vs. Exporters

For a variety of reasons, countries differ in whether they are likely to be net "tax data importers" or net "tax data exporters." Factors include the design of the country's tax base, its current capacity to use data, the relevance of cross-border tax data in its tax system, the number of foreign bank customers in the country's banks, the number of the country's citizens residing abroad, the number of multinational businesses that are tax residents of the country, and the number of corporate and other business entities "papered" or established in the country. Such differences, though not static, may shape countries' formal and informal commitments to information exchange mechanisms.

Awareness of these differences and their potential effects predate the current wave of information exchange developments. For example, highlighting how differences in countries' relative interest in tax information exchange affect outcomes, a 2010 critique of the limited number of tax information agreements signed with low-income countries (as distinct from tax havens) contended: "Industrialized countries [were] just not interested in concluding Tax Information Exchange Agreements with Low Income Countries because they don't expect much profit from such agreements for themselves,"[191] given their expectation that low-income countries possess little useful tax data on the industrialized countries' taxpayers. A similar intuition lay behind a 2007 proposal by Professor Steven Dean to have "wealthy, information-dependent countries such as the United States ... [pay] other countries, specifically tax havens, for [access to tax information]."[192]

At their core, these types of observations and proposals serve as a reminder not only that the real-time value of tax data differs among countries, but that countries' relative interest in data could impact their enthusiasm for embracing new global trends, their interest in fostering specific bilateral exchanges of tax data, and the degree to which cross-border tax data received will play a role in a country's tax enforcement decisions.

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191 Misereor, "Double Tax Treaties and Tax Information Exchange Agreements: What Advantages for Developing Countries?" (26 January 2010), online (pdf): *Tax Justice Network* <taxjustice.net> [perma.cc/W89S-ERDW].

192 Steven A Dean, "The Incomplete Global Market for Tax Information" (2008) 49:3 Boston College L Rev 605 at 610 (referencing his earlier proposal). See also Steven A Dean, "Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation" (2007) 58:5 Hastings L J 911 at 954–64 (discussing his proposed payment or revenue sharing system for provision of tax information by one country to another).

7. Strength of Rule of Law and Legal Institutions

Another metric that will likely affect the path going forward is the relative strength of rule of law and related institutions in a country. The intuition here is that the risk of politicized or otherwise inappropriate uses of data—such as to hunt political opponents, persecute unpopular minorities, or protect family members—is likely to vary based on the nature of the country's legal institutions.

The relationship between data use and the rule of law is certainly not absolute, however, and may be attenuated by other factors. For instance, critical legal studies perspectives, as well as the US examples noted above, suggest that disproportionate impacts (both intended and unintended) on less powerful groups may occur in all countries, regardless of rule of law and strength of legal institutions. Moreover, strong rule of law countries with weaker substantive cultural or political commitments to data privacy and taxpayer rights may use data aggressively despite strong legal institutions. Finally, despite the existence of at least one widely known index,[193] it is difficult to accurately and uncontroversially measure and compare the extent of rule of law and the strength of legal institutions.

In short, while informative, measures of rule of law and strength of legal institutions are only suggestive of a diminished likelihood of certain species of misuses (suggesting, for example, a lower likelihood of outright illegal uses). But without more information—such as information about the tax system and privacy culture—it does not tell us what the eventual outcome will be.

8. Two Wildcards

A final point is that no consideration of the immediate future of the international tax data revolution could be complete without explicit acknowledgement of two wildcards that have emerged on the scene in 2020. The first, the OECD digital tax project,[194] is less of a true surprise or newcomer. The BEPS project itself had already identified the challenges to taxation from the rise of digitalization as a key priority for the

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[193] See "WJP Rule of Law Index" (last visited 9 June 2020), online: *World Justice Project* <worldjusticeproject.org> [perma.cc/TW3X-MDHC].

[194] See OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework on BEPS (Paris: OECD, May 2019), online (pdf): <www.oecd.org> [perma.cc/G2WX-GUSH].

OECD in 2013[195] and ultimately for the Inclusive Framework.[196] Yet, the ways in which taxation and digitalization have come to dominate international tax policy discussions in the past year are quite notable. Driving some of this attention was unilateral action on the part of a number of countries, which have introduced their own digital taxes to create leverage in negotiations with the United States and other jurisdictions.[197] The OECD-led timetable for developing a global response to digitalization and taxation was delayed in part by the second wildcard (the COVID-19 pandemic) but continues to move along with end-of-year targets for initial agreement among countries.[198]

The second wildcard, the COVID-19 pandemic, has been much more of a genuine shock to global health, economic, and political systems. Although in theory the prospect of such a pandemic was well known, the timing and magnitude of the global emergence of this virus has now raised unanticipated challenges.[199] Now that a pandemic is upon us, countries across the globe have implemented significant spending programs to extend financial support to both individuals and businesses.[200] Though these

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195 See OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD, 2013), online (pdf): <www.oecd-ilibrary.org> [perma.cc/7APB-QYXH] (Action Item 1 looks to "[a]ddress the tax challenges of the digital economy" at 14–15).

196 See "Action 1: Tax Challenges Arising from Digitalisation" (last visited 22 June 2020), online: *OECD* <oecd.org> [perma.cc/A5XF-UA86].

197 See e.g. Keith Bradsher, "France Says U.S. Talks Could Produce Agreement on Digital Taxes", *The New York Times* (22 January 2020), online: <nytimes.com> [perma.cc/4D2R-MD69] (reviewing France's introduction of a digital sales tax and the resulting efforts at negotiation between the United States and France).

198 See e.g. Hamza Ali & Isabel Gottlieb, "Pandemic Delays Global Agreement on Digital Tax to Fall (2)", *Bloomberg Tax* (4 May 2020), online: <news.bloombergtax.com> [perma.cc/47HP-EAJL] (noting that the OECD decided to push some of its deadlines on securing international agreement on a digital tax plan and to incorporate virtual meetings in the process: "The reasonable expectation here is that we may have a staged process on at least some of the aspects," explained Pascal Saint-Amans, director of the OECD's Center for Tax Policy and Administration).

199 See generally Hannah Allam, "Years Before Pandemic, War Games Predicted A 'Global Tempest'", *National Public Radio* (19 May 2020), online: <www.npr.org> [perma.cc/X4UW-GYJ2]; Jeffrey K Taubenberger, David M Morens & Anthony S Fauci, "The Next Influenza Pandemic: Can It Be Predicted?" (2007) 297:18 J American Medical Assoc 2025.

200 See e.g. Hiba Hafiz et al, "Regulating in Pandemic: Evaluating Economic and Financial Policy Responses to the Coronavirus Crisis" (2020) Boston College Legal Studies Working Paper No 527, online: <ssrn.com/abstract=3555980> (reviewing the US response to the initial months of the pandemic); "Coronavirus Disease (COVID-19): Canada's Response" (last visited 22 June 2020), online: *Government of Canada* <canada.ca> [perma.cc/DF8V-84Q7] (mapping out Canada's legislative and other responses to the pandemic); "Japan's Emergency Stimulus Reaches ¥117 Trillion as Virus Crisis Deep-

financial outlays are viewed by many as essential to averting more serious social, health, and economic crises, the price tag is not cheap. Many jurisdictions are already thinking about how to pay for the pandemic.[201]

How might these two forces impact countries' responses to the international tax information revolution? The first, digital taxation, provides a new path for raising tax revenues. The second provides a powerful reason why countries across the globe may seek to increase effective enforcement of current tax rules (thereby increasing tax collections) and to adopt new tax bases. Access to additional and new data increases a country's ability to do both. To the extent new data flows enable countries to identify taxpayers who have not been reporting and paying taxes consistently with existing rules, and to the extent data flows increase the feasibility of implementing new tax bases, the investment in the new data revolution may yield new payoffs, and may attract even greater interest and commitment of resources.

Our delineation of these factors does not aim to solve the problems associated with uses of tax data at the nation-state level. Our goal instead is to identify the main factors that are likely to influence how data is used and what risks and outcomes may arise. Awareness of differing national landscapes going forward will enable domestic and international organizations and policymakers to formulate effective revenue policy, anticipate problems in advance, and protect the interests of citizens and taxpayers.

C. The Path Forward

What can and should the response of the global community be when a country's own distinctive mix of domestic politics, legal institutions, and technology drives that country's use of international tax data? We briefly map out some of the major options.

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ens", *The Japan Times* (20 April 2020), online: <japantimes.co.jp> [perma.cc/SF7K-9D6T] (outlining Japan's emergency financial package in response to COVID-19).

201 See e.g. Frans Vanistendael, "Will the Coronavirus Pandemic Cure the EU Budget?" (2020) 98:12 Tax Notes Intl 1417; Sam Edwards, "Wealthy, Big Tech Targets in Spain's Post-Virus Tax Overhaul", *Bloomberg Tax* (15 June 2020), online: <news.bloombergtax.com> [perma.cc/683S-BQFY] (reviewing an array of options in Spain for expanding tax revenues post-coronavirus); Alex M Parker, "COVID-19 May Usher In Digital Taxes Despite US Tariff Threat" (3 June 2020), online: *Law 360* <law360.com> [perma.cc/5M5N-P4YF] (exploring the prospect of countries' turning to digital taxes in response to the COVID-19 fiscal crisis); Tarcísio Diniz Magalhães & Allison Christians, "Rethinking Tax for the Digital Economy After COVID-19" (30 June 2020) [unpublished, archived at SSRN], online: <ssrn.com/abstract=3635907> (examining the prospect of a global excess profits tax in a digital world post-COVID); Mindy Herzfeld, "Tax Optimism for a Post-Pandemic World" (2020) 98:4 Tax Notes Intl 399 (considering ways in which the pandemic could help reshape taxation).

First, although the increased availability of international tax data is substantially a function of multilateral agreement, whether with respect to BEPS or to the exchange of tax rulings, there is, as noted, no obligation on countries to use the information received. Thus, if jurisdictions fail to act on newly acquired tax data, whether due to inadequate resources or alternative preferences or enforcement priorities, other countries have limited grounds to object.

To the extent the jurisdiction seeks assistance in capacity building, other nation-states or international bodies eager to see countries enforce their tax rules may offer to provide such assistance, but this type of engagement would be voluntary on both sides. Notably, national decisions regarding levels of funding for tax enforcement have historically been within the purview of domestic politics and not subject to direct outside control.

If a jurisdiction fails to act on information for political reasons (for example, because the taxpayer is a politically powerful individual or multinational corporation), other countries may have limited grounds for direct action. However, if a country's tax non-enforcement decisions confer a financial advantage on a domestic taxpayer that is in direct competition with foreign businesses, there may be both an incentive and, in some cases, a legal basis for other countries to react. For example, the EU's state aid investigations in recent years[202] suggest a path by which such objections could manifest. But such options are nonetheless limited. In particular, where non-enforcement occurs only through inaction rather than through advance taxpayer-favourable rulings, it may be harder for countries to find legal grounds on which to object.

If a jurisdiction uses international tax data for politically driven enforcement, the potential for objections by other countries or international organization seems stronger, but is still by no means appropriate or inevitable. As discussed above,[203] it is not altogether clear what constitutes "politically driven" use of tax data and when such use becomes inappropriate. Government efforts to convict taxpayers on tax crimes when convictions on more serious crimes have eluded enforcers are the subject of debate, but they are not viewed as universally inappropriate or abusive. Moreover, even if tax enforcement efforts cross some broadly acknowledged line into inappropriate political use, other jurisdictions may not object. This may be the outcome, for example, if the acting country is one

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[202] See e.g. General Court of the European Union, Press Release, 90/20, "The General Court of the European Union Annuls the Decision Taken by the Commission Regarding the Irish Tax Rulings in Favour of Apple" (15 July 2020), online (pdf): *CURIA* <curia.europa.eu> [perma.cc/B8GL-JNA3].

[203] See Part III.A.2.b., *above*.

that attracts relatively little attention, if the taxpayer in question is not particularly sympathetic, or if other jurisdictions are hesitant to use their political capital on this matter. In contrast, a more sympathetic taxpayer subject to more obvious political targeting could draw the attention of other countries or even international organizations.

If the taxpayer being targeted by a country is a citizen of or MNE headquartered in another country, their home jurisdiction may step in formally or informally to challenge the country in question's tax enforcement process. Informally, objections can be voiced bilaterally or in multilateral discussions, and such objections may focus on the specific mechanism by which the tax information was delivered, may centre on the specific manner or instance of targeting, or may pertain to information sharing more generally. Formally, objections may be raised through information exchange mechanisms (such as the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports)[204] or through collateral means (such as state aid investigations mentioned above).

Finally, a country's failure to adequately protect taxpayer data may be most likely to draw an immediate response from other jurisdictions, particularly if such failure results in a high-profile leak or other unauthorized transmission of taxpayer data affecting the other jurisdiction. Such failure could be the result of inadequate resources and data privacy policies, but it could also be the result of intentional sharing of foreign taxpayer data with domestic competitors. Although the causes and remedies would be different in these cases, the foreign taxpayers' protestations and their efforts to secure the assistance of their home jurisdiction would likely be strong.

The bottom line is that many decisions about the use of international tax data remain at the discretion of each jurisdiction. While we can flag the most likely pathways and possibilities, eventual outcomes will depend on the type of use or non-use and the specific countries in question. At the end of the day, countries are most likely to intervene where their own taxpayers are harmed or burdened—whether through inappropriate enforcement or inadequate protection of data—or where a spoken or unspoken norm has been violated in a high-profile instance. Stepping back, this domestic landscape of inchoate possibilities, risks, and potential reactions is the entirely predictable next step of the global tax information revolution, and one that nation-states should not neglect.

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[204] *CbC MCAA*, *supra* note 133.

Conclusion

International tax problems are not susceptible to final resolution at the global level. At its core, taxation remains a national endeavour. Thus, international tax agreements only truly take shape through their incorporation into the domestic tax process. In this article, we have discussed how—notwithstanding the global tax information revolution of the last decade—technological and political forces at the nation-state level may lead to unanticipated or undesirable outcomes when data comes home or may derail the revolution altogether. We have flagged particularly worrisome potential outcomes, outlined eight specific country-level characteristics that may trigger these outcomes as data comes home, and mapped the potential reactions and responses. Awareness of the possible pitfalls and their determinants can help policymakers identify problem areas, protect taxpayers, and improve outcomes. Importantly, a nation's profile in terms of its country-level characteristics and the relative weight of these characteristics over time may shift quickly if the country experiences notable political, economic, or other shocks, or gradually, if these features morph through slower-moving trends.

The global shock of the COVID-19 pandemic will inevitably generate new pressures on countries. Whether these pressures create significant shifts in countries' ability to invest in tax infrastructure, their desire to dramatically increase tax revenues (including through digital taxation), their political commitment to privacy and data protection, and their political stability remain to be seen. At a minimum, the introduction of this wildcard factor underscores the significance of carefully mapping the risks and determinants of major policy shifts such as the global tax information revolution. With such a frame, we can better track critical hazards and deliver policy responses in real time.