General Tax Treaties vs. T.I.E.A.s: Assessing Tools to Ensure Transparency in a Globalised World from the Perspective of Developing Countries

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ABOUT THE DeSTaT RESEARCH PROJECT

This paper condenses and articulates the findings set forth by several academic institutions involved in the DeSTaT Research Project (Sustainable Tax Governance in Developing Countries through Global Tax Transparency) "as "South Antennae" on the basis of Questionnaires drafted by the "North Research Units" of the same Project.

The "South Antennae" comprise of the University of São Paulo (Brazil), whose Antenna is headed by Professor Luís Eduardo Schoueri; the Instituto Colombiano de Derecho Tributário (Colombia), whose Antenna is headed by Ms Natalia Quiñones, LL.M., the University of Cape Town (South Africa), whose Antenna is headed by Professor Jennifer Roeleveld; the East African School of Taxation (Uganda), whose Antenna has been headed by Mr Festus Akunobera, LL.M. and Universidad of la República (Uruguay), whose Antenna is headed by Professor Addy Mazz.

The "North Research Units" comprise of the University of Oslo (Norway), under the supervision of Professor Frederik Zimmer (Head of the Project) and the WU Institute for Austrian and International Tax Law (Austria), whose Unit is headed by Professor Pasquale Pistone. The North Unit also comprises of a permanent external reviewer, Professor Irene J.J.

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Burgers (University of Groningen), who kindly agreed to act as internal reviewer for the articles drafted within the framework of the DeSTaT Project and who is hereby acknowledged.

Funding for the Project is provided by the Research Council of Norway and has been awarded following a selective international call, involving an international jury and open to projects from different disciplinary fields. Norway is traditionally a Country at the forefront in development cooperation and this is reflected also in the existence of a research programme of national interest titled "Tax Havens, Capital Flow and the Developing Countries".

The main goal of the DeSTaT research project is to explore the opportunities and challenges that developing Countries face in the current climate of global fiscal transparency.

The research project is based on comparative methodology and adopts a "field research" approach. Questionnaires on topics agreed by all institutions party to the project are drafted (primarily by the North Research Units) and submitted to the South Antennae. Questionnaires are addressed through local seminars which aim at engaging all potential relevant stakeholders. Questionnaires encompass a legal-descriptive function as well as a more policy-oriented dimension. The questionnaires intend to highlight convergences and divergences between the selected pool of jurisdictions. Convergences and divergences are monitored in relation to both specific challenges/needs and to potential solutions. The ultimate goal of DeSTaT is to develop a comparative matrix on whose basis policy recommendations geared towards "sustainable good tax governance" solutions for developing countries can be set forth.[10]

Questionnaires have incorporated survey sections, aimed at providing an accurate representation of the current state of affairs together with more policy-oriented sections. Where no other sources are acknowledged, statements of fact and conclusions are based on the answers provided to the relevant questionnaires by the South Antennae.

INTRODUCTION

With the spectacular increase of trans-boundary economic operations in the last decades, transparency has become one of the key objectives of international taxation.[11] The subsequent

[10] Further information about the Project can be retrieved on the following website: http://www.jus.uio.no/ior/english/research/projects/global-tax-tranparency/

[11] With regard to the specific topics addressed in this paper, the following persons acted as reporters for the respective Antennae. Brazil: Reporters: Mateus Calicchio Barbosa and Carlos Otávio F. de Almeida ; Panel: Prof.

proliferation of tax havens, or at least of preferential tax regimes, has, in fact, created further opportunities for the taxpayers to evade their tax base, by fictitiously relocating some items of it in places were tax pressure is lower. Efficient and timely exchange of tax information between States is the only way to tackle this phenomenon and has become a priority in international tax policy.

This problem is of course not peculiar to developing countries. Developed countries are facing similar, if not bigger, challenges as they host a significant percentage of multinational corporations. On the other hand, developed countries have the financial means and technical skills to impose the adoption of international rules on the exchange of tax information and may even put in place platforms for the automatic exchange of tax information. This is not necessarily the case for developing countries that often lack the necessary expertise to identify the most recurrent international tax base erosion practices and to negotiate international agreements to eliminate them.

The legal basis for the international exchange of tax information is usually in the form of an international agreement by which the contracting States undertake the obligation to provide tax information to the other party/parties when certain conditions are met. Such rules may be included in bilateral or multilateral comprehensible tax agreements or in more specific agreements directed to exchange of tax information, such as a Tax Information Exchange Agreement (TIEAs). More *suis generis* configurations may of course not be excluded.

While the available legal instruments are not different in nature for developed and less developed countries, the choice to be made is not necessarily the same. Developing countries face some specific challenges and may encounter specific difficulties and risks when concluding an international agreement providing for the international exchange of tax information. The objective of this meta-article is to identify the pros and cons that the conclusion of comprehensive tax treaties including an exchange of tax information clause presents for developing countries compared to the conclusion of agreements concerning only the international exchange of tax information (TIEAs, etc.). The added value of this study is to

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address the topic from the specific perspective of developing countries, a perspective which is currently missing in the academic tax literature.

The article builds upon an overview of the current status of development of the tax treaty network of five developing countries (Brazil, Colombia, South Africa, Uganda and Uruguay), focusing on the provisions related to tax information exchange. In particular, the extent and quality of the existing treaty networks is summarised for each country. On this basis, specific tax treaty policy and drafting issues are subsequently addressed regarding the preferences of the participating States as to the legal instrument (General Tax Treaties, TIEAs, multilateral agreements) and as to the wording of the provisions on international exchange of tax information. The so-called "OECD best practice" is used as an indicator for the generally accepted standard in this field, since it is followed by most countries.

The main ambition and original contribution of this research would be to address the most topical issues related to the exchange of tax information for developing countries and, based on a «bottom-up» empirical approach, to set forth policy proposals that may preserve the interests of these countries, while ensuring global transparency in a globalised world. It follows that other questions related to the conclusion of international tax agreements, such as questions regarding the allocation of taxing powers and the elimination of double taxation, will not be addressed, unless this is required for the better understanding of the issues related to the international exchange of tax information.

The meta-article is composed of a background section describing the state of play as to the conclusion of agreements that concern, partially or exclusively, the exchange of tax information in the participating States; two analysis sections identifying the reasons behind the tax policy and drafting variations observed in the tax treaty network of the participating States respectively; and a final section summarising the findings of the previous sections and containing some tax policy and drafting recommendations to overcome identified difficulties and to meet the specific needs of developing countries.

PART ONE: BACKGROUND INFORMATION

1. Overview Of The Tax Treaty Network Of The Participating States

Although it may not be conceptually excluded that the exchange of tax information between sovereign States takes place on the basis of provisions of the domestic legal order, in most of the cases binding international rules have to be adopted for this purpose. Such rules are usually included in bilateral agreements between States, although there is a recent and growing trend in signing multilateral instruments that provide – *inter alia* – for international exchange of (tax) information.[12] For sake of completeness, reference will be also made below to some non-binding/soft law instruments that contain provisions on the international exchange of tax information.

2. Bilateral Agreements Containing Rules on the Exchange of Tax Information Concluded by the Participating States

At the bilateral level, exchange of tax information can be agreed via one of the following legal instruments: i) comprehensive double tax conventions including a provision on international exchange of tax information whether this provision follows Art. 26 of the OECD and UN Model Conventions (MC's)[13] or not; ii) agreements on mutual legal assistance in criminal matters in general including provisions on exchange of information applying also in tax matters, when a criminal prosecution takes place; and iii) specific "Tax Information Exchange Agreements" (hereinafter, "TIEA(s)") largely inspired by the relevant Model elaborated by the OECD.[14]

This classification covers the most frequent, mainstream configurations and is purely indicative. Other – more *sui generis* – configurations are also possible. A good example is given by the "hybrid treaty" (also called "mini-treaty") signed between Uruguay and Argentina, which,

[12] These issues will be deal in a further section of this study.
[13] In both OECD and UN Model conventions, exchange of information is regulated in Art. 26.
[14] Model agreement on exchange of information on tax matters, developed by the OECD Global Forum Working Group on Effective Exchange of Information and published in April 2002.

while presenting all the features of a typical TIEA also includes rules for the elimination of double taxation.[15]

The analysis across the participating States has evidenced that they make use of all of these instruments, although at different degrees.

2.1 General Tax Treaties Network

The extent of the general tax treaty network of the participating countries varies significantly. If we follow the classification proposed by Victor Thuronyi[16] on the basis of the quantity of general tax treaties concluded by a given country, we find countries with broad treaty network (South Africa: 70 GTTs and Brazil: 29 GTTs), medium treaty networks (Uruguay: 12 GTTs[17]) and small treaty networks (Uganda: 10 GTTs into force; and Colombia: 4 GTTs into force and another 10 GTTs not yet into force or under negotiation).[18]

2.2 TIEAs Network

By contrast, almost all the participating States have concluded a very limited number of TIEAs. More precisely, Columbia[19] and Brazil have only one TIEA in force (both of which are concluded with the US[20]), while, recently, Brazil has signed some TIEAs, but they are still pending for approval before the Parliament. Uruguay has signed six TIEAs, but only the one with France is currently into force.[21] For its part, Uganda has no TIEA into force or under negotiation.

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[15] The Netherlands have also concluded such 'mini-treaties'. See, Verdragenoverzicht of 1 October 2014, retrievable at the following link: http://www.rijksoverheid.nl/onderwerpen/belastingen-voor-ondernemers/documenten-en-publicaties/circulaires/2014/10/01/verdragenoverzicht.html. Also, the Nordic countries concluded similar mini-treaties before 2009, in order to lure tax havens into concluding TIEAs.

[16] Victor Thuronyi, *Tax Treaties and Developing Countries*, in: M. Lang, P. Pistone et alii (eds.), *Building Bridges between Law and Economics*, ,441 et seq. (IBFD, Amsterdam, 2005).

[17] With Hungary and Germany.

[18] I. Mosquera Valderrama, *The International Tax Treaty Policy of Colombia, Copenhagen IFA Congress Special Issue – Tax Treaty Monitor*, 2013

[19] Irma Mosquera, Diego Quiñones, and Natalia Quiñones, "Colombia Approves OECD-CE Multilateral Convention, U.S.Multilateral Convention, U.S. TIEA", Tax Notes Int'l, July 15, 2013, p. 234.

[20] Brazilian Report, at 25. TIEA of 20 March 2006.

[21] TIEA of 28 January 2010.

South Africa is an exception in this respect, since it has 9 TIEAS in force and many others at different stages prior to ratification by Parliament. This is probably due to the fact that TIEAs are negotiated by the revenue authority and not by the National Treasury of South Africa, which is responsible for tax policy. As a matter of fact, it seems that the National Treasury does not perceive exchange of information to be a tax policy decision, but rather an agreement for purely administrative or technical nature and therefore falls within the mandate of the South African Revenue Service.

3. Multilateral Agreements Containing Rules on the Exchange of Tax Information Concluded by the Participating States

At the multilateral level, the most important instrument providing rules on international exchange of tax information is the OECD/CE Convention on Mutual Administrative Assistance in Tax Matters. This Convention is open to all States for signature. However, among the covered countries, only Columbia[22] and South Africa[23] have signed and ratified this Convention, whereas Brazil has signed it, but have not yet ratified it. Moreover, in the case of Brazil, ratification in the near future is dubious, due to constitutional issues that will be presented below. Uganda and Uruguay are only members of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, but this could be the first step for a future accession to the OECD/CE Convention that the OECD decided to open to all countries in December 2011.

At the regional level, the authorities of the East African Community (EAC), of which Uganda is a Partner State, have drafted a Multilateral (Comprehensive) Tax Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income on 30 November 2010 which contains a specific provision on the exchange of information (article 27), based on international standards.[24] This agreement has entered into force only between Rwanda and Kenya, since these are the only Partner States to have ratified it.

[22] Signed on 23 May 2012 and ratified on 19 March 2014.
[23] In force since 1 March 2014.
[24] For more details: Th. Dubut, *The International Tax Policy of the Least Developed Countries – The case of the Partner States of the East African Community: Burundi, Kenya, Rwanda, Tanzania and Uganda*, in Y. Brauner and P. Pistone (eds.), *BRICS and the Emergence of International Tax Coordination*, 334-335 (Amsterdam: IBFD, 2015)

Some of the so-called BRICS have signed a trilateral convention titled "IBSA tax cooperation agreement".[25] So far, this agreement, which is a genuine international agreement signed by the governments and not a mere administrative/technical agreement, only covers custom duties and procedures. Nonetheless, there are indications that, in the future, this instrument may also be used as a vehicle to introduce clauses on mutual assistance, including mutual assistance in tax matters. Currently, this convention is binding upon South Africa, Brazil and India.

In addition, there is a multilateral tax treaty signed within the framework of the Andean Community, of which Colombia is a contracting State.[26]

This short presentation should not undermine the role of South Africa as a promoter of further integration between tax administrations at the regional and sub-regional level. First of all, South Africa is the driving force behind the Multilateral African Tax Administration Forum (ATAF) Agreement on Mutual Assistance in Tax Matters, which links most of the African Tax Administrators, including Uganda,[27] but also – at a sub-regional level – the Southern African Development Community (SADC) Memorandum of Understanding on Cooperation in Taxation and Related Matters signed on 8 August 2002.[28]

4. Soft Law Instruments Containing Provisions on the Exchange of Tax Information Agreed by the Participating States

Beyond the abovementioned binding legal instruments, some of the participating States have deployed efforts to ensure the efficient exchange of tax information through soft-law instruments.

First of all, within the framework of EAC (of which – as already said – Uganda is a Partner State), a draft Model Double Tax Treaty has been elaborated to be used by the Partner

[25] Agreement on Customs and Tax Administration Cooperation between the governments of South Africa, India and Brazil, signed in Pretoria on 17 October 2007.
[26] Andean Community, Decision 578 on 4 May 2004.
[27] Specifically: Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Cote d'Ivoire, Egypt, Eritrea, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sudan (unclear whether this is North Sudan, South Sudan or both), Swaziland, Tanzania, Uganda, Zambia, Zimbabwe.
[28] Which should become a multilateral agreement on assistance in tax matters in the near future. To date, this multilateral agreement has been signed and ratified only by South Africa.

States in their relations with third countries;[29] the SADC has also prepared a (comprehensive) Double Tax Treaty Model. Both of these Models contain a specific provision on the exchange of information in tax matters (article 26) and are intended to facilitate the conclusion of international agreements, but do not formulate legally binding rules.

In addition, EAC and SADC have also elaborated Memoranda of Understanding on the Exchange of Information. Furthermore, the SADC Memorandum (which concerns South Africa) has a very extended scope and covers all customs duties, indirect and direct taxes, whereas the EAC Memorandum (which concerns Uganda) only covers customs duties.

PART TWO: RATIONALE FOR (NOT) SIGNING AGREEMENTS PROVIDING RULES FOR THE INTERNATIONAL EXCHANGE OF TAX INFORMATION

As expected, the rationale leading different countries to conclude different types of treaties is not necessarily the same and also depends on the circumstances of each case.

1. Rationale for (not) Concluding General Tax Treaties

Some national reports see clear benefits in concluding general tax treaties, provided that some conditions are met, such as a good knowledge in treaty negotiation, a good selection of treaty partners and a good perception of the relative macroeconomic position of the country (exporter or importer of goods, services, capital, oil and mineral resources).

As a matter of fact, reluctance to conclude general tax treaties seems to derive mostly from a cost-benefit analysis: negotiating such a tax treaty originates costs and requires also a sound technical knowledge. Moreover, also due to the lack of experience, it is harder to predict the future (macro-economic) consequences of having a general tax treaty in place. A recent example clearly demonstrates the risks that the conclusion of a general tax treaty may hide for inexperienced tax administrations: some years ago, Kenya and Rwanda concluded a double tax

[29] See EAC Secretariat, *Report of the first meeting of the income tax technical working group*, Ref. No: EAC/SR/…/2012 (17 February 2012) and EAC Secretariat, *Report of the joint meeting of the technical working groups on tax harmonisation in EAC to harmonise tax procedures and to consider the study on harmonization of tax incentives in EAC*, Ref. No: EAC/TF TAX/02/2013 (November 2013). See also: Th. Dubut, *The International Tax Policy of the Least Developed Countries – The case of the Partner States of the East African Community: Burundi, Kenya, Rwanda, Tanzania and Uganda*, in Y. Brauner and P. Pistone (eds.), *BRICS and the Emergence of International Tax Coordination*, 333 (Amsterdam: IBFD, 2015).

treaty with the authorities of Mauritius, the provisions of which turned out to have disastrous effects in terms of tax revenues, as they provided for very low withholding taxes (Kenya) or simply excluded withholding taxes on foreign payment (Rwanda). As a consequence, both of these countries have now terminated the tax treaty with Mauritius.[30]

Another reason, reported by Brazil, is the reduced necessity of treaties, since the relief of double taxation is, in Brazil, already granted on a unilateral basis. As a matter of fact, the vast majority of the tax systems of the developing countries contain rules ensuring a unilateral relief of double taxation and it may, thus, be argued that the conclusion of a double tax treaty is not required. This is also the case for Uganda.

In this respect, there might be a difference between worldwide and territorial systems of developing countries. As a matter of fact, some territorial systems do not need information from other jurisdictions in order to assess the amount of tax due. For these jurisdictions, the main reason for entering into general tax agreements is exogenous: the compliance with international standards (namely the OECD ones) or the need to be lifted out of the OECD grey list.

It should be noted that there is not necessarily any link between the OECD black/grey list and the domestic black lists. For example, Uruguay, despite having long being included in the OECD's black-list and more recently in its "grey list", did not appear on the domestic black-lists of its two most relevant economic partners, Argentina and Brazil. Against this background, one should not overestimate the importance of the lists produced by the OECD in assessing the reasons for countries (such as Uruguay) to enter into tax treaties.

For the rest, the BRICS countries included in the selected pool display orientations similar to those of developed countries, which are generally reluctant to concluded GTTs with traditional offshore centres and, in general, with countries with which no significant economic relations are in place. Even when offshore concerns are left outside of the picture, a clear – and foreseeable pattern – can be distinguished: the signature of comprehensive tax treaties is reserved for major trading partners (as explicitly mentioned by Brazil, Colombia and South Africa), while with other countries exchange of information is normally ensured via TIEAs.

In most of the cases, it was difficult to assess the impact of the conclusion of general tax treaties in the participating States, as their implementation was too recent. When the impact is

[30] Th. Dubut, *The International Tax Policy of the Least Developed Countries – The case of the Partner States of the East African Community: Burundi, Kenya, Rwanda, Tanzania and Uganda*, in Y. Brauner and P. Pistone (eds.), *BRICS and the Emergence of International Tax Coordination*, 331 (Amsterdam: IBFD, 2015)

effectively measured, the conclusion is that the volume of trade is unaffected by the conclusion of the agreements.

It is also reported that there is no necessary stable link between the adoption of a treaty and the creation of a most favourable environment for global business, as investors (in the case of the treaty between Uruguay and Argentina) are still vigilant as to the result. However, it is rather risky to draw conclusions on the basis of rather limited national experiences. It is generally accepted, in fact, that GTTs improve legal certainty and this may indirectly promote foreign investment, at least in developing countries. We don't have enough elements to convincingly refute this statement.

2. Rationale for (not) Concluding TIEAs

Before addressing this issue in further detail, it may be argued that territorial systems, such as the tax system of Uruguay, should not favour the conclusion of TIEAs, since they do not need information on foreign income to assess the amount of the taxes due. In this case, the conclusion of a comprehensive tax treaty to eliminate double taxation may indeed appear more appropriate, as it represents some benefits also for Uruguay. In the same way, when one of the parties is likely to have more important informational needs, as it may be the case with the TIEA between Brazil and the United States [see B, last two Paragraphs],[31] there is a clear preference towards the signing of GTTs that may compensate the lack of effective reciprocity in the domain of administrative cooperation, improve legal certainty, avoid international double taxation and tax evasion and establish a more favourable outset for international commerce.

In such instances, a TIEA may be seen as the first step towards the conclusion of a GTT. This is reported to be the sentiment surrounding the conclusion of the TIEA between Brazil and the United States, since the conclusion of a GTT would require overcoming major international tax policy divergences between the contracting States. This is a general trend observed in various areas of international economic law, where convergence is first achieved in the realm of procedural and administrative issues in the perspective of easing an approaching also on substantive issues.

[31] TIEA of 20 March 2006.

On the other hand, in the specific area of international tax law, as the tax administrations have an understandable interest also in stand-alone administrative issues, the Brazilian antenna is concerned by the fact that the conclusion of TIEAs may prevent the conclusion of comprehensive tax treaties, as the purpose of the former would not lie in the fostering of investment and development but in the need to obtain tax information.

It is thus not surprising that, when negotiations take place between countries that adopt the territorial tax system and have thus limited interest to conclude TIEAs, and countries that, for various reasons, are reluctant to conclude a GTT with a given jurisdiction, a possible outcome would be the conclusion of hybrid information exchange agreement, i.e. a bilateral agreement that combines features of a TIEA with rules on the allocation of taxing powers. An example of such a hybrid exchange agreement is the agreement concluded between Uruguay and Argentina. While our survey does not allow conclusions to be drawn on the desirability of such a compromise for a country adopting the worldwide taxation principle (such as Argentina), the hybrid instrument is perceived as an unsatisfactory outcome for a country adopting a territorial tax system (in this case, Uruguay). The hybrid exchange agreement may indeed be seen as an opportunity to foster economic relations with a major trading partner, while at the same time subjecting itself to an agreement that will likely not be executed in reciprocal terms.

3 Rationale for (not) Concluding Multilateral Agreements

A final question to address is why the participating countries have showed a lesser degree of interest towards multilateral instruments. In this respect, the reasons for scepticism provided by the Uruguayan Reporter cannot be ignored. Namely, there had been discussions about either signing a convention to avoid double taxation or an information exchange agreement with the MERCOSUR.[32] However, this initiative did not succeed, and, instead, Uruguay signed bilateral treaties with both Argentina and Brazil. In this respect, the main reasons of justification seem to be the lack of integration between the systems and their heterogeneity: Uruguay would rather favour forms of multilateral co-operation with countries that have similar features and, in particular, with countries that may be qualified as capital importing.

[32] A. Barreix, J. Roca and L. Villela, *Tributación en el MERCOSUR y la necesidad de coordinación*, in V. Tanzi, A. Barreix, and L. Villela (eds.), *Tributación para la integración del MERCOSUR*, (Washington DC: Inter-American Development Bank, 2005).

On the other hand, even countries committed to the multilateral cause sometimes act on the grounds of a mere "national - interest" rationale; for instance, Brazil and South Africa share the view that the goal of these multilateral treaties is an easy form to expand mutual assistance with countries with which no GTT is in force, even though, at least South Africa seems to be more inclined to see the OECD/COE Multilateral Convention on Mutual Assistance as an instrument that is further reaching than TIEAs.

In other cases, the conclusion of a multilateral agreement is a result of the participation in a regional integration process. For instance, Uganda is expected to ratify the EAC Multilateral Tax Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income in its quality as an EAC Partner States together with Burundi, Kenya, Rwanda and Tanzania. However, this is not yet the case, since only Rwanda and Kenya have ratified this Agreement.

PART THREE: VARIATIONS AS TO THE DRAFTING OF RULES ON THE INTERNATIONAL EXCHANGE OF TAX INFORMATION

1. Drafting Variations on the Exchange of Information Clause included in General Tax Treaties

The wording of the exchange of information clause in GTT naturally depends on the moment of their conclusion and the formulation of article 26 OECD MC at that time.

Compared to the international standards on transparency and exchange of tax information as reflected in the 2005 version of Art. 26 of the OECD MC,[33] the main divergences can be observed as to the subjective and objective scope of the relevant provisions included in the agreements concluded by the participating States (persons and taxes covered), the application/interpretation of the standard of secrecy and the existence of domestic rules restricting the extent of the exchange of tax information.

However, a distinction should be made between mere contingent deviations due to the great number of amendments that Art. 26 has been subject to over time and persistent policy

[33] Leaving aside the important but more contained amendments introduced as of July 2012.

objections or administrative difficulties stemming from tensions, not to say conflicts, between OECD model treaty provisions and domestic law rules.

In this respect, countries most affected by contingent deviations are those displaying the largest (and thus more established) treaty networks (at least in comparative terms), being those of Brazil and South Africa. With reference to such contingent deviations, an example would be the omission of Para. 4 and 5 of the OECD MC as introduced in a latter version of the MC (2005), from agreements concluded by South Africa before 2005. The national report states that this should not be considered as a substantive issue though, since domestic legislation does not create the secrecy barriers that these newly added paragraphs are intended to override. Similarly, Brazil points out at the "narrow exchange of information clause" included in its treaty with Japan; such an issue should also be overcome in case of renegotiation. Both Countries seem to implicitly (e.g., by pointing out the need to renegotiate the treaties, such as in the case of South Africa) or explicitly exclude the possibility of an ambulatory interpretation of the existing provisions in the light of the current OECD standards, but appear to be willing to embark on the necessary adaptive renegotiations.

As for hypotheses of deliberate policy-driven divergences from the current OECD standard, these appear as limited phenomena as there is a push towards the recognition of the influence of the OECD Model. Progressive convergence with the Model has been observed in the international tax policy of all examined countries.

Some persistent difficulties should, however, be pointed out. The most remarkable case is probably Brazil, since its GTT and the TIEA with the United States contain no specific clause modelled after Art. 26, Para. 4 OECD MC or a provision equivalent to Article 5 (4) (a) of the OECD Model TIEA – whereby the Contracting States should ensure that their authorities have powers to obtain and provide information held by financial institutions, agents and trustees – nor a provision corresponding to Article 5(6). Furthermore, in terms of limits to the obligation to exchange tax information, in some treaties, Brazil safeguards limits flowing from "constitutional and legal limitations and reciprocity of treatment". In these cases, the departure from OECD standards has constitutional grounds. In fact, a data secrecy rule, which is an individual guarantee in the Brazilian Constitution, may put at stake the authorisation of the tax authorities to obtain and provide information under a tax treaty, especially when provided regardless of any judicial authorisation granted on a case-by-case analysis. Due to these constitutional issues, it is

doubtful whether these specificities could soon be overcome. This also prevents Brazil from being fully compliant with the OECD requirement on efficiency: the time used to reply to the requests typically far exceeds that established as a relevant benchmark by the Global Forum on Transparency and Exchange of Information for Tax Purposes.

Another steady divergence in the tax policy of Brazil consists in the narrowing of the subjective scope of the agreements only to residents of the Contracting States.

South Africa may substantively come out as an alternative standard in relation to the development of an effective notion of "secrecy" to be applied to exchanged information, since it always requires that the information exchanged be treated as secret, but rarely provides a relevant benchmark to this purpose. As a matter of fact, only in eleven cases it is specified in the treaty that the standard for that protection of secrecy is the one set by the domestic law of the receiving State. In the other cases, there is simply no definition in the treaty, which could eventually lead to secrecy being downplayed or, on the contrary, generate an excessively conservative implementation of the clause.

Some similar drafting deviations may be found in the tax treaty networks of Brazil and South Africa regarding the exchange of information clause, such as the narrowing of the objective scope of application (taxes covered), the reference to the avoidance of fraud and evasion as one of the goals of exchange of information (which might signal a UN model influx) and the extension of the authorities entitled to use the information exchanged.

2. Drafting Variations in TIEAs

With reference to TIEAs, Brazil reports a deviation from OECD standards in its TIEA signed with the USA. In this treaty, a provision corresponding to Art. 5, Para. 4(a) of the OECD Model TIEA, dealing with the access by Tax Authorities to information held by financial institutions, agents and trustees as well as a provision modelled after Art. 5, Para. 6 OECD Model TIEA, setting time limits for the provision of a reply, are lacking. This seem to come out as deliberate policy deviation grounded on the earlier mentioned constitutional issues and on the difficulties experienced by Brazilian Competent Authorities in providing information in a timely manner.

Apart from this case, it seems to be a clear convergence regarding the OECD TIEA model, although it is probably worthy to mention a peculiar wording found in both the TIEAs concluded by Brazil a. These TIEAs include the following reference[34] "if the competent authorities of both States deem appropriate, they may agree in sharing technical knowledge, developing new inspection techniques, identifying new areas of noncompliance and study them jointly". The practical implications of this clause are yet to be defined.

PART FOUR: CONCLUSIONS AND RECOMMENDATIONS

The comparative study demonstrates that participating developing countries have a more developed GTT than TIEA network. This may appear at first sight surprising, since the negotiation and implementation of TIEA rules is technically easier. However, participating countries seem to prefer an overall approach, according to which the exchange of information is a supplement to the rules on the allocation of taxing powers. This is also a sign of the predominance of the investment attractiveness over the anti-tax evasion objective and many GTTs were indeed signed together with investment agreements.[35]

Constitutional and other domestic law constraints (in particular, rules on tax secrecy) may also have a negative impact on the conclusion of TIEAs. In addition, some developing countries (for instance, Uruguay) adopt the territoriality principle for which foreign tax information is in most of the cases not required. On the other hand, the conclusion of a TIEA could eliminate the application of domestic law rules on tax havens and Non Cooperative States or Territories, such as the base erosion rule and (increased) withholding taxes on some payments.

Regarding the formulation of the clause on the exchange of information, the variations reported by the participating States do not significantly diverge from variations that can be found in the treaty network of developed countries (for instance, the limitation of the exchange of information to residents of the contracting states and to the taxes covered by the Convention). A possible explanation might be that the majority of relevant international agreements were concluded with developed countries and reflect the tax policy and drafting preferences of the

[34] This wording seem to show a distinct UN influence.
[35] See, for instance, for Colombia, Irma Mosquera Valderrama, "The International Tax Treaty Policy of Colombia", *op. cit.*

latter. Furthermore, the OECD-MC is accompanied by interpretation materials that facilitate the implementation of its rules and promote its dissemination.

Against this background, it is very difficult to make tax policy and drafting recommendations for developing countries. To this end, it would also be necessary to have reliable data on the efficiency of the exchange of information in the participating countries (i.e. how many requests were sent to the other contracting State and how many received, how many were fruitful and how much time does it take to receive and send the requested information). This would require the adoption and implementation of domestic law instruments prescribing the way the national tax administration should handle an exchange of information request.

At the current stage of development, the only safe conclusion would be that there is no single miracle solution for all developing countries, but different policy and drafting options that should be considered carefully taking into account the objectives and specificities of each State concerned.