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International Tax

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I. Introduction

This article surveys developments in international tax during 2012, with a particular focus this year on global reactions to the U.S. Foreign Account Tax Compliance Act (FATCA).[1] Four years have passed since the global economic meltdown of 2008. Nowhere are the depressed economies of the world and the trillions in deficits more apparent than in the tax arena. In response to increased attention by public media, tax administrations have increased their efforts to collaborate so as to ensure that high net-worth individuals and multi-nationals — the perceived beneficiaries of tax breaks on the national and international stage — pay their "fair" share of taxes.

II. International Initiatives on Transparency and Information Exchange

Efforts to counter tax planning by well-advised, wealthy individuals and high profile multi-nationals are not new. The Committee on Fiscal Affairs (CFA) and the Business and Industry Advisory Committee (BIAC) of the Organization for Economic Co-operation and Development (OECD) have long led these efforts. Other organizations such as the European Union (EU), the Council of Europe, the Financial Action Task Force on Money Laundering (FATF), and the U.N. Committee on Money Laundering have also participated in these efforts. Early examples of the OECD work in this area include the Double Tax Conventions and Conduit Companies Report, going back to 1986, and the

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1. Foreign Account Tax Compliance Act (FATCA), Pub. L. No. 111-147, §§ 501-41, 124 Stat. 71, 97-117 (2010).

1998 Harmful Tax Competition Report. More recent initiatives include the creation of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), the Report on Improving Access to Bank Information for Tax Purposes, the Treaty Relief and Compliance Enhancement (TRACE) Project, the Joint Audit Protocol (which seeks to include joint examination in a single coordinated audit), and the recent revision of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Inadequate information exchange was one of the greatest issues facing tax administrations worldwide at the beginning of this process. Under bilateral Double Tax Agreements (DTA), jurisdictions did not have adequate information exchange in place. Historically, many tax haven and preferential tax regime jurisdictions did not participate in this bilateral process at all. Even where jurisdictions had entered into bilateral DTAs, there were often issues as to sufficiency of trained resources and effective procedures to collect and exchange relevant information. The Global Forum[2] has worked to put in place key principles on tax transparency and information exchange for tax purposes. It has also put in place "mechanisms for exchange of information upon request" and for expanded exchange of information in both criminal and civil matters.[3] This information is not restricted based on dual criminality principles or domestic tax interests. At the same time, the Global Forum has established confidentiality standards for information exchanged that act as safeguards for taxpayers and tax administrators. Further, it has created principles for availability of reliable information, particularly bank, ownership, identity, and accounting information.[4] It has helped to provide support for tax administrations, especially in emerging economies, to collect information and build their systems locally. These economies can then honor their commitments under bilateral agreements more effectively. Newer initiatives within the OECD and the Global Forum focus on automatic exchange of information to facilitate even greater accessibility to relevant information among cooperating tax administrations.[5] The Global Forum includes 116 member jurisdictions, the European Union, and 12 international observers.[6] Since its peer review project began in 2009, 110 peer reviews have been launched, 88 peer reviews have been completed and published, and over 800 Tax Information Exchange Agreements (TIEAs) have been signed.[7]

This level of cooperation among governments is unprecedented. It results directly from the financial crisis that peaked in April 2009, the same time as the G20 meeting in London. There, the G20 countries committed to support, and have since continued to support, the OECD's efforts to encourage increased transparency in and disclosure of tax

2. Organisation for Econ. Co-operation & Dev. [OECD], *Global Forum on Transparency and Exchange of Information for Tax Purposes: About the Global Forum*, http://www.oecd.org/tax/transparency/abouttheglobalforum.htm (last visited Jan. 31, 2013) ("The Global Forum has been the multilateral framework within which work in the area transparency and exchange of information has been carried out by both OECD and non-OECD economies since 2000.").

3. *Id.*

4. *Id.*

5. OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES: INFORMATION BRIEF 10 (Dec. 10, 2012), *available at* http://www.oecd.org/tax/transparency/Journalist's%20brief%20December%202012.pdf.

6. *Id.* at 2.

7. *Id.* at 3.

information.[8] In November 2011, at its Cannes summit, the G20 added its unanimous support to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[9] Over fifty countries have either signed the Convention or indicated their intent to do so.[10] The G20's decision to back OECD initiatives aimed at counteracting aggressive tax planning is driven by the need to reduce its members' budgetary deficits.[11] The resulting initiatives include building transparent tax compliance by banks, engaging high net-worth individuals on tax compliance, improving relationships between tax administrators and multinationals, and using the Joint International Tax Shelter Information Centre (JITSIC) as a forum for tax administrations to shorten learning curves and exchange experiences on cross-border tax shelter and other tax minimization arrangements.

III. The United States and FATCA

Historically, the U.S. position on these initiatives was somewhat unclear. Many jurisdictions still consider the United States to be a destination of choice for foreign investors in off-shoring assets. Historically, foreign persons have not been subject to U.S. tax except on U.S. source income. Reporting to U.S. withholding agents has been minimal. Since 2008, however, this has changed substantially.

U.S. pressure has severely affected the Swiss banking industry. This began with the disclosure of approximately 4450 UBS U.S. account holders and several probes and indictments.[12] In February 2012, the United States indicted Wegelin, a private Swiss Bank, for conspiring to conceal over $1.2 billion in U.S. taxpayer funds.[13] The Wegellin indictment is a prominent example of the many U.S. prosecutions undertaken or in progress against U.S. taxpayers, individual bankers, and financial institutions over the past years for concealing foreign-based assets of U.S. persons.

8. GROUP OF TWENTY [G20], LONDON SUMMIT LEADERS' STATEMENT (Apr. 2, 2009), *available at* http://www.g20.org/documents/?query=London+Summit&chm&=document_type=&extended_mode=0.

9. Press Release, OECD, Tax: G20 Countries Strengthen International Tax Co-operation, (Nov. 3, 2011), *available at* http://www.oecd.org/ctp/exchangeofinformation/taxg20countriesstrengtheninternationaltaxco-operation.htm.

10. As of December 5, 2012, the OECD has reported that ninety jurisdictions have substantially implemented the internationally agreed standard "endorsed by the G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting." OECD, PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD (Dec. 5, 2012), *available at* http://www.oecd.org/tax/transparency/progress%20report%205%20december%202012.pdf. This standard "requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes." *Id.*

11. OECD, TACKLING AGGRESSIVE TAX PLANNING THROUGH IMPROVED TRANSPARENCY AND DISCLOSURE: REPORT ON DISCLOSURE INITIATIVES 6 (Feb. 2011), *available at* http://www.oecd.org/ctp/exchangeofinformation/48322860.pdf.

12. United States v. UBS AG, No. 09-20423-CIV, 2009 WL 2524345, at *5 (S.D. Fla. Aug. 19, 2009) (settlement agreement between The United States and UBS AG).

13. Press Release, U.S. Dep't of Justice, Swiss Bank Indicted on U.S. Tax Charges (Feb. 2, 2012), http://www.justice.gov/opa/pr/2012/February/12-tax-153.html.

From a revenue standpoint, the 2009[14] and 2011[15] U.S. Voluntary Disclosure Programs yielded over $4.4 billion in revenue collections.[16] The UBS settlement added $750 million to that amount.[17] Various European jurisdictions have offered voluntary disclosure programs with similar results. The 2010 German voluntary disclosure program resulted in over €4 billion of tax revenue.[18] The U.K.'s program for Liechtenstein investments is expected to contribute over £3 billion.[19] Spain expects €2.5 billion from its program.[20] The common denominator of these programs is the leverage granted to tax authorities from their collective cooperation and willingness to exchange information. This includes information obtained on questionable legal grounds.

On March 18, 2010, the U.S. enacted legislation adding a new chapter four, the Foreign Account Tax Compliance Act (FATCA) (sections 1471–1474) to subtitle A of the Internal Revenue Code (IRC) as part of the Hiring Incentives to Restore Employment (HIRE) Act.[21] This legislation is unilateral and highly controversial. It is directed, primarily, at a broadly defined group of "foreign financial institutions" (FFI).[22] Its basic thrust is to impose a U.S. withholding tax of 30 percent on all "withholdable payments"[23] made to all non-participating FFIs. A defined category of existing obligations have been grandfathered. Withholding is scheduled to begin January 1, 2014 and to be fully effective by January 1, 2017.[24] To become participating, FFIs and all of their affiliates must agree with the I.R.S. to fulfill certain registration,[25] due diligence, reporting, and tax col-

14. I.R.S. News Release IR-2009-84 (Sept. 21, 2009).

15. I.R.S. News Release IR-2011-84 (Aug. 8, 2011).

16. I.R.S. News Release IR-2012-5 (Jan. 9, 2012).

17. Press Release, U.S. Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), http://www.justice.gov/opa/pr/2009/February/09-tax-136.html.

18. OECD, Offshore Voluntary Disclosure: Comparative Analysis, Guidance and Policy Advice 9 (Sept. 2010), *available at* http://www.oecd.org/tax/taxadministration/45967994.pdf.

19. Carolyn Bandel, *Liechtenstein May Roll Out More Tax Amnesties, Government Says*, Bloomberg (July 13, 2012), http://www.bloomberg.com/news/2012-07-13/liechtenstein-may-roll-out-more-tax-amnesties-government-says.html.

20. Andres Gonzales & Paul Day, *Spain Tax Amnesty Deal Far from Government Target*, Reuters UK Edition (Dec. 3, 2012), http://uk.reuters.com/article/2012/12/03/uk-spain-tax-idUKBRE8B20S920121203.

21. Foreign Account Tax Compliance Act (FATCA), Pub. L. No. 111-147, §§ 501-41, 124 Stat. 71, 71, 97-117 (2010); *see also* IRS, Summary of Key FATCA Provisions (Jan. 24, 2013), *available at* http://www.irs.gov/Businesses/Corporations/Summary-of-Key-FATCA-Provisions (discussing details of FATCA legislation).

22. I.R.S. Notice 2010-60, 2010-37 I.R.B. 329 (Sept. 13, 2010), *available at* http://www.irs.gov/pub/irs-irbs/irb10-37.pdf.

23. A "withholdable payment" is "any payment of interest, . . . dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income . . . from sources within the United States." The term also includes "any gross proceeds from the sale . . . of any property . . . [that could] produce interest or dividends from sources within the United States." FATCA §§ 501-41, 124 Stat. at 97, 103.

24. Patrick B. Fenn et al., *Tax Alert: New Guidance Sets Forth Delayed Timelines for Due Diligence and Other Requirements Under FATCA*, Akin Gump Strauss Hauer & Feld, LLP (Oct. 31, 2012), http://www.akingump.com/files/Publication/f6b5402c-feda-41fb-bf09-3425810ec7e7/Presentation/PublicationAttachment/75cee7d0-b03a-400c-89bc-b39515350996/121031_Tax_Alert.pdf.

25. "In building an online system for . . . [FFIs] to register as participating FFIs, the IRS has [attempted to develop] a flexible system . . . [that allows the FFI] to create accounts, [choose] login and passwords, create challenge questions and maintain the account once formed." IRS, Details on the FATCA Registration Process for Foreign Financial Institutions (FFIs) (Aug. 4, 2012), http://www.irs.gov/Individuals/International-Taxpayers/Details-on-the-FATCA-Registration-Process-for-Foreign-Financial-Institutions-(FFIs).

lection and remittance requirements. Participating FFIs must work directly with the U.S. government, as provided in Proposed Regulations to the IRC issued in February 2012.[26]

The obligations often conflict with local laws on privacy, disclosure, anti-discrimination, collection, and remittance of foreign taxes to which the foreign financial institutions are subject in their own jurisdictions of organization or operation. In complying with the U.S. requirements, they would potentially encounter legal or regulatory sanctions, civil claims, and possibly criminal actions.

To address this issue, the U.S. government has collaborated with its G5 trading partners — Germany, the United Kingdom, Spain, France and Italy — to create a bilateral intergovernmental agreement to implement FATCA compliance and reporting.

The joint initiative with the G5 countries was announced contemporaneously with the release of the regulations in February of 2012. On July 6, 2012, the United States released two versions of an intergovernmental model agreement (IGA – Model 1).[27] One version was reciprocal; the other was non-reciprocal. On September 12, 2012, the United States and the United Kingdom signed the first reciprocal IGA following the Model 1 template.[28] The inevitable occurred on October 24, 2012 when Announcement 2012-42 was released.[29] It postpones implementation dates for due diligence procedures to identify and document accounts to January 1, 2014. It sets January 1, 2014 as the divider for purposes of categorizing pre-existing and new accounts and the procedures to apply for each. It postpones withholding on gross proceeds until January 1, 2017 and expands the scope of grandfathered obligations.

On November 8, 2012, the United States announced that it was at various stages of exploration, discussion, and negotiation with at least fifty named countries with the intent to sign similar agreements.[30] A number of Latin American, Asian, Middle Eastern, and African countries were notably absent from this list. On November 14, 2012, the United States released a further template of an intergovernmental agreement (IGA – Model 2).[31] Model 2 reflects the terms of agreements made with Japan and Switzerland announced by the U.S. Treasury Department earlier in the year.[32] In November and December 2012, the United States signed five more agreements with Denmark, Ireland, Mexico, Spain, and the United Kingdom.[33] The Spanish, Swiss, and Irish agreements have been announced but are not publicly available. The agreements with Denmark and Mexico use

26. I.R.S. News Release IR-2012-15 (Feb. 8, 2012), *available at* http://www.irs.gov/uac/Treasury,-IRS-Issue-Proposed-Regulations-for-FATCA-Implementation.

27. U.S. DEP'T OF TREASURY, FATCA MODEL INTERGOVERNMENTAL AGREEMENT (MODEL 2) (Sept. 12, 2012), http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

28. Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland to Improve International Tax Compliance and to Implement FATCA, U.S.-U.K., Sept. 12, 2012 [hereinafter U.K. IGA], *available at* http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-UK-9-12-2012.pdf.

29. I.R.S. Announcement 2012-42, I.R.B. 2012-47 (Nov. 19, 2012), *available at* http://www.irs.gov/irb/2012-47_IRB/ar09.html.

30. Press Release, U.S. Dep't of Treasury, U.S. Engaging with More than 50 Jurisdictions to Curtail Offshore Tax Evasion (Nov. 8, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx.

31. U.S. Dep't of Treasury, *supra* note 27.

32. U.S. Dep't of Treasury, *Foreign Account Tax Compliance Act (FATCA): Resource Center*, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last updated Jan. 25, 2013).

33. *Id.*

the IGA - Model 1 format. This will likely also be the case with Spain and Ireland, while the agreement with Switzerland will be the first of the IGA - Model 2 versions signed.

The significant difference between the two Models is that in the IGA - Model 1 format, the information flows from reporting financial institutions through the local tax administration and then, pursuant to applicable exchange of information provisions under a DTA, is exchanged between the negotiating FATCA partner jurisdictions. Under the IGA - Model 2 arrangements, the relationship is established directly between the reporting FFIs in the FATCA partner jurisdiction and the I.R.S. The FATCA partner jurisdiction enacts facilitating legislation to accommodate the compliance and reporting requirements.

The major advantages to the FATCA partner jurisdictions of entering into an IGA include:

- Additional clarification as to the institutions included within the scope of a reporting financial institution; the specific compliance obligations for reporting financial institutions; the specific reportable accounts; the exact type of information to be supplied; and the timelines for supplying it. There is still uncertainty as to how the definitions that determine the entities included as financial institutions will be construed.
- Included financial institutions will not be required to have a "responsible officer" certify the completion of FATCA compliance procedures to the I.R.S. Whether the local tax administrations will require this certification is unclear.
- Under the IGA – Model 1, included financial institutions will not be required to enter into FFI agreements directly with the I.R.S.
- Included financial institutions, provided that they fulfill all reporting and other obligations to their local tax administration under local domestic legislation on a timely basis, will be considered compliant and participating FFIs and will not be subject to FATCA withholding on payments they receive.
- Pass-through withholding obligations are still unclear. Generally, the IGAs relieve specified holders from certain withholding requirements on pass-through payments, subject to certain exceptions. Reporting requirements remain an issue, however.
- Included financial institutions will not be required to withhold on recalcitrant holder accounts or to close such accounts. Reporting on such accounts will still be required, and it is unclear what happens if the information is not available.
- The "all or nothing" rule relating to affiliated groups has been relaxed. Related entities or branches prevented from fulfilling requirements by local laws will not taint the compliant status of a financial institution in a FATCA partner jurisdiction, subject to certain clearly defined conditions that must be satisfied.
- Specific financial institutions, plans, and products agreed between the FATCA partner jurisdictions will be treated as compliant for or exempted from FATCA.
- A most favored nation clause will ensure that more favorable terms granted in later IGAs will apply. This provides a needed basis to standardize compliance procedures and interpretations and will hopefully add a feature of multilateralism to the IGAs concluded.

These IGAs are comprehensive and clearly advantageous for FFIs and non-resident foreign entities formed or operating in the FATCA partner jurisdiction. They also afford benefits of additional clarity to the FATCA partner jurisdiction. Nevertheless, they leave numerous issues on the table, not the least of which is whether the United States will be

able to enact proposed legislation domestically that will support its undertakings to supply reciprocal information to its FATCA partner jurisdictions, by the dates and where provided for, under the IGAs.

IV. Mexican Perspective

Mexico has taken exchange of information seriously. It has entered into TIEAs with fourteen countries.[34] TIEAs are being negotiated or are pending entry into force with an additional nine countries.[35] Mexico also considers thirty-nine of its DTAs to qualify as TIEAs because they include comprehensive exchange of information provisions following the OECD Model Convention format.[36] Mexico does not consider all its DTAs to be TIEAs. For example, as of 2012, its DTAs with Belgium and Israel do not qualify as TIEAs.[37] In addition, Mexico is signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters,[38] which will enter into force for Mexico in 2013. Highlights of this Convention include:

- Exchange of information (per request, spontaneous or automatic);
- Simultaneous tax examinations;
- Tax examination can take place abroad;
- Assistance in recovery of foreign taxes and in document service on behalf of a foreign jurisdiction in Mexico; and
- Application to taxes on income, value added, capital gain, patrimony, estates, social security, and other local taxes, except customs duties.[39]

Mexican residents are estimated to hold assets in excess of U.S. $120 billion in savings in banks outside of Mexico, most of which are thought to be located in the United States. In February 2009, Mexico's Treasury Secretary Agustin Carstens sent a letter to U.S.

34. The countries are: the Bahamas, Belize, Bermuda, Costa Rica, Cayman Islands, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Netherland Antilles (Curacao), Saint Maarten, Samoa, and the United States. OECD, EXCHANGE OF TAX INFORMATION PORTAL: LIST OF MEXICAN EXCHANGE OF INFORMATION AGREEMENTS, http://www.eoi-tax.org/jurisdictions/MX#agreements.

35. These countries include Aruba, British Virgin Islands, Gibraltar, Liechtenstein, Marshall Islands, Monaco, Santa Lucia, Turks and Caicos and Vanuatu. *Id.*

36. *See* DTAs, which are also known as Double Tax Conventions (DTC), with Australia, Austria, Bahrain, Barbados, Brazil, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Finland, France, Germany, The United Kingdom, Greece, Hungary, Iceland, India, Italy, Japan, Korea, Luxembourg, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Russia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, the United States, and Uruguay. *See* OECD, *supra* note 34.

37. *See id.*

38. *Exchange of Information: A Boost to Multilateral Tax Cooperation: 15 Countries Sign Updated Convention on Mutual Administrative Assistance in Tax Matters*, ORGANISATION FOR ECON. CO-OPERATION & DEV. (May 27, 2010), http://www.oecd.org/tax/exchangeofinformation/aboosttomultilateraltaxcooperation15countries signupdatedconventiononmutualadministrativeassistanceintaxmatters.htm.

39. The countries currently signatories to the Protocol or the Amended Convention include: Argentina, Australia, Belgium, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Denmark, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Malta, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovenia, South Africa, Spain, Sweden, Tunisia, Turkey, Ukraine, the United Kingdom and the United States. *Guatemala: Commits to International Exchange of Tax Information*, ORGANISATION FOR ECON. CO-OPERATION & DEV. (Dec. 5, 2012), http://www.oecd.org/directorates/guatemalacommitstointernationalexchangeoftaxinformation.htm.

Treasury Secretary Timothy Geithner, requesting automatic exchange of information on interest paid by financial institutions resident in Mexico and the United States to residents of each other's country.[40] This exchange of information between Mexico and the United States already exists for dividends and capital gains.

When FATCA was enacted, Mexico's financial institutions (banks, broker dealers, and insurance companies) asked the Mexican Treasury Secretary to exempt them from the requirement that Mexico's financial institutions enter into agreements directly with the I.R.S. The terms and procedures under IGA - Model 1 provided the perfect vehicle for Mexico to respond to these requests and to secure its much sought after automatic exchange of information. On November 19, 2012, the United States and Mexico entered into a bilateral reciprocal IGA - Model 1 to improve international tax compliance, including FATCA compliance.[41]

From a Mexican perspective, one of the major advantages of the IGA is that Mexican financial institutions need not enter into direct agreements with the I.R.S. The IGA also facilitates the Mexican Tax Administration Service's ability to secure the following information from U.S. Financial Institutions through the I.R.S.:

- Name, address, and Mexican TIN of any person that is a resident of Mexico and is an account holder of a reportable account;
- Account number or the functional equivalent;
- Name and identifying number of the Reporting U.S. Financial Institution;
- Gross amount of interest paid on a depository account;
- Gross amount of U.S. source dividends paid or credited to the account; and
- Gross amount of other U.S. source income paid or credited to the account, to the extent subject to reporting under chapters three or sixty-one of subtitle A of the U.S. Internal Revenue Code.

The information on U.S. source income earned by Mexican account holders in 2013 must be delivered by September 2015. Thereafter, information must be exchanged within nine months of the end of each immediate prior year.

Going forward, Mexico intends to continue as an active participant in the exchange of information arena. The Secretary General of the OECD is Mexican. As Minister of the Treasury for Mexico in the mid-1990s, Angel Gurria was instrumental in the enactment of Mexico's controlled foreign company legislation.

V. United Kingdom and European Perspectives on FATCA

The European perspective on FATCA is clouded because FATCA compliance is very much a "known unknown." European financial institutions are currently unsure whether they actually are an FFI for FATCA purposes. Even those who do know they are likely to be an FFI certainly do not know whether they are likely to be FATCA-compliant in 2014 when withholding taxes become a live issue.

40. Letter from Agustin Carstens, Mex. Sec'y of Fin. to Timothy Geithner, U.S. Sec'y of Treasury (Feb. 9, 2009), http://faculty.law.wayne.edu/tad/Documents/Country/mexico-carstens_letter.pdf.

41. Agreement Between the Department of the Treasury of the United States of America and the Ministry of Finance and Public Credit of the United Mexican States to Improve International Tax Compliance Including with Respect to FATCA, U.S.-Mex., Nov. 19, 2012 [hereinafter Mex. IGA], *available at* http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Mexico-11-19-2012.pdf.

Demonstrating foresight, the national governments of France, Germany, Italy, Spain, and the United Kingdom announced their intent to enter into IGAs with the United States with the aim of clarifying some of the unknowns on a domestic level. They then negotiated two forms of model templates (IGA - Model 1). On September 12, 2012, the United Kingdom became the first country to sign an IGA – Model 1 (reciprocal) on the implementation of FATCA (the U.K. IGA). The United Kingdom has influenced the development of the IGA - Model 1 in its status as first-mover.

The U.K. IGA broadly follows the IGA – Model 1 although there is a "most favored nation" (MFN) clause included.[42] The MFN clause is welcome because, it is believed, it will promote consistency of FATCA compliance and implementation, and any concessions negotiated elsewhere will benefit U.K. Financial Institutions (U.K. FIs). Annex II is a country specific part of the U.K. IGA, identifying the status of certain U.K. entities and products.[43] It lists U.K. exempt beneficial owners, non-reporting financial institutions, and exempt products. While these are particular to the United Kingdom, they indicate the types of products and entities that might be considered in other country specific IGAs.

The U.K. IGA enables U.K. FIs to comply with FATCA by reporting directly to the U.K. tax authority (HMRC), rather than to the U.S. I.R.S.[44] Enabling legislation to be introduced through the Finance Act of 2013 will guarantee this. HMRC will, in turn, report the information to the I.R.S. under the exchange of information provisions of the U.K. - U.S. DTA. The draft U.K. legislation is expected in mid-December 2012 and should be formally enacted by July 2013.

A U.K. FI is defined broadly. The U.K. IGA applies to any U.K. FI that is tax resident in the U.K.[45] As a result, U.K. branches of non-U.K. FFIs can benefit from the U.K. IGA. The U.K. IGA sets out the information that U.K. FIs will have to report to HMRC, and the timeline for compliance. Any U.K. FI that satisfies the reporting obligations contained in the U.K. IGA will be treated as FATCA compliant and will not be subject to any withholding on U.S. source income received.

Following the publication of the U.K. IGA, HMRC launched a consultation (which has now closed) on the implementation of the U.K. IGA into U.K. domestic legislation.[46] HMRC asked for views from those affected by FATCA. Comments have been made in particular with regards to the definitions of "Depositary Institution," "Custodial Institution," and "Investment Entity" to ensure that these are sufficiently well defined in relation to U.K. specific entities to provide certainty.[47]

Part of the consultation considered whether there should be a concept of a "nil return," where U.K. FIs that do not have any U.S. account holders can make a one-off declaration on a "nil return," and then agree to update HMRC if their position changes.[48] This

42. U.K. IGA, *supra* note 28, art. 7, ¶¶ 1-2.

43. *Id.* app. 2.

44. *Id.* art. 4.

45. *Id.* art. 1, ¶ 1L.

46. *See generally*, HM Revenue & Customs, Implementing the UK-US FATCA Agreement (Sept. 18, 2012), http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032308.

47. *Id.* at 8, 10.

48. *See* HM Revenue & Customs Implementation of International Tax Compliance (United States of America) Regulations 2013: Guidance Notes 32 (Dec. 18, 2012), http://www.hmrc.gov.uk/drafts/uk-us-fatca-guidance-notes.pdf.

would certainly reduce the compliance burden on such U.K. FIs, while allowing them to be FATCA registered and compliant so that their ability to do business with other FFIs is not affected.

One area of uncertainty of considerable concern relates to the impact of FATCA on multi-nationals. Here, the implementation of FATCA across borders is key. Harmonization across FATCA partner jurisdictions should be possible. Some accommodation for inter-party communication among those jurisdictions may be needed, however, to facilitate disclosure of information required for full compliance. Difficulties will remain for those FFIs with branches or subsidiaries in non-FATCA partner jurisdictions.

Additional information is expected shortly on how FATCA will be implemented in the United Kingdom. In the meantime, all affected by FATCA implementation are awaiting the release of the U.S. Final Regulations and the FFI Agreement by the U.S. government. In addition, the United States has promised details to clarify the registration process. Publication is expected in the spring of 2013, at which time the picture on FATCA compliance and implementation should be much clearer.

VI. Brazilian Perspective

The U.S. government views the creation of FATCA as an important step to enhance tax compliance and to provide the government with important information on foreign financial assets and offshore accounts of U.S. accountholders. Notably, the concept of a "U.S. Person" for purposes of FATCA has an entirely U.S. meaning and is based on provisions contained in the U.S. I.R.C.[49] To ensure proper identification of relevant accountholders, FFIs will be required to seek assistance from qualified U.S. tax professionals in order to set up appropriate due diligence procedures. Common-sense assumptions of what is relevant in this determination may be inaccurate.

The intent behind the FATCA rules is unquestionably in line with the attitudes of tax administrations in most jurisdictions. Nonetheless, the significant resource and financial burdens of transparency are undeniably placed unfairly and unilaterally on third party FFIs through economic pressure. FFIs will be required to report directly to the I.R.S. and provide information about financial accounts held by U.S. Persons or by foreign entities in which U.S. Persons hold substantial ownership interests. Failure to do so will result in exorbitant FATCA withholding tax costs. In some cases, the taxable amounts are otherwise exempt from any U.S. tax under U.S. domestic law or treaty provisions.

Brazilian financial institutions (Brazilian FIs) have found themselves in a rather awkward position. Brazil appears on the list of countries with whom the United States has indicated that it is having discussions.[50] The Central Bank of Brazil and the various Brazilian Banking Associations are certainly aware of and considering the implications of FATCA compliance and implementation. All that said, the Brazilian constitution and domestic law present many obstacles to this process.

49. FATCA §§ 501-41, 124 Stat. at 104.

50. Neil Aragones, *President's Trip to Brazil Emphasizes Need for Tax Treaty*, LEXIS TAX STAFF ANALYSES (June 9, 2011, 3:54 PM), http://www.lexisnexis.com/community/taxlaw/blogs/lexistaxstaffanalyses/archive/2011/06/09/president-obama-emphasizes-need-for-bilateral-tax-treaty-with-brazil.aspx.

First, Brazilian law, as currently in force, does not allow voluntary compliance by Brazilian FIs with the FATCA rules. The Brazilian Federal Constitution limits this. It is readily apparent that the FATCA rules are inconsistent with Brazilian constitutional principles such as sovereignty,[51] free enterprise and protection to customers,[52] organization of the financial system,[53] and the essential principles of privacy and equality of rights between Brazilians and foreigners who live in Brazil.[54] The main obstacle to FATCA compliance that a Brazilian FI will face, nonetheless, is that it violates the principle of secrecy.

Briefly, the principle of secrecy expressly includes all mail and telegraphic communications, and data and telephonic communications in general (a few exceptions apply).[55] The principle of secrecy does not explicitly include banking information. Brazilian treatises and doctrine, however, are solid in affirming that the secrecy principle includes bank secrecy. Indeed, the Brazilian Federal Supreme Court has repeatedly upheld bank secrecy over the past years.

The Brazilian federal government tends not to agree with this judicial position. In 2001, it issued infra-constitutional Complementary Law (LC) 105 allowing Brazilian FIs to provide information on clients in defined situations.[56] An amendment to LC 105 would tend to open avenues for Brazilian FIs to provide FATCA information. The issue, however, is that LC 105's constitutionality has been challenged, and the final response of the Brazilian Courts is still pending.

Therefore, before the government amends the law, the Brazilian Courts still need to answer some questions definitively. The first question is whether bank secrecy is enshrined as a right in the Brazilian Constitution. If it is, LC 105 is unconstitutional and bank secrecy will be recognized as an essential right under Article 5. If this is so, Brazil would need a new federal constitution to change this.

If the Brazilian Courts find that bank secrecy is not constitutionally guaranteed under Article 5 of the Federal Constitution, LC 105 will be valid and could be amended to include the possibility of exchange of information between Brazil and the United States. Even then, an amendment to LC 105 would not be sufficient to permit a Brazilian FI to provide information directly to a foreign tax administration such as the Internal Revenue Service. To implement the exchange between Brazil and the United States, a TIEA or a DTA to provide for the further exchange between the governments would be necessary. A TIEA currently exists between Brazil and the United States, but it is not in force. The countries signed it in 2007.[57] The House of Representatives approved it in 2010, but it is still pending approval by the Senate. The TIEA allows the exchange of information available in the records of each Revenue Service, regardless of any judicial order.

51. Constituição Federal [C.F.] [CONSTITUTION] art. 1 (Braz.).

52. *Id.* art. 170.

53. *Id.* art. 192.

54. *Id.* art. 5, ¶¶ I, X.

55. *Id.* art. 5, ¶ XII.

56. Lei Complementar No. 105, de 10 de Janeiro de 2001, DIARO OFICIAL DA UNIÃO [D.O.U.] de 11.1.2001, *available at* http://www.receita.fazenda.gov.br/Legislacao/LeisComplementares/2001/leicp105.htm.

57. I.R.S. Press Release HP-335 (Mar. 30, 2010), http://www.treasury.gov/press-center/press-releases/Pages/hp335.aspx.

A second issue for Brazilian FIs is the requirement, under the current FATCA regulations, that they withhold on payments made from Brazil to third parties and remit the amounts withheld to the I.R.S. The rules require a participating FFI for FATCA purposes to withhold on any pass-through payment that is a withholdable payment made to a recalcitrant accountholder or a non-participating FFI.

Again, this requirement raises sovereignty matters because U.S. legislation is not enforceable in Brazil. The withholding of U.S. tax would not be a "tax" for Brazilian purposes. The United States has no nexus to Brazil for local taxation of worldwide income. Additionally, the "tax" would not be collected on behalf of the Brazilian federal government. This violates the Federal Constitution.

In complying with FATCA requirements, all Brazilian FIs will also likely face conflicts under Brazilian consumer laws. These laws prohibit discrimination against customers and unilateral changes to contracts. Brazilian FIs will face challenges arising from foreign capital legislation that guarantees equality of treatment to Brazilian capital. Further, the Central Bank and SEC would challenge the FIs because these entities prohibit the charging of taxes.

Brazilian FIs are at the very beginning of a long journey as they attempt to determine whether they can comply with FATCA and thereby avoid the threat of U.S. FATCA withholding. Given the wide scope of legislative and regulatory constraints, a favorable resolution would require a task force comprised of the federal government and the judicial courts to modify existing concepts and rules.