Tools Used by Developing Countries to Counteract Aggressive Tax Planning in the Light of Transparency

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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

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Pistone. The North Unit also comprises of a permanent external reviewer, Professor Irene J.J. 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

The first aim of this paper is to provide a comparative analysis of the domestic anti-avoidance rules that Brazil, Colombia, South Africa, Uruguay and Uganda have taken to

[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/

tackle aggressive tax planning that may have an influence on tax arbitrage, conduit and holding companies.[11] The second aim is to assess whether the rules introduced by developing countries are consistent with the principles of good governance and fiscal transparency and whether these rules contribute to enhance the relationship between taxpayers and the tax administration. Finally, and following the analysis and assessment made of the rules to tackle aggressive tax planning in the surveyed countries this paper will provide tax policy recommendations for enhancing fiscal transparency.

Aggressive tax planning has been defined by the European Commission in its 2012 Recommendation stating that “aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability”.[12]

In the framework of the DeSTaT project, the approach of this paper combines good governance[13] and fiscal transparency based on the argument that global fiscal transparency supplements the establishment of good tax governance, insofar as it allows each country to effectively exercise its sovereignty on cross-border situations falling within the boundaries of its jurisdiction.[14]

The standard of transparency and exchange of information has been developed by the Organization for Economic Cooperation and Development (OECD) in its 2010 Tax Treaty Model and in the 2002 Model Agreement on Exchange of Information in Tax Matters. This standard requires exchange of “foreseeable relevant” information, respect for taxpayers rights including right to confidentiality, removal of bank secrecy, the availability of reliable information, and the powers by the country (tax administration) to obtain such information.[15]

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[11] With regard to the specific topic addressed in this paper, the following persons acted as reporters for the respective South Antennae. Brazil: Reporter: Pedro Guilherme Lindenbergh Schoueri; panel members: Prof. Luís Eduardo Schoueri Professor Eurico Marcos Diniz de Santi, Professor Isaias Coelho and Dr. Ricardo Mariz de Oliveira; Colombia: Carolina Rozo Gutiérrez; South Africa: Professor Craig West; Uganda: Festus Akunobera; Uruguay: Dr Mario Ferrari, Dr Guillermo Nieves. Information is as of November 2014.

[12] European Commission Recommendation of 6 December 2012 on Aggressive Tax Planning C (2012)8806 Final at 2.

[13] The principles of good governance have been addressed by the ECOFIN Council that defined “good governance in the tax area as meaning the principles of transparency, exchange of information and fair tax competition”. ECOFIN Council Meeting of 14 May 2008, 8850/08 (Presse 113), at 22.

[14] Project Grant Application: DeSTaT Research Project.

[15] Global Forum Terms of Reference (November 2013). Background Brief. Annex I, at 6. Available at http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf (Last visited November 2014) Ibid.

For the OECD this standard “strikes a balance between privacy and the need for jurisdictions to enforce their tax law”. [16]

This paper argues that in order to keep the balance between the need for jurisdictions to enforce their tax rules and the taxpayer’s right to have certainty in the tax rules applicable to their business activities, transparency in aggressive tax planning should be evaluated on the basis of the availability, clarity, simplicity and reliability of the anti-avoidance rules. Fiscal transparency requires the drafting of tax rules to be clear for the tax administration to enforce them and for the taxpayer to rely on them. In this framework the notion of transparency has a broader meaning than the one provided by the OECD regarding exchange of information.

The broader approach to transparency has also been addressed by several scholars. For Owens, the notion of transparency should include clarity, simplicity and reliability. [17] Furthermore, Owens rightly states that “greater transparency between the taxpayer and the tax authorities is a good thing as it will lead to fewer disputes, greater mutual understanding and a relationship based on cooperative compliance”.[18] Another scholar, Ring addresses two notions being transparency and disclosure. Ring states that transparency includes the understanding by the tax administration of the taxpayer´s activities and that disclosure requires the need for a country to have access to the “information necessary to provide transparency regarding the taxpayer’s activities”. [19]

This paper also argues that fiscal transparency needs to address the relationship between the taxpayer and the tax administration. This relationship means on the one hand that the governments (tax administration) are able to have access to the information regarding the activities of the taxpayer; and on the other hand that taxpayers voluntary provide disclosure on the way that the economic activities or businesses are being structured in a country. In

[16] Ibid.
[17] J. Owens, *Moving Towards Better Transparency and Exchange of Information on Tax Matters*, 11 Bulletin for International Taxation, 557 (2009).
[18] J. Owens, *International Tax Transparency: The “Full Monty”,* 9 Bulletin for International Taxation, (2014), 384.
[19] D. Ring, *Transparency and Disclosure*, Selected Topics in Protecting the Tax Base in Developing Countries – United Nations, Retrievable at the following link: http://www.un.org/esa/ffd/tax/2014TBP2/Paper_TransparencyDisclosure.pdf (last visited November 2014) Available at http://www.un.org/esa/ffd/tax/2014TBP2/Paper_TransparencyDisclosure.pdf (Last visited November 2014).

short, and as rightly pointed out by Schoueri and Barbosa the notion of transparency "should be extended to the state itself and to covering the tax system as a whole".[20]

In order to address the tools used by developing countries to counteract aggressive tax planning in the light of fiscal transparency, this paper is structured as follows: Part 1 will provide an introductory section to aggressive tax planning and the OECD and G20 developments. Part 2 will provide the comparative analysis of the anti-avoidance rules in the surveyed countries. This part follows the structure of the questionnaires used for the original fieldwork research addressing mainly the following issues: (i) aggressive tax planning and domestic anti-avoidance rules; (ii) international tax arbitrage; (iii) enhanced relationships and administrative cooperation. Part 3 will provide answers to the research questions on whether the measures taken by the surveyed countries are consistent with the standard of fiscal transparency including availability, clarity, simplicity and reliability of the anti-avoidance rules and the development of enhanced relationships between the taxpayer and the tax administration.

PART ONE: AGGRESSIVE TAX PLANNING: OECD AND G20 DEVELOPMENTS

Aggressive tax planning exploits the differences in tax systems. Multinational companies may for example use holding companies or conduit companies to take advantage of a country tax treaty network or to take advantage of low tax jurisdictions to reduce their tax liability. Examples are the re-routing of income obtained in one country, or the use of one company that acts as a holding company of the other companies and that may benefit from participation exemption in dividends[21], and deductions on intra-group transaction loans amongst others.

[20] For Schoueri and Barbosa transparency "should be used as mechanism for the creation of a mature relationship between state and citizen, and the result is that taxpayers feel part of the community and therefore involved in the process of granting states the means for their activities". L.E. Schoueri and M.C. Barbosa. *Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System*, 5 British Tax Review, 677-678 (2013).

[21] Participation exemption is introduced by countries to prevent economic double taxation. By means of the exemption, the shareholder of a company will be exempted from corporate income tax on the dividends received and the capital gains (if any) arising on the sale of the shares.

The principle of tax sovereignty by means of which countries may set up their own tax rules may lead to aggressive tax planning and international tax arbitrage which may result in unintended double non-taxation or less than single taxation.

Countries have until now tackled aggressive tax planning by means of enhancing administrative cooperation i.e. concluding agreements to exchange information and administrative assistance to ensure tax compliance. In addition, countries have introduced anti-abuse rules in tax treaties and in national rules. Examples of these rules in tax treaties are the beneficial ownership, the limitation on benefits test, the main purpose test, the subject to tax clause and the switch over clause amongst others. At national level, countries have introduced general anti-avoidance rules such as substance over form, business purpose, and abuse of law. Summarizing aggressive tax planning may result in tax base erosion and therefore measures to counteract aggressive tax planning have been introduced by countries at domestic and at international level.

In 2013, the OECD launched the Base Erosion Profit Shifting ("BEPS") Report and its Action Plan[22] following the political G20's mandate.[23] According to the OECD, globalisation impacts countries' tax regimes ability to collect tax revenue and to ensure compliance. The OECD also stated that multinational enterprises have been able to greatly minimise their tax burden by means of exploiting tax arbitrage opportunities and by going beyond the boundaries of acceptable tax planning. The result is thus that multinationals have become more confident in taking aggressive tax positions. [24]

The OECD in the BEPS Action Plan calls for "fundamental changes to the current mechanisms and the adoption of new consensus-based approaches, including anti-abuse provisions, designed to prevent and counter base erosion and profit shifting". [25] As a result, the BEPS Action Plan introduces two actions for aggressive tax planning being Action 6

[22] OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing. Available at http://dx.doi.org/10.1787/9789264192744-en and OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Available at http://dx.doi.org/10.1787/9789264202719-en (Last visited November 2014)

[23] The BEPS and the Action Plan have been endorsed in the G20 meetings at Mexico (June 2012) and St Petersburg (September 2013) respectively. In the G20 meeting in St Petersburg (September 2013), G20 leaders committed to address base erosion profit shifting, tackling tax avoidance and promoting transparency and automatic exchange of information. See in particular, para. 50 of the Declaration, where it has been stated that: "In a context of severe fiscal consolidation and social hardship, in many countries ensuring that all taxpayers pay their fair share of taxes is more than ever a priority. Tax avoidance, harmful practices and aggressive tax planning have to be tackled…".
See https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf (Last visited November 2014)

[24] *Base Erosion Profit Shifting Action Pla*n. OECD, July 19, 2013, 7- 8.

[25] Ibid. at 13.

dealing with Tax Treaty Abuse and Action 12 requiring taxpayers to disclose their aggressive tax planning arrangements.

More recently, the OECD published a report addressing the impact of BEPS in Low Income Countries ("the Report") to be presented to the G20 Development Working Group. In the first part of the Report, the OECD addresses the experiences of developing countries on the main sources of base erosion profit shifting in developing countries and how these relate to the BEPS Action Plan. [26] The first part of the Report elaborates on Action 6; however no further reference in the Report is made to Action 12. In respect of Action 6, the Report states that the concern of developing countries "is focused on the use of techniques (sometimes called "treaty shopping'') to obtain treaty benefits (typically the reduction of withholding taxes) in situations in which such benefits were not intended". This results in developing countries losing revenue.[27] In addition, the Report states that the unintended use of treaties to avoid withholding taxes should be tackled by means of domestic rules and tax treaty provisions.

In the second part of the Report, the OECD presents the potential actions to assist developing countries to meet the challenges of the most relevant actions of BEPS. The Report states that in order to address treaty shopping it is important to strengthen the capacity development on treaty negotiation and to identify the tax policy considerations for countries to conclude a tax treaty including a cost/benefit analysis.[28]

PART TWO: TOPICAL AGGRESSIVE TAX PLANNING ISSUES IN THE EXPERIENCE OF THE SURVEYED COUNTRIES

In order to provide the comparative analysis and tax policy recommendations, this Part two will address the issues provided in the questionnaires used for the original fieldwork research. Section 1 will discuss the domestic anti-avoidance rules to tackle aggressive tax

[26] Part 1. *Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries*. July 2014. Report available at http://www.oecd.org/ctp/tax-global/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf (Last visited November 2014)

[27] The Report provides two examples of countries (i.e. Mongolia, the Netherlands) that are currently reviewing their tax treaties and in some cases reviewing the measures available in their tax treaties to tackle treaty abuse. *Part 1 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries*, 18 (2014).

[28] *Part 2. Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries*, 15 (2014). Report available at http://www.oecd.org/ctp/tax-global/part-2-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf (Last visited November 2014)

planning, the disclosure obligations by the taxpayer, aggressive tax planning schemes by individuals, and the access to international task forces and international databases. Thereafter, the policy issues of the selected countries regarding international tax arbitrage, the regime (if any) regarding holding companies, and conduit structures will be discussed in Section 2. Section 3 will address the existence of enhanced relationships between the taxpayer and the tax administration.

1. Aggressive Tax Planning and Domestic Anti-Avoidance Rules

1.1. Drafting and application of domestic anti-avoidance rules

All surveyed countries have included in their national laws general anti-avoidance rules: in Brazil the doctrine of simulation as codified in art. 116 of the Tax Code[29]; in Colombia the doctrines of simulation[30] (before 2012[31]) abuse of law (*fraus legis*) and substance over form (since 2012)[32]; in Uruguay and Uganda the substance over form doctrine; and in South Africa the business purpose doctrine. By means of simulation, the judiciary aims to find the true position of the taxpayer.[33] In contrast, for substance over form, and business purpose doctrine, the transaction will be analyzed as a whole. If the form deviates from the substance/purpose of the transaction, a re-characterization by the tax administration will take place based on the substance of the transaction.

[29] Art. 116 of the Tax Code has been introduced by means of Complementary Law 104 of 2011. Art. 116 allow tax authorities to disregard any transaction made with the goal of dissimulating the occurrence of the tax-triggering event.

[30] Paniagua and Mayorga stated that in "civil law, simulation occurs when a contract is established containing statements or declarations which conceal the true intent of the parties while constituting a seemingly valid legal form". J. Paniagua-Lozano and H. Mayorga-Arango, *Colombia, Form and Substance in Tax Law*, in *Cahiers de droit Fiscal International.* International Fiscal Association, Volume 87a, 217 (The Hague:SDU, 2002).

[31] Colombia had before 2012 a few special anti-avoidance rules. Special anti-avoidance rules included art. 90 of the Colombian Tax Code, which allowed the tax administration to apply the income tax on any sale on a presumed price equivalent to the fair market value, unless the taxpayer reported a sales price that exceeded 75% of said fair market value in the tax return; art. 287 also presumed commercial interest in shareholder loans. For further information on special anti-avoidance rules in Colombia before 2012, see N. Quiñonez Cruz, *Anti-Avoidance Measures: Portrait of a Thorny Struggle*, 9 Tax Planning International Review, 916 (Jan. 16, 2009).

[32] In addition to these anti-avoidance rules, other anti-abuse provisions were introduced such as thin capitalization and the possibility of re-characterise interests as dividends in the event of a deviation from arm's length conditions.

[33] According to Thuronyi "countries have made use of the doctrine of simulation developed under the civil law for tax law as well. Simulation is equivalent to the common law concept of 'sham transaction'. Where the taxpayer presents to the tax authorities a purported transaction, but the legal reality of the transaction is different under private law, the tax will be applied according to the actual legal reality, not the taxpayer's pretended reality". V. Thuronyi. *Comparative Tax Law*, 157 (Aalpheen aan Den Rijn: Kluwer Law International, 2003)

At the time of writing the clauses developed by the countries are directed towards tax avoidance in general. It is submitted that these clauses do not address specific forms of aggressive tax planning. The application of the doctrine of simulation in Brazil is based on the analysis of the intention of the taxpayers, and therefore, the tax administration will proceed to the correct characterization of the legal relationship. In Colombia, Uruguay, Uganda and South Africa the application is based on the analysis of the substance and the purpose of the transaction. The consequence is the re-characterization of the transaction by the tax administration.

Aggressive tax planning results in consequences that have not been intended by the legislator, but insofar as these consequences meet the substance/purpose requirement or do not meet the criteria for the application of the doctrine of simulation or abuse of law (*fraus legis*), then, no further analysis will be made by these countries on whether or not the transactions constitute aggressive tax planning. If aggressive tax planning is regulated, it will enable the tax administration to examine whether the consequences of the transaction were those intended by the legislator, and if not, the result will be to disregard such transaction for tax purposes.

In each of the surveyed countries implementation of the anti-avoidance rules is problematic. For instance in Brazil, even though the doctrine of simulation has been laid down in art. 116 of the Tax Code, the application of this doctrine has not yet been made possible since this provision is expressly conditioned to further regulation (i.e. ordinary law), which despite several attempts has not yet been concluded. The Brazilian reporter stated that from a formal and dogmatic perspective, the mentioned provision is not in force. Instead of the doctrine of simulation, in practice the tax administration is using the business purpose doctrine without any article in the Tax Code or in case law justifying its use.[34] According to the Brazilian reporter, the business purpose doctrine is a figure characteristic of the North American legal system which does not fit in the legal system of Brazil. In addition, this doctrine is more difficult to implement than simulation since not only the business itself but

[34] The Brazilian Revenue Service "has been lately applying the substantial holding company definition in connection with the above described business purpose doctrine, in order to disregard the fiscal effects produced by the existence of formal holding companies. In general terms, the challenges are based on the lack of business purpose of the formal holding companies, which are arguably incorporated for mere tax economy reasons. To support the lack of business purpose, the auditors usually analyze the activities developed by the formal holding company and underline the inexistence of staff and address – what, as above mentioned, may be an issue for those who believe that any holding company requires positive activities in order to fulfill its purpose".

also the purpose of the business plays a role in determining whether or not the transaction should be re-characterised due to aggressive tax planning.[35]

In Colombia, with the 2012 Tax Reform, the law-maker has introduced in art. 869 of the Tax Code specific criteria to regulate abuse of law (*fraus legis*). Abuse for tax purposes is the use or implementation, by means of one operation or a set of operations of any entity, legal act or procedure that aims to change, disguise or modify artificially the tax consequences that will be generated for the taxpayer or related parties, shareholders, or real beneficiaries. Art. 869-1 of the Colombian Tax Code states that there will be a presumption of abuse of law in case three of the following criteria are being met: (i) transaction is between related parties; (ii) transaction makes use of tax havens; (iii) transaction includes a special entities regime or an exempt tax entity; (iv) the price agreed differs by more than 25% of the arm's length price; (v) the conditions agreed by the parties would have not been agreed by third parties in similar circumstances.[36] In all cases of abuse, the burden of proof is on the taxpayer, once the tax authorities have demonstrated the existence of the elements of abuse (for small taxpayers) or three of the five criteria for abuse presumption (for larger taxpayers). This approach has been ratified in Ruling of the Tax Administration issued on the 28 August 2013.[37]

Furthermore, the Colombian reporter stated that the 2012 Tax Reform introduced the following elements of aggressive tax planning: (i) presence of one or more transactions (step-transaction doctrine); (ii) artificial alteration or modification of tax effects; (iii) one or more taxpayers and their related parties, shareholders, partners or beneficial owners; (iv) intention to obtain a tax advantage; and (v) absence of a main, legitimate and reasonable business purpose.

The Colombian reporter stated at the time of writing the report that the tax administration has not yet issued regulations regarding these anti-avoidance rules. The Colombian reporter stated that as of July 2014, there are no public cases documenting the

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[35] According to the Brazilian reporter: "this scenario gives rise to growing insecurities for the taxpayers, which have the difficult task of finding the line between the acceptable and unacceptable tax planning according to the business purpose doctrine. Since not only the business itself but also the purpose plays a role in determining whether the tax planning is acceptable, in practice the taxpayers are subject to subjective and even moral judgments, what creates an environment of insecurity - some may even call the current challenges of the Brazilian Revenue Service of authoritarian. The general feeling is that the tax authorities usually have a priori judgment of certain tax planning structures and that the business purpose doctrine is fit to give grounds to virtually any challenge".

[36] I. Mosquera, *Sweeping Tax Reforms Takes Effect*,Tax Notes International, 433 (February 4 2013)

[37] Ruling (*Concepto*) 054120 of 28 August 2013 issued by the Colombian Tax Administration (DIAN).

application of the rule to any particular transaction. Several aspects have been reported as problematic by the Colombian report, including the lack of business knowledge by tax administration officials in charge of re-characterization; the different burden of proof for taxpayers with net assets above a certain threshold (approximately 2.7 million USD); the uncertainty produced by the definition of the most "natural" legal form to achieve a business purpose; the difficulties in establishing a fair market value and the possible differences with IAS13 valuations; the uncertainty as to whether the taxpayer can challenge the determinations of abuse or the re-charaterization in court; and the interaction of the general anti-avoidance rule with existing treaties with different anti-abuse provisions or without an anti-abuse provision (Colombia-Spain).

Furthermore, in Colombia, the application of the substance over form doctrine "in cases that are of great economic and legal relevance for Colombia" lacks clarity for the taxpayer. Up till the time of writing (November 2014) neither the law-maker nor the tax administration have issued rules to clarify in which cases the substance over form doctrine will be applicable. As mentioned above, there are no public judicial decisions on the application of the anti-abuse clause, and it is not clear that the tax administration will produce an administrative act with the determination of the abuse.

In Uganda, the codification of the business purpose doctrine is the result of the codification of judicial doctrines developed in the past to tackle tax avoidance. Section 91 of the Income Tax Act states that a tax avoidance scheme includes any transaction which has as purpose the avoidance or reduction of tax liability.[38] For this purpose, the tax administration (Commissioner) may re-qualify the transaction and in some cases disregard the transaction if it does not have a substantial economic effect.[39] However, according to the reporter of Uganda, the application may also result in the courts being allowed to go beyond purposive statutory interpretation that may result in uncertainty in the application of this anti-avoidance

[38] The section is headed, "recharacterisation of income and deductions". It provides that for the purposes of determining liability to tax under the Act, Commissioner may –(a) Recharacterise a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme; (b) disregard a transaction that does not have substantial economic effect; or (c) recharacterise a transaction the form of which does not reflect the substance. J. Mugalula, A*nti-Tax Avoidance Provisions Under the Income Tax Act Cap 340: A Perspective Analysis*, 3 (December 2, 2009). The Uganda Law Society - Lawyers' Voice, April-June 2010. Available at SSRN: http://ssrn.com/abstract=1633890 . (Last visited November 2014)

[39] Section 91 Income Tax Act.

rule. The application by the court will be made on a case by case basis, taking into account the facts of each case.[40]

In Uruguay, it is not clear whether the application of the anti-abuse rule is useful to tackle tax avoidance or also tax evasion. The report of Uruguay states that in practice the tax administration has used this rule as an anti-evasion clause. Furthermore, the reporter states that these rules are not specifically applicable to aggressive tax planning since the main element for the application of the anti-avoidance rule is whether the behaviour of the taxpayer implies the use of an inappropriate legal form. It need not necessarily be aggressive.

In South Africa, even though the anti-avoidance rule was introduced in 2006 (Section 80A to 80 L of the Income Tax Act[41]), case law regarding the application of the old anti-abuse rule (Section 103(1) of the Income Tax Act[42]) is still useful and relevant for the tax administration. The previous rule was supported by case law and many of the principles in these cases have been incorporated into the new general anti-abuse rule.[43] The current rule provides that an impermissible tax avoidance arrangement is one if its main purpose is to obtain a tax benefit and is abnormal or lacks commercial substance or creates rights and

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[40] For example, one case provided by Mugalula in his article *Anti-Avoidance Tax Provisions* is the case IRC v. McGuckian ([1997] 1 WLR 991). In this case, the Court decided that "the statutory provisions are to be applied to the substance of the transaction, disregarding artificial steps in the composite transaction or series of transactions inserted only for the purpose of seeking to obtain a tax advantage. The question is not what was the effect of the insertion of the artificial steps but what its purpose was. Having identified the artificial steps inserted with that purpose and disregarded them, then what is left is to apply the statutory language of the taxing Act to the transaction carried through stripped of its artificial steps. J. Mugalula, *Anti-Tax Avoidance Provisions Under the Income Tax Act Cap 340: A Perspective Analysi*s, 3.

[41] Sections 80A to 80L defines an impermissible avoidance arrangement as any arrangement that meet the following four requirements: (i) an avoidance arrangement (as defined) is entered into or carried out; (ii) it results in a tax benefit; (iii) any one of the following "tainted elements" is present (a) abnormality regarding means, manners, rights or obligations; (b) a lack of commercial substance in whole or in part; (c) misuse or abuse of the provisions of this Act; (iv) the sole or main purpose is to obtain a tax benefit. L. van Schalkwyk and B. Geldenhuys. *Section 80A (c) (ii) of the Income Tax Act and the interpretation of tax statutes in South Africa*. Meditari Accountancy Research. Vol 17 No. 2 2009 at 167-168.

[42] Section 103(1) stated the old general anti-avoidance rule. For a transaction to fall under section 103(1), the transaction will be evaluated in accordance to the following criteria: (i) there has to be a transaction, operation or scheme entered into or carried out; (ii) the effect of the transaction is avoiding or postponing or reducing the liability for the payment of any tax imposed by the Act; (iii) the abnormality test or arm's length test under a transaction, operation or scheme; and (iv) the transaction must have been entered into solely or mainly for the purposes of avoiding, postponing or reducing the amount of tax liability. J. C. Kanamugire. *A Critical Analysis of Tax Avoidance in the South African Income Tax Act 58 of* 1962, as Amended, 6 Mediterranean Journal of Social Sciences (2013). Available at http://www.mcser.org/journal/index.php/mjss/article/viewFile/313/329 (Last visited November 2014).

[43] For example "Meyerowitz v CIR (1963 AD) 25 SATC 287, dealt with the concept of abnormality, in Hicklin v SIR (1980 AD) 41 SATC 179 it was decided that where persons are acting at arms length there is a presumption that any rights and obligations created between them are normal and because the element of abnormality was not present the GAAR could not apply. In CIR v Conhage (Pty) Ltd. (1999) 61 SATC 391, the substance of an arrangement and the true intention of the parties was examined and it was found that the scheme was not a 'sham' transaction and although tax was saved this did not turn it into an abnormal transaction".

obligations which are not arms length. The result will be the re-characterization of the transaction by the tax administration. The current rule applies to any arrangement entered into on or after 2 November 2006. According to the South African reporter, the tax authorities have been slow to challenge a taxpayer under the new anti-abuse rule, and instead, the tax authorities have chosen to introduce specific legislation to tackle tax avoidance.

What this all means is that the tax administrations of the surveyed countries are still trying to adjust the anti-avoidance rules in respect of the criteria that should be met for the abuse of law to take place (Colombia) and in some cases the application of these rules to tax evasion (Uruguay). Sometimes the countries have even made use of other anti-avoidance rules (Brazil) or old anti-avoidance rules/ case law (Uganda and South Africa).

The research shows that countries do not have a definition of aggressive tax planning and that anti-avoidance rules do not specifically address specific forms of aggressive tax planning. From a tax policy perspective, it is important that countries establish specific boundaries between acceptable tax avoidance and unacceptable tax avoidance (i.e. aggressive tax planning). It is therefore recommended that in order for aggressive tax planning to be understood but also to be regulated, tax avoidance rules should address specific forms of aggressive tax planning.

Furthermore, it is important to address the drafting of the general anti-avoidance rules. This research has shown that the anti-avoidance rules created by the surveyed countries have problems since the rules need to be clarified by further legislation and/or leave room for implementation by the tax administration. However, since such legislation/implementing rules have not yet been introduced in these countries, the taxpayers depend on the (subjective) application by the tax administration, the application of old anti-avoidance rules and on interpretation by judges on a case by case basis. The result may be uncertainty for the taxpayers on the tax consequences of their transactions due to the different approaches to these rules within a country. The different approaches should be addressed and solved by the judiciary (highest court) in each country.

It is recommended to law-makers and to the tax administration to introduce additional guidelines clarifying anti-avoidance rules as soon as the anti-avoidance rule has been introduced. Countries should take into account that taxpayers need certainty, clarity and reliability on the application of the anti-avoidance rules since the consequences of the application of those rules will be very severe being the re-characterization of the transaction, and even in some cases fines or criminal prosecution.

The challenge is for the surveyed countries to develop a clear policy regarding the type of instruments to be used by the tax administration for the interpretation of the tax rules, but also to communicate in a clear and transparent way to the taxpayer the application and interpretation of the anti-avoidance rules in respect of aggressive tax planning.

1.2. Disclosure obligations by the taxpayer

The disclosure by the taxpayer of specific transactions in order to allow a monitoring of aggressive tax planning was also addressed in this survey. In this case, companies in South Africa are subject to disclosure requirements in respect of a reportable arrangement.[44] Colombia[45] and Uruguay have only disclosure requirements in respect of transfer pricing.[46] In Brazil, companies are obliged to maintain and furnish all accounting information to the tax administration but there are no rules regarding the disclosure by the taxpayer of tax planning schemes.

In South Africa, sections 37 and 38 of the Tax Administration Act (TAA) set out the disclosure requirements in respect of a reportable arrangement, which must be submitted within 45 business days after an amount is first received or accrued or first paid or actually incurred by a participant.

From a tax policy perspective, the differences in approach towards disclosure and the use of this mechanism only in transfer pricing needs to be revisited by the surveyed countries. Requirements for disclosure by the taxpayer of aggressive tax planning may benefit the tax administration and the taxpayer since on the one hand, the tax administration will receive

[44] The arrangement will be reportable if a 'tax benefit' is derived and (a) the calculation of interest is dependent on the tax treatment of the arrangement; (b) the inclusion or presence of round trip financing or an accommodating or a tax indifferent party or it contains elements that have the effect of offsetting or cancelling each other; (c) gives rise to an amount disclosed as a deduction for income tax but not as an expense for purposes of 'financial reporting standards' or revenue for 'financial reporting standards' but not as gross income for purposes of the Income Tax Act; (d) does not result in a reasonable expectation of a 'pre-tax profit' for any 'participant'; (e) results in a reasonable expectation of a 'pre-tax profit' for any 'participant' that is less than the value of the tax benefit where both are discounted to present value at the end of the year of assessment.

[45] The Colombian reporter stated that in the 2012 Tax Reform Colombia established new disclosure obligations related to transfer pricing for all transactions involving the transfer of a Colombian asset to a foreign jurisdictions, regardless of whether the transaction involves related parties or if it is valued at a price that does not exceed the minimum threshold for transfer pricing reporting.

[46] Transfer pricing will be discussed in another paper in the framework of the DeSTaT project.

information on how the taxpayer operates, and on the other hand, the taxpayer will receive approval of the tax planning structure and the confirmation on whether or not such structure can result in aggressive tax planning. The problem is the lack of trust on the one hand by the taxpayer in the tax administration that this disclosure will not result in more audits; and on the other hand, by the tax administration in the taxpayer in that he is taking business decisions and that these decisions are not made just for aggressive tax planning purposes.

1.3. Tax planning punishable

The survey shows countries deal differently with the punishment to transactions that may result in tax avoidance. For instance in Uruguay the mere use by the taxpayer of an inappropriate legal form is only punishable, if the taxpayer's behaviour results in a tax offence or infringement. Brazil states that in case of simulation, the payment of the principal amount plus interest will be charged. In addition, punitive fines will be levied that can be up to 150% for instance in cases of intent of fraud. In the case that the taxpayer hides documents that were required to be produced following the disclosure requirement above, the fine may reach up to 225%. Additionally in extreme case criminal penalties may apply.

The process in Colombia to re-characterise the abusive transaction requires a Committee consisting of the Director of the tax administration (*DIAN*), the Director of Fiscalization of the tax administration, the Minister of Finance, the corresponding Superintendent who has the oversight of the entity, and the Attorney General (*Procurador General de la Nación*).[47] The tax administration may therefore provide a new assessment including the taxes due, interests, and additional fines that will be applicable to the taxpayer and the related parties who are co-responsible for the abusive transaction. It is also possible for the tax administration to remove the corporate veil of the entities that have been used in the abusive transaction. The result will be then that the shareholders will be liable for the company tax. In Colombia, the Congress has not yet approved criminal penalties for tax abuse, which has been discussed in the government and which may be included in the upcoming tax reform for 2014.

[47] Article 869 Colombian Tax Code. The intervention of the Attorney General is not aimed at establishing the punishment but only to determine whether or not the re-characterization of the transaction should take place.

In South Africa, the reporter stated that the South African Revenue Service (SARS) has quite wide powers as to what remedy to apply to the mischief of an impermissible avoidance arrangement. These penalties are administrative non-compliance penalties (Chapter 15 of the Tax Administration Act (TAA)) and understatement penalties (Chapter 16 of the TAA).[48] Criminal offences can also be subject to fines and/or imprisonment. These offences are set out in Chapter 17 of the TAA, and include, failure to disclose requested information. However, a permanent voluntary disclosure programme is in place which could be used to mitigate past demeanours (sections 225 to 232 of the TAA). This voluntary disclosure programme only gives relief from criminal prosecution, certain understatement penalties and 100% relief for non-compliance penalties.

Another issue that was also addressed in this survey was the existence or not of measures targeting tax consultants in the surveyed countries. Colombia, Brazil, Uruguay and South Africa do not have rules to target tax consultants; however, the reporter for Uruguay stated that the behaviour of the consultant may be punishable if such behaviour is qualified as offence or crime. In South Africa, the Tax Administration Act has rules to ensure that tax practitioners are registered with reputable bodies.

From a tax policy perspective, it is important to have clear and simple rules for the taxpayer and also to provide certainty to the taxpayer that not all transactions will be regarded as aggressive tax planning. For this purpose, the law-makers in these countries should introduce rules to set up fines for abuse, non-compliance, and criminal offences that are clear for the taxpayer. The decision to re-characterise the transaction to be made by the Committee in Colombia, the variety of penalty rules in Brazil and South Africa, and the lack of clarity in Uruguay on whether or not the behaviour is regarded as a tax offence are not consistent with the objectives of fiscal transparency since it will depend on the evaluation of the Committee

[48] According to information available at the website of the Tax Administration: "The Tax Administration Act No. 28 of 2011 (the TAA) became effective on 1 October 2012 and introduced the understatement penalty regime. In terms of section 222 of the TAA, a taxpayer must pay an understatement penalty in addition to the tax payable for the relevant tax period in the event of an "understatement". An "understatement" is defined as any prejudice to the South African Revenue Service (SARS) or the fiscus in respect of a tax period as a result of: a default in rendering a return; an omission from a return; an incorrect statement in a return; or if no return is required, the failure to pay the correct amount of tax. The understatement penalty is the amount determined by applying the highest applicable understatement penalty percentage in the understatement penalty percentage table (see below) to the difference between the amount of tax properly chargeable for the tax period and the amount of tax that would have been chargeable if the understatement was accepted." Website tax administration South Africa. Available at http://www.sataxguide.co.za/tax-administration-act-understatement-penalty-changes/ (Last visited November 2014).

or tax administration of each abusive transaction to determine the penalties that will be applicable.

1.4. Aggressive tax planning schemes by individuals and companies

Brazil, Colombia, Uruguay and South Africa have identified aggressive tax planning schemes for individuals and companies. For individuals the surveyed countries refer to the following schemes:

- Brazil has addressed the scheme that aims to incorporate a company by an individual to render services, instead of concluding an employment contract. The aim of this scheme is to reduce the total tax burden, which tends to be higher in labour relationships than in service contracts. In addition, the income is only taxed at company level, since there is no taxation in the capital flow between individuals and legal entities.
- Colombia and South Africa have identified the use of trusts by individuals that may lead to tax avoidance in case that these trusts are in low tax jurisdictions or in tax havens.
- Uruguay has identified a scheme relating to the declaration of the personal income tax as a family group. It aims to obtain benefits in relation to the applicable rate and the non-taxable minimum, but overlooking the fact that one of the members of the family group obtains at the same time income on another tax i.e. social security tax, which the first does not take into account.

The tax schemes for companies differ among countries but in general these schemes address the use of low tax jurisdictions or the use of tax treaties with less restrictive treaty abuse provisions.[49] In Colombia and Uruguay, these provisions also refer to the use or not of holding companies. This will be further explained in item 2 below.

The Colombian reporter stated that while there are no explicit distinctions in Colombia between individuals and corporate taxpayers, the GAAR does provide a different treatment for taxpayers with net assets above a certain threshold (192 UVTs, which is roughly equivalent to 2.7 million USD). Smaller taxpayers get the simplified procedure, where the tax authorities provide evidence for the existence of the elements of abuse and the taxpayer

[49] An example will be the use of beneficial ownership instead of the limitation on benefits provision. In this case, the requirements for beneficial ownership can be less restrictive than the requirements of limitation on benefits. See section 2 below.

provides evidence of the application of the safeguards in the regular administrative procedure. Larger taxpayers require evidence of 3 of the 5 criteria for abuse and the safeguard allegations must be made in an executive committee described in section 1.1. above.

Furthermore, Brazil and South Africa provide two examples on how their tax administrations have dealt with these schemes. The reporter of Brazil rightly states that the companies have more resources and more room for tax planning than individuals. As a result, tax authorities in Brazil address tax planning by companies by challenging not only the interpretation of the tax legislation but also the legal facts described by the taxpayer.[50] In South Africa, in the past, it was possible to have roundtrip financing schemes[51] and the presence of an accommodating or tax indifferent party in an arrangement amongst others. Both schemes were targeted by general anti-avoidance rules and therefore, these schemes are no longer available.

1.5. Fiscal transparency

The reporters addressed the concern of Dharmapala[52] that global fiscal transparency is less effective in preventing sophisticated corporate aggressive tax planning activity as opposed to evasion-related activities carried out by individuals in tax havens. The survey cannot confirm this statement since the instruments for exchange of information have only been recently implemented by the surveyed countries. However, the South Africa's reporters stated that the view of Dharmapala is true. They submit the expansion and increase of the exchange of information between states may influence this view in the future. The extension of information to be supplied (and penalties for non-disclosure) in the annual return to be submitted by corporate taxpayers from 2013 may also be a deterrent to aggressive tax schemes.

The Colombian reporter stated that the mere exchange of information is not enough to tackle aggressive tax planning, as financial or tax information from a different jurisdiction may initially only reveal underreporting of income or hidden assets. However, an enhanced exchange of information where the administration gets data on the taxpayers' uncertain tax

[50] Legal facts means the characterisation of a legal regal relationship in legal terms.
[51] The rules to tackle roundtrip financing arrangements is addressed in Part 2 Section 2 below.
[52] D.Dharmapala. Presentation: Tax Havens and the Economic Perspective at the Executive Training Seminar Series: Tax Havens: Selected Theoretical and Practical Key Issues. A Legal and Economic Perspective. June 2011. Organised by the Academy of Global Governance. European University Institute.

positions, or their use of domestic benefits may be more effective in tackling aggressive tax planning. The difficulty remains with the structures that take advantage of qualification mismatches, as detecting those would require a joint audit or discussion between the administrations involved in the taxpayer's day-to-day transactions, and these mechanisms are still quite foreign to the tax administrations in developing countries like Colombia.

1.5.1. Access to international databases

The tax administration of the countries may have access to international databases such as the database run by the JITSIC[53] on tax shelters or by the OECD on aggressive tax planning schemes. The reporters of Brazil and Uruguay did not have knowledge on whether or not the tax administrations have access to these databases, so information cannot be provided at this moment on this issue with the exception of the South African reporters. Even if a country has access to these databases such as South Africa, no information has been made available on what mechanisms the tax authorities may be using or which international databases are being accessed by the Tax Authorities to identify tax shelters or aggressive tax planning.

The Colombian reporter stated that Colombia only has access to the OECD reports on aggressive tax planning, but not active official exchange has been yet implemented to detect specific schemes involving Colombia.

1.5.2. International task forces

Tax authorities of a country may be party to any formal or informal international task force to counter aggressive tax planning. The developments have taken place at international (OECD) level but also at regional level. The South African reporters stated that Tax Inspectors Without Borders[54] was a South African initiative together with the OECD[55] and is

[53] Joint International Tax Shelter Information Centre (JITSIC) established by the governments of Australia, Canada, the United Kingdom and the United States. The governments created a task force to identify and curb abusive transactions. Information available at: http://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk/avoidance/aag-jitsic.htm (Last visited November 2014)

[54] OECD. 2012. Available: http://www.oecd.org/newsroom/taxoecdlaunchestaxinspectorswithoutborders.htm (Last visited November 2014).

also part of a key focus area of the South African Revenue Service ("SARS"). The South African reporters stated[56] that in addition to Tax Inspectors without borders, the regional multilateral agreement of the Southern Africa Development Community ("SADC") will most certainly facilitate future joint audits[57] and simultaneous tax examinations.[58]

The South African reporters state that while South Africa is not a member of the OECD, it does have Observer status and, since May 2007, has an "enhanced engagement" with the OECD. Furthermore, the reporters state that South Africa has been extensively involved in the OECD's Forum for Tax Administration; co-chaired the joint OECD Committee on Fiscal Affairs and Development Assistance Committee; is a member of the G20 nations and it has been involved in a number of reports generated by these bodies in the area of exchange of information and cross border cooperation between tax authorities. This involvement has also aided the improvements to SARS and the increased involvement of South Africa in international trade.

Another country that is developing a close relationship with the OECD is Colombia. Colombia has been recently (May 2013) invited to become an OECD Member. At this stage, Colombia is an Observer and participates actively in the working parties of the OECD, especially Working Party 6 at the OECD.

Colombia has also regional initiatives in which it participates actively. At a regional level, Colombia aims to exchange information with countries of the Pacific Alliance (Peru, Chile, Mexico and Colombia), and with members of the Andean Community in the framework of the Decision 578 (Multilateral tax treaty model of the Andean Community).

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[55] The driving forces behind the OECD initiative of "Tax Inspectors without Borders" were "Oupa Magashula, former Commissioner General of the South Africa Revenue Service, Nhlanhla Nene, South Africa's Deputy Finance Minister and Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration".

[56] See J. Roeleveld and C. West, *South Africa, Exchange of Information*, in *Cahiers de droit fiscal international* Vol. 98b (SDU Uitgevers: The Hague, 2013).

[57] According to the OECD a joint audit (JA) "means an arrangement whereby Participating Countries agree to conduct a coordinated audit of one or more related taxable persons (both legal entities and individuals) where the audit focus has a common or complementary interest and/or transaction. A JA shall include at least two or more Participating Countries" Sixth Meeting OECD Forum on Tax Administration. Istanbul 15 and 16 September 2010. Joint Audits Participants Guide. Available at http://www.oecd.org/tax/administration/45988962.pdf (Last visited November 2014).

[58] According to the OECD simultaneous tax examination "means an arrangement between two or more Parties to examine simultaneously and independently, each on its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain". 1992 OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations. Available at http://www.oecd.org/ctp/exchange-of-tax-information/2666483.pdf (Last visited November 2014)

The exchange of information may result also in the exchange of aggressive tax practices experienced by the tax administration of Colombia. There is no information available on how this exchange of information is taking place and on whether the names of the parties involved in an aggressive tax planning structure are also mentioned to other tax authorities within the region. The Colombian reporter stated that although the tax administration has not disclosed any public information regarding this practice, it is believed that the CIAT (Inter-American Center of Tax Administration) meetings may involve an informal exchange of information regarding notorious audits and abusive schemes.[59]

No reference was made by Brazil, Uruguay and Uganda in respect of their relation with the OECD or to any regional developments in the context of exchange of information or participation in international task forces.

All surveyed countries i.e. Brazil, Colombia, Uruguay, Uganda and South Africa are members of the OECD Global Transparency Forum.[60] Uganda's review for phase 1 was launched by the OECD Transparency Forum in September 2014. All other countries have been reviewed for phase 1 by the OECD Transparency Forum.[61] In respect of phase 2, at the time of writing (November 2014) some of the selected countries have been reviewed (Brazil, South Africa) or are now being reviewed (Uruguay) or will be reviewed on short notice (i.e. Colombia and Uganda scheduled for 2015).[62]

From a tax policy perspective, it is submitted that the participation of the surveyed countries in international task forces needs to be addressed in terms of transparency, since at this stage it is not clear how the participation in these international task forces take place, and if so, what are the consequences? Do tax administrations exchange aggressive tax planning schemes? Do they provide the names of the taxpayers? And if so, how will the information exchange be protected? Another question that will need to be clarified by the tax administration of the surveyed countries is how the international simultaneous tax examinations and joint audits will take place? What guarantees can be provided to the

[59] Ibid.

[60] The membership to the OECD Global Transparency Forum is different and is not based in the OECD requirements for accession. At the time of writing, 122 countries including African and Latin American countries are members of the Forum. The Forum is a Multilateral Framework which main focus is on transparency and exchange of information. http://www.oecd.org/tax/transparency/ (Last visited November 2014)

[61] Through an in-depth peer review process, the restructured Global Forum monitors that its members fully implement the standard of transparency and exchange of information they have committed to implement. It also works to establish a level playing field, even among countries that have not joined the Global Forum. Ibid.

[62] Information available at Exchange of Tax Information Portal at http://www.eoi-tax.org/jurisdictions/CO#default (Last visited November 2014)

taxpayer, and to which tax administration the taxpayer will have the right to appeal and to ask for guarantee of the taxpayer's rights? The issue of exchange of information and taxpayer rights and the issue of simultaneous tax examinations and joint audits will be dealt with in other papers in the framework of the DeSTaT project.[63]

2. International Tax Arbitrage

The overview of the results of the survey provided shows that the focus and the rules applicable to tackle aggressive tax planning may have an influence on tax arbitrage. The survey also shows that countries dealt with international tax arbitrage differently. For instance, policy makers in Colombia and Brazil are introducing rules to tackle tax treaty shopping and conduit arrangements. In contrast, Uruguay and South Africa are regulating holding companies but with different objectives being to repeal the beneficial holding regime (Uruguay) and to introduce a preferential headquarter regime (South Africa). This paragraph will provide more in-depth information on the relationship between rules and forms of aggressive tax planning in Brazil, Colombia, Uruguay and South Africa.

Brazil stated that international tax arbitrage has not yet been directly addressed by the law maker. The attention of the tax administration is towards the use of special purpose vehicles (SPVs) and to the differentiation between formal holding companies and substantial holding companies. The tax administration has challenged the use of SPVs for instance in goodwill amortization stating that the use of SPVs in this case will have no other purpose than reducing taxation.[64] The Brazilian report states that the Brazilian Revenue Service promoted challenges against taxpayers that engaged such tax planning, based on the assumption that those SPVs do not have any purpose other than reducing taxation. Unfortunately, however, the discussion currently held by the jurisprudence and scholarship does not furnish elements

[63] Exchange of information and taxpayer rights such as right to notify, right to appeal and right of confidentiality, simultaneous and joint audits are some of the issues that will be discussed in other papers of the DeSTaT Research Project.

[64] In particular, the Brazilian report states that the topic of holding companies is closely related to the use of special purpose vehicles (SPV) and goodwill amortization in Brazil. Indeed, the goodwill generated by the acquisition of equity interest may be offset against profits for purposes of determining the calculation basis of the corporate income tax so long as the holding company and the controlled company are merged one into the other. Since in many cases such incorporation may take years to be possible from an operational perspective, many acquisitions have been made through SPVs which are immediately merged into the acquired company, thus enabling the use of the tax benefit.

that can be consistent enough to indicate which approach will prevail and therefore, it can be argued that the approach of the tax administration lacks of transparency.

Furthermore, in Brazil a distinction is made between formal and substantial holding companies. A formal holding company only needs to comply with the commercial formalities of incorporation and does not require any staff, actual address (other than a mailbox), or any other substance requirement. In contrast, the substantial holding company requires a reasonable substance. The tax administration in Brazil is currently applying the substantial holding company definition in connection with the business purpose doctrine.

One problem in Brazil is that the interpretation of the anti-avoidance rules depends on the interpretation by the tax administration and the judiciary and that these interpretations may be different. For instance this is the case regarding the two contradictory decisions of the Administrative Tax Appeals Board (CARF[65]) regarding tax treatment of investment made through directly controlled foreign holding companies.[66] In addition, Brazil has included rules to tackle treaty abuse such as beneficial ownership, limitation on benefits and main purpose test in the tax treaties concluded with Israel, Japan, Peru and Mexico amongst others.

Colombia does not have rules regarding holding companies, but the 2012 Tax Reform modified the definition of residence to target holding companies residing in low tax jurisdictions while being effectively managed from Colombia. As to foreign holding companies, Colombia will impose the corporate income tax if the company is effectively managed in Colombia, regardless of whether the company has an active business, employees, or if it assumes substantial risks. This has been heavily criticised in academic events, as the

[65] CARF is the Court Responsible for maintaining or withdrawing the challenges before they reach the judiciary courts.

[66] The structure addressed the tax treatment of investments made directly through controlled foreign holding companies (DCHC) in indirectly controlled companies resident in third countries (ICC). The issue was to determine how the profits and losses of the ICC should be taxed: after the consolidation of the results of all foreign investments in the DCHC, with the occasional applicability of the double tax treaty concluded by Brazil and the country of residence of the DCHC, or directly by the Brazilian company, regardless of the DCHC in between. At first, the Administrative Tax Appeals Board (CARF) reached the conclusion that the profits of the ICC should be directly considered for tax purposes by the Brazilian company, regardless of the DCHC. In other words, nor the consolidation of profits and losses would be possible, neither would the DTT- DCHC be applicable. This particular decision prevents the possibility of the use of conduit structures by Brazilian companies (Decision n. 101-97.070 of 17 December 2008). Nevertheless, later decisions of the CARF seem to reverse this position. Accordingly, the results of the ICC must be consolidated in the DCHC before being considered for purposes of Brazilian taxation. According to the speakers at the roundtable, this is the only position that suits the Brazilian legislation currently in force, since the speakers disagree of the legal basis used by the previous decision of the CARF to disregard the DCHC and directly tax the results of the ICC (Decision n. 1401-000.832 of 8 August 2012 and Decision n. 1101-000.811 not yet published).

key entrepreneurial risk-taking functions approach is seen as more appropriate to attribute taxing powers.

The focus of Colombia has been on the abuse of tax treaties including the use of foreign holding or conduit companies. For that purpose, Colombia has introduced not only national anti-abuse rules but also rules to tackle treaty abuse such as beneficial ownership, limitation on benefits and main purpose test in for instance, the tax treaties concluded with Spain, Switzerland, Mexico and Canada amongst others.

Colombia-Spain tax treaty creates opportunities for conduit structures and treaty abuse by means of using the reduced withholding tax rate for dividends and the use of the Spanish holding companies that are exempted of taxation in Spain (i.e. ETVEs [67]). Spain has a tax treaty with Colombia where minimum requirements (only beneficial owner) exist in respect of substance for dividends. For the application of this treaty, in Colombia withholding tax on dividends paid by Colombia to these Spanish entities i.e. ETVES will be reduced to 0% for substantial shareholding (i.e. 20%) or 5% in other cases. In Spain the ETVES will not be taxed on these dividends. The result is then lower or no taxation.[68] It is submitted that the Colombian tax administration has become very critical of the tax treaty between Spain and Colombia and is searching ways to renegotiate the treaty and to introduce the limitation on benefits clause to address the issue of substance. The reporter of Colombia stated that the tax administration has unofficially expressed the intention to control the use of conduit companies with the application of the domestic anti-abuse provisions.

The tendency of Colombia is to introduce more anti-abuse provisions in its tax treaties and to apply the domestic anti-abuse rules to tax treaty situations. This may result in treaty override in the case that the treaty does not allow such anti-abuse provisions to be applicable in treaty situations.[69] It is submitted that treaty override brings more uncertainty to the taxpayers since in addition to the tax treaty anti-abuse provisions, domestic rules (including

[67] In 1996, a special regime governing Spanish Holding Companies was introduced. By means of this regime, the Spanish Holding Companies i.e. ETVES "*Entidades de Tenencia de Valores Extranjeros*" ("ETVE") may be fully exempt from the payment of tax on dividends and capital gains obtained from their shareholding in non-resident companies. In addition, in 2010 by means of a binding ruling of the Spanish tax authorities, ETVES may make distributions to its foreign resident shareholders free of Spanish withholding tax upon certain conditions.

[68] J.E. Sanín Gómez, *Tax Planning with ETVES and Tax Evasion*, Portafolio of 25 November 2011. See http://www.portafolio.co/opinion/blogs/juridica/planeacion-fiscal-internacional-etves-y-las-clausulas-anti-elusion (Last visited November 2014)

[69] The override doctrine applicable to bilateral tax conventions results in a bilateral tax convention having equal force as domestic law and thus the most recent prevails. The result is that a conflict between a bilateral tax convention and a domestic law is solved by applying the provision introduced later in time.

tax administration rules and case law) regulating abuse of law or substance over form will be also decisive to determine whether a transaction is disregarded or not for tax purposes. Furthermore, it should be kept in mind that since the 2012 reform is still (November 2014) in the process of being implemented[70], it is still too early to determine whether this approach of Colombia will also result in rules regarding holding companies and international tax arbitrage.

The Colombian reporter confirmed that the government has shown public concern for the use government has shown public concern for the use of aggressive tax planning schemes and structures that allow Colombian taxpayers to erode the national base and shift the profits to jurisdictions where they will remain untaxed or taxed at lower rates[71]. However, there is low awareness in the tax administration of the specific practices that involve taking advantage of legislative mismatches in different jurisdictions.[72]

Uruguay repealed in 2006 the regime for the Financial Investment Companies which was criticised due to the favourable tax regime and the purpose of holding companies making use of the regime to carry on offshore activities. As of 1 January 2011, all companies are subject to the provisions of the general tax regime and to the provisions of the Law on Commercial Companies.

Furthermore, Uruguay introduced in 2010 Controlled Foreign Company Regulations. In principle, Uruguay applies the principle of source. However, in case of unearned income obtained by taxpayers as from January 2011, the principle of residence is applicable i.e. residents of Uruguay are taxed on their income. These rules apply if one resident individual is owner of any share of the foreign entity.[73] According to the reporter of Uruguay, the structural elements of the CFC rules are the following: (i) control upon the non-resident entity; (ii) privileged tax regime of the non-resident entity; (iii) nature of the income obtained by the non-resident entity.

[70] In Colombia, once the Law enacting the Tax Reform enters into force, the Law will be subject to review by the Constitutional Court to test the compatibility of the Law with the Constitution. Furthermore, regulations of the tax administration will be issued to implement the provisions of the reform. At the time of writing, the Constitutional review of the 2012 Tax Reform has already taken place but the tax administration is still issuing regulations to implement this Law for instance to define tax havens; transfer pricing; application of the substance over form and abuse of law provisions amongst others.

[71] The motivation for the GAAR in the 2012 reform (art. 869 of the Colombian Tax Code) established that the Colombian government intended to “combat the most sophisticated abusive practices”(free translation).

[72] Ibid.

[73] The reporter of Uruguay states that in general CFC rules may apply as long as residents control the foreign company or have a significant participation in it either directly or indirectly or though related parties. However, in Uruguay, it is sufficient that the individual has shares in the foreign entity.

South Africa has introduced specific rules to prevent tax arbitrage. The general anti-avoidance rules aim to prevent round trip financing arrangements. A further example is at the time of writing, and soon to be removed, exemption for South African source interest earned by non-residents. Up to 1 January 2015 non-residents have been exempted from tax on interest income from a South African source. This exemption does not apply if the non-resident is physically present in South Africa for more than 183 days (in the 12 months preceding the accrual) or if the non-resident has a permanent establishment in South Africa. As from 1 January 2015 a withholding tax of 15% will apply subject to certain exemptions and subject to any DTC limitations.

In addition, tainted intellectual property can be regarded as royalties in South Africa. The withholding tax on royalties will increase to 15% from 12%. A withholding tax is also to be introduced on management or technical fees. The reason for this is that these fees generate local deductions giving rise to base erosion. It is believed that these fees amount to billions per annum, much of which is shifted to low tax jurisdictions.[74] These amendments introduce a uniform cross-border withholding regime to prevent base erosion. In addition South Africa has had other anti-abuse rules such as Controlled Foreign Company Regulations and thin-capitalization rules for many years.

In order to attract investment, South Africa has introduced a headquarter regime in force as of 1 January 2011. Under this regime, a company may qualify as a "preferential holding company" provided that certain requirements are being met i.e. 10% shareholding, 80% of the tax value of the holding company must represent equity, and 50% of the receipts and accruals derived from foreign companies. South Africa aims with this regime to become a country attractive for foreign investors, mainly multinationals. The main premise of this regime is that investments originated and redeployed offshore should not attract tax in South Africa.

Companies qualifying under the preferential holding regime may freely borrow from abroad and such funds may be deployed locally or offshore once registered with the South African Reserve bank for exchange control purposes. An election needs to be made by the holding company to be a headquarter company (section 9I of the Income Tax Act[75]). To make

[74] Explanatory Memorandum on the Taxation Laws Amendment Bill , 2013.
[75] Article 1 Section 9I Income Tax Act 1962 states as follows: "(1) Any company that (a) is a resident; and (b) complies with the requirements prescribed by subsection (2), may elect in the form and manner determined by the Commissioner to be a headquarter company for a year of assessment of that company".

the election the company has to qualify in terms of the criteria mentioned above. The company should submit a form to notify SARS of the election. Furthermore, companies qualified under the "preferential holding regime" are required to submit annual reports to the Minister of Finance which will enable the monitoring of activities and any intended abuse. This regime has been subject to criticism that views this regime as an "intermediary companies" regime rather than a pure headquarter holding regime.[76]

Companies that do not qualify under the 'preferential holding" regime will be taxed as any other resident company. Due to this preferential regime South Africa may be used as a conduit country, and in this case, the tax authorities may resort to spontaneous exchange of information.

Another issue addressed in the South African report is whether or not a distinction exists in treatment regarding offshore undertakings that feature staff and premises to a very limited extent to a lower tax burden than otherwise applicable to local undertakings. The surveyed countries do not have these distinctions and therefore, there is no lower tax burden even if staff and premises have a limited presence. In the same direction, there is no distinction in tax treatment between companies that make no or little profits and companies that make regular profits. The only reference that was made in this case by Colombia and Uruguay is to the preferential regime of Free Trade Zones that provides for a special treatment of the companies located in such a Zone. The regulatory framework of the Free Trade Zone has been introduced by the lawmaker in Colombia[77] and Uruguay. [78] Furthermore, Law 1429 of 2010 created an incentive for new SMEs whereby the corporation pays the corporate income tax progressively during the first five years (Year 1- 0%, year 2- 25%, year 3- 50%,

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[76] This conclusion was reached by Koeleman stating that "it would therefore appear that the legislation intended to establish an intermediary holding company regime rather than a "pure" Headquarter Regime (HQC regime). Through this requirement, the local asset base of the HQC is restricted to less than 20% of the HQCs total assets, which would generally limit the extent of local trading. In addition, this would provide the platform for the HQC to earn the majority of its income from outside South Africa, which rather indicates the intention to establish an intermediary holding company regime over a headquarter company regime. If it was indeed the intention of the Legislature to institute a "pure" HQC regime, it is submitted that the above requirements relating to foreign assets and foreign receipts and accruals would not have found expression in the legislation; as such restrictions may be regarded as counterproductive in achieving the objective of establishing a pure HQC regime". MK Koeleman, *A critical review of the South African Headquarter Company regime in light of its stated objective of attracting foreign investment*, Masters, para 5.32 (Cape Town: University of Cape Town, 2012).

[77] Inter alia: Law 1004 of 2005 . I. J. Mosquera Valderrama. New Tax Framework Applies in Free Trade Zones. Tax Notes International, The United States, Vol. 48 (2007), no. 8; pp. 745-746.

[78] Inter alia: J. Bergstein, J. And M.E. Zaglio. *Tax Benefits of Uruguay's Free Trade Zones*, 11 Tax Notes International, 889 (2008).

year 4- 75%, year 5- 100%) in order to compensate the lower income attributable to the start-up period in new businesses.

It is submitted that these differences in approach towards international tax arbitrage of the surveyed countries are to a certain extent depending on their tax systems but also in the attractiveness of these countries to investors in general. In some cases these differences also depend on the provisions of the tax treaties that do not prevent treaty shopping for instance the tax treaty between Colombia and Spain that only provides a beneficial ownership clause. Therefore, it is submitted that the differences in approach cannot be reconciled since each country has their own priorities that mostly are the result of each country's economic development and tax system.[79] It is nevertheless, important that issues such as tax treaty shopping be addressed by means of for instance a treaty anti-abuse clause such as limitation on benefits but that will still need to be tailored to the technical and administrative capacity of each country's tax administration to enforce such rule.

The report of Colombia established that the issue of tax arbitrage is only being addressed as part of the country's participation in the BEPS initiative at the OECD. Furthermore, the tax administration started a training program for the officials in charge of international tax audits with DeSTaT academics in order to raise awareness of the structures that achieve tax arbitrage in Colombia.

South Africa has introduced specific rules to deal with international tax arbitrage. The question is whether such rules are necessary. It is submitted that these rules are necessary since tax arbitrage may result in double non-taxation or less than single taxation. However the implementation of rules to tackle tax arbitrage will need more technical expertise of the tax administration, exchange of information between tax administrations and an enhanced relationship between the taxpayers and the tax administration. This enhanced relationship will be discussed in section 3 below.

It is also important to keep in mind that double taxation or double non-taxation may be the result of the differences in the interpretation of tax treaties by the tax administration and the application of the anti-avoidance rules in two countries. Countries could introduce in their

[79] In a forthcoming article the differences in approach towards aggressive tax planning in South America and Sub-Saharan Africa will be addressed taking into account that the solutions depend upon the country's economic development, tax administration capacity and resources, and the specific features of each tax system including the use (or not) of domestic laws and tax treaty rules to tackle aggressive tax planning. See I. Mosquera: *Are the BEPS-OECD Measures to Tackle Aggressive Tax Planning Feasible for South America and Sub-Saharan Africa?* (manuscript available upon request).

tax treaties a mutual agreement procedure and arbitration system to solve these differences on interpretation. The mutual agreement procedure and arbitration could take place when the application of different anti-abuse rules in two countries may result in double taxation (e.g. in case that income is taxable or a deduction is denied in two countries). Until now, countries have only focused on aggressive tax planning and exchange of information to tackle aggressive tax planning. However, it is submitted that the rules to tackle aggressive tax planning should not become a burden for taxpayers in cases where there is double taxation due to the differences in the application of anti-avoidance rules by two countries.

From a tax policy perspective, it is submitted that the countries have struggled to find the right balance between the introduction of tax measures to tackle aggressive tax planning and the introduction of transparent measures that provide clarity and reliability for the taxpayer. Uruguay and South Africa have introduced changes to their holding regime, Uruguay by repealing the use of the SAFI companies due to the offshore activities, and South Africa by introducing a preferential regime in order to attract multinationals to South Africa. The tax administrations of Brazil and Colombia have aimed to tackle abuse for instance by tackling the use of tax havens and the use of aggressive tax planning structures that include also the abuse of tax treaties. The result is a broader application in Brazil of the business purpose doctrine as developed by the practice of the Brazilian Revenue Service (without any legal basis). In Colombia the result is the introduction of anti-avoidance rules i.e. abuse of law (*fraus legis*) and substance over form in the tax legislation to be applicable not only to domestic situations but also to treaty situations. In Colombia, these two rules leave a great scope of application to the tax administration including the burden of proof for the taxpayer.

3. Aggressive Tax Planning and Enhanced Relationships

The surveyed countries addressed the relationship between taxpayers and tax administration regarding aggressive tax planning. The survey shows that the main objective up till now is transparency in terms of availability of the information for the tax administration but not transparency in terms of availability of clear and reliable rules for the taxpayers.

The Brazilian reporter underlined the poor communication between the Brazilian Revenue Service (BRS) and the taxpayers, pursuant to the interpretation of the tax legislation.

The main criticism formulated in the Brazilian report concerns the difficulty of determining a consolidated position of the BRS in regard to controversial issues. In addition, the Brazilian reporter states that the lack of information, clarity and reliability hampers the possibility of fulfilment of the legality and the reaching of an equal tax system. This issue is reinforced by the repeal of so-called normative opinions and the inefficiency of the consulting process before the BRS. However, recently, the Normative Ruling No. 1396 of 2013 assigned to the general Coordination of the Taxation Body (Cosit) the authority to answer all consultations addressed to the BRS. The ruling also stated that these consultations should be published on the website of the BRS (except specific data to protect the identification of the taxpayer such as process number, cadastral data, etc). As a result the consultations including the reasoning to take such a decision are made available to the public.

The Colombian reporter underlined the time issue and the relation between taxpayer and tax administration due to mistrust. Colombia has issued interpretative rulings regarding the application of the anti-avoidance rules, but these rulings may take some time before they are issued. For instance the interpretative ruling of August 2013 on the interpretation of the abuse of law provisions of the 2012 Tax Reform (in force as of 1 January 2013). It is submitted that the time between the tax provisions and the rulings providing clarification or interpretation should be reduced, since the rules are already in force, and therefore, the taxpayer will have to apply these rules. Furthermore, in Colombia, the relationship between the tax administration and the taxpayer is still hierarchical and there is no trust in the tax administration. Its pronouncements are regarded as inconsistent and to the detriment of the taxpayer. This is the general impression from discussions with tax advisers.

It is submitted that taxpayers in general do not trust the tax administration, and therefore a proactive enhanced cooperation cannot be yet foreseen in the tax system of Colombia. The only example of a closer relationship is the use of Advanced Pricing Agreements (APAs) between the taxpayer and the tax administration in issues of transfer pricing. Before the 2012 Tax Reform only one agreement had been concluded.[80] As of 2012, and in order to encourage the use of APAS, the validity of these APAs has been extended for the year for which it is requested, the year before, and the following three years.[81] It is too

[80] Introductory note to the Law 1607 of 2012 (2012 Tax Reform).
[81] Article 260 (10) Tax Code. I. Mosquera Valderrama, *Sweeping Tax Reforms Take Effect*, Tax Notes International, 433 (February 4 2013).

early to evaluate whether these changes to the APA regime are effective in enhancing the relationship between the tax administration and the taxpayers.

South Africa states that the tax administration is on a proactive drive to enhance relationships between themselves and other tax authorities and with corporate taxpayers. In addition, South Africa has introduced an advance tax ruling regime aiming to provide some certainty regarding a proposed transaction or scheme. The conditions for an advanced ruling are set out in Chapter 7 (Sections 75 to 90) of the Tax Administration Act (TAA) No. 28 of 2011. According to these provisions there are three types of rulings: a 'binding general ruling'; a 'binding private ruling' and a 'binding class ruling'. The difference between these rulings depend on whether or not these rulings are applicable to all taxpayers (general) or only to one taxpayer (private), and on whether these rulings can be published but without revealing any names of the parties involved (class).

In addition, to these rulings a private opinion without binding effect may be sought and interpretation notes (with or without binding power) may be issued by the tax administration. The tax administration may also issue guides and media releases on the interpretation of the law but these do not have the force of law. Furthermore, case law plays an important role in South Africa in the interpretation and application of tax law. However, the South African reporter stated that there is a disturbing trend of legislation being changed where the tax administration has been on the losing end.

In Uruguay, the reporter identified two forms of relationships between tax authorities and taxpayers. The first one is the binding tax inquiry regime laid down in art. 71 to 74 of the Tax Code. By means of this regime, the taxpayer (having a personal and direct interest) is allowed to ask the tax administration for the application of a specific legislative provision to a present and real situation. The second one is the use of advanced pricing regimes (APAs) in transfer pricing issues (art. 44 bis of the Income Tax on Economic Activities (IRAE)).[82] The validity of the APA is up to three fiscal years.

The Brazilian and the South African reports show that more instruments to give certainty to the taxpayer on the tax consequences of their transactions do not necessarily result

[82] The APA instrument was introduced by Decree 392/2009 (Article 314 of Law 18996 granted legal status to the APA provisions), which states that the GTB may execute APAs with taxpayers, which must be signed before performing the transactions under analysis and that may not exceed the term of the three following fiscal years from which the APA was signed. The term will be applicable to financial years closing after the year in which this regime comes into force. Information available at International Transfer Pricing 2013/2014 PWC at 862. http://www.pwc.com/gx/en/international-transfer-pricing/assets/uruguay.pdf (Last visited November 2014)

in a better relation between the tax administration and the taxpayer. One of the problems is that the interpretation and position of the tax administration is not always available to the public i.e. other taxpayers than the ones involved in the ruling. The survey shows that South Africa is the one who provides more instruments for the taxpayer. However, the reporter rightly stated that it is too early to establish whether these initiatives have been successful to tackle aggressive tax planning and to enhance more compliance by the companies engaged in tax planning arrangements.

It is submitted that the position of the tax administration in South Africa to resort to specific legislation when the tax administration is in the losing end should be revisited by South Africa. The main argument is that the relationship should be based not only on the activities of the tax administration, but also on trust. The legitimate expectations by the taxpayer that if a ruling is favourable, it does not mean that then later legislation will take away the benefits obtained in such a ruling should be respected.

PART THREE: AGGRESSIVE TAX PLANNING AND FISCAL TRANSPARENCY - CONCLUSIONS AND RECOMMENDATIONS

The second aim of this meta-article is to assess whether the measures taken by the selected countries are consistent the standard of fiscal transparency. This paper argues that the surveyed countries need not only to exchange information but also to enhance the standard of fiscal transparency as presented in this paper that includes availability, clarity, simplicity and reliability of the anti-avoidance rules and to improve the relationship between the taxpayers and the tax administration.

It is submitted that the measures taken by the selected countries are not consistent with the standard of fiscal transparency. From the description of the measures taken by the selected countries one may conclude that the implementation of these measures is depending on the use and interpretation of anti-avoidance rules by the tax administration and judiciary. In Brazil, the tax administration has decided to use (without any legal basis) the business purpose doctrine. This is mainly due to the lack of regulation (ordinary law) that is necessary for the implementation of the doctrine of simulation as introduced in the Brazilian Tax Code. Furthermore, the report of Brazil stated the contradictory decisions given by the

Administrative Tax Appeals Board (CARF) regarding tax treatment of investment made directly through controlled foreign companies.

In Colombia the scope of application of the anti-avoidance rules of abuse of law and substance over form has been left to the tax administration. The application and interpretation of these rules in Colombia is not clear up till the time of writing. In Uruguay the tax administration has applied the substance over form doctrine to tax avoidance, and also to tax evasion cases which according to one of the reporters of Uruguay is not in accordance with the intention of the legislator when introducing the substance over form doctrine. In South Africa, the tax administration still applies the old anti-avoidance rule even though a new anti-avoidance rule (Section 80A to 80L Income Tax Act) has been introduced in 2006.

The research shows that the tax administrations in the surveyed countries have provided their own interpretation of the anti-avoidance rules. For instance the report of Brazil refers to normative opinions and consulting process; Colombia has interpretative rulings (*conceptos*) of the provisions introduced in the 2012 Tax Reform; Uruguay has consultations; and South Africa has advanced tax rulings, non-binding private opinions and certain reportable arrangements.

Despite the existence of anti-avoidance rules and the instruments developed by the tax administration to interpret such rules, there is still uncertainty for the taxpayer regarding the application of anti-avoidance rules by the tax administration. This paper argues that transparency in respect of aggressive tax planning means that anti-avoidance rules should be available and clear for the tax administration to enforce them and for the taxpayer to rely on them. The lack of consistency in the application of anti-avoidance rules (Uruguay), lack of clarity in the use of a new or old anti-avoidance rule (South Africa), the broad scope of interpretation left to the tax administration (Colombia), the use of an anti-avoidance rule without legislative basis and to some extent the lack of reasoning for these instruments (use of business purpose doctrine and consulting process in Brazil) are still problems that need to be addressed by the law makers and the tax administration of the surveyed countries.

The first recommendation is that the anti-avoidance rules need to meet the standard of global fiscal transparency that includes not only exchange of information but also availability, clarity, simplicity and reliability of the anti-avoidance rules. In addition, an enhanced relationship between the taxpayer and the tax administration is recommended.

From a tax policy perspective, it can be observed that in the surveyed countries, the relationship between taxpayer and tax administration is still hierarchical and that there is a lack of disclosure of aggressive tax planning arrangements except in South Africa (for reportable arrangements). In order to give more certainty to the taxpayer the question will be whether the countries of research should introduce advanced tax rulings whereby the taxpayer and the tax administration agree in the tax treatment of tax planning arrangements. The answer should be yes, but in order to provide these rulings, an enhanced relationship based on mutual trust and legitimate expectations between the taxpayer and the tax administration should exist.

By means of these rulings, the taxpayer may disclose its tax planning arrangements to see whether or not those arrangements could be considered as aggressive tax planning or not.[83] The main issue is then that the tax administration may provide its opinion in respect of tax planning arrangements by means of an advanced tax ruling. Moreover, such ruling should be expected to be respected by both parties (taxpayer and tax administration) based also on the principle of mutual trust. In addition, these rulings need to be made available to the public i.e. other taxpayers than the ones involved in the ruling.

In this enhanced relationship the tax consultants should also be taken into account. Therefore, tax consultants should also offer information regarding their tax advisory activities including whether or not the tax consultants are engaged in tax planning. But for this to happen, the tax administration, the taxpayer, and the tax consultants should develop a new type of relationship. This relationship can be a top down approach e.g. tax audits or filing an income tax return, or a horizontal approach where an agreement can be signed by the tax administration and the taxpayer that results in horizontal monitoring.[84] The result should be then a relationship based on mutual trust between the tax administration, taxpayers and tax consultants.

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[83] The use of rulings has been also argued by Bentley stating that "the proliferation of ruling regimes provides a significant source of assistance to taxpayers in the assessment process, particularly in relation to complex or uncertain areas of the tax law." D. Bentley . *The Rise of 'Soft Law"in Tax Administration- Good News for Taxpayers?*, 1 Asia-Pacific Tax Bulletin, 33 (2008).

[84] In this regard, Gribnau argues that in the Netherlands due to horizontal monitoring multinational corporations are moving from aggressive tax planning towards tax risk management and certainty in the Netherlands. For Gribnau, this change of attitude by the multinationals is mainly due to horizontal monitoring that means that, on "the basis of trust and transparency, the tax authorities are prepared to respond to the multinationals' need for certainty". See H. Gribnau, *Soft Law and Taxation: The Case of the Netherland*s, 3 Legisprudence, 325 (2007).

It is submitted that the use of advanced tax rulings, horizontal monitoring, and disclosure requirements for all tax planning arrangements can help the tax administration to monitor aggressive tax planning. Furthermore, these instruments can help taxpayers to have more transparency in terms of availability, clarity, and reliability on the tax consequences of their tax planning arrangements.

The second recommendation is regarding the consistent use of the types of exchange of information taking into account the taxpayers' right by the surveyed countries. All surveyed countries are members of the OECD Global Transparency Forum. In addition Brazil, Colombia and South Africa are parties to the Declaration on the Automatic Exchange of Information in Tax Matters signed on 6th May 2014 in Paris.[85] Furthermore, Colombia and South Africa signed a Multilateral Competent Authority Agreement to automatically exchange information based on Art. 6 of the Convention on Mutual Administrative Assistance in Tax Matters on 29th October 2014.[86] The main consequence is the commitment of these countries to the Exchange of Information and to meet the standards of Fiscal Transparency of the OECD. However, the use of the types of exchange of information (i.e. automatic, spontaneous and on request) differ among countries. In respect of aggressive tax planning only the reporter of South Africa has stated that the tax administration may resort to spontaneous exchange of information in the case that the country is used for conduit arrangements.

Other countries such as Brazil, Colombia and Uruguay may have included exchange of information in their tax treaties. Nevertheless, the survey shows that the exchange of information for these countries may differ among treaties and among countries. For example the reporter of Uruguay states that the country has specifically excluded automatic or spontaneous exchange in some treaties (i.e. tax treaties concluded by Uruguay with Switzerland and with Liechtenstein).

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[85] This Declaration has been signed by 48 countries which are committed to the global standard of automatic exchange of information. http://www.oecd.org/mcm/MCM-2014-Declaration-Tax.pdf (Last visited November 2014)

[86] The competent authority agreement is a multilateral framework agreement, with the subsequent bilateral exchanges coming into effect between those signatories that file the subsequent notifications under Section 7 of the agreement. The agreement specifies the details of what information will be exchanged and when, as set out in the Standard for Automatic Exchange of Financial Information in Tax Matters. Information available at http://www.oecd.org/tax/exchange-of-tax-information/multilateral-competent-authority-agreement.htm (Last visited November 2014).

Furthermore, countries should take a position on whether the use of spontaneous exchange of information may be necessary to tackle aggressive tax planning including not only conduit arrangements, but also tax arbitrage, holding companies, etc. The decision should be made taking into account the capacity of the tax administration, the control of the exchange of information including also the protection of confidentiality of the information exchanged, and the cost/benefit analysis when introducing exchange of information provisions either in the domestic law and bilateral tax treaty or by being party to a multilateral exchange of information instrument.

Exchange of information is dealt with in other papers in the framework of the DeStaT project. However, it is safe to argue that in respect of aggressive tax planning, the use of spontaneous exchange of information has not been widespread to all countries and that the countries may also change their position regarding exchange of information taking into account the specific country to which the information should be provided. Furthermore, it is safe to argue that the endorsement by countries of the Common Reporting Standard for Automatic Exchange of Information of Financial Information may result in exchange of bulks of information among countries. The questions will be then: What should be the information that needs to be exchanged automatically? How to prevent the tax administrations of developing countries to be overloaded with information? How to guarantee the confidentiality of the information exchanged? and How to protect the taxpayer’s rights?

Finally, it is submitted that for exchange of information to be effective in preventing aggressive tax planning, changes will need to take place in the surveyed countries. These changes need to be broader than access to the information, but also should include transparent anti-avoidance rules to be applicable to aggressive tax planning in accordance with the standard of fiscal transparency as developed in this paper (i.e. availability, clarity, simplicity and reliability). Finally, the relationship between the taxpayer and tax administration should be enhanced taking into account mutual trust, legitimate expectations and respect for the taxpayer’s rights.