FATCA in the Perspective of Developing Countries

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ABOUT THE DeSTaT RESEARCH PROJECT

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

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

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

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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

This paper aims to carry out an analysis of the possible opportunities as well as difficulties that may arise when developing Countries are engaged in the implementation of FATCA.[11] The various possible incarnations of FATCA, from the so-called «classic FATCA» to various instances of inter-governmental agreements have been taken into consideration

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

[11] With regard to the specific topic addressed in this paper, the following persons acted as reporters for the respective Antennae. Brazil: Reporter: Jefferson Ferreira Antunes de Souza; Panel: Prof. Luís Eduardo Schoueri, Taxpayer’s Council Judge Lavínia Junqueira and former Taxpayer’s Council Judge João Francisco Bianco. Colombia: Diego Quiñones Cruz; South Africa: Prof. Jennifer Roeleveld; Uganda: Festus Akunobera; Uruguay: Juan Bonnet. Information is as of January 2015.

within the broader perspective of assessing FATCA as a regulatory model with an impact also on the domestic dimension of the way systems handle transparency.

The approach of this paper combines good governance[12] 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. [13]

In such a context, the starting point would be to try to define what the relevant notion of transparency would be in the perspective of this research. Namely, the notion of transparency is indeed polysemic as it assumes different meanings across different areas of international economic law and, while consistently referred to in the area of international taxation, a generally agreed definition seems to be lacking.

The word "transparency" has not been deployed to date in the OECD Model Convention and no reference thereto has been introduced even in the Commentary to Art. 26. The expression "transparency" is also not be found in the 2002 OECD Model TIEA. Likewise, the word "transparency" is also absent from the Reports issued by the Joint Ad Hoc Group on Accounts devoted to the definition of agreed standards in the availability and reliability of information (and in particular, accounting information).[14]

In order to trace the introduction of the word "transparency" in the international tax cooperation debate, it is then necessary to refer to statements and declarations having a preponderantly political nature. In particular, the emergence of the dyad "transparency and exchange of information for tax purposes" can be traced back to the statements issued upon the meeting of Finance Ministers and Central Bank Governors issued at the 2004 Berlin meeting of the G20, where it was affirmed that: "The G20 therefore strongly support the efforts of the OECD Global Forum on Taxation to promote high standards of transparency and exchange of information for tax purposes and to provide a cooperative forum in which all countries can work towards the establishment of a level playing field based on these standards."

Ever since, references to transparency started being incorporated in the "Level Playing Field" reports which have been published on an annual basis by the Global Forum since 2006.

[12] 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.
[13] Project Grant Application: DeSTaT Research Project.
[14] The relevant paper by the Joint Ad Hoc Group on Accounts of July 2005, titled "Enabling Effective Exchange of Information: Availability and Reliability Standard can be retrieved at the following link: http://www.oecd.org/ctp/harmful/42179473.pdf

In these documents, no general definition of transparency is provided nor are its constituting elements listed. It reiterated, on the other hand, that "transparency and effective information exchange are closely linked concepts" and that "lack of transparency prevents effective exchange of information."

It would then seem that transparency should be seen as the first moment of a broader administrative cooperation framework and should cover in particular those items that in the Terms of Reference drawn for peer reviews by the Global Forum are defined as "availability of information" and "appropriate access" thereto.

At the same time, such an understanding appears somewhat one-sided when compared to the debate on the notion of transparency which is ongoing in other areas of international economic law, with particular relevance for the implementation of "good governance" practices. In this regard, there are actually few "working definitions" of transparency available but it seems worthy to mention the following one, recently adopted by one of the United Nations commissions: "transparency means (…) that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media".[15]

As it may have been expected, the texture of "transparency" would seem to lie in "information" and its availability. The next questions are, however: "which kind of information is concerned?"; "who is meant to disclose information?"; and "to whom shall information be disclosed?". In this specific regard, it would seem, based on the above UN definition, that, in other areas of international economic law, "transparency" may be defined as "institutional transparency", as it is qualified as an obligation whose fulfilment chiefly lies in the prerogative of standard-setters (hereby used as a broad notion which encompasses actual law-makers or formulators of other norms without immediate efficacy) and of agencies entrusted with the implementation of such standards.

By contrast, in the realm of international taxation, to date, information would seem to be mostly referring to "taxpayer information" and the obligation to transparency would seem to have layed almost exclusively upon regulated subjects, namely taxpayers. It may then be argued that transparency has been attributed somewhat of an "extractive" connotation, whereas it only consists of tools for ensuring that Tax Administrations have sufficient information on taxpayers even in cross-border settings. On the other hand, it seems that

[15] See United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance*, 2007, retrievable on the following website: www.unescap.org (last accessed January 2015).

international standard-setters (such as the OECD) and monitoring bodies (such as the Global Forum) have been oblivious to ensuring that the obligation to "institutional transparency", which commits most tax systems and tax administrations under domestic systems, is respected in cross-border situations.[16]

In the perspective of FATCA[17] the dimension of "extractive transparency" appears even more sensitive, especially with the regard to the implementation of information gathering measures based on know-your-client rules by financial institutions which eventually effectively become vis-à-vis the taxpayer tax intermediaries in charge of processing and gathering some key items of the latter's financial information. Given that, as it will be further analysed, the key issue of FATCA possibly arises from the fact that alien procedural requirements are inserted in the texture of a domestic system.

In this regard, such a conflict really represents an interesting case study of the possible conflict or, at least, trade-off, which may arise between the earlier mentioned "extractive transparency" as conveyed by international (or, in this specific case, alien US rules) and "institutional transparency", which, in want of an adequate embodiment within the framework of the "international standards of transparency and exchange of information" finds a bastion, at least until adequate international rules will be developed in this regard, in domestic safeguards, which often derive from a Country's constitutional order. One of the questions underlying this research is then to determine what the actual content of the above mentioned conflict (if any) would be and how a selected set of developing and emerging countries may deal with such a trade-off, and, possibly , strike a balance with specific regard to the "case study" of FATCA.

In order to do so, it seems however that the other side of the coin, namely, the more "extractive" dimension of transparency, the one which appears to be prevalent in the current international tax order (either in the form of the "international tax standard" or in FATCA rules) should be understood, given that it objectively responds to some overarching concerns. As such, the key issue is to determine what the purpose of such an extractive exercise actually is and which kind of overarching interests it is meant to safeguard in order to define the

[16] It is probably telling of the sensitivity to a broader understanding of "transparency" within international taxation which characterises the DeSTaT research project as one of the few scholarly contributions concerned with such a dimension of transparency and, in general, with the transparency, simplicity and reliability of the tax systems provided, although outside of the scope of this very research project, by the Head and a core member of one of the DeSTaT Southern Antennae. See L.E. Schoueri and M.C. Barbosa, *Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System*, 5 British Tax Review, 666 (2013).

[17] Which was born as a purely US set of rules but it has eventually had an international reverbation, especially now that it serving as one – if not the main platform – on which the new standard of automatic information exchange is being elaborated.

boundaries of its legimitacy. In this regard, in view of the horizon of this research project, the overarching "working definition" of transparency that was found to be the most broadly encompassing and which will be hereby adopted will be consistent with the one recently rendered by Professor Diane Ring, according to whom "a country needs to understand how a taxpayer is conducting its business, is structuring its operations, and is making investments in the country. To achieve this level of understanding, it may be necessary for the country to have a solid grasp of the taxpayer's activities, transactions and business structure beyond the borders of that jurisdiction."[18]

Against such a background, the ambition and original contribution of this research would be to provide a survey of the most sensitive issues related to the implementation of FATCA in developing Countries and, based on such a «bottom-up», empirical approach, to set forth policy proposals aimed at addressing them within the framework of what could be defined as «sustainable tax governance».

Such a concern is directly linked to an even more overarchign research question, that is, what is the specific contribution that the implementation of FATCA may have in developing Countries in terms of a further local dissemination of «transparency», as earlier defined. In this regard, the underlying assumption is that, also when exploring the potential opportunities and challenges deriving from the current climate of global fiscal transparency (of which FATCA can be considered, despite its unilateral domestic drive, as an influential building block given its impact on the emergence on the new standard of automatic information exchange) in the specific perspective of developing Countries, no «one-size fits all» approach can be adopted. Care has thus been exercised in order to segment a representative pool of developing Countries encompassing two of the so-called BRICS (Brazil and South Africa) on one pole of the spectrum and a low income developing Country such as Uganda on the other pole.In between, a Country such as Colombia, which may be argued to represent the majority of developing countries with a world-wide system of taxation and a desire to cooperate, but with limited resources to make cooperation effective. Finally, Uruguay, which represents one of the countries that have been striving to comply with the OECD standards of transparency and exchange of information and which is interestingly in the process of shifting from a purely territorial system to one where residence-based taxation is endorsed with regards to capital.

[18] 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 January 2015)

This paper is composed of an introductory section describing the current state of the art in relation to FATCA in the United States in both its «classic» and «inter-governmental»-based dimension. The latter section of the paper follows the structure of the questionnaires used for the original fieldwork research. In particular, the second section of the paper is articulated in four sections concentrating, respectively on:

1. The scenarios deriving from the implementation of «classic FATCA»;
2. The scenarios deriving from the conclusion of an inter-governmental agreement;
3. The potential drivers for cases of non-compliance together with the possible consequences deriving therefrom;
4. The merits of FATCA as a policy option in the light of other relevant policy perspectives, with particular regard to traditional items of the tax treaty policy debate (bilateral Vs. multilateral approaches) as well as with regard to its interaction with a broader regulation agenda tied to the evolution of the international financial architecture.

PART ONE: BACKGROUND INFORMATION

1. Historical Developments

The Foreign Account Tax Compliance Act (FATCA) was implemented as section 1471-1474 in the Internal Revenue Code (IRC), through the Hiring Incentives to Restore Employment Act (HIRE) of March 18 2010. Hence, FATCA is, formally, a piece of U.S. domestic law. However, in substance, FATCA represents a radically new approach to international tax information exchange, which in regards to form traditionally has been the domain of treaties. FATCA may appropriately be defined as a unilateral approach to international tax law. However, recognizing these issues of extraterritoriality, the U.S. has developed a model intergovernmental agreement (IGA) that intends to impose FATCA bilaterally, overcoming issues arising from the principle of State sovereignty and effectively rendering compliance easier for the concerned financial institutions.

From a U.S. perspective, the view is that FATCA will be a more effective approach in collecting tax information on U.S. persons than the conventional treaty approach, thus increasing tax revenue. Specifically, FATCA aims at preventing and combating tax evasion

by U.S. persons holding assets outside the U.S.[19] To achieve these aims, FATCA generally implies that any foreign entity within its scope, regardless of residency, is obligated to provide tax relevant information on U.S. persons to the IRS. In the case of non-compliance, the entity will be subject to a 30 % withholding on its U.S. source income. The overview provided in this outline will elaborate further on the regulatory mechanism of FATCA.

2. Implementation of the FATCA-regime and the current state of the implementation process

The legal basis of FATCA consists of IRC sections 1471-1474, which are already implemented, and supplementary regulations that, according to the mentioned provisions, are to be determined by the Secretary of Treasury.

Understandably, the complex organisational implications of FATCA raised many interpretive and implementation issues that necessarily required guidance by the US Tax Administration. After the issuance of Proposed Regulations on February 8th 2012, actual FATCA Regulations were officially finalised on January 23rd 2013. More recently, in March 2014, Temporary Regulations aimed at addressing comments on final Regulations have been issued mostly with regard to specific issues of client identification.[20] The Regulations address most outstanding issues in excruciating detail and, at the same time, appear to having been markedly influenced by the requests of the various financial constituencies prospectively impacted by its application.

The first enactment of FATCA legislation dates back to 2010. However, also based on requests set forth by the financial industry constituencies, its implementation dates have been postponed several times. As the situation currently stands, actual implementation started on July 1st 2014, even though its application should take place by progressive instalments over the subsequent three-year period.[21]

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[19] http://www.irs.gov/Businesses/Corporations/Summary-of-Key-FATCA-Provisions

[20] The text of the Temporary Regulations can be retrieved at the following link: http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf

[21] See Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions on Other Foreign Entities, 78 Fed. Reg. 5874, of 28 January 2013.

3. Overview of IRC provisions. Some selected key concepts and an outline of the key mechanics of FATCA[22]

3.1 Foreign financial institutions

Section 1471(d) (4) and (5) provides a definition of “foreign financial institution” (hereinafter, “FFI”). According to the abstract definition in section 1472(d) (4), “any financial institution which is a foreign entity” is covered. The term is further defined in section 1472(d) (5) and in the proposed supplementary regulations. However, it goes beyond the frame of the briefing to address these particulars. In any case, the abstract definition is sufficient for the current purpose. The term covers institutions such as banks, trust companies and certain funds. The purpose of the extensive scope is to comprise all entities in which U.S. persons may be holding assets.

In principle, an FFI has the choice between meeting the requirements set forth in section 1471(b) or be subjected to 30 % withholding tax on its payments from sources within the U.S., in accordance with section 1471(a). In principle, this applies regardless of the FFI actually having U.S. account holders. This implies that the FFI has to enter into an agreement with the IRS. If the FFI is “out of compliance with such agreement” the agreement may be terminated thus imposing withholding tax on U.S. source payments to the FFI.

The main terms of the agreement are stated in Section 1471(b). The FFI is required to obtain information, comply with certain verification and due diligence procedures regarding its account holders and report information to the IRS on an annual basis. Compliance to these obligations is expected to require comprehensive efforts by FFIs. In particular, the due diligence requirement is expected to be burdensome, as it in practice requires the FFI to conduct various research on all its accounts to uncover whether the holder is a U.S. person. Furthermore, the FFI is obligated to deduct and withhold 30 % tax on certain pass-through payments, under the general condition that the payment originates from a U.S. source. This mechanism aims to safeguard that FATCA is not avoided by U.S. persons investing in compliant FFIs through a non-compliant FFI.[23]

It is plausible that these obligations may come in conflict with domestic law of other States, especially regarding privacy, handling of information and contractual relationships.

[22] For a relatively updated and thorough review of the mechanics of FATCA, in particular in its «classic» version, reference may be made to C.P. Tello, *FATCA: Catalyst for Global Cooperation on Exchange of Tax Information*, 2 Bulletin for International Taxation, 88 (2014).

[23] J.R. Harvey, Jr., *Offshore Accounts: Insider’s Summary of FATCA and Its Potential Future*, 5 *Villanova Law Review*, 483 (2012).

For instance, according to the domestic laws of a State, it may be prohibited for financial institutions to disclose information regarding its account holders if not provided by law. Another example is withholding on pass through payments, which may constitute breaches of existing private account agreements.

As mentioned, non-compliance will entail that the FFI is subjected to 30 % withholding tax on payments from sources within the U.S. Pursuant to the definition of "withholdable payment" in section 1473(1)(A), this includes "interest (…), dividends, rents, salaries, wages, premiums, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits and income (…) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends(…)" derived "from sources within the United States".

3.2 Non-financial foreign entities

Subject to IRC section 1473(5), "any entity that is not a United States person" is a foreign entity. Such entities are regarded as a non-financial foreign entity (NFFE) under IRC section 1472(a) if the entity does not fulfill the requirements to be a FFI under IRC Section 1471(d) (5).[24] In principle, all judicial subjects are covered. However, there are extensive practical and legal exceptions. Moreover, Treasury may exempt classes of payments that pose a low risk of tax evasion. The reporting-regime for NFFEs will be practical for institutions such as traditional holding companies engaged in primarily non-financial business and certain insurance companies.

The regulatory regime imposed on NFFEs is structurally similar as for FFIs. However, the reporting requirements are less extensive. Primarily, the NFFE is required to report on "substantial United States owners" and if it does not have such owners, to provide a certification of that fact. Summarised, according to Section 1473(2), ownership is substantial if the person owns 10 % of the entity or is the beneficiary of 10 % of its profits.

If the NFFE does not meet the reporting requirements, it will be subject to 30 % withholding tax on payments from a U.S. source, of which it is the beneficial owner.

[24] IRS Notice 2010-60 p. 4 (http://www.irs.gov/pub/irs-drop/n-10-60.pdf)

3.3 Withholding agents

As defined in Section 1473(4), a withholding agent is generally "all persons, in whatever capacity acting", having control over "any withholdable payment". Thus, both U.S and foreign persons may be withholding agents. As such, the same entity may be both a FFI or NFFE and a withholding agent, in regards to FATCA. A general premise though, is that the payment is from a U.S. source. Presumably this entails that withholding agents in most cases will be a U.S. person.

Pursuant to IRC sections 1471(a) and 1472(a), the primary obligation of withholding agents is to deduct and withhold 30 % tax on U.S. source payments to non-compliant FFIs and NFFEs. If the withholding agent does not comply with these obligations, it will be subject to IRC section 1474(a), thus liable for tax that should have been deducted and withheld.

4 Overview of FATCA model Intergovernmental Agreements (IGA)

As indicated above, the legal basis of FATCA, IRC sections 1471-1474, imply substantial issues regarding the relationship to other States' domestic law. On this basis, the U.S. has developed a model intergovernmental agreement (IGA) in consultation with France, Germany, Italy, Spain and The United Kingdom. The purpose of the model-treaty is to improve FATCA compliance and reduce compliance burdens.[25] There are two versions of the model agreement, a reciprocal[26] and a non-reciprocal[27] version. Except for regulations regarding reciprocity, both versions are identical.

Under the reciprocal version of the Model IGA, the United States will provide information to the tax authorities of the FATCA partner jurisdiction on a reciprocal basis with respect to accounts of nationals of the FATCA Partner in the United States. In particular, the US will be expected to collect and forward to the partner jurisdiction the same kind of information about IGA partner residents whose collection and transmission FATCA imposes upon FFIs.[28] By contrast, the non-reciprocal version of the Model IGA would not involve any provision of information by the United States to the FATCA Partner jurisdiction.

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[25] http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx

[26] http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf

[27] http://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf

[28] Article 6(1) of the reciprocal Model 1 IGA provides as follows: "Reciprocity. *The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with [FATCA Partner]. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and*

The reciprocal version of the IGA would be accessible only with regard to those jurisdictions bound to the United States by an international agreement, such as a double taxation convention incorporating an exchange of information clause or a TIEA and in relation to whom the Treasury Department determined, on a case-by-case basis, that the recipient government has in place robust protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes.[29]

In order to fulfill the purpose set forth, the model-IGA features, compared to classic FATCA, two primary divergent requirements. Art. 2 states that the State party shall obtain information from relevant resident entities. This is opposed to relevant entities reporting directly to IRS as under classic FATCA. Hence, the IGA modifies FATCA so that in regard to this aspect IGA-based FATCA becomes more similar to a traditional TIEA. Art. 4 states that an entity resident in a State party "will be treated as complying with, and not subject to withholding under, section 1471 of the U.S. Internal Revenue Code", if the State party complies with its obligations under article 2 and 3. This entails that FFIs and NFFEs will not be required to enter into an agreement directly with the IRS

This commitment would be more consistent with the overall design of international tax information sharing, which has typically relied, even in the experience that more closely resembles FATCA, such as the system introduced by the European Savings Directive,[30] on the interaction of competent authorities of the involved States in order to carry out information sharing. Such an inter-governmental approach would also ensure that domestic Tax Authorities will have the same information that is being provided to the IRS on domestic taxpayers.

On the other hand, in pursuance of the agreement, FFIs would not be required to terminate the account of a recalcitrant account holder nor to apply passthru payment withholding on payments to these recalcitrant account holders or on other FFIs in its Country or other FATCA partner Countries.

The United States, in turn, will eliminate the obligation of each FFI established in the FATCA partner to enter into a separate comprehensive FFI agreement directly with the IRS and also will eliminate the withholding on payments to FFIs established in such Countries.

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advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange."

[29] It is interesting to remark that a strict requirement of a "tax-only" use of the exchanged information would seem to be at odds with the more recent amendement made to Art. 26 of the OECD Model which would go in the direction of enabling, upon an explicit consent of the supplying jurisdiction, other authorities in the recipient State to access the information exchanged by virtue of the same treaty provision.

[30] Council Directive 2003/48/EC of 3 June 2003.

On a different level, the Joint Statement also included synallagmatic “checks and balances” in a system that, in the perspective of the involved financial intermediaries as well as of that of their County of residence, would otherwise appear as merely “extractive”. In particular, agreements concluded in pursuance of the Joint Statement would downplay some very burdensome and penalising implications for foreign financial intermediaries while, at the same time, ensuring that possible impediments to the implementation of the mechanism be removed.

In pursuance of the IGA, the emphasis of the FATCA system on a new emerging role of financial intermediaries as tax intermediaries would be reduced, or, more precisely, confined to the information gathering stage rather than encompassing also the processing and forwarding of information. This role, from the original project of a direct involvement also in the underlying automatic exchange of information procedures, has been re-focused on the more consolidated function of acting as information-gathering and withholding agent, a feature that has already been put to test for instance within the framework of the European Interest Savings Directive, while leaving the actual transfer of information on a routine basis to the Tax Administration of the jurisdiction of establishment.

From a legal and policy perspective, it could be argued that the Model IGA would transform the net of bilateral contractual relations between the relevant financial intermediaries operating in a given jurisdiction into a legal obligation sanctioned by the same jurisdiction and binding on local financial intermediaries to identify and report information on US account holders; tied to this would be the waiver of any Country-specific confidentiality legislation that would prevent the collection of information as per FATCA requirements.[31]

It is interesting to underline that the Model I IGA[32] does not set up additional channels for exchanging information but rather refers to existing legal instruments, that actually constitute a pre-requisite to the exchange. This remark extends to the peculiar mode of co-

[31] In the latter respect, an asymmetry between the way different kinds of institutions are treated may be observed. As anticipated, FATCA creates the heaviest burden of compliance obligations upon entities that would qualify as FFIs but some of its effects would reverberate also on other foreign entities that do not qualify as FFIs, the so-called NFFEs. Despite this circumstance, the model IGAs do not appear to address the position of NFFEs. While this circumstance may theoretically appear problematic in ensuring that NFFEs are placed in an equal position with FFIs vis-à-vis the substantive compliance with FATCA requirements, it may be argued that the kind of information that NFFEs are required to provide concerns their body of shareholders, so that they should be in a position to voluntarily waive confidentiality obligations, where applicable, without incurring penalties; moreover, as IGAs directly affect the local legal environment in which foreign entities operate, it may be argued that NFFEs would indirectly benefit therefrom even though they are not expressly mentioned in the inter-governmental agreements. In any case, considering that the Model IGAs only provide for mere “model provisions”, it appears likely that peculiar Country-specific situations will be addressed in actual IGAs upon their negotiation.

[32] See Art. 2 of the Model 1 IGA

operation of choice, centered upon automatic exchange of information: in this regard, the identified instrument would consist in an ad hoc Memorandum of Understanding, anchored to the existing treaty-based exchange of information provisions.

From a policy perspective, it can be noted that the seeds of a potentially fruitful cross-pollination with other initiatives in the area of automatic exchange of information can be found. In this regard, the fourth Paragraph of Art. 6 of the Model IGA calls for the commitment of the involved parties to working with other partners, in particular, the OECD and the European Union, as well as on adapting the terms of the IGA to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions. In this regard, the importance of the Model IGA from a policy perspective cannot be overerestimated, not so much for its specific contribution to making the FATCA system, which in itself could also appear as rather questionable, especially whereas it is not mitigated by some form of reciprocity, but rather because it would fall in the broader paradigm of what has been defined as the "snowball effect" that FATCA could potentially start.[33]

In just a couple of years, the network of FATCA IGAs has been expanding exponentially.[34] Taking into regard substantial issues arising from other States domestic law,

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[33] At the Inaugural Lecture at the Institute for Austrian and International Tax Law of 18th May 2012, Professor Tracy A. Kaye vividly referred in the same sense to the "snowball effect" generated by FATCA through the spreading of Intergovernmental Agreements.

[34] As of January 2015, the signatory jurisdictions are as follows (source: US Department of Treasury: http://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca-archive.aspx; last retrieved: January 2015).

Model I IGA: Australia (4-28-2014); Bahamas (11-3-2014); Belgium (4-23-2014); Brazil (9-23-2014); British Virgin Islands (6-30-2014); Canada (2-5-2014); Cayman Islands (11-29-2013); Costa Rica (11-26-2013); Czech Republic (8-4-14); Denmark (11-19-2012); Estonia (4-11-2014); Finland (3-5-2014); France (11-14-2013); Germany (5-31-2013); Gibraltar (5-8-2014); Guernsey (12-13-2013); Hungary (2-4-2014); Honduras (3-31-2014); Ireland (1-23-2013); Isle of Man (12-13-2013); Israel (6-30-2014); Italy (1-10-2014); Jamaica (5-1-2014); Jersey (12-13-2013); Latvia (6-27-2014); Liechtenstein (5-19-2014) ; Lithuania (8-26-2014); Luxembourg (3-28-2014); Malta (12-16-2013); Mauritius (12-27-2013); Mexico (4-9-2014); Netherlands (12-18-2013); New Zealand (6-12-2014); Norway (4-15-2013); Poland (10-7-2014); South Africa (6-9-2014); Spain (5-14-2013); Slovenia (6-2-2014); Sweden (8-8-2014); United Kingdom (9-12-2012)

Model II IGA: Austria (4-29-2014); Bermuda (12-19-2013); Chile (3-5-2014); Japan (6-11-2013); Switzerland (2-14-2013)

With the entry into force of FATCA in July 2014 it seems that there has been a surge in the negotations between the US and other Countries, most often, developing Countries. As a result, a "new category" seems to having been created, that of jurisdictions which have "concluded an agreement in substance" and have agreed to being included in a list:

Algeria (6-30-2014); Anguilla (6-30-2014); Antigua and Barbuda (6-3-2014); Azerbaijan (5-16-2014); Bahrain (6-30-2014); Barbados (5-27-2014); Belarus (6-6-2014); Bulgaria (4-23-2014); Cabo Verde (6-30-2014); China (6-26-2014); Colombia (4-23-2014); Croatia (4-2-2014); Curaçao (4-30-2014); Cyprus (4-22-2014); Dominica (6-19-2014); Dominican Republic (6-30-2014); Georgia (6-12-201); Greenland (6-29-2014); Grenada (6-16-2014); Guyana (6-24-2014); Haiti (6-30-2014); India (4-11-2014); Indonesia (5-4-2014); Kosovo (4-2-2014); Kuwait (5-1-2014); Malaysia (6-30-2014); Montenegro (6-30-2014); Panama (5-1-2014); Peru (5-1-2014); Portugal (4-2-2014); Qatar (4-2-2014); Romania (4-2-2014); St. Kitts and Nevis (6-4-2014); St. Lucia (6-12-2014); St. Vincent and the Grenadines (6-2-2014); Saudi Arabia (6-24-2014); Serbia (6-30-2014), Seychelles (5-

it seems U.S. authorities are open to let States enter into such agreements, and the U.S. seems inclined on establishing an extensive IGA-network.[35] The current model-agreements are bilateral. However, there have been some interesting discussions on a multilateral approach to FATCA implementation.[36] The adoption of such an approach appears to have been endorsed primarily by the European Union, where the original Joint Statement that brought together five of the largest Member States was substantially recused in favour of a multilateral approach centred upon the issuance of a proposed Directive amending and integrating Directive 2011/16/EU. According to the proposed Directive[37], the fact that Member States have concluded or have expressed an intention to conclude agreements with the United States of America relating to its legislation on FATCA means that they intend to provide for a wider cooperation within the meaning of Article 19 of Directive 2011/16/EU than that provided by the current Directive, and, as such, are or will be under an obligation to provide said wider cooperation to other Member States as well.[38] On the other hand, a concretisation of non-regional multilateral instruments appears, to date, somewhat detached from FATCA-specific initiatives with the Convention on Mutual Administrative Assistance enlarging its signatory body. The most interesting question would then be to determine whether there is any margin of, even partial and functional convergence between FATCA and the framework provided by the said Convention. A remarkable contribution will likely be provided in this respect by the Global Standard for automatic exchange of information released in February 2014 by the OECD.[39] The same Global Standard acknowledges that the Common Reporting Standard ("CRS"), with a view to maximising efficiency and reducing cost for financial institutions, draws extensively on the intergovernmental approach to implementing FATCA.[40] According to the same document, the main divergences, however, lie, besides the US-related peculiarities of FATCA (such as, for instance, reliance on citizenship as a relevant cause for

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28-2014); Singapore (5-5-2014); Slovak Republic (4-11-2014); South Korea (4-2-2014); Thailand (6-24-2014); Turkey (6-3-2014); Turkmenistan (6-3-2014); Turks and Caicos Islands (5-12-2014); Ukraine (6-26-2014); United Arab Emirates (5-21-2014); Uzbekistan (6-30-2014); Armenia (5-8-2014); Hong Kong (5-9-2014); Iraq (6-30-2014); Nicaragua (6-30-2014); Moldova (6-30-2014); Paraguay (6-6-2014); San Marino (6-30-2014); Taiwan (6-23-2014)

[35] Kristen A. Parillo and Jamie Arora, Tax Notes International, 2012-08-27.

[36] J. R. Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, 5 Villanova Law Review, 495 (2012); ID., FATCA and Schedule UTP: Are These Unilateral US Actions Doomed Unless Adopted by Other Countries?, 13, Villanova University School of Law Working Paper(2012 -2005), retrievable on the following website: (http://ssrn.com/abstract=2029963)

[37] Proposed Directive COM(2013) 348 final of 12 June 2013, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

[38] See Para. 4 of the Preamble of Proposed Directive COM(2013) 348 final.

[39] The document can be retrieved at the following link: http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Common-Reporting-Standard.pdf

[40] OECD, *Standard for Automatic Exchange of Financial Account Information*, Para. 8.

the supply of information in relation to specific persons) in the multilateral emphasis of the Global Standard.[41] This implies that, in the current situation, referring to FATCA as a multilateral system would probably be premature but there might be major room for convergence in the near future.

5 The potential of FATCA as a global policy tool

As indicated above, the main premises for FATCA to effectively function as intended is a payment from a source within the U.S. held by a U.S. or foreign person, which is to be paid to a FFI or NFFE. Thus, the existence of a latent payment derived from a source in the U.S. is the main premise for this regulatory mechanism, as it functions as compliance leverage. In a broader perspective, this regulatory mechanism presupposes that the implementing State be a major financial centre which proves strongly attracting inbound investments. As mentioned above, FATCA has only a limited practical effect on FFIs or NFFEs that do not derive payments from sources within the U.S. It is doubtful that this will pose a significant problem to the U.S., due to the pervasiveness of the interdependence between most economies and the US financial market.

If classic FATCA were to become a model adopted by other States, the issue of insufficient magnitude of the respective financial markets (which has ostensibly played an important role in propagating US FATCA, given that it is very difficult for foreign financial investors to stay clear of the US financial market) may arise. Private subjects may find that the market in the State in question is not adequately valuable to accept a similar regime. Thus, the regulatory mechanism of FATCA may be an impediment to inbound capital flow in such States. In particular, this may pose a problem to developing countries, in which many have the common trait of low cross-border capital flow and the need of inbound investments. However, if unilateral FATCA-like regimes are adequately widespread, it is plausible that private subjects will generally accept it, rather than limiting investment opportunities.

However, several unilateral FACTA systems may pose immense difficulties, as this could require financial institutions to withhold the same payment for several States simultaneously and comply with a number of different reporting requirements. For this reason and other concurring ones, a claim is that international adoption of a FATCA system would

[41] Ibidem

require a certain level of harmonisation, integration and collaboration among States wishing to implement such a system.[42]

The shaping of FATCA as a global mechanism has been the subject of some discussion. A general view is that considerations of efficiency and harmonisation suggest that it should be based on a multilateral framework.[43] However, in shaping the multilateral system, the views are somewhat divergent. In favor of a multilateral system is an argument particularly relevant to countries with low cross border capital flows, such as developing countries: a multilateral system could allow such States' to benefit from the leverage of other States' markets. Even though the FFIs interest in the developing country would be insufficient in itself, non-compliance with the requirements of the FATCA regime would lead to withholding on income from the other participating States', thus increasing the compliance incentive.

The current IGA system contributes to ease the compliance burden and overcomes issues of extraterritoriality and treaty override, compared to the IRC provisions. The reciprocal versions also contributes to enhanced tax information exchange. However, it does not establish a tax information exchange system among the States party to such an agreement with the U.S. In addition, information exchange under the IGA will be subject to the conditions foreseen by existing instruments, meaning that the exchanged information generally cannot be redistributed to other States. Nevertheless, this system involves exchange of vast amounts of information which will likely have the effect to promote a climate of enhanced transparency, in particular with regard to the availability of account ownership information.

PART TWO: TOPICAL FATCA ISSUES IN THE EXPERIENCE OF THE SURVEYED COUNTRIES

1. Direct application of IRC provisions ("Classic" FATCA)

1.1 FATCA against the backdrop of existing local reporting obligations

The surveyed Countries under scrutiny have expressed different reactions to the envisaging of a direct application of FATCA as set forth by the IRC provisions and the related regulations. The different orientations appear to be dependent on the relative exposure of each

[42] J.N. Mukadi, *FATCA and the Shaping of a New International Tax Order*, Tax Notes International, 1227 (June 25 2012).

[43] See J.R. Harvey Jr., *FATCA and Schedule UTP: Are These Unilateral US Actions Doomed Unless Adopted by Other Countries?*, 13, Villanova University School of Law Working Paper (2012 -2005), retrievable on the following website: (http://ssrn.com/abstract=2029963)

Country to the impact of FATCA legislation, which, in turn, is a variable of the degree of interaction between the financial system of each concerned Country and that of the US. In this respect, it is possible to infer that the selected Countries are representative of a continuum with Colombia, on the one hand, and Uruguay and Uganda, on the other hand, on the two poles, showing, respectively, greater and lesser exposure to the impact of FATCA legislation and South Africa and Brazil somewhat in the middle.

Generally, in surveyed jurisdictions, financial institutions are subject to extensive reporting requirements, set forth not only by the local tax legislation but also by anti-money laundering/terrorism financing regulations and exchange control measures. Such a generalization may not apply to Uganda, where, while there seems to be a fairly circumscribed set of know-your-customer rules, they do not actually require any disclosure concerning the nationality of the customer.

At the same time, with the exception of Colombia, where, based on information retrieved from interviews with industry representatives, the FATCA-driven adjustments in the reporting system should eventually be minor, there is a general perception among the three Countries [44]already experienced in reporting by financial institutions that the implementation of FATCA would present some elements of rigidity, since new "know your client" procedures would have to be introduced. Moreover, while not as pervasive as the reporting requirements pending upon financial intermediaries, FATCA foresees that also non-financial entities (defined in FATCA jargon as N.F.F.E. – non financial foreign entities) would be required to identify US ownership, a task for which non-financial entities may not always be prepared.

1.2 Conflict between FATCA requirements and domestic legal boundaries

One of the critical aspects of the implementation of FATCA outside the framework of an intergovernmental agreement would be that some of the obligations imposed by the FATCA system may result being at variance with the respective domestic legislation. This appears to be true in all examined Countries.

As far as Brazil is concerned, there is a general understanding that "classic FATCA" would be regarded as unconstitutional. Namely, some measures foreseen under the US FATCA legislation would bring about some violation of fundamental rights. In particular, the freezing of bank accounts of recalcitrant account holders would likely not integrate one of the

[44] Namely, Brazil, South Africa and Uruguay.

overarching reasons under which what effectively constitutes an infringement of property rights may otherwise be justified. The 30% withholding, shall this be qualified as a punitive measure (as it would seem the case also based on FATCA legislative history), then it would effectively provoke an infringement of the sovereignty of Brazil; in addition, the enforcement of penalties imposed by private parties in the absence of a supporting Court order would be considered outright unlawful under Brazilian law.

The Brazilian reporters also argued that, while it is firmly in the prerogative of any financial institution to refuse clients (for instance, due to their stated unwillingness to co-operate in ensuring FATCA compliance), a full regime application of FATCA across Brazil may lead to a situation where a US person wishing to open a bank account in the Country but unwilling to comply with disclosure will ultimately be unable to open an account in any Brazilian bank; under such a scenario, according to the Brazilian Reporters, a US person would then most likely be a successful plaintiff based on his being subject to a discrimination.

On the other hand, if the above "pathological" situations would raise considerable problems, the "physiology" of FATCA should prove less thorny. Namely, there seems to be a general understanding that reporting financial information to the IRS would not violate Brazilian bank secrecy regulations, provided that such information is used for tax audit purposes and that the account holder is duly informed. It should however be underlined that such a conclusion would be valid only under the current Supplementary Law regulating the disclosure of bank information; if, for any reason, the concerned Supplementary Law should be revoked, any reporting to the IRS would represent a legal breach and a violation of a client's constitutional rights due to the lack of an adequate legal basis supporting it.

In Colombia, regardless of the existence of bank secrecy laws, there are many domestic laws and regulations that could effectively be breached by Institutions trying to comply with "classic FATCA" requirements, particularly in what refers to reporting otherwise confidential information to a foreign government who is not a party to the contracts celebrated between the entities and their clients (at least not the existing ones), unilaterally deciding to close recalcitrant client accounts (assuming that the contract did not give the entities such power), and to acting as a withholding agent for a tax which is not authorised under domestic law and to which the client has not agreed contractually.

Moreover the sharing of information with the IRS, absent client authorisation, would constitute an infringement of several legal provisions which, while it might not mean the commission of a criminal offense, would most likely give rise to civil remedy and in most cases, compensation and the imposition of administrative fines (or even the closure of an

establishment) following administrative and/or judiciary procedures. Certainly FATCA regulations provide for the obligation to obtain waivers (authorisations) from holders of US accounts, (which would preclude the consideration of the exchange as a violation of contracts in most cases), but there are many instances of information exchange which would take place in the absence of said waiver (such as reporting what has been done for excluding individuals and entities which were initially suspected to be US persons from withholding and reporting obligations). Moreover, the legality or constitutionality of said waiver may in any case give rise to litigation as it is not certain that the waiver would be considered as a legally enforceable document.

With reference to the role of participating institutions as withholding agents (or electing to have a US based entity as the source of the payment to withhold), it may be argued that the risk of a breach of domestic law would be even higher, mainly because, unlike what would happen in most cases of unauthorised information exchange or unilateral contract termination, there are certain criminal law provisions which could be used by affected clients to accuse the withholding institution to be illegally disposing of the client's funds in order to profit an unauthorised third party (in this case the IRS) at the client's patrimonial detriment. In this case, felonies such as the Abuse of Trust (*Abuso de Confianza*) or Fraud (*Estafa*) might be brought to play with, as of now, unforeseen consequences.

In Uganda, confidentiality of bank information is sanctioned by specific Bank of Uganda regulations, that require that a customer's information be treated as confidential and not shared with third parties. More precisely, the only supervisory institution entitled to gather information from banks and other financial intermediaries is the Bank of Uganda, which, in turn, is however bound to secrecy unless it obtains a waiver from the same financial intermediary and from the concerned customer . At the same time, due to the administrative nature of such a confidentiality regime, it seems that the latter could be amended by establishing an express cause for waiver in the domestic legislation: namely, according to Paragraph 7 (3) of the Bank of Uganda Financial Consumer Protection Guidelines, 2011, disclosure of said information would not be allowed unless required by law.

Finally, in Uruguay, the main obstacle would be represented by the bank secrecy law (Law Decree 15.322) and by the Data Protection Act (Law 18.331), which would jointly limit the viability of collecting and transmitting information on an account holder without their explicit granting of a waiver.

1.3 FATCA in the perspective of the domestic financial sector

Of the Countries comprised in our pool, Colombia and South Africa appear as those whose financial sector displays an orientation to comply with FATCA even at the expense of complying with local legislation. In particular, in the Colombian perspective the impact of the 30% withholding that would be levied either by U.S. payors making payments to non-compliant foreign financial institutions or by Foreign Financial Institutions already in the FATCA system in case of flows concerning institutions that are not FATCA compliant is likely to outweigh any possible adverse consequence deriving from the infringement of domestic legislation.[45] On different grounds, the stimulation of foreign investment – primarily in the financial sector, as banking industries where FATCA compliance would not be ensured would likely be seen as less competitive and interesting by foreign investors - has also been mentioned by the South African report as a possible driver behind trying to comply with FATCA against any domestic odds. On the other hand, Brazilian reporters, while not providing speculations with regard to the likelihood of a similar occurrence emphasised how litigation stemming from such a contrast would most likely be doomed to failure for the defendants (the financial institutions) up to the Constitutional level; for this reason, they argued that only large financial players (or local branches of foreign financial institutions, that would have to comply with the orientations of their Headquarters) with a considerable trade-off at stake could be predicted to abide to FATCA "no matter what", while smaller institutions with lesser international exposure would be less likely to adopt such a stance and would instead feel themselves more constrained by their domestic legal order. In this respect, the risk projections of Brazilian financial institutions seem more comprehensive in cumulating the effects of such a potential surge of litigation with the overheads connected with the introduction of FATCA due diligence requirements. Based on the outlook of the Brazilian reporters, the conjunction of the above factors (the potential surge of litigation combined with FATCA-related overheads) may in some cases outweigh the savings from avoiding the 30 percent withholding. The overhead costs would arise from the need to re-design account opening procedures (in order to verify whether the prospective client is a US Person or not) and from investigating every single client a FFI has. Other costs to be considered would be

[45] This seems to be the prevalent perception in the Colombian banking community. At the same time, even though possibly less pronounced than in Brazil, the various extent of US exposure to which financial institutions are subject means that for some institutions FATCA would be an unavoidable burden, whilst for some others there would be options available to attempt to diminish the scope of reporting and withholding obligations by filtering out the few US persons they are engaged in business with and preventing further transactions to be carried on with such subjects.

the foregone revenue for denying or banning recalcitrant clients. Finally, due diligence and reporting would constitute a major disbursement of resources given their nature of revolving obligations, since FFI's are required to provide updated annual reports every year.

In any case, there is no doubt that FATCA would have a major impact on the local financial sector of the concerned Countries. In particular, it has been pointed out by the Colombian reporters that, since many institutions will attempt to limit their exposure to US persons if such a clientele is not a main component of their portfolio, FATCA would then have the potential to act as an externality to the financial services market that will impede or affect competition. Going back to the entities that will alter their client bases or portfolios, the objective of the changes (usually negotiated between legal, commercial and customer service departments) would be to alter the terms and conditions of the products offered so that performance of FATCA obligations becomes part of the financial contracts. However, because there are also FFI's in the Country which have already set up all the necessary procedures for FATCA compliance and which are foreseeably not going to reduce their US person clientele, any market share of US businesses that would have been lost from the other FFI's would be, logically, retained in Colombia under those FFI's with robust US links or multinational operations; this implies that, while in aggregate terms, inbound capital flows might not face any significant decrease, a major reshaping of market shares will on the other hand most likely be observed.

The majority of surveyed Countries seem to agree that it appears unlikely that FATCA would provoke migration of financial institutions to other Countries; in particular, Colombia and South Africa believe - for different reasons (the mix of investment opportunity and the deeply engrained ties with the United States in respect to the former and their role as a regional hub in respect to the latter) - to be particularly immune from such an occurrence: As a consequence, these Countries hold the view that the effect of FATCA on investment flows between the United States and their Countries should not be dramatic. On the other hand, South Africa has clearly expressed the view that a migration of account holders to other jurisdictions not compliant with FATCA may not be excluded. A similar view is understandably shared by Uruguay, whose financial sector is chiefly propelled by offshore investors that may by their very nature be more volatile than other kind of investors; in this respect, the magnitude of potential competitive repercussions will depend on the relative exposure to US financial investments. On the other hand, in Uganda, there is the perception that opening the door to the implementation of FATCA may place the Country's financial

system at a competitive disadvantage with other neighboring economies in case the latter remained outside of the scope of the FATCA network.[46]

1.4 Implementing FATCA in Developing and Emerging Countries

From an implementation viewpoint, among the surveyed Countries, Colombia possibly appears as the most confident in the capacity of its financial sector to sustain the burden introduced by FATCA. Structurally, the response capacity of Colombian institutions is strengthened by the fact that the country has had stringent financial regulations since the 1998[47] financial crisis and as part of the regulatory schemes, financial institutions are expected to comply with a multitude of reporting and investigative obligations, both before the Financial Superintendency and the Central Bank (Banco de la República) which have forced them to put in place IT systems designed to gather, process and deliver financial information about accountholders to the relevant authorities. Likewise, Colombia's own experience with fighting money laundering (seen as a vital step in fighting drug trafficking and terrorism) has seen the creation of specialised procedures to report financial information concerning both clients and individual transactions (for example the ALA/CFT system) to supervisory organisms such as the UIAF (Financial and Information Analysis Unit), the Judicial Police (DIJIN), and the General Prosecutor's Office (Fiscalía General de la República). Additionally, most Colombian financial institutions and many NFFE`s in the country are also familiar with US financial reporting procedures, having had to cooperate with DEA and the US Treasury Department in frequent operations aimed at preventing money laundering. Another structural strength which adds to Colombia's financial reporting culture is the fact that all financial institutions already have to record and report to Colombian Tax Authorities (DIAN) a plethora of information regarding their client's operations as well as their own. As a result, most financial institutions would be capable to meet the challenges since they can profit from their reporting experience and they possess IT systems which would allow them to do so; likewise, according to our investigation, those who are part of multinational groups (be it Colombian or foreign based) have the resources to create

[46] This circumstance may not be excluded in particular in relation to those African Countries that have limited ties with the US financial system, as, in this case, the penalty withholding tax would find limited scope of application so that, absent such a leverage, there would be the lack of any real incentive to comply with FATCA.
[47] The South African Report has also pointed out to the existence of stringent financial regulations in their system as enshrined in the Credit Act.

committees and task forces devoted to FATCA compliance and are likely to hire external legal or tax firms in order to design and implement the necessary processes in the Institution.

Uruguay similarly appears particularly confident in the ability of its financial sector to comply with FATCA procedural requirements despite, apparently showing, on the other hand, to still possess the tightest bank secrecy regime in the area; in this regard, the most challenging adaption would consist in obtaining a waiver by the accountholder with regard to their secrecy safeguards.

On the other pole of the spectrum, Uganda points out to the circumstance that the implementation of FATCA would require a major overhaul of the information systems of local financial institutions in order to fill the technological gap.

As for the possibility of local Tax Administrations to "free-ride" on "classic" FATCA (i.e., without an IGA in place), the possibilities appear somewhat limited by the circumstance that the procedures laid down by FACTA Regulations tailor very specific informational needs that may not match those of the local Tax Authorities; at the same time, South Africa argued that having FATCA in place may in any case reduce the frequency of due diligence audits and enable more reliance on the information produced for its own tax purposes.

In this respect, some Countries would appear to explicitly deny the existence of any potential local positive spillover arising from FATCA. In particular, in the case of Colombia, this possibility has been ruled out by the reporters because financial institutions in the Country are already commanded by law to obtain copious amounts of information regarding accounts and their transactions for the national Tax Authority. Thus, given the already considerable mass of information available to the local Tax Administration, the beneficial impact of accessing new information systems devised to comply with FATCA would, in the end, be limited. In conclusion, it may be argued that the same factors that apparently place Colombia in a situation of ease towards the perspective implementation of FATCA are the same that would prevent the local Tax Administration to reap any significant marginal benefit from such a new compliance framework. The only possible advantage would be US-specific; in particular, the Colombian Tax Administration would now know which Colombian taxpayers are also US persons and it could easily use this information to investigate the presence of unreported assets or income which has been reported to the IRS but not to DIAN.

Such a view is shared, albeit based on different arguments, by Uruguay, according to whose reporters, the fact that the institutions will be adapting in order to comply with FATCA will not grant the Tax Authorities more rights to access the information that they already have or that they could otherwise not have.

On the other hand, Uganda foresees that the introduction of FATCA, even in its classic version would provide some meaningful positive contributions to the local environment, such as better record keeping in banks not only with respect to customers who are US residents but to bank customers generally. In the end, FATCA, together with the increasing interest in tax information exchange generally, are perceived as bound in contributing positively to the manner in which information is collected, sorted and shared in the country. At the same time, there seems to be a perception of some inherently "neo-colonial" features of FATCA due to its ultimately being a piece of extra-territorial regulation.

2. Issues Arising From Non-Compliance

The only jurisdiction where instances of deliberate non-compliance (in the perspective of the local financial sector) would not appear to be too unlikely is Brazil, as it was argued that it could not be excluded that the imposition of FATCA could backfire against the US leading to a decrease in inbound financial investments. The Brazilian reporters also appear to mention the possibility of some forms of cost-sharing of the burden imposed by the implementation of FATCA between the targeted financial institutions and the Brazilian government, in case no other relief alternative is found.

In all other surveyed Countries, non-compliance with FATCA is not perceived as a likely alternative and it is not considered sustainable in the long run, as a matter of fact, some Countries, such as Colombia, rule out the possibility of non-compliance with FATCA even from day one. An insightful remark by the Colombian reporters argues how FATCA would, in any case, exert some effects on the local financial industry, pushing some actors out of the market altogether or at least out of the segment of the market where US dealings are a condicio sine qua non .[48]

South Africa and Uruguay also point out at the potential international double taxation that may derive from the application of the 30% withholding; the consequences appear particularly severe in the Uruguayan perspective, due to the absence of a tax treaty with the United States that may address the matter.[49] On the other hand, even in relation to Countries that have concluded a double taxation convention with the United States, it is not clear

[48] The latter is a situation that, due to the deep ties between the Colombian and the US economies, is possibly more common in Colombia than in other Countries in the region.

[49] Even though the Brazilian report does not appear to address such a concern, the situation would be analogous, due to the absence of a double taxation convention between Brazil and the United States.

whether the "punitive" withholding would fall within the related objective scope of application (taxes covered).

In a pre-emptive perspective, some reporters have also set forth some suggestions in relation to the means of propagating the know-how necessary for compliance with the FATCA obligation across the whole financial system of a given Country. In particular, according to Colombia, when thinking about how to reduce the externalities and transaction costs to FFI's and NFFE's in emerging countries, asides from the intervention of their respective national authority's in concluding an IGA and assuming some of the responsibilities, the other measures which might be of assistance refer to establishing synergies between smaller institutions, or tutelage schemes between larger institutions which have already implemented solid compliance procedures (usually FFI's) and smaller FFI's and NFFE's so that those entities which are lagging behind, or which do not necessarily possess the necessary resources to devise compliance schemes which are entirely customised, might be able to adopt the "best practices" established by compliant institutions.

The proposal has its caveat in that, in practice, entities which have successfully implemented compliance procedures have spent considerable resources in creating them and might see them as proprietary know how which gives them a competitive advantage and which, as such, ought not be shared. In addition to this, both trade organisations and domestic authorities have the opportunity to assist in expediting the adaptation process by providing technical support and/or resources; in this respect, it must be said that FFIs in Colombia have benefited from the proactive role undertaken by the banking guild (Asobancaria), which has acted both as a source of technical support, and as a lobbying vehicle to attempt to align the interest of FFIs with that of the Colombian government.

In the case of Uganda, one of the main potential causes for grave under-implementation of FATCA requirements would lie in structural characteristics of the local economy and, in particular, in the prevalence of a large undocumented financial sector. At the same time, local financial intermediaries may engage in a cost-benefit analysis and get to the conclusion that implementing FATCA may not be in their best interest. Namely, said institutions will need to incur additional costs in putting in place internal procedures to ensure compliance, make upgrades to technology, train their personnel in the requisite rules and undertake periodic audits to test the integrity of the information that they collect. For many of these institutions, the costs associated with compliance may not be commensurate with the benefits derived therefrom, also considering the relatively minor exposure of the local banks towards the US financial system. Moreover, as with many exchange of information exercises,

there is the risk of abuse of powers by the persons that have access to this information, as there is a concern that such information will be used for purposes other than those for which it is collected.

3. FATCA Implemented as an IGA

The pool of surveyed Countries shares an interest in the conclusion of an IGA. Among the surveyed pool, South Africa and Brazil have concluded a Model I IGA in the course of 2014 and Colombia has been included by the US Department of Treasury in the list of jurisdictions that have "substantially agreed" to a Model I IGA.

Such a pattern is consistent with the results of the period preceding the conclusion of the IGAs, as most surveyed Countries have in this respect clearly expressed a preference for a reciprocal version of IGA; the reasons for this vary and go from considerations of international legal nature, such as in the case of Brazil and South Africa, as an international agreement would have to entail some form of reciprocity, to, surprisingly, perceived benefits deriving from access to US-sourced information, such as in the case of Uruguay, where a reciprocal IGA would provide the local authorities with more thorough information on the actual source of many financial investments in the Country and, moreover, given the attractiveness of the US financial market, it would allow Uruguay to fully implement its worldwide taxation prerogatives on the capital of resident individuals. On the other hand, Uganda does not perceive the conclusion of a reciprocal IGA as a priority, as there is skepticism about the substantiality of such a reciprocity, given that comparatively few Ugandans would be accruing US-sourced income over a meaningful threshold.

Countries with a strong banking sector, such as Uruguay, are particularly concerned in making their jurisdiction attractive for other financial institutions and, in this respect, the conclusion of an IGA would be perceived to address one of the main FATCA criticalities (sustainability for financial institutions) at its roots. In this respect, subscribing an IGA would be easier for everyone, avoiding every financial institutions need to subscribe a particular agreement with the United States. Moreover, in case such an agreement is entered into, compliance could be further monitored also in the interest of the US authorities, as the State where the foreign financial intermediaries are situated could stipulate fines in case the information is not duly communicated.[50]

[50] This may, on the other hand, possibly have an expected positive spillover in those developing Countries where corruption is a big issue.

At the same time, some Countries, such as South Africa and Uganda, have recognised that the authorities of developing Countries may, unlike their US counterpart, have problems in monitoring the compliance of US financial institutions with the obligations that would be imposed upon them in pursuance of a reciprocal IGA. On the other hand, Uruguay has expressed skepticism concerning the likelihood that the United States would consent to conclude an IGA with developing Countries.

As already mentioned, Brazil and South Africa have effectively concluded an IGA with the United States under the form of Model I IGA. In this respect, South Africa has pointed out that, in the course of negotiations, intensive discussions have been held with all financial institutions and bodies to collaborate on what would be a workable model taking into account the South African financial services industry, South African definitions, South African entities and South African products.

One of the reasons why an IGA was considered as particularly necessary in these Countries lies in the circumstance that it would foster the introduction of new avenues of exchange of information on an automatic basis as opposed to the current arrangements laid down in the DTC (for South Africa) and TIEA (for Brazil) where only exchange of information upon request is provided. Such a circumstance could have very relevant implications in some Countries with pervasive confidentiality measures in their domestic systems, such as Uruguay. In particular, in the latter Country, if an IGA is subscribed, it will be enforced through a law, and therefore, it will tacitly change the laws which establish something different. The benefit of this is that the financial institutions will not have to ask for a waiver to their clients one by one, as it would be the case under a "classic FATCA" scenario.

The legal status of an IGA is a matter of debate in most Countries, however, some Countries, such as South Africa, have clearly expressed the position that an IGA would have the same status as an exchange of information agreement, which, within the South African system of sources is assimilated to a treaty and as such enjoys full force of law within the South African system.

It is understood that, unlike what would happen under "classic FATCA", the conclusion of an IGA would place a pressure on the capacity of the local tax administration, since it would involve its active participation in the routing of information (which, without an IGA would fully fall in the prerogatives of financial institutions); however, this does not appear to be perceived as a major criticality by the jurisdictions under scrutiny, even by those with a more limited experience in administrative co-operation matters, such as Uruguay. As pointed out by Colombia, however, regardless of the actual avenue of implementation, the

role of domestic authorities would in any case be very important, either by the conclusion of an IGA or by the alteration of domestic legislation and regulations in order to accommodate FATCA's demands on participating entities. In the definitive, it is very unlikely that even in a "classic FATCA" scenario, local Authorities could simply stay idle.

From the specific perspective of a low income developing Country such as Uganda, which has not concluded any tax agreements with the United States so-far, the conclusion of an IGA would necessarily be free-standing and the possibility of enhancing co-operation between the two Countries is pointed out as the main positive spill-over. In particular, Ugandan reporters have expressed the wish that the conclusion of an IGA may promote cooperation relating to technical tax assistance, workshops geared towards exchange of ideas and practices and facilitation in technological advancement, which is a prerequisite for effective information sharing.

On a final note, Brazil offers an interesting area of enquiry with regard to the impact of IGAs on the domestic legal orders of partner Countries. Namely, while "classic FATCA" would surely raise, as anticipated, major issues under Brazilian law, the conclusion of an IGA may nonetheless still touch some sensitive areas. The main problem would be that bank secrecy is a topic that can only be changed by "Supplementary Law", while treaties are enforced in Brazil as an "ordinary act"[51]. Brazilian Supplementary Law No. 105 on bank secrecy only allows for disclosure of financial information upon request Therefore, an automatic report provision under a hypothetical Brazil-United States IGA would be void. In this context, an IGA can only be fully enforceable if, either, said Supplementary Law No. 105 is amended or another Supplementary Law provides for automatic financial information reporting; or, finally, if Brazilian tax law allows the 30% withholding tax.

4. FATCA at the Interface of Other Policy Perspectives

It may be argued that when considering FATCA as a "regulatory model" susceptible of replication, some differentiated outlooks could be singled out. In particular, when it came to suggesting whether analogous mechanisms should be replicated on a unilateral, bilateral or multilateral basis, a continuum could be observed among the surveyed Countries between two poles represented by the preference for a bilateral or a multilateral system, respectively.

51 The Brazilian legal system provides that certain topics can only be addressed by a "supplementary law", while others are addressed by an "ordinary law".

In particular, South Africa displays some skepticism towards the conclusion of a multilateral agreement in this area; in particular, a multilateral model may not be advantageous to South Africa especially if it concerns other African States. The reason here is that South Africa may be potentially used as the provider of information on other African States. In the view of the local reporters, such an undertaking would be time consuming, costly and with no return for South Africa.

On an intermediate position, Colombia advocates what could be defined as "selective regional multilateralism" in order to overcome the deficiencies that would hinder developing Countries' ability to conclude agreements of a nature analogous to FATCA.

Namely, Colombia acknowledges that developing Countries are faced with three realities; in particular: the lack of economic and political leverage suffered by developing countries per opposition to the United States; the existence of structural deficiencies in developing countries which would make information collection and processing far more costly and difficult than what FATCA will be for the United States, and the fact that compliance would be reduced by the effect that a "saturation" of parallel financial reporting information processes would have on individuals and entities across the world, being forced to comply with a multitude of FATCA-like mechanisms.

By doing so, Colombia also points out, although without providing possible alternative solutions, to an inherent flaw of FATCA-like arrangements in the perspective of developing Countries, namely, the circumstance that the exchange of massive amounts of information would pose a major capacity challenge on local Tax Administrations. In any case, Colombia appears confident that in the future multilateral FATCA-like schemes would indeed constitute feasible tax policy provided the right number of developing countries, with similar socio-economic and political conditions decided to team up as a bloc. The bloc depicted by Colombia displays a geo-political and economic consciousness, as it brings together those Latin American Countries relatively more open to dialogue with "Northern" constituencies and show the best economic fundamentals and growth perspectives in the Region; in particular, such a bloc may encompass, besides Colombia, Brazil, Chile, Mexico and Peru. In the view of Colombia, such a bloc would likely be successful in creating a "critical mass" as institutions and individuals that could have transferred their assets out of one of the jurisdictions (or borne the withholding in one of them) and still managed to keep their business viable – with the exception of extractive industries which have low mobility -,

would not be able to if they suddenly faced the threat of being excluded from such a large unified market with no viable alternative jurisdictions to relocate to.

On the other end of the spectrum, Uruguay appeares to favour multilateral solutions, even without a specific regional connotation. This was mainly motivated based on the small size of the Country and on the interest in acquiring information on a worldwide basis in order to administer their income tax on individuals ("IRPF") which, in relation to capital, adopts a world-wide basis.

An interesting perspective with regard to placing FATCA into a broader regulatory context comes from Uganda, where the IMF is currently promoting the conclusion of Memoranda of Understanding aimed at ensuring that in all financial institutions subject to the oversight of the Bank of Uganda the position of a "tax manager" be introduced. There is the impression that the Bank of Uganda has not showed any inclination towards the implementation of such a recommended practice. The introduction of FATCA may then prove to be a catalyst also for broader areas of reform at the interface of financial regulation, corporate governance and taxation.

CONCLUSIONS AND RECOMMENDATIONS

The analysis carried out across the selected jurisdictions suggests that FATCA presents local financial institutions with new challenges and reporting requirements that may not be covered even in those jurisdictions where said institutions are already subject to sophisticated reporting obligations. In some instances, the kind of information that would need to be gathered and processed in pursuance of FATCA is so specific and (necessarily) geared towards a US perspective that the pre-existing reporting obligations would need to be overhauled or at least meaningfully restructured. Such a finding suggests that flexibility and proliferation of different standards of reporting may be desirable from a policy perspective insofar they allow a reconciliation between the new FATCA requirements and the existing reporting obligations and should be encouraged as far as possible.

Somewhat counter-intuitively, the transition to FATCA standards may result easier in those jurisdictions that have a relatively limited set of reporting requirements insisting upon their financial institutions as this would not need to be overhauled,/reconverted but adapted to the specific needs of FATCA. On the other hand, FATCA implementation requires great administrative capacity as well as human and technological capital.

In the light of the above, it may somewhat provocatively be argued that such an "ideal" environment for the implantation of unadultered FATCA reporting rules may be found in those jurisdictions that have previously been hosting major offshore financial centres: namely, in these cases, there would likely be a relatively minimal set of pre-existing reporting requirements while, at the same time, due to the prominence of the local financial sector, it may be expected that the necessary human and technological capacity for the implementation of the kind of compliance required by FATCA be present.

Besides the macro-perspective of the systemic interaction between FATCA reporting requirements and pre-existing reporting arrangements foreseen by the various jurisdictions, there is also a micro-perspective to be considered by assuming the point of view of the single financial institutions to which FATCA would apply. Namely, it seems unavoidable that FATCA introduces unforeseen competitive pressures within a given financial system as there will be some financial institutions that, for instance, due to their belonging to an international group may be better equipped to cope with the reporting challenges posed by FATCA. While these dynamics somewhat fall outside the proper scope of this research, in a developmental perspective it would seem desirable to promote, even in cases of application of "classic FATCA", some forms of coaching for the benefit of smaller institutions that, despite their commitment to compliance, may find such a pursuit particularly burdensome and complex.

Regardless of feasibility or interference/duplication issues with other reporting requirements, all surveyed jurisdictions showed either pieces of legislation or regulation with which the kind of disclosure and information-forwarding practices dictated by FATCA would be at odds. In this respect, some kind of intervention of either unilateral nature or brought by an IGA would be necessary in order to overcome such conflicts. At the same time, IGAs would be a way to somewhat "sterilise" such an existing friction between FATCA rules, which ultimately rely on a form of extractive transparency and domestic rules that, although often safeguarding confidentiality may actually be inspired by broader needs to fulfil "institutional" transparency. FATCA then confirms to be a very stimulating case study on the balancing between these two types of transparency. IGA would ultimately appear to strike the balance in favor of extractive transparency as it would seem that no specific set of alternative guarantees is offered to taxpayers in substitution of those domestic guarantees that, where present, would most likely be waived in pursuance of an IGA. By contrast, in pursuance of classic FATCA the dialectics between the domestic safeguard measures that consitute institutional transparency and the requirements of endogeneous extractive transparency would better be preserved.

The likelihood of deliberate non-compliance with FATCA varies from Country to Country and is ultimately based on the trade-off between the costs of sustaining the 30% withholding tax penalty (weighted by the likelihood thereof, which is directly proportional to the exposure of one's Country economy to the US financial system) and the penalties of domestic origin that would arise as a consequence of a breach of internal law.

For these reasons, an IGA seems to be unanimously perceived as a desirable objective by all surveyed jurisdictions. The main driver for this preference would be the removal of the aforementioned attrition and conflict between domestic provisions and FATCA. While there is a general inclination towards reciprocal arrangements, some of the jurisdictions appear to be aware that reciprocity would not per se ensure a mutual flow of information given that not all Countries would equally benefit from gathering information on their residents' US accounts. In this regard, the relevance of reciprocal solutions is intimately tied to the degree of attractiveness of the US financial sectors on the residents of a given Country, given that this factor would ultimately have two major implications, both strongly deposing in favour of the conclusion of a reciprocal IGA: namely, as earlier mentioned, the impact of the 30% penalty would result being magnified under these conditions of strong interdependence, so that the financial sector of the concerned Country would perceive the conclusion of an IGA as a priority in order to minimise the chances of non-compliance with FATCA; on the other hand, this will be tied to the perception by the local Tax Administration of the access to information concerning residents' offshore accounts. In any case, the only Country in the surveyed pool that that has actually gone through the conclusion of an IGA has observed that, taking into account the length of time needed to negotiate such agreements, opting for a reciprocal IGA when possible would be the most prudent option, since, even though a developing Country may not initially take advantage of reciprocal information the fact is that the facility will be available when required.

When it comes to policy perspectives concerning the bilateral nature of the IGAs, it is possible to observe that larger Countries in the pool seem to be more inclined towards bilateral solutions, due to their confidence in maximising their negotiation leverage with the US and to the perception that a multilateral solution incorporating other neighbouring developing Countries may prove problematic and burdensome due to the great asymmetry and gap between the various jurisdictions. On the contrary, other relatively smaller, emerging Countries (such as, in particular, Colombia) perceive the need to create a critical mass in negotiations. Moreover, there is also the perception of the inherently multilateral nature of the

international standards of transparency and exchange of information and the adoption of a multilateral channel to echo such a form is perceived as especially desirable.