Protecting Taxpayer Privacy Rights under Enhanced Cross-border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights

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 “[P]rivacy is an irreducibly critical element in the operation of individuals, groups, and government in a democratic system with a liberal culture.”²

“The exchange of information between national tax authorities has emerged in recent years as a—probably the—central issue in international tax policy discussions.”³

I. Introduction

For a number of important policy reasons, tax authorities share information they collect about taxpayers with tax authorities from other countries. These tax authorities along with tax scholars generally recognize the need for enhanced cross-border tax information exchange (TIE) to assist with the enforcement of tax laws as well as for other reasons, but often disagree on the appropriate reform path. This Article identifies and discusses the challenges to taxpayer privacy rights and interests presented by TIE to see whether reform efforts are needed.

In recent years, a number of initiatives have taken place to promote TIE in part because technology change has made it increasingly more feasible to engage in cross-border tax sharing. The digitization of tax records, the maintenance of these records within databases, the transmission of records across information technology networks along with other technology developments have facilitated the ability of tax authorities to collect, use and disclose tax information on a global basis. With respect to TIE, it has been noted that “[v]ery little is known about the extent, nature, or especially, the

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effectiveness of international information sharing”. Nevertheless, there have been efforts to assess the amount of information sharing. For instance, the gross amount of tax information shared between the Netherlands and certain other countries grew on average by 43% a year from 1993-2001. After reviewing the empirical literature in this area, two observers offer a tentative conclusion that TIE has “increased dramatically in recent years”.

Tax information, which includes a taxpayer’s income and an individual’s personal circumstances (e.g., to support a claim for a disability tax credit), is a particularly sensitive form of personal information, and can be used to build a detailed profile of individual identity, including religious and political beliefs. Emerging law and technology theories can serve as a useful starting point to identify the privacy challenges and the inter-relationships between technology change and potential TIE legal reforms. In particular, substantive theories of technology developed outside of legal scholarship can help to explore the ways that technology change can lead to adverse substantive impacts on individual and social interests, including privacy. The analysis within this paper is informed by a theoretical perspective called a ‘synthetic theory of law and technology’ that scrutinizes how technology change, often in subtle ways, can subvert traditional legal rights and interests.

Part II provides context by discussing the main factors that are driving the push towards enhanced TIE, including technological developments, political concerns surrounding tax avoidance and evasion, and initiatives to inhibit illicit drug money laundering and terrorist financing schemes. Part III deploys a law and technology framework to help identify and analyze the trends that have been reducing traditional

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4 Ibid. at 94.
5 Ibid. at 100.
6 While there has been significant policy attention paid to technology change and taxpayer privacy issues, the focus has traditionally been placed on domestic concerns. See, e.g., U.S. Department of Health, Education & Welfare, Records, Computers and the Rights of Citizens, Report of the Secretary’s Advisory Committee on Automated Personal Data Systems (Boston: Massachusetts Institute of Technology, 1973) at 33-47. In more recent years, greater emphasis has been placed on protecting taxpayer privacy in the context of international exchanges of taxpayer information.
8 See Arthur J. Cockfield & Jason Pridmore, “A Synthetic Theory of Law and Technology” (2007) 8 Minnesota Journal of Law, Science and Technology 475. For an introduction to this analytical approach, see Section III.A.
legal safeguards that protect taxpayer privacy interests when their information is transferred across borders with an emphasis on resolving problems surrounding tax sharing between developed and developing countries. The Part concludes that commentators should avoid conflating the term ‘effective’ TIE with ‘efficient’ TIE. Effective TIE should be understood to consist of two discrete but related elements: efficient TIE (i.e., rules and policies that promote low compliance costs for taxpayers and ease of administration and enforcement by tax authorities) and fair TIE (i.e., rules and policies that respect the rights of taxpayers, including privacy rights).⁹

Part IV offers initial thoughts on ways to address privacy and other challenges arising from TIE. To encourage data security and guard against abusive uses of taxpayer information, countries should consider ‘technology is law’ solutions such as the development of an architecture of trust for the emerging technology systems that enable TIE. In addition, governments should consider adopting a multilateral agreement on taxpayer rights to ensure that tax information that is transferred across borders attracts a minimal level of legal protection.¹⁰ This paper strives only to provide a bird’s eye view of the relevant policy challenges and further research is required before more definitive pronouncements can be made about potentially viable policy prescriptions.

II. The Drive Toward Enhanced Cross-border Tax Information Exchange

After the post-World War I era, many countries began to develop a network of tax treaties that contemplated TIE. Historically, TIE was designed to assist tax administrators with ensuring that taxpayers with foreign income sources are complying

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⁹ For instance, Duncan Bentley notes that, in an increasingly difficult environment for collecting taxes, tax authorities need to be able to collect the complete information required to assess the relevant tax liability of their resident taxpayers. The corollary is that there needs to be appropriate protections in place to prevent misuse of that information. See Duncan Bentley, Taxpayers’ Rights: Theory, Origin and Implementation (The Netherlands: Kluwer Law International Series on Int’l Taxation no. 31, 2007) at 317 - 319.

with their tax obligations as foreign income is often subject to domestic tax laws that strive to tax the world-wide income of tax residents.\(^{11}\)

Prior to discussing the technological and political reasons that are promoting enhanced TIE, it may be useful to review the main legal mechanisms that permit countries to engage in TIE:

\((a)\) unilateral measures: Countries pass enabling legislation to give effect to TIE by, for example, permitting tax authorities to exchange information, as subsequently discussed, under tax treaties.\(^{12}\) Countries also pass laws that enable their tax authorities to request resident taxpayers to provide them with tax returns and other information they have provided to foreign tax authorities; in these circumstances it is not the tax authorities themselves, but the taxpayers that provide the information.\(^{13}\)

At times, tax laws mandate that certain non-resident taxpayer information should be collected by stipulated intermediaries for possible TIE purposes. For example, the United States government passed tax laws to force U.S. banks to collect information on interest payments made to Canadian holders of U.S. portfolio investments for information sharing purposes with Canadian tax authorities.\(^{14}\) Finally, countries can also indirectly try to access foreign-held taxpayer information through voluntary compliance programs that urge tax residents to provide this information, often in exchange for amnesty against certain penalties such as criminal prosecution. Canada, for instance, promotes a Voluntary Disclosures Program to encourage taxpayers to voluntarily correct previous


\(^{12}\) See, e.g., Income Tax Act, R.S.C. 1985 (5\(^{th}\) Supp.), c. 1, s. 241(4)(e)(xii). For a discussion of Canadian tax provisions that protect taxpayer privacy as well as other taxpayer rights, see Jinyan Li, “Taxpayers’ Right in Canada,” in Duncan Bentley, ed., Taxpayers’ Rights: An International Perspective (Gold Coast, Revenue Law Journal, 1998), at 89 - 90 (noting that the Income Tax Act has provided basic rights, including privacy and confidentiality, since its introduction although there has been increasing recognition of these rights since the 1980s).

\(^{13}\) See, e.g., Income Tax Act, R.S.C. 1985 (5\(^{th}\) Supp.), c. 1, s. 231.6. For a fascinating discussion of taxpayer information exchange in an era of electronic taxpayer records, see eBay Canada Ltd. et al. v. MNR, 2008 FCA 248 (Nov. 7, 2008)(Fed. Ct. Appeal)(holding that Canadian tax authorities can request offshore taxpayer information that will not be considered to be “foreign-based” as long as the Canadian company can access it remotely through its own computers). This case has led to a concern that foreign companies may be reluctant to have Canadian operations in some contexts due to the Canadian government’s “extraordinary access to offshore records.” See Robert Todd and Kelly Harris, “eBay Could Trigger Foreign Pullouts”, Law Times (Nov. 24, 2008).

problems in their tax returns, including information regarding foreign sources of income, without penalty or prosecution.\textsuperscript{15}

\textit{(b) bilateral agreements:} Bilateral tax treaties remain the most important legal tool to give effect to TIE. Tax treaties contemplate three main types of TIE: ‘spontaneous exchanges’ that occur when a tax authority discovers information about a non-resident taxpayer’s activities and spontaneously shares this information with the tax authorities of a foreign government; ‘automatic exchanges’ that occur on an ongoing basis between two tax authorities; and ‘exchanges upon request’ that take place only when one tax authority asks its foreign counterpart for the tax information. These treaties also typically provide for provisions to ensure that transferred tax information is kept confidential as well as other procedural safeguards for taxpayer interests such as lawyer/client confidentiality.

Countries increasingly resort to bilateral agreements that only envision tax information exchanges and do not cover broader issues found within full-blown bilateral tax treaties such as the taxation of business profits. Most of these bilateral tax information agreements only contemplate exchanges upon request and do not permit spontaneous or automatic exchanges. For instance, the OECD model tax information exchange agreement (the ‘OECD model TIEA’), discussed below, only contemplates exchanges upon request.\textsuperscript{16} This model agreement suggests countries adopt similar safeguards and protections to taxpayer privacy and other interests that already exist in bilateral tax treaties.\textsuperscript{17}

\textit{(c) multilateral agreements:} In rare circumstances, certain countries have negotiated multilateral tax treaties with TIE provisions.\textsuperscript{18} The two most prominent examples of multilateral agreements are the European Council and OECD multilateral agreement on assistance in tax matters and the European Union’s Savings Directive, which came into force on July 1, 2005.\textsuperscript{19} Under the latter reform effort, each European Union country

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\textsuperscript{15} See Canada Revenue Agency, Voluntary Disclosures Program, IC00-IR2 (Oct. 22, 2007).
\textsuperscript{16} See Art. 5 of the OECD Agreement on Exchange of Information on Tax Matters (OECD: Paris, 2002) [OECD model TIEA].
\textsuperscript{17} Id. at Commentary to Art. 1, at para. 5 and 6.
\textsuperscript{18} See, e.g., the Nordic Pact Multilateral Convention on Administrative Assistance in Tax Matters (1972).
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provides information automatically to other member states on interest paid to non-resident individuals (with a transitional period that permits the imposition of withholding taxes instead of information exchanges for three EU countries).\textsuperscript{20} The United Nations is also working on a draft code of conduct that envisions TIEAs that promote routine and spontaneous exchanges of tax information (in addition to the need for exchanges upon request as contemplated by the OECD TIEA).\textsuperscript{21}

\textit{(d) non-tax agreements: } Countries also negotiate mutual legal assistance agreements to assist each other with the enforcement of criminal laws. At times, these agreements contemplate exchanging information for certain criminal tax offences. For example, Canada entered into a mutual legal assistance treaty with the Bahamas in 1990 that only contemplates assistance in criminal matters (although tax offences are not directly mentioned within this treaty).\textsuperscript{22}

In recent years, TIE has become a more significant policy issue for a number of reasons.

\textbf{A. Changing Technological Environment}

As mentioned in the introduction, information technology developments have made it more efficient and less costly for governments and the private sector to collect, use and disclose personal information such as financial and tax information.\textsuperscript{23} For instance, revenue authorities historically accessed and maintained paper tax returns that may have been stored away in the dusty drawer within a cabinet in some obscure government office. If a foreign tax authority requested this information, it could be difficult (or impossible) and costly to locate, copy and ship the tax information across borders.

\textsuperscript{20} See also the discussion in III.C.vi.
\textsuperscript{21} See Economic and Social Council - Committee of Experts on International Cooperation in Tax Matters, \textit{United Nations Code of Conduct on Cooperation in Combating International Tax Evasion}, at para. 10 (draft, Aug. 5, 2008). The draft UN code of conduct has additional provisions that appear to require more comprehensive domestic law reforms to promote effective exchanges of tax information, including the need to avoid laws that promote business entities to confound tax enforcement, to require financial intermediaries, including lawyers, to disclose to tax authorities the true beneficial owner of assets they manage. Id. at pars. 12 and 13.
\textsuperscript{23} Dean, \textit{supra} note 11, at 607-608, 625 (noting that the fall of technological and legal barriers to international capital flows has transformed already-problematic tax information exchanges into “a catastrophic failure of tax administration.”).
This environment has been drastically altered by the digitization of tax records. As discussed within information economics, a significant portion of this change is attributable to the fact that digital records are almost costless to copy and transfer (i.e., information goods share common attributes of potentially high fixed costs of production and low or nil marginal costs for reproduction and distribution).\textsuperscript{24} With the click or two of a mouse button, records can now be called up from government databases, copied and transferred to another government agency located anywhere in the world as long as it has access to the Internet. For the first time, many countries can engage in TIE with relative ease.

In particular, the ‘automatic exchange’ of tax information (enabled by, for example, bilateral tax treaties, the Council of Europe/OECD Convention on mutual assistance, or the EU Savings Directive) is facilitated by digital technologies. According to the OECD, automatic exchange of information “involves the systematic and periodic transmission of ‘bulk’ taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc.)”.\textsuperscript{25} The foreign source tax information in digital form can be input directly into the recipient country’s tax database and automatically matched against income reported by the taxpayer. In its \textit{Manual on the Implementation of Exchange of Information for Tax Purposes}, the OECD advocates this method as the most cost effective way to process the information.\textsuperscript{26}

As mentioned at the outset of this paper, there is mounting empirical evidence that governments are increasingly sharing bulk taxpayer information on an automated basis:\textsuperscript{27} what is less clear is whether this information can be usefully analyzed by tax authorities or whether much of it is ignored as the abundance of information simply overwhelms existing human resources. As suggested by the OECD, barriers to analysis may be overcome to the extent that tax authorities link their databases and share information that can be automatically compared and contrasted (perhaps through common taxpayer

\textsuperscript{26} Ibid.
\textsuperscript{27} Keen & Litghart, \textit{supra} note 3 at 100.
identification numbers) with tax information already provided by tax residents. The OECD notes that the automatic exchange of digital tax information also provides for more effective distribution of the information to local tax offices and for transmitting the information to other databases for purposes of risk analysis.

In a related point, as a result of these technological developments, government-collected information such as tax information can be cross-indexed against other digital personal information maintained by domestic and foreign governments (e.g., customs, criminal or immigration data) or by the private sector (e.g., records of consumer purchases) to allow a detailed profile of an individual to be put together from formerly discrete bodies of data. This detailed profile can be used for purposes outside of traditional tax concerns such as, as subsequently explored, a part of an investigation for terrorist financing schemes.

Scholars and policy-makers have examined the ways that enhanced TIE has been facilitated by information technology developments, along with digitized tax information, the use of the networked databases and automated tax collection systems. Since the early 1990s, many governments have taken advantage of information technology developments to develop and promote the digitization of tax records, including tax returns, and the storage of these records in networked databases to enhance administrative efficiency and promote ease of filing of annual returns for individual taxpayers, including web filing. These efforts have met with some success. For example, one of the most visited websites on the Internet is irs.gov as U.S. taxpayers seek tax information and e-file returns via this website. In another example, Brazil had previously managed to extend its e-filing system to 90% of its taxpayers. As governments gain confidence with their information technology (IT) collection, use and disclosure services,

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they appear to be seeking heightened connections with the IT services, including networked databases, offered by other governments.\(^{31}\)

In fact, we are witnessing what might be considered to be the emergence of a second generation of IT tax services that promote these heightened connections. Early reform efforts to implement automated tax collection and exchange systems include the U.S. state tax authority-sponsored Streamlined Sales Tax Project that contemplates the use of automated tax collection and exchange software systems to assess taxes and share across state borders information concerning state and local sales and use tax systems.\(^{32}\) In addition, the European Union implemented heightened VAT cross-border information sharing as part of the move towards a borderless market in 1993.\(^{33}\) In a more recent initiative, the European Union is promoting a test program that permits industry and consumer participants to participate within a new fully-digital (i.e., paperless) VAT system, which could eventually be linked to the use of a ‘smart’ identification card.\(^{34}\) Certain countries such as Singapore have been more aggressive when deploying technologies to assist with tax administration: in this country, withholding taxes can be transferred electronically from a taxpayer’s bank account directly to the government’s treasury to settle tax liabilities.\(^{35}\)

B. Political Environment

The push toward heightened levels of TIE has been driven in part by political concerns surrounding tax evasion, aggressive tax avoidance and the ‘war on terrorism.’

i. Efforts to Inhibit Tax Evasion and Aggressive Tax Avoidance

Governments are increasingly worried that aggressive tax avoidance and illegal tax evasion are leading to significant revenue losses and information exchange is seen as

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\(^{34}\) Bird & Zolt, supra note 30 at 13.

\(^{35}\) Ibid. at 28.
a way to address this challenge.\textsuperscript{36} As a result of fiscal sovereignty worries, it is only natural for governments to seek heightened TIE with other governments instead of entering into politically-problematic binding agreements where they may need to modify their tax laws to take into account the interests of foreign states.\textsuperscript{37}Because governments wish to maintain as much political control as possible over their tax regimes to promote domestic economic and social policy, concerns surrounding fiscal sovereignty remain one of the most important drivers of international tax policy.\textsuperscript{38}

Two simplified examples will serve to show how TIE could inhibit tax avoidance and tax evasion.

With respect to tax avoidance, certain taxpayers, especially multinational firms, appear to be engaging in aggressive tax planning activities that strive to reduce global tax liabilities while complying with all relevant tax laws of the countries where business activities take place.\textsuperscript{39} Consider, for instance, a situation where the tax authorities within Country A become aware of a new hybrid entity tax planning scheme involving a resident taxpayer, Corporation A, that appears to infringe on its tax laws as well as, potentially, the tax laws of Country B where Corporation A also conducts business. Country A’s tax authorities would like to request tax information held by the authorities within Country B to assist with its audit of Corporation A. If the tax authorities can exchange tax information and possibly jointly audit Corporation A then they will be in a better position to determine whether Corporation A has violated tax laws, including anti-avoidance laws, in one or both countries. In addition, the tax authorities within Country B will now be


\textsuperscript{37} Some observers have recommended heightened administrative cooperation, including joint audits by national tax authorities, as a way to protect revenue collection. See Brian J. Arnold & Neil Harris, “NAFTA and the Taxation of Corporate Investment: A View from within NAFTA” (1994) 49 Tax L. Rev. 529.


\textsuperscript{39} For a discussion of certain policy concerns arising from treaty shopping and other international tax planning strategies, see Advisory Panel on Canada’s System of International Taxation, \textit{Enhancing Canada’s International Tax Advantage, A Consultation Report} (Ottawa: Dept. of Finance, April 2008) at 33-36.
aware of this particular planning scheme and they can be on the look-out for similar schemes in the future, which may be subjected to heightened scrutiny or audit.

With respect to tax evasion, individuals appear to be increasingly willing to engage in illegal non-disclosure of income generated offshore, in part because the Internet makes it easier for these individuals to access information on offshore accounts and reduces the costs associated with setting up these accounts.\textsuperscript{40} Consider Individual A based in Country A. Individual A is self-employed and earns $1 million in revenues. She only discloses half of this income to the tax authorities in Country A and transfers the remaining amounts to an account set up for her in Country B, a tax haven. She never discloses this transfer or the income earned on the account to the tax authorities in Country A. In addition, she accesses her offshore funds via a credit card issued by a bank in Country B. Her credit card payments are paid out of the offshore account and thus there is no paper trail of these purchases within Country A. If the tax authorities within Country A suspect Individual A is engaging in tax evasion (as well as violating non-tax laws by transferring offshore undisclosed amounts that exceed stipulated thresholds), they may wish to investigate by requesting tax information maintained by authorities within Country B. But the officials within Country B may refuse to cooperate and point to their own bank secrecy laws that make it a criminal offence to disclose confidential bank information to third parties. On the other hand, this sort of tax evasion could be inhibited to the extent that Country B is willing to engage in TIE with Country A.

The Organization for Economic Development and Cooperation (OECD), which is the leading forum for international tax reform efforts, has promoted enhanced TIE to fight the perceived abusive use of tax havens as part of its ‘harmful tax competition’ project that began in the late 1990s.\textsuperscript{41} In 1998, the OECD published a report indicating

\textsuperscript{40} Due to the illegal nature of the activities, nobody knows how much money Canadians or other taxpayers are sending offshore although anecdotal evidence implies the amounts are on the rise. See Greg McCarthur, “Swiss Banking’s $5.6 billion Man” \textit{The Globe and Mail} (14 November 2008), which details the operations of a Swiss bank to use Swiss bank secrecy laws to help Canadian and U.S. taxpayers evade taxes; Karen Howlett and Paul Waldie, “Lure of Tax Havens Proving Irresistible” \textit{The Globe and Mail} (9 June 2003), which discusses a study that estimates Canadian individuals invested $44.6 billion in tax havens, an increase of 891% from 1988.

that “the lack of effective exchange of information” was one of the key factors in
determining harmful tax practices. In 2000, the OECD published an initial ‘blacklist’
of 35 tax haven countries that did not, among other things, permit effective TIE. In
2002, the OECD developed a non-binding model tax information exchange agreement
(the ‘OECD model TIEA’) to encourage transparency and to set standards for the
exchange of this information. These TIEAs, it was thought, could have an important
deterrent effect by discouraging taxpayers from trying to evade taxes through illegal non-
disclosure of offshore income. In related work, the OECD has attempted to promote
consistent principles of good tax administration as well as effective taxpayer rights and
obligations.

In 2006, the OECD’s Global Forum, constituted by the 30 OECD member states
as well as participating non-OECD member states, conducted an assessment of the TIE
regimes of 82 countries with the goal of ensuring “the implementation of high standards
of transparency and information exchange in a way that is fair, equitable and permits fair
competition between all countries, large and small, OECD and non-OECD”. The
concept of fairness in this case appears to emphasize the need to promote a level
competitive playing field with respect to TIE laws, policies and practices so that no
country would be at a competitive disadvantage with respect to attracting international
investments. A multilateral agreement that mandates a minimal level of taxpayer
protections may help to accomplish this goal (see Section IV.B.).

As a result of these political developments, many governments are promoting
unilateral and bilateral measures to enhance TIE. With respect to unilateral measures, for
example, the Canadian 2007 federal budget proposed linking the right to repatriate tax-

Flavia Ambrosanio & Maria Serena Caroppo, “Eliminating Harmful Tax Practices in Tax Havens:
43 OECD, Towards Global Tax Co-operating: Progress in Identifying and Eliminating Harmful Tax
44 See OECD model TIEA, supra note 16, at 2-3.
45 See OECD, General Administrative Principles - GAP001 Principles of Good Tax Administration (Paris:
OECD, 2001) [OECD GAP001]; OECD, General Administrative Principles - GAP002 Taxpayers’ Rights
and Obligations (Paris: OECD, 2001) [OECD GAP002].
47 Ibid. at 7-8.
free profits from abroad to the existence of TIE agreements with other countries.\textsuperscript{48} By way of background, Canada taxes its resident taxpayers on a world-wide basis. Subsidiaries of Canadian parent companies are normally not taxed on their active income profits as the subsidiary is incorporated in a foreign country and is hence a non-resident from a Canadian income tax perspective. With respect to the repatriation of profits from foreign subsidiaries back to their Canadian parent companies by way of dividends, the general rule is that these profits are effectively exempt from Canadian tax if they were earned out of active business income and the foreign subsidiary is based in a tax treaty partner country of Canada.\textsuperscript{49} As a result of the budget proposal, new tax laws were incorporated to extend the permit the tax-free repatriation of active business profits generated within a related corporation in a country that has an entered into an approved tax information exchange agreement with Canada.\textsuperscript{50}

\textit{ii. The War on Terrorism}

In the post-9/11 environment, international terrorism has played a central role for many governments in the development of their national and international security policy.\textsuperscript{51} Terrorists require financing for their activities and hence the tracking of cross-border financial flows may provide investigators with evidence to fight these financing schemes or to identify and arrest the terrorist themselves. As a result, enhanced TIE is being increasingly deployed to combat terrorist financing schemes.\textsuperscript{52} For example, Canada has amended its domestic legislation to authorize a government agency called Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to disclose information to tax authorities where there are grounds to suspect that the information is

\textsuperscript{48} This government’s views were reiterated in its proposed legislation to link TIEAs to Canada’s exemption system for active business profits. See Canada, Department of Finance, Federal Budget, Notice of Ways and Means Motion: Exempt Surplus of a Foreign Affiliate (Ottawa: Queen’s Printer, March 19, 2007).

\textsuperscript{49} More technically, repatriated dividends must come from an “exempt surplus” account of a “foreign affiliate” based in a “designated treaty country” and are entitled to a full deduction by the Canadian parent under the \textit{Income Tax Act}, R.S.C. 1985 (5\textsuperscript{th} Supp.), c. 1, s.113.

\textsuperscript{50} See Notice of Ways and Means Motion, \textit{supra} note 48.


relevant to investigating money laundering or terrorist financing offences.\textsuperscript{53} Moreover, domestic legislation has been amended in Canada to permit tax officials to provide its own national police and intelligence agencies as well as FINTRAC with certain kinds of tax information such as information concerning domestic and foreign charitable organizations.\textsuperscript{54}

This process is also being facilitated by the OECD, which in 2005 amended its model tax treaty language on TIE to contemplate exchanges for “non-tax purposes.”\textsuperscript{55} As a result of these developments, tax authorities are increasingly presented with ‘suspicious transaction reports’ by other government agencies such as police agencies. Tax authorities in turn are assisting with investigations by providing tax information to these agencies.

C. Summary

Governments worry that their taxpayers are increasingly engaging in international tax evasion or aggressive tax avoidance. With respect to the latter concern, one way to deal with the problem would be negotiate similar tax laws among different countries (i.e., harmonize tax bases and/or rates) so that sophisticated cross-border arbitrage planning strategies would be inhibited. But governments refuse to enter into these agreements, mainly because they do not wish to give up their sovereign ability to develop tax rules as they see fit. TIE hence provides a politically-feasible solution so that governments can engage in more cooperative efforts to constrain perceived problems without making substantive changes to their tax laws. In addition, TIE has been encouraged to assist in money laundering and terrorist financing investigations.

The policy push towards heightened TIE has been accompanied by significant technology change surrounding the provision of government tax services. This technology change has reduced the costs associated with TIE by making it more efficient and less costly to locate, copy and transfer tax information across borders. The following Part discusses how this technology change meshes with privacy concerns that arise from TIE.

\textsuperscript{54} \textit{Ibid.} at 31.
\textsuperscript{55} See Art. 26 of the Committee on Fiscal Affairs, \textit{Model Tax Convention on Income and on Capital} (Paris: OECD) (looseleaf, 2 volumes) [‘OECD model tax treaty’].
III. Identifying Legal Trends that Dilute Traditional Legal Protections for Taxpayer Privacy and Other Interests

A. Deploying Law and Technology Perspectives to Examine Taxpayer Privacy Interests

The interaction between technology and law influences individual and/or group behavior and ultimately determines whether a desired policy outcome will be achieved.\(^{56}\) For example, technology change can amplify the risk that interests traditionally protected by law will be harmed. A critical examination of the interdependency between technology and law offers the potential to illuminate previously ignored or under-examined issues to promote more optimal legal and policy change.\(^{57}\) A law and technology theoretical framework could assist with this process to identify trends that have served to dilute traditional protections for taxpayer interests such as privacy.

As a result, the subsequent analysis is informed by emerging law and technology theories that examine how new technologies can help promote public policy goals while at the same time subverting these goals. More specifically, the analysis will deploy a synthetic theory of law and technology—that is, a perspective based on a synthesis of instrumental and substantive theories of technology—to explore how laws and policies that govern TIE could address taxpayer privacy concerns.\(^{58}\)

Generally speaking, instrumental theories (or perspectives) tend to treat technology as a neutral tool without examining its broader social, cultural, and political impacts. The instrumentalists are often identified with strains of thought that respect human agency in matters of technology, in part because technology itself is perceived to be neutral in its impact on human affairs and in part because of the emphasis upon human

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\(^{58}\) See Cockfield and Pridmore, *supra* note 8, at 477-495.
willpower to decide whether to adopt technologies. In contrast, substantive theories emphasize the ways in which technological systems (or structure) can have a substantive impact on individual and community interests that may differ from their intended impact: substantive theorists sometimes emphasize how technological structure can overcome human agency. 59

A synthesis is necessary because each theory, standing alone, has disadvantages that reduce its potential for interfacing with legal analysis. In particular, substantive theories tend to over-emphasize the role of technological structure while downplaying the relevance of human agency. A balanced perspective, in our view, requires the scrutiny of individual facts and circumstances to discern whether technology change is adversely affecting legal interests.

The subsequent analysis explores how laws and policies may have unintended adverse effects on privacy interests in the context of cross-border tax information exchange. In other words, the analysis explores how technology change can amplify legal risk, often in subtle ways, so that these interests may be subverted. For example, automated tax collection systems could facilitate TIE, but could unduly intrude into taxpayer privacy interests to the extent taxpayer information is revealed to third parties other than the tax authorities of foreign tax treaty partners.

Moreover, in a recent critique of international tax law analysis, I argued that, to help discern optimal international tax policy, international tax law scholars need to develop analytical tools and theoretical frameworks that integrate efficiency perspectives with broader social, political or other concerns. 60 I claimed that international tax law analysis suffers from an over-emphasis on efficiency concerns, which is problematic due to existing theoretical and empirical uncertainties associated with international tax economics, including the inability to reconcile the conflict between the pursuit of national and international welfare. The use of the synthetic theory of law and technology to inform the subsequent analysis follows this critique, as it seeks to integrate efficiency

concerns relating to compliance and administrative costs with other social concerns such as taxpayer privacy.

This Part identifies legal trends that are encroaching on traditional privacy safeguards when TIE occurs.\(^6^1\) Prior to discussing these trends, it may be helpful to briefly discuss contemporary scholarly views on what is meant by the term ‘privacy’.\(^6^2\) Privacy can be a surprisingly difficult concept to define as there are many different definitions within the literature generated by different academic disciplines that examine privacy. With respect to potential government intrusion on an individual or group’s right to privacy, the concept of privacy is sometimes divided into discrete but related categories such as personal privacy (i.e., the right to maintain bodily integrity to not have state agents explore our bodies or force the disclosure of objects or matters that we wish to conceal) and territorial privacy (i.e., the right to maintain privacy within our homes or other property we own such as automobiles).

Perhaps the most relevant concept for our present purposes is the concept of information privacy, which has been called “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”.\(^6^3\) A major issue, beyond the scope of this paper, that surrounds taxpayer privacy, is whether privacy rights should be extended to business entities such as corporations and trusts in addition to individual taxpayers.\(^6^4\)

Tax information, which often includes a taxpayer’s income and other details about an individual’s personal circumstances, is a particularly sensitive form of personal information. Tax information may reveal, among other things, information about

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\(^6^1\) Fewer works have comprehensively reviewed the tax law and policy issues surrounding TIE, although some commentators have looked at privacy issues as well as other taxpayer rights such as evidentiary privilege for advice by tax lawyers to their clients. See Sara K. McCracken, “Going, Going, Gone…Global: A Canadian Perspective on International Tax Administration Issues in the “Exchange-of-Information Age” (2002) 50 Can. Tax J. 1869; Cynthia Blum, “Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail” (2004) 5 Fla. Tax Rev. 579; Dean, supra note 11 at 668-670 (discussing ways that privacy constraints could unduly inhibit information flows); Bentley, supra note 9 at 325-331.


\(^6^3\) Westin, supra note 2 at 7.

\(^6^4\) Privacy rights are normally extended in some form to business entity taxpayers under the view that these rights are necessary to protect the interests of individuals who own the entities. A worry in the context of cross-border taxpayer information sharing is that the extension of these rights to business entities will make it easier for taxpayers to hide income and assets thus inhibiting effective taxpayer information sharing.
income, spending and savings, employment status, personal belongings, disability status, associations and club memberships, donations to charities, mortgage costs, child support and alimony, and the amount and size of gifts to family members and others. This detailed personal information may be used to construct a detailed profile of an individual’s identity, including her religious beliefs, political alliances, and personal behavior. For this reason, individuals may be very reluctant to have their tax information revealed to third parties other than their governments. Cynthia Blum, for instance, notes that taxpayers may want to avoid revealing tax information to: (a) avoid favorable or unfavorable comparisons with others; (b) avoid scrutiny to protect creativity and autonomy; (c) avoid access by political or other enemies who could use the information to humiliate or embarrass; (d) prevent solicitations by businesses or individuals; (e) avoid being the target of thieves, con artists or other criminals (including kidnappers seeking a ransom); (f) inhibit identity theft; and (g) restrict the provision of information that could be used to gain advantage by business competitors.65

The following discussion focuses on recent international tax law trends that are encroaching on traditional legal protections for taxpayer privacy.

B. Expanding the Scope of Information Sharing

As previously indicated, one of the primary purposes of TIE is to ensure that countries can enforce their world-wide taxation systems on their resident taxpayers. As a result, to the extent that TIE does not work effectively revenue losses may result. According to the OECD’s Global Forum, the three main aspects to ensuring transparency and ‘effective’ (as discussed in Section III.E., a preferred term here may be ‘efficient’) exchange of information are: exchange of information mechanisms, appropriate access to the information and availability of information.66 In part as a result of OECD initiatives in this area, countries have taken steps to amend their laws and treaties to expand the scope of TIE, including (i) expanding coverage to more taxes and broadening the enquiry to include using tax information for non-tax purposes; (ii) eliminating double incrimination provisions; (iii) eliminating domestic tax interest provisions; (iv) expanding multilateral agreements; and (v) expanding enforcement by requiring financial

65 Blum, supra note 61 at 604-605.
66 OECD, supra note 46 at 9.
institutions to keep better records of information that identifies taxpayers, enforcing each others’ tax laws, and promoting more joint audits.

i. Expanding Coverage

Efficient TIE may be inhibited if the rules do not provide for comprehensive coverage of different types of taxes. Consider the example of the only TIEA agreement entered into by the Cayman Islands, a tax haven and the fifth largest banking deposit in the world.\footnote{Owens, \textit{supra} note 41 at 916.} In 2000, the Cayman Islands entered into its first and only TIEA with the United States. The IRS scrutinized this agreement and made a finding that “because of certain limitations in the scope of [this] agreement” the TIEA did not qualify as a designated exchange of information agreement that would attract certain tax benefits.\footnote{IRS Revenue Bulletin 2007-18, April 30, 2007.}

Other tax information exchanges only contemplate exchanges of information on certain types of taxes such as income taxes or ignore subfederal tax issues. In contrast, for example, since a revision in 2002 the Canada and Germany tax treaty contemplates information exchanges for all taxes imposed by their federal governments.\footnote{See Art. 26(4) of the Canada-German tax treaty (March 28, 2002).} Moreover, this revised treaty now contemplates disclosure of information held by the federal governments to its subfederal governments (e.g., provinces and municipalities) to assist in their enforcement of tax claims. Tax treaty amendments are increasingly broadening the net to catch more types of taxes.

As previously mentioned, the OECD has modified the OECD model tax treaty to contemplate exchanging tax information for the first time to non-tax purposes. In a similar move, tax treaties are being amended to reduce discretion for tax authorities to exchange information. For instance, in 2007, the Canada-U.S. tax treaty was amended so that information that may be exchanged is such information “as may be relevant” to an investigation rather than such information “as is relevant” under the previous provision.\footnote{See Art. 27 of the Canada-United States tax treaty (September 26, 1980, as amended).[Note that the Fifth Protocol has been adopted by the Canadian Parliament, but at the date of this writing had yet to be endorsed by the U.S. Congress.]}

\begin{footnotes}
\item[67] Owens, \textit{supra} note 41 at 916.
\item[69] See Art. 26(4) of the Canada-German tax treaty (March 28, 2002).
\item[70] See Art. 27 of the Canada-United States tax treaty (September 26, 1980, as amended).[Note that the Fifth Protocol has been adopted by the Canadian Parliament, but at the date of this writing had yet to be endorsed by the U.S. Congress.]
\end{footnotes}
The OECD Global Forum Report notes a general trend toward expanding coverage, noting that 70 of the 82 reviewed countries have one or more exchange of information relationships covering all tax matters.\textsuperscript{71}

\textit{ii. Eliminating Dual Criminality Provisions}

A tax agreement that includes a provision following the principle of ‘dual criminality’ means that TIE will only take place if the conduct being investigated, and which gives rise to the information request, would constitute a crime under the laws of the requested country. Some countries maintain bank secrecy laws that thwart efforts by tax officials to access offshore tax information. For example, the mutual legal assistance agreement between Canada and the Bahamas (a tax haven) is often ineffective because the Bahamas does not have an income tax or an offence of tax evasion, so the Bahamian government can refuse to cooperate when Canada investigates income tax evasion.\textsuperscript{72}

As a result of these problems, OECD and other countries have been striving to eliminate dual criminality provisions within their tax treaty network. As of 2006, only 11 of 82 countries reviewed restrict information exchange to the requested country’s criminal tax matters.\textsuperscript{73}

\textit{iii. Domestic Tax Interest Provisions}

Tax agreements can also contemplate provisions that mandate the need for a ‘domestic tax interest’ before requested tax information can be provided to the requesting country. A domestic tax interest means that the requested country will only provide tax information that it normally collects for its own domestic tax purposes.

Because of perceived barriers that domestic tax interest provisions present to efficient sharing, OECD and other countries have reduced these provisions in recent years so that, as of 2006, only 5 of 82 countries surveyed required that the tax information sought be also relevant for domestic tax purposes.\textsuperscript{74}

\textit{iv. Dual versus Multilateral Agreements}

Under one view, the patch-work of bilateral tax treaties and bilateral tax information exchange agreements, each with different information exchange provisions

\textsuperscript{71} OECD, \textit{supra} note 46 at 17.
\textsuperscript{73} OECD, \textit{supra} note 46 at 18.
\textsuperscript{74} \textit{Ibid.} at 17.
or language within provisions, has led to a less than desirable outcome. A better approach, under this view, would be to increasingly deploy multilateral instruments so that all of the participating countries and their taxpayers will be subjected to the same rules hence promoting tax certainty and a level playing field.\textsuperscript{75}

Governments have also begun in recent years to enter into multilateral agreements to share tax information or information on tax planning schemes. For example, in 2004, the Canadian government or one its federal agencies signed onto three such agreements: the Council of Europe and OECD \textit{Convention on Mutual Assistance in Tax Matters}; the Pacific Association of Tax Administrators \textit{MAP Operational Guidance for Member Countries}; and the Joint International Task Shelter Information Centre.\textsuperscript{76}

While multilateral agreements should encourage more efficient sharing, they may present greater challenges to the protection of taxpayer interests such as privacy. First, a broader community of information sharers raises the risk that taxpayer information will be accessed or used improperly by a third party government as more parties to the agreement will likely be provided with access. Second, governments may find it increasingly difficult to maintain accountability and responsibility over transferred information that ends up with multiple participants.

\textit{v. Expanding Enforcement}

With respect to the enforcement of TIE, countries need to: (a) have efficient access to bank information; and (b) real powers to access reliable information to identify and location of the owners of the bank accounts (or bearer shares). If access to bank information or the identity of account holders is denied to the requested country, then this country will not be in a position to share this information with others, which will frustrate their ability to assess tax liability. As part of its ongoing efforts to encourage transparency, the OECD began in 2000 to take steps to improve the ability of tax authorities to access bank information and identifying information for tax purposes.\textsuperscript{77} Countries have followed suit by passing domestic laws to expand record keeping requirements for financial institutions, and by asking these institutions to maintain more

\textsuperscript{76} Li, Cockfield & Wilkie, supra note 72 at 329-331.
information that serves to personally identify clients (including new ‘know your customer’ laws).

In a related point, countries are increasingly agreeing to enforce other nations’ tax laws. In what has been called an “ancient rule” by the Supreme Court of Canada, countries historically refused to enforce foreign tax laws as this was considered to be an unacceptable intrusion on a legal system’s political sovereignty.\(^78\) In one example of a departure from this ancient rule, Canada and the United States agreed for the first time in 1995 to amend their bilateral tax treaty so that the two countries could exchange tax information and enforce each others’ tax laws.\(^79\) To assist with audit and enforcement efforts, countries are also amending their tax treaties to expand information sharing cooperation and mutual obligations. In September 2007, Canada and the United States revised their tax treaty to: reduce the areas where requested tax information can be denied by the requested country; expand tax information sharing to include witness depositions and unedited original documents such as books, papers, accounts and writings; and permit tax officials to enter the other country to interview individuals and examine books and records.\(^80\)

**C. Privacy Concerns under Global Tax Information Sharing**

This section discusses privacy concerns that arise when taxpayer information is transferred across borders to foreign governments, including (i) recent legal trends to protect personal information when it is transferred across borders; (ii) transferred tax information and the global war on terror; (iii) encroachments on lawyer/client privilege and other rights; (iv) the democracy deficit when ‘soft law’ or informal means are used to engage in TIE; (v) transfers to developing countries that may not have the political willpower to properly protect exchanged tax information; and (vi) transfers to developing countries that may not have the financial or human resources to build and maintain technology systems to adequately protect taxpayer information (including a discussion of the ‘sticks’ and ‘carrots’ that may encourage more effective TIE with these countries).

\(i.\) **Transfers to Foreign Countries with Different Privacy Laws**


\(^{79}\) See Art. 26A of the Canada-United States Tax Treaty, *supra* note 70.

\(^{80}\) See Art. 27(6) and 27(7) of the Canada-United States Tax Treaty, *supra* note 70.
In part because of technological developments that facilitate the collection, use and disclosure of personal information by industry and government, many governments around the world have initiated privacy legal reforms since the 1990s. Most prominently, the European Union countries agreed to a *Data Protection Directive*, which governs private sector information collection and usage practices, that came into effect in October 1998.\(^{81}\) Article 35 of this Directive generally indicates that personal information shall not be transferred across borders to another country unless this country has legislation and policies that offer equivalent privacy protections.

In another example, Canada passed the *Personal Information Protection and Electronic Documents Act* (PIPEDA) to govern industry information collection practices, which came into full effect on January 1, 2004.\(^{82}\) PIPEDA similarly has provisions that prohibit the transfer of personal information across borders to companies that do not have similar privacy practices: the transferor company remains responsible for the personal information once it is disclosed to a third party and hence remains liable for privacy violations in foreign countries.\(^{83}\) In part as a result of the passage of PIPEDA, the European Union has deemed Canada to have equivalent privacy protections thus cross-border transfers of personal information between companies located in Canada and the European Union are permissible. In contrast, the United States does not have omnibus privacy legislation to govern the private sector and, as a result, the United States Department of Commerce negotiated a ‘safe harbour’ agreement with the European Union.\(^{84}\) Under this agreement, participating U.S. multinational firms certify they will abide by certain information collection practices (see Section IV.B.iii. for a discussion of these practices) so that personal information flows between the United States and European Union countries can continue to take place.

As part of background research for a cross-country comparative survey of privacy expectations in seven countries (see below), comparative analysis between PIPEDA and privacy legislation in these countries revealed that: three European Union countries had

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\(^{82}\) *Personal Information and Electronic Documents Act*, R.S.C. 2004, c. 5.


adopted highly equivalent legislation to PIPEDA via the EU Data Privacy Directive; the United States had adopted moderately equivalent legislation on a sectoral basis (e.g., financial information); and three countries (Mexico, Brazil and China) did not have any equivalent legislation. As a result, when a firm transfers personal information about Canadians to a majority of the countries surveyed then this information will not attract the same level of protection availed by Canadian privacy laws. The analysis demonstrated the inherent legal risk associated with transferring personal information across borders. Similarly, countries may have different law, policies and practices with respect to taxpayer rights and thus transferred taxpayer information may be treated in ways deemed unacceptable by certain countries.

ii. Transferring Cross-border Tax Information and Anti-Democratic Outcomes

As discussed, governments are increasingly turning to tax information as part of their efforts to combat the war on terror (see Section II.B.ii). For instance, a government could seek to identify the recipient of tax benefits for charitable contributions then investigate the nature of these charities to see if they are connected to alleged terrorist activities within foreign countries. As a result of post-9/11 developments, technology changes that facilitate government surveillance have been accompanied by legal changes in Canada and elsewhere that, among other things, reduce legal thresholds to obtain electronic records and enhance the government’s ability to share personal information among different government agencies and foreign governments.

Privacy researchers are struggling to understand changing privacy interests in light of technological developments and legal changes promoted by the global war on terrorism: in particular, certain researchers are challenging the view that, in order to promote more security, individuals and groups must accept less privacy. Privacy can also be conceptualized as a social interest (i.e., society’s interest in preserving privacy apart from a particular individual’s interest) so that government intrusions into privacy

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86 For a discussion of differing practices with respect to taxpayer rights, see Sawyer, supra note 10, at 1357-1371.
87 Cockfield, supra note 51, at 381-393.
interests can be portrayed as resulting in harm to social values that are integral to the maintenance of a free and democratic society.\textsuperscript{88}

The interplay between the technology change and the legal change has led to concerns that anti-democratic outcomes may occur that, at least in the long run, make our societies less secure. For instance, state investigations by government agencies, including tax authorities, that target certain individuals without any evidence of individual wrong-doing raise the risk of outcomes such as racial or religious profiling and the inhibition of freedom of speech, freedom of association and political dissent.\textsuperscript{89} By conceiving of privacy as a social interest (in addition to an individual right interest), the approach demonstrates that legal analysis sometimes overstates the tension between privacy and security as both can be portrayed to be social interests. Moreover, the approach helps to show that the preservation of both the individual and social aspects of privacy are critical to the functioning of secure democratic states.

In particular, democracies rely on a relationship of trust between citizens and their governments. This relationship of trust is fostered if these citizens perceive that they are being treated fairly and equally by laws and government agents. There is nascent empirical evidence that a combination of technology changes and post-9/11 legal changes that facilitate state investigations and intrude into the privacy sphere may be harming this relationship in trust, and making nations less secure. If certain identifiable groups, for instance, feel they are being unfairly targeted then individuals within this group may be less likely to assist state investigators, potentially harming national security.

From 2004 to 2006, our research team, the Globalization of Personal Data project, prepared and commissioned an international survey of over 7,000 residents of eight countries (Canada, the United States, China, France, Spain and Hungary, Mexico and Brazil).\textsuperscript{90} This was the first cross-national study of its kind that surveys attitudes to and experiences with the global flow of personal data, with a special focus on privacy and surveillance in the post-9/11 world. With respect to two of the survey findings: a

\textsuperscript{89} For background, see Lisa Austin, Arthur J. Cockfield and Patrick Molinari, eds., \textit{Technology, Privacy and Justice} (Montreal: Canadian Institute for the Administration of Justice, 2007).
minority of respondents (e.g., Canadians (48%), Americans (39%) and Mexicans (35%)) have reasonably high or very high levels of trust that their governments are striking the right balance between national security and individual privacy rights; and a majority of respondents (e.g., Americans (57%) and roughly half of Canadians and Mexicans) believe that laws protecting national security are intrusive upon personal privacy. Ultimately, it may be too soon to try to measure the complex and ongoing technological and social developments since the 9/11 attacks. Nevertheless, these findings urge caution when governments consider initiatives, including expanding TIE, that may intrude on the individual and social aspects of privacy.

With respect to TIE and the global war on terror, there are essentially two worries: first, that the ‘unfair’ targeting of individual resident taxpayers for terrorist investigations will erode the democratic fabric of the targeting state, and, second, that the transfer of tax information to a requesting state may lead to the unacceptable treatment (e.g., torture or other human rights violations) of non-resident taxpayers.

iii. Encroachments into Lawyer/Client Privilege and other Taxpayer Rights

As legal commentators often assert, the maintenance of lawyer/client privilege is a critical component of a democratic society: individuals need to be able to seek legal advice from, and communicate, with lawyers without worrying that the confidentiality of these communications will be breached by a third party. Bilateral tax treaties often contain provisions that indicate a requested country can refuse to disclose confidential tax communications protected by lawyer/client privilege. For example, the OECD model TIEA provides that participating countries can deny requests that violate lawyer/client privilege.

In the post-9/11 environment, there have been certain efforts to encroach on this privilege in an effort to enlist lawyers as part of the battle against international terrorism. For example, Canadian anti-money-laundering legislation initially provided that every lawyer commits a crime if he or she fails to report to FINTRAC (as mentioned, this is the Canadian government agency that collects financial information to assist with investigations of, among other things, terrorist financings) any information that has raised

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91 See, e.g., McCracken, supra note 61 at 1898.
92 See OECD Model TIEA, supra note 16 at Commentary to para. 5 and 6.
suspicion in the course of the lawyer’s dealing with his or her client. As a result of lobbying by various lawyer bodies, Canadian lawyers have been exempted from these information reporting requirements. Nevertheless, there are ongoing attempts in other countries to dilute lawyer/client privilege to assist with terrorist investigations, including efforts to access privileged information surrounding tax law advice provided by lawyers to their clients. A concern exists that governments will increasingly seek to access privileged information or reduce existing treaty protections that assert governments can deny requests for tax information that is subject to this privilege. If this is the case, transferred tax information would be at an increased risk that the privileged status of this information will not be respected.

In addition to striving to preserve lawyer/client privilege in many circumstances, tax treaties and tax information exchange agreements often contemplate additional procedural rights and safeguards for certain types of tax information. For example, countries are often permitted to decline a request if the requested information would disclose a trade, business or other secret. Moreover, requests can be denied if they would violate public policy. For example, if the foreign government’s tax investigation is motivated by political persecution then the request for information may be denied. This latter provision could act as a safeguard to refuse requests for tax information that could result in the unfair targeting of a taxpayer.

iv. The Democracy Deficit and Transnational Tax Linkages

International tax law remains one of the last areas within public international law where governments are extremely reluctant to cede sovereign control. In contrast to other areas of public international law, for example, there is no international body that can bind governments to common tax rules. As a result, Canada and other countries are increasingly turning to informal multilateral agreements sponsored by groups such as the Joint International Tax Shelter Information Centre, the Pacific Association of Tax Administrators and the Seven Country Working Group on Tax Havens to share tax and

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93 Proceeds of Crime (Money Laundering) and Terrorist Financing Act, R.S.C. 2000, c. 17.
94 See OECD Model TIEA, supra note 16 at Art. 7.
financial information without these agreements being vetted by legislative bodies such as the Canadian Parliament.\(^{96}\)

Governments find the use of informal agreements or ‘soft law’ among government agencies (including tax authorities) to be a politically viable way to encourage heightened cooperation in part because they will not be bound by law to these agreements as they would be under traditional (or hard) law. This trend may lead to a so-called ‘democratic deficit’ with citizens having a reduced political voice regarding how their tax information is shared with foreign countries, potentially harming traditional democratic values.\(^{97}\) For instance, there is little to no oversight by a legislature or other representative political institution over the types and amounts of taxpayer information that will be shared when tax authorities strike these informal agreements among each other.

\(v. \) \textit{Transfer to Developing Countries and the ‘Swiss Problem’}

Another political concern arises from the fact that developing and other countries may not have the political will to cooperate with developed countries to ensure that transferred tax information attracts the requisite amount of legal protection. Recent OECD initiatives, such as the previously-discussed harmful tax competition project, may fail to encourage sufficient political buy-in to generate effective (i.e., efficient and fair) TIE, which necessarily includes sufficient safeguards for taxpayer privacy and other taxpayer interests. Certain non-OECD countries have accused the OECD member states of unduly infringing upon their sovereign control of their tax systems.\(^{98}\) The labeling of certain countries by the OECD as tax havens subject to potential sanctions has been portrayed as a form of neo-colonialism: for instance, when the OECD initiated reform efforts in the area of harmful tax competition, supposedly infringing tax provisions by non-OECD countries were labeled as ‘harmful’ practices whereas infringing tax provisions by OECD countries were labeled as mere ‘preferential’ practices.\(^{99}\)

The OECD’s level playing field argument—the view that all OECD and non-OECD countries should converge on high standards for tax information exchanges—can

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\(^{96}\) Li, Cockfield and Wilkie, \textit{supra} note 72 at 323-331.


\(^{98}\) Easson, \textit{supra} note 41; Ambrosanio and Caroppo, \textit{supra} note 41.

\(^{99}\) OECD, \textit{supra} note 42, at 25.
be viewed as hypocritical to the extent that certain OECD member states such as Luxembourg and Switzerland maintain regulatory regimes that appear to infringe on OECD principles. For example, Switzerland maintains only two bilateral tax treaties that contemplate limited tax information exchanges in the area of criminal tax matters.\(^\text{100}\)

It may be difficult for non-OECD countries to accept proposed TIE initiatives made by the OECD when certain OECD members themselves refuse to implement these initiatives. Moreover, while full-blown tax treaties contain reciprocal benefits for the two participating countries, TIEAs generally do not contain any benefits for many developing countries (as these countries may not care about accessing tax information from other countries). Without reciprocal benefits, it remains an open question whether certain developing countries will strive to ensure that procedural safeguards for privacy and other interests within the TIEAs are respected.

Because the OECD is constituted by thirty of the most powerful economic nations in the world, it is natural for non-member countries to be concerned that this organization seeks solutions that favor the interests of their members.\(^\text{101}\) More geopolitically powerful states, and the multinational firms based within these states, may be using fora such as the OECD to skew the rules and policies to their advantage. The OECD is aware of these charges and has made a number of efforts, beginning in the 1990s, to engage in outreach and provide fora for discussion and deliberation of policy reforms that can affect non-OECD member states. The previously-discussed OECD Global Forum is one such attempt to encourage more efficient and fair TIE. Nevertheless, until OECD countries themselves agree on full-blown tax information exchanges, it may be unrealistic to expect non-OECD countries to pursue these reforms with rigor or to participate fully in the reform programs once they have agreed to implement TIE.

\(\text{vi. Transfers to Developing Countries and Technological Protections for Taxpayer Privacy}\)

An additional concern surrounds the difficulties that certain developing countries may encounter if they try to adopt technological safeguards to protect taxpayer rights. As subsequently explored in Part IV.A., to the extent that information technology networks

\(^{100}\) OECD, supra note 46 at 17.

\(^{101}\) Cockfield, supra note 94 at 183-186.
and databases are increasingly deployed to transfer tax information across borders, steps will need to be taken to create an ‘architecture of trust’ to protect taxpayer interests such as the need for secure data transfers. But it may be difficult for governments with few human and/or financial resources to participate in the development of this architecture of trust.

In particular, the push towards the use of IT systems to encourage heightened TIE between developed and developing countries has led to concerns that the latter will be unable to implement and enforce these systems. Peterson notes five reasons that make IT systems difficult for developing countries to implement: (a) organizational reform can threaten individuals and disrupt well-established operating procedures; (b) IT reform involves organizational reform that is time consuming; (c) IT reform requires good management, which is often scarce in the bureaucracies of developing countries; (d) IT professionals who implement the reforms are often insensitive to organizational constraints; and (e) public bureaucracies in developing countries often have few incentives to reform.\(^{102}\)

A concern surrounding enhanced TIE is that high taxpayer compliance costs in this area may additionally ‘punish’ countries that have adopted rigorous TIE requirements as non-resident firms will seek out lower cost jurisdictions for their investments. To promote a global level playing field, the OECD’s Global Forum recommended that existing TIE practices converge to meet high standards (i.e., rules that force taxpayers to generate and maintain taxpayer records) so that those countries that already have these standards are not unduly disadvantaged from doing so.\(^{103}\) This may place additional pressure on developing countries to adopt technology systems that are costly and difficult to implement and maintain.

A possible solution would be to increasingly deploy the private sector to administrate a developing country’s tax system, including the implementation and maintenance of the technology system that enables TIE. Countries that seek to privatize aspects of their tax administration will need to take steps to create oversight mechanisms

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\(^{103}\) OECD, *supra* note 46 at 7-8.
to review the conduct of private sector actors to encourage compliance with efforts to respect taxpayer rights when TIE occurs. If a particular country has historically had problems with these mechanisms that try to scrutinize the acts of government employees, the same problem may occur with respect to monitoring the actions of the private sector.  

According to Jenkins, “[a] chronic problem of developing countries with weak customs systems is obtaining accurate information on the origin, classification, and valuation of imports for the purposes of taxation and economic information”.  He holds out hope that IT systems that gather this information, which can be obtained much more easily from exporters, can be transmitted to the importing country from the country of export. To the extent that this system becomes workable, it may help tax authorities within developing countries enforce their tax and customs laws. However, for the foreseeable future many developing countries will be challenged to implement the technology systems that could promote taxpayer interests such as secure data exchanges.

The current approach to encourage cooperation currently mainly relies on ‘sticks’. As mentioned, under the threat of potential adoption of ‘defensive measures’ by OECD countries, 30 out of 35 countries identified as tax havens have agreed to exchange tax information.  It remains to be seen, as also discussed, whether the new TIEAs will be

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104 Bird and Zolt, supra note 30 at 34.
105 Jenkins, supra note 31 at 7.
106 As discussed in the OECD 2004 Progress Report, supra note 77, these defensive measures could include:
• The use of provisions having the effect of disallowing any deduction, exemption, credit or other allowance in relation to all substantial payments made to persons located in tax havens except where the taxpayer is able to establish satisfactorily that such payments do not exceed an arm's length amount and correspond to bona fide transactions.
• The use of thin capitalization provisions restricting the deduction of interest payments to persons located in tax havens.
• The use of legislative or administrative provisions having the effect of requiring any resident who makes a substantial payment to a person located in a tax haven, enters into a transaction with such a person, or owns any interest in such a person to report that payment, transaction or ownership to the tax authorities, such requirement being supported by substantial penalties for inaccurate reporting or non-reporting of such payments.
• The use of legislative provisions allowing the taxation of residents on amounts corresponding to income earned by entities established in tax havens in which these residents have an interest and that would otherwise be subject to substantially lower or deferred taxes.
• The use of legislative provisions ensuring that withholding taxes at a minimum rate apply to all payments of dividends, interest and royalties made to beneficial owners receiving such payments from entities established in tax havens.
enforced in any meaningful way, especially in light of technological challenges facing developing countries.

The way forward may need to increasingly rely on ‘carrots’ to incentivize effective tax information sharing. The EU Savings Directive provides an example of one such carrot that could be extended to developing countries at some point. Under the Directive, countries have either implemented automatic information exchanges (24 out of the 27 European Union) or maintained withholding taxes on cross-border interest payments (Belgium, Austria, and Luxembourg). The three countries that have maintained withholding taxes must transfer 75% of any revenues they collect to the European Union country where the investor resides. In addition, certain non-EU countries (such as Switzerland and Lichtenstein) have also agreed to impose withholding taxes, and share revenues with residence countries. Under this arrangement, the host country retains 25% of the revenues hence providing a financial incentive to create a workable system.

Alternatively and as explored elsewhere, instead of forcing host countries to adopt withholding taxes, residence countries could allocate part of any revenues derived from information sharing back to the host countries. In other words, to the extent that a developing country provides tax information to a developed country that enables the latter to impose its income taxes on cross-border flows then the developed country could share these revenues with the developing country.

In addition, governments can offer additional carrots such as: (a) including provisions in TIEAs that allocate certain taxation rights to developing countries or contemplate mutual agreement procedures for certain tax disputes (as per an approach adopted by New Zealand and Australia); (b) providing for non-tax benefits such as access to universities; (c) providing financial support for the successful adoption and enforcement of TIEAs (as per an EU approach with respect to development funds for

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107 The Savings Directive provides for a transition period whereby the countries maintaining withholding taxes must apply stipulated tax rates. From July 1, 2005 to June 30, 2008, the withholding tax rate was 15%; from July 1, 2008 to June 30, 2011, the rate is 20%; from July 1, 2011 and onwards, the rate will be 35%. See EU Savings Directive, supra note 19.


Caribbean and African countries); and/or (d) expanding trade and investment relations by offering, for instance, a free trade agreement on the condition that TIE is working effectively.

These carrots may need to be increasingly deployed to incentivize developing countries to invest in the technological infrastructure that may be needed to promote efficient cross-border tax information exchange. Moreover, the carrots may encourage fair sharing as well because incentives could encourage developing countries to adopt systems that will protect against abusive inquiries into taxpayer information.

D. Summary

Laws and administrative practices surrounding TIE have developed as a result of a process whereby tax authorities and tax advisors react to the actions taken by the other party as well as to developments in technology. There appears to be few works of legal scholarship that attempt to examine in a comprehensive or critical manner the privacy concerns arising from enhanced TIE. Instead, policy issues surrounding TIE are often referenced within a broader examination of international tax concerns such as tax evasion through tax havens. The dearth in the literature may be attributable in part to the fact that, as outlined in Part I, TIE has become a more prominent feature of the international tax regime only in recent years. A critical and comprehensive analysis of this process may help promote the development of optimal laws and policies and help us to understand where this process is leading us.

A general drawback with existing writing in the area is the failure to tease out in a clear manner what is meant by the notion of ‘effective’ TIE. The term ‘effective’ often appears to mean efficient in that new rules or policies will encourage reduced compliance costs for taxpayers and/or reduced administrative or enforcement costs for tax authorities: the corollary to reducing these costs is to increase the amount of taxpayer information that can be shared between tax authorities. By conflating the notion of effectiveness with efficiency, it may muddy the analytical waters by making it more difficult to

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110 See, e.g., the OECD Global Forum view on ‘effective exchanges,’ supra note 46. In its first official pronouncement on the issue within its 1998 harmful tax competition report, the OECD emphasized efficiency concerns when discussing problems surrounding a lack of ‘effective’ exchange of taxpayer information. See OECD, supra note 42 at 29-30.
identify the importance of non-efficiency challenges to the ability of tax authorities to collect and use taxpayer information to enforce their tax laws.

In fact, taxpayers, financial intermediaries and tax authorities may be reluctant to fully embrace TIE (hence harming efficiency interests) unless they have assurances that taxpayer interests such as privacy and confidentiality will be respected.\textsuperscript{111} Like other areas of tax policy analysis that strives to review efficiency and equity issues, the term ‘effective’ should be construed to include two discrete but related elements: efficiency (i.e., low compliance costs for taxpayers and low administration and enforcement costs for tax authorities) and fairness (i.e., respecting taxpayer rights when taxpayer information is exchanged across borders).

In other words, effective TIE necessarily involves both elements: first, efficient TIE will seek to reduce costs associated with cross-border information transfers and, second, fair TIE will respect taxpayer rights when the information is transferred. The two elements are discrete but related in that each supports the other: for example, countries may be more willing to engage in automatic exchanges of bulk taxpayer information to the extent they have assurances that their taxpayer rights, including privacy, will be respected in a similar manner as provided by domestic law and policy once this information crosses a border.

While scholarly and policy attention has mainly been paid to efficiency concerns, the next Part suggests steps to promote effective TIE by offering measures to assure taxpayers and their governments that transferred tax information will be handled in a fair manner.

\textbf{IV. Addressing the Challenges}

To the extent that a combination of technological change along with legal/policy change has significantly altered the policy landscape within which TIE operates, more significant legal and policy reform efforts may need to be undertaken. Technology is at least partly deterministic in nature, as advancing technology can shape and change the way we live. More embedded technologies—such as the IT systems increasingly being

\textsuperscript{111} Baker and Groenhagen, \textit{supra} note 10; See also Bentley, \textit{supra} note 9, at 43, 317 (maintaining that enhanced information exchanges require appropriate legal and policy protections); Sawyer, \textit{supra} note 10, at 1347 (claiming that generally accepted standards of tax administration will facilitate globalization).
deployed by national tax authorities—are said to be more deterministic and present greater resistance to change.

The synthetic theory of law and technology reflects an attempt to understand the potential adverse policy impacts of technology change.\textsuperscript{112} Under the synthesis of instrumental and substantive theories of technology, legal analysis first asks whether the technology change has undermined traditional interests that the law seeks to protect (e.g., taxpayer privacy). If a determination is made that these interests are threatened by technology change then legal analysis should become more contextual and forward-looking in an effort to come up with legal and policy solutions that preserve the traditional interests. The perspective does not seek to present a radical reconception of traditional legal analysis involving law and technology matters. Rather, the framework simply requires a more explicit consideration of the interplay between law and technology and the ways technology can have a substantive impact on individuals and their legal interests apart from the technology’s initial intended use.

While the main purpose of this paper is to tease out the principal privacy challenges posed by enhanced TIE, this Part offers initial thoughts on ways to address the challenges. Consistent with the law and technology framework discussed previously, this Part looks to general themes within law and technology writings as a beginning step toward developing legal and policy prescriptions. Ultimately, the hope is for the analysis to help generate pragmatic policy recommendations that policymakers can use to improve the laws and policies that govern TIE, with a view to balancing efficient exchanges against other policy concerns such as privacy interests.

A. Technology is Law: Developing an Architecture of Trust

A central theme often found within law and technology works is the scrutiny of ways that technology itself can promote optimal legal and policy solutions. For instance, under the ‘code is law’ perspective, governments should consider regulating the software and hardware technologies that constitute the Internet to promote the attainment of policy goals.\textsuperscript{113} Similarly, technologies outside of software and hardware solutions may help to inhibit some of the policy concerns touched on previously. Under this view, ‘technology

\textsuperscript{112} Cockfield & Pridmore, \textit{supra} note 8 at 503-506.

\textsuperscript{113} Lessig, \textit{supra} note 56.
is law’ in that technology can enable or constrain choices available to individuals, industry and government actors that may ultimately influence whether a desired policy goal is obtained.\textsuperscript{114}

\textit{i. Overview: Technologies and Trust}

In the long term, TIE may be facilitated by the development of a comprehensive information sharing network that forms part of the Internet. Such a network could involve the following components:\textsuperscript{115}

(a) a secure extranet—a portion of the Internet secured from outside access—extended to all participating tax authorities whereby they could transfer tax information on a spontaneous, automatic and/or requested basis;

(b) a secure intranet extended only between each tax authority and its domestic financial intermediaries so that the tax authority can access needed financial information;

(c) the use of digital certificates, registered with a trusted third party, to reveal limited information about individual consumers such as the country where the consumer resides;

(d) the automatic imposition of withholding taxes on payments to investors from countries that do not participate in the extranet’s information exchange (for countries that are participating in the information exchange, there will be no withholding and hence no need for the taxpayer to subsequently seek a tax refund);

(e) the use of shared information to identify arm’s length values for transfer pricing purposes; and

(f) the promotion of an online clearinghouse to assist with the automatic assessment, collection and remittance of cross-border VAT/GST payments.

The solution will only be workable to the extent that it promotes an “architecture of trust” that can be relied upon by among taxpayers, tax authorities and relevant intermediaries (e.g., businesses or banks).\textsuperscript{116} Architectures of trust include the following elements:\textsuperscript{117}

- authentication—to make sure individuals know with whom they are dealing
- authorization—to ensure an individual is permitted to conduct a particular function


\textsuperscript{115} I discussed this approach in an earlier work. See Arthur J. Cockfield, “Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation” 85 Minn. L. Rev. 1171 at 1238-1256.

\textsuperscript{116} Lessig, \textit{supra} note 56 at 39-42.

\textsuperscript{117} Grant 1998, as excerpted in Cockfield, \textit{supra} note 115 at 1248.
- privacy—to ensure others cannot discern what exchanges are taking place
- integrity—to ensure the transmission is not corrupted
- nonrepudiation—to ensure that a sender of a message cannot deny he or she sent it.

The subsequent analysis elaborates on certain elements within the architecture of trust.

*ii. Protecting a Taxpayer’s Personal Information by Collecting Needed Information Only*

Automated software systems that track consumer transactions for tax purposes and which contemplate cross-border sharing on this tax information raise a number of privacy concerns. Individual taxpayers may not wish to have their detailed tax information stored within databases of foreign tax authorities. In particular, the tracking of purchases of goods and services for VAT/GST purposes raises the danger that consumers will edit their behavior to avoid the state knowing about these purchases (hence infringing on the right to freedom of expression).

In other words, individuals may not wish to reveal their identities or precise geographic location to government authorities and may have particular fears that the foreign governments may gain access to this information. U.S. state tax authorities involved in the Streamlined Sales Tax Project (SSTP) encountered resistance based on privacy worries when they proposed forcing consumers to reveal their home addresses when they purchased goods over the Internet: home addresses were needed to assess the appropriate sales tax as both states and over 7,000 local governments assess these taxes. Ultimately, the SSTP participants decided to abandon the need for a local address and replaced it with a requirement for consumers to input their relevant zip codes.\(^{118}\)

The solution was imperfect as municipalities cross through zip codes, but was considered to be an acceptable compromise as privacy concerns had been addressed. Similarly, if tax authorities move to assist each other with cross-border VAT enforcement, they can ensure that any automated software does not call for local addresses. This may be needed to assist with the enforcement of an EU VAT Directive that, as of 2003, mandates the imposition of VATs on all cross-border consumer purchases of e-commerce goods and services from companies based within the EU by

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\(^{118}\) See Hellerstein, supra note 32.
individual consumers located outside of the European Union. Because VATs are generally assessed by federal governments, it should suffice to identify the country where the consumer resides without enquiring about more detailed information on customer location.

iii. **Protecting Data Integrity**

An important aspect of any TIE IT system would be to try to maintain data integrity and security when tax information is exchanged through computer networks across borders. An OECD survey showed a diversity of customized software solutions deployed by different national tax authorities although some areas of commonality were also identified. Due to the sensitivity surrounding the fear of imposing standardized obligations on these authorities, the OECD declined to offer suggestions for ‘best practices’. Nevertheless, in 2005, the OECD’s Committee on Fiscal Affairs decided to promote the adoption of a standard transmission format to enable secure electronic exchanges.

iv. **Inhibiting State Abuse**

Technology mechanisms should also be developed to guard against the potential abusive use of this information by government agents. Software solutions in particular can promote systems that try to ensure state agents are held accountable for their activities thus inhibiting abuse. Trusted third party software can be deployed to maintain digital logs of all cross-border tax information transfers. By maintaining logs of searches and transfers by tax authorities, authorities and wrongly-accused individuals will have access to an audit trail that can assist them in determining whether the cross-border exchange was legally permissible in the first place. The record will also permit authorities and individuals to correct errors, if any, within the transferred tax records.

As mentioned, to the extent that developing countries have problems in implementing technology systems to promote TIE, they may also have difficulties in incorporating ‘technology is law’ solutions into these systems to protect taxpayer rights and other interests.

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120 OECD, supra note 77 at 25; OECD, supra note 29.

121 Cockfield, supra note 51, at 393-406.
B. Law is Technology: Toward a Multilateral Taxpayer Bill of Rights

To the extent that the previous analysis reveals that traditional interests are threatened as a result of technology and legal changes then, under the synthetic law and technology framework, efforts need to be made to find legal or policy solutions to protect these interests that are less deferential to precedent and traditional doctrine. As explained in Parts II and III, technological, political, and legal changes appear to reduce traditional safeguards for taxpayer interests such as privacy. A possible solution in this area would be the promotion of a multilateral agreement on taxpayer rights. The idea seems to have attracted at least some support in the past. Sara McCracken, for instance, notes, “If tax administration has gone global, perhaps the time has come for taxpayers’ rights to follow suit, in the form of an international charter of taxpayers’ rights.”

i. Promoting Transparency with Respect to Protections for Taxpayer Rights

In addition, the most recent OECD perspective on TIE indicates that a workable system should be transparent to all participating countries (see Part II.B.i). Transparency requires agreement as to both the underlying rules with respect to the ways that tax information can be transferred across borders as well as with respect to the laws and policies that will govern the information once transferred. While tax treaties and TIEAs normally include language ensuring confidentiality of tax information and protecting other taxpayer interests, this may provide insufficient assurance to taxpayers that their rights will not be abused if a foreign government (or an individual within a foreign country) gains access to their tax information.

In addition, countries may want assurances that any tax information that is provided to foreign governments will not be used for abusive purposes. For instance, China maintains the death penalty for egregious forms of tax evasion, and countries may be reluctant to share tax information with China if this information will assist with the investigation and prosecution of tax crimes that result in capital penalties for taxpayers. Alternatively, countries may not want to share tax information for investigating terrorist offences if this information results in the torture (or rendition to a country that engages in torture) or other violation of the human rights of an individual.

122 McCracken, supra note 61 at 1902. For a comprehensive review of taxpayer rights, including privacy, see Bentley, supra note 9 at 292 (proposing a model of rules of best practice with respect to recognizing taxpayer rights).
ii. Market Failures and Coordinating Expectations Surrounding TIE

Opposition to this sort of reform could come from the view that, to promote effective and fair TIE, we need less government intervention and a greater role for the market (by permitting, for instance, the purchase of tax information by one government from another).\(^\text{123}\) It is not, however, clear that a more complete market in tax information will sufficiently protect taxpayer privacy rights and other interests. In fact, one perspective maintains that by coordinating expectations surrounding the treatment of transferred tax information, governments will be encouraged to engage in more effective TIE as they will have assurances that others will behave in a similar manner.\(^\text{124}\) Nevertheless, there may be opportunities for residence countries to allocate revenues collected from cross-border income to host countries (especially developing countries) when an effective tax information exchanges have taken place (see the discussion in Section III.C.vi). As previously discussed, effective TIE should contemplate both efficient and fair TIE (see Section III.D).

The most recent efforts by the OECD’s Global Forum seek to encourage a level competitive playing field among countries by advocating that all countries adopt high standards for their TIE laws, policies and practices.\(^\text{125}\) Under this view, countries should converge on high standards with respect to the protecting taxpayer rights when tax information is transferred across borders. Certain countries may be reluctant to implement the oversight mechanisms and processes to protect taxpayer rights because it may be costly to do so, and the cost of administrating the tax system may need to passed on to taxpayers who also may be reluctant to bear the costs (especially if they feel that other free riding taxpayers will enjoy the benefits of enhanced rights without paying for

\(^{123}\) Dean, supra note 11 at 658-661. In 2008, a real world example of Professor Dean’s idea came to light albeit in modified form. A bank employee in Lichtenstein stole information about the bank’s clients and sold this information to, among others, the German government (the German Finance Minister reportedly authorized payment of 5 million Euros for the information). The information revealed that German taxpayers had evaded payment of German taxes by placing their funds in Lichtenstein banks where the transfers were protected under this country’s bank secrecy laws. This revelation and subsequent political scandal has led to calls for reforms by the German government to strengthen the exchange of taxpayer information among European governments. See Carter Dougherty and Mark Landler, “Tax Scandal in Germany Fans Complaints of Inequity” The New York Times (18 February 2008).


\(^{125}\) OECD, supra note 46 at 7-8.
these benefits). Lax administrative oversight over TIE may be one way for countries to compete for international investments by reducing taxpayer compliance costs in this area. The multilateral bill of rights could help achieve high standards by forcing governments to develop institutional standards and other processes to protect the enumerated taxpayer rights. Alternatively, some observers have noted that such multilateral or ‘model’ bill of rights may need to incorporate standards that can be adapted to particular national contexts.\textsuperscript{126}

It also bears reiterating that the privacy regimes in EU countries as well as certain other countries such as Canada indicate that personal information should not be transferred across borders to countries that do not require equivalent privacy protections for this information: in part as a result of perceived market failures (e.g., asymmetric information occurs where industry knows much more about information collection practices when compared to consumers), omnibus privacy legislation was passed in these countries to account for the rising threat of technology developments to privacy and to ensure that efficient cross-border flows in personal information will persist (see Section III.C.i). A multilateral taxpayer bill of rights could similarly help to ensure that transfers of tax information to third countries will enjoy similar legal protection. By doing so, it would encourage more efficient tax information sharing.

\textit{iii. Promoting a Binding Multilateral Agreement}

In international tax law, bilateral agreements, such as bilateral tax treaties, remain the norm. Yet in certain circumstances countries have signaled their readiness to enter into multilateral agreements such as the European Council and OECD multilateral agreement on tax administration and the EU Savings Directive (see Section II). In addition, the recent OECD TIEA contemplates the possible adoption of a multilateral agreement governing TIE.\textsuperscript{127} As a result, a multilateral taxpayer bill of rights might be

\textsuperscript{126} See Bentley, \textit{supra} note 9 at 11-27 (deploying international human rights theory to argue that developing countries should be held, at least initially, to a lower standard of conduct due to, inter alia, limits on administrative capacity). The OECD has also noted that a taxpayer bill of rights must reflect a nation’s own policy and legislative environment as well as administrative practices and culture. See OECD GAP002, \textit{supra} note 45 at para. 23.

\textsuperscript{127} OECD Model TIEA, \textit{supra} note 16 at 2.
acceptable to governments who would be bound by the provisions within the agreement. 128 

A multilateral agreement would have several advantages over the existing network of tax treaties and TIEAs that already provide for certain safeguards and protections for taxpayer interests. 129 First, the multilateral agreement could incorporate additional safeguards and protections that do not already exist elsewhere, hence providing needed assurances to tax authorities, financial intermediaries and taxpayers that transferred information will attract the requisite amount of legal protection. An OECD survey from two decades ago showed that certain basic taxpayer rights, including the rights to privacy, confidentiality, and secrecy, were present in most of the survey respondents’ tax systems. 130 As mentioned, in recent years many national tax authorities have adopted informal agreements to share tax information in an effort to fight aggressive tax avoidance: the multilateral taxpayer bill of rights would ensure that this sharing will attract a minimal level of legal protection. A multilateral agreement would cover ‘gaps’ where certain bilateral tax treaties or TIEAs within a country’s network of tax agreements did not sufficient incorporate protections and safeguards for taxpayer interests.

Second, a multilateral agreement where all parties operate on a transparent and level playing field with respect to taxpayer rights might ensure that taxpayer information can be obtained more expeditiously by tax authorities: under the current regime, tax investigations are sometimes delayed as one party delays providing a response until it can investigate whether the transfer of information violates a particular procedural safeguard in a particular tax agreement. At times, the other country protests that the delay or decision to withhold tax information was improperly made. These delays may be reduced when countries agree on general principles within a multilateral agreement as there will be more consistent views on when it is appropriate to withhold tax information.

Finally, the norm under the OECD TIEA is that countries should only provide for TIEAs that call for the provision of tax information upon request (and not for

128 For background on multilateral taxpayer bill of rights, see Baker and Groenhagen, supra note 10; Sawyer, supra note 10, at 1346-1348 (arguing that basic taxpayer rights should be substantially similar to promote reasonable and consistent taxpayer expectations).
129 See, e.g., OECD model TIEA, supra note 16 at Arts. 1 and 7.
spontaneous or automatic exchanges as traditionally occurs within tax treaties). The OECD notes, however, that countries can expand cooperation by covering automatic and spontaneous exchanges. A multilateral taxpayer bill of rights might encourage countries to negotiate TIEAs with this expanded coverage, which in turn should help them administrate and enforce their tax laws over world-wide income.

Alternatively, a soft law approach could consist of developing a code of conduct to promote taxpayer rights for tax authorities to follow when they engage in TIE: the code of conduct would likely be more politically feasible as it would avoid politically-problematic binding tax agreements, but may provide insufficient assurances to tax authorities, taxpayers and industry intermediaries that taxpayer rights will be protected (as there will not be any legal recourse to the extent these interests are violated).

Appendix A sets out draft provisions that could be included in a hard or soft law multilateral taxpayer bill of rights. These draft provisions have been drawn and amended from the Taxpayer Bill of Rights produced by Canadian tax authorities and act as a tentative guide to one possible approach for a multilateral taxpayer bill of rights. The Bill of Rights were additionally modified to account for widely-adopted ‘fair information practices’ used to guide the collection, use and disclosure of personal information by governments and industry, and found within legislation such as the EU’s Data Protection Directive and Canada’s Personal Information Protection and Electronic Documents Act. Again, more research and analysis is required before a concrete prescription in this area can be offered.

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133 See the Committee of Experts on International Cooperation in Tax Matters, supra note 21. The United Nations Code of Conduct on Cooperation in Combating International Tax Evasion, if it is eventually endorsed by U.N. Economic and Social Council, will seek use the ‘soft law’ approach to encourage reforms to promote effective tax information exchange. Id. at 2.

134 Canada Revenue Agency, Taxpayer Bill of Rights Guide: Understanding Your Rights as a Taxpayer, RC17 (Ottawa: Canada Revenue Agency). The Taxpayer Bill of Rights has no legal status, but is designed to shape the attitude of Canadian tax authorities when dealing with taxpayers. For a review of this document’s history and scope, see Li, supra note 12 at 91-92. For other attempts to generate a model taxpayer bill of rights, see OECD GAP002, supra note 45 at 9-11; Bentley, supra note 9 at 373-401.

135 The EU Data Protection Directive as well as PIPEDA were based in part on the fair information practices set out within the OECD, OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Information, Security and Privacy (Paris: OCED, 1980).
IV. Conclusion

Technology change, especially recent information technology (IT) developments, has facilitated cross-border tax information exchange (TIE) as tax authorities harness and exploit the power of their domestic IT tax systems and increasingly seek linkages between these systems and those maintained by foreign counterparts. This technology change has occurred over roughly the same period when TIE is assuming a more prominent role within the international tax regime. TIE is attractive to policymakers in part because it is politically feasible as it preserves sovereign control over tax policy and is thought to be effective at inhibiting abusive tax avoidance, tax evasion, illicit narcotics money laundering and terrorist financing schemes.

Enhanced TIE, however, also amplifies the risk that taxpayer rights such as privacy may be harmed to the extent that the technology change promotes heightened and ongoing sharing of taxpayer information. For this reason, governments need to ensure that reforms promoting effective TIE include efforts to encourage both efficient exchanges (i.e., exchanges that encourage low compliance costs for taxpayers and low administration and enforcement costs for tax authorities) and fair exchanges (i.e., exchanges that respect taxpayer rights such as privacy). Efficient and fair exchanges are discrete but related topics in the sense that both are necessary elements to accomplish effective TIE. For example, if governments are not confident that their taxpayer information will be shared in a fair manner with foreign governments then they may be reluctant to engage in automatic electronic sharing of this information, harming efficient sharing.

This Article deployed a law and technology framework to inform the analysis directed at identifying challenges to taxpayer privacy rights and interests promoted by enhanced TIE. Governments should consider technology solutions and, in the medium to long term, the development of an architecture of trust for technology systems to enable efficient information exchange balanced against the need to protect taxpayer rights. While more research is required to assess an appropriate legal and policy response, governments should also consider the adoption of a multilateral agreement on taxpayer rights to ensure that tax information that is transferred across borders attracts a minimal level of legal protection for rights such as taxpayer privacy.
Appendix A: Sample Multilateral Taxpayer Bill of Rights

1. **Taxpayer has the right to receive entitlements and to pay no more and no less than what is required by law.**
   A taxpayer can expect to receive the benefits, credits and refunds to which it is entitled under the law and to pay no more and no less than the correct amount required under the law.

2. **Taxpayer has the right to privacy and confidentiality.**
   A taxpayer can expect foreign tax authorities to protect the privacy and confidentiality of their tax information. This information will be used only for purposes allowed by law. Only those persons who are authorized by law and who require the information to administer programs and legislation have the right to access a taxpayer’s personal and financial information.

4. **Taxpayer has the right to a formal review and a subsequent appeal.**
   A taxpayer is entitled to a formal review of its file if they believe that foreign tax authorities have not applied the law correctly or that the taxpayer has not received its full entitlements. If an administrative review does not resolve the matter to the taxpayer’s satisfaction, the taxpayer is entitled to appeal to an impartial court.

5. **Taxpayer has the right to complete, accurate, clear, and timely information.**
   A taxpayer can expect to be provided by a foreign tax authority with complete, accurate and timely information that will explain the laws and policies that apply to the taxpayer’s situation so that the taxpayer can get its entitlements and meet its obligations.

6. **Taxpayer has the right to have the law applied consistently.**
   A taxpayer can expect tax authorities to apply the law consistently so non-resident taxpayers get their entitlements and pay the right amount of tax.

7. **Taxpayer has the right to lodge a service complaint and to be provided with an explanation of findings by the relevant tax authority.**
   A taxpayer can expect that if the taxpayer lodges a complaint about the service you receive from a foreign tax authority, the taxpayer will be listened to and given the opportunity to explain the situation. Tax authorities will deal with a taxpayer’s complaint
promptly, impartially and in confidence, and provide the taxpayer with an explanation of findings.

8. **Taxpayer has the right to expect the tax authority to be accountable.**
A taxpayer has the right to expect tax authorities to be accountable for what they do. When a tax authority makes a decision about a taxpayer’s affairs, the authority will explain that decision and inform the taxpayer about its rights and obligations in respect of that decision. If a tax authority transfers a taxpayer’s information across a border, the original tax authority remains accountable for the treatment of this information even after it relinquishes control over the information. A taxpayer has the right to challenge tax information relating to the taxpayer and, if the challenge is successful, to have the information amended or erased.

9. **Taxpayer has the right to be warned about questionable tax schemes in a timely manner.**
Taxpayers can expect tax authorities to provide timely and relevant information about questionable tax schemes that these tax authorities intend to scrutinize so that taxpayers can recognize and avoid falling into tax schemes that could put them at odds with domestic or foreign tax laws.

10. **Taxpayer has the right to be represented by a person of their choice.**
A taxpayer can get advice about tax liabilities from and be represented by a person of his/her/its choice. If taxpayer’s provide tax authorities with authorization, these tax authorities should discuss the taxpayer’s situation with the representative of the taxpayer’s choice.

11. **Taxpayer has the right to have their information be obtained, used and exchanged across borders by lawful and fair means and, where appropriate, with the knowledge or consent of the taxpayer.**
Where appropriate (e.g., in situations that do not harm national security), a taxpayer should be notified if its tax information is being used as part of a foreign government’s investigation into tax and other matters.

12. **Taxpayer has the right to have the taxpayer’s information collected, used and exchanged across borders for the purposes for which they are to be used, and, to the
extent necessary for those purposes, this information should be accurate, complete and kept up-to-date.

If there has been a request for tax information, the purposes for which taxpayer information are collected should be specified not later than at the time of the request and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

13. **Taxpayer has the right to have its tax information protected by reasonable security safeguards when it is transferred across borders.**

Taxpayer information should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification.