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COMMENTARIES ON ARTICLE 26 OF THE OECD MODEL TAX CONVENTION: EXCHANGE OF INFORMATION[1]

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Abstract: The information exchange clause contained in Article 26 of the OECD MTC has evolved to become an instrument that has effectively increased the possibilities of obtaining and exchanging information to fight tax avoidance and tax evasion. This may be inferred from analysis of the Ibero-American network of Double Taxation Conventions.

However, such evolution raises some issues yet to be tackled. As an example, the provision has not considered the taxpayers' rights and guarantees in the course of the information exchange procedure. Also, the evidence value of documents which despite being obtained illegally, have been lawfully exchanged at an international level through cooperation instruments, remains problematic. In the same vein, its retroactive application and the time limits of the clause are also questionable.

This paper aims to discuss all of these conflicts and, if possible, to provide some solutions in this respect.

Keywords: Art. 26 OECD MTC – Exchange of Tax Information - Ibero-American network of DTCs.

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INTRODUCTION

The purpose of this paper is to analyze the tax information exchange clause contained in Article 26 of the Organization for Economic Co-operation and Development's (hereinafter 'OECD') Model Tax Convention on Income and on Capital. In the course of this analysis particular attention will be paid to the Latin American context. In order to achieve this aim, the paper has been divided into two different sections:

The first one refers to the historical development of the Article and its Commentaries. Thus, a series of general conclusions are drawn, among which the evolution of the information exchange clause as an instrument that increasingly allows greater possibilities of obtaining and exchanging information to fight tax avoidance and tax evasion more effectively is emphasized. However, as also noted, the provision has not considered the taxpayers' rights and guarantees in the course of the information exchange procedure. Likewise, as discussed below, in the Ibero-American network of Double Taxation Conventions, most part of the OECD MTCs have not been updated and an old wording of the information exchange clause is still applied.

The second section examines specific issues of particular relevance raised by the information exchange clause in the context of Latin American DTCs. Specifically, reference is made to the foreseeable tax relevance of the information exchanged and to the different types of information exchange. Subsequently, based on a case-law analysis, the section deals with the challenges arising from the evidence value of documents which despite being obtained illegally, have been lawfully exchanged at an international level through cooperation instruments. In addition, an examination of some issues related to the opposition grounds to the information requirement and the retroactive application and time limits of the clause is also carried out. Finally, a brief reference is made to the role and functions of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

I. HISTORICAL BACKGROUND OF ARTICLE 26 OECD MTC

1. Historical developments

The idea of creating a Draft Model Tax Convention to solve the problems arising from double taxation among OECD Member States first emerged in 1956 within the Fiscal Committee forum. Shortly after, in 1963, a Draft Double Taxation Convention on Income and Capital, as agreed upon by the Fiscal Committee, was presented[5]. From its origins, it was highlighted the need to periodically review the Model Convention and its Commentaries in order to align them to the changing conditions and common practices of Member States. Thus, the permanent relevance of the OECD MTC in international taxation would be guaranteed[6]. In this section, the main amendments to Article 26 OECD MTC regarding exchange of tax information will be analyzed.

1.1. Phase 1. 1963 OECD Draft Double Taxation Convention on Income and Capital[7].

Article 26 of the 1963 Draft Convention consisted of two sections. Both the scope and restrictions on the information exchange were mostly evidenced in the literal wording of the article, as shown below:

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention ~ and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation

[5] 2017 OECD MTC, par. 6.

[6] SERRANO ANTÓN, F. (2003) "La modificación del Modelo de Convenio de la OCDE para evitar la doble imposición internacional y prevenir la evasión fiscal. Interpretación y novedades de la versión del año 2000: la eliminación del artículo 14 sobre la tributación de los servicios profesionales independientes y el remozado trato fiscal a las *partnerships"*. (Crónica tributaria no. 106) pp. 67-100.

[7] As for September 2017, the DTCs following Article 26 of the OECD MTC are: Argentina-Germany, Argentina-Brazil, Brazil-Austria, Brazil-Canada, Brazil-Denmark, Brazil-Ecuador, Brazil-Spain, Brazil-Philippines, Brazil-France, Brazil-Hungary , Brazil-Italy, Brazil-Japan, Brazil-Luxembourg, Brazil-Czech Republic, Brazil-Slovak Republic, Brazil-Sweden, Brazil-Netherlands, Bolivia-Germany, Grenada-Switzerland, Ecuador-Germany, Ecuador-Brazil, DTC CARICOM (Guyana, Jamaica), Jamaica-Germany, Jamaica-Canada, Spain-Austria, Spain-Brazil, Spain-Denmark, Spain-Finland, Spain-Netherlands, Spain-Japan, Spain-Morocco, Spain- Czechoslovakia, Spain-Romania, Spain-Tunisia, Portugal-Germany, Portugal-Austria, Portugal-Belgium, Portugal-Finland, Portugal-France, Portugal-Ireland, Portugal-Italy, Portugal-Mozambique, Portugal-United Kingdom, Dominican Republic- Canada. It is also followed by the DTCs signed between Granada-United Kingdom, Granada-South Africa and Jamaica-United Kingdom. However, these conventions deviate when it comes to the grounds for opposition.

thereunder is in accordance with this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of the Convention.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

> *a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;*
>
> *b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;*
>
> *c) to supply information which would disclose any trade, business, industrial, commercial' or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).*

As can be noted, this first wording was solely inserted for the smoother application of the Double Taxation Agreement and, in line with the solution given to the problems arising from double taxation[8], it was not intended to serve as an independent mutual assistance instrument between States[9].

In accordance with this purpose, the 1963 version of Article 26 of the OECD MTC was established as a minimum clause whose objective scope was limited to the exchange of information deemed necessary for the application of the DTC and the national laws regarding taxes under its scope. In view of reinforcing this provision, the Commentaries to the article established that the exchange of information that had as its purpose the administrative cooperation between countries to avoid tax fraud or evasion should be specifically provided for by the Contracting States, either in the same Convention, either in an independent bilateral agreement[10].

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[8] M. RING, D. (2016) "Article 26: Exchange of Information" */in/* VANN. R. *Global Tax Treaty Commentaries*, (IBFD) p. 9.

[9] Commentaries to Art. 26 OECD MTC 1963, para. 6.
In this vein, FERNÁNDEZ MARÍN, F. (2006) *El intercambio de información como asistencia tributaria externa del Estado en la Unión Europea,* (Tirant lo Blanch) p. 39.

[10] Commentaries to Art. 26 OECD MTC 1963, para. 6.

The first section also stated that only the exchange of information deemed necessary was authorized under the scope of the Convention. This requirement had two implications: firstly, the exchanged data had to be of tax significance for the requesting State and, at the same time, the requesting State should have used all means available to obtain the information before making the request (principle of subsidiarity) [11]. The necessary nature of the information could be verified by the requested State by asking the requesting State to provide the facts and legal conditions to demonstrate it[12].

On the other hand, it was established that States could exchange information *'insofar as the taxation thereunder is in accordance with this Convention'*. This way, the objective scope was also limited to those taxpayers to whom the Convention was applicable; that is, those who were residents of one of the two Contracting States[13].

In addition to the limitations imposed to the objective and subjective scope of application, the modalities by which information could be exchanged were also restricted. Thus, the only form of information exchange provided by Article 26 was the exchange under request[14]. However, States could carry out spontaneous and automatic exchanges of information if so agreed in a bilateral agreement[15].

Moreover, the information exchanged could only be disclosed to the persons or authorities concerned with the assessment or collection of the taxes under the scope of the DTC (art. 26.1 in fine OECD MTC 1963). This configuration of the confidentiality clause envisaged in the original wording offered greater protection compared to subsequent versions of Article 26, as it was an autonomous secrecy rule which did not depend on the level of protection of the requesting State[16]. However, despite the literal

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[11] CALDERÓN CARRERO, J.M. (2008) *Convenios fiscales internacionales y fiscalidad de la Unión Europea* (Wolkers Kluwer), p. 585 and VOGEL K. (1997) *Klaus Vogel on Double Taxation Conventions, Third Edition, A Commentary to the OECD, UN and U.S. Model Conventions for the Avoidance of Double Taxation of Income and Capital, With Particular Reference to German Treaty Practice*, (Ed Kluwer, 3rd Edition) p. 1406.

[12] F. DEBELVA y N. DIEPVENS (2016) "Exchange of Information. An Analysis of the Scope of Article 26 OECD Model and Its Requirements: In Search for an Efficient but Balanced Procedure" (Intertax: International Tax Review*;* Vol. 44) p. 300. and VOGEL, K. *Klaus Vogel on Double Taxation Conventions. A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation of Income and Capital. With Particular Reference to German Treaty Practice,* op. cit*,* p. 1406.

[13] M. RING, D.: "Article 26: Exchange of Information", op. cit. 10.

[14] Specifically, Commentaries to Article 26 para. 7 stated that *'the rule laid down in paragraph I of the Article presupposes that information shall be exchanged only on application'.*

[15] Commentaries to Art. 26 OECD MTC 1963, para. 8.

[16] OBERSON X. (2012) *International Exchange of information in tax matters. Towards Global Transparency*, (Elgar Tax Law and Practice series), p. 24; ADONNINO, P., (1995) *Cooperación*

wording of the Article, several scholars understood that the information could also be used in tax procedures and criminal proceedings to prosecute and repress tax fraud and evasion[17].

The exchange thus provided was mandatory to the extent that the requested State had the information at the time of the request or could obtain it in accordance with its normal administrative practice. However, this State was not required to undertake measures that demanded special investigations or a particular examination of the taxpayer's accounting[18].

The information exchange was neither mandatory when the opposition requirements provided for in the second section of the Article were met. However, exchanges of information that fulfilled these characteristics were possible insofar as they were covered by the national legislation of the transmitting State[19]. That is, if any of the conditions listed in the Article were met, the exchange would become discretionary for the Contracting States[20].

These opposition grounds can be grouped into three different categories as follows:

(i) Principles of reciprocity and proportionality (Art. 26. 2 a) and b) OECD MTC).

In accordance with these provisions, the requested State may oppose the exchange request under two circumstances: when the exchange involves the adoption of administrative measures at variance with the laws or the administrative practice of any of the Contracting State; or in cases where such exchange overrides national regulations or exceeds the regular course of the administrative practice of any of the Contracting State.

These provisions constitute an expression of the general principle of reciprocity governing the information exchange procedure whose purpose is to prevent a Contracting State from taking advantage of the differences of the information system from another

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administrativa y modalidades de intercambio de información entre Administraciones Fiscales nacionales, (CIAT), p. 26.

[17] OBERSON X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. cit. p. 25

[18] Commentaries to Art. 26 OECD MTC 1963, para. 12.

[19] CALDERÓN CARRERO, J.M. (2000) *Intercambio de información fiscal y fraude fiscal internacional,* (Madrid: Centro de Estudios Financieros), p. 122.

[20] Ibid, p. 220; VOGEL, K., *Klaus Vogel on Double Taxation Conventions. A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation of Income and Capital. With Particular Reference to German Treaty Practice,* op. cit. p. 1919.

State if such operation was not allowed by its own national administrative regulations or practice[21].

In this sense, the aforementioned sub-sections also integrate what is known internationally as the "lowest common denominator" clause. This clause was conceived to establish a balance in the information exchange obligations between States, so that the most restricted legislation and practice of the States stands as the threshold above which the exchange is not mandatory[22].

Nevertheless, given the obvious variations in practices and procedures between States, the strict interpretation of this principle may render the information exchange without effect. As a mechanism to avoid the consequences of a narrow application of the Article, the Commentaries provide the contracting States for the possibility to reach an agreement based on the mutual agreement procedure contained in article 25 of the Model Convention.

In addition to the principle of reciprocity, subsections a) and b) of Article 26 establish that the principle of proportionality must also be respected. Under this principle, the administrative intervention has to be proportionate to the objective pursued - the correct management of the tax system - and the least burdensome means must be used[23].

(ii) The secrecy of the information (Art. 26.2 c) OECD MTC).

This section also reserves the right of the Contracting States not to exchange the information when such information is of a secret nature. Thus, provided that the information could disclose any trade, business, industrial, commercial or professional secret or trade process, the Contracting State is not obliged to carry out the exchange. Note that this enumeration is not exhaustive, but rather it is choice of the Contracting States to add more waivers to the obligation to provide the information if deemed necessary. In this regard, it is important to mention the explicit possibility introduced by

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[21] Commentaries to Art. 26 OECD MTC 1963, para. 11.
[22] CALDERÓN CARRERO, J.M.: *Intercambio de información fiscal y fraude fiscal internacional* op. cit., p. 162; LÓPEZ FEITO, F., (1993) "Guía de la OCDE sobre el intercambio de información fiscal entre Estados", (Cuadernos de Formación, no. 24, Inspección de Tributos), p. 4.
[23] MUÑOZ VILLARREAL, A. (2012) "Límites al intercambio internacional de información tributaria", */in/* COLLADO YURRITA, M. A. and MORENO GONZÁLEZ, S. *Estudios sobre Fraude Fiscal e Intercambio Internacional de Información Tributaria*, (Barcelona: Atelier) pp. 257-277, citing RUIZ GARCÍA, J. R., (1988) *Secreto bancario y hacienda pública*: *(el deber de colaboración de las entidades bancarias en el procedimiento de gestión tributaria)*, (Madrid: Civitas) p. 114.

the Commentaries to use bank secrecy as a reason for opposition. As will be discussed further on, this opposition ground was amended in the following versions of the MTC.

The assumptions are not defined in the Convention but it is the national legislation that establishes its specific content and extension. The divergence of concepts may entail an infringement of the principle of reciprocity as the extension of the confidentiality right differs between Contracting States[24].

(iii) *Ordre public* (Art. 26.2 c) in fine OECD MTC)

Finally, States are not obliged to carry out information exchange when it is contrary to public policy. This suggests that the exchange request can be refused when fundamental or essential principles of national regulations are breached[25].

1.2. Phase 2. 1977 OECD Model Double Taxation Convention on Income and Capital[26].

In 1971, in light of the experience acquired by the States when negotiating and applying DTCs, as well as the increase in international tax relations and the emergence of new

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[24] OBERSON X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. Cit, p. 34.

[25] Ibid, p. 35.

[26]As for September 2017, the DTCs following this Model are: Argentina-Australia, Argentina-Belgium, Argentina-Denmark, Argentina-Finland, Argentina-France, Argentina-Netherlands, Argentina-Italy, Bolivia-Sweden, Brazil-China, Brazil- Finland, Brazil-Israel, Brazil-Portugal, Brazil-Trinidad Tobago, Chile-France, Chile-Ireland, Chile-Norway, Chile-Paraguay, Chile-Portugal, Chile-United Kingdom, Chile-Russia, Chile-South Africa, Chile- Sweden, Cuba-China, Ecuador-Belgium, Ecuador-France, Ecuador-Mexico, Spain-Algeria, Spain-Australia, Spain-Bulgaria, Spain-China, Spain-Korea, Spain-Ecuador, Spain-United States, Spain-Egypt , Spain-Slovenia, Spain-Estonia, Spain-Philippines, Spain-France, Spain-Greece, Spain-Hungary, Spain-India, Spain-Indonesia, Spain-Ireland, Spain-Iceland, Spain-Israel, Spain-Italy, Spain -Lituania, Spain-Malaysia, Spain- Mexico, Spain-Norway, Spain-Portugal, Spain-Russia, Spain-Venezuela, Spain-Belgium, G uyana-Canada, Jamaica-China, Jamaica-Denmark, Jamaica-France, Jamaica-Israel, Mexico-Australia, Mexico-Belgium, Mexico-China, Mexico-Finland, Mexico-France, Mexico Greece, Mexico-Israel, Mexico-Romania , Mexico-Sweden, Portugal-Algeria, Portugal-Brazil, Portugal-Bulgaria, Portugal-Cape Verde, Portugal-Canada, Portugal-China, Portugal-Slovakia, Portugal-Slovenia, Portugal-Estonia, Portugal-Greece, Portugal-Hungary, Portugal-India, Portugal-Iceland, Portugal-Latvia, Portugal-Lithuania, Portugal-Luxembourg, Portugal-Macao, Portugal-Malta, Portugal-Morocco, Portugal-Pakistan, Portugal-Poland, Portugal-Czech Republic, Portugal-Romania, Portugal -Russia, Portugal-Sweden, Portugal-Tunisia, Portugal-Ukraine, Suriname-Indonesia, Uruguay-Hungary, Venezuela-Austria, Venezuela-Barbados, Venezuela-Belgium, Venezuela-China, Venezuela-Korea, Venezuela-Denmark, Venezuela-France , Venezuela-Indonesia, Venezuela-Iran, Venezuela-Italy, Venezuela Malaysia, Venezuela-Country It is Netherlands, Venezuela-Norway, Venezuela-Portugal, Venezuela-Qatar, Venezuela-Czech Republic, Venezuela-Sweden, Venezuela-Trinidad Tobago, Venezuela-United Kingdom. The DTCs set out below also follow the 1977 Model but with some deviations: Argentina-United Kingdom, Bolivia-France, Bolivia-United Kingdom, Brazil-Ukraine, Chile-Thailand, Chile-Malaysia, Cuba-Austria, Cuba-Barbados, Spain-Thailand, Spain-Poland, Spain-Vietnam, Guyana-United Kingdom, Portugal-Korea, Portugal-Indonesia, Portugal-Singapore, Portugal-Turkey, Venezuela-

complex forms of business organization at international level, the Committee on Fiscal Affairs (which replaced the Fiscal Committee) carried out a revision of the Draft Convention of 1963. As a result, a new Model Tax Convention and its Commentaries was published in 1977[27], in which several changes to the wording of Article 26 were made, as observed below (marked in bold):

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention *or* ***of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder*** *is not contrary* ***to the Convention. The exchange of information is not restricted by Article 1.*** *Any information received by a Contracting State* ***shall be treated as secret*** *in the same manner as information obtained under the domestic laws of that State and shall be disclosed only* ***to persons or authorities*** *(including courts and administrative bodies) involved in the* ***assessment or collection*** *of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.*

Germany, Venezuela-Kuwait. In particular, all these DTCs restrict the personal scope of application to residents of any of the Contracting States. The DTCs Argentina-Canada, Argentina-Russia, Argentina-Sweden, Venezuela-Canada, Chile-Belgium, Chile-Canada, Chile-Korea, Chile-Croatia, Chile-Denmark, Spain-Chile, Peru-Canada, Peru-Chile and all those DTCs concluded by Chile make no reference to the prohibition outlined in section 4 of the Article which prevents a Contracting State from providing information when there is no domestic interest in it. The DTCs Ecuador-Canada, Ecuador-Chile, Paraguay-Chile, in addition to the above, establish that information necessary to apply value added taxes might also be exchanged. The Mexico-Portugal and Mexico-Denmark DTCs also allow the exchange of information on value added taxes. The Argentina-Norway, Chile-Ecuador, Jamaica-United States, Mexico-Japan, Mexico-Norway and Chile-Poland DTCs expand the objective scope to taxes of any kind. The Chile-Peru DTC specifies that the information exchanged may refer to the taxes included in the Convention and, also, the General Sales Tax. Under the coverage of the Chile-Mexico, Venezuela-United States DTCs, information on any kind of taxes may be exchanged regardless of these taxes are under the scope of the Convention or not. The Cuba-Portugal, Cuba-Qatar, Cuba-Russia Agreements allows the use of the information exchanged for purposes other than those provided in the section. The following provision is missing in the Convention between Ecuador and Romania: *'Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions'.* The Spain-Cuba DTC notes that the information may only be used in the territories of the Contracting States. In the Mexico-Ireland DTC it is established that *'In the event that the laws of Ireland are amended to permit the exchange of information and non-discrimination articles of an existing Agreement or Convention concluded by Ireland for the avoidance of double taxation to apply to taxes not covered by such Agreement or Convention then the provisions of Articles 23 and 25 of this Convention shall also apply to such taxes'.* In the Portugal-Netherlands and Suriname-Netherlands Conventions, the section concerning the reasons for opposition to the exchange request is missing. Finally, the DTC Venezuela-Cuba notes that the information received will not be used for other purposes and that such information will only be used in the territories of the Contracting States.

[27] 2017 OECD MTC, para. 7.

2. In no case shall the provisions, of paragraph 1 be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to ***supply information which****, is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;*

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

These amendments were the first step in a process of expansion and evolution of Art. 26 OECD MTC towards a wider-ranging provision[28]. Thus, since 1977, in addition to the exchange of tax information for the application of the Convention, the use of this mechanism was also authorized to apply the provisions of domestic legislations of the Contracting States, even where such legislation was not related to the DTC[29].

The new version of the Article explicitly stated that *'the exchange of information is not restricted by Article 1'.* Thus, not only the objective scope of the clause was expanded but also the personal scope by authorizing the exchange of information regarding non-resident taxpayers of the Contracting States.

Likewise, the extent of the confidentiality nature of the information was expanded to the courts and administrative bodies involved in the assessment, collection, enforcement or prosecution of the determination of the taxes covered by the Convention. The disclosure of the information in public court proceedings or in judicial decisions was also explicitly allowed. The autonomous secrecy rule of the 1963 OECD MTC became an 'equal treatment obligation' under which the requesting State was forced to keep the received information secret in the same way as if it had been obtained according to its national law. This new rule, which is still applicable nowadays, favored the use of the information; however, as a downside, there was a decrease in the level of secrecy protection since it was made dependent on the different legal provisions of the Contracting States[30]. The

[28] M. RING, D.: "Article 26: Exchange of Information", op. cit. p. 10.
[29] Commentaries to Art. 26 OECD MTC 1977, para. 1.
[30] OBERSON, X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. Cit., pp. 24-25 y VOGEL, K., *Klaus Vogel on Double Taxation Conventions. A Commentary to the*

applicable penalties in case of violation of the secrecy would also be provided by the administrative and criminal legislation of the Contracting States.

In addition to the changes made in the literal wording of the provision, the Commentaries to the Article were also modified. Mainly, in relation to the modalities of the exchange of information and the scope of the investigations to be carried out when a request of information was made.

Regarding the former, remember that the Commentaries to Article 26 OECD MTC 1963 expressed that *'the rule laid down in paragraph I of the Article presupposes that information shall be exchanged only on application'*[31]. As of 1977, this restriction is repealed and explicit reference is made to spontaneous and automatic types of exchange[32].

Also, the possibility not to carry out special investigations or special examination of the business accounts kept by the taxpayer if the information could not be obtained in the normal procedure of tax determination, was eliminated.

Thus, in line with the tendency to increase the scope of the information exchange clause, the Commentaries established the obligation of the requested State to collect the information the other State needed *'in the same way as if its own taxation was involved'*[33]. As a consequence of this criteria followed by the OECD Committee on Fiscal Affairs, most part of States understood that upon a request for information -based on an DTC signed after the 1977 amendment -, the Tax Administration of the requested state was forced to use the all the means granted by its domestic legislation to obtain the information (principle of national autonomy), including those concerning special investigations, even in those cases in which the information exchanged had no interest for the requested State[34].

OECD, UN and US Model Conventions for the Avoidance of Double Taxation of Income and Capital. With Particular Reference to German Treaty Practice, op. cit., pp. 1413-1415.

[31] Commentaries to Art. 26 OECD MTC 1977, para. 1.

[32] Commentaries to Art. 26 OECD MTC 1963, para. 7.
For further information in relation to the types of information exchange see CALDERÓN CARRERO, J.M.: *Intercambio de información fiscal y fraude fiscal internacional* op. cit., p. 123.

[33] Commentaries to Art. 26 OECD MTC 1977.

[34] CALDERÓN CARRERO, J.M.: *Intercambio de información fiscal y fraude fiscal internacional* op. cit., pp. 134-135 y 142-143.

1.3. Phase 3. 2000 OECD Model Tax Convention on Income and on Capital[35].

With the aim of reducing the obstacles encountered in the practice of exchange of tax information between Tax Administrations, the 2000 amendment extended again the information exchange clause in the following terms:

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes *of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities****, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1*** *and 2****. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in the first sentence. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.***

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

[35]As for September 2017, the DTCs following this Model are: Brazil-Belgium, Brazil-Mexico, Brazil-Venezuela, Spain-Iran, Spain-Costa Rica, Spain-Macedonia, Spain-New Zealand, Spain-South Africa, Spain-Turkey, Mexico -Brazil, Mexico-Russia, Venezuela Russia, Brazil-Chile, Mexico-Czech Republic. These last two slightly deviate from the Model. The first limits the objective scope to taxes under the scope of the Convention. The second makes no reference to the domestic interest of the Contracting State in section 4.

Therefore, the main amendment was the extension of the objective scope of the information exchange. As of year 2000, under Article 26 OECD MTC, the States, their political subdivisions or local authorities can exchange tax-relevant information regarding any type of tax, being indifferent that such taxes were included in the scope of the DTC. Commentaries to the Article reflected this modification and, at the same time, specified that those Contracting States that could not adapt to the change were free to maintain the previous version of the Convention[36].

The expansion of the objective scope led to a corresponding increase in the scope of the confidentiality right: from that moment on, the information could be communicated both to the persons or authorities responsible for the management, collection and inspection of taxes covered by the DTC, and also to the persons responsible for the management of the taxes out of the scope of the Convention[37]. Regarding confidentiality, Commentaries to the Article clarified that the enumeration of the persons to whom the information provided in section 1 of the article could be communicated did not exclude that the same information was also disclosed to the taxpayer, his proxy or to the witnesses involved in the procedure of determination of appeals[38].

On the other hand, in relation to the modalities of information exchange, Commentaries to the Article clarified that they were not restricted to the three conventional forms –that is, exchange upon request, automatic or spontaneous- but that Contracting States could make use of any other techniques they deemed pertinent to obtain the information, such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information[39]. In this sense, reference was made to the publication *'Tax Information Exchange between OECD Member Countries: A Survey of Current Practices'*, where the techniques were fully described.

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[36] Commentaries to Art. 26 OECD MTC 2000, para. 1.

[37] In this vein, CALDERÓN CARRERO, J. M. (2004) "El artículo 26 MC OCDE 2000: la cláusula de intercambio de información", /in/ *Comentarios a los convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España (Análisis a la luz del Modelo de Convenio de la OCDE y de la legislación y jurisprudencia española)*, (La Coruña: Instituto de Estudios Económicos de Galicia) pp. 1270-1276.

[38] Commentaries to Art. 26 OECD MTC 2000, para. 12.

[39] Commentaries to Art. 26 OECD MTC 2000, para. 9.1; For further information in relation to the types of information exchange, see ESCALONA RUIZ, M. A. (2010) "Acuerdos internacionales de intercambio de información y asistencia mutua", (Cuadernos de Formación. Colaboración 29/10. Vol. 11/2010 Instituto de Estudios Fiscales).

1.4. Phase 4. 2005 OECD Model Tax Convention on Income and on Capital[40]

The changing economic conditions and the increasing sophistication and complexity of the methods of tax avoidance and evasion exerted a strong pressure that led to a new update and adaptation of the Model Tax Convention in 2005[41]. At the same time, the need to adapt the content of Article 26 to the current practices among States and to the global standard of information exchange was highlighted. In this context, the Model Agreement on Exchange of Information on Tax Matters and the Report *'Improving Access to Bank Information for Tax Purposes'* played a prominent role[42].

As a consequence, the Committee on Fiscal Affairs carried out an in-depth review of Article 26 in 2002, which resulted in multiple amendments to both the Article and the Commentaries of the MTC, as it is transcribed hereunder[43]:

1. The competent authorities of the Contracting States shall exchange such information as is ***foreseeably relevant*** *for carrying out the provisions of this Convention* ***or to the administration or enforcement*** *of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions*

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[40] As for September 2017 this Model is followed by the DTCs: Brazil-Korea, Chile-Australia, Chile-Austria, Colombia-Canada, Colombia-Czech Republic, Colombia-Korea, Colombia-Portugal, Costa Rica-Germany, Jamaica-Norway, Jamaica -Sweden, Ecuador-China, Ecuador-Korea, Ecuador-Singapore, Ecuador-Uruguay, Spain-Croatia, Spain-United Arab Emirates, Spain-Kazakhstan, Spain-Luxembourg, Spain-Malta, Spain-Serbia, Spain-Singapore, Mexico -Bahréin, Mexico-Colombia, Mexico-United Arab Emirates, Mexico-Hungary, Mexico-Iceland, Mexico-India, Mexico-Kuwait, Mexico-Latvia, Mexico-Lithuania, Mexico-Luxembourg, Mexico-Netherlands, Mexico-Qatar, Mexico -New Zealand, Mexico-United Kingdom, Mexico-South Africa, Mexico-Singapore, Mexico-Turkey, Mexico-Ukraine, Mexico-Uruguay, Panama-Barbados, Panama-Korea, Panama-United Arab Emirates, Panama-France, Panama-England, Panama-Ireland, Panama-Luxembourg, Panama-Mexico, Panama-Netherlands, Panama-Portugal, Panama- Qatar, Panama-Czech Republic, Panama-Singapore, Panama-United Kingdom, Panama-Vietnam, Peru-Korea, Portugal-Barbados, Portugal-Sao Tome, Portugal-Vietnam, Portugal-Saudi Arabia, Portugal-Croatia, Portugal-Georgia, Portugal-Japan, Portugal-Qatar, Portugal-Sultano de Oman, Portugal-Ethiopia, Portugal-Kuwait, Portugal-San Marino, Uruguay-Germany, Uruguay-Korea, Uruguay-Ecuador, Uruguay- United Arab Emirates, Uruguay-Finland, Uruguay- India, Uruguay-Liechtenstein, Uruguay-Luxembourg, Uruguay-Malta, Uruguay-Mexico, Uruguay-Portugal, Uruguay-Romania, Uruguay-Singapore, Uruguay-Vietnam, Venezuela-Belarus, Venezuela-United Arab Emirates, Venezuela-Vietnam. The following DTCs also follow this model, but with deviations: for example, the Brazil-Norway, Brazil-South Africa, Brazil-Turkey DTCs state that the exchange of information covers only federal taxes. On the other hand, the Brazil-Peru DTC does not include the possibility to deny the exchange in case of lack of domestic interest. The Chile-Colombia DTC lacks section 5. And, finally, the Spain-Hong Kong, Mexico-Barbados, Mexico-Hong Kong, Panama-Israel, Portugal-Hong Kong, Venezuela-Saudi Arabia Conventions limit the objective scope to the taxes covered by the DTC.

[41] 2017 OECD MTC, para. 8.

[42] In the same vein, COLLADO YURRITA, M. A. y MORENO GONZÁLEZ, S. (Coord.) *Estudios sobre Fraude Fiscal e Intercambio Internacional de Información Tributaria*; op. cit. pp. 257-274; OBERSON, X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. cit pp. 6-7.

[43] Commentaries to Art. 26 OECD MTC 2005, para. 4.

or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. *Any information received* ***under paragraph 1*** *by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred* ***to in paragraph 1, or the oversight of the above.*** *Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.*

3. In no case shall the provisions of ***paragraphs 1 and 2*** *be construed so as to impose on a Contracting State the obligation:*

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

The first modification to the Article consisted in the replacement of *'necessary'* information by '*foreseeably relevant*' information. According to the Commentaries, the reason for the terminological change was to standardize the wording with the *'Model Agreement on Exchange of Information on Tax Matters'*. In addition, the standard of 'foreseeable relevance' was intended to provide for exchange of information in tax matters to the widest possible extent[44].

Accordingly, Commentaries to Article 26 clarified that the information covered by the exchange was not limited to taxpayer-specific information but competent authorities could also exchange other sensitive information related to tax administration and compliance improvement -for example risk analysis techniques or tax avoidance or evasion schemes-[45].

In view of the expansion of the scope of the provision, concern was expressed about the possibility that the situation would result in indiscriminate information exchange[46]. Hence, the OECD explicitly rejected the possibility to engage in 'fishing expeditions'. In this sense, the 'foreseeable relevance' standard discussed above was set as a limit to this type of practice in such a way that speculative requests for information not related to an investigation or inspection in process[47] or whose relevance in relation to the tax affairs of a given taxpayer was unlikely were not allowed[48].

As regards the confidentiality of the information (paragraph 2 of the Article), the Commentaries provided for the possibility of adding an additional subsection to paragraph 2 allowing Contracting States to use the information for purposes other than those established in the Article, but always in accordance with *'the laws of both States and the competent authority of the supplying State'*[49].

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[44] In this vein, OBERSON, X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. cit., p. 33.

[45] CALDERÓN CARRERO, on the 1997 OECD MTC, stated that the information exchanged may consist both of factual issues and legal relations; for example, data referring to residence period of an individual in one of the Contracting States, accounting issues, legal characterization of income, etc. CALDERÓN CARRERO, J. M., *Intercambio de información y fraude fiscal internacional*, *op. cit.,* p. 75.

[46] M. RING, D.: "Article 26: Exchange of Information" op. cit., p.10.

[47] Manual CIAT para la implantación y práctica del intercambio de información para fines tributarios. https://www.ciat.org/Biblioteca/DocumentosTecnicos/Espanol/2006_Manual_CIAT_implantacion_Intercambio_Informaciones.pdf 15/03/2019.

[48] Commentaries to Art. 26 OECD MTC 2005, para. 5.

[49] Commentaries to Art. 26 OECD MTC 2005, para. 12.3.

On the other hand, it was noted that, as a guarantee of the taxpayer's rights, the domestic legislation of some countries included procedures to notify the person who provided the information and/or the taxpayer that was subject to the enquiry prior to the information delivery. However, notification procedures should not be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State or would unduly delay effective information exchange. Therefore, Commentaries warned of the need to introduce exceptions to these procedures. In addition, the obligation of the Contracting States to inform their treaty partners about the existence of such procedures and its consequences -prior to its signature and thereafter whenever the relevant rules were modified- was stressed.

Likewise, the importance for the requesting State of the form in which the information to be exchanged was received was highlighted - for example, for evidentiary purposes -. Therefore, the OECD advised that, as long as the form was permitted under its law or administrative practice, States should try, as far as possible, to meet such requests[50].

Another modification was made regarding the reasons for opposition to the information request. For these purposes, although the wording of section 3 of the article remained unchanged, new clarifications were introduced in the Commentaries in respect to the feasibility of bank secrecy as an opposition ground.

As for the provisions in the Commentaries, two major clarifications were introduced. The first one sought to make the interpretation of the reciprocity principle more flexible in order to prevent the frustration of the effective exchange of information. A *iuris tantum* provision was even added by establishing that *'it can be assumed that the requested information could be obtained by the requesting State in a similar situation if that State has not indicated to the contrary'*[51]. The second amendment clarified the extension of the secret nature of certain information as an opposition ground for the information request. In particular, art. 26.3 c) OECD MTC established that under no circumstance the Contracting States were obliged *'to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public)'*. Given the great extent of this provision, the Commentaries clarified that the confidentiality of the

[50] Commentaries to Art. 26 OECD MTC 2005, para. 10.2.
[51] Commentaries to Art. 26 OECD MTC 2005, para. 10.8.

information should not be given a broad sense. That is, confidentiality could only preclude the exchange of information when facts and circumstances of great economic importance were involved and its disclosure could cause serious damage[52].

As already advanced, one of the main additions to the 2005 version of OECD MTC was the incorporation of a new paragraph to the article that was intended to ensure that the limitations of paragraph 3 were not used to prevent the exchange of information held by banks or other financial institutions. The introduction of section 5 reflected the international trend in this area, in particular, the recommendations of the Model Agreement on Exchange of Information on Tax Matters and the Report *'Improving Access to Bank Information for Tax Purposes'*[53].

Finally, a fourth paragraph was introduced which explicitly included the principle of national autonomy. The principle had already been considered by the OECD since 1977[54] and, although it was not specifically mentioned in the wording of Article 26, it was noted in the Commentaries to the Convention and most States followed this practice. With the amendment in 2005, interpretative discrepancies were avoided as from that moment on the obligation to exchange information held by the requested State was established even if such exchange could infringe bank secrecy.

1.5. Phase 5. 2012 update to Article 26 of the OECD MTC[55].

On July 17, 2012, the OECD approved an updated version of Article 26 of the Model Tax Convention. The amendments affected both the Article and its Commentaries and,

[52] Commentaries to Art. 26 OECD MTC 2005, para. 29 and 19.2.
[53] Commentaries to Art. 26 OECD MTC 2005, para. 19.1.
[54] *Vid. Phase 2. 1977 OECD Model Double Taxation Convention on Income and Capital.*
[55] As for September 2017, the DTCs following this Model are: Argentina-Chile, Argentina-Switzerland, Chile-China, Chile-Italy, Chile-Japan, Chile-Czech Republic, Colombia-Spain, Colombia-India, Spain-Albania, Spain- Germany, Spain-Andorra, Spain-Saudi Arabia, Spain-Argentina, Spain-Armenia, Spain-Barbados, Spain-Bosnia And Herzegovina, Spain-Canada, Spain-Cyprus, Spain-Georgia, Spain-Jamaica, Spain-Panama, Spain -Kuwait, Spain-Moldova, Spain-Nigeria, Spain-Oman, Spain-Pakistan, Spain-Dominican Republic, Spain-United Kingdom, Spain-Senegal, Spain-Uruguay, Spain-Uzbekistan, Mexico-Austria, Mexico-Estonia, Mexico -Indonesia, Mexico-Malta, Mexico-Peru, Portugal-Cyprus, Portugal-Ivory Coast, Portugal-Montenegro, Portugal-Peru, Portugal-Senegal, Uruguay-England, Uruguay-United Kingdom. The DTCs described below also follow the Model, but with some deviations. In particular, in the Brazil-India DTC the information exchanged refers only to federal taxes. As regards the Mexico-Switzerland, Peru-Switzerland, Uruguay-Switzerland Conventions, the objective scope is limited to the taxes covered by the DTC. In addition, most DTCs signed by Spain include the possibility of using the information exchanged for other purposes others than those authorized by the Convention.

following the trend of the 2011 Oslo Conference on Tax and Crime[56], were intended to improve the tax information exchange to more effectively fight against tax crimes and other criminal activities. After the amendment of 2012 Article 26 was worded as follows:

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. ***Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.***

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

> *a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;*
>
> *b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;*

[56] OECD (2012) *Tax: OECD updates OECD Model Tax Convention to extend information requests to groups* http://www.oecd.org/newsroom/taxoecdupdatesoecdmodeltaxconventiontoextendinformationrequeststogroups.htm Last accessed: 17/03/2019.

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

As reflected, the only variation that took place in 2012 was the introduction of the possibility to use the exchanged information for purposes other than those established in the second paragraph of the Article[57] -provided that such use was in line with the legislation of the Contracting States and it was authorized by the requested State-. In addition, the requesting State had to specify the intended use of the information and demonstrate that its national legislation authorized the exchange under such conditions[58].

Together with the above-mentioned changes, Commentaries were also extended to define for the first time the concept of *'fishing expeditions' ('speculative requests that have no apparent nexus to an open inquiry or investigation')*[59].

It was provided that, within that standard, both individual requests and group requests were included. In the latter case it was more complicated to verify the foreseeable relevance of the information and, as a consequence, the State request had to meet certain requirements, namely: (i) to provide a detailed description of the group and the specific facts and circumstances that had led to the request; (ii) to give an explanation of the

[57] *Vid. Phase 4. 2005 OECD Model Tax Convention on Income and on Capital.*
[58] Commentaries to Art. 26 OECD MTC 2012, para. 12.3.
[59] Commentaries to Art. 26 OECD MTC 2012, para. 5 in fine.

applicable law and why there was reason to believe that the taxpayers in the group for whom information was requested had been non-compliant with that law supported by a clear factual basis; and (iii) to show that the requested information would assist in determining compliance by the taxpayers in the group[60]. Although the Commentaries mentioned these groups' requests, this has not resulted in a modification of the Article[61].

On the other hand, the Commentaries provided for a voluntary additional wording for those States that would like to set specific time limits to carry out the information exchange. Specifically, the term varied between 2 and 6 months depending on whether or not the Contracting State was already in possession of the requested information. These deadlines could be altered by agreement between States and there was even the possibility of establishing different ones for specific cases. However, if, due to legal impediments, a State could not provide the information within the set deadlines, the temporary requirement was not deemed breached. Lastly, the Commentaries established that *'provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits'*[62].

In addition, it was clarified that a letter requesting information issued by the requesting State fell under the scope of the confidentiality right. That is, this letter was secret, although some of its information could be disclosed so that the requested State could obtain the requested information. Besides, disclosure of such a letter might also be imposed by court proceedings. If necessary, the competent authorities could enter into specific arrangements regarding the confidentiality of the information exchanged[63].

Regarding the principle of reciprocity, there was the possibility for a State to use measures that were not provided for in its domestic legislation or administrative practice. In that case, it was entitled to request similar information to the other Contracting State.

Lastly, States were obliged to use any measure available to obtain the requested information, even if it did not have tax interest for the requested State. Besides, there was no obligation to provide information in circumstances where a Contracting State had

[60] Commentaries to Art. 26 OECD MTC 2012, para. 5.2.
[61] OBERSON, X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. cit., p. 22.
[62] Commentaries to Art. 26 OECD MTC 2012, para. 10.4, 10.5 and 10.6.
[63] Commentaries to Art. 26 OECD MTC 2012, para. 11.

attempted to obtain the requested information but found that the information no longer existed following the expiration of a domestic record retention period. However, where the requested information was still available notwithstanding the expiration of such retention period, the requested State could not decline to exchange the information available[64].

1.6. Phase 6. 2017 OECD Model Tax Convention on Income and on Capital

The last update of the OECD Model Tax Convention was endorsed on November 21, 2017. The aim of this amendment was to incorporate the developments in the field of taxation agreed upon the Base Erosion and Profit Shifting Project (BEPS). However, this version will not be analyzed since no changes were made to Article 26 or its Commentaries[65].

2. General remarks

2.1. Art. 26 OECD MTC vs. Art. 26 UN MTC

The practice of international conventions has been largely influenced by both the OECD MTC and the United Nations Model Convention (hereinafter, UN MTC)[66] to the extent that both Models form the basis of most of the DTCs concluded by States. For this reason, the following pages provide an overlook of the main differences between both Models of Convention.

Firstly, it is necessary to stress that both Models share important similarities owing to the fact that the OECD Model was taken as a starting point by the UN MTC. Specifically, regarding information exchange, the UN MTC reproduces with minor deviations the wording of the OECD MTC in force as of 2005. These deviations, although not involving substantial disparities, suggest a different approach[67].

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[64] Commentaries to Art. 26 OECD MTC 2012, para. 19.7.

[65] For further information on the amendments introduced by the 2017 OECD MTC: https://eycolombia.files.wordpress.com/2017/12/global-tax-alert-oecd-approves-2017-oecd-update.pdf Last accessed: 02/07/2019.

[66] https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf

[67] GARCÍA PRATS, F. A. (2007) "El intercambio de información en el Modelo de Convenio de las Naciones Unidas. El artículo 26", (Documentos IEF, No. 3/2007) p. 22: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002459.pdf

The first substantial deviation of the UN MTC lies in the explicit reference to the anti-avoidance purpose of the clause set as follows: *'in particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes'*. Therewith, the will to use the mechanism of information exchange as an instrument in the fight against tax fraud and evasion becomes evident in the UN MTC -without altering the interpretation of the DTCs based on the OECD MTC-[68].

On the other hand, the possibility of using the information for purposes other than those described in section 2 of art. 26 is not included in the UN MTC. Note that this competence was incorporated in the 2012 version of the Article 26 OECD MTC.

Finally, the following additional section is contained in the UN MTC: *'The competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made'*. Thus, the importance of competent authorities in the application of the information exchange provisions is emphasized[69].

2.2. The progressive development of Article 26 OECD MTC: the imbalance between information exchange powers and the taxpayers' rights and guarantees.

As shown above, since the approval of the 1963 Draft Convention, the exchange of tax information procedure of Article 26 MC OECD has undergone substantial changes. Originally, the clause was configured with the sole purpose of solving the problems arising from international double taxation in a context of growing cooperation among OECD Member States. As a consequence of this sole objective, the clause was restricted to the exchange of information regarding taxes under the scope of the DTC and persons residing in any of the Contracting States (minimum clause).

Last accessed: 20/03/2019.
In the same vein, VOGEL K.: *Klaus Vogel on Double Taxation Conventions, Third Edition, A Commentary to the OECD, UN and U.S. Model Conventions for the Avoidance of Double Taxation of Income and Capital, With Particular Reference to German Treaty Practice*, op. cit., p. 1402.

[68] GARCÍA PRATS, F. A.: "El intercambio de información en el Modelo de Convenio de las Naciones Unidas. El artículo 26", op. cit. p. 6; DEL PRADO MERINO, M., NOCETE CORREA, F.J. (2011) "El intercambio de información tributaria en el derecho internacional, europeo y español" (Instituto de Estudios Fiscales, Doc. no. 6/2011) p. 15

[69] GARCÍA PRATS, F. A.: "El intercambio de información en el Modelo de Convenio de las Naciones Unidas. El artículo 26", op. cit. p. 7

The gradual economic and financial globalization resulted in an increase and sophistication of tax avoidance and evasion arrangements. In this changing context, the importance of information exchange between Tax Administrations as an effective instrument of tax control in cross-border operations was highlighted[70].

In order to address the needs emerging in the globalization era, the OECD gradually adapted the content and extension of Art. 26 OECD MTC until it was finally erected as a wider-ranging provision. Thus, under the scope of the latest versions of the OECD MTC it is possible to exchange information in relation to taxes of any kind and regardless of whether or not the taxpayer is a resident of the Contracting States. Likewise, restrictions on the exchange of information were eliminated and the Commentaries provided for an interpretation focused on the widest possible exchange. As a result, Article 26 legally empowers the exchange of information between States, providing an instrument which guarantees compliance with tax obligations of taxpayers at transnational level. Nevertheless, the development of Article 26 with the aim of fighting tax avoidance and evasion has led to an unbalanced relationship between the exchange of information procedure and the taxpayers' rights and guarantees.

The protection of the rights of taxpayers affected by such exchange is regulated partially and indirectly not only in the OECD MTC, but also in the majority of international instruments that serve as the basis for the exchange[71]. Thus, despite the fact information exchange limits are set and certain guarantees regarding the collection and use of the exchanged information are established, there is no specific recognition of subjective rights[72]. As an example, limitations of article 26 (3) MC OECD can be mentioned; these restrictions cover situations in which the exchange of information is discretionary for the States, but where the taxpayer has no say[73]. Thus, national legislations are responsible for

[70] CALDERÓN CARRERO, F.M.: Intercambio de información y fraude fiscal internacional, op. Cit. pp. 25-30; and GARCÍA PRATS, F. A., "Cooperación administrativa internacional en materia tributaria. Derecho tributario global", op. cit., p. 6.
[71] FERNÁNDEZ MARÍN, F. (2007) *La tutela de la Unión Europea al contribuyente en el intercambio de información tributaria.* (Atelier, 1ª Edición) p. 205; MARTÍNEZ GINER, L.A. (2008) "Elusión fiscal e intercambio de información tributaria entre Estados" (Memorias de las XXIV Jornadas Latinoamericanas de Derecho Tributario. Caracas: Asociación Venezolana de Derecho Tributario) p. 838.
[72] MARTÍNEZ GINER, L.A.: "Elusión fiscal e intercambio de información tributaria entre Estados" op. cit., p. 841.
[73] Commentaries to Art. 26 OECD MTC 2017, para. 17.

the regulation of the role of taxpayers in the exchange procedure, which undermines their guarantees[74].

In any case, the legal protection of taxpayers and the effectiveness of the information exchange must be balanced[75]. In this regard, Commentaries to Art. 26 provide for the possibility that national legislations grant notification rights to the taxpayers affected by the exchange procedure. However, at the same time it is maintained that these rights cannot frustrate or unduly prevent the effective exchange of information and, in this line, recommendations on the establishment of exceptions of such rights are made[76].

In fact, one of the reasons for the scarce regulation of the taxpayers' rights is that in the balancing between both interests - the fight against tax fraud and the taxpayer's guarantees - the former has been given primacy. Also, the aforementioned deregulation is argued to be linked to the fact that the exchange procedure takes States, and not people, as its reference[77].

In a nutshell, the concern for the rights of the taxpayer affected by the exchange of information arose in recent times and it is widespread[78]. However, as evidenced, Article 26 OECD MTC has evolved in a way that the exchange of tax information has been increased and improved while the rights of the taxpayer have been disregarded.

2.3. The obsolescence of DTCs in the Latin American context and the application of the most-favoured-nation principle.

Not all DTCs concluded by States have adapted to the amendments of the information exchange clause introduced in the different versions of the OECD Model Tax

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[74] FERNÁNDEZ MARÍN, F.: *La tutela de la Unión Europea al contribuyente en el intercambio de información tributaria*. Op. Cit. p. 205.

[75] In this vein, DEL PRADO MERINO, M. y NOCETE CORREA, F.J. (2011) "El intercambio de información tributaria: entre la diversidad normativa, la imprecisión conceptual y la pluralidad de intereses", (Crónica Tributaria, núm. 139/2011, pp. 139-163).

[76] Commentaries to Art. 26 OECD MTC 2017, para. 14.1.

[77] MARTÍNEZ GINER, L.A.: "Elusión fiscal e intercambio de información tributaria entre Estados" op. cit. P.850 and CORDÓN EZQUERRO T.: "Los derechos de los contribuyentes en el intercambio de información entre Administraciones tributarias". Op. Cit. pp. 11-29.

[78] MARTÍNEZ GINER, L.F.: "Derechos y garantías del contribuyente ante el intercambio de información tributaria entre Estados", p. 458.
https://rua.ua.es/dspace/bitstream/10045/52530/6/2011_Martinez_Derechos-y-garantias-contribuyente-intercambio-informacion.pdf Last accessed: 24/03/2019.

Convention, which implies that such modifications are not really effective[79]. At this point it should not be forgotten that the Model Tax Convention is not a binding norm, but has a purely suggestive nature[80]. Therefore, changes to the MTC are not directly applicable to DTCs based on a specific version of the Model as long as no amendments are made[81].

In general, this situation of obsolescence can be observed in the DTCs network of Ibero-American countries. Not many States have adapted to the latest version of the OECD MTC, but rather most part of them follow the 1977 Model - in which the exchange of information was limited to taxes under the scope of the Convention and no reference was made to the fourth and fifth sections of the current provision-.

Therefore, it is necessary to establish effective mechanisms to incorporate in the different DTCs the amendments to the OECD MTC. Given the large number of DTCs and the possibility of further changes in the MTC, this process is difficult to carry out if addressed Convention by Convention. As a solution, the application of the most-favored-nation treatment to DTCs can be considered. By the adoption of this principle, the terms of existing Conventions can be modified, thus allowing their adaptation to the constant changes in the field of information exchange.

A most-favored-nation clause requires a country to provide any concessions, privileges, or immunities granted to one nation in a Convention to all other Member States. Thus, whenever any of the Contracting States concludes with another State a DTC in which the exchange of information is more comprehensive and effective in the fight against tax fraud, the terms agreed in this will apply to all other Member States.

This brings nothing new to the table since it had already been introduced in several Conventions. As an example, the Switzerland-Spain DTC from 2006 on states: *"Should Switzerland conclude with a Member State of the European Union, in relation to exchange of information, any Agreement of whatever kind and nature or any 6 provision in a Double Taxation Agreement, related to taxes covered by this Convention, Switzerland*

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[79] BEPS Plan, p. 27. http://www.aedf-ifa.org/FicherosVisiblesWeb/Ficheros/Fichero79.pdf Last accessed: 12/05/2019.

[80] PEDROSA, C. (2015) "El instrumento esencial en la fiscalidad internacional: los Convenios de Doble Imposición. Diferencias y semejanzas entre el Modelo de Convenio para eliminar la Doble Imposición y prevenir la evasión fiscal de la OCDE, ONU y Comunidad Andina." (Actualidad Jurídica Iberoamericana, no. 3), pp. 701-716.

[81] BEPS Plan, p. 27. http://www.aedf-ifa.org/FicherosVisiblesWeb/Ficheros/Fichero79.pdf Last accessed: 12/05/2019.

shall give to Spain the same level of co-operation as in such Agreement or provision or the part of them and Spain will act accordingly". This principle has had as a result that the exchange of information clause as concluded in the Conventions signed between Switzerland-France and Switzerland- The Netherlands also affects the DTC signed with Spain - specifically, as regards to the time scope of application-[82].

[82] CALTAX INTERNACIONAL: "El intercambio de información entre España y Suiza", pp. 3 y 4. http://caltaxinternational.es/wp-content/uploads/2014/03/Caltax-international-intercambio-Suiza.pdf Last accessed: 12/05/2019.

II. ANALYSIS OF THE DTC NETWORK OF IBEROAMERICAN COUNTRIES.

1. Issues arising from the objective scope of application.

1.1. Foreesably relevant information.

As stated above, Article 26 OECD MTC compels to exchange information that is deemed to be foreseeably relevant for the successful implementation of the DTC and the tax regulations of the requesting State. In this way, the foreseeable relevance standard is established as a necessary requirement for the exchange to be mandatory and the provision to apply.

The notion of 'foreseeable relevance' constitutes an undefined legal concept and, consequently, the exchange will rely on the more or less strict interpretation of the notion carried out by each State[83]. In order to avoid inconsistent interpretations certain explanatory provisions were introduced in the Commentaries to Article 26.

Thus, it is intended that the exchange of information is carried out as widely as possible, provided there is a reasonable possibility that the requested information is relevant. This possibility must exist at the time the request is made, regardless of whether the information is finally relevant. In other words, the exchange information cannot be refused in those cases in which the relevant nature of the information is verified once the requesting State has received the data[84].

The Tax Authority carrying out the investigation that gives rise to the request will assess the relevance of the information[85]. Consequently, provided that such relevance has been justified, the requested State cannot refuse the request for information even if it is understood that the foreseeable relevance criterion is not met[86].

Nonetheless, Article 26 is not applicable to *'fishing expeditions'*, that is, speculative requests that have no apparent nexus to an open inquiry or investigation. This is reflected in the Commentaries to the Model Convention, whose provisions have been accepted by

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[83] COLLADO YURRITA, M. A. and MORENO GONZÁLEZ, S. (Coord.) *Estudios sobre Fraude Fiscal e Intercambio Internacional de Información Tributaria*, op. cit., p. 29.
[84] Commentaries to Art. 26 OECD MTC 2017, para. 5.
[85] Judgment of the ECJ C-682/15, (Berlioz Investment Fund SA contra Directeur de l'administration des contributions directes), May 16 2017, (TJCE 2017\105), para. 70 y 71.
[86] Commentaries to Art. 26 OECD MTC 2017, para. 5.
This is also inferred from the drafting of certain DTCs, such as the Chile-Switzerland or the Uruguay-Ecuador.

the European Union Court of Justice. As an example it can be mentioned the Berlioz Case (ECJ 2017\105) where the ECJ stated that *'According to the commentary on that article adopted by the OECD Council on 17 July 2012, Contracting States are not at liberty 'to engage in fishing expeditions', nor to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be relevant'*[87]. However, the request cannot be considered as a generic investigation merely on the ground of not having identified the name or address of the taxpayer[88].

Similarly, a considerable number of States have referenced to the *'foreseeable relevance'* standard and the concept of *'fishing expeditions'* in their DTCs. In this regard, mention can be made to the DTCs concluded by Panama since all of them limit the exchange of information by the application of the foreseeable relevance standard. Thus, mainly two different versions of the clause are adopted:

(i) The first wording states the following: *'It is understood that the administrative assistance provided for in Article 25 does not include (i) measures aimed only at the simple collection of pieces of evidence, or (ii) when it is improbable that the requested information will be relevant for controlling or administering tax matters of a given taxpayer in a Contracting State ("fishing expeditions")'.*

Panama-Barbados, Panama-Korea, Panama-Arab Emirates, Panama-Spain, Panama-Luxembourg, Panama-Mexico, Panama-Netherlands, Panama-Portugal and Panama-Qatar DTC have adopted this versión of the clause.

(ii) The second version is aligned to the recommendations of the OECD MTC as follows: *'the reference to "foreseeably relevant" information is intended to provide for exchange of information in tax matters to the widest possible extent, though Contracting States are not at liberty to request information that is unlikely to be relevant to the tax affairs of a given taxpayer ("fishing expeditions")'.*

[87] Judgment of the ECJ C-682/15, (Berlioz Investment Fund SA contra Directeur de l'administration des contributions directes), May 16 2017 (TJCE 2017\105), p. 67, where the concept of 'foreseeable relevance' of Council Directive 2011/16 / EU of February 15, 2011, is assimilated to the content of the OECD Model Tax Convention.

[88] Commentaries to Art. 26 OECD MTC 2017, para. 5.

This version is followed by the DTCs Panama-France, Panama-Ireland, Panama-United Kingdom and Panama-Vietnam.

The second version is also used, with minimal differences, in the DTCs signed by Spain-Andorra, Portugal-Andorra, Argentina-Switzerland and Peru-Switzerland.

Some other DTCs deal only briefly with these issues, by establishing that the exchange provided for in the Article does not cover speculative and general requests. In addition, although some directly forbid the so-called *fishing expeditions*, an autonomous definition of such concept is not set. This is drawn from the following DTCs: Panama-Israel, Panama-Czech Republic, Mexico-Switzerland, Uruguay-Arab Emirates, Uruguay-Finland, Uruguay-Luxembourg, Uruguay-Switzerland, Spain-Netherlands and Portugal-Hong Kong.

On the other hand, the DTC concluded between Chile and Switzerland has a different wording, since it relates the foreseeable relevance requirement to tax fraud. Specifically, it is established that the requested State must provide information to the extent that the requesting State has a well-founded suspicion that a tax fraud is being carried out. However, it is clarified that this provision does not justify *fishing expeditions*.

Finally, as noted above, the requesting State is responsible for the assessment of the relevance requirement[89]. However, the requested State may exercise some control in this regard, by demanding a series of procedural requirements to ensure that generic investigations are not carried out.

These requirements are basically informative demands. In this regard, most of the DTCs referred to above set the obligation of the requesting State to provide, together with the request for information, certain additional information such as the identity of the person under examination or investigation; the tax purpose for which the information is sought; grounds for believing that the information requested is held in the requested State, etc. Portugal-Cyprus and Panama-Singapore DTCs highlight the purpose of such obligation: *'The competent authority of the applicant State shall provide the following information to the competent authority of the requested State when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request'*.

[89] Commentaries to Art. 26 OECD MTC 2017, para. 5.

1.2. Types of exchange of information.

Currently, Contracting States are free to choose any type of exchange: upon request, automatic or spontaneous. Thus, one type of exchange or another does not involve different consequences with respect to the mandatory nature of the procedure[90]. Before analyzing the DTCs network of Latin American countries, it is necessary to make a brief reference to the particularities of these three types of exchange.

The information exchange upon request is established as the most commonly used method to exchange information under Article 26[91]. Under this modality, a Contracting State provides, on request, foreseeably relevant information for carrying out the provisions of a tax convention or for the administration or enforcement of the domestic tax laws of a requesting party[92].

On the other hand, through automatic exchange of information, Tax Administrations must communicate certain categories of information in a systematic and periodic way. In this way, the high costs generated by the requesting States in the identification of the specific operator for which information is requested are avoided[93].

Finally, spontaneous exchange of information is the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested[94].

Having compared the three types of information exchange, it is necessary to examine the Ibero-American network of DTCs.

In the first place, it must be noted that the modalities by which information can be exchanged under the coverage of art. 26 OECD MTC have undergone multiple changes since 1963. In this sense, if DTCs concluded after the 1963 OECD MTC are interpreted in light of the original Commentaries to Art. 26, exchange information upon request

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[90] Commentaries to Art. 26 OECD MTC 2017, para. 9.
This provision has been accepted, for example, in the Spain-Belgium DTC, where the three main forms of information exchange are expressly mentioned.

[91] MACHANCOSES GARCÍA, E.: *El intercambio de información entre Administraciones en materia tributaria.* Op. Cit., p. 65.

[92] ESCALONA RUIZ, M. A.: "Acuerdos internacionales de intercambio de información y asistencia mutua", op. Cit., p. 80.

[93] VALDEZ LADRÓN DE GUEVARA, P. "Los Acuerdos de Intercambio de Información Tributaria y su Implementación en el Perú" (Revista Derecho & Sociedad, no. 43)

[94] OCDE (2006) *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Approved by the OECD Committee on Fiscal Affairs on 23 January 2006* http://www.oecd.org/ctp/exchange-of-tax-information/41814387.pdf Last accessed: 01/05/2019.

would be the only modality allowed[95]. However, most part of States have accepted as valid the majority of automatic and spontaneous exchanges based on the DTCs prior to 1977 -date on which the restriction was removed-[96].

Regardless of the amendments made to the Commentaries - whose impact varies from States - from the analysis of the DTC network, it can be concluded that a large part of the Conventions limit the modalities of exchange.

Thus, there are DTCs that only establish as mandatory the exchange of information upon request, being optional the use of automatic or spontaneous exchanges. Such is the case of the following DTCs: Ecuador-China, Mexico-Hong Kong, Mexico-Switzerland, Uruguay-Finland, Uruguay-Liechtenstein, Uruguay-Switzerland, Portugal-Hong Kong, Peru-Switzerland, Argentina-Switzerland, Chile-Austria and all those concluded by Panama[97].

On the contrary, the information exchange under the DTCs signed by Spain with Andorra, the United States, France and Morocco will take place either automatically or to meet requests regarding specific cases. This requires that the contracting States reach an agreement in order to determine the information that must be provided ex officio. Likewise, the Double Taxation Convention between Spain and Estonia clarifies that the expression *"information obtainable under the laws or in the normal course of administration"* includes information automatically submitted to the tax authorities and information obtainable upon request of the tax authorities as stated in the domestic law[98].

In relation to the third of the modalities of exchange, reference to spontaneous exchange is made in the Mexico-Russia and Portugal-Brazil DTCs as follows: *'It is understood that in accordance with the provisions of this Article the competent authority of a Contracting State shall spontaneously transmit to the competent authority of the other State information which has come to the attention of the first-mentioned State and which is likely to be relevant to, and bear significantly on, accomplishment of the purposes*

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[95] Commentaries to Art. 26 OECD MTC 1963, para. 7: '*the rule laid down in paragraph I of the Article presupposes that information shall be exchanged only on application'.*

[96] CALDERÓN CARRERO, J. M.: *Intercambio de información y fraude fiscal internacional.* Op. cit. p. 123.

[97] The Panama-Korea DTC states that Contracting States are not required to exchange information automatically.

[98] Both in this Convention and in the one concluded between Portugal and Andorra, it is anticipated that automatic exchange will take place at the time Andorra undertakes the OECD common standard.

referred to in paragraph 1. The competent authorities shall determine the information to be exchanged pursuant to this paragraph and take such measures and implement such procedures as are necessary to ensure that the information is forwarded to the competent authority of the other State'.

2. Admissibility of information that has been collected unlawfully.

2.1. Introductory remarks.

As a result of the case-law on the Hervé Falciani case, the legal admissibility of information obtained illegally has been questioned. This case has given States the opportunity to express their views on the validity as evidence of information with tax significance that, although being obtained with violation of fundamental rights, has subsequently been provided to other States respecting the legal requirements of cooperation mechanisms. Hence, the illicitly obtained information has subsequently been incorporated to the proceedings in full respect of the applicable law, and is thus to be considered admissible evidence from a strictly procedural perspective. More controversial is the legitimacy of evidence whose collection has violated fundamental rights in the source country[99].

To address this issue, reference should be made to the solutions given in comparative law (including the case of Spain), especially since this situation has not been expressly regulated in international information exchange instruments[100].

In this sense, it should be recalled that art. 26 OECD MTC establishes as an opposition ground to the request for information the use of administrative practices contrary to the legislation or practice of any of the Contracting States. Also, the required State cannot be compelled to exchange information whose communication is contrary to the *ordre public*. These provisions may be of interest in the assumption that the data subject to the request for information has been stolen or obtained illegally, thus violating the public order of any of the States.

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[99] MARTÍNEZ GINER, L. A. (2016) "El uso de la información ilícitamente obtenida en materia tributaria" (Crónica Tributaria núm. 159/2016) p. 81.
[100] Ibid. p. 99.

However, if any of the aforementioned situations arise, nothing restricts the exchange of information but in such a case compliance with the request is discretionary. That is, art. 26 OECD MTC does not preclude the exchange of information obtained illegally, so States, based on their national legislation, will decide on the legal value of such data[101].

Regarding to the invalidity of the evidence, the States' procedural systems are built from shared but not always convergent structural principles. In addition, these principles have undergone considerable evolution over the years[102]. The reasoning of the Falciani List case constitutes a further step in this regard and demonstrates the prevalence of constitutional interests over the fundamental right affected when obtaining the evidence.

In order to offer a helpful overlook of the issue, it is essential to make a brief reference to trends followed by the scholars. Subsequently, case-law on the theft of information from tax evaders by an employee of a bank and then provided to tax authorities will be examined. Specifically, an analysis of the Liechtenstein Group case and the Falciani List case will be made.

2.2. Exchange of illegally obtained information.

Originally, evidence acquired in violation of rights was excluded from the information exchange procedure since it was understood that material facts could not be obtained at any price. However, both American and European Law have moderated the consequences resulting from this assessment of the illegality of the evidence[103].

The doctrine of exclusion of unlawful evidence was first applied by US case-law in the Boyd v. case US (1886)*[104]*. In this regard, the Weeks vs. US case of February 24, 1914[105], where the admissibility of evidence obtained in a search without judicial permission was denied as it was understood to be contrary to the IV amendment, is also significant. This trend was completed by the United States Supreme Court decision on the Silverthorne

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[101] OBERSON X.: *International Exchange of information in tax matters. Towards Global Transparency*, op. Cit., p. 222.
[102] Judgment of the Spanish High Court no. 54/2019, February 6, (RJ 2019/287).
[103] MOSQUERA BLANCO, A. J. (2018) "La prueba ilícita tras la sentencia Falciani: Comentario a la STS 116/2017, de 23 de Febrero" (InDret Revista para el análisis del Derecho, no. 3/2018) p. 5. http://www.indret.com/pdf/1398_2.pdf Last accessed: 18/03/2019.
[104] Judgment of the US High Court *Boyd vs. United States*, 116 U.S. 616 (1886).
[105] Judgment of the US High Court *Weeks vs. United States*, 232 U.S. 383 (1914).

Lumber co. Vs. US (1920) case[106], which gave rise to what is known as the *'doctrine of the fruit of the poisoned tree'*. The logic of such doctrine is that if the source of the evidence or the evidence itself is tainted, then anything obtained from it is tainted as well[107].

The case-law that followed settled certain limits to the exclusion of unlawful evidence, making the application of the above-mentioned doctrine more flexible. In this way, the inadmissibility of the evidence was disconnected from the violation of the rights of individuals shifting the focus of the exclusion to a more dissuasive purpose for public authorities. Over time, major exceptions to the illegality of the evidence were introduced, such as the theory of good faith, of the independent source, and the weighting of social costs[108].

The US progressive development of the legal consequences derived from the illegality of the evidence has greatly influenced the comparative case-law. Different countries have formulated doctrines aimed at solving the inconveniences of the excessive rigidity of the exclusion rule. As can be seen below, the evolution of these doctrines has been quite similar.

In relation to Portuguese law, the inadmissibility of evidence whose collection has undermined fundamental rights is constitutionally protected (art. 32 of the 1976 Constitution). The theory of the fruits of the poisoned tree is sometimes applied in this country, although the result is based on a case-by-case basis[109]. This has also been the case with Mexico and Colombia, where the thesis of the reflected effect was balanced with the criterion of proportionality[110].

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[106] Judgment of the US High Court *Silverthorne Lumber Co. vs. United States*, 251 U.S. 385 (1920).
[107] Judgment of the US High Court *Nardone vs US* (1939), in ZARAGOZA TEJADA, J. I y GUTIÉRREZ AZANZA, D. A. (2017) "La prueba ilícita. Una reflexión tras la STS del 23 de febrero del 2017", (Revista Aranzadi de Derecho y Proceso Penal, no. 47/2017) pp.1 y 2.
[108] For furhter information, see MOSQUERA BLANCO, A. J.: "La prueba ilícita tras la sentencia Falciani: Comentario a la STS 116/2017, de 23 de Febrero" Op. Cit. Pp. 5-9.
[109] MOSQUERA BLANCO, A. J.: "La prueba ilícita tras la sentencia Falciani: Comentario a la STS 116/2017, de 23 de Febrero" Op. Cit., p. 10.
[110] At first, most of the traditional scholars and case-law in Mexico were favorable to the admission and validity in criminal proceedings of the evidence obtained illegally. However, over the years this doctrine changed radically and nowadays the aforementioned theory of the poisoned tree is applied. Subsequently, exceptions to this theory were introduced. In this regard, see, "La prueba en el sistema acusatorio en México (Prueba ilícita; eficacia; valoración)", Suprema Corte de Justicia de la Nación, pp. 27-66. https://www.sitios.scjn.gob.mx/cursoderechopenal/sites/default/files/Lecturas/Ensayo%20LA%20PRUEBA%20EN%20EL%20SISTEMA%20ACUSATORIO%20(Mag.%20Aguilar)%20Modulo%20VII.pdf Última visita: 06/04/2019.

Concerning Spain, the first decision that addressed this issue was the Judgment of the Constitutional Court no. 114/1984111. At first, the Court established the complete inadmissibility of any public or private act that directly or indirectly infringed any fundamental right protected by the Constitution. This case-law was largely inspired by the theory of the fruits of the poisoned tree and was subsequently reflected in the national legislation (e.g. article 11 LOPJ). The following jurisprudential developments, in line with the European trend, limited the effects derived from information obtained in violation of fundamental rights. This was the view taken by the Spanish Supreme Court in its decision no. 228/2017, April 3[112] which, for the first time, founded the rule of exclusion in the superior -but not absolute- value of the fundamental rights[113].

Finally, the theory of the spheres built by the German Highest Court deserves special attention. In this State there is no constitutional principle that rejects illegally obtained evidence, but it is instead a question of fact to be appreciated by the judge in each case. In this way, evidence is only declared inadmissible in cases in which the sphere or the core of a fundamental right has been undermined. On the contrary, if the action did not affect essential features of the right, the Court must balance the seriousness of the crime, the far-reaching interference in the law and the interests at stake[114].

These exceptions to the theory of exclusion were used to determine the probative value of bank documents that, even though illegally stolen, were conclusive to substantiate a conviction. This will be seen, in the case of the Liechtenstein Group in Germany, and the case of the Falciani List in France, Italy and Spain.

The ruling of the German Constitutional Court in the Liechtenstein Global Trust Treuhad AG case (LGT case)[115], arises from the data theft from the LGT Group by a former

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[111] Prior to this ruling, the Constitutional Court in Cases no. 173/1984, of March 21 (RTC 1984/173) and no. 289/1984, of May 16 (RTC 1984/289) addressed two cases in which the illegality of the two sources from which the court took the appropriate decision was denounced. In both cases, the Court affirmed that the judicial assessment of evidence obtained illegally was a problem of legality and, therefore, beyond its control. However, this thesis was quickly overcome in the above referenced sentence.

[112] For further information on the criterion to accept evidence as valid see the following Judgments of the Spanish Supreme Court: 320/2011, 22-4; 811/2012, 30-10; 69/2013, 31-1; 912/2013, 4-12; 963/2013, 18-12; 73/2014, 12-3; y 511/2015, 17-7.

[113] MUÑOZ CARRASCO, P. (2019) "Análisis del estado actual de la prueba ilícitamente obtenida en el proceso penal español", (Revista Aranzadi Doctrinal, no. 1/2019), p. 1

[114] ZARAGOZA TEJADA, J. I y GUTIÉRREZ AZANZA, D. A.: "La prueba ilícita. Una reflexión tras la STS del 23 de febrero del 2017" op. Cit. Pp. 4-5 and BARCELIA PÉREZ, J. A. (2017) "La validez probatoria de la denominada lista Falciani a tenor de la reciente jurisprudencia", (Revista Quincenal Fiscal no. 20/2017 parte Jurisprudencia. Comentarios,), p. 3.

[115] Judgment of the BVerfG de 09/11/2010 − 2 BvR 2101/09, asunto Liechtenstein Global Trust Treuhad AG.

employee (Heinrich Keiber). This information, which was sold to the German Federal Intelligence Services, uncovered thousands of possible tax evasion cases and served as a starting point for criminal investigations. The validity of the criminal proceedings was challenged on the grounds that the unlawfully obtained evidence was also tainting the next procedural steps.

In the decision of the German High Court, the illegality of the evidence was rejected by the application of the theory of the spheres. In particular, it was considered that the data from Liechtenstein was of an economic nature and therefore it was not covered by the essential core of the right to privacy. In addition, despite that due to such information the criminal proceedings were initiated, the rest of the evidence was validly generated in the proceeding, so there was no deliberate and serious breach of procedure rules[116].

This case reached the European Court of Human Rights, which on October 6, 2016 ruled in favor of the legality of the house search as it was considered in line with the principle of proportionality. It was understood that such action respected German regulations and was necessary for the protection of common interests, especially considering that tax evasion represents a serious threat on general interests[117].

The possibility of using unlawfully stolen bank documents and accounting files has also been analyzed by the judicial bodies of different countries on the occasion of the Falciani List case. Most of these decisions have concluded not to rule out such evidence and those responsible have been convicted as perpetrators of tax crimes.

The events that gave rise to the dispute date back to 2008, when Hervé Falciani, having taken advantage of his position as a computer technician at one of the branches of the HBSC financial institution, subtracted sensitive information from multiple clients of the entity and communicated it to the French authorities.

As a result of the information leak, the French judicial authorities allowed home searches with the aim of collecting reliable evidence of tax fraud crimes. On February 8, 2011, the Paris Court of Appeal issued a decision which compelled to nullify the audits as a result

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[116] MARTÍNEZ GINER, L. A.: "El uso de la información ilícitamente obtenida en materia tributaria", op. Cit.; ZARAGOZA TEJADA, J. I y GUTIÉRREZ AZANZA, D. A.: "La prueba ilícita. Una reflexión tras la STS del 23 de febrero del 2017" op. Cit.; and BLANCO CORDERO, I.: "La admisibilidad de las listas de evasores fiscales sustraídas en el extranjero como prueba para acreditar la comisión de delitos fiscales" Op. Cit., p. 10.

[117] Judgment of the European Court of Human Rights on October 6 2016, *K.S. and M.S. vs. Germany* (JUR/2016/241122), para. 48.

of the polluting effect of the stolen information. This ruling was appealed and upheld by the French Court of Cassation in a judgment of January 31, 2012[118].

Nonetheless, a more recent judgment of the Criminal Chamber of the French Court of Cassation of November 27, 2013 declared the validity as evidence of these documents since they had been up for discussion and public authorities had played no role in its collection[119].

The impact of the Falciani case went beyond the French borders as the data was supplied to multiple countries -among which were Spain and Italy- through international cooperation instruments. This situation was exploited in some of the court decisions to justify the validity of the evidence. In this sense, it cannot be denied that in these cases the infringement to privacy is less directly tied to the illegal evidence as first there is a house search by the French authorities and, subsequently, the information is communicated to Spain and Italy[120].

Regarding Italy, court decisions have reached different solutions, although, finally, the Italian Court of Cassation did not exclude the validity of the information collected form the Falciani List - neither in criminal nor in tax proceedings-.

In the criminal field, the Court argued the lack of conclusive data arising from the theft and emphasized that the receipt of the files was carried out under the scope of the international regulations of exchange of tax information[121]. At a later time, it was added that the use of information obtained illegally was legitimate as the start of subsequent investigation procedures[122].

In the area of taxation, the Court established that the effects of the evidence obtained illegally in the criminal and in the tax proceedings were different. In this sense, it was noted that in the tax field there was no rule providing specifically - as does the Criminal Procedure Code (art. 191) - the prohibition of the use of illegally obtained evidence, except for the cases in which constitutional rights were infringed. Therefore, the Court

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[118] Judgment of the French Court of Cassation No. 11-13097. Public audience 31/01/2012, in MARTÍNEZ GINER, L. A.: "El uso de la información ilícitamente obtenida en materia tributaria", op. Cit., p. 86.
[119] Judgment of the French Court of Cassation No. 13-85042. Public audience 27/11/2013 quoted by the Judgment of the Spanish Hight Court no. 116/2017, on February 23 2017. (ROJ STS 471/2017).
[120] MOSQUERA BLANCO, A. J.: "La prueba ilícita tras la sentencia Falciani: Comentario a la STS 116/2017, de 23 de Febrero" Op. Cit. p.24.
[121] Judgment no. 38753, September 26 2012.
[122] Judgment no. 29433, April 17 2013, in MARTÍNEZ GINER, L. A.: "El uso de la información ilícitamente obtenida en materia tributaria", op. cit., p. 89.

concluded by declaring that banking information, which had been acquired by an employee of a banking institution, could be used in the procedure, being irrelevant whether or not that same employee had obtained the data in violation of the right to confidentiality[123].

In the case of Spain, Court decisions on this issue have declared that the bank files of the Swiss entity HSBC were not affected by the exclusion rule, but had to be treated as a valid evidence. However, arguments were different and this issue was finally decided by the Spanish High Court ruling no. 116/2017, of February 23 and the Constitutional Court ruling of July 16, 2019[124].

Until the High Court decision, Spanish courts based their rulings on the fact that the exchange of information - under art. 27 of the France-Spain DTC- was adjusted to law. As a consequence, the validity of the evidence was accepted, since it was understood that Spanish Courts could not be required to perform legality controls on actions carried out beyond its borders[125]. In addition, it was considered that the duty to contribute to public expenses -art. 31 Spanish Constitution- prevailed over the right to privacy affected by the use of the data. As a result, the evidence was lawful and sufficient to set aside the right to presumption of innocence[126]. Another argument was based on the fact that, unlike Switzerland, the facts committed by Mr. Falciani did not to amount to a criminal offence under Spanish law[127].

The case reached the Supreme Court, which, in a judgment dated February 23, 2017, affirmed the probative value of the stolen information. In reaching this conclusion, it took into consideration the decisions ruled in comparative law, highlighting the impossibility of using identical solutions. This results from the fact that European procedural systems are not in all cases convergent in relation to the definition and extent of illegal evidence[128].

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[123] FJ 7 de la Ordenanza de la Corte di Cassazione, Civile Sent. Sez. 8 núm. 8605 de 15 de abril de 2015, *vid*. MARTÍNEZ GINER, L. A.: "El uso de la información ilícitamente obtenida en materia tributaria", op. Cit., pp. 91-94.

[124] Judgment of the Spanish Constitutional Court of July 16 2019. (RTC 2019/97).

[125] In criminal matters, Judgment of the Provincial Court of Madrid no. 852/2015, of December 9, (3rd section) and no. 280/2016, of April 29 (3rd section) and in the administrative field the Judgment of the High Court of Justice of Madrid no. 1002/2016 (JUR 2016/263000), of September 22, (6th section).

[126] Judgment of the Provincial Court of Madrid no. 852/2015, of December 9.

[127] Judgment of the Provincial Court no. 280/2016, of April 29 (4º section) and Judgment of the Provincial Court of Madrid no. 1002/2016 (JUR 2016/263000), of September 22, (6º section).

[128] Judgment of the Spanish High Court no. 54/2019 February 6, (RJ 2019/287), (6º section).

The line of reasoning is innovative with respect to previous case-law, which had aligned with the American approach (*deterrence of police misconduct*)[129].

Thus, for the Court, the rationale of the individual for stealing evidence is not decisive when assessing the validity of evidence obtained in detriment of a fundamental right. But the demonstration that this person has never, directly or indirectly, acted on behalf of the State in the service of criminal investigations, is conclusive[130].

Then, in order to prevent abuses that may result from misapplication of this approach, the Court states that this does not constitute an absolute and general principle. For this reason, a second valuation element is added, namely, the balancing of the interests at stake in every particular case. This way, it is established that peripheral infringements cannot be treated in the same way as those that compromise the very core of a fundamental right -thus approaching the German theory of the spheres-.

Analyzing the particular case in the light of this doctrine, it is concluded that no connection between Hervé Falciani with Spanish or foreign police services could be demonstrated and, consequently, the use of bank files as evidence was accepted[131].

This decision has been reflected in the next judicial pronouncements on the case as the judgment no. 512/2017, of September 5, of the Provincial Court of Madrid; the judgment No. 311/2018, of June 27 of the Spanish High Court; and the judgment No. 54/2019, of February 29 (RJ 2019/287) of the Spanish High Court. If the development of Spanish case-law is analyzed, it can be observed that the purpose not to admit illegal information as evidence has been progressively separated from the protection of fundamental rights, with the exception of the police excessive force cases (e.g. judgment of the Spanish High Court No. 116/2017, of February 23)[132].

Even so, the admissibility of the evidence obtained illegally cannot be based exclusively on the fact that it has been collected by a private individual unrelated to the state powers, as this can foster contacts between public and private organizations, with the purpose that

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[129] ZARAGOZA TEJADA, J. I y GUTIÉRREZ AZANZA, D. A.: "La prueba ilícita. Una reflexión tras la STS del 23 de febrero del 2017" op. Cit., pp. 2-3 y 10.
[130] Judgment of the Spanish High Court no. 116/2017, February 23 (7º section).
[131] MOSQUERA BLANCO, A. J.: "La prueba ilícita tras la sentencia Falciani: Comentario a la STS 116/2017, de 23 de Febrero" Op. Cit., p. 28.
[132] Ibid. pp. 21-23. In the same vein, ZARAGOZA TEJADA, J. I and GUTIÉRREZ AZANZA, D. A.: "La prueba ilícita. Una reflexión tras la STS del 23 de febrero del 2017" op. Cit., p. 10.

the latter collect incriminating evidence. The challenge of this situation would entail a difficult burden of proof for the defender[133].

These conclusions have been addressed by the Spanish Constitutional Court in a judgment of July 16, 2019, where the adequacy of the solution adopted by the High Court in the above-mentioned decision was analyzed in light of the constitutional requirements arising from article 24.2 of the Spanish Constitution (right to a fair trial).

In brief, the Court understands that the violation of a fundamental right - in this case the right to privacy - when obtaining evidence, does not automatically entail its exclusion from the body of evidence, but that a balancing judgment between the interests at stake must be carried out. The fact that the infringement has been committed by an individual does not change at all the constitutional protection standard applicable from the perspective of the right to fair trial[134].

However, this circumstance is taken into account to assess the nature and characteristics of the violation of the fundamental right. In this sense, it is affirmed that the right to privacy of the clients of the banking entity is adequately protected in the criminal or civil proceedings arisen in the country where the fundamental right was violated. Since there is no connection between these proceedings and the Spanish ones, there is no need for greater protection of privacy within this procedure.

From standpoint of the violation of the fundamental right, the stolen data are related to harmless aspects of economic privacy, therefore, it cannot be affirmed that such infringement is of sufficient gravity as the evidence is dismissed. In support of this argument, it is added that the breach of privacy has taken place beyond Spanish borders and solely in cases where the right is indivisibly linked to the inherent dignity of the individual a universal protection is granted (judgment of the Spanish Constitutional Court no. 91/2000, of March 30 (RTC 2000, 91))[135].

Finally, given that in Spain public powers do not protect bank opacity actions, it is considered that there is no risk of promoting practices among individuals that violate

[133] In this vein, ZARAGOZA TEJADA, J. I and GUTIÉRREZ AZANZA, D. A.: "La prueba ilícita. Una reflexión tras la STS del 23 de febrero del 2017" op. Cit., p. 11.
[134] Judgment of the Spanish Constitutional Court of July 16-2019, no. 97/2019 (RTC 2019\97) (FJ 6º).
[135] Ídem.

fundamental rights. On the contrary, the collection of bank information by the authorities for tax or criminal investigations is provided by law.

Taking into account the foregoing, the Spanish Constitutional Court dismisses the appeal considering that the right to a fair trial and the presumption of innocence –article 24 Spanish Constitutional Act- have not been infringed.

3. Issues arising from the grounds for opposition to the information request.

The principles of public order, reciprocity and proportionality, as well as the secret nature of certain information, are set as limits to the fulfillment of tax justice[136]. Therefore, the mandatory exchange of tax information ex art. 26 OECD MTC declines when any of the assumptions provided in the aforementioned provision are met.

Under these circumstances, the requested State is free to refuse the request of information, although nothing prevents it from being carried out. On the contrary, to the extent that such exchange is protected by the national regulations[137], the requested information can be provided as the information exchange falls under the scope of Article 26 OECD MTC and the secrecy right is not breached[138].

A case of special interest occurs when the information requested contains business or industrial secrets. In such a case, article 26 (3) exempts the provision of information as long as the exchange of information may reveal business, industrial or professional secrets. The purpose of this provision is to safeguard the technical, industrial and commercial knowledge of the taxpayer and the required country in order to protect productivity in the face of increasingly tough competition[139].

The Model Tax Convention does not define the concept of business or industrial secrecy or the circumstances that must be taken into account when assessing them, but it only

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[136] MUÑOZ VILLAREAL, A.: "Límites al intercambio internacional de información tributaria" */in/* COLLADO YURRITA M.A. y MORENO GONZÁLEZ, S.: *Estudios sobre fraude fiscal e intercambio internacional de información tributaria.* Op. cit. pp. 257 y 258.

[137] In this vein, CALDERÓN CARRERO, J.M.: *Intercambio de información fiscal y fraude fiscal internacional*. Op. cit. p. 122.

[138] Commentaries to Art. 26 OECD MTC 2017, para. 7.

[139] MUÑOZ VILLAREAL, A.: "Límites al intercambio internacional de información tributaria" */in/* COLLADO YURRITA M.A. y MORENO GONZÁLEZ, S.: *Estudios sobre fraude fiscal e intercambio internacional de información tributaria.* Op. Cit. P. 265.

restricts its interpretation and value according to the economic importance and the gravity of the damage that the disclosure may entail. Specifically, Commentaries to art. 26 of the Model refer to business secret as follows: *'A trade or business secret or trade process is generally understood to mean information which has considerable economic importance and which can be exploited practically and the unauthorized use of which may lead to serious damage (e.g. may lead to severe financial hardship)'*. This might happen, for instance, in information requests that involve the revelation of the methods of manufacturing goods or marketing formulas[140]. In such cases, the data protected by business secret and the remaining financial information must be separated[141].

Because of the lack of precision of these provisions, it is the States that must establish the specific content of this opposition ground. The lack of uniformity in the definition of these concepts at a national level makes the extent of the information exchanged to be different in each State, which, according to certain authors, can preclude the principle of reciprocity[142] and the confidentiality right[143].

Given this uniformity, the OECD recommends not to interpret the concept of secrecy too broadly; otherwise, in many cases the exchange of information would result ineffective[144]. In addition, it points out that the security of trade secrets is to some extent guaranteed by the obligation of confidentiality provided for in Article 26 (2) MC OECD which prevents the information exchanged from being used for unauthorized purposes[145]. Again, there is a clear aim of expanding the scope of the information exchange at the expense of the protection of taxpayers' rights and guarantees. In this case, the imbalance is, if possible, even more relevant, since such an infringement of rights is hardly going to be compensated ex post (e.g. the revelation of trade or industrial secrets to third-party competitors).

The difficulty of assessing whether trade secrecy prevails over other constitutionally protected interests has been obvious for a long time. As an example, the Bavaria, S.A.

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[140] Commentaries to Art. 26 OECD MTC 2017, para. 19.2 and 79.
[141] Commentaries to Art. 26 OECD MTC 2017, para. 19.2.
[142] OBERSON, X.: *International exchange of information in tax matters. Towards Global Transparency*, op. cit. p. 34.
[143] MARTÍNEZ GINER, L.A. (2008) *La protección jurídica del contribuyente en el intercambio de información entre Estados*. (Iustel), p. 105.
[144] Commentaries to Art. 26 OECD MTC 2017, para. 19.
[145] Commentaries to Art. 26 OECD MTC 2017, para. 19.1.

case, where Colombian Courts understood differently the protection of industrial secret, may be cited.

The dispute in the main proceedings arises from the request by the Chief of Supervision of Large Taxpayers of Bogotá to Bavaria S.A. of certain data, among which was the formula of beers and malts manufactured by the entity. In the opinion of the company, this information constituted an industrial secret and its disclosure would be equivalent to the loss of property.

The Court understood that the industrial property right is of a fundamental nature because it amounts to the assets of the company. It was noted that in the case, the Administration exceeded the limits of its competence as the required data had no relevance for the tax investigation and was especially sensitive in the current market economy that entails a production fueled by high competition. For this reason, the formulas, techniques, systems or strategies to produce and the marketing products or services acquire a great importance for entrepreneur, who strives to preserve them with a certain stealth because to a large extent the success and survival in the market depend on them[146]. Accordingly, the claims submitted at first instance were upheld.

This case reached the Constitutional Court of Colombia, which overturned this decision, stating that Bavaria, S.A. was not required to reveal any industrial secrets, nor was his right to industrial property violated. For the Court, this secrecy is limited by the priority of the general interest and, as a consequence, favoring industrial property over the regular exercise of public functions -as inspection, surveillance, intervention or search for judicial evidence-, implies distorting such right[147].

The Aloe Vera vs. United States case also demands particular attention in this regard[148].

The dispute in the main proceedings arises from the claim for damages raised by Aloe Vera, an American company which manufactured and sold aloe vera gels to its affiliated company in Japan (among other countries). In 1996, Aloe Vera was subject to a tax inspection by the US authorities and as a result it revealed that both companies had not declared 32 million dollars. Such information was transmitted, based on art. 26 of the

[146] Judgment of the Superior Court of the Bogota Judicial District of Santafé, January 15, 1993.
[147] Judgment of the Colombian Constitutional Court No. T-381/93. Ref.: Expediente T-10813.
[148] *ALOE VERA OF AMERICA, INC., et al., Plaintiffs, vs. UNITED STATES of America*. No. CV 99-1794-PHX-JAT.

Japan-USA DTC, to Japan where it was leaked by the media. However, the exchanged information was partially false and serious reputational damage was caused to the company. As a result of these events, Aloe Vera filed a claim for damages and requested recognition of a violation of its right to confidentiality.

Finally, the Court understood that the United States exchanged such information despite the lack of sufficient data to prove its veracity, which was contrary to both US regulations and Article 26 DTC; Therefore, it concludes by establishing the responsibility of the US and its obligation to compensate the damages caused to Aloe Vera.

One of the arguments accepted by the judge - which takes special interest in relation to the obligation of secrecy - refers to the possibility of imposing sanctions in cases where the transmitting State provides information to a State in which it is known that there is no compliance with the obligation of secrecy imposed by article 26 DTC.

Specifically, it was established that the possibility of transmitting information to a foreign government is subject to compliance with the terms and conditions of the DTC concluded by both countries. Among these conditions, the obligation of the receiving State to treat the information as secret and not to disclose it to any person (art. 26.2 OECD MTC) can be found. The Court noted that the obligation of secrecy imposed in the agreement is binding for both signatories, so, if the United States government knew, from previous relations with Japan, that this country violates said provision, the US would also be breaking the terms of the agreement.

Concern about the problems that arise from the differences in the protection of trade secrets between national regulations has been addressed at the international level. As an example, the Agreement on Trade-Related Aspects of Intellectual Property Rights concluded by the WTO and the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, may be cited. These rules have established a common standard in order to harmonize the laws of the Member States to a certain extent in order to guarantee that a sufficient level of judicial protection is achieved for cases of illegal use, obtaining or disclosure of trade secrets.

Besides the above, what is clear is that, at the moment, bank secrecy cannot be claimed as a reason to oppose an information request; nor can the supply be denied due to the fact

that the information is in the hands of the companies or persons listed in the fifth section of the provision[149].

Closely related to this issue, the question of the taxpayer's participation in exchange procedures arises. As anticipated, the interests of the taxpayer on whom information is exchanged can be seriously affected and, therefore, it is essential to establish safeguard mechanisms.

Among these protection mechanisms, the right to participate in the exchange procedure as an instrument to control information flows stands out: to the extent that the notification and participation of the tax obligor in the procedure is guaranteed, the existence of a trade secret that discourages the exchange can be verified at a previous stage, thus avoiding a defenseless situation and hard-to-repair damages[150].

The protection of taxpayers' rights can take place in two different ways: by adopting specific guarantees in international instruments for information exchange or leaving its regulation to Member States' national laws. Currently, primacy is given to the second option.

The Model Tax Convention on Income and on Capital does not regulate the rights and role of taxpayers in the exchange procedure, but merely points out that regulations of some Member States contain notification procedures. By allowing the voluntary cooperation of the taxpayer with competent authorities, errors can be avoided (e.g. identity error) and the exchange may be improved[151].

The same conclusion is reached if the network of DTCs of Latin American countries is analyzed, provided that most part of them refer to national regulations[152].

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[149] Art. 26.5 OECD MTC: *'In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person'.*

[150] MARTÍNEZ GINER, L.A.: *La protección jurídica del contribuyente en el intercambio de información entre Estados,* op. Cit. Pp. 164-165; and DE MIGUEL ARIAS, S. (2012) "Los derechos de los obligados tributarios ante los requerimientos de información entre estados miembros de la Unión Europea en la Directiva 2011/16/UE". (Revista española de Derecho Financiero, no.156/2012 parte Estudios) pp. 8-9.

[151] Commentaries to Art. 26 OECD MTC 2017, para. 14.1.

[152] *V.gr.* Argentina-Switzerland, Panama-Barbados, Panama-France, Panama-Mexico, Panama-Qatar, Panama-Czech Republic, Mexico-Germany, Spain-Andorra, Spain-Barbados, Spain-Jamaica, Spain-Panama, Peru-Switzerland, Portugal -Andorra and Uruguay-Switzerland.

Conventions such as the one signed between Panama and Barbados include more extensive provisions, with explicit reference to the rights of notification and participation, as follows: *'In case of an exchange of information, the administrative procedural rules regarding taxpayers' rights provided for in the requested Contracting State remain applicable before the information is transmitted to the requesting Contracting State. These procedures include notifying the person with regard to the request for information from the other Contracting State, and enabling that person to file and present his position to the tax administration before it issues a response to the requesting State. It is further understood that this provision is aimed at guaranteeing the taxpayer fair procedure and not at preventing or unduly delaying the exchange of information process'.*

Almost all DTCs establish provisions that seek to avoid the frustration or undue delay in the information exchange as a result of the application of notification rights. To this extent, it can be concluded that the underlying public interest in the exchange of information is granted primacy in detriment to the rights and guarantees of the taxpayer.

This subordination is clearly reflected in the DTC signed between Mexico and Germany: *'Upon application the person concerned shall be informed of the supplied data relating to him and of the use to which such data are to be put. There shall be no obligation to furnish this information if on balance it turns out that the public interest in withholding it outweighs the interest of the person concerned in receiving it'*[153]. In the same vein, Commentaries to Article 26 of the OECD MTC advice of the need to include exceptions to notification procedures in urgent cases that the exchange might result thwarted[154].

In fact, sometimes, the rights of taxpayers may jeopardize the effectiveness of the investigation within which the exchange of information has been requested and, in such a case, the rights should be limited for the sake of higher general interests -such as avoiding tax fraud-. However, if these exceptions are set as a general rule, the regulations that guarantee the protection of taxpayers would become devoid of purpose[155]. As a

[153] In the same vein, Uruguay-Germany and Venezuela-Germany.
[154] Commentaries to Art. 26 OECD MTC 2017, para. 14.1.
[155] MARTÍNEZ GINER, LA.: *La protección jurídica del contribuyente en el intercambio de información entre Estados,* op. Cit. P. 165-166; and CALDERÓN CARRERO, J.M.: *Intercambio de información fiscal y fraude fiscal internacional* op. cit. pp. 349-351.

consequence, fundamental rights such as legal certainty, the right to property and business secrecy would be systematically breached[156].

In any case, regardless of the existence of a DTC protecting the rights and guarantees of taxpayers, national regulations should have provided for a specific protection in this regard. After a thorough analysis of the question, it can be stated that, with a few exceptions[157], national regulations do not guarantee taxpayers' rights in the international exchange of tax information[158].

In addition, the Courts of each State have different views on the issue. In Spain, the National Court ruled on the right to communicate the request for information made by foreign tax authorities (specifically, France, Germany and the Netherlands). After analyzing both the DTCs and internal regulations, it was concluded that there was no obligation of making the request content available to taxpayers[159].

In brief, from the analysis of national and international information exchange instruments it can be concluded that the regulation on the protection of taxpayers' rights is, at the very least, deficient.

Due to the lack of participation of the taxpayer in the procedure, he is prevented from controlling the legality of the exchange of information, to the extent that States may be exchanging information without complying with the requirements demanded by DTCs. This problem is of particular relevance when exchanging information that may contain business or industrial secrets; the broad discretion of the Administration in the assessment of this secret nature and the lack of control by the taxpayer may cause damage that may be difficult to repair[160].

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[156] CORDÓN EZQUERRO, T.: "Los derechos de los contribuyentes en el intercambio de información entre Administraciones tributarias", op. cit. p. 6; and Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, para 7.

[157] *V.gr.*, Uruguay, Germany, the Netherlands, Portugal and Switzerland. Vid. CALDERÓN CARRERO, J.J.: *Intercambio de información y fraude fiscal internacional*, op. Cit. pp. 345-346.

[158] MARTÍNEZ GINER, L.A.: *La protección jurídica del contribuyente en el intercambio de información entre Estados*, op. cit. p. 161.

[159] Judgment of the Spanish National Court of September 25 2003. (JT 2003\1569).

[160] CALDERÓN CARRERO, J.J.: *Intercambio de información y fraude fiscal internacional*, op. Cit. P. 348.

4. Related applicability issues to the information exchange clause.

Within the analysis of the information exchange clause provided for in article 26 OECD MTC reference should be made to further issues whose practical application has sparked debate. Thus, this section will discuss the possibility of exchanging information on events that occurred prior to the entry into force of the DTC (retroactive exchange) along with issues related to the length of the information exchange procedure. Finally, based on the evaluations carried out by The Global Forum on Transparency and Exchange of Information for Tax Purposes, the level of implementation of the standard and legal framework for the information exchange in Latin American countries will be presented.

4.1. Retroactive application of the information exchange clause.

The temporal scope of the information exchange clause has been raising controversies both at the theoretical level and also in the practice of Tax Administrations. Certainly, the information exchange under Article 26 will take place over the life of the DTC, although it might be possible to exchange information referring to tax facts and obligations arising prior to its entry into force. Some scholars understand that in such a case there is a "retroactive exchange" of information[161].

Retroactive application of rules, although not fully banned, has been treated with great mistrust; not foreseeable changes that might affect taxpayers' legal sphere may imply a violation of the legal certainty right– as individuals adjust their performance to the legislation in force – [162].

Taking into account this negative impact, non-retroactivity is the general rule governing the temporary application of norms. This guideline also applies to international treaties as stated in article 28 of the Vienna Convention on the Law of Treaties on 23 May 1969: *'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.*

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[161] CALDERÓN CARRERO, J.M.: *Intercambio de información y fraude fiscal internacional*. Op. cit. p. 107

[162] See Judgments of the Spanish Constitutional Court no. 234/2001 December 13. (RTC 2001\234); no. 116/2009, May 18 (RTC 2009/116) and no. 176/2011, November 8 (RTC 2011/176).

Like any general rule, exceptions have been established. Thus, retroactivity is allowed under two circumstances: on the one hand, if a provision, based on the principles of party autonomy and sovereignty of States, suggests otherwise; and, on the other hand, those cases in which, from the provisions of the Convention, retroactivity can be inferred[163].

In relation to the latter, it has been understood that the possibility of exchanging information on events occurred prior to the entry into force of the DTC is a logical assumption insofar as the Convention usually enters into force in the middle of the tax period. Such situation is respectful with the taxpayers' rights as long as it does not apply to already prescribed facts and tax obligations[164]. In addition, provided that nothing in the Convention establishes otherwise, and in light of the purpose of the clause -the prevention of tax fraud and evasion-, any interpretation that maximizes its effectiveness would be covered by Article 26[165].

The OECD has also favored the possibility of exchanging information obtained prior to the entry into force of the DTC, provided that such assistance takes place while the Convention is in force[166].

While we agree with the trend that states that it is possible to provide information prior than the Convention, it is for reasons other than those mentioned:

Retroactivity is the application of a given rule to events that took place before the law was in effect, thus affecting consolidated or not-yet-concluded legal situations. However, the clause of Article 26 OECD MTC is instrumental in nature and does not imply the retroactive application of a new substantive regulation nor does it modify those consolidated legal situations. Rather, this mechanism is limited to the information exchange, without impacting or altering any previous situation. In any case, since the material legal regime is not affected, the principle of legal certainty could not be violated. For this reason, the exchange of information on existing situations prior to the entry into force of the DTC should not be prohibited.

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[163] CALDERÓN CARRERO, J.M.: *Intercambio de información y fraude fiscal internacional*. Op. Cit. p. 109.

[164] MERINO ESPINOSA, M. and NOCETE CORREA, F.J.: "El intercambio de información tributaria: entre la diversidad normativa, la imprecisión conceptual y la pluralidad de intereses" op. cit.; CALDERÓN CARRERO, J.M.: *Intercambio de información y fraude fiscal internacional*. Op. cit. P. 111.

[165] CALDERÓN CARRERO, J.M.: *Intercambio de información y fraude fiscal internacional*. Op. Cit. P. 112.

[166] This provision (para 10.3) was introduced in the Commentaries by the amendments of 2005.

With regard to conventional practice, some Conventions expressly refer to the temporary scope of the information exchange clause, namely: on the one hand, the DTCs signed by Uruguay-Liechtenstein, Portugal-Hong Kong and Panama-Czech Republic deny the possibility of a retroactive application of the Article. Other Conventions such as those signed by Chile with Austria and China only restrict the retroactive application to the data held by banks or financial institutions, so it follows that the exchange of some other information is protected by the DTC. On the other hand, the DTCs Chile-Australia[167] and Spain-Singapore[168] expressly provide for the retroactivity of the exchange.

4.2. Time limits for the information exchange procedure.

Prior to the 2012 amendment, neither the wording of article 26 OECD MTC nor the Commentaries made any reference to the duration of the exchange procedure, leaving this matter at the discretion of the Contracting States. In any case, this discretion was limited by the principles governing the international exchange of tax information, namely: reciprocity, proportionality, cooperation and loyalty -from which can be inferred that procedures must be expedited-[169].

From early times, the need to establish temporary limits to adequately respond to information requests and to prevent tax fraud was revealed[170].

Consequently, in the 2012 update, Commentaries to Art. 26 MC OECD provided for the possibility of introducing voluntary wording in the DTC which temporarily limited the exchange[171]. Specifically, where the tax authorities of the requested Contracting State

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[167] Chile-Australia DTC: *'Nothing in the Convention shall prevent the application of Article 26 to the exchange of other information that existed prior to the date of entry into force of the Convention'.*

[168] Spain-Singapore DTC:*'With reference to Article 26 (Entry into Force), it is understood that the provisions of Article 24 (Exchange of Information) of the Agreement allow for the exchange of information for any taxable period in accordance with the law of the requesting Contracting State'.*

[169] MERINO ESPINOSA, M. y NOCETE CORREA, F.J.: "El intercambio de información tributaria: entre la diversidad normativa, la imprecisión conceptual y la pluralidad de intereses" op. Cit. p. 147.

[170] Final Report of May 22 2000 from the High Level Working Party o the EU Council on the fight against tax fraud.

[171] The suggested wording states as follows: "*The competent authorities of the Contracting States may agree on time limits for the provision of information under this Article. In the absence of such an agreement, the information shall be supplied as quickly as possible and, except where the delay is due to legal impediments, within the following time limits:*
a) Where the tax authorities of the requested Contracting State are already in possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within two months of the receipt of the information requested;

were already in possession of the requested information, the time limit was of two months from the receipt of the information request. On the contrary, where the tax authorities of the requested Contracting State were not already in the possession of the information, such period was of six months. In the absence of such an agreement, the information had to be supplied as quickly as possible, except where the delay was due to legal impediments[172]. According to the Commentaries, these provisions could be applied in cases where the Tax Authorities had not agreed different terms[173].

Some DTCs of the Latin American network include different time limits not only to communicate the information, but also to certify the receipt of the request. Such is the case of the Conventions between Panama-Jamaica, Spain-Jamaica, Spain-Singapore, Spain-Uruguay, Ecuador-Singapore and Ecuador-China.

However, sometimes, the issue is not whether deadlines for the exchange of information should be set in the DTCs, but if it is possible to comply with them in practice. Many Latin American countries do not have sufficient means to manage their own tax system, a situation that would be aggravated if the scarce resources are allocated to provide information to another State. On this premise, proposals are being developed aimed at the transferal of the costs to the requested State.

Another issue raised by the establishment of a specific deadline is to determine the consequences of non-compliance with such time limit. The OECD, in its Commentaries, makes no reference to the possibility of sanctioning the non-complying State, although it clearly states that if the rest of the requirements demanded by Article 26 have been met, the request for information cannot be denied solely for the infringement of the time limits[174].

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b) Where the tax authorities of the requested Contracting State are not already in the possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within six months of the receipt of the information request.
Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits."

[172] Commentaries to Art. 26 OECD MTC 2017, para. 29.5.

[173] Introduction to OECD MTC 2017, para 29.

[174] Commentaries to Art. 26 OECD MTC 2012, para. 10.6: "*The last sentence in optional paragraph 6, referenced in paragraph 10.4, which provides, "Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits." makes it clear that no objection to the use or admissibility of information exchanged under this Article can be based on the fact that the information was exchanged after the time limits agreed to by the competent authorities or the default time limits provided for in the paragraph*."

4.3. The Global Forum on Transparency and Exchange of Information for Tax Purposes.

In recent years, the importance of tax transparency and tax information exchange between States in the fight against tax fraud and tax evasion has grown exponentially. In this context, the Global Forum on Transparency and Exchange of Information for Tax Purposes (hereinafter, the Global Forum) has played an essential role in ensuring the effective application of the rules on international tax transparency[175].

The Global Forum was created within the framework of the OECD in 2000, with the objective of working on the risks posed by non-cooperative jurisdictions[176]. Nowadays, it constitutes the largest international cooperation network in tax matters, in which participate 154 member countries and non-OECD members, together with the European Union[177].

The main achievement of the Global Forum has been the elaboration of transparency and information exchange standards for tax purposes and the analysis of their implementation by the different jurisdictions[178]. In 2009 there was a turning point in response to the call of the G20 leaders to reinforce the implementation of these standards[179].

Thus, there was an in-depth restructuration of the Global Forum, which from that moment on took a more active position in the expansion of international tax information exchange agreements. Likewise, the engagement of the OECD in the work of the G20 was intensified, as it is stressed in the reports that are periodically published on the progress of their work[180].

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[175] OECD (2016) *Global Forum on Transparency and Exchange of Information for Tax Purposes. Progress Report 2016*. P. 8. https://www.oecd.org/tax/transparency/informe-de-progreso-foro-global-2016.pdf Last accessed: 19/06/2019.

[176] OECD *Global Forum on Transparency and Exchange of Information for Tax Purposes*. Disponible en https://www.oecd.org/tax/transparency/ Last accessed: 20/06/2019.

[177] OECD (2018) *XI Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes.* http://www.oecd.org/centrodemexico/medios/xireuniondelforoglobalsobretransparenciaeintercambiodeinformacionconfinesfiscales.htm Last accessed: 19/06/2019.

[178] GARDE GARDE, M.J.: "Eficacia del intercambio de información tributaria entre Estados: experiencia de la Administración Tributaria española en el ámbito de la imposición directa". */in/* COLLADO YURRITA M.A. and MORENO GONZÁLEZ, S.: *Estudios sobre fraude fiscal e intercambio internacional de información tributaria.* Op. Cit. P. 244.

[179] OECD *Global Forum on Transparency and Exchange of Information for Tax Purposes*. http://www.oecd.org/ctp/treaties/foroglobalsobretransparenciaeintercambiodeinformacionpalabrasdeangelgurria.htm Last accessed: 19/06/2019.

[180] ANDRÉS AUCEJO, E., PISTONE P. Et. Al. (2018) *International Administrative Cooperation in Fiscal Matter and International Tax Governance*, (Thomson Reuters Aranzadi), p. 68.

Regarding the control system for the implementation of transparency and information exchange standards, two phases may be identified: Phase 1 (review of the legal framework) and Phase 2 (review of EOIR in practice).

In the first round of reviews, which took place between 2010 and 2016, the Global Forum carried out its analysis in two phases, examining separately the legal framework and its effective implementation. The results of this first round of peer reviews on the exchange of information on request (EOIR) have been positively assessed, since just a minority of jurisdictions did not reach the optimal level of implementation.

Specifically, the final assessments show that 22 jurisdictions were considered as "Compliant" - among which are Colombia, Spain and Mexico - and 77 as "Largely Compliant" - for example, Argentina, Brazil, Chile, El Salvador, Portugal and Uruguay- . Likewise, 12 jurisdictions have been classified as "Partially Compliant" - among which are Costa Rica and the Dominican Republic - and 3 were considered as "Non-Compliant" and, as a consequence, they did not submit to the second phase since an effective exchange of information was not guaranteed (e.g. Panama)[181].

In accordance with the conclusions of the 2016 Progress Report, since its inception, this peer-review system has encouraged the expansion of the DTCs network, the realization of substantial changes in national jurisdictions - both in the regulatory framework and practices - and the elimination of strict banking secrecy in more than 65 jurisdictions[182].

The international scenario evidences that solutions to tackle the fight against tax fraud and tax evasion have been effectively initiated, but its scope and implementation still need to be strengthened[183]. To this end, the Global Forum has agreed that all members and relevant non-members should be subject to a second round of review starting in 2016, to ensure continued compliance with and implementation of the EOIR standard. Whereas the first round of reviews was generally conducted as separate reviews for Phase 1 (review of the legal framework) and Phase 2 (review of EOIR in practice), the EOIR reviews

[181] OECD (2016) *Global Forum on Transparency and Exchange of Information for Tax Purposes. Progress Report 2016*. P. 8. https://www.oecd.org/tax/transparency/informe-de-progreso-foro-global-2016.pdf Last accessed: 19/06/2019.
[182] Ibid. Pp. 19-21.
[183] Ibid. P. 40.

commencing in 2016 combine both Phase 1 and Phase 2 aspects into one review. Also, reinforced and stricter analysis standards are being applied[184].

This second peer-review round includes the analysis of the amendments introduced in the 2012 update of Article 26 OECD MTC and its Commentaries as well as an assessment of the implementation levels of the OECD recommendations. Finally, a comparison is made of the results obtained in the first round with respect to the rating the countries would deserve in the second round. For instance, in the case of Costa Rica, the 2019 rating has been improved and it is currently classified as "largely compliant". This is not the case with Spain, which has not maintained its "compliant" rating, now being regarded as "largely compliant". As for Brazil, the 'largely compliant' rating from the first peer-review round has been maintained[185].

[184] OECD (2017) *Global Forum on Transparency and Exchange of Information for Tax Purposes. Handbook for Peer-Reviews 2016-2020*, p. 14. http://www.oecd.org/tax/transparency/global-forum-handbook-2017-spanish.pdf. Last accessed: 20/06/2019.

[185] Final Reports of the second rating round can be accessed in: https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews_2219469x?page=1

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