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# Will Corruption in Argentina Prevent the Protection of Personal Tax Information It Exchanges Under its FATCA and CRS Commitments?

Jihan Jude

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# Will Corruption in Argentina Prevent the Protection of Personal Tax Information it Exchanges Under its FATCA and CRS Commitments?

Jihan Jude

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## I. INTRODUCTION

Oliver Wendell Holmes, an early twentieth century jurist and Chief Justice to the Supreme Court of the United States, once said, “taxes are what we pay for civilized society.”<sup>1</sup> This quote holds true now, more than ever, as developed countries like the United States (U.S.) and developing countries like Argentina are concerned with the deleterious social effects of tax evasion and the enforcement of tax compliance among their citizens and residents living or holding accounts abroad.<sup>2</sup> In order to achieve global taxation, key countries and international organizations have pushed for more transparency and less bank secrecy in international banking in hopes of smoking out tax evaders.<sup>3</sup> The key countries and international organizations, which have primarily led the push for less bank secrecy and more information sharing include the U.S., the Organization for Economic Co-operation and Development (OECD), and the European Union (EU).<sup>4</sup> The impetus for concern over tax evasion is the amount of wealth, approximately \$7.8 trillion, in accounts in foreign financial institutions.<sup>5</sup> Traditionally, secret bank accounts in Caribbean jurisdictions like the Cayman Islands or a Swiss bank account

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<sup>1</sup> *Tax Quotes*, IRS (Sept. 23, 2016), <https://www.irs.gov/newsroom/tax-quotes>.

<sup>2</sup> See Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 306 (2012).

<sup>3</sup> Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 141 (2014).

<sup>4</sup> Grinberg, *supra* note 2, at 312 (explaining that the OECD started in 1960 as a membership of eighteen European countries as well as the U.S. and Canada); See *About the OECD: What We Do and How*, OECD, <http://www.oecd.org/about/whatwedoandhow/> (last visited Oct. 10, 2018) (noting that now the OECD is a membership of thirty-five countries across the globe that represent the world’s most advanced economies and several emerging economies, such as Mexico, China, India, Brazil, and Turkey, and focused on securing economic growth and financial stability, the OECD monitors events in member countries and provides peer reviews in order to provide insight into legal and policy corrective actions member states might take); *About The EU: The EU in Brief*, EUR. UNION (Apr. 7, 2018), [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en). (noting that the EU is an economic and political union between twenty-eight European countries established after the Second World War to promote economic trade and interdependence and the avoidance of conflict).

<sup>5</sup> Grinberg, *supra* note 2, at 306.

held in Switzerland are what come to mind when an “offshore account” is mentioned.<sup>6</sup> In addition to residents of certain countries hiding money earned domestically overseas in foreign offshore accounts, some countries such as the U.S. are also concerned with the vast amount of expatriates living and working abroad generating income in other countries.<sup>7</sup> Such expatriates are subject to taxation by virtue of their American citizenship regardless of the jurisdiction in which they reside.<sup>8</sup> Consequently, for developed countries and international organizations dominated by the perspectives of developed countries, “taxation is the only practical means of raising the revenue to finance government spending” on the social services they provide.<sup>9</sup> The United Kingdom, Italy, Spain, and France each lose about \$100 billion in revenue each year from tax evasion, and the U.S. loses \$377 billion in revenue a year.<sup>10</sup>

The U.S. and the OECD developed the prevailing methods of tax compliance and enforcement in the international tax system that are currently in force: the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS), respectively.<sup>11</sup> FATCA requires tax authorities in other jurisdictions, namely foreign financial institutions (FFIs), to obtain detailed information on financial accounts held by U.S. citizens and foreign entities with significant U.S. ownership and to report that information

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<sup>6</sup> *CAB Concerned Over the Labeling of Fifteen Caribbean Countries as “Tax Havens” in the State of Illinois’ HB3419*, CARIB. ASS’N OF BANKS (May 5, 2017), <http://cab-inc.com/cab-concerned-over-the-labelling-of-fifteen-caribbean-countries-as-tax-havens-in-the-state-of-illinois-hb3419/>; see also Robert W. Wood, *Cayman Islands is The New Switzerland, But Not The Way You Think*, FORBES (Apr. 18, 2014), <https://www.forbes.com/sites/robertwood/2014/04/18/cayman-islands-is-the-new-switzerland-but-not-the-way-you-think/#4dc3762d6fd9>.

<sup>7</sup> Kirsch, *supra* note 3, at 120.

<sup>8</sup> *Id.* at 119.

<sup>9</sup> Vito Tanzi & Howell Zee, *Tax Policy for Developing Countries*, IMF (Mar. 2001), <https://www.imf.org/external/pubs/ft/issues/issues27/>.

<sup>10</sup> Charles S. Jr. Bowen, *There Are Many Ways to Catch FATCAs: What Impact Will the Foreign Account Tax Compliance Act (FATCA) Have on Caribbean Nations’ Privacy Laws and Costs Associated with Non-Compliance*, 1 *INDON. J. INT’L & COMP. L.* 968, 973-74 (2014).

<sup>11</sup> See Andy Mukherjee, *Private Bankers, You Have Worse Coming*, BLOOMBERG (Oct. 2, 2016), <https://www.bloomberg.com/gadfly/articles/2016-10-02/private-bankers-you-have-a-worse-year-coming-don-t-fight-it>.

back to the U.S. Internal Revenue Service (IRS).<sup>12</sup> The CRS, on the other hand, is an extensive reporting standard broader in scope than FATCA and is a mechanism for participating countries to share tax information of residents globally.<sup>13</sup> CRS is broader in terms of the kind of financial information it seeks to collect, applies broadly to residents of any given participating country and not solely to citizens, and applies to more categories of reporting entities than does FATCA.<sup>14</sup>

Argentina is among the countries that have committed to both the CRS and FATCA.<sup>15</sup> As a developing country, Argentina has much to gain from the automatic exchange of tax information (AEOI) and the implementation of these standards, namely, the identification of taxpayers and evaders and the collection of revenue as around U.S. \$400 billion are held by Argentines in offshore assets.<sup>16</sup> Moreover, Argentina's fiscal budget deficit during the first half of 2017 was 1.5% of its gross domestic product, which translates to about U.S. \$8.4 billion.<sup>17</sup> However, as a developing country with a past and present marked by ubiquitous government corruption and taxpayer distrust of keeping money within Argentina, the automatic exchange of information poses serious concerns about the

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<sup>12</sup> Grinberg, *supra* note 2, at 334; *see also* *What is FATCA? What is CRS?*, THOMSON REUTERS, <https://tax.thomsonreuters.com/fatca-crs/what-is-crs-fatca/> (last visited Oct. 10, 2018).

<sup>13</sup> Denise Hintzke & Andrea Garcia Castelao, *The Common Reporting Standard: Impact on Financial Services Institutions*, THE TAX ADVISOR (Mar. 1, 2016), <https://www.thetaxadviser.com/issues/2016/mar/crs-impact-on-financial-services-institutions.html>.

<sup>14</sup> *Id.*

<sup>15</sup> *See* *CRS by Jurisdiction*, OECD (Oct. 18, 2017), <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/>; *see also* *Argentina Signs Information-Sharing Agreement With the U.S.*, THE TAX TIMES (Dec. 28, 2016, 7:24 AM), <http://thetaxtimes.blogspot.com/2016/12/argentina-signs-information-sharing.html>.

<sup>16</sup> Lucia He, *Understanding Argentina's New "Mega" Tax Amnesty Law*, THE BUBBLE (July 11, 2016, 3:32 PM), <http://www.thebubble.com/understanding-argentinas-new-mega-tax-amnesty-law/>.

<sup>17</sup> *Argentina Posts Fiscal Deficit of 1.5 Percent of GDP in First Half*, REUTERS (July 19, 2017, 1:58 PM), <https://www.reuters.com/article/us-argentina-fiscal/argentina-posts-fiscal-deficit-of-1-5-percent-of-gdp-in-first-half-idUSKBN1A423E>.

safety of confidential financial information.<sup>18</sup> Long before the initial release of CRS, the OECD recognized the potential for misuse that access to such confidential information poses in the hands of corrupt tax administrators and other government officials.<sup>19</sup> The OECD's *Keeping It Safe* report acknowledges that some countries may not have the technological or bureaucratic infrastructure for such enhanced tax administration, and also, certain countries worry about the safety and security risks of automatically disclosing hundreds of thousands of accounts to corrupt governments.<sup>20</sup>

The purpose of this article is to explore the current Argentine effort to participate in the automatic exchange of information as it relates to FATCA and the CRS, and its efforts to overcome current corruption, while protecting the confidentiality of taxpayer information. In particular, this paper will pay attention to the impact corruption may have on effective tax administration and guidance for safeguarding the privacy and confidentiality of taxpayer information. Part II of this article will discuss historical events that led to global concern with bank secrecy and tax evasion, how various agreements operate under FATCA and CRS, and Argentina's agreements to address tax evasion. Part III of this article will discuss relevant instances of corruption in Argentina, the impact of corruption on tax administration, and the status of Argentina's efforts to address corruption. Part IV will discuss data confidentiality guidance from the OECD's *Keeping It Safe* report and the IRS International Data Exchange Service (IDES) system, and explore the capacity for data privacy in tax administration in Argentina. Lastly, Part V will analyze Argentina's ability to comply with the level of tax administration required under FATCA and CRS, and future implications

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<sup>18</sup> Cf. Patricia Rey Mallen, *Mexico and Argentina Are the Most Corrupt Countries in Latin America, Survey Reveals*, INT'L BUS. TIMES (July 10, 2013, 3:02 PM), <http://www.ibtimes.com/mexico-argentina-are-most-corrupt-countries-latin-america-survey-reveals-1340779> (discussing levels of corruption in Argentina's public sector; therefore, there may be a connection between corruption and accountable tax administration that keeps financial information confidential).

<sup>19</sup> See generally *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, OECD (July 23, 2012), <http://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf> [hereinafter *Keeping It Safe*].

<sup>20</sup> *Id.*

that the international trend toward transparency may have on Argentina.

## II. BANK SECRECY AND TAX EVASION

### A. *Cracking the Vault: Tax Evasion Scandals and Commitments to End Bank Secrecy*

In 2008, major offshore tax evasion scandals gained international publicity and negatively impacted some of the oldest banking institutions in Europe.<sup>21</sup> Namely, the United Bank of Switzerland (UBS), one of Europe's largest banks, aided in tax evasion.<sup>22</sup> Wegelin & Co., Switzerland's oldest bank at 270 years old, also aided in tax evasion.<sup>23</sup> Moreover, the Liechtenstein Global Trust (LGT) bank of the royal family of Liechtenstein implicated itself in a tax evasion scandal.<sup>24</sup>

In response to disclosures of banks facilitating tax evasion, the U.S. indicted a UBS private banker, Bradley Birkenfeld, who "pled guilty to conspiracy to defraud the U.S. government based on his actions in helping wealthy U.S. citizens (living in the United States) conceal millions of dollars of income in UBS accounts."<sup>25</sup> Birkenfeld's subsequent cooperation as a whistleblower with the U.S. government exposed actions taken by UBS to help its American clients evade taxes.<sup>26</sup> Birkenfeld's disclosures were highly instrumental in the Justice Department's further investigations and UBS's admission of guilt on charges of conspiracy to defraud the U.S. government.<sup>27</sup>

In exchange for this admission, UBS entered a deferred prosecution agreement pursuant to which UBS worked with the U.S. and Swiss governments to provide the IRS with thousands of accounts held by U.S. taxpayers.<sup>28</sup> News of UBS's investigation prompted Wegelin to spontaneously disclose undeclared accounts it held for

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<sup>21</sup> Grinberg, *supra* note 2, at 306.

<sup>22</sup> Grinberg, *supra* note 2, at 306.

<sup>23</sup> Kirsch, *supra* note 3, at 143.

<sup>24</sup> Grinberg, *supra* note 2, at 306.

<sup>25</sup> Kirsch, *supra* note 3, at 142.

<sup>26</sup> Kirsch, *supra* note 3, at 142.

<sup>27</sup> Kirsch, *supra* note 3, at 142.

<sup>28</sup> Kirsch, *supra* note 3, at 142.

U.S. taxpayers.<sup>29</sup> Eventually, Wegelin pled guilty to facilitating tax evasion and shut down after agreeing to pay “\$74 million in restitution, fines, and forfeitures” to the U.S. government.<sup>30</sup> U.S. enforcement actions against tax evaders and offshore financial institutions facilitating tax evasion only increased following these scandals.<sup>31</sup> Internationally, leaders of the G20 countries also committed to increasing transparency and exposing offshore tax evasion as the financial crisis of 2008 magnified fiscal and budgetary problems.<sup>32</sup>

The Panama Papers leak in 2015 can be considered a recent indicator of where the world is on ending bank secrecy. Over eleven million files and 2.6 terabytes of information were leaked from the database of Mossack Fonseca, a leading Panamanian firm, revealing the use of offshore accounts by the wealthy around the world, including some 143 politicians and 12 national leaders and their families or inner circle associates.<sup>33</sup> Mossack Fonseca is the world’s fourth largest firm providing global offshore financial services in over 40 countries, but it mostly operates in countries considered as tax havens, such as Switzerland, Cyprus, the British Virgin Islands, and the British dependencies.<sup>34</sup> Additionally, it has serviced over 300,000 international companies.<sup>35</sup> Regardless of whether Mossack Fonseca’s offshore services have been used for tax evasion or legitimate reasons, the use of confidential “tax havens” for the favorable tax treatment of investments is still popular.

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<sup>29</sup> Kirsch, *supra* note 3, at 143.

<sup>30</sup> Kirsch, *supra* note 3, at 143.

<sup>31</sup> Kirsch, *supra* note 3, at 146 (discussing that the U.S. has worked to combat bank secrecy since the enactment of the Bank Secrecy Act in 1970, which gave rise to the Report of Foreign Bank and Financial Accounts (FBAR) treasury form); *Id.* (noting that FBAR requires U.S. taxpayers holding foreign bank and financial accounts to report their aggregate balance in foreign accounts that exceed \$10,000 at any time during the calendar year, and compliance with FBAR was traditionally low so Congress increased penalty amounts that are assessed for each year of noncompliance).

<sup>32</sup> Grinberg, *supra* note 2, at 309 (noting that the G20 member states include the U.S., U.K., E.U., and many other states including Argentina, Brazil, Canada, and China).

<sup>33</sup> Luke Harding, *What Are The Panama Papers? A Guide to History’s Biggest Data Leak*, THE GUARDIAN (Apr. 5, 2016, 5:42 PM), <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



### **B. *A Comparative View of FATCA and CRS***

In 2010, Congress enacted FATCA as sections 1471 to 1474 of the Internal Revenue Code.<sup>36</sup> It requires tax authorities in other jurisdictions, namely FFIs, to obtain detailed information on financial accounts held by U.S. citizens and foreign entities with significant U.S. ownership and to report that information back to the IRS.<sup>37</sup> The particular financial information FATCA seeks to capture is the value of each account, the value of investment income, and the “gross proceeds from the sale of property credited to a U.S. account.”<sup>38</sup> To ensure compliance by FFIs and Non-Financial Foreign Entities (NFFEs) that are implicated by the statute, FATCA contains a withholding tax provision, otherwise known as a penalty.<sup>39</sup> Because FFIs may hold U.S. investments or receive U.S. sourced income, payments, or sales proceeds, amounts are withheld by imposing a 30% tax on all U.S. sourced income that these FFIs may receive if they do not comply with FATCA’s reporting and disclosure rules.<sup>40</sup> Ultimately, Congress enacted FATCA to “force foreign financial institutions to disclose their U.S. account holders or pay a steep penalty for nondisclosure.”<sup>41</sup>

While FATCA’s expectations are primarily unilateral in that it demands that information be reported to the IRS without reciprocity, the OECD envisioned a multilateral mechanism for sharing tax information of residents globally.<sup>42</sup> The OECD released the first version of the *Standard for Automatic Exchange of Financial Account Information in Tax Matters* in 2014, which contained the CRS and model “competent authority” agreements (MCAAs) which could be

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<sup>36</sup> Grinberg, *supra* note 2, at 334.

<sup>37</sup> Grinberg, *supra* note 2, at 335; *see also* *What is FATCA? What is CRS?*, *supra* note 12.

<sup>38</sup> Grinberg, *supra* note 2, at 334.

<sup>39</sup> *What is FATCA? What is CRS?*, *supra* note 12.

<sup>40</sup> Ikens D. Clarke, *U.S. Foreign Account Tax Compliance Act (FATCA): FATCA And The Banking Sector*, DELOITTE (Oct. 31, 2012), <https://www.carib-export.com/login/wp-content/uploads/2012/11/FATCA-and-the-Banking-Sector-Ikens-Clarke.pdf>.

<sup>41</sup> Grinberg, *supra* note 2, at 334.

<sup>42</sup> *See* Kirsch, *supra* note 3, at 119 (noting that the U.S. uses either citizenship or residence as a basis to assert jurisdiction for taxation over an individual, while the overwhelming majority of other countries use residence as a basis to assert tax jurisdiction).

entered into on a bilateral, multilateral, or nonreciprocal basis by participating countries.<sup>43</sup> More specifically, the CRS is an extensive reporting standard, broader in scope than FATCA, and provides rules on documentation and due diligence applicable to financial institutions.<sup>44</sup> In scope, CRS is broader in terms of the kind of financial information it seeks to collect, applies broadly to residents of any given participating country and not solely citizens, and applies to more categories of reporting entities than does FATCA.<sup>45</sup> As of December 2015, over 95 jurisdictions committed to the CRS, excluding the U.S.<sup>46</sup>

### C. *Agreements Under FATCA and Argentina's Commitment*

The U.S. has facilitated the implementation of FATCA through the use of bilateral Intergovernmental Agreements (IGAs).<sup>47</sup> IGAs are not tax treaties, but rather are negotiated agreements with partner jurisdictions that are treated as “in effect” or “in force” by the IRS and the partner jurisdiction.<sup>48</sup> IGAs are meant to overcome restrictions or conflict with local laws in partner jurisdictions.<sup>49</sup> FFIs in these partner jurisdictions that have agreed to an IGA can choose to follow the IGA agreement in effect, or an FFI can choose not to follow the IGA.<sup>50</sup> The IRS considers FFIs that do not follow IGAs to be nonparticipating financial institutions subject to a withholding penalty.<sup>51</sup> There are two model IGAs that jurisdictions can have with the U.S., either the Model 1 IGA, providing for the reciprocal ex-

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<sup>43</sup> Hintzke & Castelao, *supra* note 13.

<sup>44</sup> Hintzke & Castelao, *supra* note 13. (noting that CRS is based extensively on FATCA Model 1 Intergovernmental Agreements (Model 1 IGA)).

<sup>45</sup> Hintzke & Castelao, *supra* note 13.

<sup>46</sup> Hintzke & Castelao, *supra* note 13.

<sup>47</sup> ERIKA K. LUNDER & CAROL A. PETTIT, CONG. RES. SERV., R43444, REPORTING FOREIGN FINANCIAL ASSETS UNDER TITLES 26 AND 31: FATCA AND FBAR 1, 8 (2014) [hereinafter *FATCA and FBAR*].

<sup>48</sup> *U.S. IRS is Focusing on FATCA Intergovernmental Agreements Currently “In Effect”*, ERNST & YOUNG (Aug. 8, 2016), <https://www.ey.com/gl/en/services/tax/international-tax/alert--us-irs-is-focusing-on-fatca-intergovernmental-agreements-currently--in-effect->.

<sup>49</sup> *Id.*

<sup>50</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>51</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

change of information, or the Model 2 IGA with no reciprocal exchange provision.<sup>52</sup> Depending on whether the jurisdiction already has a tax treaty or tax information exchange agreement (TIEA) with the U.S., the IGA may derive authority from the legal framework already in place between the two governments.<sup>53</sup> Furthermore, pursuant to Model 1 IGAs, FFIs report to their jurisdiction's tax authority or administration, and then the tax authority reports the information on an annual basis to the IRS.<sup>54</sup> Conversely, pursuant to Model 2 IGAs where there is no treaty or agreement with the jurisdiction, FFIs report, pursuant to an FFI agreement and with the consent of the account holder, directly to the IRS.<sup>55</sup> If an FFI does not have the consent of the account holder, then the FFI reports account information in the aggregate directly to the IRS, giving the IRS the option to request information about that group from the jurisdiction.<sup>56</sup> As of 2016, 83 IGAs have been signed but only 61 are considered in force.<sup>57</sup>

Currently, Argentina has signed a TIEA with the U.S., and the two governments are negotiating a more comprehensive tax treaty.<sup>58</sup> The U.S.'s desire for countries to enter into IGAs has largely expedited the negotiations it has had with Argentina in the past.<sup>59</sup> The U.S. had desired a bilateral tax treaty with Argentina to negotiate double taxation provisions as they pertain to multinational companies; whereas, Argentina preferred a TIEA to maintain some of its taxing rights over multinational companies with connections to the U.S.<sup>60</sup>

Increased collaboration between the U.S. and Argentina benefits both countries: the TIEA benefits the U.S. by inducing Argentina to

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<sup>52</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>53</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>54</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>55</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>56</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>57</sup> *FATCA and FBAR*, *supra* note 47, at 8–9.

<sup>58</sup> *Argentina Signs Information-Sharing Agreement With the U.S.*, *supra* note 15.

<sup>59</sup> See Martin Hearson, *Why the U.S. and Argentina Have No Tax Information Exchange Agreement*, WORDPRESS (Sept. 5, 2013), <https://martinhearsen.wordpress.com/2013/09/05/why-the-us-and-argentina-have-no-tax-information-exchange-agreement/>.

<sup>60</sup> *Id.*

sign an IGA to comply with FATCA, and it benefits Argentina, which suffered economically prior to the current Macri administration.<sup>61</sup> The agreement will enable Argentina to identify undeclared taxpayer accounts in the U.S. and lends credibility to the Macri administration's governance. Argentina has also implemented its own tax amnesty plan to induce voluntary compliance among its taxpayers.<sup>62</sup>

***D. Multilateral Competent Authority Agreements (MCAA)  
Under CRS and Argentina's Commitment***

CRS is very broad because it capitalizes off of existing frameworks for the automatic exchange of tax information developed already between countries, by the OECD and the E.U., such as frameworks like Article 6 of the Multilateral Convention, extant bilateral tax treaties or TIEAs, and the E.U. Directive.<sup>63</sup> As a result, CRS is readily translated into domestic law, increasing the chance of successful implementation of CRS and MCAA's due diligence requirements to identify reportable accounts in a jurisdiction.<sup>64</sup> Moreover, CRS requires jurisdictions to report intended exchange partners, confirm that domestic CRS legislation is in place, report whether the basis of its exchange is reciprocal or nonreciprocal, report data transmission and encryption methods to be used, report data protection requirements not yet achieved, and confirm that domestic data privacy and confidentiality safeguards are in line with CRS.<sup>65</sup> While CRS is already extensive, each jurisdiction that participates in CRS can choose to structure its domestic law to capture more information

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<sup>61</sup> *Argentina Signs Information-Sharing Agreement With the U.S.*, *supra* note 15.

<sup>62</sup> *Argentina Signs Information-Sharing Agreement With the U.S.*, *supra* note 15.

<sup>63</sup> *International Framework For The CRS*, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/> (last visited Oct. 10, 2018) (noting that the Multilateral Convention is also known as the Convention on Mutual Administrative Assistance in Tax Matters).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

and increase efficiency within their automatic exchange of information framework.<sup>66</sup>

Currently, Argentina has indicated its intent to comply with CRS and begin reporting by the beginning of 2017.<sup>67</sup> Argentina has shown support for information sharing and tax transparency since 2012, when it became the first country in South America to become a party to the OECD's Multilateral Convention.<sup>68</sup> Joining the Multilateral Convention gave Argentina additional tools for international tax cooperation and administrative assistance in tax matters.<sup>69</sup>

### III. CORRUPTION IN ARGENTINA

#### A. *A History of Economic Boom and Decline*

In the earlier part of the 20<sup>th</sup> century, Argentina's economic growth and urbanization outpaced other countries in Latin America.<sup>70</sup> Argentina experienced a golden age, prior to World War I, where its gross domestic product (GDP) steadily grew by 6% annually due to its agriculture and cattle industries, and the country experienced a large wave of immigration from Europe.<sup>71</sup> Argentina was even ranked as one of the ten richest countries in the world at that time in league with the U.S., Great Britain, and other western countries, such as France.<sup>72</sup> By the 1930s, many Argentine cities were urbanized while other countries in Latin America remained predominantly rural.<sup>73</sup> That legacy is evident today in metropolitan

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<sup>66</sup> *Argentina: GATCA And CRS Compliance (OECD)*, GOLDING & GOLDING, <https://www.goldinglawyers.com/argentina-gatca-and-crs-compliance-oecd-international-tax-lawyers/> (last visited Oct. 10, 2018).

<sup>67</sup> *Id.*

<sup>68</sup> *Argentina Becomes the First South American Country to Become a Party to the Multilateral Convention*, OECD (Sept. 13, 2012), <http://www.oecd.org/tax/exchange-of-tax-information/taxargentinabecomes-thefirstsouthamericancountrytobecomeapartytothemultilateralconvention.htm>.

<sup>69</sup> *Id.*

<sup>70</sup> ELISA MUZZINI ET AL., *LEVERAGING THE POTENTIAL OF ARGENTINE CITIES: A FRAMEWORK FOR POLICY ACTION 7* (World Bank Group eds., 2017).

<sup>71</sup> *The Tragedy of Argentina: A Century of Decline*, THE ECONOMIST (Feb. 17, 2014), <https://www.economist.com/news/briefing/21596582-one-hundred-years-ago-argentina-was-future-what-went-wrong-century-decline>.

<sup>72</sup> *Id.*

<sup>73</sup> MUZZINI ET AL., *supra* note 70, at 7.

Buenos Aires alone, which accounts for almost 50% of Argentina's gross domestic product (GDP) and a little less than 40% of the country's urban population.<sup>74</sup>

Although Argentina may have outpaced other countries in the region in the early 20th century, its economic growth has been dampened by political unrest and cycles of financial crises starting with a military coup in 1930.<sup>75</sup> Additional military coups followed in 1943, 1955, 1962, 1966, and 1976.<sup>76</sup> Argentina's history of military dictatorship ended in 1989 when it held popular elections for the first time in decades.<sup>77</sup> As Argentina experienced constant political change, it also experienced instability in its economy, even during the period when democracy had been restored.<sup>78</sup> Argentina experienced repeated recessions throughout the 1970s and the 1980s, and during the two-year period between 1989 and 1990, hyperinflation further destabilized the economy.<sup>79</sup> Inflation rose over 2,000% and peaked at 20,000%.<sup>80</sup>

Then in 1998, Argentina experienced a deep recession and catastrophic financial crisis that lasted until 2002.<sup>81</sup> The government's fiscal policies at that time, including extensive foreign borrowing, contributed to further devaluation and distrust of the peso and eventually led to a run on the banks in November 2001.<sup>82</sup> The government took austerity measures, such as freezing bank deposits and access to savings accounts to prevent accountholders from converting Argentine pesos into U.S. dollars under the existing Convertibility Plan, which had provided that pesos could be exchanged on a 1:1 basis with the U.S. dollar.<sup>83</sup> Unable to convert pesos into dollars,

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<sup>74</sup> MUZZINI ET AL., *supra* note 70, at 7.

<sup>75</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>76</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>77</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>78</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>79</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>80</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>81</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>82</sup> *The Argentine Crisis 2001/2002*, RABOBANK (Aug. 23, 2013), <https://economics.rabobank.com/publications/2013/august/the-argentine-crisis-20012002/>.

<sup>83</sup> *Id.*

Argentines could not protect against losing their savings to high inflation.<sup>84</sup> Civil unrest ensued in December 2001 as Argentines demonstrated against these fiscal measures.<sup>85</sup>

A few days later, after the government froze personal bank accounts, the International Monetary Fund (IMF) announced it could no longer loan money to Argentina because Argentina repeatedly failed to meet the conditions of its September 2001 rescue program.<sup>86</sup> The IMF had given Argentina over US \$20 billion in support between 2000 and 2001.<sup>87</sup> Without international financial support from the IMF, Argentina effectively lost access to international financial markets and defaulted on its US \$93 billion sovereign debt.<sup>88</sup> Due to this financial crisis, the Argentine economy suffered between 2001 and 2002: the economy contracted by 11%; unemployment rose to 22.5%; and 57.5% of Argentines were considered as living below the national poverty line.<sup>89</sup> The austere fiscal measures taken, like the Law of Public Emergency and Reform of the Exchange Rate Regime which unpegged the peso from the U.S. dollar, and negotiations to restructure its debt, slowly brought Argentina out of its financial crisis by the end of 2002.<sup>90</sup> However, it took until 2010 to restructure over 90% of Argentina's defaulted debt.<sup>91</sup> Moreover, lasting damage to the value of the peso and the Argentine banking sector further cemented public distrust of Argentine currency and Argentine institutions.<sup>92</sup>

### **B. *Popular Distrust and Ubiquitous Corruption***

The lack of confidence and distrust in Argentina's political and financial institutions could not be more evident in the illegal exchange market known as a *cueva*, or "cave," used by Argentines who favor holding onto U.S. dollars, rather than pesos.<sup>93</sup> *Cuevas* thrived between 2010 and 2015 when Argentina had an official exchange

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

rate that made it unfavorable for Argentines to exchange their pesos for dollars.<sup>94</sup> Argentines and travelers preferred the going market exchange rate because it offered more pesos per dollar than the official exchange rate.<sup>95</sup> This situation led to the black market for *dólar blue*, or “blue dollar,” and *cueva* storefronts to complete the black market transactions.<sup>96</sup> Although the Argentine government addressed this problem in December 2015 by getting rid of the official exchange rate in favor of the floating market exchange rate, the black market for dollars still exists.<sup>97</sup> Argentines are mainly trying to hedge against the uncertainty of inflation which affects the affordability of a basic food basket: “Imagine a dollar burning a hole in your pocket because you don’t know if it will be worth 60 or 30 cents in a few months.”<sup>98</sup>

It may not be surprising that Argentina’s history of political turmoil, economic instability, and distrust of the peso and legitimate banking institutions have contributed to Argentina’s standing as a corrupt nation.<sup>99</sup> According to a 2013 global corruption survey by Transparency International, an international nongovernmental organization (NGO), Argentines believe, on average, that political parties, public officials, civil servants, police, the judiciary, and the

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<sup>94</sup> Scott Grimmer, *Argentina Money Situation 2017. Is There Still a Black (Blue) Market?*, MILEVALUE (Nov. 7, 2017), <https://www.milevalue.com/argentina-money-situation-2016-dollar-blue-credit-card-atm-bank-cash/>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (“I assume it’s because many people in Argentina perform many transactions outside the legal banking system, and that there is a surplus of pesos in this parallel system, so it drives up the value of the dollar on the black market.”); see also *The Tragedy of Argentina: A Century of Decline*, *supra* note 71 (“Modern Argentina does not offer what you could call an institutional career.”).

<sup>98</sup> Jordana Timerman, *We Should All Cry for Argentina’s Economy*, HUFFINGTON POST (Dec. 15, 2015, 9:20 AM), [https://www.huffingtonpost.com/jordana-timerman/argentina-economy\\_b\\_8807804.html](https://www.huffingtonpost.com/jordana-timerman/argentina-economy_b_8807804.html).

<sup>99</sup> Brink Lindsey, *How Argentina Got Into This Mess*, CATO INST., <https://www.cato.org/publications/commentary/how-argentina-got-mess> (last visited Oct. 10, 2018).



legislature are more corrupt than the business sector.<sup>100</sup> Additionally, 72% of Argentines believed that their country's corruption had increased between 2013 and 2014.<sup>101</sup>

Whereas abuse of police power was considered the most rampant in countries like Mexico, Venezuela, Bolivia, and El Salvador, political corruption was considered the most rampant by residents in Argentina, similar to the public opinion of residents in Brazil, Colombia, and Uruguay about political corruption.<sup>102</sup> In 2000, Harvard University and the World Economic Forum did a Global Competitiveness Report of 4,022 firms in 59 countries, and Argentina also scored poorly then: 54th in the independence of the judiciary; 45th for corruption in the legal system; 40th for irregular payments to government officials; and 54th in the reliability of police protection.<sup>103</sup>

Political corruption in Argentina has even extended to the office of the president. For example, in the 1990s, former President Carlos Menem was known for packing a Supreme Court with his political supporters even though he did not align with them politically.<sup>104</sup> After his presidency, Menem was arrested and charged with an illegal arms-shipment deal.<sup>105</sup> In 2016, former President Cristina Fernández de Kirchner was charged with corruption during her time in office from 2007 to 2015.<sup>106</sup> Fernández de Kirchner was indicted for directing government contracts for public road works to a company called Austral Constructions.<sup>107</sup> Fernández de Kirchner's former

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<sup>100</sup> *Global Corruption Barometer 2013*, TRANSPARENCY INT'L 1, 35 tbl.2 (2013), [http://transparencyma-roc.ma/TM/sites/default/files/2013\\_GlobalCorruptionBarometer\\_EN%282%29.pdf](http://transparencyma-roc.ma/TM/sites/default/files/2013_GlobalCorruptionBarometer_EN%282%29.pdf) (noting that on a scale from one to five, with five meaning extremely corrupt, the following were the scores: 4.3 for political parties, 4.1 for the legislature, 3.5 for the private sector, 3.9 for the judiciary, 4.0 for the police, and 4.2 for public officials/civil servants).

<sup>101</sup> Mallen, *supra* note 18.

<sup>102</sup> Mallen, *supra* note 18.

<sup>103</sup> Lindsey, *supra* note 99.

<sup>104</sup> Lindsey, *supra* note 99.

<sup>105</sup> Lindsey, *supra* note 99.

<sup>106</sup> Madison Park & Nelson Quinones, *Argentina's Ex-President Cristina Fernandez de Kirchner Charged*, CNN (Dec. 27, 2016), <http://www.cnn.com/2016/12/27/americas/argentina-president-cristina-fernandez-de-kirchner/?iid=EL>.

<sup>107</sup> *Id.*

Minister of Planning, Julio De Vido, and her former Secretary of Public Works, José Lopez were also charged.<sup>108</sup> Fernández de Kirchner was also separately indicted for interfering with the sale of U.S. dollars by Argentina's central bank by selling U.S. \$17 billion in futures contracts at 10.65 pesos to the dollar, which was much lower than the true value of the peso per dollar in the futures market at that time.<sup>109</sup> She was indicted along with her former Finance Minister and the former Central Bank Chief.<sup>110</sup> Lastly, Fernández de Kirchner was indicted for allegedly receiving kickbacks from another construction company to which she may have directed government contracts.<sup>111</sup>

The election of the current president, Mauricio Macri, a pro-business and fiscal conservative, is considered a shift away from the liberal policies of Fernández de Kirchner and her deceased husband who preceded her as president.<sup>112</sup> Whereas Fernández de Kirchner's policies focused on extensive social spending to help poor families, human rights issues, and economic policies that were considered anti-business, Macri's administration promises to de-regulate the economy and allow the market to prevail in order to address the stagnant economy and reduce inflation.<sup>113</sup> A 2017 Multi-Dimensional Economic Survey of Argentina by the OECD shows that there are currently higher barriers to entrepreneurship and competition in Argentina than Colombia, Chile, Mexico, Brazil, and, on average, Latin America in its entirety.<sup>114</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> Patrick Gillespie, *Argentina's Former President Kirchner Charged for Manipulating Economy*, CNN (May 14, 2016), <http://money.cnn.com/2016/05/14/news/economy/cristina-fernandez-de-kirchner-charged/>.

<sup>110</sup> *Id.*

<sup>111</sup> Daniel Politi, *Ex-President of Argentina Indicted Again, Now With Her Children*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/world/americas/argentina-cristina-fernandez-de-kirchner-corruption-indictment.html?mcubz=0>.

<sup>112</sup> Timerman, *supra* note 98.

<sup>113</sup> Timerman, *supra* note 98.

<sup>114</sup> *OECD Economic Surveys: Argentina 2017 Executive Summary*, OECD 1, 2 (July 27, 2017), [http://dx.doi.org/10.1787/eco\\_surveys-arg-2017-en](http://dx.doi.org/10.1787/eco_surveys-arg-2017-en) [hereinafter *OECD Economic Surveys*].

### C. *The Nexus Between Corruption and Tax Administration*

Corruption can be defined as the “pecuniary or nonpecuniary considerations given to government officials for the use of public office for private gains.”<sup>115</sup> Corruption can further be classified into five general categories: political, administrative, grand corruption, petty corruption, and patronage or paternalism.<sup>116</sup> For example, when corruption is systemic and political, it can affect the design and implementation stages of government policies and even skew regulatory decisions.<sup>117</sup> On the other hand, corruption can be localized or petty on the bureaucratic level and involve activities such as bribery or interference with the routine allocation of zoning rights and licenses.<sup>118</sup> Other common examples of corruption are government construction projects and how such contracts are awarded or renegotiated.<sup>119</sup> Generally, corruption may initiate either on the supply side, where a bribe is offered, or the demand side, where a bribe is requested.<sup>120</sup>

While Latin America includes emerging markets that have experienced improvements in corruption, most improvements are small.<sup>121</sup> For example, corruption in Honduras has improved with efforts to control corruption in critical institutions, such as the police force, the social security administration, and the tax administration.<sup>122</sup> Nevertheless, corruption in Honduras remains above the average of normalized corruption in Latin America.<sup>123</sup> Like Honduras, Argentina’s level of corruption also remains above the average of normalized corruption in the region.<sup>124</sup>

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<sup>115</sup> Mahesh C. Purohit, *Corruption in Tax Administration*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 1, 285 (Anwar Shah ed., 2007), <http://siteresources.worldbank.org/PSGLP/Resources/PerformanceAccountabilityandCombatingCorruption.pdf>.

<sup>116</sup> *Id.*

<sup>117</sup> David Lipton et al., *Corruption in Latin America: Taking Stock*, IMF: IMF BLOG (Sept. 21, 2017), <https://blogs.imf.org/2017/09/21/corruption-in-latin-america-taking-stock/>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Lipton et al., *supra* note 117.

<sup>124</sup> See Lipton et al., *supra* note 117.

Because endemic corruption has been known to affect the state's ability to perform its core functions, it may also negatively affect tax administration.<sup>125</sup> Several variables that contribute to corruption in tax administration include: (1) the complexity of tax laws, (2) the monopoly power and degree of discretion of tax officials, (3) the lack of adequate monitoring and supervision, (4) political leadership, (5) the unwillingness of taxpayers to pay taxes, and (6) the environment in the public sector.<sup>126</sup> With regard to the complexity of tax laws, as a system becomes more complex, taxpayers are less likely to be aware of their rights and procedural rules applicable to them, giving tax officers more discretion in their treatment of taxpayers.<sup>127</sup> This dynamic may increase the risk of exploitation of taxpayers by tax officials.<sup>128</sup> With regard to the monopoly power and discretion of tax officials, the tax officers operating within their assigned regions or geographical area represent the tax department, and the monopoly power this gives a tax official increases the potential for corruption by both the taxpayer and the tax officer.<sup>129</sup> However, it is important to note that the complexity of tax laws and procedures in itself does not always lead to corruption, but rather is closely connected to another variable, the overall environment in the public sector.<sup>130</sup> The level of corruption in the administrative environment of the government as a whole will influence the level of corruption in that government's tax administration.<sup>131</sup>

Socialist systems offer greater opportunities for corruption than do liberal economic systems because of the greater administrative controls over the economy that give bureaucrats greater discretion in economic planning and implementation.<sup>132</sup> The complexity of tax laws, the overall environment of corruption in government, and the power of bureaucrats within a heavily regulated economy are closely intertwined and all often lead to a lack of monitoring and supervision.<sup>133</sup> Without adequate supervision, accountability, and

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<sup>125</sup> See Lipton et al., *supra* note 117.

<sup>126</sup> Purohit, *supra* note 115, at 286.

<sup>127</sup> Purohit, *supra* note 115, at 286.

<sup>128</sup> Purohit, *supra* note 115, at 286.

<sup>129</sup> Purohit, *supra* note 115, at 287.

<sup>130</sup> Purohit, *supra* note 115, at 288.

<sup>131</sup> Purohit, *supra* note 115, at 288.

<sup>132</sup> Purohit, *supra* note 115, at 288.

<sup>133</sup> Purohit, *supra* note 115, at 287.

enforcement measures to maintain integrity, public workers are more likely to shirk their public duties.<sup>134</sup> Political leadership may also insulate corrupt practices, and when this happens, the spread of corruption at lower levels is likely.<sup>135</sup> From macro-level fiscal incentives to foreign trade taxes, high-level officials and politicians are more likely to be involved and also implicate lower-level officials who share in the gains from the illegal activity.<sup>136</sup>

As aforementioned, Argentina has high levels of corruption at the political level, and almost two-thirds of Argentines believe that the political leadership, the legislature, and the judiciary are corrupt.<sup>137</sup> Coupled with a popular distrust of the peso, the formal banking institutions, and the black market for dollars, it can be inferred that Argentina's level of corruption even affects its tax administration.<sup>138</sup> Another variable, when determining corruption in tax administration, is the unwillingness of taxpayers to pay taxes.<sup>139</sup> The unwillingness to pay taxes is particularly common in middle-income countries, such as India.<sup>140</sup> Taxpayers who are extremely unwilling to pay taxes or comply with the law are more likely to proactively offer bribes to tax officials in order to not pay taxes at all or reduce their tax liability.<sup>141</sup> Like India, Argentina experiences high tax evasion; as of 2016, Argentines have held between \$200 billion and \$400 billion in assets in offshore accounts in countries like Switzerland, the United States, and Uruguay.<sup>142</sup> During the presidency of Fernández de Kirchner, Argentines hid their wealth offshore because of the extremely high inflation and unreliable economic data published by the administration.<sup>143</sup>

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<sup>134</sup> Purohit, *supra* note 115, at 287.

<sup>135</sup> Purohit, *supra* note 115, at 287.

<sup>136</sup> Purohit, *supra* note 115, at 287–88.

<sup>137</sup> Mallen, *supra* note 18.

<sup>138</sup> See *The Tragedy of Argentina: A Century of Decline*, *supra* note 71.

<sup>139</sup> Purohit, *supra* note 115, at 287.

<sup>140</sup> Purohit, *supra* note 115, at 287.

<sup>141</sup> Purohit, *supra* note 115, at 287.

<sup>142</sup> Patrick Gillespie, *Argentina rakes in cash from new tax law*, CNN MONEY (Dec. 28, 2016), <https://money.cnn.com/2016/12/28/news/economy/argentina-tax-amnesty/index.html>.

<sup>143</sup> *Id.*

***D. The Status of Argentina's Domestic and International Efforts to Address the Economy and Corruption***

Current domestic policy in Argentina may have the effect of lowering corruption while improving the economy. One of President Macri's goals for his administration after taking office in December 2015 was to address Argentina's economic problems, including high inflation and tax evasion.<sup>144</sup> With Macri's support, the Argentine Senate approved a tax amnesty law in 2016.<sup>145</sup> The tax amnesty law is entitled *Ley de Sinceramiento Fiscal y Reparación Histórica a los Jubilados* (the Fiscal Honesty and Historic Reparation to Pensioners Law), and is nicknamed *ley de blanqueos*.<sup>146</sup> The *ley de blanqueos* is a multipurpose bill designed to incentivize compliance with Argentine tax law, bring back billions of dollars into the formal and legitimate economy, and restore the pecuniary interests of unpaid pensioners.<sup>147</sup>

First, the *ley de blanqueos* allows Argentines to register undeclared income and assets without questioning their origins and removes the threat of prosecution for tax evasion.<sup>148</sup> Individuals and companies can declare their assets in three ways: paying a zero, five, or ten percent tax rate on declared assets depending on the total amount declared; purchase non-transferable Argentine Treasury bonds; or "invest in the economy through a Common Fund for long-term investments" in public works.<sup>149</sup> If assets are not declared, then individuals or companies risk prosecution for tax evasion.<sup>150</sup> The *ley de blanqueos* excludes all members of the Executive, Legislative, and Judicial branches, and their immediate family, from participating in the tax amnesty program because of opposition party concerns that the law would benefit government officials who evade taxes.<sup>151</sup> The government expects US \$20 billion to come into the country

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<sup>144</sup> *Id.*

<sup>145</sup> He, *supra* note 16.

<sup>146</sup> He, *supra* note 16.

<sup>147</sup> He, *supra* note 16.

<sup>148</sup> He, *supra* note 16.

<sup>149</sup> He, *supra* note 16.

<sup>150</sup> Gillespie, *supra* note 142.

<sup>151</sup> Gillespie, *supra* note 142.

through the *ley de blanqueos* because of tax revenues, assets voluntarily brought back from overseas, and its investment schemes.<sup>152</sup> The Macri administration also expects the CRS and Argentina's multinational agreements on the exchange of information to make it easier to detect taxpayers hiding money abroad.<sup>153</sup>

Second, the *ley de blanqueos* will allow for new money to be used as reparations to pensioners and retirees who never received their pension payment, or a small fraction of their payments, over the past twenty years due to government fraud.<sup>154</sup>

As the *ley de blanqueos* strengthens the integrity of the Argentine government through policies that promote Argentines participating legitimately in the formal economy, it may have the desired effect of lowering levels of corruption in Argentine government and society. Within five to six months of the enactment of the *ley de blanqueos*, Argentines declared US \$90 billion,<sup>155</sup> beating both the government's modest estimates and the \$2.6 billion declared under tax amnesty during the Fernández de Kirchner administration.<sup>156</sup>

However, despite the initial success of the *ley de blanqueos*, the OECD's 2017 economic survey of Argentina found several key obstacles still affecting Argentina: (1) the rule of law is still weak and corruption hinders the investment climate; (2) the central bank lacks a level of independence which reduces the effectiveness of monetary policy; (3) the tax system is complex, fails to reduce inequalities, and encourages people to turn to the informal economy; (4) few people pay income taxes; and (5) multi-year deficit targets by the executive branch are not mirrored in legislation and rules.<sup>157</sup> The OECD expresses hope in the pro-market economic reforms that President Macri's administration has made and provides recommendations on domestic policy that will help Argentina to raise the material living standard, bolster the social safety net, and close the high income-

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<sup>152</sup> He, *supra* note 16.

<sup>153</sup> He, *supra* note 16.

<sup>154</sup> He, *supra* note 16 (“[With this law] we are seeking to repair years of injustice. We’ve found many situations where pensioners have made legal claims, won lawsuits, and yet the state used all kinds of tricks to avoid paying. We’re going to end these decades of fraud.”).

<sup>155</sup> Gillespie, *supra* note 142.

<sup>156</sup> See He, *supra* note 16.

<sup>157</sup> *OECD Economic Surveys*, *supra* note 114, at 3.

inequality gap that leaves one-third of all Argentines in poverty.<sup>158</sup> With respect to corruption, the OECD recommends that Argentina strengthen the independence of entities that investigate corruption, reorganize the judiciary, and enact the Corporate Liability Bill to provide for the prosecution of corporate bribery.<sup>159</sup>

Aside from domestic policy, Argentina has made international commitments to lower corruption. As of March 24, 2017, Argentina has been part of the OECD Anti-Bribery Convention for the past sixteen years.<sup>160</sup> While Argentina has made efforts to implement the Convention on Combating Bribery since December 2015, the OECD Working Group on Bribery found that Argentina still remains in serious non-compliance.<sup>161</sup> Regarding recommendations from its Phase 3 evaluation, Argentina has only fully implemented Recommendations 8, 11(a), and 12(a), and partially implemented 4(e), 5(a), 5(d), 5(f), 6(a), 6(b), 9(c), 9(d), 10(c), 10(d), 10(f), 11(b), 12(b), and 13(a).<sup>162</sup> About 24 other recommendations remain outstanding.<sup>163</sup> Of these recommendations, 11(a) is a tax-related measure that would disallow the tax deductibility of bribes to foreign public officials, 11(b) would increase training for tax examiners and official tax administrators on detecting bribery, and 11(c) calls for amending legislation to allow tax information to be shared with foreign authorities for use in bribery investigations.<sup>164</sup> Moreover, the OECD is concerned that Argentina has not enacted the Corporate Liability Bill introduced into Congress in 2016, which would hold companies and citizens liable for foreign bribery.<sup>165</sup> Also, the Criminal Procedure Code of 2014 has not been entered into force, which

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<sup>158</sup> *OECD Economic Surveys*, *supra* note 114, at 3.

<sup>159</sup> *OECD Economic Surveys*, *supra* note 114, at 3.

<sup>160</sup> *Argentina Must Urgently Enact Corporate Liability Bill to Rectify Serious Non-Compliance with Anti-Bribery Convention*, OECD (Mar. 24, 2017), <http://www.oecd.org/corruption/argentina-must-urgently-enact-corporate-liability-bill-to-rectify-serious-non-compliance-with-anti-bribery-convention.htm> [hereinafter *Argentina Must Urgently Enact Corporate Liability Bill*].

<sup>161</sup> *Id.*

<sup>162</sup> *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina*, OECD 1, 62 (Mar. 16, 2017), <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 71.

<sup>165</sup> *Id.* at 62.



would aid in the speedy investigation and prosecution of complex economic crimes.<sup>166</sup> Lastly, Argentina has not introduced legislation to protect whistleblowers.<sup>167</sup>

#### IV. DATA CONFIDENTIALITY

##### *A. Fears that Less Bank Secrecy Could Threaten the Personal Safety of the Taxpayers*

Before the automatic and voluntary exchange of tax information became as popular as it is today, some jurisdictions feared the negative consequences of sharing sensitive taxpayer information with developing countries.<sup>168</sup> These jurisdictions were primarily considered tax havens, which favored bank secrecy.<sup>169</sup> The general problem was that these jurisdictions lacked confidence in the tax administrations of developing countries to safeguard confidential financial information, and they feared that leaks inside the domestic tax system would be likely, leading to formal and informal harassment of people or companies.<sup>170</sup> Wealthy taxpayers primarily feared that leakage of their financial information could lead to “extortion, confiscation of their wealth, overtaxing, kidnapping, erosion of their civil liberties,” and other forms of harassment.<sup>171</sup> For example, some taxpayers even feared that the exchange of tax information could compromise the privacy and safety of certain marginalized groups in the Middle East, such as gay individuals in Saudi Arabia or Jews in other jurisdictions.<sup>172</sup> Moreover, for wealthy taxpayers in Latin America, the growth of gang violence and organized crime presents an ongoing threat to their personal security.<sup>173</sup>

While these potential fears about the exchange of tax information may be well grounded, there are competing perspectives on

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Nicholas Shaxson, *On the Non-Perils of Information Exchange*, TAX JUST. NETWORK (May 29, 2014), <http://www.taxjustice.net/2014/05/29/non-perils-information-exchange/>.

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See id.*

the likelihood of taxpayer information being used for other illicit purposes. For example, the perspective of Nicholas Shaxson and the Tax Justice Network, a self-described pro-globalization activist think tank,<sup>174</sup> is that these fears are unfounded. Shaxson argues that a secret bank account will not protect a Latin American landowner or South East Asian executive from kidnapping or extortion because criminals or gangs act without needing to know about secret wealth holdings.<sup>175</sup> Primarily, criminals act based on knowledge of one's domestic and visible wealth or holdings.<sup>176</sup> And rich families who fear kidnapping and extortion will have already procured security or moved because they can afford it.<sup>177</sup> Shaxson further argues that wealth confiscation is a weak argument because the exchange of tax information does not mean that wealth and investments have to be returned into the country.<sup>178</sup> Rather, it means that gross income is known so that the appropriate tax can be assessed.<sup>179</sup>

On the other hand, the Center for Freedom and Prosperity shares a completely opposite view. The Center is a non-profit organization that advances international market liberalization, financial privacy, and the fiscal sovereignty of jurisdictions to preserve jurisdictional tax competition.<sup>180</sup> According to the Center, FATCA and the CRS will substantially threaten the financial privacy of taxpayers and lead to abuse, giving credibility to the fears mentioned above.<sup>181</sup> The concern for abuse stems from the Center's view that it is imprudent to share sensitive financial information about American citizens or corporations with countries that "do not respect Western privacy norms, have systematic problems with corruption or are antagonistic

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<sup>174</sup> *Our Goals and Methods*, TAX JUST. NETWORK, <https://www.taxjustice.net/about/who-we-are/goals/> (last visited Oct. 10, 2018).

<sup>175</sup> Shaxson, *supra* note 168.

<sup>176</sup> Shaxson, *supra* note 168.

<sup>177</sup> Shaxson, *supra* note 168.

<sup>178</sup> Shaxson, *supra* note 168.

<sup>179</sup> Shaxson, *supra* note 168.

<sup>180</sup> *Center's Information*, CTR. FOR FREEDOM AND PROSPERITY, <http://freedomandprosperity.org/about/> (last visited Oct. 10, 2018).

<sup>181</sup> Andrew F. Quinlan, *OECD Rules Will Create Privacy Nightmare*, CTR. FOR FREEDOM AND PROSPERITY (July 24, 2014), <http://freedomandprosperity.org/2014/blog/oecd-rules-will-create-privacy-nightmare/>.

to the United States.”<sup>182</sup> The Center says that countries such as Colombia, China, and Russia present this problem.<sup>183</sup>

Although the U.S. Treasury Department and the IRS review the data privacy legal framework of the foreign jurisdiction before entering into an information exchange agreement under FATCA, it does not dissuade foreign tax administrators from having other motives.<sup>184</sup> The Center says this is because the underlying institutional interest of tax agencies is the collection of tax revenue, and there is little incentive to think beyond that interest.<sup>185</sup> Additionally, tax administrators in corrupt governments with access to the personal financial information of American expatriates may use the information for criminal purposes like committing identity theft, identifying potential kidnapping victims, identifying the resources of potential political opponents or dissenters, or committing industrial espionage.<sup>186</sup>

A third perspective lying outside, the binary debate between tax transparency versus data protection may be evidenced in the actual experience of tax administration in developing countries, such as Mexico. At one point in time, taxpayers were able to pay taxes with in-kind contributions or even pay taxes anonymously.<sup>187</sup> For example, the art-for-taxes program, which was created in 1957, allowed noncompliant taxpayers who owed back taxes to pay off tax debt with paintings, sculptures, and other art instead of cash.<sup>188</sup> Based on Aztec and Mayan traditions of paying tax debt with in-kind goods

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See Molly Moore, *In Mexico, An Art to Tax Collection*, WASH. POST (Aug. 29, 1999), [https://www.washingtonpost.com/archive/politics/1999/08/29/in-mexico-an-art-to-tax-collection/4dc470c2-b512-4186-a39c-e05144531020/?utm\\_term=.5a71971b979f](https://www.washingtonpost.com/archive/politics/1999/08/29/in-mexico-an-art-to-tax-collection/4dc470c2-b512-4186-a39c-e05144531020/?utm_term=.5a71971b979f); see also Javier Diaz de Leon Galarza, *Mexico: Taxation of Private Clients and the Treatment of Non-Compliant or Undeclared Taxation Structures*, THOMSON REUTERS: PRACTICAL LAW (Oct. 1, 2012), [https://content.next.westlaw.com/Document/I8417d5231cb11e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I8417d5231cb11e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1).

<sup>188</sup> Moore, *supra* note 187.

or services, the art-for-taxes program has had the effect of promoting art and giving Mexico a rich art collection of museum quality works displayed in museums throughout the country.<sup>189</sup>

With respect to the anonymous payment of taxes, under the Third Article of the Tax Decree of January 26, 2005, tax residents in Mexico with foreign source income may elect to pay income taxes on an anonymous basis.<sup>190</sup> The resident taxpayer will receive payment verification to keep in their records in the event of a future audit, but their identity remains undisclosed.<sup>191</sup> These alternate methods of tax collection in Mexico show that despite its high levels of corruption and kidnappings,<sup>192</sup> plenty of taxpayers, even those with money offshore, are not evading taxation and may pay taxes without disclosure.

Overall, arguments against the exchange of tax information may hold some weight, but the general consensus after the economic crisis of 2008 and 2009 was that ensuring tax compliance promotes better governance.<sup>193</sup> An argument for the exchange of tax information was that because political leaders in developing countries were likely to either falsify domestic tax returns or use offshore bank accounts to safeguard their wealth against inflation or evade taxes, equal treatment of rich and poor taxpayers would cause domestic tax systems to improve.<sup>194</sup> The impetus for improvement would come from the elites, subject to equal treatment, who are influential enough to advocate for better governance and accountability.<sup>195</sup>

Generally, the OECD has led the consensus that transparency and the effective exchange of information would lead to improved governance and that tax havens which facilitate tax avoidance and criminal activity like money laundering and embezzlement destabilize the global economy.<sup>196</sup> To this end, the OECD has published

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<sup>189</sup> Moore, *supra* note 187.

<sup>190</sup> Diaz de Leon Galarza, *supra* note 187.

<sup>191</sup> Diaz de Leon Galarza, *supra* note 187.

<sup>192</sup> Ioan Grillo, *The Apparent Massacre of Dozens of Students Exposes the Corruption at the Heart of Mexico*, TIME (Oct. 10, 2014), <http://time.com/3490853/mexico-massacre-students-police-cartel-corruption/>.

<sup>193</sup> Shaxson, *supra* note 168.

<sup>194</sup> See Shaxson, *supra* note 168.

<sup>195</sup> Shaxson, *supra* note 168.

<sup>196</sup> Tyler J. Winkelman, *Automatic Information Exchange as a Multilateral Solution to Tax Havens*, 22 IND. INT'L & COMP. L. REV. 193, 193, 195 (2012).

comprehensive guidance in the aforementioned *Keeping It Safe* report for jurisdictions desiring to share information, while improving their governance and taxpayer confidence in the integrity of domestic tax administration.

***B. OECD and American Guidance on Data Confidentiality in Tax Administration***

In 2012, the OECD published *Keeping It Safe* as guidance to jurisdictions on protecting the confidentiality of tax information exchanged under various exchange of information agreements and treaties.<sup>197</sup> Anticipating the growth of tax information exchange globally, the OECD's report underscores the importance of taxpayer confidence in the confidentiality of their information exchanged under such agreements and treaties.<sup>198</sup> Therefore, keeping tax information confidential requires not only a legal framework made of legislation, rules, and procedures, but also a "culture of care" within a tax administration.<sup>199</sup> Promoting a culture of care involves enforcing security, ethics, and proper handling and disposal of information.<sup>200</sup> The desired outcome is that a taxpayer's sensitive financial information is not accidentally or intentionally disclosed inappropriately and that the information is used only for the purposes permitted under the exchange of information treaty or agreement.<sup>201</sup>

The OECD has created three model confidentiality provisions for each exchange of information (EOI) instruments a country may enter into with another country.<sup>202</sup> The various EOIs that a country may enter into with another may include tax treaties, tax information exchange agreements (TIEAs), or multilateral instruments on mutual administrative assistance in tax matters.<sup>203</sup> The three corresponding OECD models include: (1) the Model Tax Convention, (2) the Model Agreement on Exchange of Information on Tax Matters

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<sup>197</sup> *Keeping It Safe*, *supra* note 19, at 5.

<sup>198</sup> *Keeping It Safe*, *supra* note 19, at 5.

<sup>199</sup> *Keeping It Safe*, *supra* note 19, at 5.

<sup>200</sup> *Keeping It Safe*, *supra* note 19, at 15–17.

<sup>201</sup> *Keeping It Safe*, *supra* note 19, at 5.

<sup>202</sup> *Keeping It Safe*, *supra* note 19, at 7.

<sup>203</sup> *Keeping It Safe*, *supra* note 19, at 7.

(TIEA), and (3) the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.<sup>204</sup> In pertinent part, Article 26(2) of the OECD Model Tax Convention provides:

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.<sup>205</sup>

Article 26(2) is relevant to data confidentiality because it states that information received pursuant to a tax treaty shall be treated as secret to the same extent as information obtained domestically would in the recipient State.<sup>206</sup> Additionally, Article 26(2) limits the disclosure of information to the appropriate persons or authorities, including the taxpayer, his proxy or witness, the courts, and administrative and oversight bodies.<sup>207</sup> The information is disclosed only to the persons or authorities necessarily involved in the assessment, collection, enforcement, prosecution, or determination of appeals with which the tax information is related.<sup>208</sup>

The confidentiality provisions under Article 8 of the Model Agreement (TIEA) and Article 22 of the Multilateral Convention are both similar to Article 26(2) of the Model Convention because they require that the information be kept secret, restrict the entities that can access the information, and limit the purposes for which the information can be used.<sup>209</sup> The Model Agreement (TIEA) slightly differs from the Model Tax Convention in that the TIEA does not provide for keeping information secret in the same manner as the recipient state would, and it “permits disclosure to any other person, entity, authority or jurisdiction provided express written consent is

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<sup>204</sup> *Keeping It Safe*, *supra* note 19, at 7–11.

<sup>205</sup> *Keeping It Safe*, *supra* note 19, at 8.

<sup>206</sup> *Keeping It Safe*, *supra* note 19, at 8.

<sup>207</sup> *Keeping It Safe*, *supra* note 19, at 8–9.

<sup>208</sup> *Keeping It Safe*, *supra* note 19, at 8–9.

<sup>209</sup> *Keeping It Safe*, *supra* note 19, at 10–11.

given by the competent authority of the requested party.”<sup>210</sup> Like the Model Agreement (TIEA), the Multilateral Convention also permits the information to be used for other purposes as long as the requested party authorizes such use.<sup>211</sup> The Multilateral Convention differs from the other two because it specifically requires the recipient state to protect the personal data received in a manner consistent with the data protection laws of the supplying State.<sup>212</sup> Consequently, no matter which instrument negotiating countries may use to establish the exchange of tax information, the OECD models set a baseline for expectations regarding data confidentiality and protection.<sup>213</sup>

In addition to legal frameworks setting expectations for the protection of data exchanged internationally, the OECD’s report emphasizes the importance of tax confidentiality provisions in domestic legislation.<sup>214</sup> The OECD’s guidance that domestic laws be implemented to protect and enforce the confidentiality of tax information and reflect the binding nature of treaty obligations supports the proposition that the exchange of information as a solution to tax evasion promotes better domestic governance.<sup>215</sup> The OECD advises that domestic laws pertaining to data protection, privacy, and the freedom of information are synchronized with, or provide exemptions for, exchange of information treaties or agreements.<sup>216</sup> With respect to actual tax administration, policies and practices should be comprehensive and address the following: employee screening and background checks; employment contracts and employee training; accessibility to premises, and electronic and physical records; encryption and transferal; departure policies; information disposal policies; and managing unauthorized disclosures of information and sanctions.<sup>217</sup> Administrative policies and practices “need to be reviewed and endorsed at the top level of tax administration,” and roles for implementing policy and procedure should be

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<sup>210</sup> *Keeping It Safe*, *supra* note 19, at 11.

<sup>211</sup> *Keeping It Safe*, *supra* note 19, at 11.

<sup>212</sup> *Keeping It Safe*, *supra* note 19, at 11.

<sup>213</sup> *See* Winkleman, *supra* note 196, at 201.

<sup>214</sup> *Keeping It Safe*, *supra* note 19, at 11.

<sup>215</sup> Shaxson, *supra* note 168.

<sup>216</sup> *Keeping It Safe*, *supra* note 19, at 11–12.

<sup>217</sup> *Keeping It Safe*, *supra* note 19, at 16–17.

clearly defined.<sup>218</sup> Lastly, promoting a culture of care requires regularly monitoring compliance.<sup>219</sup>

It is important to note a criticism of the OECD models, particularly the Model Agreement. One contention is that the Model Agreement only covers the exchange of information upon request and not the automatic or spontaneous exchange of information.<sup>220</sup> For example, when information is requested, it must relate to a particular inquiry regarding a known taxpayer.<sup>221</sup> For instance, the Bahamas-U.S. TIEA requires a written request that specifically states the type of information requested, the likely location of that information, the relevant period of time, the applicable U.S. law, an indication of whether the matter is criminal or civil, and reasons why the requested information is foreseeably relevant.<sup>222</sup> Therefore, exchanging information upon request would require the requesting state to at least know that the individual is evading taxes and to initiate its own investigation.<sup>223</sup> The chances of a state knowing whether an individual has evaded taxes in the first place is remote because of the bank secrecy and data protection laws in other jurisdictions, including tax havens.<sup>224</sup>

On the other hand, the automatic exchange of information is broader in scope and requires taxpayer information about various categories of income to be spontaneously and periodically transmitted in bulk from the source country to the resident country.<sup>225</sup> The resident country need not put in any effort to ascertain non-compliant taxpayers beyond the infrastructure it has created for receiving the exchanged information.<sup>226</sup> Despite this criticism, the voluntary

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<sup>218</sup> *Keeping It Safe*, *supra* note 19, at 16.

<sup>219</sup> *See Keeping It Safe*, *supra* note 19, at 17.

<sup>220</sup> Winkleman, *supra* note 196, at 203.

<sup>221</sup> *See* Winkleman, *supra* note 196, at 203.

<sup>222</sup> Winkleman, *supra* note 196, at 203–04.

<sup>223</sup> Winkleman, *supra* note 196, at 203, 208–09.

<sup>224</sup> Winkleman, *supra* note 196, at 208–09. It is important to note that not all people use tax havens to hide income and evade taxes. *See* John S. Wisiackas, *Foreign Account Tax Compliance Act: What it Could Mean for the Future of Financial Privacy and International Law*, 31 EMORY INT'L L. REV. 586, 592 (2017). Some individuals use tax havens because they prefer more financial privacy, which the domestic laws of other jurisdictions may offer. *Id.*

<sup>225</sup> Winkleman, *supra* note 196, at 203.

<sup>226</sup> Winkleman, *supra* note 196, at 203–04.



exchange of information, as opposed to automatic exchange, may recognize the integrity of personal data and serve as a compromise between two priorities: transparency in international tax and data privacy. This may be because the exchange of information upon request still allows countries to go after tax evaders beyond its borders, while the legal framework establishing the exchange prevents the dragnet disclosure of personal financial information without a rational basis to tax administration.<sup>227</sup> Personal financial information will only be disclosed once the requesting state has done its due diligence.<sup>228</sup>

While the U.S. has not published guidance to a similar degree as the OECD, it supports the automatic exchange of information through FATCA.<sup>229</sup> FATCA has been criticized by FFIs and foreign jurisdictions that have argued complying with FATCA's automatic exchange scheme violates their domestic privacy and data protection laws.<sup>230</sup> Coupled with the withholding penalty for noncompliance, some jurisdictions and FFIs feel that they must comply.<sup>231</sup> Moreover, while IGAs between the U.S. Treasury Department and foreign jurisdictions may provide a legal framework establishing the automatic exchange of information, IGAs, and treaties alike, require foreign jurisdictions to alter their own domestic laws to incorporate terms of the agreement or treaty.<sup>232</sup>

Nevertheless, the U.S. does provide for the secure transmission of automatically exchanged information with the IDES.<sup>233</sup> The IDES is an electronic, internet-based delivery point that FFIs and Host Country Tax Authorities (HCTA) can use to directly transmit data to the IRS.<sup>234</sup> The sender must encrypt the data, and the IDES

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<sup>227</sup> Winkleman, *supra* note 196, at 203–04.

<sup>228</sup> Winkleman, *supra* note 196, at 203–04.

<sup>229</sup> See Wisiackas, *supra* note 224, at 586.

<sup>230</sup> See Wisiackas, *supra* note 224, at 587, 611.

<sup>231</sup> See Wisiackas, *supra* note 224, at 610.

<sup>232</sup> Wisiackas, *supra* note 224, at 609–10.

<sup>233</sup> *International Data Exchange Service*, IRS, <https://www.irs.gov/businesses/corporations/international-data-exchange-service> (last visited Oct. 10, 2018).

<sup>234</sup> *Id.*

encrypts the transmission pathway.<sup>235</sup> The IRS also provides information technology support known as Global IT Forum sessions to provide updates and answers to technical questions.<sup>236</sup>

Ultimately, data protection and confidentiality is an important aspect of information exchange and is itself a competing priority.<sup>237</sup> The OECD model legal frameworks appear to offer jurisdictions more flexibility with respect to determining the terms of their agreements or mutual administrative assistance.<sup>238</sup> If a jurisdiction finds that the appropriate safeguards are not in place in a partner jurisdiction or that there has been a breach in confidentiality, it may choose to suspend the exchange agreement.<sup>239</sup> While Argentina is committed to participating in the exchange of information under the CRS and FATCA,<sup>240</sup> its systemic corruption<sup>241</sup> may be an obstacle in its performance, which may cause other jurisdictions to question whether appropriate data protection safeguards have been taken within Argentina's domestic tax administration. On the other hand, participating in the global economy while committing to both transparency and the exchange of information may improve Argentina's governance and tax administration.<sup>242</sup>

### ***C. Argentina's Legal Capacity to Comply: Data Protection Law in Argentina***

In 2000, Argentina enacted the Personal Data Protection Act (PDPA) Law No. 25,326 to regulate the usage of personal or sensitive data by public and private individuals as well as legal entities.<sup>243</sup> The PDPA implements Argentina's constitutional guarantees to data privacy by guaranteeing an individual's right to data privacy and access to their data and creates a specific and affirmative cause of

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *See* Wisiackas, *supra* note 229, at 611.

<sup>238</sup> *See Keeping It Safe, supra* note 19, at 7.

<sup>239</sup> *Keeping It Safe, supra* note 19, at 7.

<sup>240</sup> *See supra* notes 15 and 68.

<sup>241</sup> *See supra* notes 93–114.

<sup>242</sup> *See supra* notes 193–96.

<sup>243</sup> Sean McCleary, *To Discovery and Beyond: A Comprehensive Look at Argentina's Data Protection Laws*, 47 U. OF MIAMI INTER-AM. L. REV. 129, 141 (2015).

action for individuals to enforce their rights.<sup>244</sup> In pertinent part, the PDPA provides the following under Section 1:

The purpose of this Act is the full protection of personal information recorded in data files, registers, banks or other technical means of data-treatment, *either public or private for purposes of providing reports*, in order to guarantee the honor and intimacy of persons, as well as the access to the information that may be recoded about such persons, in accordance with the provisions of Section 43, Third Paragraph of the National Constitution.<sup>245</sup>

Argentina refers to its affirmative cause of action as *amparo*, which loosely means “shelter.”<sup>246</sup> *Amparo* is a broad category of several causes of action and is enshrined under article 43 of Argentina’s Constitution, amended in 1994.<sup>247</sup>

Not only does an *amparo* cause of action enable an individual to obtain information about themselves held in public or private sources, it “may be filed to request the suppression, rectification, confidentiality or updating of said data.”<sup>248</sup> A plaintiff may file an *amparo* complaint in the case of false data or discrimination.<sup>249</sup> *Amparo* is codified under Section 16 of the PDPA, which closely mirrors constitutional language.<sup>250</sup> Section 16 provides for the additional affirmative right of “Habeas Data” and may be used when “the person responsible for or the user of the data bank” is noncompliant with a plaintiff’s initial *amparo* complaint to rectify, update,

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<sup>244</sup> *Id.* at 141–42.

<sup>245</sup> Personal Data Protection Act, Law No. 25326, Oct. 30, 2000, (Arg.); see also McCleary, *supra* note 243, at 141.

<sup>246</sup> Andres Guadamuz, *Habeas Data: The Latin American Response to Data Protection*, J. INFO. L. & TECH. (Nov. 7, 2001), [https://warwick.ac.uk/fac/soc/law/elj/jilt/2001\\_3/Guadamuz/](https://warwick.ac.uk/fac/soc/law/elj/jilt/2001_3/Guadamuz/).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> See Personal Data Protection Act, *supra* note 245 (“SECTION 16.- Rectification, updating or *suppression* right . . . 3.- Noncompliance with such obligation within the term established in the preceding paragraph, will enable the interested party to bring, without any further proceedings, the action for *the protection of personal data or habeas data* contemplated in this Act.”).

<sup>250</sup> *Id.*

suppress, or keep confidential their personal data.<sup>251</sup> *Amparo*, as a constitutional guarantee and category of cause of action, is not new in Latin America.<sup>252</sup> It exists in other Latin American countries as well as civil law countries such as Spain and Portugal.<sup>253</sup>

Habeas Data, specifically, also exists in several Latin American countries such as Brazil, Paraguay, Colombia, Costa Rica, and Peru and is described as a procedural mechanism to “safeguard individual freedom from abuse in the information age.”<sup>254</sup> Several priorities evident in the PDPA are (1) the consent, in most cases, of the individual about whom information or data is being collected, (2) notice, notwithstanding whether consent is required, (3) the accuracy or truthfulness of the data collected or used, and (4) the limitation of data usage to the specific purpose for which it was collected.<sup>255</sup> Accordingly, the PDPA declares “the rights of data subjects, the obligations of data controllers and data users, the supervisory authority or controlling body, [and] sanctions and rules of procedure for the ‘habeas data’ judicial remedy.”<sup>256</sup>

In December 2001, Argentina issued regulations under Decree No 1.558/2001, Regulations of Law No. 25,326, to implement the PDPA.<sup>257</sup> Additionally, the implementing regulations complete provisions of the PDPA and clarify provisions that may be ambiguous or subject to interpretation.<sup>258</sup> Together, Article 43.3 of the Argentinean Constitution, the PDPA, and Decree No. 1558/2001 form the general legal framework of data protection law in Argentina.<sup>259</sup>

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<sup>251</sup> *Id.*; see also Guadamuz, *supra* note 246 (Habeas Data means “you should have the data.”).

<sup>252</sup> See Guadamuz, *supra* note 246.

<sup>253</sup> Guadamuz, *supra* note 246.

<sup>254</sup> Guadamuz, *supra* note 246.

<sup>255</sup> Personal Data Protection Act, *supra* note 245; see also McCleary, *supra* note 243, at 144–45.

<sup>256</sup> *Opinion 4/2002 on the Level of Protection of Personal Data in Argentina*, EUROPEAN COMMISSION 1, 3 (Oct. 3, 2002), [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2002/wp63\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2002/wp63_en.pdf) [hereinafter *Opinion 4/2002*].

<sup>257</sup> John C. Eustice & Marc Alain Bohn, *Navigating the Gauntlet: A Survey of Data Privacy Laws in Three Key Latin American Countries*, 14 SEDONA CONF. J. 137 1, 2 (2013).

<sup>258</sup> *Opinion 4/2002*, *supra* note 256, at 3.

<sup>259</sup> *Opinion 4/2002*, *supra* note 256, at 3.

With respect to enforcement, the Argentine Personal Data Protection Agency (APDPA) oversees the enforcement of the PDPA.<sup>260</sup> Any public or private entity that uses data for non-personal uses must register its database with the APDPA in order to lawfully keep data.<sup>261</sup> The APDPA may review complaints and affirmatively initiate investigations into PDPA violations.<sup>262</sup> Moreover, the agency has sanctions at its disposal to punish PDPA violators, such as civil reprimands that may warn or suspend the violator's use of such information, civil fines that range between \$1,000 and \$100,000, and criminal sanctions.<sup>263</sup> Individuals may face criminal sanctions, such as imprisonment, for intentional acts like falsifying information or data within a database or repository.<sup>264</sup>

While Argentina may have a sophisticated legal framework for data protection modeled after Spain's Law on the Protection of Personal Data,<sup>265</sup> and in line with the rich history of *amparo* and habeas data in Latin America, the country is amending its data protection law to align more with Europe's General Data Protection Regulation (GDPR).<sup>266</sup> The GDPR is a comprehensive data protection law enacted by the EU.<sup>267</sup> The GDPR was enacted in 2016 and is far reaching because, once in force in 2018, it will effectively repeal and replace the data protection laws of individual EU member states.<sup>268</sup> The goal of the GDPR is to harmonize data privacy laws across Europe, reshape the way data privacy is approached in the region, and

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<sup>260</sup> McCleary, *supra* note 243, at 143.

<sup>261</sup> McCleary, *supra* note 243, at 144.

<sup>262</sup> McCleary, *supra* note 243, at 143.

<sup>263</sup> McCleary, *supra* note 243, at 144.

<sup>264</sup> McCleary, *supra* note 243, at 144.

<sup>265</sup> Eustice & Bohn, *supra* note 257, at 2.

<sup>266</sup> Sarah Buerger, *How the GDPR Changed the Argentina Personal Data Protection Act*, MICHALSONS (Feb. 21, 2017), <https://www.michalsons.com/blog/argentina-personal-data-protection-act/25090>.

<sup>267</sup> *General Data Protection Regulation- A Heads Up*, MICHALSONS (Dec. 7, 2017), <https://www.michalsons.com/focus-areas/privacy-and-data-protection/general-data-protection-regulation-a-heads-up> [hereinafter *General Data Protection Regulation*]; accord John Giles, *What is the GDPR and Why is it Important?*, MICHALSONS (Feb. 25, 2016), <https://www.michalsons.com/blog/what-is-the-gdpr/18552>.

<sup>268</sup> *EU GDPR Portal: Site Overview*, <https://www.eugdpr.org> (last visited Oct. 10, 2018).

lastly, protect the data privacy of all EU citizens.<sup>269</sup> Because of the vast spread of the EU, the GDPR is considered the most important legislation on data protection in the world.<sup>270</sup>

Generally, the GDPR defines the roles of the three key actors involved in the transfer of any data: the data subject, the controller, and the processor.<sup>271</sup> Data subjects include only natural persons, not legal persons.<sup>272</sup> Controllers are either natural or legal persons and are the entities that determine the purposes and conditions for processing personal data.<sup>273</sup> Lastly, the processor, a natural or legal person, is the entity, like an IT vendor, which processes the data on behalf of the controller.<sup>274</sup> Most of the GDPR applies to the obligations and conduct of controllers and the processors they use to lawfully process personal data.<sup>275</sup>

Argentina is aligning its PDPA with the GDPR because, although it is not an EU member state, Argentina does business with the EU and is involved with EU member states through either tax treaties, like Spain, or through Multilateral Competent Authority Agreements (MCAA) to exchange financial account information under the CRS.<sup>276</sup> Therefore, aligning its PDPA with the GDPR may benefit Argentina's private, banking, and financial services sectors, its domestic tax administration, and its ability to perform under its exchange of information agreements with respect to tax matters.

There are areas where the PDPA diverges from the GDPR.<sup>277</sup> For example, the PDPA defines data subjects differently, and it includes both natural and legal persons, whereas the GDPR only includes natural persons.<sup>278</sup> Additionally, other areas that differ from

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<sup>269</sup> *Id.*

<sup>270</sup> *General Data Protection Regulation, supra note 267.*

<sup>271</sup> *General Data Protection Regulation, supra note 267.*

<sup>272</sup> *General Data Protection Regulation, supra note 267.*

<sup>273</sup> *General Data Protection Regulation, supra note 267.*

<sup>274</sup> *General Data Protection Regulation, supra note 267.*

<sup>275</sup> *General Data Protection Regulation, supra note 267.*

<sup>276</sup> Buerger, *supra note 266*; see also *Argentina Establishes Rules for Adoption of OECD's Automatic Exchange of Financial Information in Tax Matters*, ERNST & YOUNG (Jan. 14, 2016), <http://www.ey.com/gl/en/services/tax/international-tax/alert--argentina-establishes-rules-for-adoption-of-oecd-s-automatic-exchange-of-financial-information-in-tax-matters>.

<sup>277</sup> Buerger, *supra note 266*.

<sup>278</sup> Buerger, *supra note 266*.

the GDPR were determined in 2002 by the EU's Article 29 Working Party.<sup>279</sup> The Working Party was established under Article 29 of the EU's European Commission Directive 95/46/EC, and it is an independent advisory body on data protection and privacy.<sup>280</sup> The Working Party found several concerns with Argentina's PDPA: (1) the PDPA inadequately protects the personal data and financial information of data subjects in cross-border transfers, (2) too many exceptions exist to prohibitions on transferring personal data to jurisdictions lacking appropriate levels of data protection, and (3) the National Directorate for Personal Data Protection (NDPDP) lacks sufficient independence from other entities within the Argentine government.<sup>281</sup> However, despite the few weaknesses found in the PDPA, the Working Party found that Argentina ensures an adequate level of data protection within the meaning of Article 25(6) of the European Commission's 1995 Directive on data protection.<sup>282</sup>

## V. CONCLUSION: THE CONFLUENCE OF CORRUPTION, GOVERNANCE, AND THE WILLINGNESS TO CHANGE

The provisions for data protection within Argentina's constitution, statute, and regulations provide an adequate legal framework for the protection of data according to the EU's Article 29 Working Party.<sup>283</sup> Also, the PDPA is similar in many respects to the EU's GDPR, a colossal legal framework for data protection covering twenty-eight member states.<sup>284</sup> It may be reasonable to say that Argentina's legal framework is sophisticated based on EU standards and taking into account the overall tradition of habeas data and *amparo* in Latin America.<sup>285</sup> Although there are a few weaknesses in the PDPA, it sufficiently provides Argentina with the statutory and

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<sup>279</sup> Buerger, *supra* note 266.

<sup>280</sup> *Opinion 4/2002*, *supra* note 256, at 1.

<sup>281</sup> Buerger, *supra* note 266; *accord Opinion 4/2002*, *supra* note 256, at 8–14.

<sup>282</sup> *Opinion 4/2002*, *supra* note 256, at 17.

<sup>283</sup> *Opinion 4/2002*, *supra* note 256, at 17.

<sup>284</sup> *See* Buerger, *supra* note 266.

<sup>285</sup> *See* Guadamuz, *supra* note 246, at § 1.3.4, § 1.2.

procedural means to keep exchanged tax information safe in accordance with the OECD's *Keeping It Safe* report.<sup>286</sup> This is because unlike other developing countries that may not possess the technological or bureaucratic infrastructure for such enhanced tax administration and administration in general, Argentina does.

However, while Argentina possesses the legal frameworks "on paper," it remains to be seen whether it can execute its commitments under FATCA or the CRS or whether other countries with which Argentina has agreements or treaties trust in Argentina's ability to safeguard the personal tax and financial information it exchanges. Argentina's historical and current problems with systemic corruption, from grand to petty, in its institutions at the political and bureaucratic level<sup>287</sup> are serious impediments to meeting its commitments.

Moreover, as long as economic gains are consistently eroded by inflation, and barriers to competition and income inequality remain high, Argentines will continue to flock to the informal market to substitute their pesos for dollars, which wealthier Argentines would prefer to safeguard in foreign offshore accounts.<sup>288</sup> Notwithstanding domestic policy, such as the *ley de blanqueos* offering amnesty to tax evaders,<sup>289</sup> international introspection into Argentina's tax administration shows that there are holes, which may promote bribery.<sup>290</sup> As the 2017 OECD Working Group on Bribery found, Argentina is still noncompliant, and most relevant to its tax administration, it is implementing recommendations, training tax administrators on detecting bribery, and amending its legislation to share tax information with foreign authorities for use in bribery investigations.<sup>291</sup>

Also pertinent, there are repeated calls for Argentina to strengthen the independence of government entities that investigate

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<sup>286</sup> See generally *Keeping it Safe*, *supra* note 19.

<sup>287</sup> See Lindsey, *supra* note 99; *Global Corruption Barometer 2013*, *supra* note 100; Mallen, *supra* note 18.

<sup>288</sup> See *The Tragedy of Argentina: A Century of Decline*, *supra* note 71; Timmerman, *supra* note 98; Lindsey, *supra* note 99; *OECD Economic Surveys*, *supra* note 114.

<sup>289</sup> See He, *supra* note 16.

<sup>290</sup> See *Phase 3bis Report on Implementing the OECD Anti-Bribery Convention in Argentina*, *supra* note 162, at 71.

<sup>291</sup> *Id.*



corruption.<sup>292</sup> In order for Argentina to create the culture of care<sup>293</sup> necessary to protect data, it will need to ensure that policies and procedures for handling, transferring, and even disposing of information are endorsed at the top level of tax administration and regularly monitored for compliance.<sup>294</sup> If Argentina cannot squarely tackle its problems with corruption, it may threaten the integrity of the new PDPA that the Argentine legislature is developing, and it may have a negative effect on Argentina's international business dealings and exchange of information agreements or treaties with respect to protecting personal tax information.

Argentina's willingness to change, under the current Macri Administration, is likely a good indicator that Argentina will honor its commitment to the U.S. under FATCA and to the respective countries with which it has entered into multilateral agreements with under CRS. This is because Macri has worked with the Argentine legislature to implement pro-market and fiscally conservative reforms.<sup>295</sup> These reforms have focused on addressing rampant inflation, the black market for pesos and the informal economy, tax evasion, and government fraud with respect to pension programs.<sup>296</sup> It appears that much of the domestic legal and political change Argentina is experiencing is heavily influenced by external, international changes, such as the move toward more tax transparency and less bank secrecy. Additionally, Argentina's desire to have access to international finance and markets likely compels it to agree with the international consensus that bank secrecy destabilizes<sup>297</sup> the international economy. The importance of protecting and keeping confidential personal tax and financial data compliments the international move toward transparency and the exchange of information.

While Argentina has made commitments on different fronts pertaining to data protection, the exchange of tax information, and reducing corruption, there has not been a synchronized effort. The

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<sup>292</sup> See *OECD Economic Surveys*, *supra* note 114, at 3.

<sup>293</sup> See *Keeping It Safe*, *supra* note 19, at 5.

<sup>294</sup> *Keeping It Safe*, *supra* note 19, at 16–17.

<sup>295</sup> See *Timerman*, *supra* note 98.

<sup>296</sup> See Gillespie, *supra* note 142; *see also* He, *supra* note 16.

<sup>297</sup> See Winkleman, *supra* note 196.

OECD's *Keeping It Safe* report recommends synchronizing domestic laws pertaining to data protection with exchange of information treaties or agreements.<sup>298</sup>

Despite the current status of Argentina's efforts, it should have less difficulty complying with FATCA than CRS because of FATCA's unilateral<sup>299</sup> nature. FATCA generally is not concerned with exchanging data of foreign nationals residing in the U.S., but rather, FATCA is concerned with receiving the financial data of U.S. citizens and residents under U.S. jurisdiction for tax purposes.<sup>300</sup> Moreover, the IDES system streamlines the data transmission process and encrypts the data for FFIs and Host Country Tax Authorities (HCTA).<sup>301</sup> On the other hand, Argentina may have more difficulty complying with its agreements under CRS because of the sheer number of countries it may be dealing with that may have different data protection standards. Additionally, Argentina's current data protection framework may not meet the standards of certain EU member states, necessitating Argentina to alter its domestic law.<sup>302</sup> Nevertheless, the future may be very bright for Argentina because its efforts to keep up with the global movement for tax transparency and the exchange of tax information will likely improve domestic governance and the integrity of Argentine institutions.

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<sup>298</sup> See *Keeping It Safe*, *supra* note 19, at 12.

<sup>299</sup> See Kirsch, *supra* note 3, at 119.

<sup>300</sup> Kirsch, *supra* note 3, at 119.

<sup>301</sup> See *International Data Exchange Service*, *supra* note 233.

<sup>302</sup> See Buerger, *supra* note 266; see also *Opinion 4/2002*, *supra* note 256, at 8–14.