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ECONOMIC GLOBALIZATION AND TAX EVASION

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“Only a crisis – actual or perceived – produces real change. When that crisis occurs, the action that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.”
Milton Friedman – Nobel Memorial Prize in Economics¹

¹ FRIEDMAN, M., *Capitalism and Freedom*, The University of Chicago Press, Fortieth Anniversary Edition, Chicago, 2002, p. xiv.

Introduction

The objective of this paper is to study and discuss topics about economic globalization and the phenomenon of tax evasion.

In this way, first we establish the task of the international economic order, its development since Bretton Woods, its bases and how it can be developed in the 21st Century.

Then, after these considerations, we discuss a theoretic concept of international tax evasion, trying to connect the economic globalization phenomenon with this conduct.

With this connection we can study how the economic globalization improves the possibilities of tax evasion against the good health of the nationals' budgets.

Finally, we make recommendations about how the Bretton Woods institutions and the national governments must manage these improved possibilities of tax evasion.

In light of these objectives, we hope to clarify the connections between the economic globalization and tax evasion and, with it, help Brazil and other countries to face one of the biggest challenges of the current century.

1 - Historical considerations about the international economic order and economic law.

The “purely” international economic order, from a theoretical point of view, is a system of global economic relationships that exist *de facto* and *de jure*. Even though the rules and regulations of this system are not always “formal”, they govern states and other subjects of international law, as well as multinational private companies².

There has always been an international economic order *de facto*, that was dictated by the circumstances of international politics at each moment since the beginning of the establishment of human communities, and constructed from the exchange of private and public goods, services or values with economic content. At first, these exchanges were characterized by their regional and casual dimension. The systemic and global dimension of the international economic order arises only after the period of the great voyages and the expansion of the known World, in the XV and XVI centuries.

The establishment of “evergreen” economic relationships, first between metropolis and colonies, then among the European nations and the Newly Independent States of North and South America, involved the States and the commercial enterprises in a systemic way that, for the first time, led to the set of what today we understand is a *de facto international economic order*³.

From the configuration of this international *de facto* economic order, the States began to establish, mainly through bilateral agreements, a network of living economic standards with content targeted to each State own economic interests, including the tax interests⁴.

² In the SCHWARZEMBERGER’s words: “International economic order: primarily a basic but, essentially, a ‘*de facto*’ system of international economic relations. The term ‘world economic order’ emphasizes the global character of such an international economic order. In organized international society the terms ‘international economic order’ and ‘economic world order’ may also be employed in a second meaning: as synonyms of consensual international public order or ‘*jus cogens*’. In this narrower sense, they are mandatory rules which may not be modified or abrogated by ‘*inter se*’ agreements between individual parties.” SCHWARZEMBERGER, G., *Economic world order? A basic problem of international economic law*, Manchester University Press, Manchester, 1970, p. 4.

³ SCHWARZEMBERGER remember, for example, the *Pax Británica*, that involved the “city” in London (the financial market) and the “Royal Navy” in offer and assecure loans to other countries, like happened with Venezuela (1902) and also “the gold standart” to the trade of money, that survived until the 1970 decade. SCHWARZEMBERGER, G., *op. cit.*, p. 8.

⁴ By the words of KOSTERS: “The first tax treaty was concluded in 1899 between Prussia and the Austro-Hungarian double monarchy. Prior to this bilateral treaty, there had already been similar arrangements within the German

However, this still was not the “legal element” required to establish a *de jure* international economic order.

The rise of the League of Nations started the move to reach the level of an economic order *de jure*. During the period of the League (and under Articles 16.3 and 23, "a" and "e", of the Versailles Treaty⁵) there was an attempt to set down multilateral rules with economic content, but there was no effective success in this attempt⁶.

Nevertheless, we must mention that during the period of The League of Nations, it was possible to see an effective interaction between "tax evasion" and "international economic environment". In 1928 the League of Nations called upon States to address this issue, taking into account the risks that the conduct of tax evasion brought for the communities in general⁷.

An effective international economic order *de facto* and *de jure* only was regarded as something to be sought at the end of World War II. In 1944 the Bretton Woods agreements established the International Monetary Fund (IMF) and the World Bank (WB). Also, the creation of United Nations (UN) and the economic content of the articles present in the UN Charter, developed by its Specialized Agencies and its

Federation. After the signing of this first treaty, it still took many decades before – in the 1920s – the first set of model tax treaties was published. These are now known as the 1928 Geneva Models. These first Models were created under the auspices of the League of Nations, the predecessor of the United Nations (UN).” KOSTERS, B., “The United Nations Model Tax Convention and its recent developments”, en *Asia-Pacific Tax Bulletin*, International Bureau of Fiscal Documentation, jan./feb., 2004, pp. 04-11, p. 04.

⁵ VERSAILLES TREAT (THE CONVENT OF LEAGUE OF NATIONS), signed in June, 28, 1919, and enforced in January, 10, 1920 – “Art. 16.3 – The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenantbreaking State, ...” ; “Art. 23 – Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: (a) will endeavour to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations; ... (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind; (f) will endeavour to take steps in matters of international concern for the prevention and control of disease.”

⁶ To go deep in this period, please see: SCHWARZEMBERGER, G., *op. cit.*, pp. 17-36.

⁷ “The employment of technical methods to deal with fraud in matters of taxation is no doubt wholly to be recommended, both for the good of the communities reaping the benefit of such taxation, and in the interests of the taxpayers themselves, since any fraud which goes unpunished leads to an unfair distribution of the burden of public expenditure and to the payment by one set of persons of sums properly due by others.” League of Nations (1928) - Double taxation and tax evasion. League of Nations Pub. n.º C.562. M.I 78. 1928-11 1928, p. 23 – available in the web site http://faculty.law.wayne.edu/tad/Documents/League/League_Tech_Experts.pdf .

Economic and Social Council (ECOSOC)⁸, contributed to the establishment of an international economic order.

Anyway, the division of the world in two political and economic blocks (capitalism and socialism, “market economy” and “planned economy”) conditioned for decades the question, since from the beginning the extinct USRR and its allies were out of the Bretton Woods institutions.

As the setting of "international economic order", the emergence of an effective "economic law" in the national States, regulating the performance of these same States in the Economy, only found a real development from the end of World War II.

Historically, the relationship between “State” and “Economy” was always characterized by cyclical movements of distance and closeness. In this relationship “law” placed, a few times, the guarantee instrument of economic freedom and, sometimes, the instrument of limitation and reduction of this same economic freedom.

In the early days of the raise of national States all power was centralized in the king (the "sovereign"), including the economic power. In the “absolutist State” the development of any economic activity was based on the will of the government. The performance of the State in the Economy was total and direct, relying on the strength of tradition, or even in a supposed divine appointment.

The liberal movements that emerged in the XVIII century (American and French Revolution) led to the downfall of such system⁹, establishing a new political and legal system. To this new system State’s intervention should be deleted to the fullest, and always framed in strict legal frameworks - the will of the State subject to law (State of Law).

⁸ SCHWARZEMBERGER explains that: “In the United Nations Charter two whole chapters and eighteen articles of the Charter are devoted to international economic and social co-operation and to the co-ordination of this activities by the Economic and Social Council of the United Nations. Beyond this, in the scheme of the Charter, the more technical and detailed work is left with Specialised Agencies, entrusted with ‘wide international responsibilities’ and intended to be co-ordinated by the Economic and Social Council of the United Nations.” SCHWARZEMBERGER, G., *op. cit.*, p. 37.

⁹ In the words of HAYEK, about this period: “The gradual transformation of a rigidly organized hierarchic system into one where men could at least attempt to shape their own life, where man gained the opportunity of knowing and choosing between different forms of life, is closely associated with the growth of commerce. ... During the whole of this modern period of European history the general direction of social development was one of freeing the individual

At the same time the State's performance on the Economy was refuted. The forces of "market" (the Adam Smith's "invisible hand"¹⁰) would be sufficient to regulate the Economy and bring the necessary development to all participants of the same. The State action distorted these forces and brought to the system inconsistencies and the absence of the necessary economic freedom.

The development of such assumptions, coupled with technological development gave rise to a "savage" capitalism (based on radical interpretation of private property and free enterprise). In the beginning of XX century, the system proved itself ineffective to bring development to all. It tended to concentrate economic power and to limit free competition, tendencies which undermined exactly the free enterprise and the economic freedom¹¹.

The reaction of the Society, through the actions of some States, was the emergence of a new interventionist state system, corresponding to "socialism". In this system, again, all the economic planning was dependent on the will of the State (planned economy). It totally moved away from liberal economic assumptions, negating the need for private property, free enterprise and free competition to achieve economic development.

So, the socialist system completely moved away from the "market economy", nullifying any possibility of economic freedom. This model was implemented by the former USSR, serving the "Soviet economic law" as an instrument of coercion required to the extinction of economic freedom in that State.

The 1929 crisis, the relative success of planned economies and the World War II, showed, however, that the liberal capitalist system, as then established, was no longer

from the ties which had bound him to the customary or prescribed ways in the pursuit of his ordinary activities." HAYEK, F. A., *The road to serfdom*. Definitive Edition, The University of Chicago Press, Chicago, 2007, p. 69.

¹⁰ See: ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 16.

¹¹ HAYEK criticizes this view saying: "All we are here concerned to show is how completely, though gradually and by almost imperceptible steps, our attitude toward society has changed. What at every stage of this process of change had appeared a difference of degree only has in its cumulative effect already brought about a fundamental difference between the older liberal attitude toward society and the present approach to social problems. The change amounts to a complete reversal of trend we have sketched, an entire abandonment of the individualist tradition which has created Western civilization. According to this view now dominant, the question is no longer how we can make the best use of the spontaneous forces found in a free society. We have in effect undertaken to dispense with the forces which produced unforeseen results and to replace the impersonal and anonymous mechanism of the market by collective and 'conscious' direction of all social forces to deliberately chosen goals." HAYEK, F. A., *The road to serfdom*. Definitive Edition, The University of Chicago Press, Chicago, 2007, p. 73.

sustainable¹².

It required the establishment of a new approach of the capitalism system that¹³, even if based on free enterprise and private property, count on some State action, properly limited by law in order to stimulate economic activity and correct any deviations from the market which would put at risk free competition and the possibility of development of all¹⁴.

Hence the emergence of the "economic law" in the States that kept their economies within the market system and the liberal principles of capitalism. In this sense, Economic Law is the normative system addressed to the ordination of the economic process, by regulation of economic activity; a discipline aimed to the realization of State economic policy¹⁵.

Mainly, the development of the Economic Law is from the necessity of State intervention in the economy to face concentration of economic power by large industrial groups, thus violating the freedom of competition¹⁶, culminating with the socialist

¹² Friedman didn't agree with this view saying that: "Full employment' and 'economic growth' have in the past few decades become primary excuses for widening the extent of government intervention in economic affairs. A private free enterprise economy, it is said, is inherently unstable. Left to itself, it will produce recurrent cycles of boom and bust. The government must therefore step in to keep things on an even keel. These arguments were particularly potent during and after the Great Depression of the 1930's, and were a major element giving rise to the New Deal in this country and comparable extensions of governmental intervention in others. ... These arguments are thoroughly misleading. The fact is that the Great Depression, like most other periods of severe unemployment, was produced by government mismanagement rather than by any inherent instability of the private economy." FRIEDMAN, M., *Capitalism and Freedom*, The University of Chicago Press, Fortieth Anniversary Edition, Chicago, 2002, p.37/38.

¹³ See: ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 17.

¹⁴ In the Friedman's words: "The existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the "rules of the game" and as an umpire to interpret and enforce the rules decided on. What the market does is to reduce greatly the range of issues that must be decided through political means, and thereby to minimize the extent to which government need participate directly in the game." And He completes saying: "... the organization of economic activity through voluntary exchange presume that we have provide, through government, for the maintenance of Law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework." FRIEDMAN, M., *Capitalism and Freedom*, The University of Chicago Press, Fortieth Anniversary Edition, Chicago, 2002, p. 15 and p. 27.

¹⁵ In the words of the Brazilian Supreme Court Former Judge, Eros Grau: "sistema normativo voltado à ordenação do processo econômico, mediante a regulação, sob o ponto de vista macrojurídico, da atividade econômica, de sorte a definir uma disciplina destinada à efetivação da política econômica estatal". GRAU, E. R., *Elementos de Direito Econômico*. Ed. Revista dos Tribunais, São Paulo, 1981, p. 39.

¹⁶ "... perhaps the most difficult problems arise from monopoly – which inhibits effective freedom by denying individuals alternatives to the particular exchange – and from "neighborhoods effects" – effects on third parties for which it is not feasible to charge or recompense them." FRIEDMAN, M., *Capitalism and Freedom*, The University of Chicago Press, Fortieth Anniversary Edition, Chicago, 2002, p.14.

reaction and the crisis of 1929¹⁷.

In fact, the theoretical economic models of market existing in the late nineteenth and early twentieth century preached a perfection of market system would result in economic and social development of all stakeholders in the economic process. From the standpoint of Economic Theory, markets should be perfect, i.e., the laws of supply and demand¹⁸ (natural laws and mechanisms of the market) would be sufficient to achieve the maximum potential of the entire production chain at optimal price for everyone.

This is “the perfectly competitive market model”¹⁹, i.e., perfect competition, with multiple agents that interact, in both supply and demand, so that none alone is capable of influencing market price. The reasons of this perfect competition are the homogeneity of the products, the mobility of production factors, the total access to relevant information and the lack of economies of scale or externalities²⁰.

Such model of market’s perfection, obviously, doesn’t exist behind the theoretical studies, as history has shown with the economic development of capitalism. This fact determined the emergence of a “balanced capitalism”, as the established by the Brazilian Constitution of 1988, decades later.

The logical consequence of the absence of the “perfect market”, outside the parameters of theoretical economics, is the real existence of "market failures". Market failures origins are basically four: the "market power", the "asymmetric information", the "externalities" (positive or negative) and "public goods”²¹.

That’s why, illustrating once again with the Brazilian Federal Constitution by its Article 174, government is allowed to make interventions of legislative or regulatory nature, focused on the correction of market mechanisms. These corrections must effect constitutional principles of economic order and its mechanisms (such as free enterprise,

¹⁷ FONSECA, J. B. L., *Direito Econômico*. Ed. Forense, Rio de Janeiro, 2005, pp. 1-18 e p. 24.

¹⁸ To go deep in this concepts, please see: BROWNING, E. K. and ZUPAN, M. A., *Microeconomics: Theory & Applications*, John Wiley & Sons Inc., US, 2009, Chapter 2.

¹⁹ BROWNING, E. K. and ZUPAN, M. A., *Microeconomics: Theory & Applications*, John Wiley & Sons Inc., US, 2009, Chapter 9. OLIVEIRA; RODAS. *Direito e economia da concorrência*, p. 159.

²⁰ In the same way: ARAÚJO. *Resumo de direito econômico*, 3. ed. rev. e atual., p. 10.

²¹ See: BROWNING, E. K. and ZUPAN, M. A., *Microeconomics: Theory & Applications*, John Wiley & Sons Inc., US, 2009, Chapter 20. In the same way: OLIVEIRA; RODAS. *Direito e economia da concorrência*, p. 137 a 139.

free competition and private ownership) in towards to achieve the larger goal of the constitutional economic order (stated in the *caput* of its Article 170) on "*dignified existence of all according to the dictates of social justice*".

The mention of the Brazilian Federal Constitution is merely a practical example of the effectiveness of a range of political and economic thought that was developed from the second half of the twentieth century, conducive to the construction of Economic Law in western capitalist systems.

Especially after World War II, in view of the requirement for reconstruction of Countries affected by war, it saw that the market alone would not achieve the satisfaction of the requirement. Added to this, the understanding of the existence of "market failures" and the need to correct these failures, determined to deepen the involvement of States in the economy, which however could not result in the elimination of the market and to unseat socialist solution.

The way to solve this dilemma was the realization of State economic policies, i.e., systems of economic planning which, while preserving the institutions of capitalism (property and private initiative and free competition), could face the concentration of private power, to keep these assumptions in the common interest of all participants of the system. This path was possible through the establishment of an effective Economic Law.

Consider it, the "genesis" of the Economic Law is exactly the needs of economy regulation and the establishment of policies for economic planning. It arised in the Public Society as a whole and was enforced through the State activity, trying to concretize of such regulation and government policy.

These needs are cyclical, historically and economicly, leading to a greater or lesser interaction between States and Economy, in order to maintain the assumptions of the free market for all. We can see it clearly during the current financial crisis world, triggered at the end of 2008²².

²² About the current financial crisis, WILLIAMSON says that: "The financial crisis that currently engulfs the world is largely a consequence of deficient regulation. The world economy enjoyed a cyclical upswing for much of the 2000s, and it is true that such upswings inevitably end, but they do not all end up in financial crises. It seems to me that it

This hybrid system developed (market forces acting in partnership with a State planning purposes and grounds back to the State itself) has found resonance in the constitutions after the World War II. The Brazilian Constitution of 1988, already cited as an example, did not escape such a rule, adopting a capitalist system balanced by the goals of the Federative Republic of Brazil²³, but consecrating free enterprise as a key instrument of economic constitutional order. Ultimately, the Federal Constitution placed its economic order in the system of western market economy, moving away from socialist experiments²⁴.

was failures of the regulatory system, not the absence of regulation for certain institutions —the regulated and unregulated appear to have been equally prone to fail— that should be blamed for the severity of the current crisis. What I hold responsible is the fact that the system of regulation that we had did not penalize the right things — bigness, increasing leverage in a boom, maturity mismatches— and therefore invited failure. Accordingly I welcome a revision of the system of regulation as was announced at the G-20 summit.” WILLIAMSON, P., *The Washington Consensus and the Global Crisis*, Presentation at a conference sponsored by the Johns Hopkins School of Advanced International Studies and the Center for Global Development, "New Ideas in Development Finance after the Financial Crisis" April 22, 2009, © Peterson Institute for International Economics, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=1194> (16/09/2010).

²³ BRASIL – CF: “**Art. 1º** A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado democrático de direito e tem como fundamentos:

IV - os valores sociais do trabalho e da livre iniciativa;”

“**Art. 3º** Constituem objetivos fundamentais da República Federativa do Brasil:

I - construir uma sociedade livre, justa e solidária;

II - garantir o desenvolvimento nacional;

III - erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais;

IV - promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação.”

²⁴ In Brazil, the constitutionalization of an economic order began with the CF 1934 (influenced by the German constitution of Weimar) and remains today as a form of "state action", an attempt to put order in social and economic life, imposing constraints to economic activity, which derive from the economic rights that underpin the content of the economic constitution. The CF88 has been particularly innovative in the division into separate chapters between the economic and the social order. In establishing the constitutional economic order should therefore check the contents of Art. 170: “*Art. 170 – A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios:*”. It’s possible see that the economic order envisaged in CF has clear objectives that mix capitalist and socialist tendencies, to “*ensure to everyone a life with dignity and social justice*”, which complement the goals of the Republic itself, as stated in Article 3 of the CF. This is done through two mechanisms: (1) the recovery of human work and (2) free enterprise, both mechanisms have also been expressed in article 1, section IV of the Constitution as the foundation of the Federal Republic.

2 - The UN and the emergence of international economic order.

The UN Charter²⁵ established as one of its main goals the promotion of social development and the "standards" of life, which should be achieved through cooperation in solving international economic problems.

Chapter IX of the Charter reinforces the need for this same international cooperation in economic and social issues²⁶ and Article 55 stipulates that it must occur under the principles of equality, self-determination and human rights²⁷. In this sense, the Charter provides the guidelines that should lead the establishment and functioning of international economic order²⁸.

The UN effort to establish international cooperation in economic and social issues is held by the General Assembly and the Economic and Social Council (ECOSOC), through specific studies, resolutions, recommendations, projects of international conferences and conventions²⁹, which deal with the set to provide a *de jure* international economic order. However, the impact of United Nations and the ECOSOC in shaping the international economic order was very limited and the main role has been in other international organizations, especially the Bretton Woods institutions.

Important to note that Article 1.3 of the Charter³⁰, beside then establish cooperation to

²⁵ UN CHARTER – Signed in San Francisco, 06/26/1945, enforced 10/24/1946.

²⁶ In the same way: ALBUQUERQUE MELLO, C. D., *Direito internacional da integração*, Ed. Renovar, Rio de Janeiro, 1999, p.13. And: FONSECA, J. B. L., *Direito Economico*, 5ª edição, Ed. Forense, Rio de Janeiro, 2005, pp. 153-170.

²⁷ UN CHARTER – “Article 55 - With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a) higher standards of living, full employment, and conditions of economic and social progress and development;
- b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

²⁸ In this way: “In scope, the objectives of economic and social co-operation set out in the Charter of United Nations are wide and important enough to qualify as potential heads of an international economic order.” SCHWARZEMBERGER, G., *op. cit.*, p. 38.

²⁹ “The responsibility for the discharge of the economic and social functions of the United Nations rests primarily with the General Assembly and, under its authority, with the Economic and Social Council. The functions of these organs are, however, essentially deliberative and policy-initiating or pre-legislative, to use a felicitous term recently employed by the President of the International Court of Justice.” SCHWARZEMBERGER, G., *op. cit.*, p. 38.

³⁰ UN CHARTER – “Article 1 - The Purposes of the United Nations are: 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a centre for harmonizing the actions of nations in the attainment of these common

solve economic problems as one of the purposes of the United Nations, also includes within these purposes the protection of human rights. The Charter is the international legal instrument by which was first assigned a universal value to human rights.

According to the Charter, the UN is the appropriate instrument to promote and encourage “*respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*” (Article 1.3 of the UN Charter). This assumption improves the goal of economic cooperation set out in Article 55 cited above³¹.

However, especially for this paper concerning with the tax law, the emergence of UN provided the opportunity to develop the global network of tax treaties, either by creating its own models of treaties against double taxation³², either through the emergence of models from other international organizations³³. This network of bilateral treaties, structured to facilitate international transactions, determined the possibility of more direct contacts between the different national Tax Administrations and integrates the international economic order as established today³⁴.

ends.”

³¹ In the same way ABELLÁN HONRUBIA, V., “*Algunas consideraciones ...*”, *op. cit.*, p. 214.

³² About the UN Tax Model Convention KOSTERS explain that: “In general, it can be said that the UN Model grants more taxation rights to the source state or capital-importing country than the OECD Model and this is addressed later in the article. The UN Model was quickly embraced by mostly developing nations. After the collapse of the Eastern bloc, the newly independent states and the other Eastern European economies in transition also inserted many provisions from the UN Model in their national models.” KOSTERS, B., *op. cit.*, p. 5.

³³ For example, about the OECD Tax Model Convention: “Most of the 1500 or so bilateral tax treaties currently in force worldwide are based on the Model Tax Convention. The Model is widely used not only in treaty negotiations between Member and non-Members countries, but also in negotiations between non-Members countries. The importance of the OECD Model is further evidenced by the fact that about 90 per cent of the text of the UN Model Tax Convention is based upon the OECD Model.” OECD. *Tax sparing – a reconsideration*. OECD, Committee on Fiscal Affairs, Paris, France – 1998, p. 14.

³⁴ To see how works this network of bilateral treaties and have an analysis of the tools of these treaties against tax evasion (specially the exchange of tax information), please go our PhD Thesis: PEREIRA DE SOUZA, S. A. G., “*El Problema de la Evasión Fiscal – un ámbito jurídico para la cooperación internacional*”, PhD Thesis, published in the Department of International Law and Economy of the Universidad de Barcelona, 2008.

3 - The Bretton Woods' International Economic Order (globalization).

We already said that the United Nations system was also integrated by the international financial institutions arising from the Bretton Woods agreements (IMF and WB) and, subsequently, by the system of the General Agreement on Trade and Taxes (GATT - 1947³⁵, which evolved into the establishment of the World Trade Organization – WTO³⁶).

These institutions, especially the first two, were originally set up with very clear goals in order to establish the conditions for the economic reconstruction of the countries affected by war that ended³⁷, under the governing principles of the United Nations. So, the development of its activities should lead to the development of an economic order ruled by the international guidelines for cooperation in economic and social issues fixed in the Charter, boosting international economic stability and growth of international flows³⁸.

In the beginning, the WB and IMF had a certain influence of Keynesian ideas that impacted the construction of the economic law of the second half of the XX century. According to these ideas, stability is achieved through full employment and a sharp State interventionism in the economy³⁹. These interventions should expand economies and markets trying to integrate them with the aim of circulating wealth, and making

³⁵ CARRILLO SALCEDO, J. A., *El derecho internacional ...*, *op. cit.*, p. 75. In the same way: RODRIGUES DO AMARAL, A. C., *op. cit.*, 43/50.

³⁶ To go deep in the WTO see: FERNANDEZ PONS, X., *La OMC y el derecho internacional*, Marcial Pons Ed. Jurídicas y Sociales S. A., Barcelona, 2006.

³⁷ In this way: “El FMI y el BM se originaron en la II Guerra Mundial como resultado de la Conferencia Monetaria y Financiera de las Naciones Unidas en Bretton Woods, New Hampshire, en julio de 1944, y fue parte del esfuerzo concertado para reconstruir Europa tras la devastación de la guerra y para salvar al mundo de depresiones económicas futuras.” STIGLITZ, J. E., *Globalization and Its Discontents*, Norton & Co., New York, 2002, p. 35.

³⁸ “O período que se seguiu à Segunda Guerra Mundial, em função da destrutividade do conflito bélico e da avaliação de suas causas, ensejou uma ampliação do Direito Internacional de Cooperação, tal como previsto no artigo 55 da Carta das Nações Unidas. No campo econômico, cabe dar destaque à criação das instituições de Bretton Woods – o Fundo Monetário Internacional (FMI) e o Banco Mundial, que criaram uma moldura de cooperação que favoreceu a expansão dos fluxos de capital, dos financiamentos e dos investimentos.” LAFER, C., *op. cit.*, p. 28/29.

³⁹ We must see that the ideal of “full employment” was explicit in the article 55 of the UN Charter. Also in the Brazilian constitutional system of economic law the “full employment” is a principle that must be achieved by the national economy, through the market or through the government intervention to enforce the objective of the Brazilian constitutional system of economic law, the social welfare of every one. See, art. 170, inc. V, of the CF88. Of course, “full employment” doesn’t mean that the all Labor Force is employed, it means an adequate nivel of employment and unemployment to run the economy with sustainable growth, see ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 88.

viable economic stability and development⁴⁰.

In fact, the Keynesian theories were isolated in practice, and prevailed clearly the ideals of economic liberalism of Western capitalism (now called Neoclassical Economic Theory, sustained specially by Friedman and the Chicago School). These ideals ended up presiding over the work of international financial institutions and introducing tensions and contradictions within the UN system⁴¹.

The focus of international financial institutions in the liberalization of markets resulted, in the development of its work, that the ideas of full employment and economic expansion were replaced by the deregulation of capital flows and by policies of economic contraction⁴². It was, definitely, a contradiction of the UN system, since, for some, meant effective setbacks in the protection or development of human rights⁴³.

Notwithstanding the criticism, the development of the activities of Bretton Woods institutions, combined with rising global integration driven by the development and cheapening of transports and the deployment of new technologies, established an irreversible process of internationalization of the economic, financial, commercial, technological, cultural and social relations. It was improved in 1990's with the disappearance of the USSR, the fall of the Berlin Wall and the end of the clash between

⁴⁰ To see more about the Keynesian ideas please go to: ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 16/19. In the same book we can see the relations between the Keynesian ideas and tax policy: "When the economy goes into a recession, people's incomes fall, and they pay less income tax. This 'automatic tax cut' helps cushion the drop in disposable income and (according to Keynesians) prevents aggregate demand from falling as far as it might otherwise. Likewise, when people's incomes rise during a boom, the government collects more income tax revenue, which helps restrain the increase in the aggregate demand. Keynesians argue that this automatic fiscal policy is a major reason for the increase stability of the economy since World War II". ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 582.

⁴¹ In this way: "Ahora bien, la Carta y su entorno tenían una contradicción intrínseca. Por un lado, no había la voluntad política de traducir en la práctica las disposiciones de la Carta que parecían más avanzadas; y, por otro, la firma de acuerdos paralelos tales como los de Yalta, en el plano político, y de Bretton-Woods, en el monetario, se oponían directamente a los principios y a las ideas proclamados en la Carta. No se había transformado a fondo el derecho internacional, sino que simplemente se le había adaptado a las nuevas circunstancias que caracterizaron la aparición de los supergrandes." BEDJAOU, M., *op. cit.*, p. 51.

⁴² "El FMI ha cambiado profundamente a lo largo del tiempo. Fundado en la creencia de que los mercados funcionan muchas veces mal, ahora proclama la supremacía del mercado con fervor ideológico. Fundado en la creencia de que es necesaria una presión internacional sobre los países para que acometan políticas económicas expansivas – como subir el gasto, bajar los impuestos o reducir los tipos de interés para estimular la economía – hoy el FMI típicamente aporta dinero sólo se los países emprenden políticas como recortar los déficits y aumentar los impuestos o los tipos de interés, lo que contrae la economía. Keynes se revolvería en su tumba se supiese lo que ha sucedido con su criatura." STIGLITZ, J. E., *op. cit.*, p. 37.

⁴³ "Las abiertamente restrictivas <<políticas de ajuste>> forzaron en un país tras otro retrocesos en educación y salud: en Tailandia, como consecuencia, no sólo aumento la prostitución sino que los gastos en el SIDA fueron recortados marcadamente, y lo que había sido uno de los programas de lucha contra el SIDA más exitosos del mundo padeció un serio revés." STIGLITZ, J. E., *op. cit.*, p. 111.

the two political and economic blocs (capitalism and socialism, market economy and planned economy).

This internationalization process was called "globalization", and today dominates and determines the "international order", whether economic or not. Significantly, in this sense, was the incorporation of China into the WTO in 2001⁴⁴.

Therefore, the international economic order today is characterized by increasing globalization and are the Bretton Woods institutions, the WTO and the OECD, in large part, that govern this process of globalization. As it develops, this same globalization process poses problems that reflect the absence of the Bretton Woods institutions of the initial ideals of the UN Charter and the internal contradiction of the UN system already mentioned⁴⁵.

The international economic order today suffers from so many problems that some would be able to call it "international economic disorder"⁴⁶. This was further increased in the last 30 years with the unstoppable development of multinational activities, including the illicit ones such as money laundering, corruption and international tax evasion.

The neoliberal/neoclassical proposal for the international economy was strengthened and settled, even more, from the late eighties and throughout the decade of the nineties. After the fall of the Berlin Wall, the establishment of the "Washington Consensus"⁴⁷,

⁴⁴ Note that, in tax matters: "Moreover, the decline of taxes on international trade with liberalization and the WTO as well as increased competition for foreign investment have moved international concerns from the bottom to the top of the tax policy action list in many countries. At the same time, in many countries, a new issue has risen to prominence on the fiscal menu as decentralization made the question of setting up adequate sub-national tax systems an increasing concern, not least in Latin America." BIRD, R. M., "*Taxation in Latin America: Reflections on Sustainability and the Balance between Equity and Efficiency*" – ITP Paper 306, Institute for International Business Joseph L. Rotman, School of Management, University of Toronto, Ontario, - 2003, in Web <http://www.rotman.utoronto.ca/iib/ITP0306.pdf> (30/09/2010), p. 13.

⁴⁵ In this way: STIGLITZ, J. E., *op. cit.*, p. 35.

⁴⁶ CARRILLO SALCEDO says that: "... en el capitalismo de 'casino' y en el contexto del juego de los poderosos en el mercado continuo de capitales, muchas veces parece más una 'Las Vegas global'.?"; y lo completa diciendo: "... el desorden establecido legitima las diferencias entre ricos y pobres, atribuyendo a los poderosos la facultad de perpetuar su superioridad y limitar de forma imperativa los horizontes físicos, culturales y económicos de los dominados". CARRILLO SALCEDO, J. A., *Soberanía ...*, *op. cit.*, p. 21/22.

⁴⁷ WILLIAMSON, who created the term "Washington Consensus" define it in this way: "...as originally conceived the Washington Consensus advised not simply the microeconomic liberalization (...) but also macroeconomic discipline and opening up (globalization)". WILLIAMSON, P., *The Washington Consensus and the Global Crisis*, Presentation at a conference sponsored by the Johns Hopkins School of Advanced International Studies and the Center for Global Development, "New Ideas in Development Finance after the Financial Crisis" April 22, 2009, © Peterson Institute for International Economics, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=1194> (16/09/2010). To go deep in the meaning of the term "Washington Consensus", by his creator, see: WILLIAMSON, P., *What Should the World Bank Think about the Washington Consensus?* Paper prepared as a background to the

incorporated and boasted, as basic postulates of economic, policies to be followed by the States⁴⁸: a balanced budget (through austerity and fiscal responsibility), liberalization of markets (and capital flows), and privatization of state enterprises (as form of reduced state intervention in the economy). For some, the "Washington Consensus" definitely separated the Bretton Woods institutions of the ideals of KEYNES, already isolated for a long time⁴⁹.

Seeking to address this "alienation" and claiming the role of human rights in the service of which should be the international economic order, the United Nations boosted, from the 90 years, a series of international conferences⁵⁰. Anyway, this effort didn't have pragmatism results and it is still merely theoretical propositions, made much more by lawyers and internationalists than by economists with a pragmatic view of the markets⁵¹.

Indeed, the current configuration of international economic order, further characterized by neoliberal postulates, probably will not change in the next ten or twenty years. This configuration is essential to prove the relationship between the international economic order, economic globalization, and international tax evasion, from a pragmatic point of view.

World Bank's World Development Report 2000 July 1999, © *Peterson Institute for International Economics*, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=351> (16/09/2010)

⁴⁸ "Las ideas e intenciones subyacentes en la creación de las instituciones económicas internacionales eran buenas, pero gradualmente evolucionaron con los años y se convirtieron en algo muy diferente. La orientación keynesiana del FMI, que subrayaba los fallos del mercado y el papel del Estado en la creación de empleo, fue reemplazada por la sacralización del libre mercado en los ochenta, como parte del nuevo "Consenso de Washington" – entre el IMF, el BM y el Tesoro de EEUU sobre las políticas correctas para los países subdesarrollados – que marcó un enfoque completamente distinto del desarrollo económico y la estabilización." STIGLITZ, J. E., *op. cit.*, p. 41. WILLIAMSON disagrees of STIGLITZ saying that: "...according to the alternative version espoused by Joe Stiglitz and apparently endorsed also by the background paper, the Washington Consensus was a neoliberal manifesto. But neoliberalism is normally considered to embrace such doctrines as monetarism, reduction of the progressive thrust of taxation, opposition to state action to redistribute income, and minimization of the role of the state, rather than just the reasonable liberalizing (micro) reforms mentioned in the background document. These additional doctrines never did command a consensus in Washington so I do not consider them part of a Washington Consensus." WILLIAMSON, P., *The Washington Consensus and the Global Crisis*, Presentation at a conference sponsored by the Johns Hopkins School of Advanced International Studies and the Center for Global Development, "New Ideas in Development Finance after the Financial Crisis" April 22, 2009, © *Peterson Institute for International Economics*, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=1194> (16/09/2010)

⁴⁹ STIGLITZ criticize very hard the IMF in this point. STIGLITZ, J. E., *op. cit.*, p. 40.

⁵⁰ Some examples: WORLD SUMMIT FOR SOCIAL DEVELOPMENT – A/CONF.166/9, (1995); MILLENIUM SUMMIT – Report of the Secretary-General – A/54/2000, (2000); INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT – A/CONF.198/11, (2002).

⁵¹ Either in the discussions into the Bretton Woods institutions, the changes on the globalization, or in the role of these institutions, didn't evolve, like explains WILLIAMSON in WILLIAMSON, J., *The Role of the IMF: A Guide to the Reports*, a paper commissioned by the Commonwealth Secretariat for presentation to a Conference on Developing

So, it's time to establish a concept of international tax evasion and see how this concept connects to the economic globalization phenomenon.

4 – A concept of international tax evasion.

The tax law, i.e., the set of rules governing the establishment and enforcement of taxes⁵², is currently present in many of the activities of daily life and, of course, connects with many other branches of law. It's also true that the tax law connects with political, economic and sociological assumptions that are inseparable to its full understanding and application⁵³.

Taking into account the initial goals of this paper, these assumptions have economic connection with the possibilities to the States to tax, that were developed especially as a result of the increased activities of world trade⁵⁴, the provision of international services, the integration and interpenetration of economies and the cooperation among the States⁵⁵, i.e., parallel to the development of the current world economic order, the economic globalization.

In this sense, the legal doctrine sustains the existence of an "International Tax Law"⁵⁶, whose object is any situation where there are triggering facts that are subject to taxation⁵⁷ by different States sovereignties, and whose content is a set of standards,

Countries and the Global Financial Architecture organized by the Commonwealth Secretariat and the World Bank in London on June 22-23, 2000, in Web <http://www.piie.com/publications/pb/pb.cfm?ResearchID=66> (09/16/2010).

⁵² In the original: "el conjunto de las normas que disciplinan el establecimiento y la aplicación de los tributos". FERREIRO LAPATZA, J. J., *Curso de derecho financiero español – vol. II, Derecho Tributario: parte general*, 23^a edición, Marcial Pons Ed. Jurídicas y Sociales S. A., Barcelona, 2004, p. 12.

⁵³ Friedman says that: "The major areas of governmental policy that are relevant to economic stability are monetary policy and fiscal or budgetary policy." FRIEDMAN, M., *Capitalism and Freedom*, The University of Chicago Press, Fortieth Anniversary Edition, Chicago, 2002, p.38. In the same way: ROSEMBUJ, T., *Elementos de derecho tributario*, Vol. I, PPU S. A., Barcelona, 1989, pp. 21 e 22.

⁵⁴ FERREIRO LAPATZA, J. J., *Curso de derecho financiero español – vol. I, Derecho financiero*, 23^a edición, Marcial Pons Ed. Jurídicas y Sociales S. A., Barcelona, 2003, p. 77.

⁵⁵ By the OECD: "For a global economy to succeed, governments must intensify their co-operation and provide international frameworks for the effective management of global issues. Taxation is no exception." OECD, *Towards global tax co-operation – progress in identifying and eliminating harmful tax practices*, Committee on Fiscal Affairs, Paris, 2000, p. 5.

⁵⁶ XAVIER, A., *Direito tributário Internacional do Brasil*, 5^a edição, Editora Forense, Rio de Janeiro, 2000, p. 83.

⁵⁷ To go deep in this concept, please see: BALEEIRO, A., *Direito Tributário Brasileiro*, 10^a Edição, Ed. Forense, São Paulo, 1996, p. 455; PEREIRA DE SOUZA, S. A. G., "Relações entre fato gerador e substituição tributária", *Revista Dialética de Direito Tributário* n° 48, São Paulo, 09/1999, pp. 136-143; PÉREZ DE AYALA, J. L.; and PÉREZ DE

national or international⁵⁸, relatives of the same situations.

Thus, this "International Tax Law" includes the rules about the incidence of a national tax law, with respect to a triggering fact potentially subject to two or more different State sovereignties (true rules for resolving conflict), as the rules of assistance and cooperation between these different State sovereignties, been irrelevant if these rules are international or domestic nature, since his character is defined, particularly, for its object⁵⁹.

The characterization of this "International Tax Law" is essential to establish the concept of "international tax evasion", since such characterization defines the legal scope of the concept proposed. A deep discussion about it, however, it's not necessary in the midst of a study of interactions between a factual conduct and the international economic environment⁶⁰.

More important is to identify the contours and essential requirements of such conduct in order to establish its theoretical concept and verify the applicability of this concept to the same alleged relationship with the current economic globalization.

In this sense, the concept of international tax evasion does not stick to a literally concrete definition of the conduct, cause this activity has different contours in the national systems. By the way, the concept must adjust the common theoretical formulations of the national systems, with the goal of establishing a wide sense (omnicomprehensive) about this phenomenon that is linked from the national laws. In fact, all national tax systems treat, in some different forms, the tax evasion, since living with it since the moment of emergence of the phenomenon of tax obligation⁶¹.

Therefore, in search of a concept of international tax evasion we must look for the

AYALA, M., *op. cit.*, p. 100; MARTÍN QUERALT, J.; LOZANO SERRANO, C.; and POVEDA BLANCO, F., *op. cit.*, p. 122; and FERREIRO LAPATZA, J. J., *Curso de derecho financiero español – vol.II, op. cit.*, pp. 55/67.

⁵⁸ See: XAVIER, A., *op. cit.*, p. 47, and BÜHLER, O., *Principios de Derecho Internacional Tributario*, Ed. de Derecho Financiero, Madrid, 1968, pp. 4/5.

⁵⁹ See GRAU RUIZ, M. A., *op. cit.*, p. 30, and XAVIER, A., *op. cit.*, p. 84.

⁶⁰ To go deep in this concept please see our PhD Thesis: PEREIRA DE SOUZA, S. A. G., "*El Problema de la Evasión Fiscal – un ámbito jurídico para la cooperación internacional*", PhD Thesis, published in the Department of International Law and Economy of the Universidad de Barcelona, 2008.

⁶¹ See: GIORGETTI, A., *op. cit.*, pp. 05/15; and MARTINEZ, J. C., *El fraude fiscal*, Ed. Fondo de Cultura Económica, México DF, 1989, p. 10.

conduct of the taxpayer who, somehow, be accomplished through international connections or taking advantage of the international context.

The issue of definition of "international tax evasion" is done according to the existence of different forms, legal or not (and according to a multiplicity of national tax systems), for which the taxpayer has the option to not comply with the obligation to pay tributes. So, the effort to establish a concept of "international tax evasion" must establish, first, the conduct of tax evasion, then check for the international aspects that lead to the creation of a concept of "international tax evasion."

There is a majority of the doctrine of tax law that defines the specific concept of tax evasion through its finer elements, namely the "illegal conduct" and the "concealment"⁶², under a criterion of temporality, in which is essential the time of the conduct of the taxpayer with respect to the completion of the the triggering fact.

In this way, there is a particular relevance in the relationship based in time that exists between the triggering fact and the birth of the obligation to pay tribute. Under this relationship, the simple occurrence in the social reality of the "fact" gives rise to the "obligation"⁶³, making it enforceable by the State, regardless of the achievement of other elements that quantify or determine the value corresponding to this "obligation" (as setting of rates, types or calculation basis)⁶⁴. Hence, the obligation of paying taxes comes at the exact moment of the occurrence of the triggering fact.

⁶² In Spain GAMAZO CHILLÓN defines how "aquella forma voluntaria e ilegal de reducir o evitar la carga tributaria mediante la ocultación, total o parcial, de la base imponible" (GAMAZO CHILLÓN, J. C., "Aplicación en España de la legislación comunitaria en materia de evasión fiscal", *Revista de Estudios Europeos*, número 07, Ed. Instituto de Estudios Europeos – Universidad de Valladolid, Valladolid, 1994, p. 95), also in Spain ROSEMBUJ says that "se traduce en el comportamiento ilícito del particular incumpliendo el deber de prestación patrimonial que origina la realización del hecho imponible, donde el núcleo de la conducta transgresora no es otro que la ocultación que impide la determinación de la deuda tributaria". ROSEMBUJ, T., *La simulación y el fraude de ley en la nueva ley general tributaria*, Marcial Pons Ed. Jurídicas y Sociales S. A., Barcelona, 1996, p. 11.

⁶³ In Brazil: "... o fato concreto, localizado no tempo e no espaço, acontecido efetivamente no universo fenomênico, que – por corresponder rigorosamente à descrição prévia, hipoteticamente formulada pela hipótese de incidência legal – dá nascimento à obrigação tributária. Cada fato imponível determina o nascimento de uma obrigação tributária." ATALIBA, G., *op. cit.*, p. 68.

⁶⁴ That's the concept, for example, of the US Internal Revenue Service: "**tax evasion**—The failure to pay or a deliberate underpayment of taxes. **Tax evasion** is illegal. One way that people try to evade paying taxes is by failing to report all or some of their income. Sometimes people do not report income gained through illegal activities such as gambling and selling stolen goods. Other times they do not report all the tips they collect or the money they earn through legal activities such as garage sales, baby-sitting, tutoring, or yard work. Such money-making activities are part of the **underground economy**, which exists as a way to avoid paying taxes. If taxpayers fail to pay what officials say they owe, the IRS can assess a penalty, in addition to collecting the back taxes." US – IRS, *Understanding taxes*, Worksheet: The Difference Between Tax Avoidance and Tax Evasion Theme 1: Your Role as a Taxpayer, Lesson 3: The Taxpayer's Responsibilities, in Web http://www.irs.gov/app/understandingTaxes/teacher/whys_thm01_les03.jsp.

Thus, in the specific concept of "tax evasion" the "fact" that gives rise to the obligation to pay tribute (the triggering fact) occurs and an unlawful conduct (later attributed to the taxpayer) hides this fact, or its tax basis. It is precisely for this reason that the specific concept of "tax evasion" is distinguished from the specific concept of "tax avoidance"⁶⁵.

This second kind of conduct tries to make that the "triggering fact" does not occur through formal legal arrangements created lawfully only with this purpose, what many calls "tax planning"⁶⁶ or "save option"⁶⁷. So there are two criterials that distinguish "tax evasion" from "tax avoidance": the moment of the conduct with respect to the triggering fact, and the character of lawful or unlawful acts carried out in the consummation of this conduct⁶⁸.

Thus, the specific concept of "tax evasion" brings with it an explicit charge of illegality, while the specific concept of "tax avoidance" does not imply in it⁶⁹.

From an international law point of view this difference is important since the "explicitly illegal conducts", or crimes themselves, may find treatment by international instruments addressed to mutual legal assistance in criminal matters, such as the international conventions against organized crime. In turn, the behavior that is not explicitly illegal could only find treatment by the instruments of international cooperation at the

⁶⁵ However, that's not the concept of the US Internal Revenue Service. What we call "tax avoidance" it's, for the US Internal Revenue Service, the "**abusive tax evasion schemes**". See: "**tax avoidance**—An action taken to lessen tax liability and maximize after-tax income. **Tax avoidance** is perfectly legal. IRS regulations allow eligible taxpayers to claim certain deductions, credits, and adjustments to income. For instance, some homeowners can claim a deduction for interest they pay on a home mortgage. Working parents may be able to claim a credit for child-care expenses. There are also deductions based on the number of family members. These are only a few of the many ways people can legally limit the tax they pay. However, the taxpayer must be able to prove that he or she qualifies. Many people pay more federal income tax than necessary because they misunderstand tax laws and fail to keep good records." US – IRS, *Understanding taxes*, Worksheet: The Difference Between Tax Avoidance and Tax Evasion Theme 1: Your Role as a Taxpayer, Lesson 3: The Taxpayer's Responsibilities, in Web http://www.irs.gov/app/understandingTaxes/teacher/whys_thm01_les03.jsp.

⁶⁶ In this way: ROSEMBUJ, T., *La simulación y ...*, op. cit., p. 14; and TÔRRES, H., *Direito tributário internacional: planejamento tributário e operações transnacionais*, Ed. Revista dos Tribunais, São Paulo, 2001, pp. 43 e 44.

⁶⁷ FERREIRO LAPATZA, J. J., *Curso de derecho financiero español – vol. I*, op. cit., p. 139.

⁶⁸ To go deep in this discriminations please see: PONTES, H. C., *O princípio da proporcionalidade e o direito tributário*, Editora Dialética, São Paulo, 2000, p. 109; ULHOA CANTO, G., "Las relaciones económicas internacionales y la tributación", *Administración, política y enfoques cooperativos entre las administraciones tributarias para desestimar la elusión y evasión*, XXII Asamblea General del CIAT, Ministerio de Economía y Hacienda, Madrid, 1989, pp. 37/39; BORGES, A. M., "Formas de minimização do encargo tributário nas operações internacionais e planejamento tributario internacional", *Revista dos Procuradores da Fazenda Nacional*, ano 6/7, numero 6/7, Fortium Editora, Brasília, 2004/2005, pp. 26/28; and SCARTEZZINI, A. M. G. F., "Normas anti-elisão e sigilo bancário", *Revista de Direito Bancário e do Mercado de Capitais*, n° 31, Ed. Revista dos Tribunais, São Paulo, 2006, p. 30.

⁶⁹ In this way: FERREIRO LAPATZA, J. J., *Curso de derecho financiero español – vol. I*, op. cit., pp. 140/141.

administrative level⁷⁰.

However, is it possible to say that the behavior of escaping the general duty to pay taxes and hide an effective ability to pay, through “legal arrangements” created only for the purpose of not paying taxes that would be due (if there was no this “legal arrangements”) also brings a charge of implicit unlawful⁷¹?

In fact, much of the tax legal doctrine focuses its efforts to argue for, or against, the explicit legality and implicit unfairness of the "tax savings" realized, either within the tax evasion, either within the tax avoidance, which would determine the extent or otherwise of the concept of "international tax evasion." Such discussion, however, is not applicable to this study. Interest only to verify that both, tax evasion and tax avoidance, give taxpayers the option of not fulfilling the obligation to pay tax and, accordingly, represent a loss of revenue that affects national budgets.

Given the above consideration and the initial objectives of this paper, it makes no sense here to talk about the various lines of argument and legal dogmatic aimed at building a legal concept of tax evasion more or less broad.

We take on, then, the assumption that this concept should be broad (omnicomprehensive), precisely to enable its comparison with the real environment of a globalized economy and determine its interaction with that environment⁷². In truth, by this large concept the

⁷⁰ GRAU RUIZ, M. A., *op. cit.*, p. 187.

⁷¹ Or, see what the US-IRS does. For then it's an explicit case of illegality, by the “abuse of tax evasion schemes”. For the US-IRS what matters is the purpose (substance) and not the form and it's supported by the US Supreme Court: **“I. Substance - Not Form - Controls Taxation:** The Supreme Court of the United States has consistently stated that the substance rather than the form of a transaction is controlling for tax purposes. Gregory v. Helvering, 293 U.S. 465 (1935), XIV-1 C.B. 193; and Helvering v. Clifford, 309 U.S. 331 (1940), 1940-1 C.B. 105 - The court determined abusive trust arrangements may be viewed as sham transactions, and the IRS may ignore the trust and its transactions for federal tax purposes. Markosian v. Commissioner, 73 T.C. 1235 (1980) - Held that the trust was a sham because the parties did not comply with the terms of the trust, and the supporting documents and the relationship of the grantors to the property transferred did not differ in any material aspect after the creation of the trust. Zmuda v. Commissioner, 731 F.2d 1417 (9th Cir. 1984) - The income and assets of the business trust, the equipment in the equipment trust, the residence in the family residence trust, and the assets in the foreign trust were all determined to belong directly to the owner. Lucas v. Earl, 281 U.S. 111 (1930) - Stated an assignment of income does not shift the incidence of taxation - the income remains taxable to the one who actually earned it.” US – IRS, *Abusive Trust Tax Evasion Schemes - Law and Arguments (Section I)*, in Web http://www.irs.gov/businesses/small/article/0_id=106542.00.html . In the same way: GIORGETTI, A., *op. cit.*, p. 3 (Spain) and GRECO, M. A., *Planejamento fiscal e interpretação das leis tributárias*, Editora Dialética, São Paulo, 1998, p. 44 (Brazil).

⁷² About the globalization and the tax environment: “In the "old days"—say before 1970—international commerce was largely confined to merchandise trade; multinational enterprises (MNEs) were a modest part of the world economy; and most individuals consumed and invested at home. In this setting, legislative bodies could set the tax rates on different types of transactions and agents without worrying too much about a disappearing tax base, or the balance between benefits and burdens for different categories of firms and households. The old days are gone forever. The

countries can work together to have an overview of the problem (the losses) and, after that, by internal means and legal system, decide what is lawful or unlawful.

Thus, the establishment of the concept of “international tax evasion” is a construction of a “tool”, that must contain in itself the specific concepts of "tax evasion" and "tax avoidance" referenced above, as well as elements of internationality, in proof of the initial concern of this work.

In fact, even as a consequence of the processes of internationalization of trade and economies synthesized previously, taxpayers are given the opportunity to use systems or international transactions in their attempts to escape the tax due, in one or more countries, what in fact incapacitates the initiatives of the States to combat this conduct, an exclusively internal efforts⁷³.

In this sense, the definition of international tax evasion has its axis in an explicit aspect of internationality: the use of international routes to carry out the conduct, i.e., the use of the international scene through commercial or financial transactions that transcend the boundaries of more than one country and have as main objective the benefits in terms of avoiding or evading taxes that would normally be paid.

The use by taxpayers of international tax planning, along with the existence of tax havens with a very large bank secrecy and whose activities are problems to be controlled, since they also are related to money laundering, shows the real possibility that many times the commercial or financial transaction which crosses the borders of more than one country have the primary purpose of obtaining tax advantages in terms of

enhanced mobility we have already seen between 1970 and 2000 only previews greater mobility in the next thirty years.” HUFBAUER, G. C., *Tax Policy in a Global Economy*, Paper for the American Institute of Contemporary German Studies, February 2000, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=365> (09/16/2010).

⁷³HUFBAUER gives an exemple: “About a decade ago, the Internal Revenue Service proposed a system of withholding at source, to cope with enormous underreporting of interest and dividend income. The proposal never made it through Congress, and instead was replaced by a system of backup withholding for proven tax cheats. Finally, since the 1960s, the U.S. Treasury Department has sought to end "deferral," the compromise under which the active foreign income of U.S.-controlled subsidiary firms incorporated and operating abroad is not taxed until repatriated as dividends to the U.S. parent firm. The U.S. Treasury has made inroads on "deferral", but the goal remains elusive.” HUFBAUER, G. C., *Tax Policy in a Global Economy*, Paper for the American Institute of Contemporary German Studies, February 2000, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=365> (09/16/2010).

avoidance or evasion, concealment of assets, income, or relevant information⁷⁴.

Indeed, there are so many ways to perform international transactions with the said purposes that would be too complex to pass on to describe each of them. The goal here is not to establish an exhaustive “list of procedures” that would fit in the concept under construction but, instead, establish a open concept that can bring together activities and transactions that were not even conceived under the same broad concept of international tax evasion. Nevertheless, it’s possible to mention some basic classes of such transactions.

Let’s start with the so-called "linked operations" between headquarters companies and subsidiaries located in different States, which in simple transactions can use their appropriate values to the tax burden of each country, only to put the profits in the State with a smaller charge (rate) tax, while put in the other State themselves spending (expenses)⁷⁵.

The same is true with the so-called "transfer pricing": the decrease of the price artificially or between groups of companies under the same or common control, located in different States, with respect to the sale of goods, technology transfer, payment for services or payment of interest on loans within the group, always with tax implications⁷⁶.

⁷⁴ In the same way: COLLINS, M. H., “Evasión y elusión de impuestos a nivel internacional”, en *Administración, política y enfoques cooperativos entre las administraciones tributarias para desestimar la elusión y evasión*, XXII Asamblea General del CIAT, Ministerio de Economía y Hacienda, Madrid, 1989, pp.151-175, pp. 156/157, and BRASIL, *Tributação da renda no Brasil pós-real*, Secretaria da Receita Federal, Brasília, 2001, p. 85.

⁷⁵ Also called “turn-key” transactions (COLLINS, M. H., *op. cit.*, p. 159). In the same way: RODRIGUES DO AMARAL, A. C. (coordenador), *Direito do comercio internacional – aspectos fundamentais*, Edições Aduaneiras Ltda./Lex Editora S.A., São Paulo, 2004, pp. 148/153, and BRASIL, *op. cit.*, p. 85.

⁷⁶ TANZI explains: “A third important termite originates in transactions that take place between different parts of the same multinational enterprises (i.e., intra-company transactions) located in different countries. Because these transactions are internal to a multinational company, they require the use of “transfer prices” that is of prices at which one part of the enterprise, located in a given country, “buys” products or services from other parts of the same company located in other countries which have different tax systems and tax rates on the incomes of the companies. Being inputs for final products, the products or services bought and sold may not be traded in the open market. Therefore, there may not exist market or “arm’s length” prices that can be used as references. Problems arise especially (a) with inputs that are made specifically for a final product (say a particular jet plane); (b) with use of copyrights, trademarks and patents for which a value must be determined; (c) with the allocation of headquarters R & D or other fixed costs; (d) with interest on loans made from one part to another part of a multinational corporation for which a determination of a market rate is difficult. The determination of these costs or of the prices of the goods and services traded within the enterprises is often difficulty and arbitrary. It lends itself to manipulations by enterprises aimed at showing more profits in countries where nominal tax rates on enterprise profits are low (say Ireland), and less profit in countries where the rates are high (say Germany). The strategic use of “transfer prices” by enterprises can significantly reduce the total taxes paid by multinational enterprises creating major problems for tax administrators.” TANZI, V., “*The Role of the State and Public Finance in the Next Generation*”, Las finanzas

Another example is related to the use of bilateral agreements against double taxation. By this way, taxpayers seek tax-exempt devices in these international instruments in order to establish a sequence of operations, including the use of third countries, which in the end, aren't taxed in any country. In this class of transactions, called "*treaty shopping*"⁷⁷, the element of internationality is explicit and tied to typical tools of international tax law which are intended to establish a tax that is divided between the States fairly, but not a "zero taxation".

Indeed, in the examples the conduct exceeds the borders of one State, i.e., the actions are made from two or more different national legal systems, serving up as "rules of coverage" respect to each other. Also the international financial system is used for the movement of capital employed, and the agreements that establish the tax relationship between States (or even lack thereof) are used as tools to build legal frameworks that hinder the unilateral efforts of these same States.

The element of internationality sought to build the concept of international tax evasion, then, is to use two or more different national jurisdictions for the conduct, strengthened by means of the international financial system or the tax agreements concluded between States.

So, the definition of "international tax evasion" that matters for this paper brings together all voluntary conduct committed by individuals (taxpayers), whether lawful or not in a specific national system of law, but that brings to the taxpayer the possibility to not comply with the obligation to pay tax, representing a loss of revenue for States, enhanced by the use of networks or international systems, specially others countries laws and the tax agreements concluded between States.

públicas y el pacto fiscal en América Latina, Documentos y ponencias presentados en el XX Seminario Internacional de Política Fiscal, Santiago de Chile, 28 al 31 de enero de 2008, Ricardo Martner (editor), in Web http://www.eclac.cl/ilpes/publicaciones/xml/4/35174/SYC_54.pdf (09/30/2010).

⁷⁷ It's also called "*cross-border*" or "*international tax arbitrage*" by BORGES, A. M., *op. cit.*, pp. 32/34.

5 - The relationship between international economic order (globalization) and international tax evasion.

Once some assumptions regarding the international economic order and the emergence of economic law are outlined, as well as some considerations of legal doctrine regarding the concept of international tax evasion, it's necessary to establish the relationship between the themes addressed in order to discern the impact of economic globalization on national laws, specifically in the field of tax law aimed to control tax evasion.

The concept of international tax evasion outlined has made clear the connection of the conduct to escape the duty to pay taxes with the use of international networks and international financial systems developed by economic globalization, especially the use of the various national legal systems and the treats between the States. Therefore, such conduct will always be a tax loss for one or all States whose legal framework or treats were used⁷⁸. This tax loss, that we call "international tax loss" is imposed to States, i.e., it's the tax loss, or revenue, with "international economic" content⁷⁹.

It means that a monetary value that probably would enter a particular State (given that in this State was originally developed the economic activity that provided this right of revenue) is moved out of their borders, going into another State, or not, but determining the possibility of a different division of the product of the international labor and international trade, which will always have potential impact on the budget capacity of the States involved.

Indeed, severe or systemic losses of revenue can weaken stability, or the ability of the State budget, and thus compromising the ability of the government to meet its overall objectives in relation to its citizens. The treatment of such losses in the domestic sphere

⁷⁸ HUFBAUER gives an example: "It is thought that about three million civilian Americans live outside the United States, but only about 300,000 submit tax returns. On a worldwide basis, interest, dividends and capital gains are substantially underreported and account for a major portion of the tens of billions of dollars of "errors and omissions" in national balance of payments accounts." HUFBAUER, G. C., *Tax Policy in a Global Economy*, Paper for the American Institute of Contemporary German Studies, February 2000, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=365> (09/16/2010).

⁷⁹ "Like the ocean and the atmosphere, the "world tax base", is thus becoming a kind of "commons", a common resource without clearly established property rights, that, to some extent, all countries can try to exploit to their advantage and to the potential detriment of other countries." TANZI, V., *The Role of the State and Public Finance in the Next Generation*", Las finanzas públicas y el pacto fiscal en América Latina, Documentos y ponencias presentados en el XX Seminario Internacional de Política Fiscal, Santiago de Chile, 28 al 31 de enero de 2008, Ricardo Martner (editor), in Web http://www.eclac.cl/ilpes/publicaciones/xml/4/35174/SYC_54.pdf (09/30/2010), p. 17.

is thus already sufficiently complex and troubling to the National Tax Administrations. Tax losses with international economic content, then, come to deepen and worsen the problem pointed⁸⁰.

We already demonstrated that the economic globalization has its basis in: economic stability, reachable through a balanced budget and controlled spending; liberalization of international capital flows, through the absence of its regulation; and privatization of State enterprises (as a form of reduced State intervention in the economy). All these measures were encouraged by the economic international institutions that run globalization, such as the IMF, WB, WTO and OECD. The first two of these goals of international economic globalization, are the elements of connection between it and international tax evasion.

Indeed, the budgetary stability is extremely relevant to the governance of a Country and its economic development. During the last 50 years of the twentieth century the major effort of the IMF and World Bank was to emphasize it. Undoubtedly, this effort led to the concept of stability linked to the States' ability to revenue and the relationship of this ability to the level of spending in the same State.

In this sense, the "balanced budgets of the State" is connected to its own tax policy⁸¹, its domestic tax law and its enforcement, which establishes its chances of revenue and the resulting capacity of spending and investment. Moreover, the budgetary stability is relevant to the possibility of realization of innumerable State activities, specially for developing or emergent States.

In these States, any deviation or loss of revenue may pose in risk the implementation of

⁸⁰ "Lawyers and investment bankers can with relative ease convert equity to debt, business profits to royalties, leases to sales, and ordinary income to capital gains--or the other way around. Much of the traditional tax regime for taxing cross-border transactions rests on a stylized set of facts: (i) small flows of cross border investments; (ii) relatively small numbers of companies engaged in international operations; (iii) heavy reliance on fixed assets for production; (iv) relatively small amounts of cross-border portfolio investments by individuals; and (v) minor concerns with international mobility of tax bases and international tax evasions. But all this has now changed, at least to some degree." Bird, R. M., "Taxation in Latin America: Reflections on Sustainability and the Balance between Equity and Efficiency" – ITP Paper 306, Institute for International Business Joseph L. Rotman, School of Management, University of Toronto, Ontario, - 2003, in Web <http://www.rotman.utoronto.ca/iib/ITP0306.pdf> (09/30/2010), p. 48.

⁸¹ By TANZI and ZEE point of view: "...determining the optimal tax level is conceptually equivalent to determining the optimal level of government spending. Unfortunately, the vast literature on optimal tax theory provides little practical guidance on how to integrate the optimal level of tax revenue with the optimal level of government expenditure." TANZI, V., y ZEE, H., *Tax policy for developing countries*, IMF, Washington, 2001, p. 3.

development policies⁸², and even affect the degree of effectiveness of certain human rights⁸³. The typical example is the effort undertaken by some States to reduce poverty as a way for development, and the need for resources to fight poverty.

Brazil, for example, only in its direct distribution of income program (the "Bolsa Familia"), served nearly 11 million families around the Country in the years 2008 and 2009, spending the annual budget of around 10.5 billion "reais" in 2008, and around 11.4 billion "reais" in 2009. In 2010 the forecast is for spending of around 13.13 billion "reais", with an expected attendance of 12.7 million households, i.e., approximately US\$ 7 billion (considering the change US\$ 1.00 = R\$ 1,80)⁸⁴.

In this sense, the improvement of tax revenue, reducing the effective international tax evasion, improves the budgetary stability and is also important in seeking to achieve the necessary resources to face the issue of poverty, making the connection between the budgetary stability and tax policy in order to achieve social development⁸⁵.

Thus, there is a close connection between a balanced budget and tax policy of States, what means also a clear connection with the defense of this same tax policy against tax evasion⁸⁶, especially in its goal for revenue and especially in the international field. Given that the budgetary stability is a goal that has been encouraged by the Bretton Woods institutions, particularly since the "Washington Consensus", we can conclude

⁸² In the same way: "... state in the third world plays a major role in economic development, not only in laying the foundations of infrastructure, but also in owning and controlling wide range of industries and services. Given the scale of this involvement it follows that any significant diversion of public resources into private sphere is likely to have far-reaching consequences for overall economic and social development." THEOBALD, R., *op. cit.*, p. 127.

⁸³ THEOBALD, again, connecting the discussion with the evil effects of the corruption: "Not only this, regimes based heavily on the distribution of spoils among hegemonic groups are invariably characterized by a marked degree of mass manipulation and repression. ..., there seems to be a strong inverse relationship between level of corruption and respect for human rights. Accordingly corruption is anti-democratic in two senses: if corruption is the primary form of political influence then by definition only the wealthy and the well-connected have it. Secondly, corrupt regimes are invariably ones in which basic democratic rights are minimal." THEOBALD, R., *op. cit.*, p. 130.

⁸⁴ In Web: www.mds.gov.br.

⁸⁵ In the same way: IMF – WORKING PAPER WP/00/35, *Tax policy for emerging markets: developing countries*, Washington, 2000.

⁸⁶ By the words of TANZI: "The implications of these developments for the countries' tax systems and the economic role of the states are still not fully understood by policymakers or economists. The clear and limited role of the state that was identified a hundred years ago by classical economists is giving rise to a much more complex and much less well-defined role. Increasing evidence suggests that the developments described above are also creating growing difficulties for the tax administrators of many countries and opportunities for a few of them. As a consequence, they are raising questions about the optimal role of the state in the current and especially future and more globalized economies." TANZI, V., "The Role of the State and Public Finance in the Next Generation", Las finanzas públicas y el pacto fiscal en América Latina, Documentos y ponencias presentados en el XX Seminario Internacional de Política Fiscal, Santiago de Chile, 28 al 31 de enero de 2008, Ricardo Martner (editor), in Web http://www.eclac.cl/ilpes/publicaciones/xml/4/35174/SYC_54.pdf (09/30/2010), p. 16.

that the budget “imbalance” of one or more States affects overall the World economic stability.

That was proved by the recent global financial crises, such as the Asian, the Mexican, the Russian and the South American crisis⁸⁷, not counting the current global financial crisis that began in 2008, that at every sigh of recovery is feed back again by budget deficits in countries like Portugal, Ireland, Greece or Spain (called “PIGS” by the market).

Therefore, international tax evasion has been a factor that affects the States’ budgetary stability, has also connection with the stability of the current international economic order.

Let’s pass to the second basis of the economic globalization, the liberalization of international capital flows, through the absence of its regulation. This point found in the IMF, World Bank and the OECD its strongest supporters and, especially after the "Washington Consensus", was proposed and encouraged by these institutions in a general way to all countries of the international community.

The liberalization of capital flows and the increase in multinational activities, legal or not, have virtually crippled the States to respond to the same level of development, doesn’t matter if it would be to regulate, to repress or to tax these activities.

In fact, the two phenomena above mentioned also weakened the ability of national governments to control their own budgets and their capital investment, since it reduced the income tax for foreign investors as a way to not scare away these same investors⁸⁸. This fact reduced the States revenue and, also, determined an increase of harmful tax competition⁸⁹, what indicates other connection between economic globalization and international tax evasion.

⁸⁷ STIGLITZ, J. E., *op. cit.*, pp. 66.

⁸⁸ Documentos Oficiales de la ONU – Departamento de Asuntos Económicos y Sociales – ST/ESA/250, (1997), pp. 56/57.

⁸⁹ In this way: OECD, *Harmful tax competition – an emerging global issue*, Committee on Fiscal Affairs, Paris, 1998; OECD, *Towards global tax co-operation – progress in identifying and eliminating harmful tax practices*, Committee on Fiscal Affairs, Paris, 2000; and OECD, *The OECD’s project on harmful tax practices: the 2001 progress report*, Committee on Fiscal Affairs, Paris, 2001.

By other hand, the liberalization of capital flows has increased the possibilities of new forms of international tax evasion⁹⁰: 1- by the use of available international instruments of the international financial system for the rapid transfer of funds, developed further more with new technologies⁹¹, and; 2- by the multiplication of mechanisms for international tax planning, which would be impossible without this liberalization. These two facts also prove the connection between tax evasion and the current economic globalization.

In spite of this close connection between the tax policies, the liberalization of capital flows and budgetary stability, unfortunately the scope of taxation has been marginalized by the Bretton Woods Institutions⁹². However, the taxation could establish an alternative to the controls of capital flows, by imposing taxes on outputs of "hot money" (that money that only uses the international economic order like a "casino," without contributes effectively to economic development of any State), as did Malaysia during the East Asian crisis⁹³.

⁹⁰ "When people face high tax rates, or an unfriendly tax climate in today's environment, they may: (a) "vote with their feet", thus moving to a friendlier fiscal environment, as long as the ceteris paribus condition holds; (b) "vote with their portfolio", by sending their financial assets abroad, to safer and lower taxes jurisdictions; (c) remain in the country, but exploit more fully tax avoidance opportunities; and (d) engage in, or increase, explicit tax evasion. Globalization and tax competition are making it easier for individuals and enterprises to exploit these options." TANZI, V., "*The Role of the State and Public Finance in the Next Generation*", Las finanzas públicas y el pacto fiscal en América Latina, Documentos y ponencias presentados en el XX Seminario Internacional de Política Fiscal, Santiago de Chile, 28 al 31 de enero de 2008, Ricardo Martner (editor), in Web http://www.eclac.cl/ilpes/publicaciones/xml/4/35174/SYC_54.pdf (09/30/2010), p. 17.

⁹¹ "The day is long past when a normal citizen could understand, and easily choose from, the financial instruments in which he/she invested savings. New financial instruments are designed by extremely clever and highly paid individuals and at times are specifically designed to avoid (if not evade) paying taxes. In the United States this has allowed some billionaires to pay tax rates on their incomes that are much lower than the rates paid by their drivers. As a consequence, it is becoming more difficult for the employees of tax administrations (who have normal trainings and modest salaries) to keep up with these developments." TANZI, V., "*The Role of the State and Public Finance in the Next Generation*", Las finanzas públicas y el pacto fiscal en América Latina, Documentos y ponencias presentados en el XX Seminario Internacional de Política Fiscal, Santiago de Chile, 28 al 31 de enero de 2008, Ricardo Martner (editor), in Web http://www.eclac.cl/ilpes/publicaciones/xml/4/35174/SYC_54.pdf (09/30/2010), p. 19.

⁹² "... otros aspectos han sido claramente marginados de la agenda actual: la movilidad de la mano de obra; las normas internacionales sobre tributación, especialmente sobre el capital, esenciales para garantizar la tributación adecuada de este factor de alta movilidad; la formulación de normas auténticamente internacionales sobre competencia y códigos de conducta aplicables a las empresas multinacionales, y el financiamiento compensatorio para asegurar la incorporación de aquellos países y grupos sociales que tienden a quedar rezagados en el proceso de globalización." OCAMPO, J. A., "Retomar ...", *op. cit.*, p. 10.

⁹³ "Como los rápidos flujos de capitales entrando o saliendo de un país provocan grandes perturbaciones, generan los que los economistas llaman <<grandes externalidades>> – efectos sobre otras personas corrientes no involucradas en esos flujos de capital –. Tales flujos dan pie a masivas sacudidas en la economía en su conjunto. El Gobierno tiene el derecho, incluso el deber, de tomar medidas para lidiar con esas sacudidas. En general los economistas piensan que las intervenciones basadas en el mercado, como los impuestos, son más efectivas y surten menos efectos colaterales adversos que los controles directos, y así en el Banco Mundial recomendamos a Malasia eliminar los controles directos e imponer un impuesto de salida. Asimismo, el impuesto podía ser reducido gradualmente, con lo que no habría apreciables conmociones cuando las intervenciones fueran finalmente suprimidas." STIGLITZ, J. E., *op. cit.*, p. 162.

Thus, the budgetary stability of States and the liberalization of international capital flows, as typical elements of policies driven by economic globalization, under increasing integration of national economies, have a clear connection with the problems of tax policy, and of course with international tax evasion, which were traditionally considered topics as internal problems of States⁹⁴, without repercussion or international relevance.

But how can we connect the tax evasion with the economic law that we discussed in the beginning of this paper?

First, we must see that economic globalization improved the development of the economic law, like we said before: the emergence of economic law was demanded by the needs of economy regulation and the establishment of policies for economic planning, which arise in Public Society as a whole and ultimately be conveyed through the State activity, trying the concretization of such regulation and government policy. These needs were especially strong after the World War II and during the whole process of the established globalization.

One of the principal issues of the economic law is the preservation of the market competition, i.e., make real the rights of property, private initiative and free competition, facing the concentration of private power, to keep these assumptions in the common interest of all participants of the system. In true, economic law came to regulate Economy in the national States, given legal or constitutional objectives to the market system, but also like a way to preserve the free market system from its own failures and other more interventionists systems.

In this way, the enforcement of tax law, fighting tax evasion, helps to prevent distortions in the competition, because tax evasion can works like a kind of “externality⁹⁵” that disturb the free competition in market by given competition

⁹⁴ HUFBAUER says that: “Faced with these challenges, the taxman's first reaction is to devise clever technical fixes, implemented on a national basis, designed to prevent tax base erosion. His next reaction is to think about international tax agreements that might enable member countries to shore up their systems. Further down the taxman's list are responses that would adjust the tax system to the new realities of the international economy.” HUFBAUER, G. C., *Tax Policy in a Global Economy*, Paper for the American Institute of Contemporary German Studies, February 2000, in Web <http://www.pii.com/publications/papers/paper.cfm?ResearchID=365> (09/16/2010).

⁹⁵ By definition, externalities are “the harmful or beneficial side effects of market activities that are not fully borne or realized by market participants”. BROWNING, E. K. and ZUPAN, M. A., *Microeconomics: Theory & Applications*, John Wiley & Sons Inc., US, 2009, p. 572.

advantage to the “tax evasor”, compares with the other players of market that effectively pays the taxes. It’s the role of the “underground economy”⁹⁶.

The “underground economy”, by definition, “includes both legal activities hidden from the government record keepers (to avoid payment of taxes or compliance with regulations, for example) and illegal activities such as drug dealing, prostitution, and (in some places) gambling”⁹⁷. So, it means that there is an output from the market of goods and services that is not legal, or paying taxes, with a clear advantage against the legal firms that pays taxes and can’t support the low prices that illegality brings to the consumer⁹⁸.

Could we measure this output? How the size of this “underground economy” can really works like a relevant externality of the market? Can we estimate the taxes losses of that “underground economy”?

We can have an idea looking for some data that came from Brazil. Let’s see the Brazilian GDP⁹⁹:

GDP

| Year | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|-----------------|---------|---------|---------|----------|----------|----------|
| Million US\$ | 553 603 | 663 783 | 882 439 | 1088 767 | 1366 544 | 1636 022 |

GDP per capita

⁹⁶ About it: “Given how difficult life is for companies that pay taxes and comply with labor laws, it is unsurprising that Brazil has a large informal economy. Its black economy is a place of wonderful invention. ... But large Black economy is bad for a country, and normally it fades away with rising affluence. ... Thus many companies in the formal economy find themselves squeezed between a set of rules that makes it expensive for them to operate, and competition from informal competitors who do not abide by those rules.” THE ECONOMIST, *The self-harming state*, London: Nov 14, 2009. Vol. 393, Iss. 8657; pg. 14.

⁹⁷ And the autors complete: “Government statisticians regularly adjust GDP figures to include estimates of underground economy’s size”. ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 28.

⁹⁸ And this is a vicious circle, like explain SCHNEIDER and ENSTE: “Transactions in the shadow, rather than the official, economy keep state revenues lower than they otherwise would be, and in turn reduce governments' ability to provide goods and services. Governments may respond by raising individual and corporate tax rates. Higher taxation—especially when combined with a perceived deterioration in the quality of public goods and public administration, or under investment in public infrastructure—motivates firms and workers even more strongly to move into the shadow economy, perpetuating the cycle.” SCHNEIDER, F. and ENSTE, D. “*Hiding in the Shadows: The Growth of the Underground Economy*”, International Monetary Fund, 2002, <http://www.imf.org/external/pubs/ft/issues/issues30/index.html> (02/10/2010).

⁹⁹ Source: Banco Central do Brasil and IBGE <http://www.bcb.gov.br/?INDECO>

| Year | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|------|----------|----------|----------|----------|----------|----------|
| U\$ | 3 097,23 | 3 665,17 | 4 811,99 | 5 867,33 | 7 282,73 | 8 628,22 |

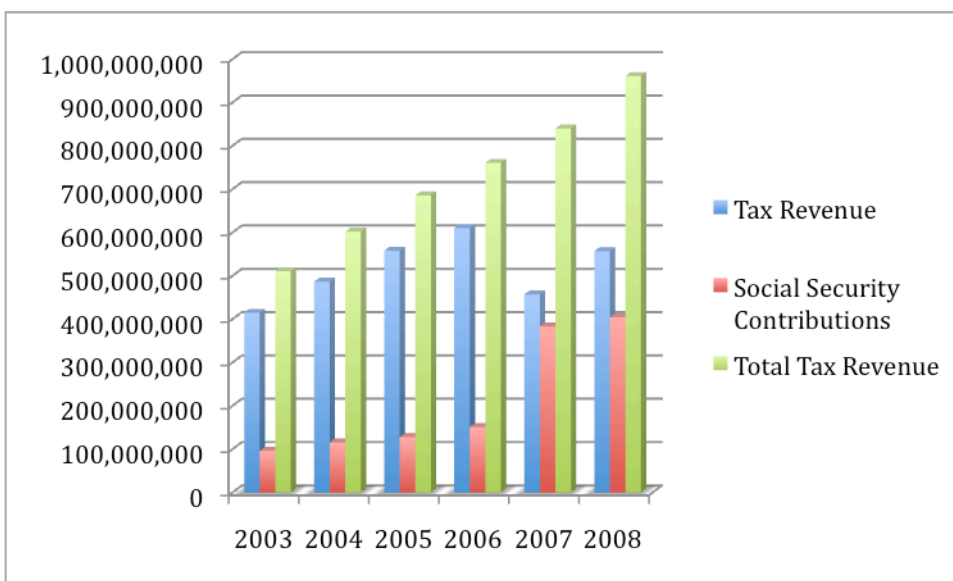
GDP (in Reais)

| Year | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|-------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Million R\$ | 2 490 177,93 | 2 632 424,17 | 2 715 600,18 | 2 823 436,84 | 2 995 028,34 | 3 148 854,04 |

Now, let's see the Brazilian revenue data for the same average years¹⁰⁰:

Reais (Thousand)

| | Tax Revenue | Social Security Contributions | Total tax revenue |
|------|-------------|-------------------------------|--------------------|
| 2003 | 414.610.765 | 96.053.650 | 510.664.415 |
| 2004 | 486.441.693 | 115.348.017 | 601.789.710 |
| 2005 | 557.739.138 | 127.719.704 | 685.458.842 |
| 2006 | 609.842.927 | 150.796.004 | 760.638.931 |
| 2007 | 456.912.666 | 383.173.237 | 840.085.903 |
| 2008 | 556.787.467 | 404.191.720 | 960.979.187 |



So, if we take in account the numbers above, in “Reais”, we can calculate the “Brazilian tax ratio”, in proportion to the GDP:

| | Total Tax Revenue/Reais | GDP/Reais | RATIO % |
|------|------------------------------------|------------------|----------------|
| 2003 | 510 664 41,00 | 2 490 177,93 | 20,50 |
| 2004 | 601 789 71,00 | 2 632 424,17 | 22,86 |
| 2005 | 685 458 84,00 | 2 715 600,18 | 25,24 |
| 2006 | 760 638 93,00 | 2 823 436,84 | 26,94 |
| 2007 | 840 085 90,00 | 2 995 028,34 | 28,04 |
| 2008 | 960 979 18,00 | 3 148 854,04 | 30,51 |

Now, let’s see the size of the “underground economy” in some regions of the World, in the average years of 2002 and 2003, and the historical Brazilian size of the “underground economy”¹⁰¹:

World

| Region, 02/03 | OECD | Asia south | Pacific Isl. | Transit. Countries | Africa | Latin America |
|------------------|------|------------|--------------|-----------------------|--------|------------------|
| % GDP | 16,3 | 30,4 | 33,4 | 40,1 | 43,2 | 43,4 |

Brazil

| Average years | 90/91 | 94/95 | 99/00 | 01/02 | 02/03 |
|------------------|-------|-------|-------|-------|-------|
| % GDP | 32,5 | 36,4 | 39,8 | 40,9 | 42,3 |

We don’t have the size of Brazilian “underground economy” in the average 2003-2008, but we can assume that Brazil could maintain this in 40% of the GDP¹⁰², so it would be:

¹⁰⁰ Source: Resultados Nominiais do Governo Geral BR (revenue) - Secretaria do Tesouro Nacional http://www.stn.fazenda.gov.br/estatistica/est_estados.asp

¹⁰¹ Source: JIMÉNEZ, J. P., GÓMEZ SABAINI, J. C., and PODESTA, A., “Tax gap and equity in Latin America and the Caribbean”, Fiscal Studies No. 16, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Eschborn, 2010, in WEB http://www.eclac.cl/de/publicaciones/sinsigla/xml/0/39960/Fiscal_Studies_No16_End.pdf (30/09/2010)

¹⁰² This assumption is confirmed by Friedrich Schneider (2005) and the UNDP, in the chart brought by THE ECONOMIST, *The self-harming state*, London: Nov 14, 2009. Vol. 393, Iss. 8657; pg. 14.

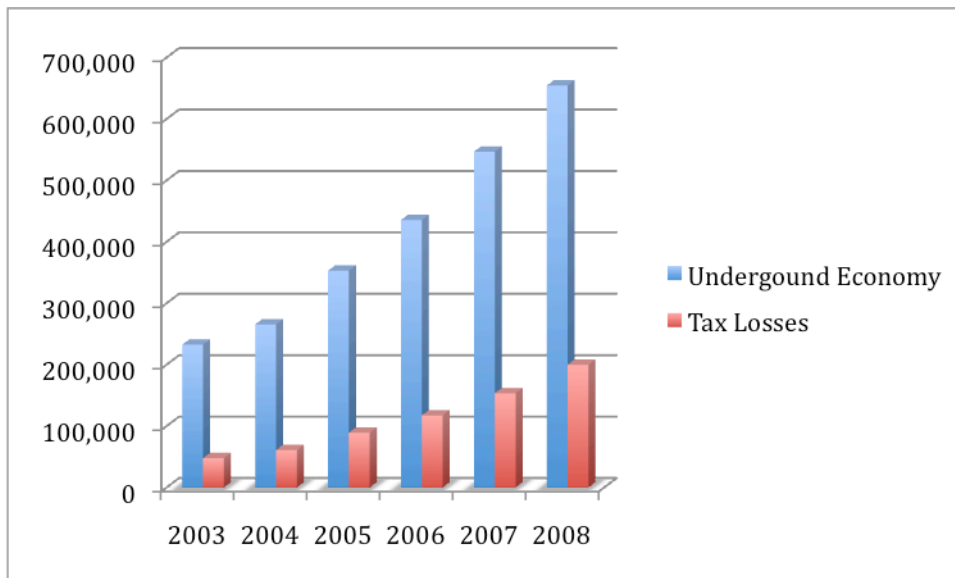
Brazil Underground Economy (UE)

| Year | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|-----------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Million US\$ (GDP) | 553 603 | 663 783 | 882 439 | 1088 767 | 1366 544 | 1636 022 |
| Million US\$ (UE) | 232 513 | 265 513 | 352 975 | 435 506 | 546 617 | 654 408 |

Now, we can use these numbers and the “Brazilian tax ratio” to estimate the losses of tax revenue with the underground economy:

Brazil Tax Losses Underground Economy (TL)

| Year | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|-------------------|---------------|---------------|---------------|----------------|----------------|----------------|
| Million US\$ (UE) | 232 513 | 265 513 | 352 975 | 435 506 | 546 617 | 654 408 |
| RATIO % | 20,50 | 22,86 | 25,24 | 26,94 | 28,04 | 30,51 |
| Million US\$ (TL) | 47 665 | 60 696 | 89 090 | 117 325 | 153 217 | 199 659 |



By the assumptions above, we can say that the most part of these losses were “tax evasion” and, by the relative numbers, that each year it had been improved like a relevant externality that affects the market.

By other hand, considering that Brazil's program of income distribution ("Bolsa Familia"), in 2010 will spend approximately US\$ 7 billion, with an expected attendance of 12.7 million households, we can imagine the impact that bringing this loss of revenue could have in social programs and in the national budget as a whole.

But, would these losses be a result of "national" tax evasion or "international tax evasion" (in the way described in this paper)?

We must say that, probably, the most part of these losses were "national" tax evasion because the "underground economy", in most part of the time, works exclusively in the national market. However, we also must say that an important part of this "underground economy" is fed by the "smuggling" of goods sold in the national market. The economic globalization surely contributes to improve this activity, what means that we also have "international tax evasion" here.

A practical example can also shows like these losses of the "underground economy" are been run by big established companies in Brazil, with obviously international schemes, affecting the national budget, but also affecting the market competition, creating "externalities" of not-paying taxes, against the tax law and the economic law.

Only after years of judicial dispute the government of Brazil was allowed to close, and keep closed, the American Virginia Tabaco Company in Brazil, which through abusive schemes of tax evasion and tax avoidance didn't pay the correct values of "IPI – Imposto de Produtos Industrializados", a kind of Brazilian VAT (the "Receita Federal do Brasil - RFB", the Brazilian IRS, estimates that the company didn't pay one billion reais in taxes during the last years)¹⁰³.

By the enforcement of the tax law it was impossible in the courts of Brazil¹⁰⁴, until the government (by the attorneys of the National Treasury) brings to the Supreme Court the argument of the unfair competitive advantage and the prejudice of the free market. By this argument and the principles of Brazilian economic law the Supreme Court accepted

¹⁰³ To know more about this case see, in the brazilian's Supreme Court web site (www.stf.jus.br), the files, decisions and resolutions of the cases AC 1657/2008 and RCL 10128/2010.

to aloud the government to deregistrate and close the tabacco company.

Just to make clear the international conections of this case, Brazil is the biggest tabacco exporter of the world (22% of the world tabacco trade) and 37% of the internal consume of tabacco, in 2002, was supplied by the ilegal market: 60% by smuggling, 30% by simply tax evasion and 10% by falsification. The principal way for the smuggling, during this time, was the false exportation to Paraguay and Uruguay¹⁰⁵.

Today everybody knows that big Brazilians companies are making direct investiments (FDI) in the United States and, in the absence of a tax treaty between the two countries, all of them are banking in third countries, specially tax havens, through off shore subsidiaries. These banking schemes are all out of the formal economy of the two countries, contribute to the underground economy, imply in international tax evasion and could be easily avoided by a tax treaty between Brazil and United States, that still remains in discussion after almost 40 years of negotiations.

The above national data and the pragmatcal case show clear the interaction between tax law and economic law. More than it, it also shows the interaction with the concept of international tax evasion and the relevance of it in the healph of the national budget.

We must say that this connection through economic law, in Brazil, also comes from the constitutional system, by the article 146-A of the Federal Constitution¹⁰⁶, which expressly says that the government it's allowed to use the tax system to prevent and correct distortions in market competition. Unfortunately this article of the Federal Constitution still remains without the necessary complementary law to be fully applicable.

By other hand, if we use the examples of international tax evasion conducts, like “transfer price” and “treaty shop”, it's very logical to think that this conducts gives, to

¹⁰⁴ That's because the Supreme Court in Brazil has a very strong list of precedents that says that the government can't close a company or cancel its register to force the payment of taxes. About it see: http://www4.jfrj.jus.br/seer/index.php/revista_sjrj/article/viewFile/162/173

¹⁰⁵ To go deep in this data see: IGLESIAS, R., *A economia do controle do tabaco nos países do Mercosul e associados: Brasil*, Washington, D.C.: OPAS, 2006, available in the Web site http://www.paho.org/Spanish/AD/SDE/RA/Tab_Mercosur_BRA.pdf (16/10/2010).

¹⁰⁶ CF Brasil – “Art. 146-A - Lei Complementar poderá estabelecer critérios especiais de tributação, com o objetivo de prevenir desequilíbrios da concorrência,sem prejuízo da competência da União, por lei, estabelecer normas de igual objetivo”.

firms or people who did it, an specific competition advantage, reducing costs not paying taxes, that is unfair with the other player of market that complies with the tax obligation. Again, tax evasion and globalization works together.

So, the whole process of globalization has boosted the maximum interaction between the international economic order, even when considered specifically from the commercial point of view, and tax issues¹⁰⁷, which means that globalization represents a challenge to the State's tax policy, especially developing States¹⁰⁸.

Such challenge can find, no doubt, a solution in developing a framework for international cooperation aimed at the problems mentioned in the preceding paragraph¹⁰⁹, among which includes international tax evasion. This, however, should be discussed by other academics studies focused in the international cooperation.

For the present paper, on the other hand, in view of the objectives outlined in its beginning, is the moment to conclude with recommendations about how the Bretton Woods Institutions can help the National Governments to manage the international tax evasion, and about how Brazil can improve its efforts to face this challenge.

¹⁰⁷ “El problema de la interacción potencial entre los acuerdos tributarios y comerciales siempre estuvo implícito en el Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT). El Acuerdo General sobre el Comercio de Servicios (GATS) ha hecho el asunto más severo. Los asuntos respecto a la aplicación no intencionada de acuerdos comerciales, y su coordinación con las obligaciones tributarias existentes, han sido reconocidos en los tratados más recientes – el GATS, el Tratado de Maastricht y el NAFTA – y han recibido más atención. El tratamiento de los impuestos directos en estos acuerdos reconoce que la extensa red de tratados tributarios – en la actualidad hay más de 1500 tratados – provee un marco multilateral para evitar y resolver disputas tributarias relacionadas con el comercio e inversión, estando la vasta mayoría de esto tratados basados en el Convenio Modelo de la OCDE.” PINO, G. I. A., *op. cit.*, p. 5.

¹⁰⁸ “Developing countries attempting to become fully integrated in the world economy will probably need a higher tax level if they are to pursue a government role closer to that of industrial countries, which, on average, enjoy twice the tax revenue. Developing countries will need to reduce sharply their reliance on foreign trade taxes, without at the same time creating economic disincentives, especially in raising more revenue from personal income tax. To meet these challenges, policymakers in these countries will have to get their policy priorities right and have the political will to implement the necessary reforms. Tax administrations must be strengthened to accompany the needed policy changes. As trade barriers come down and capital becomes more mobile, the formulation of sound tax policy poses significant challenges for developing countries. The need to replace foreign trade taxes with domestic taxes will be accompanied by growing concerns about profit diversion by foreign investors, which weak provisions against tax abuse in the tax laws as well as inadequate technical training of tax auditors in many developing countries are currently unable to deter. A concerted effort to eliminate these deficiencies is therefore of the utmost urgency.” TANZI, V., y ZEE, H., *Tax Policy ...*, *op. cit.*, p. 18.

¹⁰⁹ To go deep in it see: HUFBAUER, G. C., *Tax Policy in a Global Economy*, Paper for the American Institute of Contemporary German Studies, February 2000, in Web <http://www.piie.com/publications/papers/paper.cfm?ResearchID=365> (16/09/2010).

6 - Conclusions and recommendations.

I really would like to have the keys and the ways to solve all the problems that we saw above, but it's impossible for me and for everyone that works alone in the matter.

I believe that only the cooperation between the Nations might solve the problems of the international economic order and, specifically about the improvement of the tax evasion in the economic globalization environment.

I think that it's necessary, also, to change the way that we see our national taxes laws, not considering the tax matter only like a internal problem, but also an international public law matter, an international issue.

Anyway, these are only theoretical law considerations, which can be developed better in law or international relations studies.

By the proposal of this paper, in the other hand, it's necessary to think in pragmatically ways, that could be taken now by the national governments and the international institutions that run the economic globalization, to avoid the tax evasion in the economic globalization environment and, with it, to help the Countries to save, in this specific point, their own budgets.

I think that the IMF, the World Bank, and the WTO may have a more important role. Like drivers of the economic globalization and with an enormous persuasive power to indicate to the nations economic goals and standarized patrons to achieve these goals, the Bretton Wood institutions no more may avoid to see the relevance of the international tax matters, specially the ones related with the international tax evasion, the harmful tax competition, and the good health of the national budgets.

In this way, I believe that the Bretton Woods institutions must:

- 1) promote the change in the way that the countries see taxes laws, moving the tax matter from an exclusive internal problem to an also international public law matter, an international tax issue;

2) do not marginalizing the scope of taxation, showing the countries that the fight against tax evasion, national or international, can work together with budgetary stabilization and opened economies;

3) assuming a minimum international regulation of the international capital flows, specially through taxation controls over the “hot international money”; finally,

4) assuming the need to construct a large concept of international tax evasion, like it did here, a tool to help the countries to work together and to be possible an overview of the international tax matter problem.

In other hand, I also think that are important measures that the national governments must do to fight international tax evasion.

Assuming that changes in the tax rate makes important distortions in the economy¹¹⁰ and assuming the said distortions in the competition market by the tax evasion, I really believe that the national governments must not go into the “vicious circle” of raising the tax rate to support the national budget expenditure.

Specially in Brazil, by its tax rate, we must fight tax evasion making a true effort to increase the enforcement of tax law, to simplify the tax system and incentive the tax complain, specially showing that tax evasion can works like an “economic externality” that disturb the free competition in market by given competition advantage to the “tax evader”, compares with the other players of market that effectively pays the taxes.

We can do it by some ways:

1) adopting an open and abroad concept of tax evasion (like the concept of international tax evasion here described) and limiting by the law all the possibilities of tax avoidance, like in the US tax system;

2) criminalizing very hard the conduct of tax evasion;

¹¹⁰ See: ABEL, A. B., BERNANKE, B. S., and CROUSHORE, D., *Macroeconomics*, 6th Edition, Pearson Education Inc., Boston, 2008, p. 588.

- 3) improving the government structure of tax enforcement (RFB and PGFN¹¹¹) with the tools and sources necessary to really enforce the tax law;
- 4) doing a public campaign to incentive the tax complain, advising about the new tax enforcement policy; in this campaign the government can offer better tax refund for those who describe better operations made with third parts that leaves to a true tax liability;
- 5) showing the force of this new tax enforcement policy by putting in jail, very quickly, the possible most large number of tax evaders;
- 6) simplifying the tax system by a tax reform that decreases the number of taxes and the number of documents that companies and people have to fulfill to complain tax; in the same way, making all the efforts to conclude the negotiations and sign a tax treaty with the United States; and finally,
- 7) reducing the tax rate to show that the government believes in the tax law enforcement like a way to support the national budget expenditure.

These recommendations are addressed to the national market, what means more addressed to fight national tax evasion. Anyway, the same recommendations can work fighting international tax evasion, especially when aggregated to the international cooperation and using international patrons of tax enforcement in fields like the treatment of “tax paradises” and banker secrecy.

Of course, these recommendations assume the risks of total change in the way like the Brazilian tax system has been ruled through the last decades, but I think that Brazil’s economy and democracy are now enough strong to support this upgrade in how government and tax system treat citizens and contributors.

By the way, it’s the moment of political choices in Brazil and I really believe that the next government must face the problem of tax evasion and use the beginning of 2011, a moment of political expectations and strong popular support, to make of the enforcement of the tax law the key to the reform of our tax system and tax policy.

¹¹¹ RFB – Receita Federal do Brasil (Internal Revenue Service); PGFN – Procuradoria-Geral da Fazenda Nacional (Office of the Attorney-General of the National Treasury).

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