

***G.S.B. v. Switzerland* (European Court of Human Rights): Data Transfer in Tax Evasion Matters Did Not Violate Human Rights**

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I. INTRODUCTION

On December 22, 2015, the European Court of Human Rights (ECtHR or Court) ruled in *G.S.B. v. Switzerland*¹ that the disclosure of banking information from Switzerland to the United States, based on a bilateral agreement, did not amount to a violation of Article 8 § 1 of the European Convention on Human Rights (ECHR or the Convention)², which provides for the right to respect for private life.³ This piece will include a short introduction to the ECHR and the ECtHR, a summarization of the facts and legal claims involved in *G.S.B. v. Switzerland*, a description of the Court's main legal reasoning supporting its holding, and some concluding thoughts on the potential impact of the judgment on international income taxation, bilateral tax agreements, and extraterritorial jurisdiction. The holding in this case is a step in the right direction with respect to increasing transparency between the U.S. and Swiss tax systems, and raises important considerations regarding balancing of individual privacy rights with states' broader economic rights.

II. THE ECtHR AND THE ECHR

The ECtHR is the human rights court for the Member States of the Council of Europe. It was established as a reaction to the atrocities committed during World WarII.⁴ The Court seeks to bring together countries that are "likeminded and have a common heritage of political traditions, ideals, freedom

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1. App. No. 28601/11 (Eur. Ct. H.R. Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732> [<http://perma.cc/V8M7-8HGX>].

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, http://www.echr.coe.int/Documents/Convention_ENG.pdf [<http://perma.cc/MSZ3-9EKU>] [hereinafter ECHR].

3. *See id.* at 7.

4. *See* Daniel Rietiker, *From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent Haas v. Switzerland Judgment*, 25 HARV. HUM. RTS. J. 85, 87-88 (2012) (describing establishment of ECtHR).

and rule of law.”⁵ The ECtHR’s legal basis for deciding cases is based on the ECHR, which was adopted on November 4, 1950.⁶ The ECHR’s primary goal is to secure the universal and effective recognition of human rights as set out in the Articles of the Convention, which include Article 3 (prohibition of torture); Article 8 (right to respect for private and family life); and Article 9 (freedom of thought, conscience, and religion).⁷ After the fall of the iron curtain and the Berlin Wall in 1989, many more countries joined the Convention, and as of 2012, there are forty-seven Member States to the Council of Europe.⁸ All forty-seven Member States of the Council of Europe are under the Court’s jurisdiction.⁹ A unique aspect of the Court is that individual applicants have the right—as set out in ECHR Article 34—to seek redress directly from an independent judicial body that focuses solely on examining allegations of serious human rights violations: this right is also known as the right to individual application.¹⁰ Moreover, the judgments of the Court are binding upon the State Parties, and the Committee of Ministers of the Council of Europe oversees their implementation.¹¹ Another important power of the Court is its ability to impose interim measures while a case is pending before the ECtHR.¹²

III. THE FACTS AND LEGAL CLAIMS

In *G.S.B. v. Switzerland*, the applicant alleged that he had suffered a violation of his right to private life as defined in Article 8 § 1 of the ECHR

5. ECHR, *supra* note 2, preamble (outlining primary goals of ECtHR).

6. *See id.* art. 19 (establishing ECHR’s primary legal basis for ECtHR cases).

7. *See id.* preamble, arts. 3, 8, 9 (highlighting several important human rights protections within Convention framework).

8. *See Rietiker, supra* note 4, at 87-88 (noting relatively recent increase of Member States to ECtHR).

9. *See* ECHR, *supra* note 2, art. 19 (setting forth Court’s responsibilities); *see also Chart of Signatures and Ratifications of Treaty 005*, COUNCIL EUROPE, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> (last visited Mar. 2, 2017) [<http://perma.cc/U84U-GYCM>] (enumerating signatories of Convention).

10. *See* ECHR, *supra* note 2, art. 34.

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Id.

11. *See id.* arts. 1, 46 (explaining binding nature of ECtHR decisions).

12. *See* ECHR Rules of Court, R.39 (1), http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [<http://perma.cc/4XDC-2TUH>] (introducing interim measures doctrine ECtHR uses for certain pending cases).

The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

Id.; *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99, ¶¶ 109-14 (Eur. Ct. H.R. Feb. 4, 2005),

http://www.jus.unitn.it/download/gestione/marco.pertile/20090331_0619Mamatkulov_and_Askarov_Turkey.pdf [<http://perma.cc/8B6D-C78K>] (ruling interim measures binding on Member States).

because the Swiss bank UBS SA (UBS) transmitted his banking information to the Internal Revenue Service (IRS) against his will.¹³ Article 8 of the Convention stipulates that “[e]veryone has the right to respect for his private and family life, his home and his correspondence,” and that a public authority can only interfere with this right in certain instances, such as when it is “necessary in a democratic society” or for the “economic wellbeing of the country.”¹⁴

Similar to the case’s procedural history in the Swiss domestic courts and at the ECtHR, the facts are extremely complex. For practical reasons, only the most important developments will be examined. In 2008, the IRS discovered that thousands of U.S. taxpayers had Swiss bank accounts with the bank UBS, located in Geneva, Switzerland, and these taxpayers had not reported these accounts to the IRS.¹⁵ The U.S. government brought civil proceedings demanding that UBS hand over the banking information of approximately 52,000 U.S. taxpayers who held accounts at UBS.¹⁶ The U.S. and Swiss governments came to an agreement—“Agreement 9”—in order to address the IRS’s request.¹⁷ The U.S. and Swiss governments eventually amended the agreement to include “Protocol 10.”¹⁸ After unsuccessfully having tried his case in the domestic Swiss courts, the applicant submitted a claim to the ECtHR.¹⁹

IV. THE ECtHR’S REASONING IN *G.S.B. V. SWITZERLAND*

The ECtHR ultimately held that the Swiss government did not violate the applicant’s right to respect for private life by disclosing his Swiss banking information to the IRS.²⁰ In its judgment rendered on December 22, 2015, the Court stated that personal banking information is generally protected under Article 8 of the ECHR, but that an interference of this right is justifiable as long as the factors set out in Article 8 § 2 are met.²¹ In other words, in deciding cases relating to Article 8 of the ECHR, the Court must determine whether or not the interference was “in accordance with the law,” whether it pursued a legitimate aim, and whether the interference was “necessary in a democratic society.”²²

13. *G.S.B. v. Switzerland*, App. No. 28601/11, ¶¶ 3, 14 (Eur. Ct. H.R. Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732> [<http://perma.cc/V8M7-8HGX>].

14. ECHR, *supra* note 2, art. 8.

15. *See G.S.B. v. Switzerland*, App. No. 28601/11, ¶ 8.

16. *Id.* ¶ 10.

17. *Id.* ¶ 12 (explaining terms of agreement).

18. *Id.* ¶ 16 (describing progression of agreements between United States and Switzerland, addressing undeclared Swiss bank accounts).

19. *See G.S.B. v. Switzerland*, App. No. 28601/11, ¶ 19-28 (Eur. Ct. H.R. Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732> [<http://perma.cc/V8M7-8HGX>] (detailing procedural history).

20. *Id.* ¶ 98 (holding no ECHR Article 8 violation).

21. *See id.* ¶¶ 51-52 (noting limitations of individual rights under Article 8).

22. *See ECHR, supra* note 2, art. 8; *G.S.B. v. Switzerland*, App. No. 28601/11, ¶ 52 (summarizing Article

In the present case, the Court determined that the measures taken were in accordance with the law, that the applicant had access to and knowledge of the applicable laws, and that the Swiss government's actions were consistent with general principles of international law.²³ Regarding the legal basis of the case, *G.S.B. v. Switzerland* also addressed Switzerland's principles of direct democracy and the nation's optional referendum process.²⁴ One disputed issue in the case was whether an optional referendum was necessary under Swiss law for the enactment of Agreement 9 and Protocol 10.²⁵ Under Article 141 of the Swiss Constitution, an optional referendum can be requested by 50,000 citizens or by eight cantonal districts.²⁶ One of the reasons for calling an optional referendum is to oppose the enactment of an international treaty, such as the bilateral treaty between the United States and Switzerland in the present case.²⁷ The ECtHR noted that the decision as to whether the bilateral treaty should have been submitted to an optional referendum was not for the Court to decide but, rather, the Court should defer to the domestic Swiss court authorities in this matter and respect their decision to not put forth an optional referendum.²⁸

Moreover, the Court agreed with the Swiss government that transmitting the applicant's banking information pursued a legitimate aim, as required by Article 8 § 2.²⁹ The Court reasoned that Switzerland's economic interests were significant and that the interference on the applicant's individual rights was justified due to the need to protect the "the country's economic well-being."³⁰

8 analysis in case).

23. See *G.S.B. v. Switzerland*, App. No. 28601/11, ¶¶ 78, 80, 84 (relaying holding of case).

24. See CONSTITUTION FÉDÉRALE, [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 141, para. 1 (Switz.).

If within 100 days of the official publication of the enactment any 50,000 persons eligible to vote or any eight Cantons request it, the following shall be submitted to a vote of the People:

...

(d) [I]nternational treaties that:

are of unlimited duration and may not be terminated,

provide for the accession to an international organisation,

contain important legislative provisions or whose implementation requires the enactment of federal legislation.

Id., translated in *Federal Constitution of the Swiss Confederation*, <https://www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf> [last visited Mar. 2, 2017] [<https://perma.cc/3AM4-4CCN>]; see also *Switzerland's Direct Democracy*, DIRECT DEMOCRACY, <http://direct-democracy.geschichte-schweiz.ch/> (last visited Mar. 2, 2017) [<http://perma.cc/499K-GN7Q>] (outlining referendum process).

25. See *G.S.B. v. Switzerland*, App. No. 28601/11, ¶¶ 72, 73 (Eur. Ct. H.R. Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732> [<http://perma.cc/V8M7-8HGX>] (noting optional referendum challenges present in case).

26. See CONSTITUTION FÉDÉRALE, [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 141 (Switz.) (describing technicalities of optional referendum process in Swiss law).

27. See *id.* (detailing permissibility of calling optional referendum to dispute constitutionality of bilateral treaty); *Referendums*, CH.CH., <https://www.ch.ch/en/referendum/> (last visited Mar. 2, 2017) [<http://perma.cc/TP56-CYSG>] (describing importance of referendums in Swiss democratic system).

28. See *G.S.B. v. Switzerland*, App. No. 28601/11, ¶¶ 72, 73 (explaining deference given to domestic court's decision regarding optional referendum).

29. See *id.* ¶¶ 81-84.

30. *Id.* ¶ 83 (describing Member State's ability to protect its economic wellbeing).

Given the importance of UBS to the Swiss banking sector, the Court considered the decision necessary to protect the banking sector specifically, as well as the Swiss economy as a whole.³¹ The Court also noted that the applicant had access to several “procedural safeguards” in order to appeal the decision during the judicial proceedings in Switzerland.³²

Finally, the Court held that Switzerland’s decision to transmit the applicant’s banking information to the IRS was proportionate to the legitimate aim of resolving the dispute with the United States, and it did not exceed its margin of appreciation.³³ The margin of appreciation refers to the flexibility given to Member States in fulfilling their human rights obligations as defined in the ECHR.³⁴ The margin of appreciation concept is similar to a U.S. court deferring to another branch of government on topics that are deemed to be within that branch’s authority and expertise. In the case of the ECtHR however, the other branch of government is the Member State’s domestic authority. The ECtHR tries to balance remedying human rights violations while respecting the individual decisions made by Member States.

V. THE RELEVANCE OF THE JUDGMENT FOR INTERNATIONAL INCOME TAXATION, BILATERAL TAX AGREEMENTS, AND EXTRATERRITORIAL JURISDICTION

G.S.B. v. Switzerland brings up several important questions regarding international income taxation, bilateral tax agreements between countries, and extraterritorial jurisdiction (ETJ). The case also demonstrates the challenges and complexities nations face in determining the current limits of ETJ, and how one state can compel another to provide individual income tax information. In international law, ETJ allows a government to exercise its legal authority beyond its borders.³⁵ This type of legal authority can manifest in a number of ways in U.S. law, including “the geographic scope of U.S. regulatory laws, the power of U.S. courts over foreign defendants, . . . or the ability of U.S. courts to entertain causes of action arising out of activity abroad.”³⁶ For example, the IRS stipulates that all U.S. citizens, resident aliens, and dual citizens must report their worldwide income, which includes income in “foreign trusts and foreign bank and securities accounts.”³⁷

31. *See id.* ¶ 86.

32. *See G.S.B. v. Switzerland*, App. No. 28601/11, ¶ 96.

33. *See id.* ¶ 93; *see also* STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2000) (introducing margin of appreciation concept of ECtHR).

34. *See GREER, supra* note 33, at 5-6 (acknowledging ECtHR’s ability to defer to Member States in certain instances).

35. *See* Extraterritorial Jurisdiction, 18 U.S.C. § 3042 (2012) (defining extraterritorial jurisdiction); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1304 (2014) (providing legal definition of ETJ).

36. Colangelo, *supra* note 35, at 1303-04.

37. *See IRS Reminds Those with Foreign Assets of U.S. Tax Obligations*, IRS (Apr. 10, 2015),

Even with laws, rules, and regulations in place, the U.S. government struggles to close an annual “tax gap,” which is reported to be as high as \$353 billion USD.³⁸ The current system in place for countries to share bilateral tax information is typically through the use of bilateral agreements.³⁹ Bilateral agreements allow countries to “barter” with each other in order to obtain similar tax information, such as “lists of taxpayer-specific information.”⁴⁰ On the other hand, the barter system is criticized for compiling too much personal data, and raising privacy concerns similar to those raised in *G.S.B. v. Switzerland*.⁴¹ In balancing the competing interests at stake in *G.S.B. v. Switzerland*, the ECtHR did not consider the transmitted banking data to be particularly sensitive information compared to medical data, for example.⁴² Therefore, the State enjoyed a broad margin of appreciation, and the public interests that the Swiss Government defended outweighed the applicant’s private interest.⁴³

G.S.B. v. Switzerland highlights the challenges of keeping tax laws current and effective in an ever-globalizing world. As the world continues to globalize, it will be more important than ever for states to find more effective strategies in order to obtain and share international tax information. Looking forward, a question to consider is how countries can best share individual tax information to prevent tax evasion, while also balancing individual taxpayers’ privacy concerns. Finally, even though the involvement of the ECtHR in tax evasion cases is perhaps surprising, the situation demonstrates that international tribunals also have a say in these types of matters. Considering the increasingly interconnected economics of countries worldwide, international tribunals are expected to play an even bigger role in the future.⁴⁴ *G.S.B. v. Switzerland* is also a relevant example for the extraterritorial effects of the ECtHR’s jurisprudence, including on U.S. authorities, compared *inter alia* with

<https://www.irs.gov/uac/newsroom/irs-reminds-those-with-foreign-assets-of-u-s-tax-obligations-2015> [<http://perma.cc/KE2N-69VS>] (reminding U.S. taxpayers of reporting obligations).

38. See Max B. Sawicky, *Do-It-Yourself Tax Cuts: The Crisis in U.S. Tax Enforcement*, in BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION 1, 1, <http://www.epi.org/files/page/-/old/briefingpapers/160/bp160.pdf> [<http://perma.cc/C8CP-TTG8>]; see also Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. 605, 606 (2008) (describing U.S. federal government’s annual tax gap).

39. Dean, *supra* note 38, at 608.

40. *Id.* (explaining challenges of barter system present in current international taxation model).

41. See *G.S.B. v. Switzerland*, App. No. 28601/11, ¶ 44 (Eur. Ct. H.R. Dec. 22, 2015), <http://hudoc.echr.coe.int/eng?i=001-159732> [<http://perma.cc/V8M7-8HGX>] (comparing privacy concerns present in *G.S.B. v. Switzerland* and in barter system); Dean, *supra* note 38, at 609 (noting potential privacy concerns of barter system).

42. See *G.S.B. v. Switzerland*, App. No. 28601/11, ¶¶ 89, 97.

43. See *id.* ¶¶ 90-93 (detailing ECtHR’s balancing approach between individual rights and public interest).

44. See JULIEN CHAISSE, E15 TASK FORCE ON INV. POLICY, INTERNATIONAL INVESTMENT LAW AND TAXATION: FROM COEXISTENCE TO COOPERATION 1, 13-15 (2016), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Policy-Chaisse-FINAL.pdf> [<http://perma.cc/UY7S-F834>] (noting potential for increased role of international tribunals).

expulsion and extradition cases, or cases dealing with international child abductions.⁴⁵

These authors agree with the reasoning and conclusions reached by the Court in *G.S.B. v. Switzerland*, especially the result of balancing the competing interests at stake. Finding a violation of the right to privacy would have been a significant setback in the global fight against tax evasion. It is also suggested in *G.S.B. v. Switzerland* that the Court made a sound application of the doctrine of the margin of appreciation enjoyed by the States Parties to the ECHR. It is probably not exaggerated to think that declaring the treaty between Switzerland and the U.S. unconstitutional or illegal under international law could have led to the suffocation of the Swiss banking sector. The Court must balance individual human rights with the survival of the state and its economic wellbeing, otherwise, there is a concern that it will convert the ECHR into a “suicide pact.”⁴⁶

45. See *Maumousseau & Washington v. France*, App. No. 39388/05, ¶¶ 35, 43-47 (Eur. Ct. H.R. Dec. 6, 2007) (describing ECtHR child abduction case between U.S. and French citizens).

46. See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (describing need for balancing of individual and state interests). Justice Jackson argues that “[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either.” *Id.*