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**IGAs vs. MAATM:  
Has Tax Bilateralism Outlived Its Usefulness?**

Reuven S. Avi-Yonah<sup>1</sup>  
Gil Savir<sup>2</sup>

In 2010, the United States began a revolution in international taxation of individuals when it enacted the Foreign Account Tax Compliance Act, or FATCA. FATCA was a response to the UBS scandal, in which it was revealed that UBS was aiding and abetting tax evasion by US citizens despite being a trusted “qualified intermediary” of the IRS.<sup>3</sup> In response, FATCA imposed a 30% withholding tax on the US source income of any “foreign financial institution” that is found not to have shared information on its account holders who are US citizens or residents.

FATCA created an outcry among the foreign banks and other financial institutions, for two main reasons. First, the banks claimed that it imposed unreasonable compliance costs on them. The fundamental problem stems from the fact that the US has since 1861 taxed its citizens living permanently overseas, and as a result, FATCA applies to many such expatriates who have no intention of hiding their income from the IRS (in fact, most of them do not owe any taxes to the US because of the earned income exclusion of IRC section 911<sup>4</sup> and the foreign tax credit of IRC section 901<sup>5</sup>). The solution to that is to stop taxing citizens living overseas, as the first author has argued.<sup>6</sup>

The second problem with FATCA was that many foreign countries have taxpayer confidentiality laws that preclude banks from sharing account information with the IRS. Under the modern version of article 26 of the tax treaties and under tax information exchange (TIEA) agreements, such prohibitions should not bar the exchange of information, but many treaties have not been updated to reflect the new norms. Thus, the banks argued that they faced a serious dilemma of either violating the laws of their home country or being subjected to the FATCA penalty.

The US Treasury responded by negotiating a series of Intergovernmental Agreements (IGAs) with the governments of various countries with which the US has

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<sup>3</sup> Avi-Yonah, Reuven S., *What Goes Around Comes Around: Why the US is Responsible for Capital Flight (and What it Can Do about It)* (January 23, 2013). U of Michigan Public Law Research Paper No. 307. Available at SSRN: <http://ssrn.com/abstract=2208553> or <http://dx.doi.org/10.2139/ssrn.2208553>

<sup>4</sup> I.R.C. § 911; *See also IRS, Foreign Earned Income Exclusion – Requirements*, <http://www.irs.gov/Individuals/International-Taxpayers/Foreign-Earned-Income-Exclusion---Requirements>

<sup>5</sup> I.R.C. § 901 - “Foreign Tax Credit”

<sup>6</sup> Avi-Yonah, Reuven S., *The Case Against Taxing Citizens* (March 25, 2010). U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-009; U of Michigan Public Law Working Paper No. 190. Available at SSRN: <http://ssrn.com/abstract=1578272> or <http://dx.doi.org/10.2139/ssrn.1578272>

either a tax treaty or a TIEA. Under the IGAs, it is the responsibility of the foreign government to collect the necessary information from its banks and transmit it to the IRS. In return, under some IGAs the US has agreed to do the same for the foreign government, i.e., collect information on its residents who have accounts in US banks and share it with the foreign government. The difference, of course, is that the US is the only country that taxes its citizens living overseas, so it has many more taxpayers with accounts in foreign financial institutions than the foreign country is likely to have in US banks.

It is not clear that the IGAs are permitted under FATCA, since the legislation clearly requires direct submission of the information by the FFIs to the IRS. Nor is it clear that Treasury had the authority to enter into IGAs under the tax treaties and TIEAs.<sup>7</sup> But the main concern about the IGAs is that they enshrine the bilateral model of tax information exchange that has dominated the 20th century. Unfortunately, there are good reasons to believe this bilateral model does not work, especially when IGAs are signed with countries like the Cayman Islands<sup>8</sup> who have no interest in reciprocity and every interest in making them not work.

Instead, there is an alternative. In response to the financial crisis and the outrage it caused in Europe about tax evasion by the wealthy, the OECD has proposed a Multilateral Agreement for Administrative Assistance in Tax Matters<sup>9</sup> (MAATM), which has by now over [75]<sup>10</sup> signatory countries. The MAATM provides for automatic exchange of information and because it is multilateral it overcomes the problem of non-reciprocity that bedevils the tax treaties, bilateral TIEAs, and the IGAs.

In what follows, we will argue that the MAATM model is superior, and that therefore the US and OECD should abandon tax information exchange and administrative assistance under articles 26 and 27 of the tax treaties, as well as bilateral TIEAs and IGAs, and instead commit to the MAATM.

## **Tax Evasion**

As technology has evolved dramatically in recent years, it is easier today more than ever for both companies and individuals to shift income and capital among countries

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<sup>7</sup> Christians, Allison, *The Dubious Legal Pedigree of IGAs (and Why it Matters)* (February 11, 2013). *Tax Notes International*, Vol. 69, No. 6, 2013. Available at SSRN: <http://ssrn.com/abstract=2280508>

<sup>8</sup> For list of TIEAs see <http://www.oecd.org/ctp/harmful/taxinformationexchangeagreementstieas.htm> (last visited Feb. 5, 2014).

<sup>9</sup> Organisation for Economic Cooperation and Development [OECD], *Convention on Mutual Administrative Assistance in Tax Matters 2011* [hereinafter MAATM]. Available at <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>

<sup>10</sup> For list of countries that signed on the MAATM convention see [http://www.eoi-tax.org/multilateral\\_agreements/fe15bbbd33dc02b34816e64335556653#default](http://www.eoi-tax.org/multilateral_agreements/fe15bbbd33dc02b34816e64335556653#default) (75 countries signed the MAATM convention. However, about 32 countries, e.g. the U.S., have signed the convention but not yet ratified it).

in order to reduce their global tax amount by using tax haven jurisdictions. This phenomenon has been recognized by the OECD as a “Harmful Tax Competition”<sup>11</sup>. The ability of individuals to shift their capital income without being taxed is subject to substantial limitations<sup>12</sup>. However, the possibility still exists, especially in situations where the taxpayer relies on the lack of information-sharing between different countries around the world<sup>13</sup> by not reporting their income<sup>14</sup>. Ever since the OECD members officially recognized the problem in 1998, a significant effort has been made to force those tax haven countries to share their information<sup>15</sup> about foreign taxpayers who utilize the lack of information exchanges between countries, while enabling the tax havens<sup>16</sup> to enjoy the investment of capital in their jurisdiction.

The “Tax Justice Network”, a non-profit organization, set itself a goal to promote the recognition that the lack of transparency is a major problem for developed countries, out of which there is usually a flow of capital. To get a perspective about the size of the problem, in 2002 the organization released a report that the amount of equity held offshore by individuals alone was about \$11.5 trillion, with a resulting annual loss of about \$250 billion in taxes, which “is five times what the World Bank estimated in 2002 was needed to address the UN Millenium Development Goal of halving world poverty by 2015”<sup>17</sup>. According to the United Nation Office on Drugs and Crimes, the “hidden” money from criminal activities, corruption, and tax evasion is estimated at between \$1 trillion and \$1.6 trillion per year. As has been recognized before, the effect on the U.S treasury is also significant<sup>18</sup>. A study conducted by the Congressional Research Service (CRS) indicates that tax evasion by individuals alone through setting up foreign

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<sup>11</sup> Organisation for Economic Co-operation and Development. [OECD] (1998). *Harmful Tax Competition: An Emerging Global Issue*. Data retrieved February 5, 2010 from <http://www.oecd-ilibrary.org/>. [hereinafter OECD Harmful Tax Competition]. (Under the OECD definition for tax havens, a country that does not share information about transactions that occurred within its jurisdiction is also a potential tax haven).

<sup>12</sup> Avi-Yonah, Reuven S., “*And Yet it Moves: A Tax Paradigm for the 21st Century*” (Law & Economics Working Papers. Paper 59, 2013). available at [http://repository.law.umich.edu/law\\_econ\\_current/59](http://repository.law.umich.edu/law_econ_current/59)

<sup>13</sup> Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A 10th Anniversary Retrospective*, (U. Mich. Program in Law and Econ., Working Paper No. 89, 2008), available at <http://law.bepress.com/umichlwps-olin/art89>.

<sup>14</sup> Jane G. Gravelle, *Tax Havens: International tax avoidance and evasion*, (Congressional Research Service, Library of Congress, 2009), available at [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.tera/crstax0642&section=1](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.tera/crstax0642&section=1).

<sup>15</sup> Avi-Yonah, supra note, 13 at 3.

<sup>16</sup> The OECD recognized that a country that does not provide information about its taxpayers is also a tax haven.

<sup>17</sup> See <http://www.taxjustice.net>.

<sup>18</sup> Avi-Yonah, supra note, 13 at 13.

corporations in tax havens and channeling the income to these foreign companies, results in an estimated \$70 billion a year deficit to the U.S. treasury<sup>19</sup>.

### **Lack of information**

As the world become borderless, countries are faced with problems enforcing their local tax laws. As a result, tax evasion has become a central concern of the major economies around the world<sup>20</sup>. Hand in hand with the double taxation convention, the global finance system has developed agreements for the exchange of information in order to increase the ability of their tax systems (both civil and criminal) to enforce their rules on sophisticated taxpayers<sup>21</sup>. A primary goal set by the OECD in the last decades is the war against countries whose lack of transparency allows them to function as a comfortable place to route income, without enabling other countries to track this income.<sup>22</sup>.

A report released by Avi-Yonah, “The OECD Harmful Tax Competition Report: A 10th Anniversary Retrospective”<sup>23</sup> indicates that the OECD has achieved significant progress in the field of information exchange over the last decade. However, lack of transparency is still a major problem in the global field. In our opinion, as long as some countries continue to provide tax shelters to taxpayers, the OECD may win the battle but will lose the war, resulting in the need for an alternative solution. Our opinion is based on two factors: First, the assumption that in a competitive financial world, some countries will always be willing to host trillions of dollars in order to achieve investment in their infrastructure. The second factor is sophisticated internal law, such as exists in the British Virgin Islands (BVI)<sup>24</sup>. As of 2010, the BVI population stood at 29,537. However, more than 400,000 companies were incorporated under BVI law. The assumption of the Congressional Research in its article is the fact that the local laws in the BVI “require no

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<sup>19</sup> Jane G. Gravelle, *supra* note, 14.

<sup>20</sup> See the first paragraph, for a description of the problem,.

<sup>21</sup> Kevin Jestin, *Harmful Mutual Legal Assistance In Tax Matters Recent Trends and Challenge Ahead (2008)*, available at <http://visar.csustan.edu/aaba/Jestin2008.pdf>

<sup>22</sup> Harmful Tax Competition: An Emerging Global Issue, *supra* note, 11.

<sup>23</sup> Avi-Yonah, *supra* note 2, at 5-7.

<sup>24</sup> Jane G. Gravelle, *supra* note 14, at 22.

identification of shareholders or directors, and require no financial records”<sup>25</sup>. Thus, even if the country provides information about its taxpayers, no real valuable information can be found<sup>26</sup>, so the taxpayer has no real concerns.

Though the lack of transparency is still a major problem, in our opinion the ability to track unreported income is increasing under those agreements, due to the countries’ option to track the source of the income. In the event of income “disappearing” without reporting it to the suitable tax authority (or to any authority at all), a flag should be raised. Based on our assumption, we will briefly review the existing bilateral treaties and Tax Information Exchange Agreements (TIEAs) of the U.S. and the OECD.

With the above problem in mind, the U.S. started signing TIEAs with countries around the world<sup>27</sup>. In order to create a wide network of information exchange, the U.S. has over 60 bilateral treaties that include articles dealing with the exchange of information. These treaties usually allow exchange of both civil and criminal information<sup>28</sup>. In addition, where a treaty is not in place, the U.S. has signed TIEAs with over 20 countries<sup>29</sup>.

The effectiveness of the TIEAs agreements is in doubt<sup>30</sup>. Between the years 2006 and 2010, 5,111 information requests were exchanged between the U.S. and other countries<sup>31</sup>. However, only 894 were outgoing requests<sup>32</sup>. Several factors can explain the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also Jackson, Randall, *Brown Pushes U.K. Tax Havens on OECD Standards*, (Tax Notes International 54 (3)), at 180-181.

<sup>27</sup> Chris Horton, *The UBS/IRS Settlement Agreement and Cayman Island Hedge Funds*, (University of Miami Inter-American Law Review, Volume 41, Number 3, 357, 2010) at 372.

<sup>28</sup> See IRS, *The Tax Gap and International Taxpayers*, February 2008 (Last Updated 10 Dec 2013), [http://www.irs.gov/irm/part5/irm\\_05-021-002.html](http://www.irs.gov/irm/part5/irm_05-021-002.html) (“The U.S. has over 60 bilateral tax treaties with other countries, and over 20 Tax Information Exchange Agreements (TIEA) in effect with various countries and jurisdictions where a bilateral tax treaty is not in place. These treaties and agreements facilitate the exchange of information, and generally allow for mutual assistance for both civil and criminal investigations. The tax treaties allow for information exchange by specific request, and in most cases, through spontaneous and automatic exchanges as well”).

<sup>29</sup> *Id.*

<sup>30</sup> Jane G. Gravelle, *supra* note 14, at 22.

<sup>31</sup> United State Government Accountability Office (GAO) Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, *IRS's Information Exchanges with Other*

low number of outgoing requests. First, “as pointed out by Avi-Yonah, most of these agreements are restricted to criminal matters, which are a minor part of the revenues involved and pose difficult issues of evidence”<sup>33</sup>. Second is the complexity of the information that the IRS agent is required to provide<sup>34</sup>. A review of the agreements reveals that the IRS must provide a specific taxpayer name in order to retrieve any information. Moreover, the IRS needs to provide the reason that the taxpayer is under investigation. For instance, the U.S. signed a TIEA with the Cayman Islands in 2004. According to the TIEA, the U.S. must provide very specific information to the Cayman Islands in order to get information about a U.S. taxpayer. As a result, the TIEA is more of a confirmation, rather than discovery tool<sup>35</sup>.

In addition to tax treaties, in 2001 the IRS established the “QI Program”<sup>36</sup>. Under the program, a qualified intermediate (such as a bank) is required to identify the payment, and in some types of investments – where the beneficiary is a U.S. resident or any profit that is subject to withholding<sup>37</sup> – the bank should notify the IRS about the transaction without disclosing the name of the taxpayer<sup>38</sup>. In return, the banks are required to withhold any tax amount and send the payment to the U.S. treasury<sup>39</sup>. After the UBS Scheme<sup>40</sup> the effectiveness of the program was questioned<sup>41</sup>. Although the UBS was a QI, instead of discovering the identity of the beneficiary account, they created shell companies for their clients in the Cayman Islands in order to hide their identities.

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*Countries Could Be Improved through Better Performance Information*, September 2009, <http://www.gao.gov/assets/590/585299.pdf> [hereinafter GAO Report].

<sup>32</sup> *Id.*

<sup>33</sup> Jane G. Gravelle, *supra* note 14, at 22.

<sup>34</sup> GAO Report, *supra* note 31, at 8 -11.

<sup>35</sup> Chris Horton *supra* note 27, at 373

<sup>36</sup> Morse, Susan C., *Qualified Intermediary or Bust?* (August 3, 2009). Tax Notes, Vol. 124, No. 5, 2009; Santa Clara Univ. Legal Studies Research Paper No. 2009, at 471-474. Available at SSRN: <http://ssrn.com/abstract=1444291>

<sup>37</sup> See I.R.C. § 862(A), 871(A). (For more information).

<sup>38</sup> Morse, Susan C. *supra* note 36.

<sup>39</sup> Lynnley Browning, *U.S. tax agency to strengthen program to catch offshore tax evasion*, July. 15, 2008 N.Y Times, available at <http://www.nytimes.com/2008/07/15/business/worldbusiness/15iht-15tax.14499852.html>

<sup>40</sup> Lynnley Browning, *U.S. Ends Inquiry of UBS Over Offshore Tax Evasion*, Nov. 16, 2010 N.Y Times, available at <http://www.nytimes.com/2010/11/17/business/17tax.html>

<sup>41</sup> Jane G. Gravelle, *supra* note 14, at 22.

The war against offshore tax evasion is far from ending. However, it seems that today more than ever, a U.S. taxpayer will think twice before using an offshore jurisdiction in order to avoid taxes, so as not to risk the potential of sanctions arising from the cooperation of foreign banks or jurisdictions with the IRS. For example, after the UBS case, the UBS agreed in 2009 to disclose about 4,450 American clients suspected of using the bank's offshore services to evade taxes<sup>42</sup>.

### **Assistance in the Collection of Taxes**

As the world becomes global, tax collection is becoming more complex. Even if a country has determined the right to tax liabilities of its taxpayers, collection can be a difficult task. In the event that a taxpayer is devoid of any assets in the country that is trying to make the collection, very limited solutions are available to that country. Any attempt to collect taxes through another country will be considered a violation of the other country's territory<sup>43</sup>.

Assistance in the collection of taxes has a long history in international and American law. In 1955, in the case of *India V. Taylor*<sup>44</sup>, the government of India sought taxes from a company registered in the United Kingdom, but trading in India. The House of Lords held that India cannot enforce its collection of taxes through a British court.

“My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.”

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<sup>42</sup> Lynnley Browning, “14,700 Disclosed Offshore Accounts,” New York Times, Nov. 17, 2009 available at <http://www.nytimes.com/2009/11/18/business/global/18irs.html>

<sup>43</sup> Kevin Jestin *supra* note 21 at 3.

<sup>44</sup> Government of India, Ministry of Finance (Revenue Division) v. Taylor, [1955] A.C. 491;



In *United States V. Harden*<sup>45</sup> (1963), the United States District Court for the Southern District of California held for a deficiency of \$639,500.15 against the respondent, Mr. Harden, for the years 1945-1946. When the U.S. tried to enforce the judgment they could not locate any assets of the respondent in U.S. jurisdiction. Therefore, the U.S. tried to enforce the judgment against the respondent in a Canadian court, claiming that this was a contract that the Canadian court was required to enforce. The supreme court of Canada held that no Canadian court would enforce the revenue laws of another country.

“Similarly, in my opinion, the argument that the claim asserted is simply for the performance of an agreement, made for good consideration, to pay a stated sum of money must also fail. We are concerned not with form but with substance, and if it can properly be said that the respondent made an agreement it was simply an agreement to pay taxes which by the laws of the foreign state she was obligated to pay.”

The non-enforcement of foreign public judgments is a taboo in law history<sup>46</sup>. Although countries may enforce private judgments in fields like torts and contracts, when they are faced with a request to force foreign judgments in fields like criminal, antitrust and tax, the request will be denied<sup>47</sup>. The obvious result is a decrease in the ability of countries to enforce their laws even when public policy is not an issue.

The reasons for the aforementioned phenomenon are varied<sup>48</sup>. According to Johnson, Alan, and Lawrence the efforts by one country to enforce its law on public issues within the territory of another may “constitute an extraterritorial intrusion”<sup>49</sup>.

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<sup>45</sup> United States Of America V. Esperanza p. Harden, [1963] S.C.R. 366; 1963 S.C.R. LEXIS 37.

<sup>46</sup> Dodge, William S., *Breaking the Public Law Taboo*. Harvard International Law Journal, Vol. 43, Winter 2002. Available at SSRN: <http://ssrn.com/abstract=316660>

<sup>47</sup> *Id.*

<sup>48</sup> Alan R. Johnson, Lawrence Nirenstein, and Stephen E. Wells, *Reciprocal Enforcement of Tax Claims Through Tax Treaties*, Tax Lawyer Vol. 33 No. 2, (1979) at 470. Available at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/tl33&div=4&id=&page=>

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

Although international tax practice has evolved dramatically in the last decades<sup>50</sup>, it seems that the cooperation of countries on a voluntary basis is limited and subject to complex and uncertain processes.

### **Multilateral conventions for Tax Collection Assistance**

Due to a historic problem of tax collection by countries within a foreign country, jurisdiction countries have begun to sign mutual agreements.

The first agreement can be found at the beginning of 1950, as a multilateral convention among the Benelux<sup>51</sup> countries for tax collection assistance<sup>52</sup>. Under the convention, the Benelux countries agreed to enforce the collection of tax in their territory for the foreign country. In 1972, the Nordic convention was signed with similar principles<sup>53</sup>. Following the success of the Nordic convention in 1988, the OECD started to draft a new convention that was intended to break the historical barrier of lack of cooperation between the countries in collecting taxes<sup>54</sup>. At first, the successfulness of the convention was very limited, with only a few countries having signed the convention<sup>55</sup>. Two decades later, in 2008, the OECD opened the convention on Mutual Administrative Assistance in Tax Matters (MAATM)<sup>56</sup> for signature. In less than two years, about 50 countries signed the MAATM convention. It should be noted that the MAATM convention results in major cooperation among countries due to the creation of a global network that deals with tax evasions cases, making it harder and more unprofitable.

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<sup>50</sup>See Reuven S. Avi-Yonah, *International Tax as International Law* 7 (U. Mich. Law Sch. Pub. Law Research Paper 41, Mich. Law & Econ., Research Paper No. 04-007, 2004), available at <http://ssrn.com/abstract=516382> or <http://dx.doi.org/10.2139/ssrn.516382> (For the evaluation and the impact of the international law on the practice)

<sup>51</sup> A collective name for Belgium, the Netherlands, and Luxembourg, esp. with reference to their economic union

<sup>52</sup> Kevin Jestin, *supra* note 21, at 3.

<sup>53</sup> Kevin Jestin, *supra* note 21, at 3-4.

<sup>54</sup> Kevin Jestin, *supra* note 21. At 4.

<sup>55</sup>OECD, *Background brief: The Convention on Mutual Administrative Assistance in Tax Matters and New Protocol*, June 5, 2012, <http://www.oecd.org/ctp/exchange-of-tax-information/backgroundbrieftheconventiononmutualadministrativeassistanceintaxmattersandnewprotocol.htm> [hereinafter MAATM Background]

<sup>56</sup> See MAATM, *supra* note 9 ; See also OECD, *Convention on Mutual Administrative Assistance in Tax Matters*, <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> (For more information regarding the MAATM)

The model of the MAATM convention is based on a combination of tax exchange provisions and administrative assistance in the collection of taxes. Under the model, countries that have signed the convention enjoy “cross-border tax co-operation including exchange of information, multilateral simultaneous tax examinations, service of documents, and cross-border assistance in tax collection, while imposing extensive safeguards to protect the confidentiality of the information exchanged”<sup>57</sup>. The main purpose of the convention is to create a worldwide network of countries that will, in some cases, share automatic / per request information about potential tax evasion, and in some cases collection of taxes within the foreign jurisdiction as well.

One advantage, which can also be a disadvantage, is the flexibility that the convention offers to countries by reserving the right to provide no information or assistance in the collection of taxes<sup>58</sup>. For example, a country can exclude the collection of taxes in its jurisdiction either at the time of signing, at the time of ratification, or at a later date<sup>59</sup>. An illustration of this is Poland’s withdrawal of its reservations concerning assistance in collection of taxes when it joined the EU<sup>60</sup>.

Open questions that this paper does not address are the practical adaptation of the convention, and the way that countries enforce the convention.

## **Bilateral Conventions**

### **Article 27 – The U.S Treaties in Practice vs. the OECD Model**

The MAATM convention operates at the international level, similar to other conventions such as the Geneva Convention (multilateral conventions). Another traditional way to address tax issues among countries is through bilateral conventions. A quick overview of the U.S model tax convention of 2006 reveals that there is no reference

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<sup>57</sup>MAATM *Background*, *supra* note 55.

<sup>58</sup>Article 30 of the MAATM, *supra* note 56.

<sup>59</sup>OECD, MAATM’s flyer (June. 5, 2013), [http://www.oecd.org/ctp/exchange-of-tax-information/ENG\\_Convention\\_Flyer.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/ENG_Convention_Flyer.pdf).

<sup>60</sup>*Id.*; *See also* Article 30 of the MAATM, *supra* note 58.

to assistance in the collection of taxes. Nevertheless, in practice the U.S. signed treaties that include an article relating to assistance in collection of taxes in a foreign country<sup>61</sup>.

The provisions that are related to the collection of taxes can be divided logically into two types<sup>62</sup>, a “General Enforcement” and a “Limited Enforcement”<sup>63</sup>. A “general enforcement” is general mutual assistance in the collection of taxes within a foreign country.

The “general enforcement” provision is found in treaties with Canada, Denmark, France, The Netherlands and Sweden<sup>64</sup>. A review of paragraph 1 of Article 27 of the convention between the U.S. and Sweden<sup>65</sup> reveals that the assistance in collection applies to any type of tax that is covered by Article 2. Paragraphs 2 and 3 of Article 27 note that in the event a country files<sup>66</sup> a tax claim against a person’s assets in another country, the latter country will enforce the claim as if the liability were in its jurisdiction. Article 27 is a fly in the ointment; paragraph 4 sets out that “the assistance provided by the article shall not be accorded with respect to the citizens, companies, or other entities of the state to which the application is made, except when the enforcement is against a person who enjoyed the convention although he was not entitled to”.

It’s worth noting that the application of Article 27 is different from treaty to treaty. For instance, under the tax convention between the U.S. and Canada<sup>67</sup>, Article 27 is worded differently. Under Article 15<sup>68</sup> of the U.S-Canada tax convention the article is not applicable against a Canadian citizen if at the date of the tax deficiency, the taxpayer was a citizen of the Canada. Therefore, today the United States would have won the case of *United States V. Harden*.

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<sup>61</sup> IRS, *Part 5. Collecting Process*, [http://www.irs.gov/irm/part5/irm\\_05-021-002.html](http://www.irs.gov/irm/part5/irm_05-021-002.html)

<sup>62</sup> Alan R. Johnson, Lawrence Nirenstein, and Stephen E. Wells, *supra note* 48 at 472.

<sup>63</sup> Alan R. Johnson, Lawrence Nirenstein, and Stephen E. Wells, *supra note* 48 at 473.

<sup>64</sup> IRS, *Part 5. Collecting Process*, *supra note* 61.

<sup>65</sup> The Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Treaty art. 27, U.S.-Swed., Jan. 1, 1996. Available at <http://www.irs.gov/pub/irs-trty/sweden.pdf>

<sup>66</sup> See IRM 5.1.8.7.7, *Incoming Mutual Collection Assistance Requests regarding mutual collection assistance requests*, [http://www.irs.gov/irm/part5/irm\\_05-001-008r.html](http://www.irs.gov/irm/part5/irm_05-001-008r.html) (For the procedure of filing a claim).

<sup>67</sup> Treaty Concerning the Avoidance of Double Taxation, U.S.-Canada art. 15, Aug. 16, 1987. Available at

<sup>68</sup> Article 15 Under the Canadian convention is equivalent to Article 27 under the Swedish convention – “Assistance in Collection”

Due to the fact that the U.S. was among the first countries to sign the MAATM convention in 1988<sup>69</sup>, it raises the question of why the United States does not include a uniform version of Article 27 in its income tax convention model. One hypothesis that comes to mind is the existence of the ITEA agreements. However, the answer is hidden in the late 60's when a broad collection of provisions was deleted from the U.S model<sup>70</sup>. Three hypotheses can explain the withdrawal of the provisions: 1) the IRS performed very limited collection abroad under the five treaties that included "general enforcement" provisions<sup>71</sup>. 2) In our opinion, during the years following World War II, countries were more sensitive to measures that could be expressed as a foothold in their territory. 3) There was a development of independent agreements that are more limited, as described above. As a result, the U.S entered a collection provision only where a convention was re-negotiated and assistance of tax collection provisions were included<sup>72</sup>.

"Limited enforcement" is assistance in collection of taxes where a person or entity enjoys the benefits provided by the treaty, even though they are not entitled. As a result, the application of the provision is narrow and limited to very specific situations, as described above<sup>73</sup>. A "limited enforcement" paragraph can be found under the U.S.-Iceland convention<sup>74</sup>.

*"Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto"*<sup>75</sup>.

A similar approach can be found under the treaties with Luxemburg (1996), Germany

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<sup>69</sup> The U.S. have signed the MAATAM Convention but not yet ratified it.

<sup>70</sup> Van de Vijver, Anne, ed., *The New US-Belgium Double Tax Treaty: A Belgian and EU Perspective*. Larcier, 2009.. Page 558.

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

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

<sup>73</sup> Alan R. Johnson, Lawrence Nirenstein, and Stephen E. Wells, *supra* note 48 at 475-476.

<sup>74</sup> Treaty Concerning the Avoidance of Double Taxation, U.S.-Iceland., Oct. 23, 2007. Available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Iceland-10-23-2007.pdf> [hereinafter "U.S.-Iceland Treaty"]

<sup>75</sup> See U.S.-Iceland Treaty, Par. 5, Art. 25 ; *See also* Van de Vijver, Anne, ed., *supra* note 70

(1989), Austria (1996), the U.K (2001) or Belgium<sup>76</sup>.

### **Article 27 under the OECD Model of the Tax Convention On Income and Capital**

In January 2003 the OECD added Article 27 concerning “The Assistance in The Collection of Taxes”. Article 27 lays out a set of rules for contracting parties who wish to collaborate in collecting taxes within the other State. A brief review of the article reveals a painstaking job.

Under paragraph 1 of the article, a country will provide assistance to the other country upon a request to collect taxes within the foreign country. According to the Commentaries on the Articles of the Model Tax Convention (CAMTC), paragraph 1 is very flexible and is subject to negotiation among the contracting countries, based on their local law. In addition, according to the CAMTC the article is an elective.

The collection of taxes is not limited to the type of taxes covered by Article 2 and most importantly, are also enforceable against people who are not entitled to the benefits derived from the convention.

Paragraph 4 of the Article allows a contracting country to require temporary relief before a final judgment is made against the taxpayer in order to safeguard future collection. The aforementioned provision combined with paragraph 6 of the Article is very interesting. According to paragraph 6, the “validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State”. An interesting question is whether paragraph 6 should also apply in the case where temporary relief is provided (e.g. seizure), and whether the foreign court has the right to determine whether the request is reasonable on the strength of the evidence. A review of the CAMTC supports the hypothesis that any judicial proceeding will take place in the country that asks for assistance in the collection of taxes.

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<sup>76</sup> Van de Vijver, Anne, ed., *supra note 70*.

## **Conclusion**

This paper reviewed the development of the exchange of information on tax matters and the assistance in the collection of taxes between countries. As detailed in the study, the history and the present show that countries are faced with sophisticated taxpayers who wish to reduce their income using artificial methods<sup>77</sup>. As a result, a dual problem arises. First, due to globalization countries should locate the foreign income of their taxpayers. The problem is that taxpayers are hidden behind shell companies in some tax haven 100% of the time. Second, even when the country has managed to track the income and the beneficiary of the income, it has a problem collecting the tax if no assets are located within its jurisdiction. Consequently, over the years, countries have been attempting, both on their own and with the help of treaty models in particular, to provide a solution in the form of bilateral agreements. However, most of the current agreement are limited in their application, or too complex to carry out. In addition, in some of the agreements as described above, countries have a very limited range of operation.

As this article demonstrates, the ability to force the collection of taxes worldwide by countries is critical in today's world. However, the question remains as to whether bilateral conventions and agreements are the keys to the solution. In our opinion, in a global economic world that is growing daily, a bilateral agreement among countries may win the battle but will lose the war against tax evasion. Indeed, tremendous efforts by countries are making people to think twice today before trying to avoid tax payment. However, when the exchange of information and the collection of tax is dependent on agreements between two countries, the possibility of detecting tax evasion by a taxpayer is very low. Even if we succeed in such a mission, locating assets in foreign countries other than the one with which the country has the agreement is not a valid option.

**Based on the analysis above, We are of the opinion that the US and OECD should abandon tax information exchange and administrative assistance under articles 26 and 27**

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<sup>77</sup> As described in the UBS case.

of the tax treaties, as well as bilateral TIEAs and IGAs, and instead commit to the MAATM.

Given the realities of today, adopting a multilateral model will create a worldwide network for the exchange of information, and will make it easier than ever to track suspicious transactions taking place in multi-jurisdictions. Once a country claims a tax deficiency, the locating of assets can be done in different states under a common electronic system. As a result, a smaller percentage of taxpayers will be willing to take the risk of getting caught and paying with “their own” capital and their own freedom.