THE TAX CLUB

THE PROPOSED MULTILATERAL
CONVENTION ON MUTUAL ADMINISTRATIVE
ASSISTANCE IN TAX MATTERS

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I. Introduction

The expansion of international commerce and the accelerated pace of advances in communications and technology have heightened the opportunities for international tax avoidance and thus the need among taxing authorities for assistance in enforcement of the tax laws of the various countries. There remains in conflict of laws jurisprudence, however, a principle against the extraterritorial enforcement of a country's revenue laws. Countries have attempted to overcome these problems by including provisions in bilateral income tax treaties and treaties relating to judicial assistance that call for mutual exchanges of information and assistance in recovery of tax claims. These treaties are subject to a variety of limitations, however, and have not been especially effective in combating international tax avoidance and evasion.

Culminating after five years of preparation, the Organization for Economic Cooperation and Development (the OECD) and the Council of Europe opened for signature on January 25, 1988, a multilateral convention for mutual assistance in tax matters. The Multilateral Convention
extends to the signatories a somewhat more liberal form of the assistance provisions contained in the usual bilateral income tax treaties, primarily in the area of recovery of tax claims. The Convention proclaims an intention to foster international administrative assistance in tax matters, while ensuring adequate protection of taxpayers' rights and the protection of privacy and personal information. 4/

This paper surveys international law on mutual assistance prior to the Multilateral Convention, including the provisions of existing bilateral treaties, and then summarizes the provisions of the Multilateral Convention, and examines the ways in which it diverges from provisions of bilateral income tax treaties. The analysis is bifurcated into an examination of provisions for enforcement (collection of tax), and provisions for exchange of information.

II. International Law on Mutual Assistance in Tax Matters Prior to the Multilateral Convention

A. International Law in the Absence of Treaties or International Agreements

1. Enforcement of Tax Claims

The principle is well established in international law that one sovereign is not obligated to assist in the enforcement of the penal or tax laws of another, in the absence of an agreement to the contrary. 5/ This principle,
also known as the "revenue rule," can be traced at least as far back as 1775 to the oft-quoted dictum of Lord Mansfield in Holman v. Johnson: "[N]o country ever takes notice of the revenue laws of another." 6/

The recent vitality of this rule was demonstrated in British Columbia v. Gilbertson 7/ and United States v. Harden. 8/ In Gilbertson, the Canadian tax authorities brought an action in Oregon to enforce a tax assessment, that had the effect of a judgment under Canadian law, against U.S. taxpayers on income derived from logging operations in the province of British Columbia. The Oregon District Court and the Ninth Circuit refused to enforce the assessment, stating that principles of comity require that foreign judgments be recognized in the United States except judgments based on tax or penal laws of the foreign country. The Ninth Circuit noted that the income tax convention between the United States and Canada in effect at the time did not abolish the "revenue rule". The court stated that while the convention provided for exchange of information, "this is as close as the treaties come to providing for enforcement powers." 10/

In United States v. Harden, the Supreme Court of Canada refused to enforce a judgment entered by a federal district court in California against a citizen of British
Columbia for an income tax deficiency of approximately $640,000. This decision was cited by the court in *Gilbertson* in support of its refusal to enforce the Canadian tax judgment on the basis of the principle of reciprocity.

The "revenue rule" emanating from Lord Mansfield's opinion in *Holman v. Johnson* applied to tax judgments of the several states of the United States until the U.S. Supreme Court decision in *Milwaukee County v. M. E. White Co.*, in 1935. The Court in that decision held that the full faith and credit clause of the Constitution mandates that states recognize tax judgments rendered by other states. The Court went on to say, however, that the "revenue rule" had continuing validity in the international context.

2. Exchange of Information

The ability of countries to obtain information from foreign sources relating to the determination or collection of taxes, in the absence of a treaty agreement, has been quite limited. Under United States law, for example, Section 6103 of the Internal Revenue Code protects the confidentiality of tax returns and return information and prohibits disclosure of such information in any manner except, *inter alia*, to the competent authority of a treaty partner to the extent provided in the terms and conditions of the treaty. The secrecy laws of many countries
likewise preclude the discretionary disclosure of information that would relate to the determination of tax liability. 16/.

Furthermore, the United States is limited by its own laws in gathering information regarding tax matters from other countries. Section 7602 of the Code authorizes the Internal Revenue Service to issue summonses for the inspection of books or questioning of witnesses to determine the liability of any person for any revenue tax, or to collect such liability. While section 7602 of the Code contains no limit regarding the service of a summons, section 7604(a) provides that the summons is enforceable by the district court in the "district in which the taxpayer resides or is found." Thus a person or entity residing outside the United States is not likely to be subject to an administrative summons. 17/

A United States grand jury subpoena may be issued in criminal tax cases and is enforceable against a taxpayer outside of the United States. 18/ Enforcement of the subpoena, however, is limited to persons or entities over which the United States court has in personam jurisdiction. It has been used in limited cases to compel information from foreign entities with domestic operations, 19/ from foreign
persons temporarily present in the United States, 20/ and from the foreign operations of domestic entities. 21/

A sovereign may obtain the assistance of a foreign tribunal in the gathering of evidence (not subject to laws prohibiting disclosure) in a tax case through the use of letters rogatory. 22/ Through this procedure, for example, the U.S. court in which a matter is being heard sends a request, on behalf of the party seeking the information, asking for the assistance of the foreign tribunal. This procedure may be used only in a judicial proceeding, however, and it has not been used often in tax cases. 23/ Compliance with a letters rogatory request by a foreign tribunal is purely discretionary and is performed as a matter of comity between nations. Furthermore, the procedure has been criticized because of the slow response of foreign tribunals and the inadmissible form of much of the evidence provided. 24/

B. The Law under Existing Tax Treaties

In light of the near impossibility of obtaining information and international assistance in tax enforcement unilaterally, tax treaties have provided to varying degrees for the exchange of information and, to a much lesser extent, the collection of taxes.
1. **Enforcement of Tax Claims**

The existing United States bilateral tax treaties contain two quite different types of enforcement provisions. One is found in nearly all tax treaties, and is quite limited -- it provides only that a treaty partner will collect the taxes of the other to the extent necessary to ensure that treaty benefits are enjoyed only by the persons entitled thereto. The other type of provision, which is contained in four of the United States income tax treaties, provides for the collection of taxes or the enforcement of tax claims of the foreign treaty partner. Typical of such provisions is article 27 of the income tax convention between the United States and Denmark, which reads, in part:

1. The Contracting States undertake to lend assistance and support to each other in the collection of the taxes to which this Convention applies, together with interest, costs, and additions to such taxes.

2. In the case of applications for enforcement of taxes, revenue claims of each of the Contracting States which have been finally determined may be accepted for enforcement by the other Contracting State and will be collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes.

The effectiveness of the enforcement provisions in each of these treaties, however, is severely limited by a
restriction in application based on the nationality of the taxpayer. Under the French, Danish, and Dutch treaties with the United States, a country cannot request of a treaty partner collection from such partner's own "citizens or corporations." 28/ The collection provision of the Swedish treaty is further restricted in application so that collection may be made only from citizens, corporations, or other entities of the applicant state. 29/ Additionally, all four of the general enforcement provisions provide that claims that are recoverable under the provision must be "finally determined" before enforcement will be accepted by the requested date. 30/

The general enforcement provisions of these four treaties were originally executed prior to 1950, and represent an effort at providing for tax enforcement that generally has been abandoned in the execution of recent bilateral treaties. 31/ Most of the U.S. tax treaties currently in force, however, include a provision for collection assistance for the purpose of ensuring that the treaty benefits are not enjoyed by unintended beneficiaries. 32/ While these provisions are not limited by a restriction relevant to the nationality of the taxpayer, they are useful only when it is discovered that a person or entity is taking unintended advantage of the
exemptions and reduced rates of tax treaties, and only when assets are available in the treaty country from which the treaty partner may collect. 33/

The yet unratified U.S.-Bermuda treaty, which was approved by the Senate Foreign Relation Committee on September 14, 1988, contains a rather novel provision for administrative assistance. Article V of the treaty provides for:

"assistance as appropriate in carrying out the laws of the respective Covered Jurisdictions relating to the prevention of tax fraud and the evasion of taxes. In addition, the competent authorities shall, through consultation, develop appropriate conditions, methods, and techniques for providing, and shall thereafter provide, assistance as appropriate in carrying out the fiscal laws of the respective Covered Jurisdictions other than those relating to tax fraud and the evasion of taxes." 34/

This provision has yet to be interpreted, although in an exchange of notes dated July 11, 1986, between the Department of State and the Embassy of the United Kingdom, it was agreed that the obligation to provide assistance would be limited to matters relating to the domestic laws of the treaty partners.35/

2. Exchange of Information

a. History

Provisions for the exchange of fiscal information can be traced as far back as 175 years ago to an 1843 treaty
between Belgium and France providing for the exchange of information regarding immovable property located in one of the contracting countries and owned by inhabitants of the other. 36/

The ubiquity of exchange of information provisions in current income tax treaties was spawned by the work of the League of Nations in the 1920s, which culminated in the first international draft model treaty governing administrative assistance in tax matters. 37/

The Organization of European Economic Cooperation, which became the Organization for Economic Cooperation and Development (OECD), resumed the study of the use of treaties to alleviate problems of international taxation in 1956. In 1963 the OECD produced a model income tax treaty, which was revised in 1977, that contains a provision for the exchange of information. 38/ This provision, article 26 of the Model Treaty, provides a general rule requiring the competent authorities 39/ of contracting states to exchange such information as is necessary for carrying out the provisions of the treaty and the domestic laws of the contracting states concerning taxes covered by the convention. 40/

The OECD Model Treaty provides that information that is exchanged is to be treated as confidential, except that the information may be disclosed to persons who are
involved in the assessment and collection of revenue, including courts and administrative bodies.

The second paragraph of article 26 of the OECD Model Treaty limits the exchange provision by providing that the contracting states are not obligated to enforce measures that are at variance with the laws of either of the contracting states, or to supply information which is not obtainable under the laws of either contracting state. 41/

The OECD Model Treaty served as the prototype for the exchange of information article of a United States model income tax treaty, first published by the Treasury Department in 1977, and modified by a draft model published in 1981. 42/ The first two paragraphs of the cognate provision of the United States Model Treaty are virtually identical to article 26 of the OECD Model Treaty. The United States Model Treaty contains four additional paragraphs, however, that considerably broaden the scope of the exchange provision by providing for the type and form of information subject to exchange and by expanding the coverage of article 26 to taxes of every kind imposed by a contracting state. 43/

The oldest exchange of information provision in a bilateral treaty with the United States is the 1939 income tax treaty with Sweden. Today there are exchange of
information provisions in all of the income tax treaties to which the United States is a party except the U.S.-U.S.S.R. income tax treaty. 44/

The exchange of information provisions were apparently unused in the U.S. until the early 1970's. Until that time, it was unclear whether the section 7602(b) summons, the principle administrative tool used by the Internal Revenue Service to obtain information, could be used solely in aid of a treaty partner. The Second Circuit resolved that issue in United States v. A.L. Burbank & Co., 45/ which held that the treaty exchange of information provisions of the U.S.-Canada income tax treaty permitted the United States to issue a summons under section 7602 of the Code when the sole purpose of the summons was to obtain information for use by Canada. Once Burbank disposed of this core issue, resort to the exchange of information provisions by treaty partners increased.


The exchange of information articles of current income tax treaties contemplate three principal methods of information exchange: routine exchange, spontaneous exchange, and exchange upon a specific request. 46/ To these has recently been added a fourth, simultaneous examination.
The most commonly employed method of exchange is the routine transmittal of information that a contracting state gathers in the course of administering its own internal revenue laws. Such information usually consists of information relating to passive income received by a taxpayer in one treaty country from sources within the treaty partner. This information typically includes: the names and addresses of payees in a treaty country receiving income from the treaty partner, the payers, the type of income, the amounts of the income, and the amount of tax withheld by the treaty partner. Many treaties separately provide for the routine exchange of information relating to the tax laws of the treaty partners. Those provisions are variously contained in the exchange of information article and in the article describing the taxes covered by the convention.

Spontaneous exchange of information is the unsolicited transmittal of information that a country acquires in the course of a domestic investigation that suggests noncompliance with the tax laws of a treaty partner or that the partner would otherwise be interested in. The Internal Revenue Service has stated that it will engage in spontaneous exchanges of information with all treaty partners with whom the United States has treaties that
permit such exchanges. Exchange of information provisions are generally considered to authorize spontaneous and routine exchanges if they do not specify any particular manner in which the exchanges are to be carried out.

The exchange of information upon a specific request is a method that has grown in significance in recent years in the United States. Under this method, a country requests specific information from a treaty partner relating to a taxpayer; if the requested state attempts to obtain the information and the party possessing the information refuses to cooperate voluntarily, then the requested state can obtain the information by compulsory process. Specific requests for information received by the United States generally concern the foreign tax liability of a foreign individual and related enterprises, and relate to the individual's financial activities, residence, travel activities, and his tax treatment by the United States.

Recently, the taxing authorities have added a fourth form of information exchange -- the simultaneous or coordinated examination of related taxpayers by the authorities of several countries. The United States has worked out bilateral arrangements with the taxing authorities of Canada, France, Italy, Japan, Norway and the U.K. Multilateral simultaneous examination, and
international "industry-wide" exchanges of information 55/ are possible. In a simultaneous examination, each country separately examines the return(s) of the affected taxpayer(s) within its jurisdiction. According to the Internal Revenue Service manual, each treaty partner nominates appropriate cases for simultaneous examination, and appropriate authorities (in the United States, the Assistant Commissioner, Examination) agree on the list of taxpayers. The two taxing authorities will coordinate the examinations, with the country of the parent or the base of operations having primary coordinating responsibility.

c. Limitations on the Obligation to Exchange Information

The goal of exchange of information provisions is not to extend the existing powers of the tax administrations but to improve them by widening the territorial area in which they can be effective. Hence the exchange provisions throughout treaty history have been attended by the limiting principle of reciprocity, in general terms means that a contracting state is not required to furnish information unless the other party can be required to furnish such information were the situations reversed. Express reference was made to reciprocity in the exchange of information articles of the early income tax treaties. 56/
The principle is embodied in more recent treaties in the provision that limits the obligation to exchange that information that is obtainable under the laws and procedures of both treaty partners commonly known as the lowest common denominator or "LCD provision." 57/ The proper interpretation and effect of the LCD provision of income tax treaties has been the subject of litigation in the United States. Two interesting issues of interpretation that have yet to be resolved arose in a 1980 district court case, United States v. Lincoln First Bank. 58/

The first issue is whether the provision relieving a state of the obligation to supply information that is not obtainable under the laws or administrative practices of the applicant state is also a prohibition against such cooperation, or whether the requested state may choose within its discretion to supply the information, notwithstanding the absence of an obligation to do so. In Lincoln First Bank, Norwegian tax officials requested information from the Internal Revenue Service regarding bank holdings of a Norwegian accused of tax evasion. 59/ The Service issued an administrative summons pursuant to section 7602 of the Code to the Lincoln National Bank to obtain the bank records pursuant to the request. Prior to the issuance of the summons, a criminal indictment had been filed in Norway
against the Norwegian citizen with respect to whom information was requested. The bank refused to comply with the summons and the Service sought enforcement of the summons in the Southern District of New York. The district court denied enforcement because the Internal Revenue Service had not shown that enforcement of the summons was consistent with the laws and administrative practices of Norway. The court stated that such a showing was required by the LDC provision of the treaty, as the intent of the provision is that "the requesting party (Norway) may not take advantage of the information system of the other party (United States) if it is wider than the information system of the requesting party." The court rejected the argument that the LCD provision merely established the minimum obligation to exchange information, stating that "the governmental agencies of the United States should not be employed to provide information to a foreign country which could not be obtained under the laws of that country."

The second issue that arose in Lincoln First Bank is whether inquiry into the consistency of an exchange of information with the laws of the supplying state under the LDC provision requires a hypothetical test of whether the supplying state would be able to obtain the information
under its laws in a purely domestic case. The issue arose in Lincoln First Bank because the IRS summons was issued after the equivalent to a criminal indictment had been filed in Norway against the taxpayer. Under the Supreme Court decision in United States v. LaSalle National Bank, an IRS summons could not be enforced after the IRS had recommended criminal prosecution of the taxpayer under investigation to the Justice Department. Thus it was urged by the taxpayer in Lincoln First Bank that enforcement of the summons in that case would violate the doctrine established in LaSalle.

The Service acknowledged, in response, that the summons would not have been enforceable in a domestic tax investigation, under LaSalle. The Service argued, however, that the prohibition on summons enforcement in LaSalle was intended to prevent the Service from usurping grand jury functions and to avoid broadening the Justice Department's right to discovery after the commencement of a criminal prosecution; thus, the Service argued, LaSalle was decided on the basis of domestic policies that are simply irrelevant to a foreign tax investigation and, therefore, it should not apply in a foreign context.

The court in Lincoln First Bank did not reach a conclusion on this issue, as it held that in any event the
summons was invalid because the Service had made no showing that enforcement would not be inconsistent with the laws or practices of Norway. 66/

The Second Circuit had occasion to examine this issue in the context of the 1942 United States-Canada income tax treaty in United States v. Manufacturers and Traders Trust Co. 67/ In Manufacturers, the taxpayers were under investigation by both the Canadian tax authorities, for their civil income tax liabilities, and the Royal Canadian Mounted Police, for suspected criminal activities concerned with bankruptcy proceedings. 68/ During the investigations, the two agencies of the Canadian government freely exchanged information, as permitted by Canadian law. Pursuant to the exchange of information articles of the 1942 United States-Canada income tax treaty 69/ the Canadian tax authorities requested the United States to obtain information that would aid in determining the taxpayers' civil tax liabilities. 70/ The Internal Revenue Service thereupon issued summonses to various banks for records concerning the Canadian taxpayers' transactions. Relying on LaSalle, 71/ the district court refused to enforce the summonses on the basis that the information obtained by the tax authorities was at least in part for the use of the Royal Canadian Mounted Police in its criminal investigation. 72/
The Second Circuit reversed the district court and ordered the summonses enforced. The court stated that the summonses may not have been enforceable in a purely domestic case because of the United States policy against use of an IRS summons to acquire evidence for a pending criminal prosecution; the court noted that Canadian law imposed no restriction on such use, however, and it held that the United States prohibition on such use in domestic cases should not apply in the treaty context. The court explained that the restriction on issuance of a domestic summons following a referral for criminal prosecution is grounded in United States policy considerations related to the division of governmental functions, the use of the grand jury in all criminal matters, and pre-trial discovery in criminal cases. These policy considerations, the court continued, are not applicable to Canada, "which does not have our marked separations and does not normally use the grand jury." The court further warned of the damage to international relations that might be suffered if enforcement of the summons were refused in the United States on grounds Canada does not recognize in its own territory or with respect to its own income taxes.

The Ninth Circuit Court of Appeals declined to follow the Second Circuit's holding in Manufacturers in a
recent case also interpreting the 1942 United States-Canada tax treaty, *Stuart, Sr. v. United States*, 76/ now pending before the United States Supreme Court. In *Stuart*, the Canadian Department of National Revenue requested information from the United States relating to the bank holdings of Canadian taxpayers whose income tax liability from prior years was at issue. The Canadian tax authorities requested the information pursuant to a "criminal investigation, preliminary stage." 77/ The Internal Revenue Service issued summonses to obtain the information pursuant to the exchange of information articles of the 1942 United States-Canada income tax treaty. 78/

The Ninth Circuit reversed an order of the district court enforcing the summonses, and held that domestic law governing summons enforcement applied to summonses issued under the Canadian treaty. The court thus held that the summonses could not be enforced until it was shown that the Canadian investigation had not progressed to a stage analogous to a Justice Department referral, under section 7602(c)(2) of the Code. 79/ The court held, furthermore, that the Internal Revenue Service must make an affirmative statement to that effect, as part of its prima facie case for enforcement of the summons. 80/
The Ninth Circuit in Stuart explicitly rejected the holding in Manufacturers. The court suggested that the decision in Manufacturers was based in part on consideration of the LaSalle doctrine, which, by the time of the Stuart decision, had been overridden by the TEFRA amendment to the Code in section 7602(c)(2). The court stated that the Second Circuit in Manufacturers was "understandably reluctant to delve into the institutional good faith of Revenue Canada," as would have been required by an application of LaSalle to the treaty summons. Under section 7602(c)(2), however, inquiry must be made only into whether there has been the equivalent of a referral for criminal prosecution in Canada, according to the court. Thus the court held the domestic standard applicable to the treaty summonses; the court reversed the order enforcing the summonses and remanded for a determination consistent with the opinion.

The Ninth Circuit's holding in Stuart appears to be in direct conflict with the Second Circuit's decision in Manufacturers, notwithstanding the Ninth Circuit's rather specious attempt to distinguish Manufacturers on the grounds that it was decided prior to the TEFRA amendment in section 7602(c)(2). Although these cases involved provisions of the 1942 United States-Canada income tax
treaty that have been superseded by those contained in the 1980 treaty, Supreme Court resolution of the issue may significantly affect the use of the exchange of information provisions, one would expect that a country would invoke those provisions only in significant cases. 84/

d. Nature of Information to be Provided

The scope of the exchange of information provisions of the various income tax treaties is tailored to accommodate the policy interests of the contracting parties. For example, the exchange of information provisions modeled after article twenty-six of the United States Model Treaty contain a provision requiring that the form of information supplied be the form that is specifically requested by the applicant state, to the extent that the information can be obtained in such form by the laws of the requested state. 85/ This provision was added to the United States Model Treaty in apparent response to a holding of the Swiss Supreme Court in 1970 that interpreted the exchange provision of the U. S.-Switzerland tax treaty as requiring merely that "information" be exchanged, and not necessarily information in a form admissible in United States courts under United States rules of evidence. 86/

The exchange of information provisions also vary as to the purpose for which information may be exchanged. Some
of the early bilateral income tax treaties contained provisions requiring information exchanges only as necessary for the prevention of fraud or evasion and for the effective implementation of the treaty terms. 87/ Most of the current United States income tax treaties provide for exchanges of information as necessary to carry out the domestic tax laws of the contracting states as well as the treaty provisions. 88/

C. The CBI Exchange Of Information Agreements.

The Caribbean Basin Economic Recovery Act of 1983 (the CBI) gave rise to a new kind of exchange of information agreement which was designed to target Caribbean Basin countries that have extensive secrecy laws and have served effectively as tax havens. The CBI amended section 274(h)(6) of the Code to allow tax deductions for conventions in "beneficiary countries," as defined in section 212(b) of the CBI, provided that those countries entered into exchange of information agreements with the United States. Under section 274(h)(6)(C)(i) of the Code, the CBI exchange of information agreement is to provide for:

the exchange of such information ... as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure provisions of the local law of the beneficiary country such as
provisions respecting bank secrecy and bearer shares. 89/ 

The Treasury Department released a draft of a model exchange of information agreement satisfying the requirements of section 274(h)(6)(C) on July 24, 1984. The draft is similar to the exchange of information article of the United States Model Treaty. The Treasury model CBI agreement differs from the Model Treaty, however, in two principal ways: (i) it requires the disclosure of certain bank information notwithstanding local financial secrecy laws prohibiting disclosure, and (ii) it provides for eleven procedures that must be available to respond to a request for information, primarily relating to the form of the information (so that it will be admissible into evidence in a United States court). 90/ The United States currently has CBI agreements in force with Barbados, Grenada, Dominica, and Jamaica; agreements are pending with Costa Rica and St. Lucia.


The Multilateral Convention on Mutual Administrative Assistance in tax matters is the product of five years
of collaborative efforts between the OECD and the Council of Europe to develop a multilateral treaty designed to combat the international avoidance and evasion of taxes. The Multilateral Convention calls for three forms of administrative assistance. It provides for the exchange of information in a fashion similar to that provided for in the bilateral income tax treaties. The Convention extends beyond the scheme of assistance of the bilateral income tax treaties, however, in its provision for general assistance in collection of taxes, and the service of documents. The idea of international mutual assistance in the collection of taxes is not a recent one. A committee of technical experts of the League of Nations issued a draft model treaty governing administrative assistance in the collection of taxes in 1927, which was followed by two subsequent model treaties for assistance in collection in 1943 and 1946. The OECD drafted a model convention for mutual administrative assistance in the recovery of tax claims in 1981. States have been reluctant to execute bilateral treaties according to these models, however, because of concerns over safeguarding the rights of taxpayers and the practicality of the mandatory enforcement by one state of the fiscal laws of another. Concurrently with the increase in international movement of persons and capital, however, has come an
increasing concern among governments and international organizations over the widening scope of taxpayer noncompliance. Thus, the study of a convention calling for mutual assistance in recovery intensified in the 1980's by the OECD and the Council of Europe, and the Multilateral Convention resulted from these efforts in January of 1988. The drafters of the Multilateral Convention were equally concerned with safeguarding the rights of taxpayers, however, and as a result have included in the Convention several provisions that severely limit the potency of the articles calling for assistance in collection. These include an LDC provision similar to that of the bilateral tax treaties, and, most importantly, a provision allowing contracting states to reserve out of the assistance in recovery obligation.

The Multilateral Convention is currently open for signature by the twenty eight countries that are members of either the OECD or the Council of Europe. The Convention will enter into force three months after five countries have signed, and deposited their instruments of ratification.

A. Scope of the Multilateral Convention

The Multilateral Convention provides generally under article one that the parties to the Convention shall
provide administrative assistance to each other in tax matters, including measures by judicial and administrative authorities. Though the treaty covers all three forms of assistance, the reservation provisions of Article thirty permit a party to limit its obligation to only the duty to exchange information (and to limit that obligation in some respects), with the provisions relating to assistance in tax recovery and service of process being optional. The Convention does not apply to judicial actions intended to punish criminal tax offenses after criminal proceedings have begun -- those are to be left to treaties on assistance in criminal matters; preparation of criminal proceedings is, however, covered by the Convention. 96A/

A contracting state has some degree of discretion over the choice of taxes to which the Convention shall apply. The taxes potentially covered by the Convention include all national, state and local taxes except customs duties. The taxes are itemized under article two, and grouped in tiers by category. The first category comprises a core group of taxes to which the convention must apply; these include national taxes on income, capital gains (if imposed separately from a tax on income) and net wealth. The second category is broken down into four sub-divisions: (i) taxes on income, gains and net worth imposed by
political subdivisions, (ii) social security taxes, (iii) a list of miscellaneous taxes including "all other taxes," except customs duties, and (iv) miscellaneous taxes imposed by political subdivisions. Through the reservation mechanism of article thirty, a contracting state must have the Convention apply to the core group of taxes in the first category, but may elect to extend the treaty to those taxes in any or all of the subdivisions of the second category. A contracting state is to list the taxes to which the Convention applies in an annex to the Convention; if it does so, however, it must provide assistance with respect to foreign taxes of like character.

1. The Exchange of Information Articles

Article four of the Convention provides generally for exchange of information, stating that the parties to the Convention shall exchange any information that is "foreseeable relevant to":

(a) the assessment and collection of tax, and recovery and enforcement of tax claims, and

(b) the prosecution before an administrative authority or the initiation of prosecution before a judicial body. 97/

The Convention specifies particular methods of exchange to be used under the Convention in articles five through ten, which are exchanges on request, automatic and spontaneous exchanges, simultaneous tax examinations, and
tax examinations abroad. Exchange of information on request is covered by Article five. The only novel feature of the article is that it requires a party to take "all relevant measures" to provide the requested information if that information is not available in its files.

Article six provides for the automatic exchange of information but only in accordance with procedures to be worked out in separate agreements by the taxing authorities. It also expresses the hope that standard forms for the exchange of information will be used, including, perhaps, electronically. Article seven of the Convention, providing for the spontaneous exchange of information, diverges from the silence on this point of bilateral income tax treaties in that it mandates such exchange in the following five specified sets of circumstances:

(1) a party has grounds for supposing that there may be a loss of tax in the other party; (2) a taxpayer obtains a reduction in or exemption from tax in one party which would give rise to an increase in tax in another party; (3) business dealings between taxpayers in two or more parties are conducted through third countries in such a way that a savings in tax may result in one or the other party or in both; (4) a party has grounds for supposing that a savings of tax may result from artificial transfers of profits within groups of enterprises; (5) information forwarded to one party by another party has enabled information to be obtained which may be relevant in assessing tax liability in the latter party.

98/ Article seven of the Convention, providing for the spontaneous exchange of information, diverges from the silence on this point of bilateral income tax treaties in that it mandates such exchange in the following five specified sets of circumstances:

(1) a party has grounds for supposing that there may be a loss of tax in the other party; (2) a taxpayer obtains a reduction in or exemption from tax in one party which would give rise to an increase in tax in another party; (3) business dealings between taxpayers in two or more parties are conducted through third countries in such a way that a savings in tax may result in one or the other party or in both; (4) a party has grounds for supposing that a savings of tax may result from artificial transfers of profits within groups of enterprises; (5) information forwarded to one party by another party has enabled information to be obtained which may be relevant in assessing tax liability in the latter party. 99/
The parties are, moreover, required to adopt implementing procedures that ensure that information will be spontaneously exchanged.

Article eight provides for simultaneous tax examinations to be conducted essentially in the same manner as the U.S. simultaneous examinations are conducted today.

The Convention provides for a novel method of exchange in article nine; it permits the taxing authorities of one country to conduct an examination at the request of those in the treaty partner. Any such examination would be conducted under the procedures of the country conducting the examination but a tax official of the requested country could be permitted to attend the tax examination upon the consent of the examining country.

A duty of verification is imposed by Article ten -- if a party receives information that is inconsistent with information otherwise available to it, it is required to notify the party that provided the information.

Unlike the assistance in recovery articles, compliance with the exchange of information articles is a mandatory commitment to a country's decision to sign the Multilateral Convention.

The exchange obligation under the Convention is limited, however, by an exception for trade secrets and an
LCD provision, both of which are similar to that found in the bilateral income tax treaties. Under article twenty-one, a state is not obligated to carry out measures at variance with either its own laws or those of the applicant state, or to supply information not obtainable under its own laws or the laws of the applicant state. 100/ By virtue of the similarity of the language of article twenty-one to that of the LCD provision in the exchange of information articles of the income tax treaties, this article may be troubled by the same issues of interpretation that arose in *Lincoln First Bank* and *Stuart, Sr.* The issues are: (1) whether article twenty-one limits the discretion of a party to supply information that would not be obtainable in the applicant state, or merely limits the obligation of a party to supply such information; and (2) whether section 7602(c)(2) of the Internal Revenue Code governing enforcement of a summons under United States law should apply to limit the enforcement of a summons issued under the Multilateral Convention.

The language of the Commentary on article twenty-one of the Multilateral Convention alludes to the first issue but fails clearly to resolve it. The Commentary states that article twenty-one of the Convention "reflects as closely as is possible in this type of convention the
principle of reciprocity which has traditionally governed international cooperation . . . 101/ The Commentary continues:

[i]n short, it is only those powers and practices which the Contracting States have in common which the requested States is obliged to carry out. This rule is important in safeguarding the rights of taxpayers since it prevents the applicant State from making use indirectly, because it has sought assistance, of greater powers than it possesses under its own law. By virtue of this principle, the requested state is at liberty, though not obliged, to refuse to grant assistance. 102/

The underscored language of the Commentary appears to be consistent with the decision in Lincoln First Bank, which prohibits the discretionary supplying of information not obtainable in the applicant state. The last sentence, however, indicates that the LCD article merely provides the minimum assistance obligation and would permit discretionary cooperation. Judicial resolution of these issues in the United States in the context of the bilateral income tax treaties may have an interesting effect on the interpretation on the Multilateral Convention by the United States. 103/

The use of information obtained under the Convention is limited in two ways. First, the confidentiality of information obtained by a party to the Convention is protected in article twenty-two which prohibits disclosure of the information except to "persons
or authorities . . . involved in the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes of that Party." Disclosure is permitted in courts and to administrative bodies under article twenty-two. Under article four, however, the information may be used as evidence before a criminal court, only with prior authorization of the supplying party. Likewise, disclosure in public court proceedings or judicial decisions is permitted only with prior authorization of the supplying party.

2. Assistance in Recovery

The Multilateral Convention diverges most dramatically from the assistance scheme of the bilateral income tax treaties in its provision for assistance in the collection of taxes. Article eleven(1) of the Multilateral Convention provides that "[a]t the request of the applicant State, the requested State shall ... take the necessary steps to recover tax claims of the first mentioned State as if they were its own tax claims." Par. 2 of the article further provides that: "... paragraph one shall apply only to tax claims which form the subject of an instrument permitting their enforcement in the applicant state, and ... which are not contested." The Commentary to
the Convention that an "instrument permitting enforcement" includes an assessment.

Assistance in collection is optional, for under article thirty(1), a party may reserve the right "not to provide assistance in the recovery" of a tax claim or an administrative fine, either for all taxes or for selected taxes.

The Convention deals with claims that the tax is not due in several ways. Firstly, in the case of a taxpayer not resident in the taxing state, the tax claim must be final and incontestible, though in the case of a resident of the taxing country, the tax claim need only be covered by an instrument permitting enforcement (so that there may be some further possibility of contest). Secondly, article twenty-three makes clear that the tax claim may not be contested in the collecting state -- the only contest there may relate to the method of collection. Article twenty-three, moreover, requires the suspension of collection action if the claim is being contested in the taxing state.

A number of open questions remain with respect to the collection provisions. For example, the commentary makes clear that the collection procedures to be applied are those applicable to tax claims of the collecting state. But, what if that state has no comparable tax? Paragraph
113 of the commentary states that the party shall use the procedure applicable to the most analogous tax. Provisional assessments cause another issue, since those assessments often may not be contested until after they are paid; there, the commentary simply enjoins the parties to use restraint in seeking collection.

The collection provisions of the Convention contain a number of special additional rules. Article fourteen provides that the time limits of the taxing state (including tolling provisions) shall apply except that a state shall not be required to take collection action more than 15 years after the date of the instrument permitting enforcement. Article fifteen denies tax collection claims any special priority in the collecting state that its tax claims might have. Article sixteen permits the collecting state to defer payment of tax to the extent permitted under its law or procedure with respect to its tax, but only if it so informs the taxing state.

Unlike the general enforcement provisions of the bilateral income tax treaties, recovery assistance in article eleven is mandated even against nationals of the requested state.105/

The convention goes beyond the enforcement provisions of tax treaties in providing for conservancy
measures. The convention mandates in article twelve that measures of conservancy be taken even if the claim is contested or is not yet the subject of an instrument permitting enforcement. According to the commentary, these measures could include the seizure of the freezing of a taxpayer's assets. The convention stipulates as a condition precedent to the taking of such measures only that the amount of tax be at least provisionally determined beforehand; according to the commentary, this means that the tax amount not be "purely speculative." Estimates of tax owed are sufficient bases for the taxing of measures of conservancy. The LCD provisions ensure that a state may not request measures of conservancy before it can do so under its own law.

The mandatory recovery provisions of article eleven may present constitutional problems. A United States court for example may not recognize the judgment of the court of a foreign state if the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process law under the United States Constitution. A court of the United States asked to enforce the judgment of a foreign court, therefore, must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered. In
the Supreme Court case of *Hilton v. Guyot* 107/, the essential elements of fair procedure were identified as follows:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect. 108/

Constitutional problems with treaty enforcement provisions arose and were discussed during Senate consideration of the 1946 United States-France income tax treaty. 109/ The problems arose as a result of anomalies in the French judicial system. Under the French judicial system taxation is purely an administrative matter, and the French doctrine of separation of powers precludes civil review of administrative decisions; only administrative courts in France may review the assessment of taxes. Hence if the United States were requested to enforce an administrative assessment of tax against a Frenchman resident in the United States without an opportunity to inquire into the merits of the assessment, two United States constitutional issues would arise. The first is that the legality of the administrative act would not be subject to
review in regular court, as mandated by *Crowelly v. Benson*. Second, the constitutional guarantee of a jury trial under the seventh amendment would not be available. To the extent that a jury trial is required, these arguably would constitute due process violations under *Shelley v. Kraemer* and *Wong Wing v. United States*, which held American constitutional guarantees of procedural due process applicable to an alien within the United States.

Due to concerns over potential constitutional and political problems concerning the recovery provisions that could deter participation by individual states, the drafters of the Multilateral Convention limited the provisions for assistance in recovery by permitting a signatory state to enter a reservation with respect to the provisions for assistance in recovery, under article thirty, paragraph 1(b), and adopt merely the articles providing for exchange of information.

Alternative methods of safeguarding taxpayers' rights considered by the OECD during its drafting of the 1981 Model Convention for Mutual Assistance were: (i) to include a list of safeguards in the Convention and (ii) to allow a taxpayer access to the legal remedies of the requested state. These were considered inadequate, however, due to the differences in national tax systems and domestic
law and thus the impracticality of devising a single list of safeguards, and the obvious complications and impracticalities of requiring a state to inquire into the correctness of a foreign tax assessment.

The decision by the drafters of the Multilateral Convention to allow a reservation with regard to the collection provisions as a method of taxpayer protection hardly seems adequate from the standpoint of the effectiveness of the treaty. The ability of states to reserve out of the collection provisions constitutes an all-or-nothing proposition: either the collection articles are expunged from the operation of the Convention and their purpose thereby defeated, or taxpayers' rights are left completely unprotected by the Convention.

3. The Service of Documents Article

The third form of assistance is in the service of documents. A state that has not reserved with respect to Article seventeen may be required to serve documents "by the method prescribed by the domestic law" for the service of similar documents, and, to the extent possible, in accordance with the method requested by the taxing state. These provisions appear non-controversial.
FOOTNOTES

1/ International tax avoidance through the use of tax havens was the focus of intense governmental scrutiny in the United States in the early 1980's; in a series of reports and congressional hearings it was estimated that tax loss due to international tax evasion schemes amounted to billions of dollars. Tax Evasion Through the Netherlands Antilles and Other Tax Haven Countries: Hearing Before a Subcommittee of the House Committee on Government Operations 98th Cong., 1st Sess. 3 at 224 and 239 (1983) [hereinafter Netherlands Antilles Hearings]; R. Gordon, Tax Havens and Their Use By United States Taxpayers - An Overview, Report to the Commissioner of Internal Revenue, the Assistant Attorney General (Tax Division) and the Assistant Secretary of the Treasury (Tax Policy) (1981) reprinted in Tax Notes Microfiche Edition, TWR Doc. 81-397 (Jan. 19, 1981) [hereinafter the Gordon Report]; Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 98th Cong., 1st Sess. 15 (1983) [hereinafter Senate Hearings].

2/ The terms "treaty" and "convention" are used interchangeably.


4/ See Preamble to the Multilateral Convention.

5/ Restatement (Second) of Conflict of Laws § 89; See Restatement (Third) of Foreign Relations Law § 483 (1986).

6/ 98 Eng. Rep. 1120 (K.B. 1775). The rule has been asserted to rest upon such rationales as the burdensome complexity and expense of one state's tribunal applying another's tax provisions, and the possibility of affronting the public policy of the effectuating nation. Id. The rule appears to reflect a reluctance of courts to subject foreign public law to judicial scrutiny. See the Restatement (Third) of Foreign Relations Law § 483 (1986).

7/ 597 F.2nd 1161 (9th Cir. 1979).
The convention at issue was the 1942 U.S.-Canada income tax convention. Conventions and Protocol between the United States of America and Canada Regarding Double Taxation, United States-Canada, 56 Stat. 1399 (1942). The new convention between the United States and Canada, signed on September 26, 1980, contains significantly broader exchange of information provisions, but reciprocal enforcement of tax judgments is still not authorized. See Appendix for citations to all U.S. income tax treaties.

The Gilbertson case represents the first U.S. judgment rendered in response to the request of a foreign government for enforcement of a tax judgment in the United States.


In the absence of either a judgment or a statute providing for the reciprocal enforcement at tax claims, the practice is mixed. See Reporters Note, Restatement (Third) Conflict of Laws § 89. See also Government of India v. Taylor, 1955 A.C. 503. (Great Britain refused to enforce a judgement rendered in India against a British corporation, which had engaged in business in India, for a capital gains tax realized upon the nationalization of the corporation's Indian assets.)

See the Gordon Report, supra, note 1, at 8-9.


I.R.C. § 6102(k)(4).

See Netherlands Antilles Hearings, supra, note 1, at 263-64 (Statement of John E. Chapoton, Assistant Secretary for Tax Policy, Department of the Treasury). Note that the United States has obviated this obstacle through the use of summonses and subpoenas when in personam jurisdiction over the subject was obtainable. See infra, note 17.
17/ See Crinion, Information Gathering on Tax Evasion in Tax Haven Countries, 20 The International Lawyer 1209, No. 4 (1986). A § 7602 summons may be enforced against a person or entity outside the United States, however, through a related entity over which the court has territorial jurisdiction. See United States v. Vetco, 691 F.2d 1281 (9th Cir. 1981) (An administrative summons issued to a domestic corporation and its Swiss subsidiary for the production of books and records was enforceable notwithstanding Swiss laws prohibiting disclosure).

18/ I.R.C. § 1783.


20/ See, e.g., U.S. v. Field, 532 F.2d 404 (5th Cir. 1976)

21/ See U.S. v. Vetco, supra, note 17.

22/ A letter rogatory is a request by a court or tribunal of one country to the court or tribunal of a foreign country to take testimony or obtain documents in the foreign country for use of the requesting court or tribunal. See Blacks Law Dictionary, p. 815 (Fifth Edition 1979).

23/ See the Gordon Report, supra, note 1, at 205. The U.S. was successful in 1982 in obtaining information from Cayman Island banks through the assistance of the Cayman Island Grand Court upon a letters rogatory request for use in criminal proceedings against certain U.S. residents and entities for transactions involving the banks and two Cayman companies controlled by the defendants. United States of America v. Carver, LeMire, et al., Civil Appeal No. 5, slip op. (Cayman Islands Court of Appeal 1982).

24/ Id. Note that compulsory process through treaties on mutual assistance in criminal matters is another possible method of information gathering available to tax authorities. See the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302, which requires the United States and Switzerland to assist each other in obtaining information for investigations in court proceedings with respect to criminal matters.
This treaty significantly restricts the exchange of tax information, however; a request for information related to tax law violations must be made for the purpose of investigating someone who is, or is reasonably expected to be, knowingly involved in the illegal activities of an organized crime group. Id. at Art. II, ¶ 1 (c)(5), 2(6) and Art. VI, ¶ 2.

These provisions are found in the income tax treaties between the United States and the following countries: Denmark (originally signed in 1948 and reexecuted in 1980 with virtually the same provisions) at art. 27; France (conventions of 1939 and 1967) at art 27; the Netherlands (1948) at art 12; and Sweden (1939) at art 17. See Appendix. The income tax conventions between the United States and Greece and between the United States and South Africa contain general enforcement provisions that effectively have been converted to limited enforcement provisions by Senate reservations.

The treaty partner whose assistance is requested will hereinafter be referred to as the "requested state" or "supplying state," and the country requesting assistance will be referred to as the "applicant state."

See Appendix.

The Dutch treaty permits enforcement of claims for interest, costs, and additions to tax, and fines that are not penal in nature.

This limitation in the French treaty apparently stems from a rule of French law that French courts alone are competent to adjudicate the merits of a tax claim when a French citizen is defendant or plaintiff in an action, unless he specifically waives his right to be judged solely by a French tribunal. H. Battifol, Droit International Prive § 718 (4th ed. 1967); Johnson, Systems for Tax Enforcement Treaties: The Choice Between Administrative Assessments and Court Judgments, 10 Harv. Int'l L.J. No. 2, 263, 280 (1969). Thus if a judgment were the basis of liability upon which the United States requested collection assistance from France against a Frenchman for American taxes owed, the Frenchman could avoid enforceability in France. This would create a disparity in treatment of the citizens of the two countries under the treaty terms.
A French decision in the Conseil d'Etat (the highest administrative court in France) held that the French authorities were competent to collect Belgian taxes on behalf of Belgium against a resident of France under a provision of an income tax treaty dated May 16, 1931 between France and Belgium. The provision, article 15 of the treaty, reads in part: "1) the contracting states undertake, on condition of reciprocity, to support and assist each other in the collection in accordance with their own law of the taxes finally due which are dealt with in this convention together with additional amounts, surcharges, interest, and costs relating to such taxes. . ." This treaty provision did not contain a restriction on collection from a resident of France. Dec. 21, 1977, Conseil d'Etat (Req. No. 1344).

29/ Article XVII of the income tax treaty between the United States and Sweden (of 1939) reads as follows:

Each Contracting State undertakes, in the case of citizens or corporations or other entities of the other Contracting State, to lend assistance and support in the collection of the taxes to which the present convention relates, together with interest, costs, and additions to the taxes and fines not being of a penal character. The Contracting State making such collection shall be responsible to the other Contracting State for the sums thus collected....

Emphasis added. See Appendix. Note that these provisions preclude recovery in the common situation in which a taxpayer owes taxes to a foreign state, and that state seeks collection from the assets of the national in his home state.

30/ In United States v. Van der Horst, 270 F.Supp. 365 (D. Del. 1967), the term "finally determined" was defined for purposes of the U.S.-Netherlands treaty as "the point at which the time for seeking judicial review had passed, or, if it had been sought, until the litigation had been concluded." Id. at 369. In an exchange of letters dated June 17, 1983, between the Ambassador of Denmark and the Secretary of State the term "finally determined" in the U.S.-Denmark treaty provision on enforcement was defined as the point at which "all rights of administrative appeal ... have lapsed or have been exhausted and the Contracting State applying for enforcement has the right under its internal law to enforce and collect the revenue claim
or tax, provided, however, if the revenue claim or tax is at any time before a judicial tribunal in the Contracting State applying for enforcement, the revenue claim or tax is finally determined when all rights of judicial appeal have lapsed or have been exhausted and the judicial decision has become final."

The Swedish and Dutch Treaties further limit the collection provision so that the contracting states are under no obligation to "carry out administrative measures at variance with the regulations and practice of either Contracting State, or supply particulars which are not procurable under its own legislation or that of the State making application." This provision, sometimes called the "lowest common denominator provision," will be examined in the context of exchange of information provisions, infra, text accompanying notes 56-67.

31/ The Report of the Senate Foreign Relations Committee on the U.S. income tax convention with France signed in 1967, states:

Although the provisions of Article 27 are not new in the case of France, they do go further than most other United States Treaties presently in force. Such being the case, the Committee wishes to emphasize that it approved this Article only because similar language is contained in the 1939 Treaty with France, and it should not be considered as a precedent for future treaties.


There is virtually no authority on the use of the general enforcement provisions in the United States tax treaties. (See the Conseil d'Etat No. 1344, supra, note 28, involving the implementation of a general enforcement provision of the France-Belgium income tax treaty.)

32/ This provision has been called a "limited" enforcement provision and typically provides as follows in article 26 of the U.S.-Canada tax treaty:

Each of the Contracting States will 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 enure to the benefit of persons not entitled thereto. However, nothing in this paragraph shall be construed as imposing on either of the Contracting States the obligation to carry out administrative measures of a different nature from those used in the collection of its own tax or which would be contrary to its public policy.

The United States has such a limited enforcement provision in income tax treaties with the following countries: Argentina; Australia; Belgium; Canada; Denmark; Egypt; Finland; Honduras; Iceland; Italy; Jamaica; Japan; Korea; Luxembourg; Netherlands; Norway; Phillipines; Romania; Sri Lanka; Switzerland; Trinidad/Tobago; U.K.; and West Germany. See Appendix.

33/ These provisions commonly apply to securities in custodian accounts held by foreign banks. Under the address method of withholding applicable to dividend payments, see, e.g., former Treas. Reg. § 505.2(c), the withholding agent could presume that the registered holder whose address was in a treaty country was in fact a resident thereof and, accordingly, withhold at the treaty rate without the necessity for certification. Regulations under the various treaties issued by the United States required foreign nominees to withhold the difference between the treaty and the statutory rate if the holder were not a treaty country resident. Surprisingly large amounts have been collected by foreign authorities and paid over to the U.S. under these provisions.

34/ The treaties between the United States and the following countries contain neither a general nor a limited enforcement provision: Austria; Bangladesh; Barbados; China; Hungary; Ireland; Morocco; New Zealand; Pakistan; Poland; Tunisia; and the U.S.S.R.


36/ Double Taxation and Tax Evasion-Report of the Technical Experts to the Financial Committee of the
League of Nations (Geneva: League of Nations, 1925) 23. In 1907, France concluded with Great Britain an agreement under which the taxing authorities of the two countries exchanged certain information with a view to counteracting the evasion of death duties. Id.


39 The "competent authority" of the United States is defined in most treaties as the Secretary of the Treasury or his delegate. See United States Model Treaty, infra, note 42, art. 3, ¶ 1(e)(i). The Assistant Commissioner (International) is the current competent authority. Comm. Del. O. 114 (Rev. 8) 1988-11 IRB 19.

40/ Article 26(1) of the OECD Model Treaty provides in full as follows:

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of the State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
Paragraph 2 of Article 26 of the OECD Model Treaty states that:

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

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

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

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

OECD Model Treaty, supra, note 38, art. 26, ¶1; see infra, text accompanying notes 65-67, for a discussion of this provision.


See infra, text accompanying notes 85 & 86.

See Appendix.


The Gordon Report, supra, note 1, at 207-209. See Commentary to the OECD Model Treaty, ¶9, supra, note 38, which describes the three methods of exchange permitted under the OECD Model. Paragraph 10 of the Commentary states that the manner in which the exchange of information will be finally effected can be decided upon by the competent authorities of the contracting states.

Under the routine exchange program in the United States, after the close of each calendar year the Commissioner of Internal Revenue transmits to each of the treaty partners of the United States duplicate copies of Forms 1001 and 1042S - income subject to withholding - showing a payee with an address in the respective partner's country.

The routine exchange program is advantageous in that information is collected by tax officials in the ordinary course of business, and there is no need for a special investigation. See Curtin, Exchange of Information Under the United States Income Tax Treaties, 12 Brooklyn J. Int'l L., No. 1, 36, 52 (1986). Internal Revenue Manual 42(10)(10)(1) at 3 CCH Internal Revenue Manual at p. 7319-10 et seq. [hereinafter I.R.M.]

I.R.M. 42 (10)(10)(2). See the Commentary to the OECD Model Treaty, ¶9, which provides that information transmitted spontaneously is that which a state supposes to be "of interest" to the other contracting state.

The United States government stated in its petition for certiorari in Stuart, Sr. v. United States, infra, note 82, Tax Notes Microfiche Edition, Doc. #88-4287 at 21, that, according to the Internal Revenue Service, more than 1600 specific requests for information were made or received by the United States competent authority pursuant to income tax treaties during the period between January 1984 and July 1987. Compare, in 1978 the Internal Revenue Service received 135 specific requests for information from treaty partners and made 106 specific requests for information. Reiner, How IRS Exchanges Tax Information with Other Countries, 31 Tax Executive 305, 306 (1979).

The use of a summons by the Internal Revenue Service to obtain information unrelated to the United States tax laws for the sole use of a treaty partner, pursuant to an income tax treaty, was upheld in United States v. A.L. Burbank & Co. Supra note 45.


I.R.M. at 42 (10)(10).7(6).


Article XV of the United States-Sweden income tax treaty, signed on March 23, 1939, states in pertinent part:

[w]ith a view to the more effective imposition of the taxes to which the present convention relates, each of the Contracting States undertakes, subject to reciprocity, to furnish such information in the matter of taxation, which the authorities of the State concerned have at their disposal or are in a position to obtain under their own law...

Emphasis added. See appendix.

OECD Model Treaty, supra, notes 38 and 41, art. 26, ¶2. It has been remarked that the net effect of this provision is to reduce the exchange obligation to the "least common denominator;" hence, the popular appellation "LCD provision." See Note, The IRS Summons Power under the Lowest Common Denominator Provisions of United States Double Taxation Treaties, 16 Geo. Wash. J. Int'l L. & Econ. 143 (1981); Switzer, Exchange of Information Articles, 26 Can. Tax J. No. 3, 306, 310 (1978).

Not officially reported. 45 AFTR 2d 942, 80-1 USTC ¶9231 (S.D.N.Y. 1980), (not officially reported).

80-1 USTC at 83,403. The exchange of information article of the Norwegian treaty parallels that of the OECD Model Treaty, supra, note 38.

80-1 USTC at 83,403.

Id. at 83,405. See Commentary to the OECD Model Treaty, paragraph 15:

15. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply
items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system.

Although the language of the commentary would appear at first blush to support the decision in Lincoln First Bank, the literal meaning of the words of the commentary do not necessarily imply a prohibition on the discretionary exchange of information. The words "cannot take advantage" may merely imply that a country cannot require another to furnish information that it would not be able to obtain under its own laws.

Id. Compare, United States v. Bache Halsey Stuart, Inc., 563 F.Supp. 898 (S.D.N.Y. 1982) (Summons issued pursuant to a request from the Netherlands concerning the income tax liability of a Netherlands citizen held enforceable, as the government had established by affidavit a prima facie showing that the requested information could be obtained pursuant to the domestic law of the Netherlands.)

The Lincoln court effectively interpreted the LCD provision as a limitation on the discretion of a state to comply with an exchange request, rather than a limitation on the obligation to comply. This aspect of the decision has been commented on at length. See, e.g., Note, The IRS Summons Power Under the Lowest Common Denominator Provisions of United States Double Taxation Treaties, supra, note 44, at 160.

This issue specifically has been addressed in the legislative histories of recent treaties. The United States Treasury Department's technical explanation of the 1980 United States-Canada income tax treaty interprets the LCD provision of the treaty as permitting the discretionary exchange of information. It states that the exchange provision "allows, but does not obligate the United States and Canada to obtain and provide information that would not be available to the requesting State under its laws and administrative practice, or in different circumstances would not be available to the State requested to provide the information." U.S. Treasury Department Technical Explanation of Article XXVII of the 1980

The legislative history of the United States-Australia Income Tax Treaty of 1982, Appendix, also advocates a more liberal interpretation of the LCD provision of that treaty's exchange of information article. The explanation of the treaty by the Joint Committee on Taxation states, in part, that:

[A] requested country is to use its subpoena or summons powers or any other powers that it has under its own laws to collect information requested by the other country. It is intended that the requested country may use those powers even if the requesting country could not under its own laws. Thus it is not intended that the provision be strictly reciprocal. For example, once the U.S. Internal Revenue Service has referred a case to the Justice Department for possible criminal prosecution, the United States investigators can no longer use an administrative summons to obtain information. If, however, Australia could still use administrative process to obtain requested information, it would be expected to do so even though the United States can not. The United States could not, however, tell Australia which of its procedures to use.


64/ Id. at 311-13. The Court in LaSalle held that a summons could no longer be enforced after either a Justice Department referral had been made or after the Internal Revenue Service as an institution had "abandoned the pursuit of civil tax determination or collection." Id. at 318. The dissent argued for a bright line test prohibiting summons issuance only upon a Justice Department referral. The position of the dissent was codified by TEFRA in 1982, in section 7602(c) of the Code.

65/ 80-1 USTC at 83,405 (citing LaSalle, 437 U.S. at 312).
66/ Id.
67/ 703 F.2d 47 (2nd Cir. 1983).
68/ 703 F.2d at 48. During the tax investigation, the Canadian tax authorities learned that the taxpayer was transferring assets out of Canada, and the Canadian equivalent of a jeopardy assessment was made against him. The taxpayer thereafter commenced bankruptcy proceedings and it is in connection therewith that the Royal Canadian Mounted Police began a criminal investigation. Id.
69/ Article XIX of the 1942 U.S.-Canada income tax treaty provides that each country undertakes to furnish to the other "information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws" and that "may be of use" in the assessment of tax liabilities. Article XXI provides that for purposes of determining income tax liability, the Canadian Minister may seek the cooperation of the Commissioner of Internal Revenue who may furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain "under the revenue laws of the United States." Convention for the Avoidance of Double Taxation and Prevention of Fiscal Evasion in the Case of Income Taxes, United States-Canada, 56 Stat. 1399 (1942) (emphasis added).
70/ 703 F.2d at 49. The district court in Manufacturers found that there had been an express or implied agreement that information obtained pursuant to the exchange of information request would be made available to the Royal Canadian Mounted Police for use in the criminal investigation. Id.
71/ United States v. LaSalle National Bank, 347 U.S. 298 (1978). The issue in Manufacturers arose prior to the 1982 amendment of §7602(c), which replaced the LaSalle doctrine with a bright-line prohibition on post-referral summonses.
72/ 703 F.2d at 49. The district court held that the summons was not enforceable under the language of the exchange provision of the treaty empowering the Commissioner of Internal Revenue to furnish the Canadian Minister information that the Commissioner is "entitled to obtain under the revenue laws of the United States of America." Supra, note 69.
73/ Id. at 52.

74/ Id.

75/ Id. In a footnote to the opinion, the court alluded to the first issue addressed in Lincoln First Bank, and specifically declined to extend its holding to that issue:

We do not, of course, mean our ruling to cover the converse situation where the Internal Revenue Service, having recommended prosecution in this country, seeks help from Canada under the Convention and the Canadian revenue laws. That problem (including the possible suppression in this country of information received from Canada in those circumstances) is not before us.

703 F.2d at 52, n.8.

76/ 813 F.2d 243 (1987).

77/ 813 F.2d at 244.

78/ Supra, note 69.

79/ 813 F.2d at 248. Stuart was decided after the 1982 TEFRA amendment to section 7602(c)(2), which replaced the LaSalle doctrine.

80/ Id. The Supreme Court in United States v. Powell, 379 U.S. 48 (1964) held that enforcement of a §7602(b) summons required a "prima facie showing of good faith," which, the Court held, required a showing that: the investigation will be conducted pursuant to a legitimate purpose; that the inquiry is relevant to that purpose; that the information sought is not already in the Commissioner's possession; and that the administrative steps required by the Code have been followed. 379 U.S. at 57-58.

81/ Supra, note 64.

82/ Certiorari was granted on the petition of the United States. The Certiorari petition stated the issue as: "Whether, in issuing an administrative summons pursuant to a request for information made by a tax treaty partner, the Commissioner of Internal Revenue is required to state that the foreign tax investigation has not reached a stage analogous to a
domestic tax investigation's referral to the Justice Department for criminal prosecution." The government argued in its petition that the Ninth Circuit in Stuart had erroneously imported into the treaty context a restriction on summons enforcement that is grounded entirely in internal policies that bear no relevance to practices in a treaty partner's jurisdiction. Petition at 8. Moreover, the government argued, the rule adopted by the Ninth Circuit injects a "new and complex issue into summons proceedings -- the comparison of the various stages of a foreign tax investigation with our very different system." Id. at 14, n. 8. The government further asserted that the Ninth Circuit's refusal to adopt the Second Circuit's decision in Manufacturers creates a "square conflict in the Circuits." Id. at 11.

83/ In the certiorari petition, the government stated that the implication in the Ninth Circuit's opinion that Manufacturers might be decided differently today in light of TEFRA is "wholly without merit." Id at 10. "There is no hint in the Second Circuit's opinion of any concern over an inquiry into the institutional good faith of Revenue Canada," according to the government; rather, the opinion focuses exclusively on the appropriateness of importing the criminal referral restriction into the treaty summons context -- "a restriction that is common to both the holding in LaSalle and to the TEFRA amendment." Id at 11.

84/ The ambiguity in the 1942 Canadian treaty as illustrated by these two Circuit court decisions is no less troublesome in the language of the 1980 U.S.-Canada income tax treaty. For example, article 27(2) of the treaty, which is similar to article 26(3) of the United States Model Treaty, supra, note 42, provides that the requested State "shall endeavor to obtain information to which the request relates in the same way as if its own taxation was [sic] involved"... It is unclear from the literal words of the provision whether the underscored expression refers to the methods of obtaining information or to the legal basis for obtaining information under United States law.

Note, however, that the United States Treasury Department's technical explanation of the 1980 U.S.-Canada treaty impliedly addressed the issue in Stuart, and declared an interpretation of the exchange of information article that is inconsistent with the
Ninth Circuit decision in Stuart. The explanation states that the exchange provision allows but does not obligate the United States and Canada to obtain and provide information that "... in different circumstances would not be available to the state requested to provide the information." Supra, note 49 (emphasis added).

Note that this issue is also imbedded in the language of the LCD provisions of current treaties -- which relieves a state of the obligation to carry out administrative measures "at variance" with its own laws or practice.

85/ U.S. Model Treaty, supra, note 42, art. 26, ¶3. This provision of the U.S. Model Treaty has been adopted in the income tax conventions between the United States and the following countries: Australia; Barbados; Canada; Cyprus; Denmark; Egypt; Hungary; Jamaica; Korea; Malta; New Zealand; Norway; the Phillipines; Poland; and Romania. See Appendix.

86/ X and Y Bank v. The Swiss Federal Tax Administration, 76-1 USTC ¶9452, 37 AFTR 2d 76-1282 (Swiss Sup. Ct. 1975). The Internal Revenue Service had requested and received from the Swiss tax authorities reports from the books and records of a Swiss bank relating to dealings between the bank and an American citizen suspected of tax fraud in the United States. Following an earlier decision to the effect that information might be exchanged in the case, X v. Federal Tax Administration, 28 AFTR 2d 71-5510, 71-1 USTC ¶9435 (1970), the Tax Court ordered the taking of deposition. Ryan v. Commissioner, 58 T.C. 107 (1972), cert. denied, 412 U.S. 939 (1972). After receiving the reports, the Service discovered that they would not satisfy evidentiary rules of the U.S. courts; certified originals were needed in order to be admissible as evidence. The Service thereupon requested assistance from the Swiss authorities to provide the original copies of bank documents. In the 1975 decision, the Swiss Supreme Court refused to order the Federal Tax Administration to supply the original documents, finding no requirement regarding the form of information that need be provided under the 1951 U.S.-Switzerland income tax treaty. Finally, limited immunity was granted, and the taxpayers were ordered to answer certain interrogatories that presumably built on the information furnished by the Swiss. Ryan v. Commissioner, 67 T.C. 212 (1976),
aff'd, 568 F.2d 531 (7th Cir. 1977), cert. denied, Estate of Ryan v. Commissioner, 439 U.S. 820 (1978). The principal taxpayer died before the Seventh Circuit affirmed the Tax Court order holding him in contempt for his refusal to answer the interrogatories.

87/ For example, article 27 of the Germany-Switzerland income tax treaty of August 11, 1971 states in part: "the competent authorities of the contracting states may, on application, exchange such information (being information which is available under their respective taxation laws in the normal course of administration) as is necessary for the carrying out of this convention . . . ."

88/ OECD Model Treaty, art. 26 (1), supra, note 40; United States Model Treaty, art. 26 (1), supra, note 42. Some of the treaties specify that the threatened violation of domestic law must concern fraud or fiscal evasion, however. For example, article 26 (1) of the U.S.-Switzerland income tax treaty provides for the exchange of information as is necessary to carry out the provisions of the convention or "for the prevention of fraud or the like" in relation to the taxes which are subject to the convention. See Appendix. The Swiss Supreme Court has interpreted this provision to mean that Switzerland is not authorized to provide information to the United States unless the United States is seeking to prevent tax fraud as defined under Swiss law. X v. The Federal Tax Administration, 71-1 USTC ¶9435 (1970). Tax fraud under Swiss law does not include tax evasion as that term is understood under United States law; rather, "tax fraud" under the then Swiss definition meant the "deliberate deception of tax authorities by the use of substantively untrue documents for the purpose of obtaining an illegal tax advantage." Id. See also the U.S.-Luxembourg income tax treaty, art. 18, Appendix (same language as article 26(1) of the Swiss treaty).

Other treaties emphasize the prevention of tax fraud and evasion as a goal of the exchange provision in addition to the carrying out of domestic laws of the contracting states. See U.S.-Barbados income tax treaty of 1984 (entered into force in 1986), Appendix.
I.R.C. §274(h)(6)(C)(i). An exchange of information agreement need not provide for the exchange of information which is subject to local nondisclosure laws, however, if the Secretary of the Treasury finds that the agreement will "significantly assist in the administration and enforcement of the tax laws of the United States". § 274(h)(6)(C)(ii).

Another provision of the draft CBI agreement requires that a signatory country have "adequate internal process," including the authority to compel testimony and production of materials. These provisions are manifestations of congressional intent behind the CBI agreements that the Secretary of the Treasury have "great latitude in determining what information is to be exchanged" and that the information exchanged be in a form admissible into evidence. H.R. Rep. No. 266, 98 Cong., 1st Sess. 30 (1983).


The following countries are members of both the Council of Europe and the OECD: Austria; Belgium;
Denmark; France; Germany; Greece; Ireland; Iceland; Italy; Luxembourg; Netherlands; Norway; Portugal; Spain; Sweden; Switzerland; Turkey; United Kingdom. The additional countries of the OECD are: Australia; Canada; Finland; Japan; New Zealand; and the United States. The additional countries of the Council of Europe are: Andorra; Cyprus; Liechtenstein; and Malta.

95/ To date no country has come forward to sign the Convention.


97/ Compare the language of article 26(1) of the OECD and United States Model Treaties which requires the exchange of such information "as is necessary for the carrying out . . . of the domestic laws of the Contracting State . . ." The "foreseeably relevant" standard of the Multilateral Convention appears to reflect an intent to broaden the scope of the exchange provision. Indeed, paragraph 50 of the Commentary on the Multilateral Convention declares that the scope of this article is wide, and is intended to assist states in combating international tax avoidance and evasion "to the widest possible extent."

Article 4 of the Convention also states that parties to the convention are not at liberty to exchange information which is "unlikely to be relevant" to the purposes specified.

98/ Id. at 67068.

99/ The Convention provides that simultaneous tax examinations may be arranged between two or more parties to examine the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain. Involvement in such an arrangement is undertaken at the discretion of an interested party, and procedures for such examinations are to be determined by the parties involved in such an arrangement on an ad hoc basis.

100/ Article 21, paragraph 2 of the Convention provides that the provisions of the Convention shall not be
construed so as to impose on the requested state the obligation:

a. to carry out measures at variance with its own laws or administrative practice or the laws or the administrative practice of the applicant State;
b. to carry out measures which it considers contrary to public policy (ordre public) or to its essential interest;
c. to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant State or its administrative practice;
d. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information disclosure of which would be contrary to public policy (ordre public) or to its essential interest;
e. to provide administrative assistance if and insofar as it considers the taxation in the applicant State to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation or of any other convention which the requested State has concluded with the applicant State.
f. to provide assistance if the application of this convention would lead to discrimination between a national of the requested state and nationals of the applicant state in the same circumstances.

101/ Commentary to the Multilateral Convention, ¶ 188 (emphasis added).

102/ Id. at ¶ 189 (emphasis added).

103/ See revenue rulings 81-79, 81-1 CB 605; 59-569, 59-1 CB. 737 (general rule that similar provisions of tax treaties should be similarly interpreted).

104/ The term "tax claim" is defined in article 3, paragraph 1(c) to mean "any amount of tax, as well as interest thereon, related administrative fines and costs incidental to recovery, which are owed and not yet paid;" The Commentary to the Convention, at paragraph 41, states that the definition of "administrative fine" is to be governed by domestic
law. The Commentary continues, however, that an administrative fine is "generally deemed to be any penalty the legal basis of which is determined by rules other than those of criminal law." A tax claim would thus appear to include penalties and additional to tax.

Article 11 further provides in paragraph 2 that: "...paragraph one shall apply only to tax claims which form the subject of an instrument permitting their enforcement in the applicant state, and ... which are not contested." Paragraph 115 of the Commentary to the Convention suggests that an "instrument permitting enforcement" includes an assessment.

105/ Contrast the general enforcement provisions of the bilateral income tax treaties, supra, text accompanying notes 27 & 28.

106/ Commentary to the Multilateral Convention, ¶ 262.

107/ 159 U.S. 113 (1895)

108/ Id. at 202.


111/ 34 U.S. 1 (1948)

112/ 163 U.S. 228 (1896).
APPENDIX: United States Income Tax Conventions


6. Income Tax Convention with Bermuda (Approved by the Senate Foreign Relations Committee on September 14, 1988.)


8. Income Tax Convention with China (Entered into force Nov. 21, 1986) reprinted in 23 ILM 677-704;


12. Convention with Respect to Taxes on Income and Property, Mar. 6, 1970, United States-Finland, 22 U.S.T. 7042;


27. [Convention with The Netherlands-Antilles and Aruba] [Partially terminated, effective January 1988]


38. [Convention with Tunisia] [Unpublished; Convention on Double Taxation and Income Taxes, signed 6/17/85.]
