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NOTE AND COMMENT: INTERNATIONAL TAX REGULATION BY UNITED STATES FIAT: HOW FATCA REPRESENTS UNSOUND INTERNATIONAL TAX POLICY

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HIGHLIGHT:

Abstract

The United States adopted the Foreign Account Tax Compliance Act (FATCA) in 2010 to identify tax evasion through offshore holdings. Questions have arisen concerning the legality, efficacy, and practicality of FATCA during its implementation by the US Department of the Treasury. Despite FATCA's unorthodox approach to tax enforcement and the burdens it creates, international cooperation in its implementation has been surprisingly strong. Nevertheless, the questions raised over the act and its policies have the potential to create long term impediments to its success.

TEXT:
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Introduction

Imagine a group of children playing a ballgame on a playground. The ball they are using was provided by one child in particular. This child announces to the other children that they should all play by his rules. When the other children object, this one child throws a temper tantrum and threatens to leave with his ball. Not willing to see the game end, the other children relent and agree to play by the child's rules. In reality, such an ending could likely be different; the other children would play a different game, find another ball, or gang up on the child and force him to play along with everyone else. That is, unless, the petulant child is the United States and the other children are the rest of the world. If, in this scenario, the rules at issue are international bank secrecy and information sharing laws, and the fulcrum providing the leverage is not a ball, but unfettered access to the US financial system, then the other children relent, unwilling to see the game end.

[*983] The United States is one of a few countries in the world to assess an income tax on all worldwide income earned by its taxpayers. [n1] Such a system creates a tax enforcement challenge not realized by any other nation. [n2] In 2010, the United States Congress passed the Foreign Account Tax Compliance Act (FATCA) to combat tax evasion by the sheltering of assets overseas. The goal of the legislation was to improve compliance and enforcement provisions within the Internal Revenue Code (IRC), enhancing asset disclosure requirements. What distinguishes FATCA from other anti-tax evasion measures are the requirements it places on foreign entities and governments.

FATCA has not only affected US tax cheats, but also the foreign financial institutions and governments who have acquiesced to this extraterritorial intrusion of US tax law, and law-abiding US citizens living abroad. [n3] FATCA does not achieve its goals by being a statute enforceable on all foreign nations [n4] but rather by effectively shaking down the rest of the world, making it prohibitively costly to invest or do business in the United States via the US financial system unless a party chooses to comply with FATCA. To this end, there is a real economic cost for any entity to comply with FATCA, and this cost can be great. [n5] Furthermore, the scope and way FATCA was implemented has negatively impacted US expatriates who were already in compliance with existing tax laws, raising controversial questions of the exigencies and long-term impact of the law.

Regardless of the form, effect, or means of enforcement, FATCA is, at its core, a tax statute. As such, FATCA should be analyzed in the same manner and held to the same standards as any other form of tax policy. Although FATCA concerns an aspect of international tax policy, that does not preclude the necessity to consider its impact on equity, [*984] economic efficiency, revenue, and administrative ease. [n6] While FATCA was enacted with an eye toward equity, the statute raises problematic questions when considered with respect to the other three metrics.

This Comment argues that foreign financial institutions and governments have largely acquiesced to the jurisdictional intrusion of US tax law via FATCA without any legal obligation to do so; entering legally valid and binding intergovernmental agreements out of the financial necessity for unfettered access to US financial markets. Consequently, FATCA's negative impacts and enforcement costs exceed its provided value to the United States. As such, FATCA constitutes poor international tax policy and should be repealed.

In Part I, this Comment will review the history and purpose of FATCA, from its passage into law through its initial implementation. Part II will discuss the intergovernmental agreements used by the US Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) to attain foreign reporting. Part III will analyze the constitutionality and legality of the intergovernmental agreements within the context of US and international law. Part IV will examine the tax policy impacts of FATCA, the unintended consequences of FATCA, and what impact, if any, they will have on continued enforcement of the law.

I. Background: History and Purpose of FACTA

A. Offshore Tax Evasion and Enforcement Prior to FATCA

In 2006, the IRS achieved a voluntary tax compliance rate of 83.1 percent. [n7] When enforcement and late payments are considered, the compliance rate increased to 85.5 percent. [n8] These figures are impressive considering the voluntary nature of income tax reporting and payment in the United States. [n9] A considerable tax gap, however, still remains after [*985] voluntary compliance and enforcement. In 2009, $ 100 billion of the tax gap was estimated to be from assets held in foreign offshore accounts. [n10] FATCA was designed to close the portion of the tax gap caused by unreported foreign held assets. [n11] Its passage, however, was not quick, taking Congress multiple years and bill drafts before being able to pass legislation in both houses that addressed the foreign asset issue. [n12]

1. Bank Secrecy Laws, Whistleblowers, and the US Department of Justice

A constant impediment for the US Department of Justice (Justice Department) and the IRS in enforcing the IRC is the existence of foreign bank secrecy laws. For example, Switzerland's bank secrecy laws criminalize the release of information pertaining to bank accounts, which includes information about the account holders. [n13] These Swiss laws create a "secure and tax-evasion friendly sanctuary for those subject to US and other nations' tax laws." [n14] Therefore, these types of laws make it difficult to ascertain information about foreign accounts for which US taxpayers are either an unnamed beneficiary or the account holder.

The government-protected deniability held by Swiss banks and other foreign banks in nations with similar laws was abruptly altered in 2008 when whistleblowers alerted the world's governments to the extent of tax-evasion being conducted in these former safe havens. Bradley Birkenfeld, an American banker for Swiss bank UBS AG of Switzerland, resigned his position at UBS after learning that the bank's asset management efforts for wealthy clients were in violation of US law. [n15] [*986] Mr. Birkenfeld revealed to the Justice Department privileged information concerning the methods of tax evasion schemes used by UBS. [n16] His revelations prompted an extensive investigation into UBS's activities, which resulted in UBS entering into a deferred prosecution agreement with the Justice Department to avoid criminal prosecution. [n17]

The deferred prosecution agreement effectively opened the doors to the Swiss banking industry's secrets. In addition to waiving indictment; paying $ 780 million in fines, penalties, interest, and restitution; and exiting the business of providing banking services to US clients holding undeclared UBS accounts, UBS agreed to provide the Justice Department and the IRS client information of UBS's cross-border business US customers. [n18] The agreement also provided that the disclosures were to take place by the order of the Swiss Financial Market Supervisory Authority (FINMA). [n19] This is of particular note, as it recognizes foreign cooperation and assistance in US efforts aimed at preventing and identifying offshore tax avoidance schemes.

2. Rationale for Tax Compliance Overhaul and Pre-FATCA Efforts

Relying on the significant tax gap reported by the IRS and the existence of offshore tax havens that catered to the tax evasion efforts of American citizens and companies, Senator Carl Levin introduced the Stop Tax Haven Abuse Act of 2009 (STHAA), [n20] a modified and improved version of his earlier Stop Tax Haven Abuse Act of 2007. [n21] The purpose of the bill was, as Senator Levin described, to "target ... offshore tax abuses that rob the U.S. [sic] Treasury of an estimated $ 100 billion each year, reward tax dodgers using offshore secrecy laws to hide [*987] money from Uncle Sam, and offload the tax burden onto the backs of middle income families who play by the rules." [n22] The US investigations into the tax evasion schemes orchestrated by UBS and other European banks was largely the motivation for the bill. [n23]

The STHAA was a complex and multi-faceted piece of legislation. Indicated by its title, the purpose of the Act was to stop the use of tax havens in "foreign jurisdictions that maintain ... corporate, bank, and tax secrecy laws and industry practices that make it very difficult for other countries to find out whether their citizens are using the tax haven to cheat on their taxes." [n24] The bill included numerous ways to achieve its purpose, including: creating new evidentiary presumptions during enforcement proceedings; allowing sanctions for foreign money laundering threats to be applied to foreign tax administration threats; treating foreign corporations as US corporations if certain asset, management, or control thresholds are met; extending the time allotted to complete offshore audits in countries with bank secrecy laws; instituting additional third party reporting requirements for US financial institutions; and strengthening and clarifying statutory prohibitions and disclosure requirements regarding the use of foreign accounts and corporations. [n25]

While intended to protect the interests of the US Treasury and all compliant US taxpayers, the STHAA was not a legislative success. Upon introduction, the Senate took no further action on Senate Bill 506, other than referring it to the Committee on Finance. [n26] House Bill 1265, introduced by Representative Lloyd Dogget and an identical bill to Senate Bill 506, was referred to the House Committees on Ways and Means, Financial Services, and the Judiciary, where it too received no further action. [n27] Regardless of its failure to become law, the STHAA was successful in setting the stage for the introduction of FATCA later that year.

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B. Enactment and Structure of FATCA

1. Congressional Enactment of FATCA

On October 29, 2009, Senator Max Baucus introduced Senate Bill 1934, the Foreign Account Tax Compliance Act of 2009 (FATCA). [n28] On the same date, Representative Charles Rangel introduced the House version of the act, House Bill 3933. [n29] Unlike Senator Levin's attempts to pass the STHAA, FATCA was a joint effort between the Senate and the House with the backing of President Barack Obama's administration and the Treasury Department. [n30] Rather than simply increasing the reporting and disclosure requirements on US banks like the STHAA, FATCA would amend the IRC to authorize the IRS to receive reports and disclosures from foreign financial institutions on accounts held by US taxpayers. [n31] Additionally, it would require those same taxpayers with offshore accounts to disclose the accounts when filing US tax returns. [n32] Unlike Senator Levin's bill, FATCA is about ending offshore tax abuses, not just targeting them. Noted by Senator Baucus in his remarks on introducing the bill, "the bill gives the IRS powerful tools to find US taxpayers who are hiding their money in offshore accounts. It includes strong incentives for individuals to properly report income from assets held in offshore accounts. The days of sending your money offshore to avoid paying US taxes are over." [n33]

Passage of FATCA through Congress was a relatively easy exercise. On February 11, 2010, Senator Harry Reid attached FATCA to House Bill 2847 with Senate Amendment 3310. [n34] The Senate passed the amended version of House Bill 2847, the Hiring Incentives to Restore Employment (HIRE) Act, on February 24, 2010. [n35] The House followed suit, passing an "as amended" version of the HIRE Act on March 4, 2010. [n36] The Senate passed the final "as amended" version of the HIRE [*989] Act on March 17, 2010. n37 President Obama signed the HIRE Act into law the following day as Public Law No: 111-147, making FATCA law. n38

2. Basic Structure of FATCA

FATCA amended multiple sections of the IRC, but its key functionality is contained in four new sections it added to the code: sections 1471-1474. n39 These sections impose reporting requirements, requiring foreign financial institutions ("FFI") and non-financial entities to disclose foreign-held assets of US account holders to the IRS. n40 Success of the statute's aims is largely dependent on cooperation from foreign entities and governments, n41 with participation conditioned on the threat of losing access to US financial markets. n42 Enforcement is achieved through a 30 percent withholding tax applied to US-sourced income directed to nonparticipating FFIs or to foreign accounts held by persons subject to reporting requirements. n43

At its most basic level, FATCA is the product of an unexpected change in worldwide bank secrecy laws. Absent the role of UBS in the deferred prosecution agreement, it is plausible there would not have been the political will to upset what seemed like an impenetrable foreign banking system. UBS's actions, however, demonstrated that foreign entities are willing to breach bank secrecy laws. As such, the entire structure of FATCA depends on this type of sharing relationship. Achieving this cooperation with foreign entities and governments has necessitated a complex and unusual regulatory structure.

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II. Intergovernmental Agreements to Attain Foreign Reporting

As was briefly mentioned, n44 traditional norms of sovereignty protect sovereign states from being forced against their will to abide by the laws of a foreign state. Therefore, the application of one sovereign's laws to another requires the cooperation of both states. There are many ways in which a state goes about securing this cooperation, and they form the basic principles in intergovernmental negotiations and international debate. One possible way is by providing an economic and financial incentive to the state to gain its cooperation. FACTA is predicated on this means, and it is the means by which the Treasury and the IRS craft FATCA's enforcement and regulatory mechanisms.

A. Model Intergovernmental Agreements

The statutory language of FATCA requires FFIs to report information and provides an applicable penalty for the failure to do so. The statute does not, however, create a legally enforceable reporting obligation on the FFIs, insomuch as they are not subject to the jurisdiction of the United States. n45 The Intergovernmental Agreement (IGA) resolves this problem. The entire reporting scheme of FATCA is dependent upon the IGA between the United States and the nation of the relevant FFI, as it establishes legally enforceable reporting obligations on the FFIs and fulfils the agreement requirement of the statute by the use of the encompassing IGA. n46 Absent an IGA, there are genuine legal questions as to whether the United States can impose US law on a foreign entity outside the United States where no jurisdictional nexus [*991] exists, n47 and whether FFIs could comply with the US law without violating laws of their nation of residence. n48 The overwhelming participation of foreign nations in entering into IGAs, however, may preclude this legal question from having to be answered in the foreseeable future.

At the most rudimentary level, the IGAs are agreements between the United States and a foreign nation that require FFIs in that nation to provide the relevant account information. n49 There are two basic IGA forms - Model 1 and Model 2 - whose primary difference is the designation of the FFI or the foreign nation as the transferor of the information to the United States. n50 Within the two models there are additional differences and alternative sub-models that provide for different agreement structures while maintaining a common transferor. n51 The IRS has chosen to recognize as fulfilling the statutory agreement requirement, IGAs that have been formally agreed to by both nations, as well as IGAs without formal agreement but with agreement in substance, as fulfilling the statutory agreement requirement. n52

1. Model 1

Nations who enter into a Model 1 agreement with the United States agree to collect from reporting FFIs under their jurisdiction all requested account information and transfer it to the United States. n53 The Model 1 agreement is subdivided further between reciprocal and nonreciprocal agreements. Specifically, reciprocal agreements ("Model [*992] 1a") provide for the transfer of similar account information of residents of the foreign nation who hold accounts in US financial institutions. n54 Non-reciprocal agreements ("Model 1b") do not provide for the similar transfer of information from the United States to the foreign nation. [n55] Model 1a agreements assume a preexisting Tax Information Exchange Agreement (TIEA) [n56] or Double Tax Convention (DTC) [n57] between the United States and the foreign nation party to the IGA. [n58] Model 1b agreements, however, can be entered into regardless of whether a TIEA or DTC is in existence. [n59]

2. Model 2

Unlike all Model 1 agreements, nations who enter into a Model 2 agreement with the United States assume no reporting duty. They are, however, required to direct and enable all reporting FFIs within their jurisdiction to register with the IRS and comply with the reporting requirements contained within FATCA and the Model 2 agreement. [n60] Under Model 2 agreements, FFIs report account information directly to the IRS and not to their nation of residence. [n61] Model 2 agreements are considerably less common than Model 1 agreements, with only fourteen nations having entered into a Model 2 IGA or having reached a Model 2 agreement in substance. [n62]

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B. Structure of IGAs

An odd facet of FATCA is the structure of its withholding mechanism. On its face, the withholding component of FATCA operates unlike a function of typical tax withholding mechanisms. [n63] The withholding, which functions more akin to an economic sanction, is assessed on an entity due to its refusal to submit to the jurisdiction of the United States and respond to an informational reporting demand. [n64] This withholding occurs regardless of whether a jurisdictional nexus exists between the FATCA violating entity and the United States, serving as a response to an inaction on the part of the entity, wherein there was no actual obligation or requirement to act. This begs the question: can this withholding mechanism be legally assessed?

This questionable issue is further muddied by the odd way in which the IRS and Treasury have gone about the act of international enforcement. The statutory law created by FATCA requires an agreement between the Treasury and an FFI, but basic US jurisprudential concepts of sovereignty and legal jurisdiction may likely prevent the legal enforcement of FATCA against an unwilling FFI. [n65] The withholding requirement, however, is directed at US-sourced payments to FFIs, [n66] thus creating the necessary nexus to allow withholding under the law. Such a distinction may satisfy the requirements of the Third Restatement of Foreign Relations Law of the U.S. and the jurisdictional requirements of the IRC. [n67] Unfortunately, congruence with the Third Restatement does not resolve competing sovereign interests. For example, a foreign nation could impose strict bank secrecy requirements on FFIs subject to its jurisdiction, with violations enforced by criminal [*994] penalties. [n68] Such an FFI must make a choice: violate US law by abiding by the law of its country of residence and ignoring the FATCA reporting requirement, thereby subjecting itself to the automatic withholding, or violate the laws of the country of residence in order to comply with FATCA and avoid the withholding. The second choice, however, opens an FFI to criminal prosecution in its country of residence for violating bank secrecy laws. As such, the statutory structure of FATCA creates a paradox in which many FFIs cannot comply with the laws of one sovereign without violating the laws of another.

This paradox dictates that the statutory requirements [n69] precipitate the necessity of an IGA between the United States and the partner nation, [n70] providing the legal backbone to allow FFIs to comply with FATCA. An agreement between two nations, however, is not immediately enforceable law insomuch as it may not be self-executing. In such a case, the IGA requires additional action on the part of the partner nation to enact it into law. Legal enforceability cannot be suggested until this has been accomplished.

When compared to an accord such as a self-executing treaty between two nations, FATCA seems to require considerable legal gymnastics to make its enforcement remotely possible. To effectuate the goals of Congress, US regulators have relied on a triad of legal systems to completely implement FATCA: US law, international law, and the laws of foreign partner nations. [n71] As such, the question of enforceability must be considered for each system within the triad. It is not sufficient to only ask whether enforcement of FATCA is lawful under US laws, but also whether it is lawful under international law and the laws of respective foreign nations who are party to an IGA. The enforceability of IGAs will be examined in this context, using the IGA between the United [*995] States and Canada as a model when considering common arguments against enforceability that have been or are likely to be made.

On June 27, 2014, the Treasury entered into a Model 1a reciprocal IGA with Canada. [n72] The IGA was entered into under the auspices of the existing Convention Between the United States and Canada with Respect to Taxes on Income and on Capital (the "Convention"). [n73] Specifically, the Canadian IGA constituted an agreement between the Treasury and Canada to enter into an information sharing agreement under the terms of the Convention. This required that the parties (1) "establish the procedures for the automatic exchange obligations described in Article 2 of this Agreement," (2) "prescribe rules and procedures as may be necessary to implement Article 5 of this Agreement," and (3) "establish as necessary procedures for the exchange of the information reported under subparagraph 1(b) of Article 4 of this Agreement." [n74] To comply with these three obligations, Canada passed executing legislation of the type referenced above. [n75]

By statutorily enacting the provisions of the Canadian IGA, Canada has closed the final link in the chain that effectively allows enforcement of FATCA on Canadian FFIs. The reality is that what is actually being enforced is not the US FATCA statute, but rather the IGA entered into under the Convention and subsequently enacted by Canadian statute. This process, which is not uncommon among foreign nations who are parties to FATCA IGAs, presents a number of general arguments against enforceability.

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III. Intergovernmental Agreements within the Context of US and International Law

Since legal regimes vary by country, it is not possible within the confines of this Comment to address every legal argument, or even the most common legal arguments, that could be made against the enforceability of FATCA. Moreover, the law has proven to be less than ripe for a decision on the merits within a US court. [n76] As such, this Comment's analysis is limited to the broadest arguments applicable to the foreign and international legs of the triad: first, whether the IGA or executing statute are enforceable if they violate a different international agreement, and second, whether a sovereign nation may statutorily require its citizens to submit to the jurisdictional authority of another sovereign nation. [n77]

A. IGAs Within the Context of Foreign Law

Since the Canadian IGA requires an executing Canadian statute, an analysis of whether a foreign law is violated becomes far more nuanced. [n78] Assuming the primacy of new statutes to old, the IGA and executing statute would necessarily need to violate a superior law - such as the Canadian Constitution or a superior international agreement - to be considered unenforceable. For example, one author argues that the Canadian IGA and its associated Canadian statute are unenforceable because they violate the International Covenant on Civil and Political [*997] Rights ("ICCPR"), to which Canada is a party state. [n79] The absence of a specific anti-discrimination statement in the Canadian IGA, which is present in the model IGA, could subject Americans to discrimination by FFIs on the basis of their national origin. [n80] Specifically, it would be simpler for Canadian FFIs to discriminate against US citizens and refuse them banking services (thus avoiding the reporting requirements) than to comply with the reporting requirements that FATCA and the Canadian IGA would impose. As such, the IGA violates the ICCPR.

1. State Initiated Actions

The concept of enforceability regarding international agreements must be considered first when assessing the assertion that one international agreement is made unenforceable by the prior existence of another. Regardless of whether the agreement subject to enforcement is a FATCA IGA, the ICCPR, or any other international agreement, enforceability is relevant only to the extent that an international actor wishes to enforce the document. Absent such a desire by a sovereign, there is a limited group of actors who may seek enforcement: non-sovereign international organizations such as the United Nations Human Rights Committee, the International Court of Justice (ICJ), other various international bodies, and individuals who seek enforcement where the agreement in question provides for a private right of action. [n81] Therefore, if Canada chooses not to enforce the ICCPR with regard to the Canadian IGA, [n82] enforcement would be left to the international community by an international body or an individual to bring a private action. While it is [*998] possible the Canadian IGA may be technically unenforceable within the strictures of the law, to date, no Canadian court has ruled as such. [n83]

The ICJ provides dispute resolution to nations through quasi-judicial arbitration. To have standing, the court must recognize both parties as sovereign entities who have consented to the court's jurisdiction in the matter. [n84] The United States and Canada would have standing to bring an action against the other in the ICJ seeking enforcement of the ICCPR. Considering, however, that the United States sought and agreed to the terms of the Canadian IGA and the executing statute, it is unlikely the United States is concerned with any resultant violation of the ICCPR. [n85] Specifically, seeking relief from the ICJ would be antithetical to US interests in passing FATCA and entering into the Canadian IGA.

Likewise, seeking to invalidate the IGA would open Canadian FFIs to the withholding penalty, which is what the Canadian IGA sought to avoid.

The existence of the nondiscrimination clause in the Model IGA and its absence in the Canadian IGA is likely by design. Negotiations between the United States and Canada concerning the implementation of FATCA and the formation of an acceptable IGA resulted in a compromise between the two nations. [n86] Also, it is unlikely that the United States would be willing to amend the IGA to satisfy FATCA opponents in Canada. In the interest of furthering the goals of FATCA, it is in the best interest of the Treasury to allow some limited discrimination against US citizens living in Canada to protect the collection of the massive amount of financial information Canadian FFIs are now required to report.

2. Private Rights of Action

If the ICJ does not provide a viable platform to enforce the ICCPR, the United Nations Human Rights Committee (UNHRC) may be an alternative venue. There is precedent for Canadian citizens to bring [*999] complaints against Canada before the UNHRC. [n87] The UNHRC, however, lacks any legitimate mechanism to enforce its findings. [n88] Rather, the UNHRC hopes the party nation to the complaint will adopt the views the Committee expresses. [n89] Since the Supreme Court of Canada has yet to rule on whether the Canadian IGA or the executing statutes violate the ICCPR and are unenforceable, a complaint to the UNHRC is premature, and would likely be found inadmissible. [n90]

Absent these international outlets, a party looking to challenge the Canadian IGA and executing statutes must initiate a private right of action in the Canadian court system. While the ICCPR was signed and ratified by Canada, it was not enacted verbatim in the Canadian statutes. Many of the aims of the ICCPR, however, were included in the Canadian Charter of Rights and Freedoms, and therefore have the weight of constitutional authority. [n91] Therefore, a potential litigant would need to determine under which authority, the ICCPR or the Canadian Charter, a private right of action exists. Additionally, the litigant would need to determine what law violates the authority.

The Canadian Supreme Court, in RWDSU v. Dolphin Delivery Ltd., addressed the issue of rights of action in tort arising from the Canadian Charter. [n92] The court held that the Charter does not create a [*1000] constitutional law of private human rights, and that it does not apply to private litigation or to common law in the absence of some governmental action. [n93] Legal philosopher Sandra Raponi posits that Canadian courts may take a similar view with regard to international human rights treaties. [n94] Ms. Raponi argues that Canadian courts may find no private right of action from these forms of international law, due in large part to the "established ... comprehensive regime of bodies, procedures and remedies for addressing human rights violations that exclude resort to other means of settling disputes or providing remedies." [n95] This would seem to preclude action taken directly against a FFI that violates some provision of the ICCPR.

The end result would likely be the same if a suit was brought against the Canadian government rather than a FFI, but for different reasons. As a constitutional document, the Charter has the force of law. Given that Chapter 15 of the Charter incorporates the protections outlined in the ICCPR, [n96] the Canadian Government would be prevented from violating the ICCPR by virtue of the enactment of the Charter; laws passed by Canada would be subject to the protections of the Charter. Therefore, neither the Canadian IGA nor the executing document could affirmatively permit the discrimination of persons based on national origin. [n97] Even absent language preventing discrimination, both documents are still subject to the provisions of Section 15. It is important to note that a lack of a statement regarding an activity and the affirmative recognition of the acceptability of the same activity are inherently distinct from one another.

Additionally, it is necessary to draw a distinction between private actors and government actors. Both the Charter and the ICCPR apply to abuses by government actors. Section 15 provides for constitutional protection against the abuses the ICCPR seeks to prevent. This protection, therefore, has a greater weight than the statutory [*1001] protections the ICCPR requires. The argument that, absent language prohibiting discrimination in the Canadian IGA and executing statutes, the Canadian FATCA documents are in violation of the ICCPR and are therefore unenforceable, necessitates an overly broad reading of the operative language within Article 26 of the ICCPR. [n98] Rather, the provisions required by the ICCPR, that individuals are entitled to equal protection under the law without discrimination, are provided for in Section 15 of the Charter. [n99] While it is true that discrimination by private entities may occur, such discrimination does not make the provisions of the Canadian IGA unenforceable. Rather, the person who is discriminated against can seek equitable relief in court, provided there is an available private right of action. [n100]

Other potential violations of international agreements would need to be examined in a similar fashion. This type of an examination reveals that, while a FATCA IGA may appear to violate the letter of some other international agreement, it nonetheless remains enforceable due to a lack of desire or an inability to enforce the provisions of the other international agreement. Furthermore, and perhaps more importantly, what matters is not which law is in technical violation of another, but rather which law is enforced in practice.

B. IGAs Within the Context of International Law

FATCA is, explicitly, a US law. At first glance, it seems apparent that citizens of a foreign nation are not under any requirement to abide by FATCA when outside the jurisdiction of the United States. But, in a way, a foreign sovereign can require its citizenry to abide by the provisions of FATCA.

As previously discussed, IGAs create a triad of relevant laws: US statutes and regulations, international law, and the laws of foreign party nations. This triad is key to the effective enforcement of FATCA. Because of the three distinct levels, FFIs in party states are not directly complying with the laws of the United States, but rather with the laws of their nation of residence. For example, a Canadian FFI is identified as such and reports information regarding its account holders not because [*1002] US law instructs it to do so, but rather because Canadian law requires it to. [n101] An eloquent way of describing this process is that "IGAs allow the Treasury to sidestep any conflicts of law when strong-arming FFIs into releasing the requested account information." [n102]

1. Default Invalidity Under Model 2

Attentive readers will note that the Model 1 IGAs do not require FFIs to submit to the jurisdiction of a foreign sovereign; rather they are required by the law of their jurisdiction to report information to the local government. There does appear to be, however, some FFIs that are forced to submit to the jurisdiction of the United States, specifically in countries that have a Model 2 IGA. As discussed above, the Model 1 IGAs are structured to make compliance mandatory under the laws of a FATCA Partner, not under the laws of the United States. FFIs in compliance with the FATCA Partner laws are deemed to have met the requirements of FATCA and are not subject to the withholding penalty. [n103] Under Model 2 IGAs, however, the FATCA Partner must require the FFIs to comply with the provisions in FATCA and the associated regulations. [n104]

This seems to be nothing more than a distinction without a difference. In the end, the FFIs have to report the same information regardless of which Model IGA controls, and the IRS gets the information it desires, regardless of its source. Yet, in this case there is a structural difference; therefore, it warrants a closer examination to determine if the distinction is material. Under Model 1, FFIs are required to "identify U.S. accounts pursuant to due diligence rules adopted by the partner jurisdiction and report specified information about the U.S. accounts to the partner jurisdiction." [n105] Whereas, under Model 2, a FATCA Partner "agrees to direct and enable all FFIs that are located in the jurisdiction, and that are not otherwise excepted or exempt pursuant to the Model 2 IGA, to register with the IRS and report [*1003] specified information about U.S. accounts directly to the IRS." [n106] The difference is Model 2 requires no adoption of rules by the FATCA Partner, just an admonishment to direct and enable the FFI to follow US law.

FFIs under Model 2 IGAs must submit to the jurisdiction of the United States, at least insomuch as the IGA requires the FFIs to comply with directives outlined in the FATCA statutes. Under the Vienna Convention on the Law of Treaties (Vienna Convention), the Model 2 IGAs appear to be validly entered into international agreements. [n107] The signatures of representatives of the United States and the FATCA Partner constitute consent to be bound under the terms of the IGA per the Vienna Convention. [n108] Furthermore, an IGA is effective upon the date provided within the IGA, a date the negotiating states agree upon, or, absent either of the preceding, when consent to be bound by the treaty is established by the negotiating states. [n109] This provision would have been satisfied for all IGAs on the provided for date within the IGA. [n110] Under the basic structure of the Vienna Convention, the Model 2 IGAs are at least nominally valid treaties or international agreements.

The next question is whether the content of the agreement may render it unenforceable, due to the nature of what is required by the IGA. Under the Vienna Convention, there seems to be a slight potential for unenforceability due to invalidity. Looking first to reservations, no FATCA Partners who have signed an IGA have done so while stating reservations to any of the provisions contained therein, per Article 19 of the Vienna Convention. [n111] Therefore, it can be concluded that all FATCA Partners are in complete agreement to enforce the entirety of the IGA.

Next, Articles 26 and 27 require a good faith effort of compliance [n112] and prevent the invocation of internal law to justify nonperformance of a treaty. [n113] Therefore, an argument that an IGA conflicts with Canadian laws requiring an FFI to submit to the [*1004] jurisdiction of the United States would not be valid under the Vienna Convention. Finally, forms of invalidity must be considered. The Vienna Convention provides for invalidity in the event of: lack of competency to conclude treaties due to internal law, [n114] restrictions on authorities to express the consent of the state, [n115] error, [n116] fraud, [n117] corruption or coercion of a representative of a state, [n118] coercion of a state, [n119] and conflict with a peremptory norm of general international law. [n120] Among these, a potential argument could be made concerning the invalidity of Model 2 IGAs under Article 53, conflicting with a peremptory norm of general international law. Specifically, to argue that a sovereign may not subjugate a person or entity within its jurisdiction to the jurisdiction of another sovereign constitutes "a norm [of international law] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." [n121]

a. Article 53 Challenge

The success of an Article 53 challenge to the validity of the Canadian IGA is difficult to determine. There is no single, exhaustive list of all peremptory norms of general international law. [n122] Rather, "despite their acknowledged universality, it remains unclear which norms are peremptory." [n123] As such, before an argument can be made to challenge the validity of the Canadian IGA under Article 53, a peremptory norm must be identified under which to bring the challenge. There is some generalized agreement in identifying categories of peremptory norms, [*1005] often drawing on natural law. [n124] Norms concerning human rights, crimes against humanity, and the independence of states are often cited as examples of peremptory norms on which there is broad consensus among the international community. [n125]

A Model 2 IGA challenger asserting that a sovereign may not subjugate a person or entity within its jurisdiction to the jurisdiction of another sovereign would need to rely on the peremptory norm recognizing the independence of states. [n126] The challenger, however, would have to immediately refute the counterargument that a state may exercise its independence in whatever way it sees fit, including requiring its citizenry to abide by the laws of another state. This is a difficult counterargument to rebut. While such state actions may be ill advised, the state is nonetheless justified in taking them. The independence of the state remains intact: no violation of Article 2(4) of the UN Charter occurs, [n127] and the representatives of the state are acting within their power to enter an international agreement. [n128]

Has the counterargument remained unrebutted? Is this resolution sufficient? The logical conclusion to the question of independence relies in part on a circular argument: the peremptory norm recognizing the independence of states has not been violated because the state remains independent. The counterargument remains unrebutted, but the discussion of defining the state of independence has opened the door for an alternate line of analysis. Rather than rebutting the counterargument by arguing whether the state has remained independent, a rebuttal grounded in the question of transfer of sovereignty is more appropriate.

Disregarding the limits of absolute sovereignty for the sake of this argument, [n129] it can be assumed a state is independent and sovereign when it enters into IGA negotiations. Based on such assumption, the question to subsequently answer is whether, in requiring its citizenry to [*1006] abide by the laws of a foreign state, the state in question transfers its sovereignty to the foreign state. If the state retains its sovereignty, then it may take all actions under Section 3 of the Vienna Convention - including a breach of the IGA. If sovereignty is retained, then so too is independence. If the state transfers its sovereignty to the foreign state, then it has abrogated its authority and independence. Returning then to the counterargument, there is no indication that sovereignty has been transferred; the state remains independent and the counterargument has not been refuted.

It is difficult, if not impossible, to say whether a legitimate Article 53 challenge to the validity of a Model 2 IGA would in any way resemble this hypothetical. What this hypothetical does, however, is establish the strong presumption of validity that would need to be overcome. Therefore, it seems quite unlikely that the Model 2 IGAs are invalid due to violating Article 53.

b. Article 52 Challenge

Alternately, an argument that relies on the coercion of the state under Article 52 may have a greater chance of success. [n130] Given that coercion is easier to identify and define than an international peremptory norm, it is plausible a challenger could show that the withholding penalty constitutes coercion of the state through the threat of economic force, less the financial system of the state be impaired due to withholdings by the United States. Considering that FATCA is frequently viewed as being coercive or extortionist, such an argument does not seem farfetched. Moreover, this argument would not only apply to Model 2 IGAs, but also to Model 1 IGAs, since the question is not of the independence of the party states but whether a state was coerced into entering the agreement.

To establish coercion, a challenging state would need to make an argument rooted in the global financial system. The challenger could argue that the US financial system's integration with the Alpha++ city of New York [n131] renders it so integrated with the worldwide economy, that restricted access prevents the citizenry and the state from unfettered [*1007] engagement with the worldwide financial system. [n132] Next, the challenger would need to make a second, critical argument that unrestricted access to the worldwide economy is recognized and accepted by the international community as constituting at least a right of states, if not a peremptory norm. [n133] If this second right or peremptory norm can be established, this argument may have a higher likelihood of success.

Establishing this secondary argument is necessary, because reliance on Article 52 requires coercion, and coercion demands the potential for a use of force to injure or deprive a person or state of a right, barring their acquiescence to the demand. [n134] The threat of restricting access to the US financial system violates Article 2, paragraph 4 of the UN Charter and fulfills the need for the threat of inflicted injury or infringed upon right. [n135] Threatening to use international economic force to resolve a domestic tax collection issue violates one of the established purposes of the UN in Article 1, paragraph 3 of the UN Charter. [n136] Absent the secondary argument, the entire challenge would be susceptible to the counterargument that in negotiating the IGA, the United States has the sovereign right to restrict access in any way to the US financial system, including the FATCA 30 percent withholding penalty. By making the secondary argument, the challenger is attempting to overcome the presumption that a state has the sovereign right to open or close its financial and economic markets to the world.

The challenge's success requires the extension of prohibitions on coercion through force in Article 52 to coercion through economic force - hence the necessity of the secondary argument. Unfortunately, the Vienna Convention does not define what "by force" means in this context. During the drafting of the Vienna Convention, there was considerable debate as to whether "force" was to be interpreted narrowly or broadly. [n137] Those in favor of a narrow interpretation wanted it limited to just physical force, while those in favor of a broad interpretation expanded it to include economic and political force. [n138] Drafters [*1008] considered adding language specifically designating economic and political force but ultimately did not, taking no official position on the definition and interpretation of "force" in Article 52. [n139]

Compared to the validity challenge under Article 53, the validity challenge under Article 52 seems more plausible. As with Article 53, the success of such a hypothetical challenge cannot be determined with any certainty. The need to interpret the definitions of key terms in Article 52 only adds to this. Even though this argument might be persuasive, it likely will not succeed due to the lack of evidence that the term "force" should be interpreted broadly to include economic force. [n140] Moreover, the very nature of sovereignty is likely an obstacle too large to overcome in an Article 52 challenge. A sovereign nation has the right to close itself off completely or selectively to the economic activity of other nations. As such, an economic coercion challenge under Article 52 is effectively moot.

The takeaway is this: under international law, IGAs are presumed valid and the circumstances necessary to successfully argue for their invalidity are quite limited, amounting to uncommon and egregious violations of international norms. While the United States' assertion of its own interests in these IGAs may be ill advised, it is nonetheless protected under its sovereign rights. Therefore, the IGAs are likely valid international agreements under international law. Despite this, the question remains whether FATCA constitutes good international tax policy.

IV. Tax policy, Unintended Consequences, and Enforcement of FACTA

A. Analyzing Tax Policy

When analyzing the policy aspect of a tax system, four basic principles are often used: equity, economic efficiency, revenue, and administrative ease. [n141] Good tax policy results when a tax system is evaluated positively under these principles rather than negatively. Equity [*1009] is typically divided between vertical equity and horizontal equity; the former being the notion that people with different amounts of income or wellbeing should pay different amounts of tax, and the latter being the notion that people with similar amounts of income or wellbeing should pay similar amounts of tax. Equity can also be viewed in broader terms of fairness and justice, insomuch as a tax system should achieve an equitable result.

Economic efficiency often looks to two factors: economic growth and a lack of economic distortion. Economic growth stands for the idea that a good tax system should grow the economy, while lack of economic distortion stands for the idea that people should not be motivated in their economic decision-making based on the effects of a tax system. Economic efficiency can also be utilized when considering notions of global competitiveness. Revenue is treated as the impact the tax system will have on revenue generation or revenue cost. [n142] Finally, administrative ease looks to the ease with which a tax system can be enforced or complied with. Two factors considered in the analysis of administrative ease are the simplicity of the tax system and the impact of the tax system on taxpayer morale.

Analysis within the limits of these principles can take on multiple forms and variations, but the core substance remains the same. [n143] In the analysis of international tax policy, these principles remain the foundation of analysis but the scope of analysis is necessarily increased when analyzing the tax system on a global, rather than state level. [n144] [*1010] FATCA is a domestic tax law that has global implications. Therefore, its analysis must consider not just the impact on US taxpayers, but also the impact on foreign states and the citizenry and entities of foreign states. When FATCA is analyzed within this framework, the result is mixed. This result is unsurprising, because there is no perfect system of taxation and even the worst tax systems can be viewed to satisfy at least one of these four principles. Thus, a tax system's positive policy aspects must be balanced against its negative policy aspects to determine the overall tax policy impact of the law.

B. FATCA Constitutes Poor Tax Policy

1. Equity

FATCA is a law born out of a desire for equity; its stated goal is to find tax cheats sheltering assets in offshore accounts and to limit sheltering assets in foreign tax havens in the future. [n145] This is the one principle that FATCA certainly meets, because FATCA is concerned with neither tax rates nor who should be taxed but rather identifying all assets held offshore to determine if they are subject to tax. Of course, this analysis must be limited to just the text of FATCA, as an analysis of the entirety of the US tax system is completely beyond the scope of this Comment. An analysis of FATCA must acknowledge that it functions as a reporting scheme within the broader tax system, [n146] mandating information that is to be disclosed, not what tax is due on income identified within that information. [n147] Because of this, the scope of analysis is considerably narrow. Due to this limitation, an analysis of vertical equity or horizontal equity becomes unnecessary, as FATCA does not concern who pays what tax or how much tax is owed. Therefore, the analysis is limited to the broader notions of fairness and justice.

[*1011] FATCA is decidedly just. Its aim is to combat tax evasion, which benefits all taxpayers. [n148] Furthermore, it is nondiscriminatory in its approach, mandating the disclosure of all relevant information. [n149] The law uses broad generalized language to avoid inadvertent exclusions, using the terms "United States accounts" [n150] and "United States persons." [n151] The result is a text that requires disclosure based on relationship to the United States, not based on status or position.

FATCA is certainly fair for US taxpayers, for the same reasons it is just, but the same conclusion is less clear for FATCA on a global scale. The law demands cooperation from all FFIs and countries equally. Likewise, it assesses the withholding penalty in a nondiscriminatory manner. In these ways, the law is globally fair in that it is equitable in its treatment of all concerned parties. However, an argument can be made that the withholding rate of 30 percent is not fair. [n152] Any analysis of this point is highly subjective. It is the view of the author, however, that imposing an economic penalty without granting any in kind economic benefit for cooperation is not equitable, and could therefore be regarded as unfair. Regardless, on the whole, FATCA does seem to meet the minimum standards of equity in a limited, global context.

2. Economic Efficiency

Unlike equity, FATCA is not economically efficient. FATCA may hamper economic growth, as the burden the law places on FFIs and foreign states may be sufficient to discourage commercial partnerships with US entities, instead encouraging them to avoid the presence of US accounts or US persons in the state. Likewise, economic distortion follows suit, by allowing international business decisions to be made [*1012] based on the negative tax consequences of FATCA rather than the likelihood of success of the venture.

FATCA's impacts on economic efficiency are best viewed at the individual level. The burdens created by the law have caused economic decisions with a negative effect on US taxpayers living abroad. Specifically, US taxpayers now have restricted access to foreign bank accounts and business entities are making decisions based on their ability to avoid reporting requirements rather than what is in the business's best interest. [n153] This is a prime example of a tax system impacting the economic decision making of individuals and entities. The impact, however, does not end with the denial of a bank account to a US expatriate. That individual must then make economic decisions that are burdened by FATCA. The decision could be as minimal as finding a different financial institution, or as great as relocating to a different nation or back to the United States to avoid the burden of FATCA. [n154] In this way, FATCA is affecting the free movement of people around the globe. Such a result may be extreme and an outlier, but it is nonetheless a significant economic decision attributable directly to the burdens FATCA creates.

FATCA creates real economic inefficiency. It distorts economic decision making, which has the potential to hinder economic growth. This is problematic, especially in an age where people are more globally interconnected than ever before. Furthermore, the current effects of FATCA are potentially the tip of the iceberg. With the implementation of FATCA still in its infancy, future impacts of the law are unclear, especially considering the recent boom in international mergers and acquisitions, particularly focused around inversions of US companies to foreign states. [n155] Large US holdings with foreign ownership means more US persons and US accounts in foreign nations that will be subject to FATCA. With so much uncertainty and moving pieces, it is [*1013] unforeseeable how the global economy will react to FATCA in the long-term.

3. Revenue

Revenue represents the greatest unknown with respect to a policy analysis of FATCA. When FATCA was passed, the estimated tax gap attributable to foreign held assets was known [n156] and the Treasury estimated the amount of revenue the increased reporting would likely generate. [n157] Compared to its initial estimated implementation and lifetime maintenance costs, [n158] FATCA will generate revenue for the United States, assuming the estimates for revenue generation are correct. In contrast, the estimated revenue gain per year, $ 800 million, constitutes just over a half of one percent of the tax gap attributable to assets held offshore. [n159] Regardless of issues of fairness and equity, this is an incredibly small amount of generated revenue to justify such an impressive burden on the entire world. Furthermore, once the global implementation cost of FATCA is factored in, the net revenue generated is zero. Global implementation costs were estimated to be $ 8 billion in 2011 [n160] but more recent estimates have suggested firms expect to spend more on implementation than they originally thought, with over a quarter of surveyed firms expecting to spend between $ 100,000 and $ 1 million on implementation and administration costs in 2015. [n161] Additionally, the former acting Commissioner of the IRS, Steven Miller, has suggested that the benefits of FATCA may not outweigh the cost, and the entire reporting scheme may not be a revenue-positive event. [n162] Miller also [*1014] pointed out the all too obvious fact that it is the FFIs and FATCA partner states who bear the cost burden without reaping any of the benefits of the reporting scheme. [n163]

Considering this, it is exceedingly difficult to see how FATCA benefits anyone other than the United States, and even then, the amount of revenue generated is sufficiently small enough to question the necessity of the reporting scheme. On a global level, there is no revenue benefit to FATCA. From a cost benefit analysis, FATCA is unsustainable and unwarranted, at least initially. Only through the benefit of time and the analysis of future revenues and costs will the true economic success or failure of FATCA be known.

4. Administrative Ease

FATCA embodies the antithesis of a tax system with optimal administrative ease, constituting a burden on all parties involved. It is administratively inefficient for the US government, it is administratively inefficient for FFIs, and it is administratively inefficient for FATCA partner states. FACTA is complex rather than simplistic, with the statutory text, while not long in length, necessitating a highly complex administrative and regulatory system. The text of the statutes anticipates an individual agreement between the Treasury and each FFI: "the requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary [of the Treasury]." [n164] Recall that an FFI constitutes a single foreign financial institution, and FATCA applies to all FFIs in all foreign states. The statute expects the Treasury to enter into an agreement with every FFI who has a reporting obligation and wishes to avoid the withholding penalty. Such a directive is so unrealistic and [*1015] incomprehensible that the Treasury formulated the Model 1 IGA as a workaround to the statutory requirement. [n165]

FATCA partner states have every administrative burden that the United States does in entering IGAs. FATCA partners also have the extra burden facilitating the collection of information from an FFI to the FATCA partner for transfer to the United States or enabling the collection of information by an FFI and the FFI's subsequent transfer of information directly to the Treasury. This burden, however, is minimal when compared to the FFI's burden. Not only does the FFI bear the financial burden of implementation, collection, and transfer, [n166] but it must also conduct the collection of the data and the research and due diligence that accompanies that task, necessitating an increased compliance staff. [n167]

Administratively, FATCA is a logistical nightmare. It has a negative impact on the morale of all parties involved, not just the individual taxpayer (with the potential exception of the US Congress). [n168] Given the lack of administrative ease, and the great burden placed on all parties, FATCA's lack of benefit for all countries except the United States is hard to justify. When all four basic principles of tax policy are considered, FATCA meets the standards of just one: equity - and even then an argument can be made that FATCA is not actually equitable. Simply stated, FATCA constitutes unsound international tax policy. This fact should have prevented its passage into law and should necessitate its repeal and yet, the former did not happen and the latter looks unlikely to occur anytime soon. [n169] Despite its continued existence, there is no reason why the entire world must begrudgingly accept FATCA as a tax information reporting system.

[*1016] Generally speaking, the rest of the world is opposed to the citizenship-based taxation favored by the United States; [n170] no state other than the United States receives any real positive benefit from FATCA; the classification of London as an Alpha++ city negates the argument that the world is by necessity bound to conduct business through the United States via New York City; [n171] and it is completely possible that the United States could not garner enough votes in the UN General Assembly to oppose a resolution condemning its coercive behavior. The question still remains why the rest of the world has not acted against FATCA. Absent conclusive evidence, the most logical reason is that the cost and burdens associated with reengineering the global financial sector to avoid the withholding penalty exceed even the cost of implementing FATCA.

V. Conclusion

In an age of international commerce, access to US financial markets is a necessity. The United States Congress relied on that necessity to pressure much of the rest of the world to comply with the reporting requirements of FATCA. While likely lawful and legal under international law, FATCA is nonetheless problematic and troubling. The cost to enforce it, including both economic cost and human capital, the burden of which falls largely on foreign institutions and governments, far exceeds the monetary return received by the Treasury. With respect to tax policy, FATCA is economically inefficient, generates a small amount of revenue from an unknown total of foreign sheltered assets, and is an administrative nightmare. While technically legal and valid, FATCA constitutes poor international tax policy. Incapable of achieving its enacted purpose in an efficient manner, and responsible for future uncertainties with respect to the impact it will have on international banking and tax laws, FATCA is not fit to remain part of the IRC and, thus, should be repealed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReciprocal ContractsTax LawFederal Tax Administration & ProcedureCriminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375)General OverviewTax LawInternational TaxesForeign Persons' Activities in the United StatesNonresident & Resident Aliens (IRC secs. 864, 871-880)General Overview

FOOTNOTES:

n1. The United States taxes income based on citizenship and/or resident status when it was acquired (worldwide taxation), whereas the global norm is to tax income based on location of the state in which it is earned (territorial taxation). See generally Thornton Matheson et al., Territorial vs. Worldwide Corporate Taxation: Implications for Developing Countries (Int. Monetary Fund, Working Paper No. 205, 2013).

n2. The United States must monitor income acquired within its borders and outside of them.

n3. E.g., Ragheed I. Moghrabi, A Boy's Allowance: Never Safe From the IRS, Wall St. J., Oct. 17, 2016, http://www.wsj.com/articles/a-boys-allowance-never-safe-from-the-irs-1476745799.

n4. Basic tenets of sovereignty prevent such an occurrence. See Sovereignty, Black's Law Dictionary 1611 (10th ed. 2014).

n5. See Tina Allen, Thomson Reuters Survey Indicates FATCA Compliance to Cost More Than Anticipated, Thomson Reuters (Nov. 12, 2014), https://tax.thomsonreuters.com/press-room/press-release/thomson-reuters-survey-indicates-fatca-compliance-cost-anticipated/.

n6. The four common principles of tax policy. See infra Part IV for tax policy analysis.

n7. I.R.S. News Release IR-2014-4 (Jan. 6, 2012) (showing that 83.1 percent of total tax revenues were paid on a timely basis).

n8. Id. (resulting in a net tax gap of $ 385 billion).

n9. See I.R.C. ß 6011(a) (2007); Flora v. U.S., 362 U.S. 145, 176 (1960) (stating that persons liable for a tax are required to make a return or statement with respect to such tax. It is the person filing the return who states the amount of tax owed, not the government stating to that person the amount to be paid). See also, Internal Revenue Service, Anti-Tax Law Evasion Schemes - Law and Arguments, ß 1, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Anti-Tax-Law-Evasion-Schemes-Law-and-Arguments-Section-I (last updated Aug. 15, 2016).

n10. 155 Cong. Rec. S2624 (daily ed. Mar. 2, 2009) (statement of Sen. Levin) (stating that by 2014, the portion of the tax gap due to foreign held assets had grown to an estimated $ 150 billion out of an estimated tax gap of $ 450 billion). See Permanent Subcommittee on Investigations, Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, Majority and Minority Staff Report, 9 (2014).

n11. See 155 Cong. Rec. S10785 (daily ed. Oct. 27, 2009) (statement of Sen. Levin).

n12. See generally 1 Foreign Account Tax Compliance Act: A Legislative History of Public Law No. 111-147, (William H. Manz ed., 2014).

n13. See Bruce W. Bean & Abbey L. Wright, The U.S. Foreign Account Tax Compliance Act: American Legal Imperialism?, 21 ILSA J. Int'l & Comp. L. 334, 337-38 (2015).

n14. Id. at 338.

n15. See Lynnley Browning, Ex-UBS Banker Pleads Guilty in Tax Evasion, N.Y. Times, June 20, 2008, http://www.nytimes.com/2008/06/20/business/20tax.html?_r=0.

n16. Id. In exchange for his information and testimony, Mr. Birkenfeld sought immunity from prosecution for his role in the tax evasion schemes and a percentage of any recovered tax revenue under an IRS whistleblower law. The IRS denied Mr. Birkenfeld's request for immunity, and he ultimately plead guilty to conspiring to defraud the US government. See Davis S. Hilzenrath, Swiss Banker Turned Whistleblower Ended Up with a Prison Sentence, Wash. Post, (May 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/15/AR2010051500089.html.

n17. Press Release, Department of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), http://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement.

n18. Id.

n19. See Deferred Prosecution Agreement at 6, United States v. UBS AG, No. 09-60033-CR-COHN (S.D. Fla.).

n20. 155 Cong. Rec. S2624-25 (daily ed. Mar. 2, 2009) (statement of Sen. Levin).

n21. 155 Cong. Rec. S2624, supra note 10; S. 681, 110th Cong. (2007).

n22. 155 Cong. Rec. S2624, supra note 10.

n23. Id. UBS entered into the deferred prosecution agreement with the Justice Department a month prior to Sen. Levin's introduction of S. 506. Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (2009), available at http://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement.

n24. 155 Cong. Rec. S2624-25, supra note 20.

n25. See 155 Cong. Rec. S2624-32 (daily ed. Mar. 2, 2009) (statement of Sen. Levin). See also S. 506, 111th Cong.ßß101-05, 108-09 (2009).

n26. 155 Cong. Rec. S2623, supra note 12.

n27. 155 Cong. Rec. H2924 (daily ed. Mar. 3, 2009).

n28. 155 Cong. Rec. S10785 (daily ed. Oct. 27, 2009) (statement of Sen. Baucus).

n29. 155 Cong. Rec. H11867 (daily ed. Oct. 27, 2009) (statement of Rep. Rangel).

n30. 155 Cong. Rec. S10785, supra note 28.

n31. Id.

n32. Id.

n33. Id.

n34. 156 Cong. Rec. S559 (daily ed. Feb. 11, 2010) (statement of Sen. Reid).

n35. 156 Cong. Rec. S724 (daily ed. Feb. 24, 2010).

n36. 156 Cong. Rec. H1147 (daily ed. Mar. 4, 2010); The vote in the House was 217-201. Id.

n37. 156 Cong. Rec. S1637 (daily ed. Mar. 17, 2010); The vote in the Senate was 68-29. Id.

n38. Remarks on Signing the Hiring Incentives to Restore Employment Act, 2010 Daily Comp. Pres. Doc. 185 (Mar. 18, 2010).

n39. I.R.C. ßß1471-74 (2012).

n40. DLA Piper, The Foreign Account Tax Compliance Act (FATCA), DLA Piper, (Nov. 4, 2016), https://files.dlapiper.com/files/Uploads/Documents/FATCA-Alert.pdf.

n41. Id.

n42. Lee A. Shepard, News Analysis: Getting Serious About Offshore Evasion?, 56 Tax Notes Int'l Mag. 399, 402 (2009).

n43. I.R.C. ß 1471(a) (2012).

n44. See Black's Law Dictionary, supra note 4.

n45. See I.R.C. ßß1471(b), 1473(5); 26 C.F.R. ß 1.1471-5(d) (2013) (calling for FFIs to enter into an agreement with the US government or be subject to the withholding penalty, however, whether or not the United States has the authority to require such agreement is questionable).

n46. See Agreement Between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA art. 2, Nov. 4, 2013 [hereinafter Model 1a]; Agreement between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA art. 2, June 6, 2014, [hereinafter Model 1b]; Agreement between the Government of the United States of America and the Government of [FATCA Partner] for Cooperation to Facilitate the Implementation of FATCA, art. 2 [hereinafter Model 2].

n47. Given the newness of FATCA, the statutory provisions, and the considerable time requirement to implement the statute, no FFI has yet been penalized by the withholding requirement, nor has an FFI brought suit against the United States in a US court challenging the legality of FATCA. The relative newness of FATCA makes it less than ripe for a court challenge at this point in time. See generally, Brianne N. De

Sellier & John M. Kelleher, Revisiting Nexus Standards: Establishing U.S. Jurisdiction to Tax Cross-border Commerce, 88 Fla. B. J. 31 (2014).

n48. See Model 1a, supra note 46, at preamble. The preamble to the model IGA seems to suggest as much, "Whereas, FATCA has raised a number of issues, including that [FATCA Partner] financial institutions may not be able to comply with certain aspects of FATCA due to domestic legal impediments." Id.

n49. DLA Piper, supra note 43.

n50. Compare Model 1a, supra note 47, at art. 2(1), with Model 1b, supra note 47, at art. 2(1), and Model 2, supra note 46, at art. 2(1).

n51. Id.

n52. See I.R.S. Announcement 2014-38, Internal Revenue Bulletin 2014-51 (Dec. 15, 2014).

n53. See Model 1a, supra note 46, at art. 2(1); Model 1b, supra note 46, at art. 2(1).

n54. See Model 1a, supra note 46, at art. 2(2)(b).

n55. See Model 1b, supra note 46, at art. 2(1). Note the absence of any language requiring information transfer on the part of the United States. Id.

n56. See generally Treaties and TIEAs, U.S. Dep't of the Treasury (last updated June 22, 2016) http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx (providing the text and an explanation of all TIEA's entered into by the United States).

n57. See generally U.N. Dep't of Econ. & Soc. Aff., United Nations Model Double Taxation Convention between Developed and Developing Countries (2011), http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf.

n58. See Model 1a, supra note 46, at preamble.

n59. See Model 1b, supra note 46, at preamble (showing the inclusion or exclusion of TIAE or DTC language).

n60. See Model 2, supra note 46, at art. 2(1).

n61. Id. at art. 2(1)(b).

n62. See Additional FATCA Documents, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx. (last updated Mar. 29, 2017) Compared to ninety-nine nations who have entered into a Model 1a or 1b IGA or having reached a Model 1a or 1b agreement in substance. Id.

n63. See e.g., I.R.C. ß 1441 (2012).

n64. There are no general international norms wherein sovereign states, or entities within their jurisdiction, are obligated to provide information (regardless of the nature of such information) to some other foreign state when requested to do so. Absent some treaty or intergovernmental agreement requiring it, no international norm mandates such communication and disclosure. See Sovereignty, supra note 4.

n65. See Restatement (Third) of Foreign Relations Law of the U.S. ß 402 (1987) (stating that the United States does not have jurisdiction to prescribe a law governing the conduct of an FFI existing substantially outside the territory of the United States).

n66. See 26 C.F.R. ß 1.1471-1(a) (2013).

n67. See I.R.C. ß 1473(1); Restatement (Third) of Foreign Relations Law of the U.S. ß 402. Ultimately, this is a question of statutory interpretation, concerning US jurisdiction to tax foreign taxpayers, that US courts must decide. See I.R.C. ß 871(b) (2012); I.R.C. ß 882(a) (2012).

n68. See Bean & Wright, supra note 14, at 337-38.

n69. See I.R.C ß 1471(b)(1) (2012) (requiring that FFIs enter into an agreement with the Secretary of the Treasury).

n70. As opposed to only an agreement between the Treasury and the individual FFIs as a strict reading of the statute would require. Id.

n71. See I.R.C. ßß1471-74 (2012); Vienna Convention on Law of Treaties art. 1, 6, May 23, 1969, 1155 U.N.T.S. 331; US law creates FATCA and the regulatory framework in which the Act operates in the United States, international law governs the enactment of IGAs between the United States and other nations, and the laws of foreign nations govern the execution of the IGAs in the respective party's nation. See Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99 (Can.).

n72. See Foreign Account Tax Compliance Act (FATCA), U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last updated Mar. 29, 2017).

n73. See Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 5, 2014, http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf [hereinafter Canadian IGA].

n74. Id. at art. 3(6).

n75. Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99 (Can.).

n76. See Alsheikh v. Lew, No. 15-cv-03601-JST, 2016 U.S. Dist. LEXIS 111686 (N.D. Cal., Aug. 22, 2016); Crawford v. United States Dep't of the Treasury, No. 3:15-CV-00250, 2016 U.S. Dist. LEXIS 55395 (S.D. Ohio, Apr. 25, 2016).

n77. Since this Comment's analysis is focused on FATCA in an international context, the author assumes the legal enforceability of FATCA and all associated IGA's under US law for the sake of the analysis under foreign and international law. It being noted however, that the question of constitutionality and enforceability has not been resolved by US Courts, and considerable analysis could be undertaken as to whether the law is enforceable under the US Constitution or US statutory or common law. Such analysis though is simply beyond the scope of this Comment.

n78. While the analysis of foreign law in this Comment is limited to Canadian law, the basic argument should remain applicable to other nations due to the reliance of multinational agreements in making the Canadian argument. However, it is important to note that while the arguments will involve treaties and international agreements to which many nations are parties, the legal arguments, by necessity, are grounded in Canadian law. Ideally, any legal scholar should be able to take the base argument, and adapt it to another country, applying the laws of that country in place of those of Canada's used herein.

n79. Yvonne Woldeab, Comment, "Americans: We Love You, but We Can't Afford You": How the Costly U.S.-Canada FATCA Agreement Permits Discrimination of Americans in Violation of International Law, 30 Am. U. Int'l L. Rev. 611, 615-16 (2015).

n80. Id.

n81. This includes where the laws governing the agreement provide for a right of action. See Phillip M. Moremen, Private Rights of Action to Enforce Rules of International Regimes, 79 Temp. L. Rev. 1127, 1135-36 (2006).

n82. It seems that Canada is choosing not to apply the provisions of the ICCPR, particularly with respect to actions taken within the private banking marketplace that have been perceived as discriminatory. See Siri Srinivas, "I was terrified we'd lose all our money': banks tell US customers they won't work with Americans, Guardian (Sept. 24, 2014), https://www.theguardian.com/money/2014/sep/24/americans-chased-by-irs-give-up-citizenship-after-being-forced-out-of-bank-accounts.

n83. See generally Hillis v. Canada, [2015] F.C. 1082 (Can. Ont.).

n84. See How the Court Works, Int'l Court of Just., http://www.icj-cij.org/court/index.php?p1=1&p2=6 (last visited Nov. 4, 2016).

n85. They are likely unconcerned considering that the United States is also a party to the ICCPR.

n86. See Canada and U.S. Sign Agreement on Tax Evasion, Reuters (Feb. 6, 2014), http://in.reuters.com/article/canada-usa-fatca-idINL2N0LA1G120140205.

n87. Human Rights Comm., Lovelace v. Canada, Commc'n No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1985) (requiring the complainant to have exhausted all forms of domestic remedies or the nations highest court to have substantially decided the question at issue).

n88. See International Covenant on Civil and Political Rights, art. 2 para. 3, Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1979) [hereinafter ICCPR]. See generally U.N. Hum. Rights Off. of the High Commissioner, Individual Complaint Procedures Under the United Nations Hum. Rts. Treaties 10-11 (2013) (explaining that nations party to the complaint are required to provide the UNHRC an update within three months of the initial finding, detailing the steps taken to correct the issue. Viable actions that may be taken should the party nation choose not to comply are representative of similar issues within the scope of international law and politics).

n89. As was the case in Fedotova v. Russian Fed'n, wherein the UNHRC could do nothing more than "compel ... Russia to make the relevant provisions of the law compatible with the ICCPR." Human Rights Comm., Fedotova v. Russian Fed'n, Commc'n No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010 (2012).

n90. See Frequently Asked Questions, Human Rights Council Complaint Procedure, Off. of the High Comm'r for Hum. Rights, http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx#faq4 (last visited Nov. 4, 2016) (requiring the exhaustion of domestic remedies).

n91. See generally Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.) (protecting rights granted to every individual in Canada with respect to actions taken by the government).

n92. RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 574 (Can.).

n93. Id. at 574-75.

n94. Sandra Raponi, Grounding a Cause of Action for Torture in Transnational Law, in Torture as Tort: Comparative Perspectives on the Dev. of Transnational Human Rights Litig. 373, 390-91 (Craig Scott ed., 2001).

n95. Id. at 392.

n96. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.), at para. 15.

n97. Both documents omit language protecting against discrimination, which is fundamentally different than an affirmative authorization of discrimination.

n98. But see Woldeab, supra note 83, at 629-30.

n99. Canadian Charter of Rights and Freedoms, supra note 96.

n100. See Raponi, supra note 94, and accompanying text.

n101. Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99, art. 4 (Can.).

n102. See Bean & Wright, supra note 14, at 352.

n103. 26 C.F.R. ßß1.1471-74 (2013).

n104. Id.

n105. Id.

n106. Id.

n107. Vienna Convention on Law of Treaties art. 6-18, May 23, 1969, 1155 U.N.T.S. 331, 334-36.

n108. Id. at art. 12.

n109. Id. at art. 24(1)-(2).

n110. Model 2, supra note 46, at art. 11(1).

n111. However, multiple party states have entered into memorandums of understanding with the Treasury. These memorandums are an understanding between the two parties to clarify some specific component of the IGA. See Vienna Convention, supra note 107, at art. 19.

n112. Id. at art. 26 (using Pacta sunt servanda, which means "Agreements must be kept").

n113. Id. at art. 27.

n114. Id. at art. 46.

n115. Id. at art. 47.

n116. Id. at art. 48.

n117. Id. at art. 49.

n118. Id. at arts. 50-51.

n119. Id. at art. 52.

n120. Id. at art. 53 (called jus cogens). See also Kamrul Hossain, The Concept of Jus Cogens and the Obligation Under the U.N. Charter, 3 Santa Clara J. Int'l L. 72, 73 (2005).

n121. Vienna Convention, supra note 107, at art. 53.

n122. " Clearly defined contents of the rules of jus cogens are not yet likely to be decided. Existence of such norms is now universally recognized and well established." Hossain, supra note 120, at 74.

n123. William E. Conklin, The Peremptory Norms of the International Community, 23 Eur. J. Int'l. L. 837, 838 (2012).

n124. See Hossain, supra note 120, at 73.

n125. See id. at 75; Rafael Nieto-Navia, International Peremptory Norms (Jus Cogens) and International Humanitarian Law, in Man's Inhumanity to Man: Essays on Int'l Law in Honour of Antonio Cassese 595, 613-17 (Lal Chand Vohrah et al. eds., 2003).

n126. The person or entity would need to rely on some similar norm. See Nieto-Navia, supra note 125, at 617.

n127. U.N. Charter art. 2, P 4.

n128. Vienna Convention, supra note 107, at arts. 12, 24.

n129. See generally Jean Bodin, On Sovereignty: Four Chapters from Six Books on the Commonwealth (Julian H. Franklin ed., trans., Cambridge Univ. Press 1992) (1576) (discussing the theory of absolute sovereignty).

n130. Vienna Convention, supra note 107, at art. 52.

n131. See The World According to GaWC, Globalization and World Cities Res. Network, http://www.lboro.ac.uk/gawc/gawcworlds.html (last visited Mar. 27, 2016).

n132. Id.

n133. See Nieto-Navia, supra note 125, at 612.

n134. Coercion, Black's Law Dictionary (10th ed. 2014).

n135. U.N. Charter art. 2, P 4.

n136. U.N. Charter art. 1, P 3.

n137. David Heywood Anderson et. al, The Vienna Conventions on the Law of Treaties: A Commentary Vol. 2, 1205-11 (Olivier Corten & Pierre Klein eds., 2011).

n138. Id.

n139. Id.

n140. Id. at 1205-07. (demonstrating the fact that drafters considered broadly defining the term, and declined to do so, supports the narrow reading of "force").

n141. Michael J. Graetz, The U.S. Income Tax 10-13 (1999).

n142. This is estimated by a static or dynamic measurement.

n143. In applying these principles, Graetz asks the following five questions: "1. Is the tax fair? 2. Is the tax easy to comply with and administer? 3. Does the tax interfere as little as practical with private economic decisions? 4. Is the tax conducive to economic growth? 5. Does the tax produce adequate revenues?" Graetz, supra note 141, at 10. Compare Graetz, supra note 141, with the Principles of Sound Tax Policy relied on by the Tax Foundation in their policy analysis: (1) simplicity, (2) transparency, (3) neutrality, (4) stability, (5) no retroactivity, (6) broad bases and low rates. Principles of Sound Tax Policy, Tax Foundation, http://taxfoundation.org/principles-sound-tax-policy (last visited Nov. 4, 2016). Also, compare with the OECD's principles of tax policy: (1) neutrality, (2) efficiency, (3) certainty and simplicity, (4) effectiveness and fairness, (5) flexibility, (6) equity. OECD, Addressing the Tax Challenges of the Digital Economy 30-31 (2014), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-the-tax-challenges-of-the-digital-economy_9789264218789-en#page1. While all three are different from each other in the way their analysis is organized, the four basic principles of tax policy nonetheless form the substance of the analysis.

n144. These four principles also form the core substance of foreign states' tax policy. They absolutely have global application. See generally Brian J. Arnold et. al., Tax Policy in Canada (Heather Kerr et al., eds. 2012); House of Commons Treasury Committee, Principles of Tax Policy, 2010-11, HC 8, at 10-21.

n145. 155 Cong. Rec. S10785, supra note 28.

n146. It functions in a similar fashion to the use of W-2's and 1099's to report income to the IRS.

n147. I.R.C ß 1471(b) (2012).

n148. 155 Cong. Rec. S10785, supra note 28.; In this way, it could be said that FATCA has both vertical and horizontal equity. Id.

n149. Exemptions are provided for a select type of account held by individuals where the total value of assets maintained in the account does not exceed $ 50,000. I.R.C ß 1471(d)(1)(b) (2012). This class of accounts represents individuals who are not considered to be the primary focus of FATCA: individuals holding low valued assets. This mirrors the requirements in I.R.C. ß 6038D (2012).

n150. I.R.C ß 1471(d) (2012).

n151. I.R.C ß 1473(3) (2012).

n152. In the same vein, it could be argued that any withholding - regardless of the rate - is not fair, as only the United States and its citizenry, and not any foreign entities, persons, or states, benefits from the law.

n153. Stu Haugen, An American Tax Nightmare, N.Y. Times (May 13, 2015), http://www.nytimes.com/2015/05/14/opinion/an-american-tax-nightmare.html.

n154. See Emma Elliott Freire, Toxic Citizen: The Misery of Being an American Abroad, Federalist (Jan. 27, 2014), http://thefederalist.com/2014/01/27/toxic-citizen-the-misery-of-being-an-american-abroad/.

n155. See generally Bob Tita & Dana Mattioli, Johnson Controls, Tyco to Merge in Inversion Deal, Wall St. J. (Jan. 25, 2016), http://www.wsj.com/articles/johnson-controls-tyco-to-merge-in-inversion-deal-1453724828.

n156. See 155 Cong. Rec. S2624, supra note 10; It is most certainly just an estimate, given that the information about those accounts is unknown, and the point of FATCA was to make that information known. Id.

n157. The Treasury estimated $ 8 billion from 2010-2020. Kyle Pomerleau, Foreign Account Tax Compliance Act (FATCA) Goes Into Force Today, Tax Foundation (July 1, 2014), http://taxfoundation.org/blog/foreign-account-tax-compliance-act-fatca-goes-force-today.

n158. This was estimated at less than $ 50 million. U.S. Gov't Accountability Office, GAO-01-484, Foreign Account Reporting Requirements: IRS Needs to Further Develop Risk, Compliance, and Cost Plans, 14 nn.1-2 (2012).

n159. See 155 Cong. Rec. S2624, supra note 10; Pomerleau, supra note 157.

n160. Robert W. Wood, FATCA Carries Fat Price Tag, Forbes (Nov. 30, 2011), http://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag/#169f6cdd489a.

n161. See Allen, supra note 4.

n162. William Hoffman, Former IRS Head Miller Unsure if FATCA's Benefits Outweigh Costs, Tax Analysts (Oct. 7, 2014), http://www.taxanalysts.com/www/features.nsf/Features/1BF1D85CF640117A85257D6B00537F71?OpenDocumen.

n163. Id. It could be argued that FATCA partner states benefit from the reciprocity agreements in Model 1a IGAs, however, a reciprocal agreement is not guaranteed to every FATCA partner, nor is there a guarantee that the reported information from the United States will be equal in value and benefit to that from the FFIs and FATCA partner. See generally supra notes 53-64, and accompanying text.

n164. I.R.C. ß 1471(b)(1) (2012).

n165. The Model 1 IGA treats all FFIs in a FATCA partner state as having entered into agreements with the Secretary, without actually entering into individual agreements. The overwhelming majority of all states who are recognized as having entered into an agreement with Treasury have done so under the Model 1 IGA. See generally supra notes 51-62 and accompanying text.

n166. See Allen, supra note 6.

n167. Rita Trichur, Canada Banks Tally Their Tax-Compliance Tab, Wall St. J. (July 27, 2014), http://www.wsj.com/articles/canada-banks-tally-their-tax-compliance-tab-1406504252.

n168. This raises the whether whether positive morale can be measured by the lack of any concerted effort within Congress to repeal FATCA. See Wood, supra note 160.

n169. With the election of Donald Trump as President of the United States and the Republican majority in Congress, there are recent discussions of broad and comprehensive tax reform occurring. This has prompted renewed calls in the editorial statements of some news outlets for the repeal of FATCA. The Wall Street Journal Editorial Board, My Big Fatca IRS, Wall St. J. (Mar. 1, 2017), https://www.wsj.com/articles/my-big-fatca-irs-1488413354?mod=wsj_review_&_outlook.

n170. See generally Matheson, supra note 1.

n171. See The World According to GaWC, supra note 131.