Key Issues for a New Model of Tax Co-operation for Developing Countries

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Tax treaty negotiations are based mainly on two models: the Organisation for Economic Co-operation and Development (OECD) model and the United Nations (UN) model.¹ These models distribute the taxing rights over certain international transactions between the residence jurisdiction (where the corporation that earns the profit is domiciled) and the source jurisdiction (where the profit is earned).

The Fiscal Committee of the OECD comprises 30 members: all European Union members, the USA, Canada, Japan, Australia and other economically developed countries.² The OECD model has been criticized on the grounds that it favours capital exporting countries (developed nations) over capital importing countries (developing nations³).⁴ This is because in the OECD model, the residence jurisdiction has a preferred position.⁵

The UN model was created as a tool that could be used by developing countries in international tax treaty negotiations instead of the OECD model. The UN model allows

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³ According to the World Bank Group, developing countries are defined as “Low- and middle-income countries in which most people have a lower standard of living with access to fewer goods and services than do most people in high-income countries. There are currently about 125 developing countries with populations over 1 million; in 1997, their total population was more than 4.89 billion.” (definition available on the web at http://www.worldbank.org/html/schools/glossary.htm#d).
⁴ Jinyan Li, in International Taxation in the Age of Electronic Commerce: A Comparative Study (Toronto: Canadian Tax Foundation, 2003) at 46.
⁵ As Lee Burns explains it in Emerging International Tax Issues, (available at http://us.i1.yimg.com/us.yimg.com/i/bc/bdoc.gif) at 3, under the OECD model, if the level of trade and investment is not equal (i.e., a treaty between a developed and developing country), “the effect of the treaty is to transfer taxing rights from the source (developing) country to the residence (developed) country.”
broader source taxation, and hence, has been said to be more advantageous for developing nations.\textsuperscript{6} However, according to Figueroa, the UN model does not meet the objectives set for by the Secretary General of the United Nations for the creation of the UN model nor the requirements of the developing countries.\textsuperscript{7} Furthermore, the conflict between developed and developing countries remains unsolved.\textsuperscript{8} Developed countries consider the UN model to be too generous and “a substantial modification of what ought to be contained in a balanced tax treaty (as exemplified by the OECD model), particularly in the concessions which it makes to the source principle of taxation.”\textsuperscript{9} The differences between these two models have polarized tax treaty negotiations. This divergence cannot be easily solved since there are no categorical reasons to prefer one model over the other.

Notwithstanding the above, Lee Burns explains that many developing countries have accepted the OECD model to encourage capital inflows. He indicates that the acceptance of this model by developing nations gives foreign investors certainty of the applicable taxation regime. Acceptance of the OECD model also serves as a message to the international community that the particular country is willing to act according to international norms.\textsuperscript{10}

\textsuperscript{6} Supra note 4, at 47.
\textsuperscript{8} Supra note 7, at 12.
\textsuperscript{9} International Fiscal Association, “General Issues for Discussion”, \textit{Double Taxation Treaties Between industrialized and developing countries; OECD and UN Models, a Comparison: Proceedings of a Seminar Held in Stockholm in 1990 during the 44\textsuperscript{th} Congress of the International Fiscal Association} (Deventer: Kluwer, 1992) at 34.
\textsuperscript{10} Supra note 5, at 3.
One of the problems of the OECD and UN models is that they were “developed by reference largely to tax laws of developed countries and the shape of international commerce among those countries.”

Therefore, the most influential models of international tax treaties do not take into account the needs and special characteristics of developing countries.

Developing countries need a more favourable international tax system to stimulate their economies. This goal may be achieved, among many other tasks, by the following:

A. Promotion of greater and more stable inflows of foreign investment on conditions which are politically acceptable as well as economically and socially beneficial;

B. Modernisation of their tax systems;

C. Securing of their tax base;

D. Countering of tax evasion;

E. Facilitation of the exchange of information between tax authorities;

F. Elimination of harmful tax practices; and

G. Improvement of the effectiveness of tax administrations.

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12 Additionally, the OECD and UN models have been unable to stop harmful international planning practices that result in unfair savings or misallocation of taxes payable. Such harmful international practices include: a) double deduction of single expenditures, also known as ‘double dipping’; b) taking advantage of income characterization mismatches; and c) aggressive transfer pricing planning.


14 According to Christopher Heady, in Tax Policy in Developing Countries: What Can Be Learned from OECD Experience?, (available at http://www.ids.ac.uk/gdr/cfs/activities/Heady.pdf) at 15, some trends in OECD countries may benefit developing countries. Those trends are: “a) Simplification of personal and corporate tax systems by reducing the number of tax rates and tax reliefs, thus producing a system with low rates and a broad base; b) Reduction in the use of taxes on international trade; c) Increased use of taxes on land; and d) The encouragement of international trade and investment, while defending the domestic tax base, by entering into tax treaties and applying rules to prevent manipulation of reported profits.”

To date, these tasks have constituted a minor factor in international tax treaty negotiations. Developing nations must take an active stand to include these tasks in their negotiating agendas.

Burns points out that “we are beginning to see the emergence of a new generation of tax treaties, namely treaties that are far more detailed than the OECD Model and that aim to more effectively connect the tax laws of the Contracting States. The recent treaties of the US with the UK and Australia are examples of this trend.” 17

As is illustrated by Burns’s example, the most comprehensive tax treaties that are being created at the moment are between developed nations. Developing nations should step in to influence the creation of this “new generation of tax treaties”.

In a world that is going through a process of globalization, the developing countries’ pursuit of a sustainable level of development should be seen as a global issue and not just a bilateral issue. Likewise, and taking into account that taxation is a crucial factor in a country’s progress, international taxation should be addressed as a global issue. 18

However, there is no point in creating another treaty model if it is not going to have any substantial international influence. It is also advisable that developing countries do not concentrate only on alternatives that are not likely to be adopted in a reasonable time. For example, alternatives like tax harmonization, formulary apportionment and an e-commerce international sales tax may offer great advantages to developing countries but

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17 Supra note 5, at 3.
18 Supra note 14, at 3.
their adoption in a short or even medium term is unrealistic.\textsuperscript{19} Even much smaller tasks, like lowering the permanent establishment threshold in the international tax treaties seems like an extremely difficult goal to achieve.\textsuperscript{20}

One alternative for developing countries to achieve a more advantageous international tax system is by influencing international measures that do not pose significant international resistance but can give substantial benefits to developing countries.\textsuperscript{21} Such measures would be included in a limited model agreement to be negotiated first by developing countries among themselves, and then with developed countries.

This paper identifies key issues for the creation of a model agreement limited to the following measures: a) exchange of information; b) assistance in the collection of taxes; and c) anti-abuse provisions.


\textsuperscript{20} According to M.S. Feinberg, “United States Views on Selected Aspects of Developing Country Tax Treaty Issues”, Double Taxation Treaties Between industrialized and developing countries; OECD and UN Models, a Comparison: Proceedings of a Seminar Held in Stockholm in 1990 during the 44th Congress of the International Fiscal Association (Deventer: Kluwer, 1992), at 42, the US objective regarding PE provisions in international tax treaty negotiations with developing countries is to set the PE thresholds sufficiently high to “permit an enterprise to explore a market in the partner country by engaging in limited activities there without becoming involved in the country’s tax system”. The US government believes that if the exploratory activities are successful then they would create a PE.

\textsuperscript{21} In principle, another alternative for developing countries is being tax havens. However, it is not possible for all developing countries to be tax havens. In fact, tax havens are just a small proportion of developing countries. Furthermore, as Edison Gnazzo explains it, in “the Attitude of Latin American countries to Tax Havens” in proceedings of a seminar held in Paris in 1980, during the 34th congress of the international fiscal association, Paris 1980, at 36, becoming a tax haven may give little material advantages to the host country and may bring them serious difficulties. Among the advantages, it may bring some increase in the employment level and a correlative increase in social security contributions. Among the disadvantages, are a loss in tax revenues, illegal operations may be linked to the tax haven, and a possible dependence of the economy on operations that are short term or that may migrate to more beneficial jurisdictions. Additionally, the international community may apply some retaliatory measures against the tax haven that may affect the economy in a great level.
Chapter I

Exchange of Information

Self-assessment based tax systems have the implied risk that taxpayers may under-declare or even fail to declare their income to reduce their tax liabilities.\textsuperscript{22}

Tax authorities fight tax evasion in many ways from ‘hard techniques’ (direct letter and assessments) to ‘soft techniques’ (a psychological approach). However, one crucial tool for tax authorities is its ability to gather information.\textsuperscript{23} Without this tool, its assessing powers are ineffective especially towards international transactions.

Worldwide political and economic trends have created a powerful but dangerous paradox. Liberalisation and globalization of the economy, a proliferation of international treaties and increasing electronic commerce have greatly increased the possibilities for tax avoidance and evasion. At the same time, these factors have greatly increased the difficulties tax authorities face in inspections of international transactions.\textsuperscript{24}

Tax authorities, in general, require and resort to international co-operation to tackle evasion.\textsuperscript{25} “[T]here is a longstanding recognition of the need for international co-operation on the basis of common principles in the field of exchange of tax


\textsuperscript{23} Ibid.


\textsuperscript{25} Preamble of the Convention on Mutual Administrative Assistance in Tax Matters between the member States of the Council of Europe and the Member countries of the OECD, 1988 (http://www.radaeuropy.sk/english/documents_coe/conventions/docs/1_127e.htm).
This has led to the inclusion, in many international tax treaties, of provisions for the exchange of information.\textsuperscript{27} In fact, exchange of information may be one of the most important reasons for developing nations to enter into international tax treaties with developed nations.\textsuperscript{28}

Besides contributing directly to the collection of tax revenue, international exchange of information has many benefits. As listed by Sara McCracken\textsuperscript{29} and Inland Revenue\textsuperscript{30}, the most important benefits are:

- Regarding tax treaties, it helps authorities “in ascertaining the facts in relation to which a particular convention is to be applied”\textsuperscript{31}.
- Regarding local law it assists in:
  - The accurate determination, assessment and collection of taxes;
  - The implementation of domestic tax legislation;
  - The protection of local businesses from unfair competition\textsuperscript{32};
  - The protection of the integrity of the tax system by contributing to tax legislation observance, and preventing and suppressing violations of tax law;
  - The minimization tax avoidance, tax fraud and evasion\textsuperscript{33}, acting as a powerful deterrent against non-disclosure of income;

\textsuperscript{26} Supra note 22.
\textsuperscript{27} Supra note 19, at 1871.
\textsuperscript{28} Supra note 7, at 36.
\textsuperscript{28} The latest versions of the UN (2001) and OECD (2003) models were used for the analysis.
\textsuperscript{29} Supra note 19, at 1871.
\textsuperscript{30} Supra note 22.
\textsuperscript{31} Supra note 19, at 1882.
- Aiding in the fight against drug trafficking, money laundering and the financing of terrorism; possible may provide information of assets that were hidden from tax authorities even before the investment abroad was made; and
- The prevention of legalization of income gained from criminal activities and terrorism financing;

Since tax authorities of developing countries usually do not have enough resources to make an efficient collection of taxes, the advantages described above could be even greater for developing countries. A sound system of exchange of information may help tax authorities from developing countries in two of the greatest challenges they face: a) identifying and collecting taxes from taxpayers who are carrying on business with very little physical presence; and b) gathering the necessary information for transfer pricing controversies. Additionally, since tax authorities would be able to assess taxpayers that evade tax regularly through international transactions, exchange of information would create a more favourable general perception of the tax system.

There are many forms of information exchange. Some of the most important initiatives are discussed below.  

1. Exchange of Information Initiatives

1.1. The OECD Model

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34 Among other initiatives are: a) The Convention on Mutual Administrative Assistance in Tax Matters of 1988 between the member States of the Council of Europe and the Member countries of the OECD; b) CIAT’s Model Agreement on the Exchange of Tax Information; c) OECD’s Agreement on Exchange of Information on Tax Matters; d) the Convention on Administrative Assistance in Tax Matters of 1973, often referred to as “the Nordic convention”,

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International exchange of information provisions are generally based on article 26 of the OECD model tax convention.\textsuperscript{35}

Paragraph 1 of article 26 provides that

the Contracting States shall exchange such information as is necessary for

carrying out the provisions of this Convention or of the domestic laws concerning

taxes of every kind and description imposed on behalf of the Contracting States,

or of their political subdivisions or local authorities, insofar as the taxation
thereunder is not contrary to the Convention.\textsuperscript{36}

This article is applicable both for the purposes of the tax convention and for implementing local law. However, not all tax treaties include this provision verbatim. Consequently, the scope and kind of information that a country may request to another may change depending on the way this provision was worded in the particular tax treaty.\textsuperscript{37}

Additional limits to the exchange of information originate from the article itself. Under paragraph 1 of article 26, information will not be exchanged if taxation under local taxes is contrary to the convention. Paragraph 2 of the same article provides that tax authorities of the requested state are not obliged to supply information if it is not obtainable under its own laws or normal administrative practices, or those of the requesting state.

Moreover, tax authorities are not required to provide information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or if the disclosure of the information would be contrary to public policy. The requested states

\textsuperscript{35} Supra note 22.
\textsuperscript{37} According to supra note 19, at 1881, “Switzerland has expressed a reservation at paragraph 24 of the commentary on article 26 indicating that exchangeable information is limited to that which is necessary for the application of the tax convention”.

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have a wide space of interpretation to decide what documents are not exchangeable because of public policy.\(^{38}\)

In countries with bank secrecy rules or tax havens, the authority may not have the power to disclose the information requested; the process can take a very long time; or the request may be denied.\(^{39}\)

1.2. The UN Model

The exchange of information provision contained in the UN model is very similar to the one contained in the OECD model. Notwithstanding, the OECD provision is more allows a more effective exchange of information. Regarding the scope of the provision, the OECD model encompasses “taxes of every kind and description”, while the UN only applies to taxes covered by the model.\(^{40}\)

1.3. The Bank Information Report

In April 2000, the Committee on Fiscal Affairs of the OECD published the report “Improving Access to Bank Information for Tax Purposes”. According to this report

all Member countries should permit access to bank information, directly or indirectly, for all tax purposes so that tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchange of information with their treaty partners.\(^{41}\)

The measures proposed by the 2000 Bank Report can be summarized as follows: a) prohibition of anonymous bank accounts; b) review of domestic laws or practices that

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\(^{38}\) Supra note 19, at 1883.

\(^{39}\) Exchange of information can occur in three ways: on request, automatic (systematic), and spontaneous (when the information is voluntarily passed).

\(^{40}\) Previously, paragraph 1 of article 26 of the OECD model only authorized the exchange and use of information in relation to taxes on income and capital. In 2000, the paragraph was amended to allow for exchange of information for purposes of the application of taxes not specifically covered under article 2 of the convention.

\(^{41}\) Supra note 24.
may deter the exchange of information that is obtainable for domestic tax purposes; and c) “re-examination of policies and practices that do not permit tax authorities to access and exchange bank information for purposes of criminal tax prosecutions”.

The OECD has also addressed the issue of access to bank information in its Report of Harmful Tax Competition. In this report, it was recommended that countries review their laws, regulations and practices, and remove impediments to the access to banking information by tax authorities.

1.4. Savings Directive

The Savings Directive has been a great tool for exchange of information. “Proposed US rules would require banks to report interest paid to all foreign individuals. Similar UK reporting requirements took effect in 2001 as to fully-reportable countries. The revised proposed EU savings directive allows 3 countries to withhold tax instead” None of these rules demand exchange of information regarding payments to companies and trusts. For an efficient system of exchange of information this directive has to be broadened to any person or entity.

2. Positions Against the Exchange of Information

21. Bank Secrecy

The OECD is of the view that revenue authorities should have full access to bank information. The OECD is concerned that bank secrecy may enable taxpayers to hide

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42 Supra note 24, and supra note 19, at 1890.
43 Supra note 19, at 1890.
illegal activities and evade taxes. Consequently, undue restrictions on tax authorities’
access to information have been regarded as a harmful tax practice.\textsuperscript{45}
However, according to the survey of state practices of the bank information report,
internationally there are various levels of access to bank information.\textsuperscript{46} Is OECD’s position really ideal?
Austria and Switzerland have a neutral stance toward foreign disputes.\textsuperscript{47} Bank secrecy is
based on this neutral stand. “Bank secrecy is similar to professional secrecy and not
essentially different from other kinds of business secrecy.”\textsuperscript{48} It is also a fundamental
requirement of any sound banking system.\textsuperscript{49} Bank secrecy against tax collection is also
applied by some developing countries considered “tax havens” like Panama, Bahamas
and Bermuda.
However, bank secrecy cannot be absolute. For example, although in Switzerland,
Austria and Luxembourg, “piercing bank secrecy is very much a minority event”\textsuperscript{50}, it can
be pierced for criminal investigation.\textsuperscript{51}
Switzerland, Austria and Luxembourg enforce secrecy for tax collection. These countries
have stated that “bank secrecy protects citizens against their governments”.\textsuperscript{52} In
Switzerland, it is a criminal offence to reveal confidential banking information.\textsuperscript{53}

\textsuperscript{45} Supra note 22.
\textsuperscript{46} Supra note 19, at 1890.
\textsuperscript{47} Supra note 44 at 1.
\textsuperscript{48} Ibid.
\textsuperscript{49} Supra note 24.
\textsuperscript{50} Supra note 44 at 1.
\textsuperscript{51} According to ibid., the Financial Action Task Force on Money Laundering (FATF) has recommended
extending the definition of money laundering to other non-narcotic serious crimes. Therefore, countries
may choose to fight against tax evasion as a serious crime.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
As a result, countries that enforce bank secrecy, like Switzerland, against tax collection may be protecting funds from tax evasion and organized crime.\footnote{International Relations and Security Network, “Questions For Switzerland” (document available on the web at http://www.isn.ethz.ch/securityforum/Online_Publications/WS4/Treverton/Treverton-10.htm)} The position set forth by these countries poses as a sever challenge for an effective international system of exchange of information.

In June 2003, the EU savings tax directive excused Switzerland, Luxembourg, Austria and Belgium from complying with OECD standards and timelines and by permitting Switzerland to set its own timetable for moving forward.

In January 2004, an agreement was reached between the OECD and Switzerland regarding certain tax practices considered as harmful by the OECD. Switzerland agreed to “exchange information with other countries on Swiss holding companies and to advise domestic businesses in Switzerland to follow OECD guidelines with respect to transfer pricing with subsidiary companies.”\footnote{Deloitte and Touche, “World Tax Advisor”, March 2004, (document available on PDF at www.deloitte.com/dtt/cda/doc/content/dtt_tax_worldtaxadvisor_010304.pdf) at 20.} However, the issue remains entirely separate from the issue of banking confidentiality, which remains “non-negotiable”.\footnote{Ulrika Lomas, “Switzerland Reaches Agreement With OECD Over Tax Questions”, Tax-News.com (Brussels 30 January 2004) (available on the web at http://www.tax-news.com/asp/story/story_print.asp?storyname=14915).}

Switzerland argues in favour of the “coexistence” or withholding system. Under this system, certain countries (e.g. Switzerland, Austria and Luxembourg) would be exempt from the exchange of information rules. Instead, they would impose a withholding tax on foreign investments. The disadvantages of the coexistence system are the following:\footnote{Supra note 22 and supra note 24, at 29-30.}
The tax authorities' ability to determine and collect the right amount of tax is diminished. The coexistence system “would unlikely tax investors at the same rate they would be taxed in their country of residence”;\(^58\)

- It can create inequalities between taxpayers. Taxpayers with the means to use jurisdictions with bank secrecy would have an unfair advantage. This could lead to distortion in the distribution of the tax burden, and to general disbelief in the fairness of the tax system. “[A] withholding system, without exchange of information, might appear to give the impression of legitimising tax evasion since it fails to deter non-declaration … as a signal that non-declaration to the taxpayer's state of residence will be tolerated”;\(^59\)

- It can create inequalities between types of income since mobile capital may be moved to bank secrecy jurisdictions easier than immovable capital. This may produce distortions in the system and in the efficient allocation of resources;

- It may increase the costs of tax administration and compliance costs for taxpayers;

- Internationally, it may obstruct efficient international tax cooperation and produce disharmony in the international fight against tax evasion. It may distort the allocation of financial flows between countries by providing an unfair competitive advantage to jurisdictions which operate such provisions;\(^60\) and

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\(^58\) Supra note 22.
\(^59\) Supra note 22.
\(^60\) According to supra note 24, “the scope of non-compliance with the tax laws that is facilitated by lack of access to bank information is difficult to measure precisely because there is insufficient access to the necessary information. The same problem exists in attempting to measure the extent of money laundering. Nevertheless, the FATF estimates that the size of that problem amounts to hundreds of billions of dollars annually.”
As long as OECD countries are still non-conforming to the exchange of information regulation, offshore jurisdictions (like Panama and Bahamas) have a moral argument not to comply.\textsuperscript{61}

As mentioned before, from the perspective of tax authorities of developing countries, full access to bank information would be very beneficial. However, people living in developing countries may fear that such information may leak from tax authorities directly to criminals. In countries where kidnapping is a common crime, this is a serious concern.\textsuperscript{62}

This problem is not about the exchange of information between financial institutions and revenue authorities, \textit{per se}. The problem may also arise in any bank even without exchange of information. The real problem is a lack of confidentiality or control that may be given to sensitive information. The solution would be to guarantee proper control and confidentiality to all information exchanged. Additionally, governments should enact laws that ensuring a proper level of confidentiality with penalty clauses in case their tax authorities breach their duties of protecting such documents.

Another issue that should be examined is whether the model agreement granting access to bank information for tax matters should override local law. Even though this may maximize the efficiency of the provisions, most probably many countries would not agree to be bound by such provisions. In order to be internationally acceptable, the model must have a balance between efficiency and acceptability.

Just as the exchange of information rules have to be efficient, they have to be fair. The exchange of information rules must sufficiently safeguard taxpayers’ rights.


\textsuperscript{62} Supra note 44.
3.2. Violation of the Taxpayers’ Rights

The power that exchange of information provisions gives to the tax authorities must be balanced with protection of the legitimate rights of all taxpayers. Among other, the following rights should be especially protected: a) the privacy and confidentiality of personal affairs, b) the competitive position of business, and c) human rights.63 According to Bruce Zagaris, some intergovernmental organizations such as the OECD and FATF, have become self appointed rule-makers. They are trying to expand their power by turning soft unofficial standards into “hard laws”. For example,

"(t)he OECD HTC process illustrates the attempted creation of laws without the scrutiny to which national laws are subject, the absence of any means whereby the targeted countries can participate meaningfully in the application of the laws. In addition, the OECD HTC process is designed to apply sanctions to small non-signatory states without any right of appeal to a tribunal on findings of fact or interpretation.”64

The exchange of information rules should not be turned into a mechanism of intimidation or abuse toward taxpayers. As Zagaris points out, the purpose of the exchange of information rules is to create international cooperation - not to impose sanctions. Countries should participate by their own free will.65 Models of exchange of information usually contain provisions that guarantee the confidentiality of the information provided and protect secrets from being released. According to McCraken, taxpayers have the right to expect that revenue authorities will not intrude unnecessarily in their privacy when gathering information. Additionally,

63 Supra note 25, and supra note 22.
65 Ibid.
taxpayers are entitled to have the information provided to tax authorities kept confidential by tax authorities and not used for any purposes other than those specified in the tax legislation. A very important trend is the application of the European Convention on Human Rights (ECHR) to tax matters.66

The articles of the ECHR that have been used the most by taxpayers in tax matters are: a) article 1 of the first protocol, the right to peaceful enjoyment of property; b) article 6, the right to a fair trial; c) article 8, the right to respect for private and family life67; d) article 9, freedom of thought, conscience, and religion; and e) article 14, prohibition of discrimination.68 Legal professional privilege is another fundamental human right protected by the ECHR69

However, according to McCraken, these protections are “somewhat illusory” because taxpayers are not notified by tax authorities when they receive an information request from a foreign government.70

Nevertheless, tax authorities should not be obliged to notify taxpayers of every request of exchange of information they receive. For example, in the case of requests of low sensitivity information, e.g. tax returns, it would not be necessary to inform the taxpayer before the exchange has been done. There could be a list of information that tax authorities may share freely on request without having to notify the respective taxpayer. Furthermore, governments may opt not to notify certain taxpayers in circumstances in

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66 Supra note 19, at 1895.
67 Article 8 has been used in cases where the powers of the authorities seeking information are broad and not accompanied by adequate judicial safeguards.
68 Supra note 19, at 1895.
69 Supra note 19, at 1899.
70 Supra note 19, at 1896.
which governments have reason to believe that notifying a certain taxpayer may lead to further tax evasion.

In order to try to make a system that protects rights of the taxpayers, taxpayers should be allowed to participate actively in the structuring of the safeguards to their rights.\(^{71}\) Notwithstanding, participation of taxpayers should not limit what is the core of exchange of information; it should be focused on guaranteeing its fair application.

It is also necessary that international provisions of exchange of information expressly include protection of taxpayers’ rights and directly apply international human rights conventions since: a) some countries may not have sufficient guarantees for their taxpayers in their local legislations; and b) some countries may discriminate foreign persons from using the rights given to their national taxpayers.

3.3. Corporations

Corporations tend to criticize requests of information stating that tax officers should ask only for what they strictly need. Requests of information should not constitute an excessive compliance burden.\(^{72}\)

On the other hand, tax officers usually require ample information about a corporation in order to make a proper assessment. For example, under the application of an international tax treaty, the information needed for reviewing a certain transaction depends on factors such as the type of business, the applicable article of the corresponding tax treaty and the information previously provided.\(^{73}\) Additionally, tax authorities may want to gather as much information as possible for future controversies e.g. transfer pricing.

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\(^{71}\) Supra note 64.
\(^{73}\) Ibid., at 176-177.
Standard formats of request of information may help reduce compliance costs and would help to organize the information received by tax authorities for a more efficient assessment.\textsuperscript{74} As for individual taxpayers, tax authorities should provide corporations with guaranteed confidentiality of information requested.

3.4. Other Problems

There are a number of other problems that need to be resolved before exchange of information can be accomplished successfully.

One major issue is that countries are not always willing to cooperate with one another. How can it be made attractive for governments to participate in exchanges of information with other countries? One possible solution is that governments pay a percentage of the amount collected when the exchange of information effectively leads to its collection.\textsuperscript{75}

Another problem is that both the text and the commentary of article 26 of the OECD model are silent on what procedure should be followed in exchanging information. There are a couple of administrative issues that have to be clarified to make the exchange of information work. It must be decided: first, whether a minimum revenue threshold should be required in order for exchange of information to be considered cost-effective;\textsuperscript{76} and second, whether, and to what extent, countries should share or reimburse costs incurred in the process of exchanging information.

For developing countries, it would be better for there to be no minimum threshold for the exchange of information for two main reasons: a) an amount that may be seen as non-material for a developed country may be seen as considerable for a developing country;

\textsuperscript{75} Ibid.
\textsuperscript{76} Supra 19, at 1883-1884.
and b) the results of the information exchange may be much greater than what was at first considered, especially in the cases that the exchange may lead to the discovery of money laundering and hidden assets. Also, for developing countries it would be better for their tax administrations to not pay for the exchange of information.

Notwithstanding, it would be in the interest of harmonized relationships for there to be a maximum number of requests that one country may make to the other.

4. Proposal

A model agreement with the following characteristics must be made:

1. It should be based on the OECD’s Agreement on Exchange of Information on Tax Matters and article 26 of the OECD model and its commentaries.\(^{77}\).

2. It should describe in detail, the different types of exchange of information (on request, automatic and spontaneous) and other techniques that may be used to obtain information such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information.\(^{78}\)

3. It should specify that the exchange of information be free of charge and that there be no minimum threshold for its request. It should also determine a maximum number of requests of information that a country may ask the other.

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\(^{77}\) According to supra note 19, for example, “where a competent authority receives a request for information not in its possession, paragraph 2 of article 5 of the new model agreement requires the authority to use all its powers to obtain the information requested, notwithstanding that it may not need such information for domestic purposes. Paragraph 4 of article 5 also requires each state to ensure that its competent authority has the ability to obtain information held by financial institutions, agents, nominees, and trustees, as well as information regarding the ownership of companies, partnerships, trusts, and other such entities. Both of these requirements strengthen exchange of information by removing lack of access to and availability of information as obstacles to effective exchange. Neither is expressly included in article 26 of the OECD model tax convention.”

4. Automatic exchanges should be expressly allowed. Not only by objective factors (transactions with certain suspicious characteristics) but also by subjective factors (documents of a certain taxpayer). It should also include as an annex, a list of documents that may be exchanged without notifying the taxpayer. This list may include, among others, tax returns, financial statements and customs declarations.

5. It should also include the provisions contained in the savings directives, but should broaden such duties to interests paid to corporations, trusts and any other entity.

6. There must be express references to international human rights conventions like the ECHR. Additionally, in order to ensure the safeguard of the taxpayers’ rights, when convenient, further protections to the taxpayers can be introduced through the agreement’s commentaries.79

7. The agreement should not override local law. However, the signatory countries of this agreement must agree to amend their legislation, if applicable, to: a) facilitate the application of the exchange of information provision e.g. bank secrecy must not be an impediment for exchange of information; b) expand the definition of money laundering to include tax evasion; b) ensure adequate confidentiality of the documents exchanged and c) protect adequately the taxpayer’s rights.

8. Most importantly, the main purpose of the agreement is to increase awareness that international taxation is a global issue. Consequently, the agreement should not be limited to exchange of information. It should include training for tax officers of developing countries, logistical and strategic support both in taxes and in customs.

79 The agreement should have a set of commentaries, similar to the OECD commentaries. Those commentaries should be agreed as being part of the context of the agreement. For a description of the legal weight of the OECD commentaries please see chapter III.
Chapter II
Assistance in the Collection of Taxes

Article 27 of the OECD model was added in 2003 to facilitate assistance in the collection of taxes.\textsuperscript{80} Bilateral and multilateral agreements for assistance in the collection of taxes are often based on article 27 of the OECD model convention.\textsuperscript{81}

This provision is not restricted to collecting claims against residents of the signing countries nor to the collection of taxes covered by the convention. Paragraph 2 clarifies that this provision applies to amounts owed in respect of any tax, as well as interests, administrative penalties and costs of collection or conservancy.

The conditions for a country ("requested state") to accept a revenue claim from another country ("requesting state") are as follows: a) the revenue claim must be enforceable under the laws of the requesting state\textsuperscript{82}; and b) under the laws of the requesting state, the debtor cannot prevent the collection of the revenue claim. That revenue claim shall be collected by the requested state as if it was collecting its own taxes.

The main limitations to the assistance in the collections of taxes are discussed below.

1. Limitations Contained in Article 27 of the OECD Model

Similar to the exchange of information provision, article 27 provides that the assistance in the collection of taxes is not applicable when a contracting state has to:

a) Carry out administrative measures at variance with the laws and administrative practice of any of the contracting states;

\textsuperscript{80} The UN model has no provision for assistance in the collection of taxes.
\textsuperscript{81} Supra note 74, at 2003.
\textsuperscript{82} According to paragraph 6 of article 27 of the OECD model, proceedings with respect to the existence, validity or the amount of a revenue claim of the requesting state shall not be brought before the courts or administrative bodies of the requested state.
b) Carry out measures which would be contrary to public policy (ordre public);
c) Provide assistance if the other contracting state has not pursued all reasonable measures of collection or conservancy available under its laws or administrative practice;
d) Provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other contracting state.

According to some authors, the broad limitations contained in article 27 may severely limit its utility. For example, the limitation regarding "public policy" may be abused by some countries that are unwilling to cooperate. Furthermore, those limitations may be used as a defence by taxpayers.

However, it has to be said that the limitations to article 27 are necessary for the preservation of the taxpayers’ rights and even the legal system. Additionally, the exchange of information has to be voluntary. Countries that are unwilling to co-operate will soon discover that they can obtain greater benefits by co-operating than by denying requests of information e.g. raise revenue collection.

2. Other Limitations

2.1. Revenue Law

Common law countries follow a centuries-old rule known as the “revenue rule” or the “Mansfield rule”. This rule provides that the courts of one jurisdiction will not be used to collect the taxes of another jurisdiction. The rationale for the rule is as follows:

83 Supra note 74, at 2003.
84 Supra note 72, at 190-191.
85 According to Shirley Peterson, "International Enforcement of Canadian and US Tax Laws" in Tax Planning for Canada-US and International Transactions, 1993 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1994), at 23:5, the rule can be traced back to 1775, when Lord Mansfield stated that "no country ever takes notice of the revenue laws of another."
- Respect for sovereignty and comity (a foreign sovereign should not exercise its sovereignty outside its country);

- Judicial standards “A court of one state will not enforce a claim of another state if to do so would violate public policy. Enforcement of a tax claim would require the court of one state to inquire into the tax laws and procedures of the state whose claim was at issue; such an inquiry would not be appropriate”;\(^\text{86}\) and

- Constitutional restraints (respect for the separation of powers between the judiciary and the government).\(^\text{87}\)

The “revenue rule” constitutes a very significant obstacle to international assistance in the collection of taxes. In order to ensure international cooperation in the collection of taxes, a country may include in its legislation: a) that they can enforce any foreign tax rulings; or b) that the revenue rule does not apply to those countries that enforce the tax rulings of that country.\(^\text{88}\)

2.2. Compatibility of Tax Systems

As explained before, the “revenue law” prevents a tax court from inquiring into the tax laws and procedures of a foreign state.\(^\text{89}\) Disregarding the “revenue law” may lead to “inappropriate” results when the tax legislation between the countries is very different. Article 27 of the OECD model is considered “quite comprehensive”. For this reason, its implementation is usually recommended between countries that have similar or compatible tax legislations.\(^\text{90}\)

\(^{86}\) Ibid., at 23:6.
\(^{87}\) Supra note 72, at 189-190.
\(^{88}\) Ibid., at 190-191.
\(^{89}\) Supra note 85, at 23:6.
\(^{90}\) Supra note 72, at 192.
A solution could be to allow that countries choose to what extent they want the assistance to be applicable. For example, they may agree to assist only in the collection of income taxes or to limit it to taxpayers that are not residents of the requested state.

3. Proposal

An agreement on assistance in the collection of taxes should be part of an agreement for exchange of information. Not only are these two matters deeply related, but this would have the advantage of strengthening co-operation between countries and supplying tax authorities with sufficient information in order to identify the jurisdiction it may ask to enforce the collection of taxes.

The model agreement for assistance in the collection of taxes should have the following characteristics:

1. It should be based on Article 27 of the OECD model and its commentaries.

2. Should include an obligation for signatory countries to amend their legislations in order to allow the collection of taxes owed to countries with which it is bound.

3. The provisions regarding the collection of taxes should be flexible so that the signatory countries may decide the extent to which they want the agreement to apply.

4. Additionally, the requested state may also reject the request when the costs that it would incur in collecting a revenue claim of the requesting state would exceed the amount of the revenue claim.91

5. As in the exchange of information, in order to improve international co-operation, a percentage of the amount collected can be given to the country that collected the taxes.

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91 OECD, Paragraph 36 of the commentary to article 27 of the OECD model (document available in PDF at http://www.lrz-muenchen.de/~steuerrecht/forschungstelle/israel/treaties/OECD2003en.pdf)

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6. Furthermore, the safeguards foreseen for the protection of the taxpayers’ rights for exchange of information should also be available for the collection of taxes.
Chapter III
Abuse of Tax Treaties

When a tax treaty does not expressly allow limiting the benefits of a taxpayer in case it abused a tax treaty, it is unclear if tax authorities may challenge such a taxpayer.

1. Anti-abuse Provisions in Tax Treaties

The first question to be addressed is whether there is an anti-abuse provision included in international tax treaties. Under international tax treaties that follow the OECD or UN models, there are two ways in which a transaction can be challenged as an abuse of the treaty: a) as a violation of the preamble of the treaty; and b) as a violation of the commentaries of the treaty.92

According to the preamble, one of the stated purposes of international tax treaties is the “prevention of fiscal evasion”.93 However, there are three main reasons why the preamble cannot be used as an anti-avoidance provision.94

First, an abuse of a tax treaty may not constitute tax evasion; the opposite can also be true.95 Second, the prevention of fiscal evasion is only one of the two stated purposes of tax treaties; the other is the prevention of double taxation.96 Some authors consider that

93 Supra note 36, Preamble.
94 According to supra 92, at 9, another factor that may limit the use of the preamble of tax treaties as an anti-abuse provision is the “domestic tax provision” which is included in some tax treaties. The domestic tax benefit provision stipulates “that the provisions of a tax treaty do not in any way limit tax abatements, exemptions, or other tax relief afforded to taxpayers, now or in the future, by the legislation of a contracting state in the determination of the tax imposed by that state”. This provision ensures that the taxpayer is entitled to apply the most favourable rule between the local law and the tax treaty (assuming they are both applicable to a particular transaction).
95 However, a different conclusion was reached in Cudd Pressure Control inc. vs. The Queen, 98 dtc 6630, at 6636-37.
96 Supra note 92, at 7.
prevention of double taxation is the principal purpose of tax treaties, and therefore should prime over any other principle.\textsuperscript{97} Furthermore, it can also be said that the purpose of ‘prevention of evasion’ relates only to the articles of exchange of information and of assistance in the collection of taxes, while the other stated purpose of avoiding double taxation relates to all the other articles.

Third, according to the commentary to article 31 of the Vienna Convention (“VC”), the literal interpretation should prime over the teleological approach.\textsuperscript{98} Therefore, although the preamble of a treaty can be used as a tool for its interpretation, under the OECD and UN models, treaties do not foresee a limitation of taxpayers’ benefits if taxpayers are abusing a treaty.

Regarding the use of the commentaries, according to the OECD the changes introduced to the commentaries in 2003 removed “uncertainty or ambiguity regarding the compatibility of domestic anti-avoidance rules with the provisions of tax treaties”. Therefore, according to the OECD, such amendments “clarified” the following\textsuperscript{99}:

States do not have to grant the benefits of a tax treaty where arrangements have been entered into that constitute an abuse of the provisions of the treaty.

“Substance-over-form”, ”economic substance” and general anti-abuse rules forming part of the basic domestic rules for determining which facts give rise to a


\textsuperscript{98} However, according to ibid., at 41:1-3, Canadian courts apply a flexible approach when interpreting tax treaties.

\textsuperscript{99} According to ibid., at 41:8, the amendment of existing treaties by amending the commentaries raises serious legitimacy issues. Especially when OECD’s shifting positions on this issue are considered.
tax liability are not affected by tax treaties. Thus, as a general rule, there will be
no conflict between domestic anti-abuse rules and provisions of a tax treaty.\textsuperscript{100}

However, the application of the OECD commentaries as a source of law is not clear. The
legal weight of the OECD commentaries will depend on whether they can be seen as part
of the context of tax treaties signed by OECD members or as a supplementary means of
interpretation.\textsuperscript{101}

In the first case, article 31 VC will be applicable.\textsuperscript{102} Under article 31(1) VC, a “treaty
shall be interpreted in good faith in accordance with the ordinary meaning to be given to
the terms of the treaty in their context and in the light of its object and purpose”.\textsuperscript{103}

Article 31(3)(b) and (c) \textit{ibid.} states that

\begin{quote}
[i]here shall be taken into account, together with the context:…

(b) any subsequent practice in the application of the treaty which
establishes the agreement of the parties regarding its interpretation.; and

(c) any relevant rules of international law applicable in the relations
between parties.\textsuperscript{104}
\end{quote}

In the second case, article 32 \textit{ejusdem} deals with the supplementary means of
interpretation. According to this article:

Recourse may be had to supplementary means of interpretation, including the
preparatory work of the treaty and the circumstances of its conclusion, in order to

\textsuperscript{100} OECD, 2003 update to the OECD Model Tax Convention on Income and Capital, 3 February 2003
\textsuperscript{101} Tony Ancimer, “Tax 627: International I” course notes, MTax University of Waterloo, Spring 2003 at
\textsuperscript{102} Article 31(1) VC provides the general rule of interpretation of treaties.
\textsuperscript{103} United Nations, Article 31(1) of the Vienna Convention on the Law of Treaties (available on the web at
\textsuperscript{104} Supra note 103, Article 31(3)(b) and (c).
confirm the meaning resulting from the application of article 31, or to determine
the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.\textsuperscript{105}

According to articles 31 and 32 \textit{ejusdem}, if the commentaries are part of the context of
the treaties then they shall be used every time a treaty is interpreted. On the other hand, if
the commentaries are a supplementary means of interpretation, then they can only be
used to confirm or clarify the meaning when the interpretation according to article 31
\textit{ejusdem} is ambiguous, obscure or unreasonable. Under the last hypothesis, if an abusive
transaction benefits from a tax treaty without involving an ambiguous, obscure or
unreasonable interpretation under article 31 \textit{ejusdem}, then the OECD commentaries
cannot be used to limit such benefits.

According to Tony Ancimer, there is no complete agreement on whether the OECD
commentaries should be used under article 31 or 32 \textit{ejusdem}.\textsuperscript{106}

In conclusion, it is not clear that there is any provision in the models of international tax
treaties that may be sufficient to challenge a transaction.


The next question is whether there are other kinds of anti-abuse rules that may be
applicable. One possibility is the application of domestic anti-abuse rules overriding

\begin{footnotesize}
\begin{footnote}{Supra note 103, Article 32.}
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\begin{footnote}{Supra note 101, at 24. The Supreme Court of Canada in Crown Forest and the Dutch Supreme Court “in
a recent case” (see supra supra note 1) used the OECD commentaries to ensure compliance with article
31(1) VC. However, this may lead to the unwanted conclusion that the OECD is creating international law
without being legitimized to do so. Additionally, if the direct application of the OECD commentaries were
so clear there would be no need to include “limitation of benefits” clauses in international tax treaties as
some countries are doing now.}
\end{footnote}
\end{footnotesize}
treaty provisions. The other possibility is to apply the principle of “abuse of law” as a preeminent international principle over the treaty provisions.\textsuperscript{107}

Regarding the first possibility, the application of local law over treaty provisions is a violation of the \textit{pacta sunt servanda} principle.\textsuperscript{108} This principle is included in article 26 VC which provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.\textsuperscript{109}

Notwithstanding the above, according to David Ward\textsuperscript{110}, there is a “scattering”\textsuperscript{111} of cases where some countries have applied national anti-abuse provisions over the provisions of an international treaty.\textsuperscript{112}

Countries should be careful when applying anti-abuse provisions overriding provisions of an international tax treaty. According to article 60 (1) VC, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

Regarding the abuse of law, according to Ward, as an anti-abuse rule it is one of the “general principles recognized by civilized nations”. He bases his conclusion on the following: a) the International Court of Justice has already recognized the principle of

\begin{footnotesize}
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\item[107] According to supra note 92 at 48, abuse of right can be defined as encompassing “some limitation on the exercise of one’s right. As a tentative proposition, it may be said to consist of the prohibition of the exercise of a right for an end different from that for which the right was created, to the injury of another person or the community… is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right”\textsuperscript{107}
\item[108] According to Black’s Law Dictionary, 7\textsuperscript{th} edition, “pacta sunt servanda” means that the “agreements and stipulations, esp. those contained in treaties, must be observed”\textsuperscript{108}
\item[109] Supra note 103, Article 26.
\item[110] Supra note 97, at 403.
\item[111] Among those cases are Aiken Industries v. Commissioner 56 T.C. 925 (1971), and Johansson v. The United States 336 F.2d 809 (1964).
\item[112] In \textit{Aiken Industries v. Commissioner}, 56 T.C.925 (1971) acq. 1972-2 C.B. 1 it was determined that undefined terms in treaties are to be defined based on U.S. rules and that U.S. rules apply to determine entitlement to treaty benefits. (Letter available on the web at http://www.crossborder.com/pshipwithholdfinal.html)
\end{enumerate}
\end{footnotesize}
abuse of rights when interpreting tax treaties; b) article 31 VC requires parties to a treaty to perform the treaties with good faith; c) anti-abuse principles have been adopted in a great number of countries.  

According to article 38(1)(c) of the Statute of the International Court of Justice, the Court shall apply in its decision the general principles of law recognized by civilized nations. Therefore, if general anti-abuse provisions are general principles of law, they should be applied by tax administrations and courts of law when interpreting tax treaties. However, the conclusion reached by Ward is disputed by other authors.

First, the recognition of the abuse of rights from the International Court of Justice comes from the same source (“the opinion of Judge Alvarez of that court), so it is questionable whether other judges will accept it. Furthermore, Iluyomade claims he had never come across “any decision of an international tribunal in which liability has been expressly founded on abuse of rights.”

Second, the Vienna Convention only applies to the contracting states and not to taxpayers.

Third, once having discarded the first two arguments, the “mere fact that a principle is to be found in several legal systems, or indeed in all systems of municipal law, does not entitle the principle to be translated into the international sphere.” Moreover, the principle of abuse of rights is unclear because it does not exist in positive law. “[T]he

113 Supra note 97, at 403.
115 Supra note 92, at 13.
117 Supra note 92, at 10-11.
118 Supra note 116 at 61.
absence of criteria for determining whether a transaction is abusive makes it difficult to apply the principle in the tax treaty context”.

Fifth, courts of law are often hesitant to apply the abuse of rights doctrine because in the end it is an accusation of bad faith. Proving the bad intent of a taxpayer might be a “very delicate judicial exercise”. The difficulty of such an exercise is increased when the Westminster principle is pondered.

3. Types of Anti-abuse Provisions the Model may Contain

There are many types of provisions that may be included in a tax treaty to limit its benefits. Some of the most common types are: a) anti-conduit company provisions (limits the benefits when a company is owned by persons not resident of the contracting states); b) subject-to-tax provisions (treaty benefits are only granted if the taxpayer is subject to tax in the state of residence; c) limitation of benefits to entities that have preferential tax regimes; d) limitations of benefits to particular types of income (in respect to income that is subject to low or no tax under a preferential tax regime); and e) limitations to preferential regimes introduced after the signature of the convention.

Specific anti-abuse provisions have different purposes. For example, the conduit rules “seems an adequate basis for treaties with countries that have no or very low taxation and where little substantive business activities would normally be carried on.” Therefore, it does not seem appropriate to adopt specific anti-abuse provisions in instruments that are

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119 Supra note 92, at 13.
120 Supra note 116, at 91.
121 According to M. Ramjohn, Revenue Law, Q&A Series (London: Cavendish Publishing Limited, 1999), at 8-9, the Westminster principle states that “[e]very man is entitled, if he can, to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.”
122 Supra note 78, Paragraphs 12-23 of the commentary to article 1.
123 Supra note 78, Paragraphs 14 of the commentary to article 1.
intended to be multilateral. Coherent with this thought is the fact that neither the OECD nor the UN models contain such provisions.

However, the inclusion of anti-abuse provisions may be needed to avoid abuse of tax treaties. One option is that a model agreement may include more general anti-abuse provisions. Since its application is broader they can be helpful for any country regardless of its particular characteristics. The “substance over form”\textsuperscript{124} and the “abuse of rights” principle are good examples of such general anti-abuse provisions.

Additionally, further bilateral agreements on anti-abuse provisions should be encouraged, especially for countries where the general anti-abuse provisions referred to above are inapplicable according to local legislation.

4. Proposal

Since under the OECD and UN models there are not sufficient and clear grounds to challenge transactions based on abuse of treaties, developing nations should create a model agreement that remedies this situation. A good model for this agreement is article XXIXA(7) of the Canada-US tax convention and its Technical Explanation.\textsuperscript{125} This model agreement should include additionally the following:

1. Express inclusion and descriptions, if possible, of the substance over form principle.
2. Express mention of the abuse of rights principle.

\textsuperscript{124} According to Mindaugas Palijanskas, “Tax Planning: Unethical and Harmful?”, (article available on the web at http://www.freemo.org/Events/Papers/palijanskas.phtml) the substance over form doctrine covers several options: “lack of economic substance, sham transactions, doctrine of the label”.

\textsuperscript{125} Article XXIX A (7) of the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997 (herein referred to as "the Canada-US tax convention") and United States, Treasury Department, Technical Explanation to the Third Protocol: Treasury Department Technical Explanation of the Protocol Amending the Canada-US tax convention, article 18, "general anti-abuse provisions".

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3. Express mention that this agreement is intended to amend any previous international tax treaty and to be included in any international tax treaty subscribed to by the same parties.

4. Express recommendation that countries should analyze whether further anti-abuse provisions are needed.

5. A recommendation that countries amend their legislation, if needed, in order to make their local anti-abuse legislation compatible with this international instrument.
The rules for exchange of information, assistance in the collection of taxes and prevention of the abuse of treaties (the “proposed provisions”) can be adopted either separately or in a comprehensive document.

Including all the proposed provisions in one document may demand a greater international commitment, but it may also give faster results. Especially since these provisions will be based on the OECD model, no significant international opposition should arise toward this type of document.126

This model agreement may contain other kinds of provisions (e.g. avoidance of double taxation) or relate just to the proposed provisions. Furthermore, it may be created as a bilateral and/or a multilateral tax treaty model.

It is not easy to determine the different advantages or disadvantages that the alternative forms may have. Its differences are mainly political, and escape the scope of this paper. However, it can be supposed that an instrument with the following characteristics may be one of the easiest ways to gain international acceptance:

1) It would only include the proposed provisions; and

2) It would be a multilateral instrument with bilateral acceptances.

The first characteristic ensures that the acceptance of this agreement is not dependent on other international tax negotiations that are riskier and may fail. Also it is easier to be accepted by countries that do not want renegotiate their treaties or that are adverse to the

126 Except maybe for Switzerland and other countries that defend their right to enforce bank secrecy over exchange of information.
system of international tax treaties. For example, Colombia decided to reconsider its position on concluding income tax treaties\textsuperscript{127}, and has not subscribed any international tax treaty except for the Tax Information Exchange Agreement with the US.

Regarding the second characteristic, the instrument would not be a multilateral agreement in the traditional sense. Instead, it would provide “the basis for an integrated bundle of bilateral treaties”.\textsuperscript{128} It would adopt the scheme of the multilateral agreement of OECD's Agreement on Exchange of Information on Tax Matters.\textsuperscript{129}

The parties to this agreement would specify the countries with which they wish the agreement to be applicable.\textsuperscript{130} Those decisions will be reciprocal.

Moreover, a country may decide to be bound only by some articles of the agreement. For this purpose, the agreement could have a “check the box system”, so that the signatory countries will be able to easily identify the provisions they want to be applicable in respect of each treaty partner.

\begin{footnotesize}
\begin{enumerate}
\item [129] Ibid.
\item [130] Supra note 19, at 1888.
\end{enumerate}
\end{footnotesize}
Conclusions

The OECD and UN models have been created based on the tax legislations of developed countries. The OECD, which is perhaps the most active ‘rule maker’ in international tax, only represents the interests of developed countries.

A more equitable approach to international taxation will only be achieved with strong influence from developing countries. However, instead of creating another model of international tax treaties, developing countries should negotiate, as a block, on certain critical aspects of international tax treaties. This strategy would allow a much simpler and faster amendment of the existing bilateral tax treaties models.

Exchange of information, assistance in the collection of taxes, and anti-abuse provisions are three subjects that can be used by developing countries for this purpose. A model agreement that includes the concepts described in this paper would allow developing countries that adopt it to: a) secure their tax base; b) aid in the fight against tax evasion; c) facilitate the exchange of information between tax authorities; d) aid in the fight against harmful tax practices; f) improve of the effectiveness of tax authorities and e) if the international co-operation includes sufficient support, the agreement may help the developing countries to modernize their tax systems.

The creation of such a model agreement involves a very delicate and demanding legal and political work. In order to improve its acceptability, this model should be as flexible as possible but without compromising its efficiency. For this matter, the suggestion of using a “check in the box format” to identify the provisions a particular country wants to apply to its treaty partners, although unorthodox is a tool that should be considered.
A convenient way to introduce this model agreement would be through supra-national
groups of developing countries e.g. Andean Community, Caricom and Mercosur in Latin
America or Asean in Southeast Asia. This model agreement would be adopted by the
countries from each supra-national group to be applicable within the group. Then, supra-
national groups of developing countries, as a block, would negotiate the model agreement
with developed countries in order to have a more powerful negotiation position.
International acceptance of the model agreement could lead the way to more advanced
international negotiations that may be very advantageous for developing countries but
require a greater degree of international co-operation.
BIBLIOGRAPHY


United Nations, *Convention between (State A) and (State B) for the avoidance of double taxation with respect to taxes on Income (and on capital)*, 2001 version.

United Nations, “Fundamentals for the Negotiation of Tax Conventions between Developed and Developing Countries,” in *Second Interregional Training Workshop on International Taxation and Steering Committee Meeting* (Beijing, The People’s Republic...


United States, Treasury Department, Technical Explanation to the Third Protocol: Treasury Department Technical Explanation of the Protocol Amending the Canada-US tax convention.