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Exchange of Information under the OECD and US Model Tax Treaties

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I. INTRODUCTION

The basic function of income tax treaties[1] is the relief of the burden of double taxation on taxpayers. Whenever an enterprise enters an inter-country transaction or an individual steps across a national boundary, the possibility of double taxation arises. As international trade and commerce have expanded, the problem has increased. Despite this, the problem has been a long-standing one. As long ago as 1775, Lord Mansfield said: "No country ever takes notice of the revenue laws of another."[2]

The problem of international tax evasion has not received much attention, but nevertheless, it has serious international ramifications. Most importantly, it can serve to frustrate revenue gathering efforts of those countries most in need of additional revenue to aid developing economies.[3] Thus, the need for adequate protections against evasion has taken on increased significance in recent years.

The problems of double taxation and tax evasion in an international context can be reduced by either provisions in the tax code of a particular country or by bilateral tax treaties.[4] Initial measures to combat international double taxation were unilateral in nature.[5] For example, the United States adopted the foreign tax credit mechanism, which treats taxes paid to a foreign country as if they were paid to the United States.[6] Even so, the weaknesses of unilateral measures caused many countries to seek supplementary arrangements.[7] A network of tax treaties between commercial partners has been the result.[8] Significantly, these treaties include provisions spe-

1. The terms "treaty" and "convention" are often used interchangeably. *See* Treas. Reg. § 1.894-1(a) (1975) ("treaty" as used in § 894 includes "convention").

2. Holman v. Johnson, [1775] 98 Eng. Rep. 1120, 1121.

3. van Hoorn, *Problems, Possibilities, and Limitations With Respect to Measures Against International Tax Avoidance and Evasion*, 8 GA. J. INT'L & COMP. L. 763, 773 (1978).

4. J. ADAMS & J. WHALLEY, THE INTERNATIONAL TAXATION OF MULTINATIONAL ENTERPRISES IN DEVELOPED COUNTRIES 41 (1977).

5. van Hoorn, *supra* note 3, at 764.

6. *See* I.R.C. §§ 901-906 (1982).

7. *See* Trelles, *Double Taxation/Fiscal Evasion and International Tax Treaties*, 12 IND. L. REV. 341 (1979).

8. The United States is signatory to twenty-six bilateral tax conventions or treaties

cifically designed to attack the problem of fiscal evasion.[9]

A model tax treaty for use by industrial nations was prepared in 1963 by the Organization for Economic Cooperation and Development (OECD), and revised in 1977.[10] Article 26 of the OECDMC provides for the exchange of information between contracting States, and was included to deal with the evasion problem.[11] Also,

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applicable to thirty-eight independent nations and eight territories of other nations. U.S. Dep't. of the Treasury, TAXATION OF FOREIGN INVESTMENT IN U.S. REAL ESTATE (1979).

9. Tax treaties have provided nations with an important tool to deal with the problem of tax avoidance. The number of countries involved in such arrangements is increasing as an understanding of the consequences of international taxation evolves. Brazil, India, and Pakistan are among the developing countries which have negotiated such treaties. *See* Surrey, *United Nation Group of Experts and the Guidelines for Tax Treaties Between Developed and Developing Countries*, 19 HARV. INT'L L.J. 1, 5 (1978).

10. OECD, Committee on Fiscal Affairs, MODEL DOUBLE TAXATION CONVENTION ON INCOME AND ON CAPITAL (rev. ed. 1977) [hereinafter cited as OECDMC].

11. OECDMC, Article 26, states:

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

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

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

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

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

3. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the first-mentioned State were the tax of that other State and were being imposed by that other State. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, or writing), to the same extent such depositions and documents can be obtained under the laws and administrative practices of such other State with respect to its own taxes.

4. Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to enure that relief granted by the present Convention from taxation imposed by such other Contracting State does not enure to the benefits of persons not entitled thereto.

in 1977, the United States Treasury Department released the text of its version of a model income tax treaty which itself conforms closely to the OECDMC revision.[12]

This Note will explore the basic parameters of the exchange of information provisions. Moreover, because taxation is an important tool for developing economies the Note will explore how the elimination of tax evasion is a crucial objective of these provisions. Accordingly, the Note examines the work of the UN Group of Experts and the contributions they have made to the understanding of the problems involved in tax relationships between developed and developing nations.

Also, practitioners should be alerted to a decision on this subject by the Second District Court of Appeals. At issue in the case was the construction of the exchange of information provision in a United States tax treaty with Canada. After reviewing the provision, the court determined that foreign countries can obtain tax information concerning domestic companies through the IRS. The decision signifies an increase in the impact that such provisions can have on tax policy.

The Note concludes with the recommendation that a greater commitment to supplying developing countries with tax information and assistance is needed. This requires an emphasis on the implementation of exchange of information provisions. Significantly, these provisions not only benefit developing countries but also can enhance international business relations and opportunities.

II. THE PROBLEM OF TAX EVASION

The tremendous growth of international trade and investment has stimulated the rise of a significant problem: international tax evasion.[13] Unlike the problem of double taxation, the problem of

5. Paragraph 4 of this Article shall not impose upon either of the Contracting States the obligation to carry out administrative measures which are of a different nature from those used in the collection of its own tax, or which would be contrary to its sovereignty, security, or public policy.

6. For the purpose of this Article, this Convention shall apply to taxes of every kind imposed by a Contracting State.

The Commentary on Article 26 has been considerably enlarged as compared with the 1963 text and has introduced the new concepts of *automatic* and *spontaneous* exchange of information. *Id.* at Commentary, No. 9(b), (c).

12. M. CARROLL, INCOME TAX TREATIES 51, 70 (J. Bischel ed. 1978).

13. Eichel, *Administration Aspects of the Prevention and Control of International Tax Evasion*, 20 U. MIAMI L. REV. 25, 26-27 (1965).

tax evasion has not received widespread concern.[14] Quite often, the major difficulty is that the states involved do not wish to grapple with the problem. The Internal Revenue Service has expressed interest in this problem but has been limited in the kind of assistance it can provide.[15]

Only recently has there been any significant measure of concern about fiscal evasion.[16] In large part, this apathy has been due to the fact that "the administrative problems inherent in world-wide enforcement are both technically complex and fraught with political and diplomatic ramifications."[17] Reflecting the increase in concern about the problem, the 1977 OECDMC is worded much more clearly and is more extensive on this subject than its 1963 predecessor.[18]

One of the basic cornerstones of an effective tax enforcement system is intelligence.[19] "The function of intelligence (information gathering) is to determine the extent to which taxpayer compliance is being achieved. Through an efficient intelligence network, tax officials can ascertain which individuals or entities are engaged in activities that result in tax liability, and the extent of that liability."[20] Of primary importance to any tax system is the need to maintain a systematic flow of information to the tax authorities.[21] Such a system serves an important indirect compliance purpose. "Those who might otherwise evade the revenue laws refrain from doing so because they are aware that the government is receiving information as to their income."[22]

Section 7602 of the U.S. Internal Revenue Code provides for the collection of information from the taxpayer.[23] It authorizes the

14. Trelles, *supra* note 7, at 363.
15. *Id.*
16. Eichel, *supra* note 13, at 27.
17. *Id.*
18. Trelles, *supra* note 7, at 363.
19. Eichel, *supra* note 13, at 28.
20. *Id.*
21. *Id.* at 29.
22. *Id.*
23. I.R.C. § 7602 (1982) (examination of books and witnesses).
For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

issuance of a summons and the production of books and records to determine the liability of any person "for any internal revenue tax."[24] Other countries have similar provisions for gathering information, but in many cases, suffer from inefficient and unsophisticated systems.[25] Tax treaties between nations also consistently provide for sharing of information, but the continuing emphasis on double taxation has placed fiscal evasion in a subsidiary position in terms of providing effective safeguards.[26]

III. Exchange of Information Provisions in Tax Treaties

Initially, it was recognized that the primary interest of the United States was not in the relief of double taxation. The government felt that it had already alleviated double taxation by the unilateral code provisions. But concerns relating to the prevention of fraud or fiscal evasion and the simplification of tax administration remained.[27] As one approach to preventing tax evasion, tax treaties were implemented which commonly included provisions for the exchange of information between governments.[28]

Typically, the foreign country reports to the United States those taxpayers from whom it has withheld a tax and whose addresses are in the United States. The United States, at the same time, follows a similar process. As a result, both nations receive data about foreign income received and the amount of foreign taxes paid by their citizens and residents. Generally, information may be exchanged either as part of a routine process or, in particular cases, in response to a particular request. In exchanging information, the contracting

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(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

24. *Id.*

25. van Hoorn, *supra* note 3, at 764-65.

26. Eichel, *supra* note 13, at 77.

27. *See* Joint Comm. on Int. Rev. Tax., Legislative History of United States Tax Conventions (1962).

28. OECDMC, art. 26; United States Treasury Model Convention, Treas. Dept. News Release B-235 (May 17, 1977) *reprinted in* [1977] Tax Treaties (P-H) ¶ 1019 [hereinafter cited as USMT].

nations are not obligated to supply data that is unobtainable. They do not have to carry out administrative measures which are not permitted in their respective nations, or to provide information which would disclose trade or public secrets.[29]

The problem of tax avoidance, on the other hand, entails efforts on the part of the taxpayer to reduce tax liabilities. The taxpayer may not be doing anything illegal, though his actions may be against the spirit of the law. The difference lies in the fact that tax avoidance is usually openly carried out and only requires an effective auditing decision to discover and close loopholes, whereas tax evasion consists of facts that should be disclosed but which are either not entirely disclosed or are not disclosed at all.[30] Where taxpayers willfully contravene the law and do not meet their tax obligations, they expose themselves to any penal consequences the law may prescribe. The existence of tax evasion requires, therefore, special investigation mechanisms in order to obtain the most accurate information to expose the fraud.[31]

At the international level, a sharp distinction cannot always be made between tax evasion and tax avoidance. Treaties providing for an exchange of information do not usually distinguish between the two.[32] "Where information exchanged reveals a case of fraud, the country or countries concerned will then have to apply their domestic penal provisions."[33]

Exchange of information between countries, though in a stage of infancy, is increasingly being advocated as an effective tool in dealing with taxpayer's efforts to minimize or eliminate their taxes in the countries in which they operate. Certain new developments in this area indicate how strongly the need for a consistent and sophisticated system of cooperation is felt. The highlights of these developments will be discussed in this Note. They are worthy of due consideration in this emerging and important area of international taxation.

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29. OECDMC, art. 26(2); USMT, art. 26(2) & 26(5). *See also* Namorato, *The Government's Tools in the Investigation of a Criminal Fraud Case*, 34 INST. ON FED. TAX'N 1019 (1976).

30. van Hoorn, *supra* note 3, at 769.

31. *Id.*

32. *Id.*

33. *Id.*

A. UN Proposals

In 1967, the Economic and Social Council of the United Nations established the United Nations Group of Experts on Tax Treaties Between Developed and Developing Countries (UN Group) to facilitate the conclusion of tax treaties between developing and developed countries.[34] This Group consists of eighteen members: ten from developing countries and eight from developed countries.[35] The UN Group decided that the most expeditious way to proceed was to use the 1963 OECDMC as a reference for discussion.[36] "This model was being used by the developed countries as the framework for their negotiations."[37] Indeed, that was the purpose of the draft.[38] The developed countries also attempted to apply this model in the negotiations that were commencing in the 1960's with developing countries.[39] Differing ideological approaches to international tax issues, however, provided incentive for the formation of the UN Group and its consideration of various policy positions.[40]

The UN Group has held seven meetings and has issued a report on each meeting.[41] Aspects of the 1977 changes to the

34. E.S.C. Res. 1273, 43 U.N. ESCOR, Supp. (No. 1) at 5, U.N. Doc. E/4429 (1967).

35. *See* Surrey, *supra* note 9, at 5-6.

36. *Id.* at 7.

37. *Id.* at 6.

38. *Id.*

39. *Id.*

40. *Id.* at 7.

41. The reports have been published by the United Nations under the title, TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES. All but the last Report are divided into two parts, one being a summary of the proceedings, the other consisting of a suggestion and consideration prepared by the Secretary General on behalf of the Expert Group. The Reports bear respectively, the following document numbers:

U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: First Report, U.N. Doc. ST/ECA/110 (1969) [hereinafter cited as First Report];

U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: Second Report, U.N. Doc. ST/ECA/137 (1970) [hereinafter cited as Second Report];

U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: Third Report, U.N. Doc. ST/ECA/166 (1972) [hereinafter cited as Third Report];

U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: Fourth Report, U.N. Doc. ST/ECA/188 (1973) [hereinafter cited as Fourth Report];

U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: Fifth Report, U.N. Doc. ST/ESA/18 (1975) [hereinafter cited as Fifth Report];

U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: Sixth Report, U.N. Doc. ST/ESA/42 (1976) [hereinafter cited as Sixth Report];

OECDMC were largely adopted and incorporated into the UN Group's material. After the fifth meeting, the UN Group also prepared *Guidelines for Tax Treaties Between Developed and Developing Countries* covering their efforts to that time.[42] "The subject of exchange of information occupied a prominent place in the work of the UN Group."[43] The Group's discussions had placed great emphasis on the prevention of tax evasion, and all members saw the process of exchange of information as a valuable weapon in achieving that goal. The developing nations especially feel a strong need for information, if only to benefit from the "superior investigative facilities" of their colleagues in industralized countries.[44] It has even been argued that a provision on the exchange of information may be the most valuable contribution a convention can make to the tax effort of a developing country.[45]

"A member from a developing country pointed out that the annual loss of tax revenue and, in particular, foreign exchange suffered by his country was of major proportions even in relation to the foreign aid that the country received."[46] This implies that the problem of tax evasion weakens the monetary position of the suffering country as the uncertain state of tax law administration distorts the flow of goods and capital among countries.[47] It is equally true that all countries, and developing countries in particular, need tax revenues to meet the goals of their socio-economic policies. Therefore, it is valid, even desirable, for countries to take measures to safeguard their economic interests. The requirement of equal tax treatment protects these principles. Moreover, an adequate system providing for the exchange of information can lead to a rectification of the existing discrepancies.

The UN Group adopted an exchange of information provision that differs from the OECD version in two important respects. First, it is expressly stated that the exchange of information shall be made

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U.N. Dep't of Economic & Social Affairs, Tax Treaties Between Developed and Developing Countries: Seventh Report, U.N. Doc. ST/ESA/78 (1978) [hereinafter cited as Seventh Report].

42. U.N. Dep't of Economic & Social Affairs Guidelines for Tax Treaties Between Developed and Developing Countries, U.N. Doc. ST/ESA/74 (1974) [hereinafter cited as Guidelines].

43. Surrey, *supra* note 9, at 49.

44. First Report, *supra* note 41, Ch. V, para. 86.

45. *See* Third Report, *supra* note 41, at pt. 1.

46. *Id.* at pt. 1., Ch. III, para. 151.

47. Forry & Lerner, *Taxing Multinational Enterprises: Basic Issues of International Income Tax Harmonization*, 10 INT'L LAW. 623 (1976).

"for the prevention of fraud and evasion."[48] This addition emphasizes the need to pay stricter attention to the problem of evasion.[49] Second, the UN Group desired to place an affirmative obligation on the authorities to fully implement the exchange of information article. This was done by inserting the following sentence: "The competent authorities shall, through consultations, develop appropriate conditions, methods, and techniques concerning the matters respecting which such information shall be made, as well as exchange of information regarding avoidance of tax where appropriate."[50] This second addition is the key to the approach of the UN Group. They considered that the benefits of tax administration could only be obtained if there was adequate focus and consideration given to the issue.[51]

Included in the Sixth Report was a detailed inventory of the factors and techniques involved in the exchange of information. The UN Group viewed the article as delegating full authority to the competent authorities for the administration of the provision. The Group's primary thrust was to remove any obstacles, real or imagined, to the effective exchange of information. The essence of the Group's creativity was in the realization that such a provision is crucial to the interests of developing nations.[52]

One of the major points of concern to developing countries is the determination of how and by what method information ought to be supplied.[53] A representative from a developing country recommended to the UN Group the formation of a multilateral agreement on the exchange of information and the establishment of a permanent body to implement such exchange through collection and dissemination of information.[54] The Group viewed the proposal as

48. *See* Surrey, *supra* note 9, at 49.

49. *Id.*

50. Guidelines, *supra* note 42, at 64.

51. *See* Surrey, *supra* note 9, at 49.

52. *Id.*

53. van Hoorn, *supra* note 3, at 771.

54. *See* van Hoorn, *supra* note 3, at 771-72. *See, e.g.*, A proposal by S. Gafny, member of the U.N. Group of Experts to create an international agency, A Multilateral Agreement on the Exchange of Information Concerning Direct Taxation and on Mutual Assistance in Tax Administration, U.N. Doc. ST/SG/AG. 8/L.20 (1977). Mr. Gafny's proposed international body would be:

> set up on the basis of a multilateral agreement on the exchange of information and on mutual assistance in tax machinery to make these effective and adequate as part of the measures required to combat tax evasion which, in the opinion of their representatives, is one of the main problems with which the developing countries are

premature because of the many difficulties it presented.[55] Nevertheless, it did suggest that the UN Secretariat "consider the possibility of undertaking preparatory work for such a project."[56]

Such a proposal, although complex and fraught with numerous problems, is suggestive of the kind of measures that are needed to work out current inequities in tax administration. Much thinking and discussion remains to be done. The stress of the UN Group on the *implementation* of the exchange of information provision (Article 26) signals a possible end to the neglect of that provision by treaty countries.[57]

Of additional importance is the fact that at present there is still only a small number of tax treaties between developed and developing countries.[58] The need for the exchange of information is especially crucial for developing countries. Tax administrations of some developed countries have worked out bilateral or multilateral schemes for regular consultation and information.[59] Such arrangements are encouraged because of the potentially significant benefits for maturing nations.

B. Construction of U.S. Treaty Provisions

The question of whether a foreign country can obtain tax information pertaining to a U.S. corporation was squarely settled in *United States v. A.L. Burbank & Co.*[60] The case is significant in that it is the only time the courts have been called upon to interpret the exchange of information provisions in tax treaties. Its significance also lies in the fact that it advances the objectives of such provisions by requiring compliance with requests for information regarding foreign tax liability by utilizing the same investigative techniques that the Internal Revenue Service (IRS) could employ if that person were under investigation for domestic tax liability.

Construing the tax treaty of 1942 between the U.S. and Canada,[61] the Court of Appeals for the Second Circuit reversed a dis-

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concerned. In the course of time the institutions set up under such an agreement might develop into a body embracing the whole field of direct taxations.

55. *See* Surrey, *supra* note 9, at 52.

56. Seventh Report, *supra* note 41, at 59.

57. *See* Surrey, *supra* note 9, at 53.

58. van Hoorn, *supra* note 3, at 772.

59. *See, e.g.*, Internal Revenue News Release IR-1839, (1977) 779 STAND. FED. TAX REP. (CCH) § 6723 (agreement between U.S. and Canada).

60. 525 F.2d 9 (2d Cir. 1975).

61. 56 Stat. 1399 (1942).

trict court's refusal to enforce the summons authority of the IRS found in the 1954 Internal Revenue Code.[62] The IRS was attempting to obtain information from American based corporations solely for a Canadian tax investigation where there was no United States interest in the investigation and no claim that U.S. taxpayers were potentially due and owing.[63] The court noted that "the case is one of first impression in this country."[64]

The district court had held that there was no authority either in the treaty or the Code for issuance of an IRS summons solely for the purpose of aiding Canadian tax authorities in a Canadian tax investigation.[65] In other words, the court refused to enforce the summons because no concurrent U.S. tax liability was involved.

The court of appeals, however, applied a more liberal construction to the statute. The court's reading of the statute was based on the broad purposes of the tax treaty.[66] In the court's eyes it was clear that one purpose of the pact was to provide a means of cooperation between the contracting states whereby information could be exchanged after it was collected through the administrative processes provided by the statutory law of each state.[67] The court recognized that the procedural tools of each state were to be available for use against tax evasion.[68] Moreover, the court acknowledged that, to hold that the examination process set forth in the Code could only be employed in the event of American tax liability would totally frustrate the purpose of the treaty.[69]

Because the U.S. was party to eighteen other tax conventions, at the time the case was decided, it was a crucial decision.[70] Indeed, the court of appeals realized that the narrow interpretation by the lower court would not only frustrate the Canadian Tax Treaty but those other conventions with comparable exchange of information procedures.[71]

The U.S. Treasury Model Convention of 1977 contains explicit

62. *See* note 23 *supra*.
63. 525 F.2d at 11.
64. *Id.*
65. United States v. A.L. Burbank, 74-2 T.C. 9779 (S.D.N.Y. 1974).
66. 525 F.2d at 13.
67. *Id.*
68. *Id.* at 16-17; 9 VAND. J. TRANSNAT'L L. 659, 667 (1976).
69. 525 F.2d at 13.
70. *See* 11 TEX. INT'L L.J. 391 (1976).
71. 525 F.2d at 13.

language confirming the result in *Burbank*.[72] Moreover, the OECDMC, on which much of the U.S. model is based,[73] has language in its commentary which was devastating to the appellee's arguments.[74] The court emphasized that the Commentary provides that administrative measures employed in one state, "must be utilized even though invoked solely to provide information to the other Contracting State."[75] Further, the Commentary also requires that "the requested State has to collect the information the other State needs in the same way as if its own taxation was involved."[76] These statements provided ample rationale to the court's holding. Indeed, approval of the lower court's holding would have been a significant blow to effective international tax administration.

In making its decision, the court applied the general rule that treaties are to be broadly construed to enable the intent of the treaty

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72. *See* art. 26(3) which states:
If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the first-mentioned State were the tax of that other State and were being imposed by that other State. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, or writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of such other State with respect to its own taxes.

73. *See* Surrey, *supra* note 9, at 6; van Hoorn, *supra* note 3, at 767-68.

74. The pertinent provisions of the Revised Comentary are quoted in the opinion:
12. This paragraph (Paragraph 2 of the Model Treaty) embodies certain limitations to the main rule in favor of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. *However, types of administrative measures authorized for the purpose of the requested State's tax must be utilized even though invoked solely to provide information to the other Contracting State*. Likewise, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article.
14. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, *which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons provided the tax authorities would make similar investigations or examination for their own purposes. This means that the requested has to collect the information the other State needs in the same way as if its own taxation was involved*, under the proviso mentioned in paragraph 13 above. 525 F.2d at 16. (italics added).
The court relied primarily on paragraphs 12 and 14 for its decision.
See also 9 VAND. J. TRANSNAT'L L. 666 (1976).

75. 525 F.2d at 16.

76. *Id.* at 14.

to be enforced.[77] Two United States Supreme Court decisions were relied on, and are particularly relevent to the thrust of this Note. In *Bacardi Corp. v. Domeneck*,[78] the Court held that more liberal interpretations of a treaty's provision are preferred over restrictive interpretations.[79] Further, in *Factor v. Lanbanheimer*,[80] the Court stated:

> Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.[81]

The holdings of these cases encourage an activist approach to exchange of information provisions. Such provisions should not be regarded as trivial administrative appendages. They have the potential to contribute to an improvement in the economic status of developing nations and, thus, in the improvement of international relations. Moreover, liberal enforcement of these provisions will contribute to the alleviation of the significant, but overlooked, problem of tax evasion.

The significance of the *Burbank* decision is clear: factors contributing to tax secrecy should not be permitted to serve as obstacles to the exchange of tax information between nations. Presumably, the decision would apply to other covenants with similar provisions. Accordingly, practitioners should take note of the widespread ramifications of this decision. Counsel should be aware that foreign countries have the same degree of access to information as the IRS does in order to ascertain tax liability.

IV. CONCLUSION

Beyond even the traditional problem of apathy on the part of governments and taxpayers, there are still complex and serious difficulties in reaching workable agreements in international taxation.[82] Progress has been made, but much remains to be done.[83]

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77. Havenstein v. Lynham, 100 U.S. 438 (1880); *see also* Trelles, *supra* note 7, at 351.

78. 311 U.S. 150 (1940).

79. *Id.* at 163.

80. 290 U.S. 276 (1933).

81. *Id.* at 293.

82. *See* Trelles, *supra* note 7, at 377.

83. The work of the United Nations Group of Experts is encouraging, but it is by no means the final solution. Of particular concern are the issues related to the tax *collection* provisions in tax treaties. Information is necessary to establish cases of fiscal evasion. However, once information is supplied, collection of revenues is appropriate in order to protect

Generally, the level of sophistication in the administration of a tax system reflects the economic development of the country.[84] Many countries lack the information and expertise to administer their tax systems as effectively as more developed nations. Often, these variations in administration are easily exploited by taxpayers. Further, difficulties arise from the traditional reluctance of countries to provide local information. Thus, the flow of goods and capital is distorted by the uncertain manner in which tax laws are administered.[85]

Enforcement of exchange of information provisions is of great interest to developing countries. Certainly those who stand most to benefit from enforcement are those developing nations in need of expanded expertise in revenue collection. Developed nations, understandably suspicious of such notions, have begun to indicate their willingness to explore the parameters of increased use of exchange of information provisions with lesser developed countries.[86] The provisions do not require Contracting States to do anything that is beyond the laws and administrative procedures that are applied internally. But the requirement that information which is available to the other nation as if it had jurisdiction over the person possessing the information has tremendous potential to deal with tax evasion and thus create an environment of equal tax treatment.[87]

Exchange of information is one facet of a complex array of issues. It is not a panacea. It is, however, advocated as a tool against the reduction of tax liabilities to the disadvantaged of one country or another. The world economy stands to benefit from the safeguarding of economic interests. Moreover, the principles of justice and fairness should be pursued for the benefit of the international community.

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the interests of the concerned government. Such a procedure raises concerns about national sovereignty and due process and these concerns continue to hamper the formulation of fully workable agreements. *See* Trelles, *supra* note 7, at 369-77.

84. *See* Forry & Lerner, *supra* note 47, at 627.

85. *Id.*

86. Surrey, *supra* note 9, at 49.

87. van Hoorn, *supra* note 3, at 773.