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Note

The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem

Anthony D. Todero*

INTRODUCTION

On March 2, 2009, Senator Levin introduced the Stop Tax Haven Abuse Act (the “Act”) in the Senate. Like its name implies, the goal of the Act is “[t]o restrict the use of offshore tax havens and abusive tax shelters . . . .” The Obama Administration fully supports the Act. Although the bill is currently in committee (as of Nov. 1, 2009), many speculate

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that the legislation will pass in the current session. In the event of its passage, the Stop Tax Haven Abuse Act will fail to eliminate tax havens and foreign tax evasion. The Act is not geared toward international cooperation. Instead, it uses a “name and shame” strategy, which other countries have an incentive to oppose.

Fortunately, alternative mechanisms for the exchange of international tax information exist, such as an international tax authority with domestic enforcement powers or a market-oriented solution that would use cash as consideration for tax information. Both alternatives could improve the exchange of tax information necessary to enforce U.S. tax laws. These alternatives take into account the needs of tax haven jurisdictions and therefore are more likely to promote international cooperation.

and revise the bills. Then the bills are sent to the floor for general debate. Most bills do not make it out of committee. Id.

5. See infra Part III.
7. The Act refers to targeted tax havens as “foreign secrecy jurisdictions.” See S. 506 § 101(b). For how the Act defines a “foreign secrecy jurisdiction,” see infra Part III.B. Other nations’ politicians and bankers do not like the stigma attendant with the label of “foreign secrecy jurisdiction” because it might scare away reputable clients. See States of Guernsey, Chief Minister Welcomes G20 Summit Outcome, http://www.gov.gg/ccm/treasury-and-resources/press-releases/2009/chief-minister-welcomes-g20-summit-outcome.en?textonly=yes (last visited Nov. 2, 2009) (quoting Guernsey Chief Minister Lyndon Trott after the island signed thirteen Tax Information Exchange Agreements: “This puts to bed, once and for all, the myth that the island of Guernsey is a tax haven . . . . The stigma of tax haven status should be gone forever.”); Anthony Faiola & Mary Jordan, Tax-Haven Blacklist Stirs Nations: After G-20 Countries Unveiled a New “List of Shame.”, WASH. POST, Apr. 4, 2009, at A7 (giving examples of countries, such as Austria and the Philippines, that promised to exchange tax information after the G-20 countries unveiled a new “list of shame”). Moreover, Swiss banks, for example, face the uneasy choice between violating U.S. law or defying Swiss law’s stringent bank secrecy provisions. See David S. Hilzenrath, IRS, Justice Target Undisclosed Assets in Swiss Accounts, WASH. POST, Nov. 1, 2008, at D01 (describing the predicament of Swiss bank UBS in trying to comply with a U.S. court order that is contrary to Swiss secrecy laws).

8. See ZVI DANIEL ALTMAN, DISPUTE RESOLUTION UNDER TAX TREATIES 351 (2005) (explaining that an international mechanism trusted by all treaty partners is inherently necessary for coordination, but that enforcement, because of sovereignty, necessitates an international tax institution capable of domestic enforcement).


States in the unenviable position of global tax enforcer, an international tax authority or a more complete market for tax information would better facilitate the exchange of extraterritorial tax information and promote U.S. tax enforcement.

This Note does not consider the entirety of the Stop Tax Haven Abuse Act. Instead, the brunt of the criticism is levied at the Act’s list of tax havens. The Act identifies specific jurisdictions as tax havens; mandates heightened scrutiny of financial transactions conducted in those jurisdictions; imposes relaxed evidentiary burdens on prosecutors, in the form of rebuttable presumptions, to make enforcement of tax laws financialcrisis/outcomedoc.pdf (highlighting the need for inclusive policies that will allow developing countries to benefit from international tax cooperation); see also Steven A. Dean, *End the Barter System*, N.A.T’L L. J., Aug. 27, 2007, available at http://www.brooklaw.edu/news/homepage_news/dean_tax_article.pdf (advocating compensating cooperative countries with cash rather than bartering for the exchange of extraterritorial tax information).


12. See S. 506 § 101(b). According to the initial list in the Act, each of the following jurisdictions is an offshore secrecy jurisdiction: Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Cyprus, Dominica, Gibraltar, Grenada, Guernsey/Sark/Alderney, Hong Kong, Isle of Man, Jersey, Latvia, Liechtenstein, Luxembourg, Malta, Nauru, Netherlands Antilles, Panama, Samoa, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Singapore, Switzerland, Turks and Caicos, and Vanuatu. Id. § 101(b).

13. For example, the Act allows more time for investigating transactions conducted within one of the identified jurisdictions. In the instance of a tax return for a year in which the taxpayer received money from a financial account located in an offshore secrecy jurisdiction, "the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.” See id. § 104(a). The current statute of limitations on international tax enforcement is three years. I.R.C. § 6501(a) (2006); see also Press Release, the White House Office of the Press Secretary, Leveling the Playing Field: Curbing Tax Havens and Removing Tax Incentives for Shifting Jobs Overseas (May 4, 2009), http://www.whitehouse.gov/the_press_office/leveling-the-playing-field-curbing-tax-havens-and-removing-tax-incentives-for-shifting-jobs-overseas/ (proposing to increase the statute of limitations on international tax enforcement to six years).

14. See S. 506 § 101. The law would amend the Internal Revenue Code by establishing a rebuttable presumption relating to control (§ 7492(a)) and transfers of income (§ 7492(b)) against persons who participated in transactions involving offshore secrecy jurisdictions. For example, the law provides that a U.S. person exercises control over an entity domiciled in an offshore secrecy jurisdiction if she has transferred any assets to the entity. The law also would amend 31 U.S.C. §
easier in those jurisdictions; and enacts other provisions all geared toward boosting the international enforcement of U.S. tax laws.\textsuperscript{15} Certain sections of the Act are logical amendments to the tax code. For example, the Act extends the statute of limitations for the Internal Revenue Service (IRS) to assess taxes on tax returns requiring offshore examinations from three years to six years.\textsuperscript{16} Government Accountability Office (GAO) studies show that offshore examinations take “a median of 500 more calendar days to develop and examine than other examinations” because of technical complexity and the need to obtain information from foreign sources.\textsuperscript{17} The IRS ends some offshore examinations prematurely or opts not to conduct them at all, even with evidence of noncompliance, because of the current three-year statute of limitations.\textsuperscript{18} It makes sense, then, to allow the IRS more time to conduct examinations of offshore transactions. However, the decision to blacklist the countries whose cooperation is necessary for the IRS to obtain the necessary information to enforce U.S. tax laws demands scrutiny and is the focus of this Note.

In light of the acknowledged caveat in scope, this Note proceeds as follows. Part I discusses the current international mechanisms (and their limitations) by which the United States attempts to enforce its tax laws abroad. Part II illuminates the impetus behind cracking down on tax havens. Specifically, two recent occurrences—the Liechtenstein and UBS scandals—have catapulted tax abuse to the forefront of the collective conscience.

Part III takes aim at the Stop Tax Haven Abuse Act. This Note does not take a normative position on the benefits or


\textsuperscript{16} See supra note 13.


\textsuperscript{18} \textit{Id.} (“Because of the 3-year statute of limitations on assessments, the additional time needed to complete an offshore examination means that IRS sometimes has to prematurely end offshore examinations and sometimes chooses not to open them at all, despite evidence of likely noncompliance.”).
drawbacks of tax havens.19 Rather, it assumes that taxation, as a mechanism to gather revenues for government programs, is necessary.20 A legislative attempt to achieve this goal that will fail in practice is worthy of noting.21 Although increasing government tax revenue22 is a laudable motivation, the Act does not take into account foreign actors' interests. As a result, it is unlikely to bolster the exchange of tax information, which would improve IRS enforcement of U.S. tax laws.

Part IV concludes this Note by discussing two alternatives to the Stop Tax Haven Abuse Act’s “name and shame” strategy of blacklisting tax havens. A policy of paying cash as consideration for tax information would be more successful in eliciting the cooperation of foreign actors, but market failures and privacy issues are potential concerns. An international tax institution might take a long time to create because existing entities, like the Organisation for Economic Co-operation and

19. Although the term “tax haven” is used frequently, “[t]here is no precise definition of a tax haven.” JANE G. GRAVELLE, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 2 (2009), http://assets.opencrs.com/rpts/R40623_20090709.pdf. I do not use the term in any normative sense, but only in a descriptive sense to indicate a jurisdiction with few or no taxes, a lack of effective information sharing, and a lack of transparency. See id. (citing ORG. FOR ECON. DEV. AND CO-OPERATION, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 23 (1998)) (describing features of tax havens).


22. See Hearing on Fiscal 2010 Appropriations, supra note 21, at 6 (noting that new enforcement personnel are expected to generate $2 billion in additional annual revenue and an estimated $6 billion in indirect revenue based on the deterrent effect of the new enforcement programs by FY 2012).
Development (OECD) and the United Nations (U.N.), are not compelling status quo auspices for an international tax authority.23 Regardless of the potential counterarguments against these alternatives, if implemented, both would be more successful at facilitating the exchange of extraterritorial tax information than the Stop Tax Haven Abuse Act.

I. THE TAX GAP AND CURRENT MECHANISMS OF EXCHANGING EXTRATERRITORIAL TAX INFORMATION

Globalization has collapsed many previously existing legal and technological barriers to international capital flows, making tax evasion easier and tax administration more difficult.24 The Internal Revenue Service’s international enforcement of U.S. tax law thus faces daunting challenges.25 The largest obstacle in administering U.S. tax law in foreign locales is that much of the information needed to enforce these laws is unavailable.26 The IRS, for example, has difficulty identifying persons outside of the United States who are taxable as U.S. residents or citizens.27 The IRS does not cross-check passports against filed returns to locate those outside the United States who fail to file.28 Even if the IRS could identify U.S. residents or citizens in


26. Id. The IRS has domestic capabilities, e.g., the powers to investigate, summons, and sue, to enforce tax laws but lacks similar powers in foreign jurisdictions. Id.

27. See generally Hearing on Tax Compliance, supra note 17, at 7–11 (discussing the difficulty the IRS has in collecting tax information from U.S. persons in foreign jurisdictions).

28. See Tillinghast, supra note 25, at 39–40 (noting that the IRS has no system in place to help administrators perform these cross-checks of passports or green cards against filed returns).
foreign jurisdictions who failed to file their taxes, in many cases the IRS has no enforcement mechanism with which to compel foreign persons to comply.29 Not surprisingly, few foreign withholding agents properly withhold the required taxes from their client’s income.30 Moreover, foreign laws, such as bank secrecy laws, may limit the disclosure of tax information necessary for IRS enforcement.31 Largely due to these enforcement difficulties, the United States has a gross tax gap—“the difference between the aggregate tax liability imposed by law for a given tax year and the amount of tax that taxpayers pay voluntarily and timely for that year.”32

In 2005, the IRS estimated that the gross tax gap was approximately $345 billion.33 Other countries face similar shortfalls in tax revenues.34 A fairness issue arises when some

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29. See Tillinghast, supra note 25, at 39 (stating that the IRS has “no practical way to enforce” U.S. tax obligations against foreign persons). In the recent presidential campaign season, there was a debate about whether or not paying taxes is patriotic. See, e.g., Thomas Friedman, Op-Ed., Palin’s Kind of Patriotism, N.Y. TIMES, Oct. 8, 2008, at A31. If patriotism is not a factor, i.e., if people are foreign to the United States, it is logical that foreign persons would ignore U.S. tax laws, particularly if the IRS had no means of requiring compliance.

30. See Tillinghast, supra note 25, at 39 (noting that the IRS has had success in “inducing foreign financial institutions to ‘volunteer’ to act as withholding agents . . . . It has no practical way to enforce this obligation, however, and few foreign persons . . . comply.”).

31. For example, Switzerland’s bank secrecy is legendary. Switzerland has a “reputation for confidentiality that has helped make a small nation in the Alps a magnet for international deposits.” Hilzenrath, supra note 7, at D3. Generally, Swiss law limits a bank’s ability to breach client confidentiality. More specifically, Swiss law affords account holders the chance “to oppose the release of their names through a judicial process . . . .” Id. See also Prosecutors Focus on Swiss Bank Accounts, UNITED PRESS INT’L, Nov. 1, 2008, available at http://www.upi.com/Business_News/2008/11/01/Prosecutors-focus-on-Swiss-bank-accounts/UPI-6560122553320/ (noting that “Swiss banks, by law, cannot disclose account holder information . . . .”).


34. For example, the United Kingdom’s (UK) public finances are short billions of pounds because some of the country’s biggest corporations have complex, opaque, albeit legal tax schemes by which they avoid paying taxes to the exchequer. UK-based Diageo, which owns Johnnie Walker and Gilbey’s gin, “[d]espite average
people pay the taxes required by law and others do not. Furthermore, if noncompliance goes unpunished, there is an added incentive to those who ordinarily comply to stop paying taxes, resulting in "a vicious cycle of increased noncompliance."  

A. SOURCES OF THE TAX GAP

Individual income taxes constitute the majority of the U.S. gross tax gap. Unreported or underreported income account for the bulk of these unpaid taxes. Estimates of the annual costs of offshore tax abuses are as high as $100 billion per year, although accurate estimates of individual tax avoidance are more difficult than estimates of corporate tax avoidance. Transparency International France estimated that approximately $10 trillion U.S. dollars, or over four times the amount of France’s gross domestic product, are located in secret offshore accounts.

profits of £2 bn a year... paid an average of £43m a year in UK tax – little more than 2% of its overall profits.” Firms’ Secret Tax Avoidance Schemes Cost UK billions: Investigation into the Complex and Confidential World of Tax, GUARDIAN (London), Feb. 2, 2009, at 1. Germany also has a significant problem collecting taxes, as thousands of Germans shelter funds from taxes in the Alpine country of Liechtenstein. Id. at 3.


36. See U.S. DEP’T OF TREASURY, supra note 33, at 3 (finding that individual income taxes represent more than 50% of the tax gap); see also JASON FURMAN, Closing the Tax Gap, CTR. ON BUDGET & POLICY PRIORITIES (Wash., D.C.), Apr. 10, 2006, 1–2, http://www.cbpp.org/files/4-10-06tax3.pdf (noting that $244 billion of the $345 billion tax gap comes from individual income taxes).

37. FURMAN, supra note 36, at 2.

38. The distinction between “tax avoidance” and “tax evasion” is unclear. See GRAVELLE, supra note 19, at 1 (noting that avoidance sometimes refers “to a legal reduction in taxes, while evasion refers to tax reductions that are illegal . . . .”). Most international tax reductions by individuals reflect evasion. Id.

39. See GRAVELLE, supra note 19, at 21 (indicating that there are no official estimates of individual tax evasion, and that estimates of individual evasion, as opposed to corporate evasion, are difficult “because the initial basis of the estimate is the amount of assets held abroad whose income is not reported to the tax authorities.”).

B. BILATERAL AGREEMENTS

Bilateral tax information exchange is the main tool by which the IRS gathers extraterritorial tax information. Using this mechanism, a nation enters into an agreement with another nation that requires both nations' tax authorities to provide relevant tax information to the other nation upon request. Bilateral tax information exchange agreements (TIEAs) are increasing in number. Estimates put the number of bilateral tax treaties at greater than 1700. These agreements find their roots in the model taxation treaties created by the League of Nations in 1927. In 1927, states recognized that bilateral treaties, rather than multilateral conventions, would be more effective in dealing with the international tax evasion problem because fundamental differences in fiscal systems would make multilateral agreements difficult to conclude without intruding on national sovereignty.

There are, however, problems regarding the effectiveness of bilateral tax agreements. In order to request information about a foreign person located outside U.S. territory who has failed to


41. See Dean, supra note 9, at 608 (discussing the current barter system by which countries exchange tax information for tax information).


43. See ORG. FOR ECON. CO-OPERATION & DEV., TAX CO-OPERATION: TOWARDS A LEVEL PLAYING FIELD—2007 ASSESSMENT BY THE GLOBAL FORUM ON TAXATION 9 (2007) (The OECD, referring to eighty-six countries, noted that “[s]ince 31 December 2005, 86 new DTCs [double taxation conventions] have entered into force . . . resulting in a total of 1814 DTCs in force . . . .”).

44. See, e.g., Michael J. Graetz, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies, 26 BROOK. J. INT’L L. 1357, 1358 (2001) (referring to the 1920s as the decade in which countries created the system of international income tax enforcement mechanisms that has served as the “basis for more than 1700 bilateral income tax treaties now in force throughout the world.”).

45. See Dean, supra note 9, at 609 (“The roots of today’s extraterritorial tax information acquisition system can be traced back to . . . the foundational 1927 League of Nations report on international taxation.”).

46. See Reports Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion, League of Nations Doc. C.216M,85 1927 II, at 23 (1927), available at http://faculty.law.wayne.edu/tad/Documents/League/League_Tech_Experts.pdf (noting that the Committee realized that a major risk of the Convention was “appearing in some quarters as an extension beyond national frontiers of an organised system of fiscal inquisition.”).
pay taxes, the IRS must establish the identity of the taxpayer under investigation in advance. The IRS must also demonstrate that it has exhausted all the available means by which it could have obtained the necessary information domestically. Another problem with bilateral treaties is that they often do not yield the necessary tax information in a particular case. For example, most of the agreements that the United States has in place are limited to criminal matters, which constitute a minor portion of overall tax revenues. In the event the IRS does obtain information via bilateral exchange agreements, the exchange of “bulk taxpayer information” and the trade of personally sensitive information raise profound privacy issues. In one sense, bilateral agreements do not provide enough useful information. In another sense, the exchange of bulk information provides too much sensitive information. Although bilateral agreements may seem preferable to a multilateral tax treaty in that they more easily accommodate differences in countries’ tax systems, this rationale does not

47. See Gravelle, supra note 19, at 20. The agreements do not override bank secrecy laws, making it difficult to identify potential tax evaders.

48. See Tillinghast, supra note 25, at 42 (noting the “legal and practical impediments to the use of these [exchange-of-information] agreements.”).

49. The United States might not have agreements in place, as bilateral agreements often exclude developing countries. See Markus Meinzer et al., Tax Information Exchange Arrangements 3 (2009), http://www.taxjustice.net/cms/upload/pdf/TJN_0903_Exchange_of_Info_Briefing_draft.pdf (noting that “TIEAs do not work for developing countries” because developing countries have little leverage and are unlikely to benefit from these agreements). Furthermore, the countries with which the United States has an exchange agreement may have little to no tax information of use. See id. at 4 (arguing that TIEAs are ineffective when the “information simply does not exist in the jurisdiction concerned . . . .”).


withstand scrutiny. First, the IRS needs tax information from countries with radically different tax systems than the United States.53 As a result, bilateral tax treaties do not necessarily solve the problem of gathering the necessary information for IRS enforcement of U.S. tax laws. The Bahamas, for example, do not levy taxes on personal income, capital gains, corporate earnings, dividends, or sales54 and thus may not have the information the United States needs to enforce U.S. tax laws if a bilateral treaty was in effect between the two countries. Second, countries from which the United States needs information to enforce its tax laws may not have an agreement in place for the exchange of information. For example, the Bahamas do not have a bilateral tax treaty with the United States, so the U.S. has no means of obtaining even the limited information that is available.55 Third, with the already large number of tax agreements, conducting future bilateral agreements may add unnecessary complexity, making enforcement more, not less, difficult.56 Finally, even if compelling arguments for bilateral tax agreements exist, they do not necessitate foregoing multilateral agreements.57


55. Despite the existence of hundreds of bilateral tax exchange agreements, the United States does not have agreements in place with many countries from which the United States needs tax information. As of April 2009, the United States had tax treaties in place with only fifty-seven countries. See INTERNAL REVENUE SERVICE, U.S. TAX TREATIES (2009), available at http://www.irs.gov/pub/irs-pdf/p901.pdf. Of the thirty-four jurisdictions listed as foreign secrecy jurisdictions in the Act, only five—Barbados, Cyprus, Latvia, Luxembourg, and Switzerland—currently have bilateral tax treaties in place with the United States. Id.

56. See Rawlings, supra note 53, at 7–8 (noting that the current international tax regulation scheme is not homogenous; instead, there are many competing regulatory orders that both intersect and diverge at vital moments). Although the regulatory agendas of various bodies (e.g., the IRS and the OECD) do converge at points, they are likely to diverge from each other as well as from the agenda of a tax authority in an offshore financial center. Id.

57. But see Haruhiko Kuroda, Japan’s former Vice Minister of Fin. for Int’l Affairs, Keynote Address at the First International Convention of the Asia-Oceania Tax Consultants Association: Economic Integration and Tax Harmonization in Asia and Oceania (Nov. 6, 2002), available at http://www.mof.go.jp/english/ii/
C. MULTILATERAL AGREEMENTS

There have been numerous attempts to deal with the problem of international tax evasion on a multilateral level. The OECD, the European Union, the International Monetary Fund (IMF), and the U.N. have all sought ways to spur international cooperation in tax administration by improving transparency or stimulating new exchange agreements. The OECD, for example, established criteria for identifying member countries with preferential tax regimes, identified jurisdictions as “tax havens” if they met certain criteria, and proposed new methods of cooperation with non-member countries. The 2000 OECD Report identified thirty-five jurisdictions that might have been functioning as offshore tax havens. It required those jurisdictions to express a commitment to cooperate by 2005 and threatened to apply sanctions if the jurisdictions did not express commitment before July 31, 2001. The U.N. Financial Action
Task Force (FATF) also released a report in 2000 on “non-cooperative countries or territories (NCCTs).” The critical enforcement mechanism of the FATF is Recommendation 21 that provides:

Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible purpose, their background and purpose, should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply the appropriate countermeasures.

The FATF recommends regulations and monitoring to ensure compliance, but leaves it to individual jurisdictions to determine which countermeasures to apply in specific instances of tax abuse. The FATF is not a legal entity, so its recommendations are not binding on governments or on the private sector. The IMF, however, adopted the FATF recommendations in devising its review procedure to assess compliance with international anti-money laundering laws. Furthermore, section 311 of the USA PATRIOT Act authorizes the U.S. executive branch to monitor, regulate, and enforce countermeasures against “jurisdictions, financial institutions, or international transactions of primary money laundering

[to express a formal commitment to cooperate].”

62. Id. at 373 (noting that the FATF identified hindrances to money laundering prevention and detection, released the results of judicial inquiries regarding the same, and that FATF members agreed on a process for identifying NCCTs and international methods to incentivize compliance).


64. Id.

65. See Zagaris, supra note 61, at 374 (noting that countermeasures may include not processing certain transactions or reporting transactions to tax authorities).

66. See Zagaris, supra note 61 at 375.

67. Zagaris, supra note 61 at 375; cf. Kern Alexander, Global Financial Standard Setting, The G10 Committees, and International Economic Law, 34 BROOK. J. INT’L L. 861, 877 (2009) (noting that the FATF has played a prominent role in international regulatory standard setting, but also noting that “[i]n recent years, however, the International Organization of Securities Commissions and the International Association of Insurance Supervisors have attracted much more policy attention since their standards have been recognized by the IMF and World Bank as international benchmarks . . . for compliance . . . ”).
concern.”\textsuperscript{68} Therefore, although FATF recommendations are not legally binding, they carry considerable force.

1. Criticisms of Multilateral Approaches

Commentators have levied assaults at the OECD’s campaign against preferential tax regimes as being too one-sided and unfair to non-OECD members.\textsuperscript{69} A U.N. panel’s recommendation to establish an international tax organization under the auspices of the United Nations,\textsuperscript{70} has similarly received a lukewarm response.\textsuperscript{71} Although a “World Tax Organization”\textsuperscript{72} could remedy the patchwork of bilateral treaties, and such an authority would have the power to compel compliance and punish malfeasance, “there is no international organization that appears capable of serving as the linchpin of such a regime.”\textsuperscript{73}

II. THE CURRENT IMPETUS DRIVING THE CRACKDOWN ON TAX HAVENS

Although tax havens are not a new phenomenon,\textsuperscript{74} they have grown recently because financial deregulation and globalization promote the international transfer of capital.\textsuperscript{75}

\begin{itemize}
\item \textsuperscript{69} See, e.g., Littlewood, supra note 59, at 442–49 (reasoning that countries operate preferential tax regimes because doing so is in their economic interest); see also Pirozzi, supra note 58, at 3 (noting that “by asking them [weak-poor jurisdictions] to act ‘cooperatively’ and ‘openly’—the high taxation regimes . . . maintain their privileges and their power . . . .”).
\item \textsuperscript{71} See, e.g., Daniel J. Mitchell, Radical U.N. Tax Plans Threaten America, HERITAGE FOUNDATION, Dec. 18, 2003, http://www.heritage.org/press/commentary/ed121803b.cfm (arguing that governments with free market systems, such as the United States, would be a target for persecution).
\item \textsuperscript{72} See Vito Tanzi, Is There a Need for a World Tax Organization?, in THE ECONOMICS OF GLOBALIZATION: POLICY PERSPECTIVES FROM PUBLIC ECONOMICS 173, 173–86 (Assaf Razin & Efraim Sadka eds., 1999) (lamenting that domestic legislators cannot keep pace with recent technological developments in financial markets).
\item \textsuperscript{73} Dean, supra note 9, at 663.
\item \textsuperscript{74} See, e.g., Pirozzi, supra note 58, at 5 (noting that during the nineteenth century, some territories, currently labeled as tax havens, were harbors of refuge where ships could shelter from pirates and foul weather).
\item \textsuperscript{75} See Birdsall, supra note 24 (noting that open, unregulated markets make
\end{itemize}
Besides the obvious motive to boost government coffers in a time of economic straits, there are multiple factors driving the initiatives to stem the tide of tax evasion. Financial liberalization generally leads to increased economic instability, because large amounts of capital flow easily into and out of jurisdictions. Furthermore, the attacks of September 11, 2001 highlighted the use of tax havens to finance international terrorism. More recently, global tax scandals erupted in February and May of 2008: the Lichtenstein and UBS scandals, respectively.


The OECD and the G-20 have both recently targeted tax haven countries. See William Boston, G-20 Leaders to Target Nations Harbor Tax Dodgers, CHRISTIAN SCI. MONITOR, Mar. 30, 2009, at 6; David Crawford, OECD Compiles List of Alleged Tax Havens for G-20, WALL ST. J., Mar. 18, 2009, http://online.wsj.com/article/SB123733504461563913.html. In addition to the Stop Tax Haven Abuse Act, there are other legislative proposals including draft proposals by the Senate Finance Committee, two related bills, S. 386 and S. 569, and a proposal by President Obama. See GRAVELLE, supra note 19, at Summary.

See Robert Kuttner, The Bubble Economy: The Sub-prime Mess, the Huge Risks Taken by Hedge Funds, and the Conflicts of Interest that Led to Enron Are All the Consequences of Serial Bouts of Financial Deregulation. Will We Reverse Field in Time to Prevent Another 1929?, AM. PROSPECT, Sept. 24, 2007, available at http://www.prospect.org/cs/articles?article=the_bubble_economy (noting how the Glass-Steagall Act, which tightly regulated commercial banks, was weakened throughout the eighties until it was outright repealed in 1999).


A disgruntled bank employee in Liechtenstein provided German tax authorities with tax information regarding approximately 1400 persons. See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 110TH CONG., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 2 (Comm. Print 2008). For more on the UBS scandal, see infra Part II.A.2.
A. TWO RECENT SCANDALS

1. The Liechtenstein Scandal

German tax authorities, armed with the names of six hundred to seven hundred German taxpayers who were using Liechtenstein accounts to evade paying the comparatively high German tax rates, executed search warrants and arrested a prominent businessman for evading $1.46 million in taxes.\(^2\) Shortly thereafter, the IRS initiated enforcement action against more than one hundred taxpayers who also had accounts in Liechtenstein banks.\(^3\) Approximately one dozen countries have announced a commitment to investigate potential tax evaders with accounts in Liechtenstein banks, evidencing the global scope of the scandal and the increased determination of countries to crack down on tax evaders.\(^4\)

2. The UBS Scandal

A second worldwide tax scandal flared when the United States arrested a former UBS AG (one of the world’s largest banks) employee on conspiracy charges involving defrauding the IRS of $200 million in unpaid taxes on assets in Switzerland and Liechtenstein worth approximately $7.26 billion.\(^5\) The former UBS senior banker pled guilty in June of 2008 to

\(^2\) Carter Dougherty & Mark Lander, *Tax Scandal in Germany Fans Complaints of Inequity*, N.Y. TIMES, Feb. 18, 2008, at C1 (reporting that the scandal “brought down one of Germany’s most powerful business figures, Klaus Zumwinkel, who resigned . . . as the chief executive of the German postal service after the police raided his home.”).

\(^3\) IRS News Release, IRS and Tax Treaty Partners Target Liechtenstein Accounts 1 (Feb. 26, 2008) (“The Internal Revenue Service is initiating enforcement action involving more than 100 U.S. taxpayers to ensure proper income reporting and tax payment in connection with accounts in Liechtenstein.”).

\(^4\) See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 81, at 2 (“The national tax administrations of Australia, Canada, France, Italy, New Zealand, Sweden, United Kingdom, and the United States of America, all member countries of the OECD’s Forum on Tax Administration (FTA), are working together following revelations that Liechtenstein accounts are being used for tax avoidance and evasion.”).

conspiracy to defraud the IRS. The Department of Justice detained the U.S. citizen’s Swiss co-conspirator, Martin Liechti, as a “material witness” to the investigation. This enforcement action is unprecedented, representing the first time the United States has initiated criminal charges against a Swiss banker for helping a U.S. taxpayer evade taxes. On June 30, 2008, the United States filed a petition with the U.S. District Court for the Southern District of Florida for permission to “file an IRS administrative summons with UBS asking the bank to disclose the names of all of its U.S. clients who have opened accounts in Switzerland, but for which the bank has not filed forms with the IRS disclosing the Swiss accounts.” The Court approved service of the summons and the IRS served the summons in July of 2008. The case ultimately settled, as the U.S. Department of Justice deferred prosecution of UBS in exchange for UBS paying $780 million and agreeing to cease its cross-border business in entities not registered with the Securities and Exchange Commission. As part of the settlement, the

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89. Ex Parte Petition for Leave to Serve “John Doe” Summons at 1, Case No. 08-21864-MC-LENARD/GARBER (S.D. Fla. June 30, 2008) (asking UBS for the names of U.S. clients for whom UBS “(1) did not have in its possession Forms W-9 executed by such United States taxpayers, and (2) had not filed timely and accurate Forms 1099 naming such United States taxpayers and reporting to United States taxing authorities all reportable payments made to such United States taxpayers.”). This petition for leave to serve summons is authorized under 26 U.S.C. § 7609(f), which requires court approval for an IRS administrative summons that does not identify that taxpayer’s name under investigation. See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, supra note 81 at 3.


Swiss government agreed to give the names of 4,450 U.S. citizens suspected of using secret Swiss accounts at UBS to evade taxes. The summons was the first attempt by the United States to “pierce Swiss bank secrecy by compelling a Swiss bank to name its U.S. clients.”

III. U.S. LEGISLATIVE INITIATIVE: THE STOP TAX HAVEN ABUSE ACT

In 2007 Senators Barack Obama (D) of Illinois, Carl Levin (D) of Michigan, and Norm Coleman (R) of Minnesota sponsored the Stop Tax Haven Abuse Act, but the legislation languished in committee. Some analysts cite the political power of big commercial banks, such as Citigroup, as the reason why the United States has not previously clamped down on U.S. banks that do business with foreign banks that have neither a physical presence in the United States, nor a connection to regulated banks. Lawmakers may decide whether to enact the Stop Tax Haven Abuse Act or similar legislation as early as the 2009-2010 legislative session. Legislators might also find it politically difficult to oppose legislation that could raise billions of dollars in government revenues by stymieing efforts geared toward offshore tax evasion.

92. See Graham Bowley, From the Global Financial Crisis, A Push by Counties to Repatriate Cash; Broad Political Trend Underlies UBS Decision to Release Clients’ Names, INT’L HERALD TRIB., Aug. 24, 2009, at 15 (noting that although the settlement is a victory for the United States, “[t]he actual process of recovering the names may become lost in bureaucracy and foot-dragging” and “smaller Swiss banks . . . are confident that they can continue to profit by finding new ways to protect the privacy of their clients . . .”). But see Lynley Browning, U.S. Indicts Two in Switzerland on Tax Charges, N.Y. TIMES, Aug. 22, 2009, at B1 (highlighting that the Justice Department’s indictment of Hansruedi Schmacher, a director at NZB Neue Zurcher Bank of Zurich, and Matthias W. Rickenbach, a Swiss lawyer, for conspiring to defraud the United States, signaled that Justice would pursue “smaller players” including professionals who assist individual account holders).

93. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, supra note 81 at 3.


toward illegal tax evasion. 98 “With the worsening U.S. budget and deficit situation, increased pressure exists . . . to enhance tax enforcement . . . against persons who intentionally deposit income in offshore jurisdictions” making “increased international tax enforcement a likely priority that will receive increased resources and political focus.” 99 Passage of the Act may be part of a concerted global effort to crack down on tax havens that “play host to many non-regulated hedge funds that were partly blamed for the global financial crisis.” 100 After governments bailed out banks to stave off the global financial crisis, many politicians wonder why some financial institutions are still conducting transactions in countries considered tax havens. 101 Finally, the fact that President Obama was one of the sponsors of the 2007 Stop Tax Haven Abuse Act has fueled speculation that the 2009 Act will pass. 102

98. See Francis, supra note 33 (“If the nation’s economic woes continue, lawmakers will probably have a more difficult time opposing legislation that could raise billions . . . .”); see also Jay Krause & Christopher McLemore, Pennies from Havens: Obama Pledges Crackdown on Offshore Banking Jurisdictions, WITHERS LLP, Jan. 21, 2009, available at http://www.withersworldwide.com/news-publications/455/pennies-from-havens-obama-pledges-crackdown-on-offshore-banking-jurisdictions.aspx (explaining that President Obama has not indicated he would back down from such a measure despite the sorry state of the economy; highlighting that Congress recently enacted an exit tax on individuals who expatriate, demonstrating a willingness to target this source of revenue; and noting that such an Act might be useful in raising revenue to fund portions of the economic stimulus package).


101. French President Nicolas Sarkozy, for example, questioned, “Is it normal that a bank to which we [France] guarantee loans or allocate our own funds continues operating in tax havens?” President Sarkozy, answering his own question, said, “The answer is no.” Id.; see also Lucia Kubosova, EU States Crack Down on Tax Evasion, EUOBSERVER.COM, Oct. 22, 2008, http://euobserver.com/9/26976 (“German finance minister Peer Steinbruck insisted . . . ‘Switzerland offers conditions that prompt German taxpayers to evade taxes . . . .’”); Emma Thomasson & Saeed Azhar, Offshore Under Scrutiny but Secrecy to Survive, HEDGEWORLD DAILY NEWS, Oct. 15, 2008, available at http://www.reuters.com/article/WealthManagement08/idUSTRE49E41S20081015 (noting how the financial crisis will increase the pressure on tax havens because government officials will have to finance large rescue packages and politicians have “decided pursuing offshore centers was politically popular.”).

When Sen. Levin offered testimony in support of the bill, he cited “tax abuses that rob the U.S. treasury of an estimated $100 billion each year, reward tax dodgers using offshore secrecy laws to hide money . . . and offload the tax burden onto the backs of middle income families” as the reasons why Congress should pass the Act.103 According to Levin, the Act would give the government “powerful tools to end offshore tax haven . . . abuses” and that “[w]ith the financial crisis facing our country today and the long list of expenses we’re incurring to try to end that crisis . . . it is long past time for Congress to stop tax cheats . . . .”104 Such motivation is understandable in light of the fact that the United States has a national debt of greater than $10 trillion105 and pays almost $500 billion annually in interest on that debt.106 An objective observer, regardless of her feelings about the fairness of the tax code, might have difficulty siding with tax evaders rather than taxpayers. Before examining the tools the Act gives tax authorities to decrease the incidence of tax evasion, it is useful to examine the current methods by which the IRS enforces U.S. tax policy.

A. THE CURRENT METHODS OF TAX ENFORCEMENT

The IRS generally expects a U.S. taxpayer to voluntarily report all of her income.107 Nevertheless, if a taxpayer conducts a transaction within the United States, the IRS has methods to procure some information regardless of taxpayer reporting. For example, a U.S. payor or broker must report numerous types of payments, e.g., interest, wages, dividends, and unemployment compensation, to the IRS and the taxpayer.108 If the taxpayer

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103. Press Release, Senator Carl Levin, supra note 76.
104. Press Release, Senator Carl Levin, supra note 76, at Part II.
107. See, e.g., Eileen Ambrose, Canceled Debt May Bring Big Tax Bill from IRS; Amount Forgiven Counts as Income in Many Cases, Chi. Trib., May 11, 2008, at C5 (highlighting that the IRS wants and expects people to pay taxes on their income on a “pay-as-you-go basis,” including canceled debts worth less than $600 which constitute “other income”).
who receives this reported information fails to provide his taxpayer identification number (TIN)\textsuperscript{109} to the payor or broker, the IRS requires backup withholding of tax.\textsuperscript{110} The IRS may examine relevant books and records to determine a taxpayer's liability and can summon the taxpayer or others to produce such records or give testimony, on penalty of perjury, toward that determination.\textsuperscript{111} For example, the IRS may summon a U.S. bank to produce the banking information of an individual the IRS suspects of underreporting her income.\textsuperscript{112} Lastly, U.S. banks must report all suspicious banking transactions by filing Suspicious Activity Reports and all currency transactions exceeding $10,000 by filing Currency Transaction Reports.\textsuperscript{113} The IRS has access to these reports, can audit bank records, and can sue to impose civil and/or criminal penalties on banks found to be in violation of these reporting requirements.\textsuperscript{114}

1. Foreign Enforcement is Difficult

In stark contrast to domestic reporting requirements, IRS reporting obligations generally do not reach foreign payors or brokers.\textsuperscript{115} Furthermore, to attract foreign clients, some countries, e.g., Liechtenstein, Singapore, and Switzerland, guarantee client confidentiality and account holdings secrecy.\textsuperscript{116}

109. Under penalty of perjury, a U.S. citizen or resident must provide her name, address, and TIN when opening a bank account at a domestic bank. ORG. FOR ECON. CO-OPERATION & DEV., Improving Access to Bank Information for Tax Purposes Appendix I, ¶ 1.5.5.3.1 (2000) [hereinafter OECD BANK REPORT].

110. I.R.C. § 3406(a); see Blum, supra note 52, at 593 (identifying the means by which the IRS can obtain tax information).

111. I.R.C. § 7602(a)(1)–(3); see also Blum, supra note 52, at 593.

112. See Blum, supra note 52, at 593–94 (explaining that U.S. District Courts are “authorized to compel compliance with the summons and to use the contempt power toward this end.”). Although the Right to Financial Privacy Act generally safeguards individuals’ banking information, there are exceptions for enforcement of I.R.C. provisions, for example, the administrative summons provided in I.R.C. § 7609. See Id. at n.49 (citing OECD BANK REPORT).

113. See Blum, supra note 52, at 594; see also OECD BANK REPORT, supra note 109, app. I, ¶ 1.4 (citing Reg. § 103.21–22).

114. OECD BANK REPORT, supra note 109, Appendix I, ¶ 1.6 (citing 31 U.S.C. §§ 5531 and 5332); see also Blum, supra note 52, at 594 (explaining that the purpose of such measures is to “protect against money-laundering as well as tax evasion”).


116. See Greg Brabec, The Fight for Transparency: International Pressure to Make Swiss Banking Procedures Less Restrictive, 21 TEMP. INT’L & COMP. L.J. 231,
In fact, in certain jurisdictions like the Bahamas, where taxes are minimal to nonexistent, the governments may not collect tax information from banks at all. Moreover, some countries might not have the capacity to collect the sophisticated tax information that U.S. tax authorities seek. Regardless of the reason why tax information is unavailable, U.S. tax authorities’ requests for information directed to the executives or judiciaries of such countries usually fall on deaf ears. Therefore, bank secrecy jurisdictions have become attractive destinations for illicitly earned monies, funds used for illicit purposes such as money laundering or political corruption, or deposits meant to evade U.S. income reporting requirements. Regardless of whether the source or use of the funds is legitimate, offshore secret accounts shield interest paid on monies held from U.S. tax authorities, and the IRS might find it difficult, if not impossible, to collect taxes based on these sources of funds.

B. THE STOP TAX HAVEN ABUSE ACT’S TREATMENT OF TAX HAVENS

The Stop Tax Haven Abuse Act initially identifies thirty-four offshore secrecy jurisdictions. Most of these jurisdictions are small and some are very small. Anguilla, for example, has a landmass of only ninety-one square kilometers, or about half the size of Washington D.C., and a population numbering 14,436.
Some of these jurisdictions are relatively rich, such as the Channel Islands (Jersey, Guernsey, Sark, and Alderney), while others are relatively poor. Regardless of their economic status, most of these countries are small in terms of both land and population size, and weak in the arena of international affairs. In other words, they make easy targets.

1. Defining a Tax Haven

The first step to stopping tax haven abuse is to identify tax havens. According to the Act, the term “offshore secrecy jurisdiction” means “any foreign jurisdiction . . . listed by the Secretary [of the Treasury] as an offshore secrecy jurisdiction.” Under the Act, the Secretary determines which jurisdictions are offshore secrecy jurisdictions based on the existence of tax secrecy laws that “unreasonably restrict the ability of the United States to obtain information relevant to the enforcement [of the Act], unless the Secretary also determines that such country has effective information exchange practices.”

The Act defines secrecy or confidentiality rules and practices as “both formal laws and regulations and informal government or business practices” that inhibit “access of law enforcement and tax administration authorities to beneficial ownership and other financial information.” To determine which countries have ineffective information exchange practices,
the Act authorizes the Secretary, on an annual basis, to classify any jurisdiction as an offshore secrecy jurisdiction unless the country: (i) has a treaty or some type of information exchange agreement with the United States; (ii) the exchange of information was adequate in terms of preventing tax evasion or avoidance of U.S. income tax during the 12-month period of review prior to the annual determination; and (iii) such jurisdiction, during the 12-month review period, “was not identified by an intergovernmental group or organization of which the United States is a member as uncooperative with international tax enforcement . . . .” 130 Finally, the Secretary has the authority to add or remove a jurisdiction from the initial list based on whether or not they improve their exchange-of-information practices. 131

2. Ambiguous Definitions

The Act’s definition of “tax haven” is ambiguous. 132 While there are standards by which the Secretary must make a determination, there are few concrete criteria by which to make that finding. 133 For example, whether a country has an established tax treaty with the United States is a verifiable criterion. Whether a jurisdiction has rules or practices that unreasonably restrict U.S. access to tax information, however, lies in the eye of the beholder. 134 It is plausible to argue that

130. Id.
131. Id.
133. See Krause & McLemore, supra note 98 (noting the criticism that the initial list of jurisdictions does not differentiate between jurisdictions that do conform to widely accepted international standards, i.e., countries that have recently penned TIEAs with the United States, and those that have not).
134. See Rawlings, supra note 53, at 3 (“The principles . . . devised by multilateral organisations and offshore financial authorities are subject to divergent interpretations between regulators and regulatees. It is social actors – lawyers, accountants, fund managers, tax compliance regulators – who frame these contests, through their daily deeds and narrated reflections on their practices.”).
the mere existence of tax secrecy rules is an objective factor. In that case, Switzerland, famous for its bank secrecy laws, is an obvious choice for the list and does appear as a listed offshore secrecy jurisdiction. Whether those rules "unreasonably restrict the ability of the United States to obtain information relevant to . . . enforcement," however, is another matter.

The Act does not define what constitutes a reasonable restriction on the exchange of tax information. In that way, it seems discretionary—one might say arbitrary—whether the Secretary believes a country's bank secrecy provisions unduly restrict U.S. tax authorities' ability to obtain the necessary tax information. Additionally, it is unclear how the Secretary would determine whether the bank secrecy laws or some other factor prevented U.S. tax authorities from making use of relevant information to enforce U.S. income tax. For example, Swiss bank UBS told Senate investigators that approximately 20,000 U.S. clients have about $18 billion in deposits in UBS Switzerland. In the summer of 2008, a federal court granted the IRS permission to pierce Swiss bank secrecy laws and demand the identities of 19,000 American clients who "failed to disclose their Swiss-based accounts on U.S. tax returns." If UBS readily defied Swiss bank secrecy laws, did those tax secrecy rules unreasonably restrict IRS access to relevant tax information? Assume UBS agreed to circumvent Swiss bank secrecy laws contingent on a U.S. federal court granting the IRS permission to attempt to pierce bank secrecy laws. If the federal court had not granted the IRS leave to seek the identities of U.S. citizens with accounts in UBS, was it the Swiss tax secrecy laws or the federal court order that restricted U.S. tax authority access to the necessary tax information? Assume that UBS disclosed the identities of the 19,000 individuals who failed to comply with the U.S. reporting requirement, but that the IRS could not handle that volume of tax evaders. Under the Act, this might be a sufficient reason

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135. See Brabec, supra note 116, at 231; Hilzenrath, supra note 7.
137. Id.
138. Hilzenrath, supra note 7, at D3.
139. Id. at D3.
140. See Evan Perez, Guilty Plea by Ex-Banker Likely to Aid Probe of UBS, WALL ST. J., June 20, 2008, at C1 (stating that prosecutors in the Birkenfield case sought to delay sentencing while they attempted to use Birkenfield's knowledge to "pierce the centuries-old secrecy for which UBS and other Swiss banks are known.").
141. Martin Lobel, Chairman of the Tax Analysts Information Service, argued
to label a foreign jurisdiction a tax secrecy haven.

3. Who the Act Does Not Include—Countries Operating Preferential Tax Regimes

Some jurisdictions not on the Act’s initial list, such as the United States, have higher than nominal income taxes, but exempt some forms of income from those taxes as part of a preferential tax regime. In fact, “no major capital-importing country has been able to impose such a tax [on interest paid to foreigners] for fear of driving mobile capital elsewhere...” For that reason, most countries are tax havens. That is, individuals intentionally route transactions through foreign countries because of the savings earned by avoiding taxes on interest. In practice, this means that the Act cannot completely solve the erosion of the U.S. tax base because it only targets countries with bank secrecy laws, rather than countries that operate preferential tax regimes. Because the Act would subject jurisdictions on the list to heightened scrutiny and potential sanctions, it seems hypocritical and inequitable to target tax secrecy jurisdictions, and not countries that operate successful tax preferential regimes. Such hypocrisy could weaken foreign actors’ resolve to comply. The absence of

that the IRS could not handle that many tax evaders. A former federal prosecutor turned tax defense specialist, Edward M. Robbins Jr., countered that the Justice Department, separate from the civil lawyers working for the IRS, could handle such a caseload. See Hilzenrath, supra note 7, at D01.

142. See Avi-Yonah, supra note 115, at 1576. As of 1984, the United States exempts taxes on interest paid to non-residents.

143. Id. at 1576.

144. See Littlewood, supra note 59, at 460 (“individuals and firms routinely conduct transactions through such jurisdictions for no other purpose than to escape taxes...”).

145. For example, China operates a very successful tax preferential regime. See Tola Adewola, China Approves Bill to End Preferential Tax Treatment for Foreign Companies, Ill. BUS. L.J., (March 27, 2007), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2007/03/will_chinas_new.html. Domestic Chinese companies pay a statutory income tax rate of 33%, but foreign companies, such as foreign service companies, qualify for preferential rates of income tax of 15% or 24%. China enacted a new enterprise income tax law (EIT), effective January 1, 2008, that largely ended preferential tax treatment for foreign companies operating in China. Significantly, however, two categories of companies—foreign high-tech and other important industries, and foreign companies with small profits—still pay preferential income taxes. Id.

countries operating preferential tax regimes from the Act’s initial list makes sense politically. It is much easier to take on the likes of Vanuatu than China.147

4. Musical Havens—The “Shift” Argument

Because of the inherent lag in listing countries as offshore secrecy jurisdictions—the Act specifies a 12-month period preceding the annual determination—the Act is more likely to shift tax evasion to untargeted tax havens rather than eliminate targeted jurisdictions. A country not on the initial list, Liberia for example,148 might advertise itself as protecting account holders’ identities and holding amounts by offering client confidentiality guarantees. During the 12-month lag period, that country is likely to win business that might otherwise have gone to targeted foreign secrecy jurisdictions.149 This argument may seem like a stretch because the burden of transferring funds or transfer-driven scrutiny would deter shifting funds in the manner described.150 However, in an era in which it is easier than ever to transfer funds from one jurisdiction to another, unless all tax havens cease to exist at once, the specter of musical havens is a real one.151
5. Failing to Account for Other Countries’ Interests

The Act will fail to eliminate tax havens for the simple reason that it fails to account for other nations’ interests. In terms of taxation, putting U.S. citizens first might not be objectionable. Consider, however, the reasons why a country might enact strict bank secrecy laws or allow transactions that other countries’ tax authorities would consider objectionable or suspicious. One underlying rationale is survival. For example, Nauru, a small island in the South Pacific Ocean, has a total area of 21.3 square kilometers (8.2 square miles), and is the world’s smallest independent republic. Rich phosphate deposits are the country’s main economic resource, but because of mining and the depletion of this resource, the country’s per capita GDP is declining. Given the country’s size and declining resources, one incentive to operate as an offshore secrecy jurisdiction might be the lack of available alternatives for economic growth. Even countries that do have available alternatives, Singapore for example, lack an economic incentive to comply with the U.S. law. Singapore has said it will not budge, despite pressure to undo its strict bank secrecy provisions, presumably because those provisions are precisely friendly Ireland following legislative crackdowns on Bermuda).

152. See Graetz, supra note 44, at 1371–72 (explaining that historically, “the power to tax is rarely delegated to multinational organizations,” and “we [U.S. citizens] regard our obligation for the well-being of our fellow citizens as more pressing than for people in need elsewhere in the world.”). But see Allison Christians, Sovereignty, Taxation and Social Contract, 18 MINN. J. INT’L LAW 99, 99 (“[T]his view of sovereign autonomy over taxation is increasingly inconsistent with . . . global economic reality. . . . Major theoretical developments in tax policy are now arising not through solely national political and legal processes but through the interactions of nongovernmental actors in transnational settings.”).


155. See Anthony B. van Fossen, Money Laundering, Global Financial Instability, and Tax Havens in the Pacific Islands, CONTEMP. PAC., Fall 2003, at 237 (explaining that multilateral attempts to exclude Pacific Islands from the international financial system has those jurisdictions “battling for their survival”). One can surmise that those countries would not risk such severe consequences without equally strong motivations.

what lure international financial investors.\textsuperscript{157} The Boston Consulting Group predicted offshore assets will reach $8.8 trillion by 2012, giving foreign banks a strong financial incentive not to cooperate with U.S. tax authorities.\textsuperscript{158}

IV. ALTERNATIVES THAT CONSIDER OTHER COUNTRIES’ INTERESTS

The problem is not that the Act puts U.S. interests first.\textsuperscript{159} Rather, the problem is that although the United States is dependent on other countries for tax information in order for the IRS to enforce U.S. tax policies,\textsuperscript{160} the Act does not consider other countries’ interests in promoting bank secrecy.\textsuperscript{161} The U.S. motivation is obvious. When other countries hold themselves out as tax shelters and guarantee bank secrecy, U.S. taxpayers cheat on their tax returns.\textsuperscript{162} This decreases the U.S. tax base by depleting financial resources that the government can use to support its initiatives.\textsuperscript{163}

Motivation for a country like Nauru is relatively simple as well. Because Nauru’s resources are declining, one source of economic security is the foreign investment attracted by the country’s bank secrecy laws.\textsuperscript{164} Alternatives that consider others’ economic interests—while not necessarily requiring the subordination of U.S. interests—are a policy that trades cash for tax information and an international tax organization with domestic enforcement powers.

\textsuperscript{157} See Thomasson & Azhar, supra note 101, at 1 (“Singapore says it will not budge on its tough bank secrecy laws despite EU demands . . . .”).

\textsuperscript{158} See Thomasson & Azhar, supra note 101, at 1 (“The Boston Consulting Group has forecast total offshore assets under management will climb to $8.8 trillion by 2012 from $7.3 trillion in 2007 . . . .”).

\textsuperscript{159} See Graetz, supra note 44, at 1371–72 (arguing that it is natural, both historically and politically, for policy makers to give primacy to U.S. citizens’ interests in national policy, including tax policy).

\textsuperscript{160} See Tillinghast, supra note 25, at 39.

\textsuperscript{161} See supra Part III.B.5.

\textsuperscript{162} See David Cay Johnston, Tax Cheats Called Out of Control, N.Y. Times, Aug. 1, 2006, at C1 (giving examples of U.S. citizens who cheat on their taxes, such as Robert Wood Johnson IV, the owner of the New York Jets, and Charles and Sam Wyly, founders of the Center for Public Integrity).

\textsuperscript{163} See id. (proving examples of what governments might use tax revenues for, e.g., infrastructure or providing for the needy).

\textsuperscript{164} See Van Fossen, supra note 155, at 237.
A. CASH FOR TAX INFORMATION

If the United States were to purchase tax information, the goal would not be to collect as much information as possible, but to collect only the smallest amount of information necessary to enforce tax laws.165 Once the United States identified a jurisdiction from which it needed tax information, that jurisdiction’s willingness and ability to provide the necessary tax information would become an issue of price negotiation.166 The final price might include compensation necessary to repay private parties and “to offset the burdens imposed” on foreign governmental actors.167 This market system of tax information acquisition takes into account another country’s non-reciprocal need for tax information or its inability to gather such information. If the U.S. paid less for such information than the amount of tax revenue that information would produce, the system would account for all parties’ interests. By doing so, a net importer of tax information, such as the United States, could acquire extraterritorial tax information from a country with relatively small amounts of collected tax information, such as the Bahamas.168

The current method of bilateral exchange—trading tax information for tax information—remains fundamentally unchanged since before World War II and is outdated.169 Rather than using sanctions to force countries into compliance as the Stop Tax Haven Abuse Act would do, the United States might allow the use of cash as consideration for specific tax information.170 This would allow an importer of tax information

165. The IRS has previously limited the amount of tax information collected. See Dorothy A. Brown, Race and Class Matters in Tax Policy, 107 COLUM. L. REV. 790, 807 (2007) (noting the end of IRS “general audits” according to the Taxpayer Compliance Measurement Program).

166. See Dean, supra note 9, at 659 (“[T]he United States could negotiate with the governments of those jurisdictions the specific nature of the information . . . as well as regarding the price at which it would be willing and able to provide it.”).

167. See id. at 659–60.

168. See id. at 611 (noting that a more complete market would allow a country to “maximize its utility and to minimize its impact on privacy” even if they collected little or no information.”); see also Gibson, supra note 54 (stating that the Bahamas does not levy taxes on “capital gains, corporate earnings, personal income, sales, inheritance, or dividends.”).

169. See Dean, supra note 9, at 611 (highlighting for example, that net tax information importers, such as the United States, could acquire specific tax information, rather than import homogenized information en masse, which is less useful and more invasive).

170. See Dean, supra note 9, at 611.
to acquire tax information ex post, thereby decreasing the privacy concerns associated with the shipment of tax data.\footnote{171}

However, the possibility of market failure still exists in this cash-for-information system. For example, the fair price for information might exceed the revenues generated by the acquisition of information or a bilateral monopoly might prevent a more complete market.\footnote{172} Even though a purchaser of tax information would acquire tailored information making privacy less of a concern, a nonmarket solution might provide more robust privacy protections than a market alternative.\footnote{173} A governmental alternative might avoid market failures.

B. A NEW MULTILATERAL INSTITUTION

Because leaders have political and financial incentives to act in nationally self-interested ways, a transnational body with domestic tax authority could overcome the problem of extraterritorial tax information acquisition.\footnote{174} Such a transnational actor would need to have powers on par with the domestic capabilities of national tax authorities, which would impinge on traditional notions of national sovereignty.\footnote{175}


\footnote{172. See \textit{Richard A. Posner, Economic Analysis of Law} § 3.8, at 62 (6th ed. 2003) (noting that a bilateral monopoly occurs and causes high transaction costs when neither party has a beneficial alternative to “dealing with the other”).}

\footnote{173. See generally Peter P. Swire, \textit{Trustwrap: The Importance of Legal Rules to Electronic Commerce and Internet Privacy}, 54 \textit{Hastings L.J.} 847, 860–73 (2003) (discussing the importance of privacy protection in the Internet era).}


\footnote{175. See Ronen Palan, \textit{Tax Havens and the Commercialization of State}}
Recently, two existing international organizations, the United Nations and the OECD, have vied for leadership of a new global tax authority.\(^{176}\) Both the United Nations and the OECD are capitalizing on their history of work aimed at increasing international tax cooperation.\(^{177}\) In theory, either organization could fill the gaps generated by the current patchwork system of bilateral tax treaties and avoid the inequity of the multilateral conventions on tax information acquisition. In practice, however, the reality is much different.

The OECD’s exclusive membership fuels non-members’ perceptions of discrimination in the development of international tax rules.\(^{178}\) This generates a perception of illegitimacy whereby large powerful countries dominate smaller, weaker ones in the realm of tax policy and enforcement.\(^{179}\) Although the OECD might have more power than the United Nations to enforce an international tax regime, it lacks the necessary international legitimacy because of its membership makeup, which includes historically powerful nations, such as the United States, France, Germany, Portugal, Spain, Italy, Japan, and the United Kingdom.\(^{180}\) While the United Nations might have greater international credibility as a fair arbiter of

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\(^{176}\) Dean, supra note 9, at 661–62.


\(^{178}\) See Arthur J. Cockfield, The Rise of the OECD as Informal “World Tax Organization” Through National Responses to E-Commerce Tax Challenges, 8 Yale J.L. & Tech. 136, 185–86 (2006) (arguing that extending OECD membership to different countries will “help to allay concerns that the OECD has been ‘captured’ by multinational firms based in OECD countries” and noting that “the perceived influence of these firms may be reducing the legitimacy and effectiveness of OECD reform efforts.”); Littlewood, supra note 59, at 480–85 (describing pitfalls to OECD reform efforts, including the fact that the membership is not viewed as representative of the entire world).


\(^{180}\) Dean, supra note 9, at n.370; see also Littlewood, supra note 59, at 480–85. For a list of OECD member nations, see Org. for Econ. Co-operation & Dev., Ratification of the Convention on the OECD, http://www.oecd.org (last visited Nov. 2, 2009).
international tax controversies, it lacks sufficient power to be a transnational tax enforcer. Countries, especially the United States, might resist the necessary curtailment of sovereignty for international tax enforcement. Realizing its incentives to resist U.N. enforcement authority, the United States might recognize other countries' similar incentives to work against the successful enforcement of a U.S. dominated multilateral tax regime such as the OECD. Thus, tax evasion is a global problem requiring a global solution.

V. CONCLUSION

Globalization, the September 11th attacks, and two recent scandals have put tax havens in the legislative crosshairs. The Obama Administration fully supports the Stop Tax Haven Abuse Act. Because of President Obama's unqualified support, the political popularity of cracking down on tax evaders in tough economic times, and banks' decreasing ability to fight against such measures, the Act is likely to pass. The centerpiece of the Act is a list of offshore secrecy jurisdictions. Although some of the motives behind enacting such legislation are laudable and some of the Act's provisions are commendable, the Act is unlikely to garner cooperation from countries vital to its success. The Act fails to account for other countries' economic interests. Although alternatives are not perfect, they are preferable. A market solution, such as allowing the United

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184. See Palan, supra note 175, at 173 (“[A]ny serious attempt to combat the tax havens phenomenon would have to be conducted on a multilateral level.”); see also Michiel van Dijk & Francis Weyzig, The Global Problem of Tax Havens: The Case of the Netherlands 3 (Stichting Onderzoek Multinationale Ondernemingen [Centre for Research on Multinational Corporations] 2008) (2007) (arguing that the Netherlands must end harmful tax policies but that the tax haven problem requires a global solution).

185. Drawbaugh & Daly, supra note 3.
States to purchase tax information from other countries, or an intergovernmental solution, such as a World Tax Organization, would facilitate a greater exchange of extraterritorial tax information and bolster the enforcement of U.S. tax laws.