EXCHANGE OF TAX INFORMATION POLICIES AT THE MILLENNIUM: BALANCING ENFORCEMENT WITH DUE PROCESS AND INTERNATIONAL HUMAN RIGHTS

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1. INTRODUCTION

This paper discusses exchange of tax information policies at the millennium. It will discuss the constitution of the countries agreed on the reconstitution of the Organization for Economic Cooperation and Development, which has been the principal initiator of the effort to develop better international tax cooperation and particularly improved exchange of information policies. The paper will discuss some of the remaining issues over exchange of information in the OECD harmful tax competition initiative. The paper will discuss the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters. The need for improved privacy and human rights protection will be examined in the context of the new enforcement initiatives.

Clearly, the rise of new enforcement conventions and initiatives require enhanced protection for taxpayers, third parties, such as fiduciaries and financial intermediaries. The enhanced protection will guarantee the ability to conduct normal commercial relations in the face of increased enforcement measures and will ensure the fairness and integrity, without which the new enforcement initiatives will not have the confidence and support of the private sector.

2. CONSTITUTION OF THE OECD

On December 14, 1960, twenty countries agreed on the reconstitution of the Organization for Economic Cooperation and Development (OECD).[1]

The goals of the OECD are to promote policies designed: "(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations."[2]

The Convention sets forth the means to achieve the Convention's aims which its Members are to individually and joint undertake: "(a) promote the efficient use of their economic resources; (b) in the scientific and technological field promote the development of their resources, encourage research and promote vocational training; (c) pursue policies designed to achieve economic growth and internal and

1. For the reconstitution document, *see* OECD, Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960 (http://www.oecd.org/about/origins/convention/conventn.htm.

2. *Id*., Art. 1.

external financial stability and to avoid developments which might endanger their economies or those of other countries; (d) pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalization of capital movements; and (e) contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries, having regard to the importance to their economies of receiving technical assistance and of securing expanding export markets."[3]

In addition, the Convention sets forth additional actions of OECD members to further the aims and means in Articles 1 and 2 respectively of the Convention: "a) keep each other informed and furnish the Organization with the information necessary for the accomplishment of its tasks; (b) consult together on a continuing basis, carry out studies and participate in agreed projects; and (c) cooperate closely and where appropriate take coordinated action."[4]

To achieve its aims, the OECD may do three other tasks: (a) "take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organizations."[5]

The reconstitution provides that, if an OECD Member abstains from voting on a decision or recommendation, such abstention will not invalidate the decision or recommendation. It will apply to the other Members, but not to the abstaining Member.[6] Another provisions of the reconstitution helps to balance accomplishing the goals of the OECD with the sovereignty of its Members: an OECD decision does not bind any Member until it has complied with the requirements of its own constitutional procedures.[7]

A Council composed of all the OECD Members is the body from which all acts of the OECD derive. The Council may meet in sessions of Ministers or of Permanent Representatives.[8]

Under the reconstitution the Council may establish an Executive Committee and such subsidiary bodies as may be required for the achievement of the aims of the Organization.[9]

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3. *Id*., Art. 2.

4. *Id*., Art. 3.

5. *Id*., Art. 5.

6. *Id*., Art. 6(2).

7. *Id*., Art. 6(3).

8. *Id*., Art. 7.

9. *Id*., Art. 9.

The OECD's reconstitution authorizes the Council, on such terms and conditions as it may determine, may "(a) address communications to non-member States or organizations; (b) establish and maintain relations with non-member States or organizations; and (c) invite non-member Governments or organizations to participate in activities of the Organization."[10]

A question arises whether the OECD's decision to pursue the harmful tax competition (HTC) initiative and especially to spend the amount and type of resources it has devoted has been done in compliance with its constitution. Many observers have contended that the OECD HTC initiative does not support sustainable economic growth and employment or contribute to the development of the world economy nor does it achieve economic growth or internal and external financial stability. Instead, observers have argued that economic stability and world development as well as fiscal stability requires competition among countries. A sound airing of these issues should have preceded any decision by the OECD to undertake the initiative or would seem to be required if the OECD is to continue its work on this initiative.

3. OECD HARMFUL TAX COMPETITION INITIATIVE

A. Overview

In May 1999, the OECD initiated a harmful tax practices initiative designed the combat tax evasion, level the playing field among sovereigns in tax policy, and facilitate better cooperation in tax matters. The OECD subsequently published a blacklist of so-called tax havens and called for the jurisdictions listed to make a commitment to remove their harmful tax practices. A country became a tax haven by having two of the following four elements: (1) no or low taxes; (2) ring-fencing or discrimination in the types of persons eligible for tax preferences (typically offering incentives to only foreigners); (3) lack of transparency in the operation of the tax laws; and (4) inadequate exchange of tax information.

The key development in the OECD HTC was the Bush Administration's withdrawal of support for part of the initiative. On May 10, 2001, U.S. Treasury Secretary clarified the U.S. reservations on the Organization of Economic Cooperation and Development's harmful tax practices initiative, creating further uncertainty as to the outcome of the initiative.[1]

O'Neill announced he was "troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system. I also am concerned about the potentially unfair treatment of some non-OECD countries. The United States does not support efforts to dictate to any

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10. *Id*., Art. 12** (check).

1For a text of his statement *see* Paul O'Neill, *Confronting OECD's Notions on Taxation*, THE WASHINGTON TIMES, May 10, 2001, website (www.washtimes.com); BUREAU OF NATIONAL AFFAIRS (BNA) TAX CORE.

country what its own tax rates or tax system should b e, and will not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition that forces governments like businesses to create efficiencies."[2]

Mr. O'Neill did express that the U.S. has "an obligation to enforce our tax laws as written because failing to do so undermines the confidence of honest taxpaying Americans in the fairness of our tax system. We cannot turn a blind eye toward tax cheating in any form. That Means pursuing those who illegally evade taxes by hiding income in offshore accounts." Mr. O'Neill referred to the use by John Mathewson of a bank account in the Cayman Island, in which 95% of his customers were U.S. citizens. Mathewson's cooperation enabled the IRS to obtain tax evasion convictions and collect substantial back taxes from more than 20 of his clients. [3]

During the last week of June 2001, the media announced that the Organization for Economic Cooperation and Development had reached in principle a compromise on its harmful tax practices initiative.[4] Since the OECD's Fiscal Affairs Committee meeting June 26-27, the organization refocused its program on the exchange of banking and financial information with OECD governments and away from pressuring jurisdictions identified as tax havens to reset their tax rates. The initiative will now only require the 32 so called tax haven countries to agree to take action on exchange on tax information and transparency. The deadline of July 31, 2001 by which those tax havens failing to make the commitment would be put on the blacklist has been extended until November 30, 2001.

On June 29, 2001, the OECD announced that Aruba is the tenth jurisdiction to make a commitment to the harmful tax practices principles. The other jurisdictions that have made similar commitments are Bermuda, the Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, the Netherlands Antilles, San Marino, and the Seychelles.[5]

The OECD harmful tax competition initiative has as its purpose to level the playing field in the imposition of taxes and ability to raise revenue. It cited the erosion of tax base by preferential regimes and especially by tax havens. The definition of a tax haven was the existence of two or more of the following criteria: zero or low tax rates. ring-fencing or discrimination

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2. *Id*.

3For background on the U.S. partial withdrawal, *see* Bruce Zagaris, *U.S. Announcement of Partial Withdrawal from Harmful Tax Initiative Creates Uncertainties*, 17 INT'L ENFORCEMENT L. REP. 284 (July 2001).

4Michael M. Phillips, *Accord Is Reached By U.S. and Allies on Tax Havens*, WALL ST. J., June 28, 2001, at A11, col. 1.

5For additional information, *see* Bruce Zagaris, *OECD Reaches Compromise in Principle on Harmful Tax Practices*, 17 INT'L ENFORCEMENT L. RPE. 332 (Aug. 2001).

B. Remaining Issues over Exchange of Information[6]

Major problems remain in the proposed obligations in the OECD HTC Memorandum of Understanding.[7] They significantly exceed those called for in the OECD reporting, "Improving Access to Bank Information for Tax Purposes."[8] The latter report was designed to encourage agreement within the OECD on the best way to improve cooperation. The latter report constantly provides alternative options and uses words such as "encourages" whereas the OECD HTC MOU makes the obligations mandatory without any wiggle room. In fact, the targeted countries would be required to have in place administrative practices so that the legal mechanism for exchange of information functions effectively can be monitored, including having personnel responsible for ensuring that requests for information are answered promptly and efficiently and that personnel are trained or experienced in obtaining such information. Ironically, one OECD country, Canada, has admitted that it does not have sufficient resources to conduct exchanges of information and hence believe that such exchanges cannot be reciprocal.[9] If Canada believes that such exchanges cannot be reciprocal due to its shortage of administrative resources, then the much smaller targeted countries are not surprisingly also taking the position that such exchange obligations cannot be reciprocal and, similar to the Canadian viewpoint, would want to take a restrictive view of such obligations. The targeted countries have a more important perspective: the need to protect their economic security and well being.[10]

In essence, the OECD countries are signaling that the targeted countries should respond forthwith to the requests for exchange of information and have derided some of the targeted countries for taking too much time responding to requests. However, the time for response is often to ensure that the requests are properly concerned with an offense covered by the treaty. Further, sometimes an interested person may have recourse to a court to protect their own rights and ensure that the request complies with the treaty, the constitution, and any other applicable provisions.

Even some OECD members (i.e., Austria, Luxembourg and Switzerland) have insisted on covering criminal tax enforcement through a Mutual Assistance in Criminal Matters Treaty. Hence, the MOU to the U.S.-Luxembourg tax treaty explains that certain information of financial

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6. This section is adopted from the article by Bruce Zagaris, *Initiatives by OECD, Financial Action Task Force on Money Laundering at Critical Junctures*, 23 TAX NOTES INT'L 3087 (June 18, 2001).

7. OECD Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices, OECD Web site (http://www.oecd.org).

8. Committee on Fiscal Affairs, OECD, *Improving Access to Bank Information for Tax Purposes* (declassified 24 Mar. 2000).

9. Stephen S. Heller/Boris Stein, Canada, *International Mutual Assistance Through Exchange of Information*, LXXVb CAHIERS DE DROIT FISCAL INT'L 259, 265 (1990).

10. For additional discussion of the problems with exchange of information, see Richard J. Hay, *Offshore Financial Centres: The Supranational Initiatives*, TAX PLANNING INT'L Rev. 1, 5 (Feb. 2001).

institutions may be obtained and provided to "certain U.S. authorities" only in accordance with the proposed U.S.-Luxembourg MLAT. As a result, the U.S. delayed the effective date of the income tax treaty to coincide with the MLAT's taking effect.[16]

The upshot of these and other controversies over exchange of information are that, even if the OECD only proceeds on exchange of tax information, there will be many substantive and procedural policy disputes about the policy and they will concern achieving a level playing field between the OECD and targeted countries in the making of the policy and its fair implementation. Indeed, there are just as many controversies involving transparency,[17] but it is instructive to consider the FATF's counterpart initiative and privacy and human rights implications.

4. THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS

A. Background

On January 25, 1988, the Council of Europe and the OECD completed the Convention on Mutual Administrative Assistance in Tax Matters.[18] On June 28, 1989, the U.S. signed it. On Septmber 18, 1990, the U.S. Senate approved the treaty and it entered into force with respect to the U.S. on April 1, 1995.

Countries that are members of the Council of Europe, the Organization for Economic Cooperation and Development (OECD), or both, are eligible parties to the treaty. Currently the treaty is in force in Denmark, Finland, Iceland, the Netherlands, Norway, Sweden and the U.S. Belgium has signed, but not ratified.[19]

B. Contents

The Convention is not the usual tax treaty. While it has some vague references in the protocol, the Convention does not refer to the elimination of double taxation. Instead, it provides a mutual

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16. *See* Bruce Zagaris, *Developments in Mutual Cooperation, Coordination and Assistance Between the U.S. and Other Countries in International Tax Enforcement*, 27 TAX MGMT. INT'L J. 506, 508-9 (Oct. 9., 1998); *Luxembourg and U.S. Conclude Tax Treaty Whose Ratification Process Awaits Conclusion of a MLAT*, INT'L ENFORCEMENT L. REP. 171 (May 1996).

17. For a discussion of the transparency issues, see Bruce Zagaris, *Application of OECD Tax Haven Criteria to Member States Shows Potential Danger to U.S. Sovereignty*, TAX NOTES INT'L 2298, 2299-2301 (May 7, 2001); Zagaris, *Issues Low-Tax Regimes Should Raise When Negotiating with the OECD*, TAX NOTES INT'L 523, 529-30 (Jan. 29, 2001)..

18. For the text and a brief discussion of the Convention, *see* 28 I.L.M. 1160 (1988); 3 Rhoades & Langer, INCOME TAXATION OF FOREIGN RELATED TRANSACTIONS, COUN §8.00[2].

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assistance treaty to prevent evasion and avoidance of all taxes other than customs duties. It provides for a wide range of exchange of information between any two countries that are parties to the Convention. It also provides for assistance in the collection of taxes and in the services of documents, but the U.S. has entered reservations on these types of assistance. Hence, the U.S. will not assist in collecting taxes at all and will only serve documents by mail.

The Convention provides, on a multilateral basis, for administrative assistance in respect to income, capital (wealth), social security and other taxes. Administrative assistance would include the exchange of information, simultaneous tax examinations, assistance in collection, and service of documents.

For purposes of international criminal law, the Convention has limited application. The Convention is meant to cover the preparation of criminal proceedings in the tax area to be initiated before the judicial bodies. However, after criminal proceedings ha ve started before the judicial bodies. However, after criminal proceedings have started before a judicial body, the Convention does not apply, in order to avoid any conflict with the Convention on Mutual Assistance in Criminal Matters.[20] Another part of the Convention that will have potentially significant impact on international criminal law is the provision authorizing the use of information exchanged under the Convention in criminal proceedings in the requesting state. In this regard, Article 4, Paragraph 2 of the Convention provides that:

> A Party may use information obtained under this Convention as evidence before a criminal court only if prior authorization has been given by the Party which has supplied the information. However, any two or more Parties may mutually agree to waive the condition of prior authorization.

The U.S. Department of Treasury decided to waive the condition of prior authorization despite the fact that the position was controversial.[21]

The Council of Europe and the Organization of Economic Cooperation and Development (OECD) recently concluded the Convention on Mutual Administrative Assistance in Tax Matters,[22] a multilateral convention that will affect the ability of the United States and the other parties to obtain information regarding investors in those countries.[23] The parties began negotiating the Tax Convention in order to

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20. *See* Committee on Fiscal Affairs, OECD, *Explanatory Report and Commentary on the Provisions of the Convention, Commentary on para. 1* (May 27, 1986).

21. Bruce Zagaris, *Governments Take Divergent Paths on OECD Convention on Administrative Assistance in Tax Matters*, 5 INT'L ENFORCEMENT L. REP. 8 (Jan. 1989)

22. Convention on Mutual Administrative Assistance in Tax Matters, opened for signature Jan. 25, 1988, I.L.M. 1160 (1988) [hereinafter Tax Convention] reprinted in R. Rhoades and M. Langer, 5 INCOME TAXATION OF FOREIGN RELATED TRANSACTION ch. 85 (1989).

23. Id., passim.

improve cooperation in tax matters, reduce the incidence of tax evasion, and otherwise enhance tax administration. The Tax Convention will substantially affect investor confidentiality because of its provisions for multilateral administrative assistance with respect to income, capital (wealth), social security, and other taxes.[24] Administrative assistance will include exchanges of information, simultaneous tax service of documents.[25] The Tax Convention should eventually result in standardized procedures for information exchanges and enhanced worldwide cooperation in tax matters.

Before the Tax Convention can enter into force, at least five governments must consent to be bound by its provisions.[26]Three Nordic countries and the United States have signed and deposited their instruments of ratification. The Netherlands has signed. Once the Dator Government deposits its instruments of ratification the Convention will be in force. Hence it is expected to go into effect shortly. The Tax Convention provides for the exchange of tax information either on request, automatically, or spontaneously.[27]Two or more parties can examine the tax liabilities of a taxpayer simultaneously and examinations can occur abroad.[28] However, the Tax Convention allows signatory countries, through reservations, to limit its applicability to certain types of taxes (e.g., social security or local taxes) and to limit the duty to assist either in collecting taxes or serving tax documents.[29]A party may also refrain from actions that are at a variance with its own public policy or laws, and decline to furnish information regarding trade secrets or processes.[30] Information obtained through the Tax Convention may be used only for tax enforcement purposes and must be treated as a secret according to the most restrictive secrecy laws among the particular countries exchanging information.[31]

The Tax Convention covers a broad variety of taxes -- far beyond the coverage of bilateral tax treaties -- including income, capital gains, net wealth, state and local, social security contributions,

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24. Id., art 1.

25. Id., art. 28(2). The following countries are eligible to sign the Convention: Australia, Austria, Belgium, Canada, Cyprus, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The Convention may also be extended to cover some or all of the overseas territories of these countries. Id. art. 28(1). It seems likely that once the United States and the United Kingdom sing the Tax Convention, they will extend its coverage to their overseas territories -- i.e. American Samoa, Bermuda, the Cayman Islands, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, the Turks & Caicos, and the U.S. Virgin Islands, respectively.

26. Id., art. 5-7

27. Id., art. 8-9.

28. Id., art. 30(1).

29. Id., art. 21.

30. Id., art. 21.

31. Id., art. 22.

estate, inheritance, gift and other taxes.[32] The Tax Convention's scope is not restriction by the residence or nationality of the taxpayer.[33] These potentially intrusive results of the Tax Convention's broad scope have helped to engender the opposition of many business groups, including member groups' of the International Chamber of Commerce (ICC).[34] ICC member groups also criticize the Tax Convention because it fails to distinguish adequately between tax evasion and legitimate tax avoidance.[35] Another criticism is that only national, and not state, governments are involved in tax cooperation under the Tax Convention. Some European nations object to the possibility of American states participating in tax information exchanges themselves and with the federal government in the U.S. concerning matters such as unitary taxation, and have declined to sign the Tax Convention.[36] However, the three Nordic countries and the U.S. have already signed and deposited their instruments of ratification. The Netherlands has signed and Spain has announced its intention to sign.[37]

Once the Tax Convention is implemented, initial challenges are likely to focus on possible violations of international human rights laws. For example, the Government of Malta has alleged that the basic provisions of the Convention have not been examined for the compatibility with the fundamental principles of human rights laws.[38] The Maltese Government has requested that the draft should have

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32. Id., art. 2(1)(a)-(b).

33. Id., art. 1(3).

34. See International Chamber of Commerce Seeks to Re-Open Debate on Multilateral Tax Accord, BNA Daily Tax Rep. No. 189 at G-3 (Oct. 1, 1987) (reporting the ICC member organizations have lobbied against the Tax Convention for several years.) The American Bar Association has also argued that individual taxpayers should be notified regarding requests for information under the Convention. See Practitioners Call for Protection of Taxpayer Rights Under OECD Treaty, BNA Daily Tax Rep. No. 194 (Oct. 6, 1988).

35. Id. The ICC also argued that the Tax Convention is superfluous in light of existing treaties and that the Convention "lacks clear standards for information." Id. See also Zagaris, OECD Convention on Mutual Assistance Opened for Signature While ICC and Others Oppose Its Ratification, 3 INTERNATIONAL ENFORCEMENT LAW REPORTER 337, 338 (1987) (reporting on ICC objections). The Business and Industry Advisory Committee opposed the Tax Convention on the ground that it would increase the risk that taxpayer confidentiality might be compromised -- "without the knowledge of affected taxpayers." International Chamber of Commerce Seeks to Re-Open Debate on Multilateral Tax Accord, supra note 77. However, policy representatives of the Treasury Department have indicated strong support for the Convention, and have alleged that such exchanges of taxpayer information proceed with "extreme sensitivity." See Multilateral Treaty Includes Adequate Confidentiality Provisions, Treasury Official States, BNA Daily Tax Rep. No. 90 at G-4 (May 12, 1987).

36. E.g., Switzerland, Luxembourg, and Portugal. See OECD Opens Information Exchange Convention to Signature by U.S. and Other Countries, BNA Daily Tax Rep. No. 195 at G-2 (Oct. 9, 1987) [hereinafter OECD Open Convention]. Austria, Australia, FRG, and the UK declined to decide whether to sign when the Convention was first opened for signature. Id.

37. See id.; United States To Sign Convention on Mutual Administrative Tax Assistance, BNA DAILY TAX Rep. No. 124 at G-3 (June 29, 1989); U.S. Ratifies Convention on Mutual Administrative Assistance in Tax Matters, 7 INT'L ENFORCEMENT LAW RPTR. 45 (Feb. 1991).

38. See International Chamber of Commerce Seeks to Re-Open Debate on Multilateral Tax Accord, supra note 78 at G-3 (reporting Malta's objection).

been referred to the Council of Europe's Committee of Experts on Human Rights. Malta has focused on the Tax Convention's lack of any reference to the human rights standards that must be respected by member states of the Council of Europe. Applicable rights under the European Convention for the Protection of Human Rights and Fundament Freedoms (Human Rights Convention)[39] that may apply are included in the guarantee of a fair and public hearing by an independent and impartial tribunal.[40]

To understand the cases that will challenge the Tax Convention under the Human Rights Convention requires a review of the basic guarantees of the Human Rights Convention. The European Court of Human Rights has held that Article I of Protocol Number 1[41] to the European Convention of Human Rights contains three distinct rules: (1) the principle of peaceful enjoyment of property; (2) governmental depreciation of private possessions is subject to certain conditions; and (3) states are entitled to control the use of property by enforcing such laws as they believe necessary to serve the general interest.

The first rule from Protocol 1 mandates a fair balance between the protection of an individual's right to property and the needs of the community.[42] An otherwise legitimate taking of property violates Article 1 if the effect on individual rights is unreasonably disproportionate to the asserted public interest objectives. The Human Rights Court has treated the right to compensation for interference with property rights as inherent to the right to property.[43]

The second rule involves a Court determination of whether there was an actual depreciation of

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39. European Convention for the Protection of Human Rights and [Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (hereinafter Human Rights Convention)]. For a useful discussion of some of the issues in applying the European and other international human rights conventions to international asset forfeiture issues, see Wilson, Human Rights and Money Laundering: The Prospect of International Seizure of Defense Attorney Fees, in INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW 1-25 (ABA Criminal Just. Sec., Aug. 13, 1991).

40. The Human Rights Convention provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Id., art. 6(1), 213 U.N.T.S. at 228.

41. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms, March 20, 1952, art. 1 213 U.N.T.S. 262.

42. See Case of Lithgow and Others, 102 Eur. Ct. H.R. (ser. A) (1986) (Holding that a taking of property under Article I requires that the state balance the public interest in the taking against the individual's interest in maintaining ownership -- the Court required compensation to the individual in an amount representing the reasonable value of the property).

43. See Sporrong and Lonnroth v. Sweden, 46 Eur. Ct. H.R. (ser B) (1980); Case of Lithgow.

property, where Court is empowered to bypass formalities and investigate substance of the case.[44] To make this determination, the Court applies "general principles of international law" which include principles established in general international law concerning the confiscation of the property of foreigners but not concerning the property of a state's own national.[45] The Court and the Commission have yet to specifically explain the third rule from Protocol 1.

Several additional cases decided by the Court provide insight regarding the application of these principles in criminal cases. Two cases, Campbell and Fell v. United Kingdom[46] and Piersack v. Belgium[47] set forth standards established by the European Human Rights Commission and the European Court of Human Rights requiring judicial independence and impartiality in criminal matters. The procedures used to gather information in Marc Rich[48] a major case involving novel issues to international tax law arguably violated the standards set forth in Piersack v. Belgium. Specifically, one can argue that the independence and impartiality of the tribunal were tainted, and that the evidence gathering process used by the tribunal was unfair. For example, the process by which the court issued grand jury subpoenas evidenced a lack of independence from the prosecutor.[49]

The rights guaranteed by the Human Rights Convention will likely be asserted by taxpayers seeking to avoid the coverage of the Tax Convention. Article 6 of the Human Rights Convention guarantees a fair hearing, a guarantee that in some ways limits administrative and judicial measures to fight economic crime. Although the Court has yet to construe the general meaning of Article 6, it has applied the fair hearing guarantee to at least one economic case. In Colozza v. Italy[50] the applicant contended that his Article 6 guarantees of a fair hearing were violated when an Italian court tried and convicted him of various offenses of which he was never made aware by the authorities. The Court found a breach of the fair hearing rights guaranteed in Article 6 and held that an accused cannot be presumed to have waived his Article 6 rights where he was not notified of the proceedings against him

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44. See Gudmundosson v. Iceland, 1960 Y.B. EUR. CONV. ON HUM. RTS 394 (Eur. Comm. on Hum Rts).

45. Id.

46. Campbell and Fell v. United Kingdom, 65 Eur. Ct. H.R. (ser. B) (1982) (concluding that Articles 6 and 8 of the Human Rights Convention require independent and impartial conduct of prison disciplinary proceedings).

47 Piersack v. Belgium, 47 Eur. Ct. H.R. (ser B) (1981) (holding that Article 6 of the Human Rights Convention requires that criminal trials be impartial and independent from both the executive and the defendants).

48. In re Marc Rich and Co., 707 F.2d 663 (2d Cir.), cert. denied, 463 U.S. 1215 (1983). See generally Note, The Marc Rich Case: Extension of Grand Jury Subpoena Power to Nonresident Alien Corporations, 18 GEO. WASH. J. INT'L & ECON. 97 (1984) (supporting the Second Circuit's assertion of grand jury subpoena power over a non-resident alien corporation that had at least minimal contacts with the United States, despite the existence of a foreign nondisclosure law).

49. See 707 F.2d at 665 (re dual role of U.S. courts as issuers and enforces of subpoenas). See also INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW, supra note 83.

50. Colozza v. Italy, 89 Eur. Ct. H.R. (ser. A) (1985) reprinted in 7 E.H.H.R. 516.

and attempts to trace him were inadequate. In addition, the court found that lack of notice would make it difficult to exercise other guaranteed rights, such as the right to defend oneself, examine witnesses, and secure the free assistance of in interpreter.

The challenge by the Maltese government to the Tax Convention raises the specter of incompatibility between international criminal law and international human rights law. One impending issue is thus whether Tax Convention should embrace -- expressly, or in legislative history -- rights enumerated in the Human Rights Convention. At present there is marked absence of well-defined concepts in international law upon which a comprehensive framework for the development and enforcement of any of these branches can be based.[51] However, as internationally protected human rights become classified and defined, either in terms of the values sought to be preserved or their enforcement modalities, the interaction of the various parts will become more pronounced. [52]

Disputes will also arise from the evidence obtained or procedures taken under the Tax Convention which violate the Human Rights Convention. Presumably, affected individuals will be able to use the Human Rights Convention as protection against many adverse consequences. For example, if the violation of the Human Rights Convention are intentional, then deprivations of individual human rights by tax officials could result in criminal penalties against enforcement officials, just as U.S. law penalizes officials who violate confidentiality requirements related to tax information.[53] Although this author is not aware of precedents under the Treaty of Rome, an analogous body of law is developing for violations of other business laws.[54] Presently, the Tax Convention is open for signature and is expected to come into force in the near future, perhaps as early as the end of 1991 or beginning of 1992.[55] Already the United States and the Scandinavian countries have signed the Convention. Hearings on ratification are expected in the U.S. Senate Foreign Relations Committee in June.

Because the European Convention on Human Rights applies to some British dependencies that

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51. See M. Bassiouni, The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights: A Continuum of Two Disciplines (May 1984) (paper delivered at the New Horizons in International Criminal Law seminar held in Noto, Sicily); D'Amato, International Criminal Law and Human Rights, in NEW HORIZONS IN INTERNATIONAL CRIMINAL LAW 45-47 (1985) (discussing the need for better foundations in protecting international human rights).

52 For additional discussion of the interaction between international taxation and international human rights, see TAXATION AND HUMAN RIGHTS (Kluwer 1988).

53. See U.S. C. §§ 6103 (1982 & Supp V. 1987) (imposing sanctions on unauthorized disclosure of taxpayer return information.)

54. See Van den Wyngaert, Criminal Law and the European Communities; Defining the Issues, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 247 (1983) (discussing new penal sanctions introduced to protect the economic interest of European Community member states); Zagaris & Fantauzzi, European Integration and International Criminal Law, in 1 1990 THE EXTERNAL IMPACT OF EUROPEAN INTEGRATION 9 (1989).

55. The U.S. Dept. of State submitted the Convention for ratification to the U.S. Senate in late 1989. Telephone interview with Genevieve Bell of the State Department Office of Treaty Affairs (Sept. 6, 1989).

have important international financial sectors (i.e., Bermuda and the Cayman Islands), the Convention's jurisprudence assumes significant breadth. An analogous trend in which tension between the application of international criminal law and international human rights law has been in the holding of the Soering case in the European Court of Human Rights and the Short case by the Dutch Supreme Court that international human rights conventions have precedence over extradition conventions and can block regimes for extradition.

On January 20, 2987, shortly before the Convention was initially opened for signature, U.S. Assistant Treasury Secretary for Tax Policy, O. Donaldson Chapoton said he hoped it would go into effect that year. Although the U.S. had not formally decided to sign, Mr. Chapoton reportedly stated that he was optimistic the Convention would receive a positive recommendation and would be singed later in the year. He signaled the Convention would be particularly important for tax cooperation among governments without bilateral treaties.[56]

On May 13, 1988, Charles Triplett, Deputy Associate IRS Chief Counsel (International), and William Roth, Director of IRS' Office of International Programs, said that, as a result of the OECD Draft Convention, the IRS and Treasury were considering whether to notify taxpayers and allow them to appeal foreign governments' request for information.[57] In particular, Aret. 21 of the OECD Convention provides limits to the obligation of the requested state to provide assistance. For instance, the requested state need to supply information that is not obtained under its own laws or its administrative practice or to supply information that would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information, the disclosure of which would contravene public policy. It need not provide administrative assistance, if it would lead to discrimination between a national of the requested state and nationals of the applicant state in the same circumstances. The Commentary to the Article explains that, if a requested state has no power to take measures of conservancy, it could decline to take such measures on its behalf, or if seizure of goods to satisfy a tax claim is not allowed in the applicant State, the requested State is not obliged to seize goods when providing assistance in collection. Hence, only those powers and practices that the treaty states have in common are the ones the requested State is obliged to implement.

Article 23(1) provides that proceedings relating to measures taken under the CONvention by the requested state will be brought only before the appropriate body of that sstate. The OECD Commentary to the Article specifies that the Article confers powers on the authority and the question arises where the individual is entitled to require the authority to exercise them especially where the failure to exercise a power violates a right guaranteed by the national law of the authority in question. Specifically, when a taxpayer wants to resist the recovery of a tax or the enforcement of the tax laws, two grounds normally exist in the laws of a treaty country on which the tax claim can be resisted. Either the taxpayer can contest the existence of the enforceability of the claim, or he can try to contest the

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56. *OECD Convention for Mutual Assistance Opens for Signature*, 4 INT'L ENFORCEMENT L. REP. 9 (Jan. 1987).

57. Bruce Zagairs, *IRS Contemplates Taxpayer Rights Under OECD Assistance Convention*, 4 INT'L ENFORCEMENT L. REP. 158 (May 1988).

enforcement measures himself.

Since the competent authority of the treaty country may not always have the entire information on a case, only the taxpayer involved may be able to provide the competent authority with the information to know when and timely take actions allowed under the provisions of Article 21 and 23. The ability of the requested State to have the input of the taxpayer may determine the very liberty of the taxpayer and his property. [58]

On May 23, 1989, speaking at a program of the "Foreign Investment in the United States" seminar in New York City, Anne Fisher, office of International Tax Counsel, U.S. Department of the Treasury, stated that the U.S. was planning to sign the Convention in two weeks. Because many U.S. income tax treaties are very old, the Convention would strengthen cooperation in international tax matters, even with many countries with which the U.S. already has income tax treaties. This theory seems to refute the contention of the U.K. Government that it and other OECD countries already have enough tax treaties with adequate exchange of information and cooperation procedures. In order to obtain support from business and bar groups, Fisher explained that the U.S. Treasury is strengthening taxpayer protection and will share this information with the business community. In response to an inquiry of Marshall J. Langer, Counsel, Shutts & Bowen, whether Treasury plans to extend the taxpayer notification to bilateral tax treaties as well, Fisher stated that it does so plan for the long-term, but first the U.S. wants to try it with the COE/OECD Convention.[59]

During the discussion of the ratification process, on May 10, 1989, James P. Springer, International Tax Counsel, U.S. Department of Justice, at a briefing of the Committee on International Tax Law, Section of International Law & Practice, American Bar Association, explained the provisions that the Treasury would adopt to provide certain U.S. taxpayers with notification of a request and an opportunity to object to the U.S. assisting such requests. Springer stated that the bulk of requests for assistance under income tax conventions are, and will continue to be, third party requests for records of banks, accounting firms, and attorneys. Springer explained that Treasury does not intend at least initially to apply the potentially proposed notification procedures to bilateral treaties. According to Springer, a minor difference between the proposed resolution of the Committee on International Tax, Section of International Law & Practice, ABA, and the letter of September 28, 1988, from Irwin L. Treiger, Chair, Section of Taxation, is that, unlike the Section of Taxation, the Committee on International Tax does not recommend recourse to court if a taxpayer is aggrieved by an administrative decision on a request for information.[60]

At the time of the discussion on the Convention on Mutual Administration Assistance in Tax

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58. *Id*.

59. Bruce Zagaris, *Fisher States that U.S. Expected to Sign Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters*, 5 INT'L ENFORCEMENT L. REP. 179, 179-80 (May 1989).

60. Bruce Zagaris, *Springer Briefs Committee on International Tax Developments*, 5 INT'L ENFORCEMENT L. REP. 182, 182-83 (May 1989)..

Matters, the Senate Foreign Relations delayed a scheduled mark-up of six pending Mutual Legal Assistance Treaties (MLATs) at the request of Senator Jesse Helms, who raised concerns as to whether the MLATs sufficiently protected the constitutional rights of individuals. In particular, Sen. Helms mentioned concern about the fact that, in comparison to the U.S., foreign governments had made far greater use of the then four U.S. MLATs. In the future the U.S. may receive many applications from overseas to deal with individuals who may be using tax shelters in the U.S. that are considered criminal evasion abroad.[61]

C. Ratification Process

On December 20, 1988, the United Kingdom announced that it will not sign the Convention. At that time the Federal Republic of Germany and Malta had announced that would not sign. The U.K. announced that the reasons for its decision include its extensive network of double taxation treaties and its European obligations, which already provide enough cooperation.[62]

In 1988, the U.S. Government announced it had decided to reserve recovery of taxes because the provisions on assistance in collecting taxes in the current U.S. treaties are not used and cooperation in the collection of taxes tends to be controversial in the U.S.

In November 1988, the U.S. Department of Treasury convened a meeting at which it expressed its desire for persons knowledgeable and experienced in the legal areas covered by the Convention to make suggestions on the position(s) the U.S. should take and any implementing regulations. Anne Fisher, Office of International Tax Counsel, U.S. Department of Treasury, noted the Treasury was preparing international procedures to apply the Convention once it takes effect. These procedures would provide taxpayers affected by the Convention with notification and the right to participate in whether, and how, the U.S. responds to a request for cooperation. The procedures will provide more expanded notification and due process than the IRS presently affords taxpayers under bilateral tax treaties.[63] At this time, bar associations, including the Subcommittee on International Assistance in Criminal Matters, White Collar Crime Committee, Criminal Justice Section, American Bar Association, and the Tax Section, Florida Bar, prepared and circulated a draft recommendation.[64]

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61. Bruce Zagaris, *Sen. Helms' Inquiries over Individual Rights in MLATs Delay Mark-Up,* 4 INT'L ENFORCEMENT L. REP. 160 (May 1988).

62. Bruce Zagaris, *Fisher States that U.S. Expected to Sign Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, supra*.; *Exchange of Information: Government Decides Not to Sign*, THE TAX JOURNAL 2 (Jan. 12, 1989).

63. Bruce Zagaris, *Governments Take Divergent Paths on OECD Convention on Administrative Assistance in Tax Matters*, 5 INT'L ENFORCEMENT L. REP. 8 (Jan. 1989).

64. *Id*.

5. NEED FOR IMPROVED PRIVACY AND HUMAN RIGHTS PROTECTION

Globalization brings enhanced enforcement cooperation, both formal and information, through tax enforcement instruments and more broad-based criminal cooperation instruments. The new instruments, instead of providing for enhanced human rights and privacy protections, have intentionally or inadvertently downgraded such protections.[65]

A. Tax Information Exchange

As governments continue to given their revenue authorities more extensive powers, such powers will require extensive safeguards if abuse is to be prevented. In particular, in countries such as the U.S. where revenue authorities can apply substantial criminal sanctions, the taxpayer is entitled at least to the safeguards he would have enjoyed in a normal criminal investigation. Indeed in the 1990s a proliferation of taxpayer charters has underscored the need for greater taxpayer protection in the domestic context.[66]

While the OECD has endorsed a clear statement of taxpayers' rights and accompanying protection will be positive in terms of improving taxpayers' collective levels of compliance and providing a mechanism for limiting even more powerful tax administration, it has not yet set forth an international statement of taxpayers' collective rights. There needs to be a separate statement of taxpayers' right in addition to statements of basic human rights, especially insofar as they relate to international tax cooperation.[67]

A gap is the absence of a generalized legal instrument containing the taxpayers' rights that are universally recognized. In the absence of such a treaty, no process exists whereby standard-setting occurs by which generalized statements in an international covenant on taxpayers' rights could be made more concrete based on the experience and expertise in particular countries.[68]

Some countries protect taxpayers in the constitution through general and even provisions specific to tax, in legislation governing the tax administration, and/or in a taxpayers' charter. For instance, the U.S. has enacted three taxpayer bill of rights in 1988, 1996 and 1998. The U.K., Hong Kong, India and Canada have also enacted taxpayer bill of rights. The mechanisms for protecting taxpayers include the courts, an ombudsman or a specific taxpayer advocate or adjudicator.[69]

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65. This section is adopted from the last part of Zagairs, Initiatives by OECD, Financial Action Task Force on Money Laundering at Critical Junctures, *supra*.

66. Philip Baker and Anne-Mieke Groenhagen, *The Protection of Taxpayers Rights An International Codification* (European Financial Forum, London, April 2001)

67. *Id*. at 4-5.

68. *Id*. at 34.

69. *Id*. at 8-20.

Bilateral conventions on double taxation and exchange of information contain some protections of taxpayers. In particular, Article 26 of the OECD Model providing for the exchange of information between the revenue authorities of the two states concerned, has the following taxpayer protections:

1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of 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)."

Hence, the tax information exchange provisions guarantee the taxpayer secrecy and the promise that information that may disclose any secret ir trade process will not be exchanged. In practice, the guarantees are illusory since in the bulk of exchanges of information the taxpayer does not receive prior notice of the proposed exchange of information relating to him. Hence, it cannot challenge the exchange.

As mentioned above, when the U.S. was considering ratifying the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, the Treasury Department promised it would issue regulations providing for notice to taxpayers when the U.S. received requests and the opportunity to participate in such requests. It promised to consider extending the same regulations to all requests for tax information. However, Treasury has not followed up and would be better to implement this promise before it embarks on new enforcement initiatives.

B. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Similarly, proactive policing vis-a-vis transnational crime has produced transformations in international criminal cooperation law in the U.S.[70] Globalization ensures that the number of transnational criminal investigations and prosecutions involving the U.S. will increase. Undoubtedly an increasing

70. This discussion of the MLATs is from Bruce Zagaris, *Uncle Sam Extends Read for Evidence Worldwide*, 15 CRIMINAL JUSTICE 5, 55-56 (2001).

number of cases will bring into play the potential applicability of the various rights guaranteed by the U.S. Bill of Rights and/or applicable provisions of international human rights conventions, such as the International Civil and Political Covenant.[71] The tension between the need for the U.S. to cooperate more with national governments and international tribunals and the concern for the fulfillment of constitutional and international human rights standards is likely to continue to build. As mentioned above, some OECD countries have insisted that cooperation in criminal tax matters be done only through MLATs. Hence, it becomes important to consider rights of individuals in the context of MLATs.

Recent U.S. mutual assistance treaties in criminal matters that grant the government compulsory process rights, as delimited by the respective treaties, expressly state that the treaties do not create a right for a "private person" to obtain evidence. The purpose is to prevent its MLATs from being used to suppress or exclude evidence or to impede its investigations. Hence, if an adversely affected person wants to prevent the execution of a request which s/he believes was made in violation of the treaty, his or her only recourse under the treaty is to the executive authority of the requested country, not to its courts. Similarly, if s/he wants to contest that the requested country violated the terms of the treaty in executing a request s/he may do so only to the executive authorities of the respective countries.

The treaty provisions do not prevent a person adversely affected by a request or its execution from asserting whatever rights s/he has under the laws of the appropriate country in its courts. For instance, a person whose home or place of business was searched and whose property was seized under a search warrant issued pursuant to a treaty request, may assert whatever rights s/he has under the laws of the requested country to prevent that property from being turned over to the requesting country. Similarly, a person whose records have been subpoenaed pursuant to a treaty request may assert whatever rights/he has, under the laws of the requested country, to prevent the production of those records and/or their transmittal to the requesting country. An affected person would also presumably be able to seek to enjoin the requested country from taking an action not authorized by the treaty or its laws.[72]

In at least one case in which a defendant sought to use a U.S. mutual assistance treaty in criminal matters to obtain evidence from a U.S. treaty partner pursuant to a treaty which was silent with respect to a defendant's right to seek evidence under it, the trial court directed the Department of Justice to make a treaty request on behalf of the defendant.[73]

In a recent case in which I was involved, the defendants were able to persuade the U.S. court

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71. For background *see* Michael Abbell and Mark Andrew Sherman, *The Bill of Rights in Transnational Criminal Litigation*, THE CHAMPION 22-29 (1992).

72. 3 Abbell and Ristau, INTERNATIONAL JUDICIAL ASSISTANCE § 12-4-7.

73. The request was made by the Department of Justice to Switzerland at the direction of the U.S. District Court for the Southern District of New York in the case of Michele Sindona. *See* 3 Abbell and Ristau, INTERNATIONAL JUDICIAL ASSISTANCE § 12-2-1

to order the U.S. Government to allow the defendants to make use of a U.S. MLAT. In particular, the court ordered that the defense counsel and U.S. Government agree on a procedure to allow defense counsel to utilize the applicable MLAT for a series of witnesses whose depositions abroad were required and for other evidence gathering. If the defense counsel and the U.S. Government could not reach agreement, the court indicated it would set a hearing and make rulings. The court expressed sympathy to the need for defense counsel to proactively use the MLAT. Defense counsel and the U.S. Government did reach accommodation on the procedure. However, when it came to implementation, defense counsel were able to obtain a much more favorable plea offer and eventually a plea agreement was achieved.[74]

The potential for abuses of privacy and human rights is magnified in the context of the proposed exchanges of suspicious activity reports (SARs) which banks and financial institutions must make. Some countries, such as the U.S., take the position that, once exchanged, they have the right to keep and use such reports indefinitely. The European Union takes the position that, if no enforcement action is taken within three or five years, the information must be destroyed in order to safeguard privacy rights. The problem is exacerbated by the entry into the SAR business of hundreds of new jurisdictions whose banks and financial institutions and Financial Intelligence Units are not high trained or sophisticated when it comes to financial investigations.
Ironically, many of these jurisdictions made their mark on guaranteeing privacy.

6. SUMMARY AND CONCLUSION

Increasingly intergovernmental organizations, such as the OECD and FATF, have become self-selected rule-makers. In fact, the FATF is not even an organization, just an informal group. Even though the soft laws are not endorsed by legislatures, the standards, codes of conduct, recommendations, and guidance contained in soft measures can create peer group pressure on individuals and organizations to conform and provide a point of reference for negotiating settlements of disputes.[75]

The paper distinguishes among the various rules that provide guidelines for actions. Rules can be divided into three broad categories: front-door laws enacted by Parliament; rules enacted under authority delegated by an Act of Parliament; and rules made by self-selected organizations without direct or indirect authorization by Parliament.

A rule is a law in the traditional sense if it is introduced through the front door of Parliament and becomes law through a democratic process. International treaties that require approval by an

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74. *U.S. v. Nanne Hogendoorn et al*, U.S. District Court for the District of Alaska, Case No. A98-0087-CR (JKS), Transcript of Proceedings, Status Conference, July 15, 1999.

75. Richard Rose and Edward C. Page, *Lawmaking Through the Back Door* 1 (European Policy Forum April 2001); *see also* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed.) (2000).

affirmative vote in Parliament are a special form of front door legislation.

Delegated regulations, whereby the legislature delegates authority to make regulations to an executive department or to an administrative agency with special responsibilities, illustrate the making of laws through the side door. Some international agreements, such as the Treaty of Rome, shift authority to make rules above the heads of national legislatures. Problems of accountability may be exacerbated in intergovernmental agencies such as the IMF. IMF staff are supervised by a governing broad representing groups of countries. While national Ministry of Finance officials liaise with IMF staff, the amount accountability is questionable.

Rules are made through the back door when they lack the direct or delegated authority of an Act or Parliament. In a modern society, every large organization has self-selected rules, some in its charter of incorporation or by-laws and others in codes of conduct and standards, intended to promote efficiency and consistency in its work.

The paper distinguishes between hard and soft enforcement. Hard enforcement occurs when courts and related agencies can decide specific disputes arising under a law, interpret laws, and can even declare a law as in violation of the constitution. Courts give individuals aggrieved by governmental actions the opportunity to challenge what government does, and judicial rules are intended to ensure due process, that is, a fair consideration of the claims and counter-claims of all participants in a legal dispute. Some international organizations, such as the EU, can enforce rules through the courts. Other international organizations must enforce through conditions attached to its loans, such as the right to suspend loan payments if a national government does not deliver policies that are a condition of the loan.

International organizations also use soft enforcement, such as expertise, hortatory declarations and moral suasion to promote rules for which no hard means exist to secure compliance.

Increasingly intergovernmental organizations are trying to expand their power by turning soft unofficial standards into hard laws. An example is the OECD Fiscal Affairs Committee's harmful tax practices initiative. The OECD's Fiscal Affairs Committee (FAC) is composed of civil servants representing national fiscal and revenue authorities. Ministers in charge of fiscal affairs ultimately endorse its recommendations, but do scrutinize it as a parliament could. The process whereby the OECD FAC classified certain jurisdictions as tax havens occurred without consultation with national parliaments, political consultation or due process (i.e., in obtaining and assessing evidence and/or allowing the targeted countries to participate fully). The OECD HTC process illustrates the attempted creation of laws without the scrutiny to which national laws are subject, the absence of any means whereby the targeted countries can participate meaningfully in the application of the laws. In addition, the OECD HTC process is designed to apply sanctions to small non-signatory states without any right of appeal to a tribunal on findings of fact or interpretation.[76]

76. Rose and Page, *supra*, at 16. See also concerning process problems in the OECD initiative Bruce Zagaris, *Issues Low-Tax Regimes Should Raise When Negotiating with the OECD*, TAX NOTES INT'L 523 (Jan. 29 2001)

The OECD HTC initiative and the FATF initiative against non-cooperative countries suffer from the problem of opaque adoption procedures. The initiatives do not have the transparency and democratic processes a legislature uses in enacting bills. The means by which an act of a legislature is adopted may be complex and time-consuming. The lengthy procedures ensure that bills are open to scrutiny by many groups at several stages of the legislative process. The greater the controversy, the greater the publicity and public scrutiny. The rules and processes of intergovernmental organizations, such as the OECD, are less open and their sources are foreign. The remedy is more openness. First, the process should be open from the start of the law-making to all affected states. If that is not possible, then, another intergovernmental of more universal membership, such as the U.N., should undertake the task.

Public notification of draft rules is another step in achieving openness. Inviting and also considering comments and objections to the draft is an important aspect. Another element is notifying the jurisdictions of proposed rules. Affected persons that believe a draft rule does not adequately take their interests into account can then address elected representatives to advance their objections. Openness does not guarantee consensus. The drafting of rules is inherently a political process. In a democratic politic system persons who make objections will sometimes win and sometimes lose in open political debate.

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