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**United States Methods  
of Gathering  
International Tax Information**

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by  
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**I. Introduction and Scope:**

- A. This outline deals with certain aspects of methods used by the United States to obtain information, for tax purposes, from persons and places outside the United States. A bibliography on the topic, containing articles published after 1981, appears as Appendix B, at p. 28 below. Of particular value is the excellent and detailed bibliography prepared by Kate McKay, ¶ 48 at p. 32 below, which refers to many articles published before 1982. Because these bibliographies provide a rich source for further research, this outline is selective rather than comprehensive in its coverage. Thus, it only briefly mentions mutual assistance treaties (at ¶ III.C.1, p. 17 below), so interested parties should refer to other sources, e.g., in the case of Switzerland, the articles cited at ¶¶ 1, 2, 21, and 38 in the bibliography which appears as Appendix B, at p. 28 below. Still further citations are provided at appropriate places in the outline. See also R. GORDON & B. ZAGARIS, CO-CHAIRMEN, INTERNATIONAL EXCHANGE OF TAX INFORMATION (P.L.I. Course Handbook No. 225, 1985).
- B. This outline does not address methods of enforcing or collecting U.S. taxes from persons or sources outside the country. There are various collection procedures available to the U.S. for these purposes. All, however, are limited, and there exists no generally-effective international-tax-collection technique. See U.S. v. Harden, 41 D.L.R.2d 721 (Can. 1963); Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979); Comm. on Int'l Prop., Est. & Tr. Law, Local Enforcement of Foreign Tax Laws, 20 REAL PROP. PROB. & TR. J. 73 (1985); Smith, The Nonrecognition of Foreign Tax Judgments: International Tax Evasion, [1981] U. ILL. L. FORUM 241; Note, Enforce-

ment of Foreign Tax Judgments in the United States: The Queen ex rel. British Columbia v. Gilbertson, 14 J. INT'L L. & ECON. 281 (1980); Johnson, Nirenstein & Wells, Reciprocal Enforcement of Tax Claims Through Tax Treaties, 33 TAX LAW. 469 (1980); Dale, Withholding Tax on Payments to Foreign Persons, 36 TAX L. REV. 49, at 50-52 (1980). For various reasons, and notwithstanding the occasional frustration of the fisc in such matters, the U.S. has long been unwilling to enter into bilateral or multilateral agreements which contain tax-collection-assistance provisions.

- C. This outline does not deal with information gathering in non-tax contexts. However, similar issues arise when international information is desired for securities law, antitrust law, or other legal purposes. The McKay bibliography is not restricted to tax information, and thus provides references which may be relevant in other areas. See also H.R. Rep. 100-1065, 100th Cong., 2d Sess. (1988) ("Problems With the SEC's Enforcement of U.S. Securities Laws in Cases Involving Suspicious Trades Originating from Abroad"); Pitt, Hardison & Shapiro, Problems of Enforcement in the Multinational Securities Market, 9 U. PA. J. INT'L BUS. L. 375 (1987).
- D. This outline will consider unilateral, bilateral, and multilateral procedures for gathering international tax information. They are taken up, in order, below.

## II. **Unilateral Methods:**

- A. The techniques considered here are those which do not depend on the existence of any treaty. They include information reporting requirements, administrative summonses, grand jury subpoenas, letters rogatory, formal document requests, Tax Court orders, and informal procedures.

- B. *Information reporting requirements:* the IRS requires the filing of many forms which, in turn, call for the disclosure of much international tax information. A quite useful description of the various forms which may be required can be found in the following articles: Starr & Jacobs, International Transactions: Information Reporting and Backup Withholding, 16 TAX MGMT. INT'L J. 100 (March 13, 1987); Stewart, U.S. International Tax Reporting Forms: How to Claim Benefits and Meet Requirements, TAX PLAN. INT'L REV., Dec. 1986, at 9-17; Fishman, Tax Forms for International Transactions: An Annotated Filing Guide for Practitioners, TAXES INT'L, July 1986, at 3-15, 78-83 (1986); Fishman, Tax Forms for International Transactions: An Annotated Filing Guide for Practitioners, 63 J. TAX'N 38-45 (1985); Fishman, Reporting Requirements Imposed on Foreign-Controlled Corporations, 33 CAN. TAX J. 1052-67 (1985); Fishman, Reporting Requirements Imposed on Foreign-Controlled Corporations, 63 TAXES 773-79 (1985). Of particular interest is Form 90-22.1, which must be filed with the Treasury Department whenever the taxpayer has signatory power over, or a beneficial interest in, a foreign bank account.<sup>1</sup> The Form has a strange number because it is a Treasury Department, not an IRS, form. It is immune from the non-disclosure rules of I.R.C. § 6103, which is explicitly intended. G.C.M. 37900 (July 26, 1982) reads, in part, as follows:

"Form 90-22.1 . . . replaced Form 4683 in 1977. Both were issued pursuant to the Currency and Foreign Transactions Reporting Act . . . The reason for the new form was that the information asked for on Form 4683 might be subject to potential disclosure problems with respect to other federal agencies because that form was

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1 The Form is authorized under the Currency and Foreign Transactions Reporting Act, Pub. L. 91-508, 84 Stat. 1118 (1970). The relevant provisions are codified at 31 U.S.C. § 5314, and are expanded upon in 31 C.F.R. § 103.24.

thought to contain tax return or return information. See H.R. Rep. No. 95-246, 95th Cong., 1st Sess 35-37 (1977). . . . Consequently, in order to permit broad multi-agency dissemination of the information gathered pursuant to the foreign account reporting requirements, it was the recommendation of Committee on Government Operations in 1977 that 'Treasury should devise alternate procedures . . . or recommend legislation to remedy the specific problem or to transfer implementing authority . . . .' H.R. Rep. No. 95-246, supra, at 13. Accordingly, 'implementing authority' was assumed directly by the Department of the Treasury in 1977, and I.R.S. Form 4683 was replaced by Treasury Form 90-22.1."

For examples of cases in which the failure to file Form 90-22.1 was found relevant in imposing criminal or other sanctions, see Ronald L. Lerch, T.C. Memo. 1987-295; United States v. Franks, 723 F.2d 1482 (10th Cir. 1983).

C. *Administrative summonses:*

1. The Service may issue summonses to witnesses, and to obtain documents and records. I.R.C. § 7602(a). These are enforceable by District Courts in which the person resides or is found. I.R.C. §§ 7402(b), 7604(a). Venue is in the D.C. District for U.S. citizens and residents not residing in or found in any judicial district. I.R.C. § 7701(a)(39).
2. The scope and enforceability of such summonses has been the subject of much litigation.<sup>2</sup> The defenses asserted by persons summoned include arguments based upon alleged extraterritoriality of

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2 There appears to be no legally-meaningful distinction between enforcement of administrative summonses and court enforcement of other forms of discovery orders, such as grand jury subpoenas. Thus, no effort has been made to segregate precedents, below, and many of the relevant cases involve compulsion orders other than administrative summonses.

U.S. enforcement. Issues include the effect of foreign jurisdictions' anti-disclosure rules, which in turn may involve civil or criminal sanctions for violation. The U.S. courts, in more recent years, have tended to analyze cases by purporting to balance the competing interests of the U.S. (in obtaining disclosure) and the foreign states (in preventing disclosure). An early and often-quoted formulation of the balancing test was suggested by the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965):

"Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct on the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as

- "(a) vital national interests of each of the states,
- "(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- "(c) the extent to which the required conduct is to take place in the territory of the other state,
- "(d) the nationality of the person, and
- "(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

3. After a long gestation period, the third Restatement was recently issued. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). The portions dealing with jurisdiction and enforcement of orders compelling international discovery have been

significantly reordered and expanded. Of particular interest are the provisions of §§ 403 and 442. These are set forth in Appendix A, at p. 25 below.

4. With very few exceptions, U.S. courts, although purportedly employing a balancing-of-interests test, have required discovery of foreign-based information even when the foreign state in question has legal rules opposing such disclosure. See, e.g., In re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120 (8th Cir. 1986), judgment vacated and remanded, 482 U.S. 522 (1987); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); Garpeg, Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984), motion to vacate denied, 583 F. Supp. 799 (S.D.N.Y. 1984); United States v. Toyota Motor Corp., 569 F. Supp. 1158 (C.D. Cal. 1983); United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Proceedings, 532 F.2d 404 (5th Cir.), rehearing denied, 535 F.2d 659 (5th Cir.), rehearing denied sub nom. United States v. Field, 535 F.2d 660 (5th Cir.), cert. denied sub nom. Field v. United States, 429 U.S. 940 (1976). But a few cases have declined to order disclosure, e.g., In re Sealed Case, 825 F.2d 494 (D.C. Cir.), cert. denied sub nom. Roe v. United States, \_\_\_ U.S. \_\_\_, 108 S. Ct. 451, 98 L.Ed.2d 391 (1987); United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983). For a helpful discussion of the cases, and the balancing-of-interests test, see Reporters' Notes



1-11, RESTATEMENT (THIRD), cited at ¶ II.C.3, p. 5 above, at pp. 354-66.

5. The U.S. may also employ its summons power to obtain information for use by a foreign treaty partner. See, e.g., United States v. A.L. Burbank Co., ¶ III.B.2.c at p. 16 below. In what is perhaps the most recent case in the area, Revenue Canada asked the IRS to obtain certain information about U.S. bank accounts of Philip George Stuart, a Canadian citizen whose tax affairs were being investigated in Canada. Pursuant to the U.S.-Canadian treaty, the IRS served an administrative summons on the bank in question. At Mr. Stuart's request, the bank refused to comply, and Mr. Stuart petitioned the Federal district court to quash the summons. His argument was:

- a. I.R.C. § 7602(c) prohibits the IRS from issuing a summons when a Justice Department criminal-prosecution referral is in effect.
- b. The investigation of him by Revenue Canada was a criminal investigation.
- c. Therefore, I.R.C. § 7602(c) should be applied to prevent the use of an administrative summons in this case.

The district court rejected the argument and ordered the bank to comply with the summons. On appeal, however, the 9th Circuit reversed. The U.S. Supreme Court granted certiorari to resolve a conflict between the 9th Circuit and the 2d Circuit, and, on February 28, 1989, reversed. United States v. Stuart, \_\_\_ U.S. \_\_\_ (Feb. 28, 1989). The court said:

"So long as the summons meets statutory requirements and is issued in good faith, as we defined that term in United States v. Powell, 379 U.S. 48, 57-58 (1964), compliance is required, whether or not the Canadian tax investigation is directed toward criminal prosecution under Canadian law."

The court explicitly left open two questions: (1) whether the IRS could issue an administrative summons in aid of a foreign treaty partner's request if a simultaneous U.S. criminal referral had occurred, and (2) whether the U.S. could use information it received from a foreign treaty partner in a U.S. criminal prosecution. United States v. Stuart, *supra*, \_\_\_ n. 3.

6. For cases involving court-compelled "waivers" of foreign secrecy laws, see ¶ II.D.2 at p. 10 below.

D. *Grand jury subpoenas:*

1. Criminal tax investigations often involve the use of grand jury subpoenas. If the person subpoenaed is not found within the United States, a court may nevertheless issue a subpoena, but only if the person is a resident or national of the United States. 28 U.S.C. § 1783. Thus, subpoenas may issue either if the person is *resident* within or is *found* within this country.
  - a. A foreign corporation or other entity may be treated as *resident* for this purpose if its contacts with the U.S. are sufficient. At least one court invoked principles from International Shoe Co. v. Washington, 326 U.S. 310 (1945), as an aid in interpreting the meaning of "resident" for this purpose. Matter of Arawak Trust Co. (Cayman), 489 F. Supp. 162 (E.D.N.Y. 1980) (correspondent banking relationship not

sufficient for minimum contacts). However, other courts have hinted at a much broader possible reach. For example, the Second Circuit, in dictum, stated:

"That the United States is injuriously affected by the wrongful evasion of its revenue laws is beyond dispute. Under such circumstances, it well may be that the occurrence of the offense itself is sufficient to support a claim of jurisdiction, provided adequate notice and an opportunity to be heard has been given." Matter of Marc Rich & Co., 707 F.2d 663, 667-68 (2d Cir.), cert. denied, 463 U.S. 1215 (1983).

(The quoted remarks are dictum because the Court went on to say, "However, appellant's contacts with the United States were not limited to appellant's alleged extraterritorial violation of United States revenue laws." Id. at 668.)

- b. If a person can be *found* within the United States, that person can often be compelled to disclose, or to cause to be sent into this country, documents located outside the United States. Thus, e.g., in In re First Nat'l City Bank, 396 U.S. 897 (2d Cir. 1968), the U.S. head office of the bank was directed to disclose records located at its German branch. In the so-called Field litigation, ¶ I.I.C.4 at p. 6 above, a director of a foreign bank, served at a U.S. airport, was directed to disclose records located at the foreign offices of the bank. And in the Bank of Nova Scotia litigation, ¶ I.I.C.4 at p. 6 above, a Miami agency of a Canadian bank was ordered to cause disclosure of records located at various foreign branches of the Canadian bank.

2. A court may also compel a witness, even if a "target" of a grand jury investigation, to execute a waiver of foreign bank secrecy, to consent to discovery of information about foreign bank accounts, and to sign and deliver a consent directive (or "waiver") instructing foreign banks to disclose to the U.S. records of any and all bank accounts over which the witness has a right of withdrawal. Even if disclosure of such information would otherwise violate secrecy laws of the foreign jurisdiction, and even if the information in question may help to convict the witness of a U.S. criminal offense, the 5th Amendment is no defense and the witness must execute the forms. Doe v. United States, 108 S. Ct. 2341, 62 A.F.T.R.2d 5744, 88-2 U.S.T.C. ¶ 9545 (1988), affirming 812 F.2d 1404 (5th Cir. 1987). Prior to the Doe decision, there had been a conflict in the Circuits on the issue:
  - a. Most appellate courts had compelled the waiver, e.g., United States v. Ghidoni, 732 F.2d 814 (11th Cir.), cert. denied, 469 U.S. 932 (1984); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); In re United States Grand Jury Proceedings (Cid), 767 F.2d 1131 (5th Cir. 1985); In re Grand Jury Subpoena, 826 F.2d 1166 (2d Cir. 1987); and, of course, the 5th Circuit in Doe.
  - b. The 1st Circuit, however, had held to the contrary, in a divided decision. In re Grand Jury Proceedings (Ranauro), 814 F.2d 791 (1st Cir. 1987).

E. *Letters rogatory:*

1. Letters rogatory are requests from one country to the courts of another, asking for judicial assistance in the second state in obtaining information or testimony. They are usually made available by the second state as a matter of international comity. For a general discussion of the U.S. practice with respect to letters rogatory, see RESTATEMENT (THIRD), ¶ II.C.3 at p. 5 above, § 474, and the Comments and Reporters' Notes to that section.
2. In the U.S., there is Federal statutory authority permitting Federal district courts to respond to foreign letters rogatory. 28 U.S.C. § 1782. The legislation is the descendant of statutes dating back to 1855. See 7 Op. A.G. 56 (Feb. 28, 1855). It is intended not only to honor this country's duties of comity, but to stimulate international reciprocity. See, e.g., John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 135 (3rd Cir. 1985). For a recent discussion of the standards to be used in responding to foreign requests, under 28 U.S.C. § 1782, see In re Chun, 858 F.2d 1564 (11th Cir. 1988).
3. Several states have enacted similar legislation, authorizing their courts to respond to foreign-issued letters rogatory, e.g., New York Civ. Prac. Law & Rules § 3102(e). See also id. § 3108, authorizing New York courts to issue letters rogatory addressed to foreign judicial tribunals.
4. Letters rogatory are of limited utility because the process is slow, and because the resulting information is often inadmissible in evidence under our rules. Nevertheless, such requests are not infrequently made by the U.S. authorities, and provisions for their use

appear in the United States Attorneys' Manual, both for civil and criminal matters.

5. A further obstacle to the use of letters rogatory was indicated recently by Michael C. Durney, Acting Assistant Attorney General, Tax Division, Department of Justice, in testimony before the Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations of the U.S. House of Representatives. Testifying on Sept. 16, 1987, about international tax administration, Mr. Durney said, in part:

"Where no treaty applies the Tax Division often uses the letters rogatory process to obtain offshore evidence. But the United Kingdom, and many of its present and former dependencies whose legal systems are rooted in United Kingdom common law, are now rejecting our letter rogatory requests. The basis for rejection is the international rule of comity, whereby the courts of a given state will not assist in the direct or indirect enforcement of a revenue law of a foreign state. Generally see In re State of Norway's Application, [1986] 3 W.L.R. 452, [1986] 1 Lloyd's Rep. 496 (C.A.). Thus, a viable approach to obtaining evidence such as bank records in several tax haven countries is no longer available to use."

F. *Formal document requests:*

1. Paradoxically, I.R.C. § 982, added by TEFRA in 1982, is probably best understood not as a means of gathering, but as a means of foreclosing the use of, international information. It permits the IRS, under certain circumstances, to make a "formal document request" for the production of "foreign-based documentation." If the taxpayer fails substantially to comply with the request, the docu-

mentation in question generally cannot later be used by the taxpayer in a civil tax proceeding. I.R.C. §§ 982(a), (c), and (d).

2. An exception exists if the taxpayer proves that the failure to comply was "due to reasonable cause." I.R.C. § 982(b)(1). But I.R.C. § 982(b)(2) provides:

"For purposes of paragraph (1), the fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the requested documentation is not reasonable cause."

Thus, foreign bank secrecy laws are explicitly to be disregarded.

3. The obvious indirect purpose of the provision is to compel disclosure, but the only sanction is blocking the affirmative use of the documentation by the taxpayer. Thus, while I.R.C. § 982 may protect the Service against unfair surprise, it will not work to compel discovery if the taxpayer is willing to forego use of the documentation at trial.
4. For further discussion of formal document requests, see the outline by Garbis & Namorato, Internal Revenue Service Access to Foreign Evidence, A.L.I.-A.B.A. COURSE OF STUDY, INTERNATIONAL TAXATION 423, 428-32 (1988). See also Lassila, The Miscellaneous Foreign Tax Provisions of TEFRA, 15 TAX ADVISER 200 (1984); Cutter, Admissibility of Documentation Maintained in Foreign Countries, 35 TAX EXEC. 299 (1983); Feinschreiber, Tax Procedure: Analysis of the New International Provisions, 9 INT'L TAX J. 5 (1982).

G. *Tax Court orders:*

1. The Tax Court may order foreign persons to produce foreign-located books and records, pursuant to I.R.C. § 7456(b), a provision

which has been in the Code since 1954. For failure to comply, the Court may impose sanctions which include striking out pleadings, dismissing the proceeding, or rendering a default judgment against the foreign person.

2. The Court has used this provision to mandate production of voluminous information sought by the IRS, albeit for inspection in Hong Kong where they were located. Hong Kong & Shanghai Banking Corp., 85 T.C. 701 (1985).
3. Although I.R.C. § 7456(b) does not apply to domestic entities, the Court may nevertheless require a domestic taxpayer to produce foreign-situs documents, and preclude taxpayer from introducing any evidence "derived" from them for failure to comply, under Tax Court Rule 104(c). Gerling Int'l Ins. Co., 86 T.C. 468 (1986).
4. In a later opinion in the same case, at 87 T.C. 679 (1986), the Tax Court granted summary judgment against taxpayer for its noncompliance, upon finding that "[t]here appears to be no possibility, given the preclusion of evidence provision of our [earlier] order . . . that petitioner can carry its burden of proof." But this was reversed by the Third Circuit in what it described as "a narrow holding based on the current record in this case." The appellate court found insufficient evidence that the taxpayer had "control" of the foreign records in question, and remanded for further proceedings. Gerling Int'l Ins. Co. v. Commissioner, 839 F.2d 131 (3d Cir. 1988) (2-1 decision).
5. In any event, these Tax Court remedies are of no use unless the case is already pending before the Court. Thus, they do not help



in obtaining foreign information for the purpose of determining whether tax is due.

- H. *Informal procedures:* it is understood that the U.S. Government exchanges certain information informally, with foreign governmental and quasi-governmental organizations, in a variety of ways. For example, U.S. law-enforcement officials cooperate with Interpol in sharing information about known or suspected international criminals.

### III. **Bilateral Methods:**

- A. The techniques considered here depend upon bilateral treaties (or similar agreements) between the United States and other countries. Included are tax treaties, mutual assistance treaties, and executive agreements of various sorts.

B. *Tax treaties:*

1. The U.S. is currently a party to more than 3 dozen bilateral income tax treaties. All contain a provision for exchange of information, except for the treaty with the Soviet Union. Illustrative of the language of the treaties is the following:

"The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention." U.S. Treasury Model Treaty, Art. 26(1) (1977).

The quoted language is only the first sentence of Article 26(1).

The remaining four sentences of Article 26(1), and the provisions of the other paragraphs of Article 26, should be inspected by stu-

dents of the issue.<sup>3</sup> Similar language appears in the more than one-dozen estate and gift tax treaties to which the U.S. is a party.

2. Five types of information exchange programs have been implemented under these treaties:
  - a. Routine exchanges, primarily involving withholding tax information. The U.S. provides over half a million documents to its treaty partners annually. It receives many more, in return, but about 90% of the documents received come from Canada.
  - b. Spontaneous exchanges, in which the U.S. or its treaty partner furnishes information which is discovered during tax audit activities and which suggests noncompliance with the tax law of the treaty partner. This is a relatively new program, which -- although at first restricted to the U.K., France, and Germany -- has been extended to all treaty partners where the treaty permits it.
  - c. Specific exchanges, in which the U.S. provides information in response to a specific request from a treaty partner, or vice versa. In support of such requests, the U.S. will fully use its administrative and summons powers to elicit the information sought. See United States v. A.L. Burbank Co., 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976). See also United States v. Stuart, ¶ II.C.5.c at p. 7 above.

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3 Although a few linguistic changes were made in the 1981 Draft U.S. Model, Article 26 of that later version appears to be substantively identical to the 1977 Model.

- d. Industrywide exchanges, in which the treaty partners cooperate, pursuant to an exchange of letters, in attempting to develop comprehensive information about a particular industry's practices and operating patterns. As of the Fall of 1988, seven industries were being examined via exchanges of information with eight treaty partners. See Woodard, International Exchange of Tax Information, in Gordon & Zagaris, ¶ I.A at p. 1 above, 25, at 29.
  - e. Simultaneous examinations, in which the U.S. and one or more of its treaty partners simultaneously examine the tax affairs of a single taxpayer and its affiliates. The simultaneous-examination program is now operative between the U.S. and Canada, France, Germany, Italy, Norway, and the United Kingdom.
- C. *Mutual assistance treaties:*
1. In general:
    - a. The U.S. has entered into agreements with many foreign countries involving different forms of mutual assistance. The agreements vary widely among themselves, as to scope, procedure, and other matters.
    - b. The U.S. has general agreements for mutual assistance in criminal matters with Canada, Columbia, Italy, Morocco, the Netherlands, Switzerland, and Turkey. Most of this cover at least some sorts of fiscal matters.
    - c. The U.S. has entered into more limited mutual assistance agreements with various countries. For example, there is an

agreement with the Cayman Islands dealing with Narcotic Drugs. See Zagaris, Exchange of Information Outside Tax Agreements, in Gordon & Zagaris, ¶ I.A at p. 1 above, 63, at 94-98.

2. Carribean Basin Initiative:
  - a. As part of the U.S.'s desire to achieve a closer integration of the U.S. economy with the economies of countries in the Carribean Basin, to promote greater political stability in the area, and in order to encourage those countries not to rely on tax-haven-status income, the U.S. set forth a Carribean Basin Initiative ("CBI"). One aspect of it was an effort to enter into exchange-of-information agreements between the U.S. and such countries. To this end, the U.S. developed model language, and has used both "carrots" and "sticks" to encourage CBI countries to sign it.
  - b. The "carrots" -- incentives to those countries which agreed to sign an acceptable exchange-of-information treaty -- included:
    - (1) Permitted FSC status: under I.R.C. § 927(e)(3), only countries which have signed such an agreement are eligible to host FSC's.
    - (2) Deductible conventions: under I.R.C. § 274(h)(6), countries which have signed such an agreement are automatically treated as within the "North American area." This, in turn, allows taxpayers attending conventions there to deduct their expenses, if otherwise

ordinary and necessary, without having to prove that it is as reasonable to hold the meeting there as within the North American area.

- (3) Qualified Possession Source Investment Income ("QPSII"): CBI countries which sign such exchange-of-information agreements become eligible to receive investments, under I.R.C. § 936(d)(4)(B), the income of which in turn will qualify, as QPSII, for favored treatment for possessions corporations.

- c. The "sticks" -- disincentives to those countries which do not agree to sign an acceptable exchange-of-information treaty -- include unilateral termination, by the U.S., of existing bilateral treaties.

As a result of the CBI initiative, the U.S. has four currently-effective agreements -- with Barbados, Grenada, Jamaica, and Dominica -- which satisfy all of the necessary criteria, and which thus qualify the countries in question for the above benefits. As described in Rev. Rul. 87-95, 1987-38 I.R.B. 5, Barbados (by agreement of Nov. 3, 1984, effective as of the same date), Grenada (by agreement signed on Dec. 18, 1986, which entered into force on July 13, 1987), and Jamaica (by agreement of Dec. 18, 1986, effective as of the same date) so qualify. Furthermore, a protocol dated May 21, 1980, and effective for conventions and meetings that began on or after January 1, 1982, added a new Article 25 to the U.S. income tax treaty with Jamaica. The new Article allows convention-expense deductions without the taxpayer having to make a "specific

showing of reasonableness," per Rev. Rul. 87-95. Finally, the ruling states that:

"exchange of information agreements with Costa Rica and Saint Lucia have been signed, but have not yet entered into force. For current information on . . . the North American area, taxpayers may telephone Branch 1 of the Office of the Associate Chief Counsel (International) at (202) 287-4851 (not a toll-free call)."

An agreement with the Commonwealth of Dominica, signed Oct. 1, 1987, and which entered into force on May 9, 1988, also satisfies the CBI criteria. The provisions of these agreements differ in various ways, but it is beyond the scope of this outline to explore the differences.

D. *Executive agreements:*

1. While not subject to ratification by the Senate, executive agreements are in many ways identical in force to treaties. They have often been used to gather international information, sometimes for tax and sometimes for other purposes.
2. For a list of the almost three dozen such agreements which were in effect in 1979, see HEARINGS BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF THE COMMITTEE ON WAYS AND MEANS, OFFSHORE TAX HAVENS, 96th Cong., 1st Sess. 243-45 (April 24, 25, 1979) (prepared statement of Harvey P. Dale). Although no doubt many others have been signed since then, no effort has been made here to update that ten-year-old listing.

#### IV. Multilateral Methods:

- A. The techniques considered here depend upon multilateral treaties. The treaties discussed are the Hague Evidence Convention, and the OECD proposed Multilateral Mutual Assistance Treaty. Although several other multilateral conventions exist, the U.S. is not a party to any of them.<sup>4</sup>
- B. *The Hague Evidence Convention:*
1. The proper title of the treaty is The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. The United States is a signatory, and the treaty has entered into force. The use of the Hague Convention is contemplated by § 473(2) and (3) of the RESTATEMENT (THIRD), cited at ¶ II.C.3, p. 5 above, and in the Comments and Reporters' Notes to §§ 473-74.
  2. The Hague Convention applies in aid only of civil or commercial litigation. The U.S. position is that the Hague Convention procedures will be honored even if the foreign-initiated request pertains to foreign tax proceedings. It is likely, however, that other countries would not honor a U.S. request, under the Hague Convention, for fiscal information. See Comment *c* to § 473, *id.* Compare the testimony of Michael C. Durney, as to similar problems with the use of letters rogatory, ¶ II.E.5 at p. 12 above.

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<sup>4</sup> E.g., Agreement Concerning Reciprocal Administrative Assistance in Matters of Taxation, Nov. 9, 1972, 956 U.N.T.S. 61 (Denmark, Finland, Iceland, Norway, and Sweden); E.E.C. Council Directive 77/799, 20 O.J. EUR. COMM. (no. L-336) 15 (1977) (members of the E.E.C.).

3. Resort to the Hague Convention is not mandatory, and trial courts are free to utilize other procedures without first exhausting remedies which may be available under it. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).
4. Since the Hague Convention applies only to judicial requests, it may not be used as part of an investigation prior to the commencement of litigation. For this reason, and for the reason discussed at ¶ IV.B.2, p. 21 above, it is of limited value in tax matters.

C. *The OECD proposed Multilateral Mutual Assistance Treaty:*

1. The OECD/Council of Europe Convention for Mutual Administrative Assistance in Tax Matters was opened for signature on Jan. 25, 1988. The United States is not a signatory, but the administration has indicated its intention to become one.
2. There has been some strong opposition to the treaty expressed by groups within the U.S., e.g., the United States Council for International Business. On December 20, 1988, the U.K. announced its decision not to become a signatory. The Right Honorable Norman Lamont, Financial Secretary to the British Treasury, although reaffirming the U.K.'s strong support for international cooperation in fiscal matters, went on to say:

"[I]n view of the existing provisions for mutual assistance in this area provided, for example, by our extensive network of double taxation treaties and our European obligations, we have concluded that the UK need not become a party to the Convention." Inland Revenue Press Release (Dec. 20, 1988).



3. No hearings on ratification have yet been scheduled, but it is expected that the Senate Foreign Relations Committee will meet to consider the Convention before the end of 1989.

## V. Conclusion:

- A. The U.S. has been the most aggressive nation in asserting unilateral methods to compel the disclosure of international tax information. This has sometimes been productive, but often has failed. It has almost always been successful, however, in annoying (even infuriating) other nations, including some of our closest allies.
- B. More recently, the U.S. has become more effective in entering into bilateral agreements for exchange of information. Whether through negotiations alone, or by use of "carrots" and "sticks," these routes seem more likely to produce useful results.
- C. The U.S. has not yet ratified the OECD agreement, but it stands poised to do so. It will be interesting to watch developments here, from two points of view:
  1. The arguments, pro and con, that have been and will be advanced during the ratification process should illuminate policies and attitudes that may affect the future utilization of the treaty.
  2. If the treaty is ratified, it remains to be seen how often it will be invoked and how effective it will prove to be.
- D. The U.S. will certainly continue to exert strenuous efforts to gather tax information from persons and places outside this country. Ever since the so-called "Gordon Report" -- R. GORDON, TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS -- AN OVERVIEW (Jan. 12, 1981) -- it has been an important focus of IRS, Treasury, Justice, and legislative attention. New

information reporting forms, litigation initiatives, treaty developments, and legislation are quite likely. Thus, the features of the terrain sketched above will change, providing just one more challenge to practitioners in the area.

Appendix A  
RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW  
OF THE UNITED STATES (1987)

§ 403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;

- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

(3) when it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

**§ 442. Requests for Disclosure: Law of the United States**

- (1) (a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.
- (b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.
- (c) In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other

information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

(2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,

- (a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;
- (b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);
- (c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

Appendix B  
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