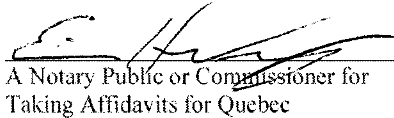
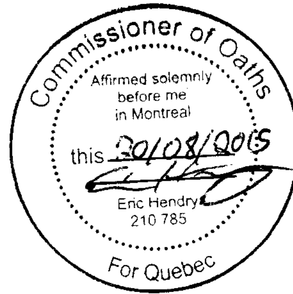
This is Exhibit A referred to in the
Affidavit of Allison Christians
Sworn before me at the City of Montreal,
in the Province of Quebec,
on the 20th day of July, 2015.



A Notary Public or Commissioner for
Taking Affidavits for Quebec



Supplemental Report of Allison Christians

1] I provide this supplemental report to explain the legal nature, under US law, of the *Agreement Between the Government of Canada and the Government of the United States of America to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital*, 5 February 2014 (hereinafter, the "Intergovernmental Agreement") and its relationship to the *Convention between The United States of America and Canada with respect to Taxes on Income and on Capital*, signed at Washington on 26 September 1980, as Amended on 14 June 1983, 28 March 1984, 17 March 1995, 29 July 1997, and 21 Sept. 2007, (hereinafter, the "Treaty").

2] Attached hereto is an article I authored in 2013. I present it as my opinion of the general legal status under US law of FATCA-based intergovernmental agreements.

3] It is my opinion that under US law, the Tax Treaty is a "treaty," while the Intergovernmental Agreement is a "sole executive agreement."

4] Under US law, a "treaty" is an international agreement that is signed by the President of the United States (hereinafter, "President") and ratified upon the advice and consent of two-thirds of the United States Senate (hereinafter, "Senate"), pursuant to Article II of the United States Constitution. Under US law, a "sole executive agreement" is an agreement entered into by the President upon his plenary executive authority and without the advice and consent of the Senate.[1]

5] The President and the Senate were each a party to the Treaty. The President was a party to the Intergovernmental Agreement, but the Senate was not.

6] The President was a party to the Treaty through his authorized delegates in the US Department of the Treasury (hereinafter "Treasury"), who negotiated, initialed, and signed the Treaty (including the original treaty and each of its protocols) prior to its ratification. The President was a party to the Intergovernmental Agreement through authorized delegates in Treasury who negotiated the treaty, and through Richard M. Sanders, a *Charge d'Affaires ad Interim* stationed at the U.S. Embassy in Ottawa, who signed the agreement for the United States.

7] The Senate became a party to the Treaty when the President transferred it (including the original treaty and each of its protocols) to the Senate Foreign Relations Committee, which deliberated over its text and reported it with recommendation to the full Senate in favour of consent to ratification, and when

1 U.S. Department of State Foreign Affairs Manual Volume 11—Political Affairs § 723.2-2(C).

two thirds of the Senate voted to consent to its ratification.[2] The President did r transfer the Intergovernmental Agreement to the Senate Foreign Relations Committee, nor has the Congress given its prior statutory consent to the Preside to enter into the Intergovernmental Agreement.

8] The Senate's role in treaty-making in the United States is independent and disti from that of the Executive, and does not consist of mere formalization of the Executive's wishes. On occasion the Senate makes changes to proposed treaties prior to giving consent. For example, the Senate Foreign Relations Committee reported the Fifth Protocol to the Treaty to the full Senate with one declaration a one condition.[3] On occasion, the Senate Foreign Relations Committee refuses to consent to treaties. Senate Foreign Relations Committee Majority Member Sena Rand Paul has opposed treaties presented to the Senate Foreign Relations Committee since 2010, on grounds involving disagreement with the scope of information exchange authorized by these treaties.[4] In his capacity as a Senator, Senator Paul is a party to a lawsuit challenging the authority of the Treasury to enter into the Intergovernmental Agreement, together with similar intergovernmental agreements between the United States and three other countries. According to that lawsuit, Senator Paul would vote against the Intergovernmental Agreement if it was submitted to the Senate for advice and consent under Article II or to the Congress as a whole for approval.

9] Treaties are distinct from sole executive agreements as a matter of US law. Treaties, together with the Constitution, and all legislation duly enacted by Congress, are "the Supreme Law of the Land" pursuant to Article VI, Clause 2 of the US Constitution.[6] Sole executive agreements are not equivalent to treaties, laws, or the Constitution; rather, these agreements constitute agency actions that can be set aside by US courts if they are inconsistent with the Constitution or other laws.[7]

---

2 See Senate Exec. Rep. 110-15, Protocol Amending 1980 Tax Convention With Canada, 13 March 2008, *available at* http://www.foreign.senate.gov/treaties/110-15; Senate Exec. Rep. 105-12, Protocol Amending Tax Convention With Canada, 30 October 1997, *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105erpt12/html/CRPT-105erpt12.htm; Senate Exec. Rep. 104-9, Revised Protocol Amending the Tax Convention with Canada, 10 August 1995, *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104erpt9/html/CRPT-104erpt9.htm.

3 Senate Executive Report 110-15, 11 Sep. 2008, available at http://www.gpo.gov/fdsys/pkg/CRPT-110erpt15/html/CRPT-110erpt15.htm.

4 U.S. Department of State, Treaties Pending in the Senate (updated as of April 27, 2015) *at* http://www.state.gov/s/l/treaty/pending/.

5 *Crawford v. U.S. Department of Treasury*, 15-cv-00250 (filed 14 July 2015).

6 That Article reads in full as follows: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

7 U.S. Department of State Foreign Affairs Manual Volume 11—Political Affairs § 723.2-2(C) ("The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority."); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) ("[E]xecutive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the 'supreme Law of the Land.'"); Restatement (Third) of Foreign Relations Law § 115 reporters' n. 5 ("[A]n executive agreement made by the President on a matter expressly within the constitutional

For this reason, sole executive agreements are typically reserved for short-term, administrative or routine matters over which Congress exercises no independent authority, such as recognizing foreign states or making armistice agreements during declared wars.[8]

10] The constitutional validity of sole executive agreements is uncertain according to leading US international law scholars. For example Louis Henkin stated that "[t]he power to make [sole executive] agreements remains vast and undefined, and its constitutional foundations remain uncertain.";[9] Joel Paul has stated that "[t]he Framers [of the US Constitution] did not grant the President exclusive power to make treaties committing the nation internationally";[10] Michael Ramsey concluded that the "independent presidential power to undertake international obligations... extended only to minor, short term agreements [and] unlike treaties, international obligations undertaken by the President alone lacked the status of law in the domestic legal system, and thus required legislative enactment for domestic implementation";[11] and Oona Hathaway has stated that "The President may not use a sole executive agreement with another nation ... to expand his powers beyond those granted to him in the Constitution."[12]

11] The procedure chosen to enter into an international agreement reflects an understanding of the nature of the agreement under US law. The US Department of State lists among the criteria used in choosing a procedure for an international agreement:

1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
2) Whether the agreement is intended to affect State laws;
3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
4) Past United States practice as to similar agreements;
5) The preference of the Congress as to a particular type of agreement;

---

authority of Congress, such as the regulation of commerce with foreign nations, is subject to the controlling authority of Congress and will not be given effect in the face of an inconsistent Congressional act"); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953) *aff'd*, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955) (a sole executive agreement is void where it contravenes a federal statute and relies on constitutional power expressly reserved to Congress); 5 U.S.C. § 706 (reviewing courts shall "hold unlawful and set aside agency action ... found to be ... (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law").

[8] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. g (1987); affirmed in *United States v. Pink*, 315 U.S. 203 (1942).

[9] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 219 (2d ed. 1996).

[10] Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 692 (1998).

[11] Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 136–37 (1998).

[12] Oona A. Hathaway, Presidential Power over International Law: Restoring the Balance, 119 Yale L.J. 140 (2009).

6) The degree of formality desired for an agreement;

7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and

8) The general international practice as to similar agreements.[13]

12] As a sole executive agreement, the Intergovernmental Agreement has been adopted using a procedure that is inconsistent with the type of procedure that would typically be expected for an agreement of its nature, namely, the Article II treaty procedure, pursuant to the US State Department criteria. The Intergovernmental Agreement:

1) involves commitment and risk because it promises that the United States Treasury will implement the provisions of the US federal income tax code as it pertains to FATCA other than according to the statutory terms adopted by Congress;[14]

2) is intended to affect state laws because it promises to increase tax information reporting by financial institutions, many of which are regulated by state law;

3) cannot be given effect in the United States without the enactment of subsequent legislation by the Congress, because it requires the enactment of new tax information reporting requirements on US financial institutions;[15]

4) is wholly inconsistent with past US practices with respect to tax treaties, with Canada and with other countries, which have always been entered into with Senate advice and consent, and is inconsistent with past US

---

13 U.S. Department of State Foreign Affairs Manual Volume 11—Political Affairs § 723.3.

14 For example, the statutory provisions of FATCA require all foreign financial institutions to annually report specified information directly to the IRS or face penalties for noncompliance. 26 USC 1471(b)(1)(C). The Intergovernmental Agreement alters the scope of specified information (by, among other things, eliminating the reporting of certain registered accounts), and exempts covered Canadian Financial Institutions from direct reporting to the IRS.

15 See Office of Management and Budget, Fiscal Year 2014: Analytical Perspective Budget of the U.S. Government at 202 (2013) (in which the President seeks to "Provide for reciprocal reporting of information in connection with the implementation of the Foreign Account Tax Compliance Act (FATCA). -- In many cases, foreign law would prevent foreign financial institutions from complying with the FATCA provisions ... by reporting to the IRS information about U.S. accounts. Such legal impediments can be addressed through intergovernmental agreements under which the foreign government agrees to provide the information required by FATCA to the IRS. Requiring U.S. financial institutions to report similar information to the IRS with respect to nonresident accounts would facilitate such intergovernmental cooperation by enabling the IRS to reciprocate in appropriate circumstances by exchanging similar information with cooperative foreign governments to support their efforts to address tax evasion by their residents. The proposal would provide the Secretary of the Treasury with authority to prescribe regulations that would require reporting of information with respect to nonresident alien individuals, entities that are not U.S. persons, and certain U.S. entities held in substantial part by non-U.S. owners, including information regarding account balances and payments made with respect to accounts held by such persons and entities."). To date Congress has not passed the requisite legislation to provide Treasury the authority described herein.

practice in connection with the conclusion of international agreements with Canada as well as the United Kingdom and Australia in circumstances viewed by the United States to require legally binding instruments;[16]

5) has not been presented to the Congress in order to ascertain Congress' preferences with respect to its form;

6) has been entered into with no formality in the United States, because it has not been presented to the Senate for advice and consent, and has not, to my knowledge, been formally introduced as in force by exchange of notes between the parties indicating that each party has completed its necessary internal procedures for entry into force;

7) has no termination date and has not to my knowledge been subject to any Congressional debate regarding the need for either its prompt conclusion or its desirability; and

8) is wholly inconsistent with the general international practice as to similar agreements, both because Canada has treated the Intergovernmental Agreement and other governments have treated similar intergovernmental agreements as treaties requiring formal ratification procedures, and because Canada, the United States, and other governments have treated all other tax treaties as instruments requiring formal ratification procedures.

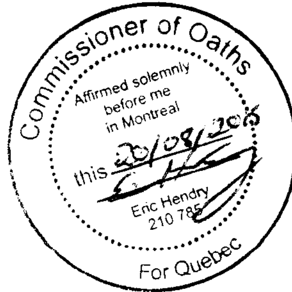
13] Accordingly, it is my opinion that the Treaty is a treaty under US law and therefore equivalent in legal status to other treaties, laws, and the Constitution of the United States, while the Intergovernmental Agreement is not a treaty, and therefore does not have equal status.

---

[16] According to John H. McNeill, Former US Senior Deputy General Counsel, U.S. Department of Defense, "nonbinding terms or conditions in situations where an international agreement would be required with UK, Australian or Canadian defense counterparts" are to be avoided in order to "avoid any misunderstanding about the intent of the parties." John H. McNeill, *International Agreements: Recent U.S.-U.K. Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT'L L. 784, 841 (1994). Thus, according to Mr. O'Neill, whenever Canada was to be a prospective partner to an agreement with the United States, formalities should be taken to ensure that the agreement is understood as legally binding on both parties. O'Neill at 822; *see also* Maurice Copithorne, *National Treaty Law and Practice: Canada*, in STUDIES IN TRANSNATIONAL LEGAL POLICY 33 (2003) ("In the case of memoranda of understanding … Australia and Britain as well as Canada have traditionally considered that such documents do not create a legal relationship. The United States has argued otherwise and various accommodations have had to be reached such as an exchange of notes constituting an enforceable 'chapeau' for aspects of an otherwise non-binding memorandum of understanding.").

tax notes international

Volume 69, Number 6 ■ February 11, 2013



This is Exhibit B referred to in the Affidavit of Allison Christians
Sworn before me at the City of Montreal,
in the Province of Quebec,
on the 20th day of July, 2015.

A Notary Public or Commissioner for
Taking Affidavits for Quebec

The Dubious Legal Pedigree of IGAs (And Why It Matters)

by Allison Christians

Reprinted from *Tax Notes Int'l*, February 11, 2013, p. 565

(C) Tax Analysts 2013. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

taxanalysts® *The experts' experts.*℠

THE BIG PICTURE

The Dubious Legal Pedigree of IGAs (and Why It Matters)

by Allison Christians

Allison Christians is the H. Heward Stikeman Chair in Tax Law at McGill University in Montreal, where she writes and teaches in the area of national and international tax law and policy. You can follow her on the Tax, Society & Culture blog at taxpol.blogspot.com or on Twitter @taxpolblog.

When Congress enacted the Foreign Account Tax Compliance Act as part of the Hiring Incentives to Restore Employment Act in 2010, it made no mention of any internationally agreed alternative to its enforcement. Since then, Congress has made no authorization for the president to override FATCA's statutory provisions by international agreement. Yet due to difficulties in implementing FATCA abroad, Treasury has entered into several "intergovernmental" agreements (IGAs) to essentially bypass the hurdles and even gone so far as to draft model IGAs with the intent of streamlining their enactment globally.

What are these agreements as a matter of U.S. law? And does it matter what they are in legal terms so long as they do the job of binding the parties to their terms? The answer is that the legal pedigree of IGAs is tenuous, and this matters for two reasons. The first reason is practical: If the IGAs are not good law in the U.S., FATCA partners incur the risk of penalties should the statute they seek to override apply in default. The second is more fundamental: The IGAs violate the rule of law, unnecessarily so, and this undermines U.S. credibility in the international community.

To understand this landscape, we must first determine what IGAs *are* from a legal perspective. In order to make that determination, let us consider what they *are not*.

Not Treaties

IGAs are not, strictly speaking, treaties. Every country has internal rules and procedures that determine how it binds itself to agreements with other countries. The Vienna Convention on the Law of Treaties defines any such duly enacted agreement as a treaty, but in the U.S., a treaty is defined only as those international agreements that are signed by the president and ratified only after receiving the advice and consent of two-thirds of the Senate, under Article II of the U.S. Constitution. That is the process by which all U.S. income tax treaties become the law of the land. It is sometimes a contentious process, and it is often a lengthy process.

Since IGAs are not submitted to the Senate for advice and consent, they are not treaties in the U.S. constitutional sense of that word. That is not necessarily fatal for these agreements as a matter of law, however. There are some alternative means by which the U.S. can bind itself to agreements with other countries that, according to most constitutional scholars, are equivalent in status and force of law to treaties. These range from the fairly uncontroversial to the very controversial in constitutional law scholarship.

Not Congressional-Executive Agreements

The most recognizable and perhaps least controversial alternative to the treaty power vested in the president under Article II of the U.S. Constitution is the power reserved to Congress under Article I of the Constitution to "regulate Commerce with foreign Nations" and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." While some scholars have argued that this cannot be read to override the treaty-making process outlined Article II, most constitutional scholars view

(C) Tax Analysts 2013. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

so-called executive agreements as interchangeable with the treaty power if they are undertaken under statutory pre-authorization by Congress. Agreements entered into under pre-authorization are typically referred to as congressional-executive agreements to distinguish them from agreements entered into by the president without such pre-authorization (discussed more below).

Thus, when Congress views it as expedient to pre-authorize the president to enter into international agreements, it enacts a statute that lays out content guidelines and a streamlined means of passing these signed agreements by the full legislature. Usually this takes the form of automatic passage within a specified time frame unless Congress raises an objection. Some of the more well-known congressional-executive agreements in the U.S. are trade related: These include the WTO agreements and the North American Free Trade Agreement, as well as bilateral and multilateral free trade agreements, which are authorized under 19 U.S.C. section 3803.

Congress has also pre-authorized Treasury to enter into tax information exchange agreements in this manner. IRC section 274(h)(6)(C)(i) provides the grant of authority, and it does so in very specific terms. It authorizes Treasury to "negotiate and conclude an agreement for the exchange of information with any beneficiary country," and clearly delineates the content of these agreements. Congress has also authorized the State Department to enter into social security totalization agreements, which allocate social security taxes and benefits among two countries. There, the relevant language is found in the Social Security Act, 42 U.S.C. section 433, and it includes similarly clear language about the content of these authorized agreements.

Pre-authorization does not ensure that every agreement signed by the president is rubber-stamped by the legislature, suggesting that the president does not act alone, even under statutory pre-authorization. For example, in 2004, the U.S. signed a social security totalization agreement with Mexico under the legislative authority granted under the Social Security Act. However, the State Department never submitted the agreement to Congress because several lawmakers opposed its terms, making it likely that the agreement would be rejected if submitted. The resolution was referred to the House Subcommittee on Social Security on July 19, 2004, and no further action has been taken — in other words, the agreement died in committee even after being preapproved by Congress. Thus, while pre-authorization seems to lend legal status to these agreements from a constitutional law perspective, it does not allow the president to bind the U.S. internationally, on tax matters at least, without legislative approval.

Since there is no statutory pre-authorization for Treasury to enter into them, IGAs are clearly not congressional-executive agreements. Again, this is not necessarily fatal to their status as legal instruments in the U.S., but it does rule them out of the category of the most commonly recognized treaty alternatives.

Not Treaty-Based Agreements

A second well-accepted alternative to a treaty is an agreement entered into under the authority of an existing treaty. That is, if a president enters into a treaty that includes within its terms a right to enter into derivative agreements, and the Senate advises and consents to the ratification of that treaty, then agreements entered into under those express terms are viewed as duly authorized. The scope and breadth of authority given must be clearly delineated, because the effect of the executive branch granting itself broad authority could produce agreements well beyond the scope of the initial treaty. That would make any treaty a potential doorway for sole executive action without Senate oversight, which plainly contradicts the constitutional framework. Accordingly, treaty-based agreements are typically interpretive in nature. They are meant to allow the treaty partners to agree on how the treaty will be interpreted and applied in practice.

The U.S. Treasury is taking the position that the IGAs "interpret" existing information exchange provisions, which are currently found in existing U.S. tax treaties and tax information exchange agreements. This position is dubious on the merits. While Treasury has authorized itself to enter into interpretive agreements under existing tax treaties and information sharing agreements, casting IGAs in this role creates an uncomfortable fit.

All tax treaties give express authority to a designated bureaucrat — the competent authority — to engage in direct efforts to resolve treaty interpretation problems on behalf of their respective governments. The product of competent authority resolution may take one of two forms: a taxpayer-specific competent authority agreement and a non-taxpayer-specific, or "generalized," competent authority agreement. A specialized competent authority agreement typically makes a tax allocation decision on an individual case, applies only to the individual taxpayer, and remains unpublished. A generalized competent authority agreement is typically characterized as procedural, which is meant to "clarify or interpret treaty provisions." It is in this category that the IGAs are meant to fit. Indeed, if Treasury is successful in its goals for FATCA compliance, the IGAs will swamp the existing body of generalized competent authority agreements: With only 33 such agreements currently published, generalized competent authority agreements comprise a tiny minority of all competent authority agreements in the U.S. (and globally).

But it is not at all clear that these IGAs are in fact competent authority agreements. First, if they were competent authority agreements, they could be entered into by the competent authorities of the treaty signatories without any ratification procedures by either side. Hundreds or perhaps thousands of specialized competent authority agreements, as well as a few generalized competent authority agreements, are entered into every year on that basis. Instead, FATCA partner countries (with the exception of Mexico) are treating the IGAs

(C) Tax Analysts 2013. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

as they must certainly be — international agreements that override the current tax treaty arrangement and therefore must be subject to internal ratification procedures in order to come into force as legal instruments.

Second, even if the FATCA partners were willing to forgo internal ratification procedures, as Mexico appears willing to do, it is difficult to see how the IGAs could be said to be in the nature of clarity or interpretation, since their purpose is to incorporate a newly enacted U.S. law. The IGAs in effect impose a new condition on existing treaty-based withholding tax rates, namely, the fulfillment of FATCA information gathering and reporting requirements. While all existing treaties have information exchange provisions, none has ever made information exchange a condition for receiving treaty benefits. It is difficult to see how imposing a new condition on an article of the treaty that deals with how one country will tax investors from the other can be seen as an interpretation of another, unrelated article of the treaty that lays out how the countries will exchange information.

Moreover, even if the new contingency was not at odds with all established practices, it seems problematic to suggest that an agreement could interpret an existing treaty to implement a law that postdates and apparently overrides it by more than doubling the typical rate of tax called for under the treaty unless the new information gathering and reporting regimes are adopted and implemented. This seems especially unlikely when it is clear that many or most treaty partner countries will have to enact comprehensive domestic legislation to fulfill the new reporting requirements required under the IGAs mainly to override existing privacy and confidentiality laws.

Finally, as a technical matter, it is difficult to see how the IGAs could be competent authority agreements when in at least one case an IGA was apparently signed by a member of an embassy staff rather than a competent authority. Perhaps that is not fatal, but it certainly calls into question the idea that these agreements are being negotiated by competent authorities as a matter of treaty interpretation, similar to the hundreds and thousands of other treaty interpretation negotiations that take place every year, mostly out of the public eye.

Since they are not expressly authorized by the treaty and they cannot be said to interpret existing treaty provisions, IGAs are not treaty-based agreements.

This leaves IGAs in an uncertain place in terms of their legal pedigree. They are not treaties. They are not congressional-executive agreements, that most viable of treaty alternatives. And they are not interpretive agreements authorized by existing treaties.

Therefore: Sole Executive Agreements

This leaves only one possible characterization for IGAs: They must be "sole" executive agreements — agreements undertaken by the president without congressional authorization of any kind. This is a tenuous status in U.S. treaty-making that raises serious doubt about whether IGAs in fact bind the U.S. as a matter of law.

Sole executive agreements are extremely controversial in U.S. law. Constitutional scholars either reject them outright as a viable alternative to treaties and congressional-executive agreements, or begrudgingly allow that they might be viable for administrative or routine matters. Louis Henkin, a leading U.S. scholar of international law and foreign policy, characterized sole executive agreements as constitutionally suspect. Other constitutional scholars agree, stating that the Framers of the constitution did not grant the president exclusive power to make treaties committing the nation internationally, and if the president was to exercise such authority, it would have to be only for minor, short-term agreements. The consensus is that short of those that deal with minor, routine, and noncontroversial matters, international obligations undertaken by the president without any congressional oversight lack the status of law in the U.S.

Using a sole executive agreement to serve as an alternative to direct FATCA implementation thus creates a tremendous amount of uncertainty, and unnecessarily so when it is clear that other, more viable alternatives exist in law, namely, treaties and congressional-executive agreements. This puts the IGAs, and therefore Treasury and the IRS, in a precarious position.

Why This Uncertainty Matters

The dubious legal status of the IGA means that even as due ratification of such agreements makes them good law in partner countries, the agreements might not actually be good law in the U.S. And if they do not constitute good law in the U.S., the existing domestic U.S. law they are meant to override — that is, FATCA itself — would necessarily be in full force and effect. That would impose penalties of 30 percent on any U.S.-source payment passing through virtually any financial institution outside the U.S. As a matter of law, none could escape penalty because it would not be compliant with FATCA's terms even if its government was compliant with those of the IGA. One might anticipate leniency on the part of the IRS in such a case, but speculation does not bind the rule of law.

This raises the question of why the U.S. chose this route. Why jeopardize the important and complex project of global tax compliance with such a legally dubious procedure? The obvious straightforward approach to overriding FATCA bilaterally is to do what treaty partners are doing: following normal treaty-making procedure. This would require either achieving Senate advice and consent to each IGA or enacting the proper congressional authority as was done for TIEAs and social security totalization agreements. Either approach will take more time and create more delay in an already-postponed regime. But in marrying itself to

(C) Tax Analysts 2013. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

a dubious treaty alternative in haste, Treasury may well find itself repenting at leisure.

Clearly the U.S. and its partners have good reason to seek bilateral cooperation in the fight against tax evasion. Reining in tax evasion is important, perhaps even critical, to the future of the income tax and the welfare state it supports. But it is difficult to see how the U.S. can sign the IGAs in good faith when Treasury is exposing itself to constitutional challenge, especially when this risk is so unnecessary to undertake. Ensuring that the IGAs will have the force of law as any other treaty seems critical to ensuring that the override they provide for the FATCA regime will not fail, with global consequences. ◆

(C) Tax Analysts 2013. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.