Chasing Tax Hares and Stags:

The Need for Realignment of U.S. Tax Strategy to Facilitate Multilateral Cooperation Against International Tax Evasion

I. Introduction

The challenge of combating international tax evasion has long plagued the United States and other countries. With the ability to access international financial markets from almost anywhere in the world and the differences in regulatory and legal regimes across jurisdictions, the past few decades have seen an increasing amount of international tax evasion. Countries like the United States have valiantly struggled to curb evasion and have developed many different means of combatting it. Particularly since 2008, when the United States made a dent in Swiss banking secrecy for the purposes of prosecuting tax crimes, U.S. prosecutors have faced a challenge of trying to prosecute tax evasion in cases in which they need information that is not readily accessible because it is located in non-transparent, overseas jurisdiction. When would-be-evaders locate their accounts in foreign jurisdictions far from the reach of the IRS, prosecutors are faced with the significant challenge of how to proceed to effectively prosecute tax crimes and collect tax revenue.

Ultimately, this paper provides a criticism of the direction of U.S. tax policy with respect to the prosecution of these sorts of international tax evasion cases. Although the outcry and determination to reduce tax evasion is justified and correctly identifies an important priority for U.S. tax policy, the United States has increasingly employed a concerning strategy involving unilateral prosecution methods. Recently, prosecutors have focused on using tools such as John Doe summons and *Bank of Nova Scotia* summons, which obtain information for prosecutions through the threat of unilateral penalties instead of through multilateral cooperation. This paper

seeks to explain why the U.S. would benefit from being patient in addressing tax evasion involving jurisdictions from which the United States cannot easily access information. Instead of acting unilaterally on a case-by-case basis by using unilateral summonses, the United States should focus on multilateral solutions to establish regimes that more broadly encourage information sharing. This paper argues that such an approach is more likely to benefit the United States (as well as other countries looking to collect on tax evaders) in the long run.

In this paper, I model the international tax coordination problem surrounding international tax evasion using game theory and, more specifically, describe the coordination problem as a stag hunt game. Ultimately, the United States and other countries seeking to extract tax revenue by cracking down on tax evasion have the option to cooperate with each other or to act unilaterally. Although it may be tempting for these tax revenue hunters to act unilaterally for short-term wins (hunting the hare), the optimal solution for the hunters is if they patiently cooperate (hunting the stag). In the tax context, this paper argues that the United States, as one hunter in the game, must focus its efforts on establishing multilateral regimes to combat tax evasion by pushing for information sharing and by creating unified fronts with other countries against jurisdictions that refuse to cooperate with tax transparency measures. This paper establishes the difficulty of achieving a multilateral solution but highlights the severe shortcomings of a unilateral one. I provide several potential policies and actions policymakers might take to encourage multilateral solutions, grounded in the stag hunt analysis.

Part II lays out the stakes of the international tax coordination problem, both with respect to the magnitude of tax evasion as well as with respect to the importance of shaping multilateral tax policy at the time of the writing of this paper. Part III provides background and history of the U.S. approach to prosecuting international tax evasion and the history of international tax

cooperation. Part IV describes international tax coordination problem as an example of the stag hunt game. I provide a description of the stag hunt game and discuss why it is an accurate way to understand the tax coordination problem. I draw upon the stag hunt to discuss several aspects of the challenge that the international community and the United States face in coordinating to reduce international tax evasion. I argue that the unilateral actions currently being promoted by the United States are likely to jeopardize international cooperation and result in fewer successes in the long run. Multilateral solutions are more likely to succeed and likely to yield larger payoffs. In Part V, the paper provides a more detailed discussion of recommendations and possible policy solutions to escape some of the traps in the stag hunt game. I provide some suggestions of ways in which incentives and payoffs might be practically altered, in a game theory context, to discourage unproductive, unilateral actions and instead encourage multilateral cooperation. Part VI concludes.

II. The Stakes

Offshore financial wealth is significant. Some estimates suggest that offshore wealth may account for roughly 8% of the world's household financial wealth.[1] Much of this wealth is facilitated by tax havens where sophisticated financial institutions facilitate tax evasion while simultaneously enabling access to international financial markets. Financial centers including Switzerland, Singapore, Hong Kong, the Bahamas, and Luxembourg have historically attracted assets for these purposes.[2]

For developing countries, tax avoidance and illegal tax evasion have significant negative consequences. As Itai Grinberg writes, "Without proper support mechanisms for the overstretched tax administrators of [many emerging and developing countries], it is difficult to constrain their citizens from evading domestic tax liability on capital income and closely held

business income by using offshore accounts and offshore entities."[3] As a percentage of their countries' wealth, offshore holdings are very significant for countries in Latin America, the Middle East, and Africa.[4] Particularly following the Great Recession, tax revenues present an important opportunity for many states to combat rising public debts.[5]

For the United States too, lost revenue from tax evasion is significant.[6] The impact of legal tax avoidance and the transfer of profits to low tax jurisdictions have both been documented thoroughly.[7] Estimates for the lost profit to these tax havens has been estimated at magnitudes in the tens of billions of dollars and continue to pose challenges for tax policymakers.[8] More than 90 percent of the $450 billion tax gap is attributable to underreporting and underpayment of tax liabilities.[9] Indeed significant tax legislation such as FATCA have been motivated by the United States' desire to reduce its deficit.[10] The magnitude of offshore finance suggests that there are large potential revenue gains, which could contribute to reducing the deficit.[11] Joseph Guttentag and Reuven Avi-Yonah estimate the magnitude of individual offshore tax evasion is greater than the international tax gap created by underpayment corporate taxes, which the IRS estimated at $29.9 billion in 2001.[12]

From a fairness and rule of law perspective, evasion undermines the legitimacy of a tax system. Effective tax governance can contribute to curbing inequality and upholding the integrity of a tax system.[13] The ability of tax evaders, particularly those with access to offshore tax evasion mechanisms, to undermine the rule of tax law represents a threat to equity and clearly represents a place where policymakers and law enforcement ought to step in.

The offshore evasion challenge is ultimately a global one. The revenue loss from individual tax evasion and unreported foreign accounts may cost up to $200 billion for countries worldwide.[14] Tax evasion activities often cross borders and involve evaders' taking advantages

of differences in laws between jurisdictions. Countries not only have a common interest in minimizing the problem but also the nature of the problem necessitates international coordination. Intuitively, international problems might lend themselves to international solutions.

III. Background

Although the history of international tax coordination over tax enforcement is lengthy and complex, I provide an abridged discussion, particularly as it relates to American efforts, to provide context for the current moment.

Bilateral tax treaties have recognized the importance of tax information and some tax treaties have allowed for information exchange since World War II.[15] Similarly, the OECD Model Tax Convention, which has been in effect for decades, has required information exchange upon request and permitted automatic information exchange.[16] The United States, for example, has signed Mutual Legal Assistance Treaties (MLATs) with many countries that enable cooperation with other countries on crimes. However, these treaties have been ineffective in many cases for pursuing tax crimes and receiving relevant tax information due to limitations provided for in the agreements.[17]

a. U.S. Anti-evasion Efforts

It is only in the past couple decades that the United States has begun to seek information from foreign jurisdictions who have bank secrecy concerns and are hesitant to provide tax information upon request.[18] In 2001, the United States began its implementation of the U.S. Qualified Intermediary (QI) system. Enacted through regulation, the QI regime required certain financial intermediaries that were labeled as "qualified intermediaries" to report U.S. source income and to identify their customers, although secrecy of non-U.S. customers was still

permitted.[19] However, the QI system contained multiple loopholes and exceptions that were utilized by taxpayers to still avoid the reporting of income to the IRS.[20]

Two major tax scandals in 2008 sparked international tax efforts into action and resulted in tougher U.S. stances against foreign secrecy when it came to tax matters.[21] The United States was driven into action by the DOJ's prosecution of the Swiss bank, UBS, for conspiring to help some of its customers to evade U.S. taxes.[22] Before the scandal, the United States had not taken strong steps to accessing information located in financial institutions that were protected by bank secrecy. However, in 2008, the DOJ began using unilateral tools such as administrative summons to require UBS to disclose the names of clients who were suspected of evading taxes.[23] Ultimately the UBS scandal revealed the shortcomings of the U.S. QI system and Congress pushed for a stronger QI system or new and altogether stronger tax enforcement and information gathering systems.[24]

What followed was one of the most significant developments in U.S. international tax policy: the development of the Foreign Account Tax Compliance Act (FATCA) regime. In 2010, Congress enacted FATCA, which requires foreign financial institutions (FFIs) to provide information to the IRS "about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest."[25] The reporting requirements came into effect in 2014.[26] FATCA is enforced through a withholding tax. Payments made from the United States to FFIs who do not cooperate in providing information must be withheld by U.S. financial intermediaries.[27] Similarly, FFIs who are participating in FATCA must also withhold from non-participating FFIs.[28]

Scholars have characterized FATCA as a unilateral regime because of its characteristics. FATCA seeks to establish reporting relationships between the U.S. and FFIs without the need for

foreign governments and does so in a coercive manner, relying on the importance of U.S. accountholders as customers for financial intermediaries.[29] Notably, under FATCA, foreign governments do not receive information about participating financial institutions that operate within their countries. FATCA thus established a much stronger information disclosure regime than its predecessor QI regime. Relatedly, FATCA is often also characterized as extraterritorial because it requires foreign institutions to comply with information reporting even when doing so would violate local privacy and banking laws.[30] Commentators have noted that FATCA places the United States in a policing role with respect to compliance with U.S. tax laws and situates it as the "lone sheriff in town."[31]

However, the establishment of intergovernmental agreements (IGAs) have partially alleviated these concerns related to comity and international overreaching. Starting in 2012, the United States began entering into these agreements by which information located in foreign jurisdictions would be reported to those local tax authorities instead of the IRS. The foreign government would then engage in a reciprocal exchange of information with the United States through a tax information exchange agreement (TIEA).[32] In addition, in low tax countries, entering into IGAs allows financial intermediaries in those countries to avoid the withholding sanctions.[33] The U.S. Congress was effectively able to embrace multilateral solutions that allowed FATCA to get around the conflicts of law issues that threatened to stall the whole regime.[34] There are a variety of efforts and mechanisms aimed at establishing information exchange but all of the systems are similar in that they make financial institutions act as intermediaries to provide information to foreign tax administrations or to the IRS..[35]

The IRS has also developed several mechanisms under FATCA by which to encourage compliance by taxpayers. Under programs such as the Offshore Voluntary Disclosure Program

(OVDP), taxpayers are encouraged to come forward and to disclose illegal offshore tax activity in exchange for partial amnesty and reduced penalties.[36] Thus while the IRS has prosecuted and used FATCA to actively prosecute tax evasion, these voluntary compliance programs have also generated billions of dollars in tax revenue.[37]

b. Burgeoning Multilateralism

At the same time the United States has pushed anti-evasion policies, other countries seem ready for a multilateral moment. As FATCA has moved forward, there has been an interest, both by the United States and other countries, in establishing multilateral regimes for tax cooperation on these sorts of tax evasion matters. After the implementation of FATCA, the United States has been negotiating Intergovernmental Agreements ("IGAs"), which modify the FATCA regime such that FFIs report information to their local governments, which then provide the information to the United States through treaty.[38] The American model of FATCA and information exchange through IGAs has also been used by other countries, who have increased their efforts to collect information from foreign accounts.[39] Thus while FATCA was certainly initially seen as a unilateral tool, many have argued that it paved the way for more multilateral cooperation as well.[40]

The regime also encouraged the signing of the Multilateral Agreement on Administrative Assistance in Tax Matters ("MAATM"), an agreement providing for automatic information exchange. Over 80 countries have already signed on to the agreement.[41] As of 2011, with TIEAs, MLATs, and other tax treaty information exchange regimes, the United States had agreements for information exchange with over 90 countries.[42] The American push for information exchange similarly encouraged efforts by other countries as well.[43] For example, groups such as the G-5 and the EU have endeavored to establish various forms of information sharing agreements.[44]

The responses to other international tax challenges reveals an increasingly multilateral landscape as well. For example, the OECD has organized various efforts for multilateral coordination over the years including the OECD's Forum on Harmful Tax Practices as well as the Base Erosion and Profit Shifting ("BEPS") project.[45]

c. Pressure Mounting to Curb Tax Evasion

One trend that is putting pressures on U.S. international tax enforcement efforts is the shifting of offshore finance holdings to new jurisdictions, following pressure in countries such as Switzerland. After the Department of Justice's prosecution of the UBS scandal in 2008, it implemented its Swiss bank program and pushed forward with its Offshore Voluntary Disclosure Program (OVDP) to increase its information sharing with Swiss financial institutions. As Switzerland has entered into information exchange agreements and cooperated with investigations, its bank secrecy protection have become weaker and the country offers fewer protections for would-be tax evaders.[46]

As a result, taxpayers have fled to new tax havens that are further outside the grasp of U.S. law enforcement's information-gathering capabilities.[47] Commentators have suggested that much of the wealth that was previously invested in secret Swiss accounts is now finding its way to jurisdictions such as Hong Kong and Singapore.[48]

This flight of would-be tax evaders has been partially responsible for the stronger rhetoric coming from governmental authorities to take a more aggressive approach toward prosecuting offshore tax evasion. From Congress, there has been rhetoric putting pressure on prosecutors to more strongly use its summons powers to get information on investigations into international tax evasion.[49] The pressure has unsurprisingly been one centered on uniquely American solutions. The suggestion is to use solutions and "U.S.-based tools" instead of relying on treaties and

bilateral agreements. [50] Congressional sentiment is largely that international agreements and cooperating are not moving quickly enough—Congress would prefer that the United States assert its rights to information and aggressively pursue prosecution of international tax crimes. Congress has even gone so far as to suggest the use of specific unilateral tools such as *Bank of Nova Scotia* summons, John Doe summons, and exercises of prosecutorial authority.[51]

Other external factors have also played into the additional push for more aggressive prosecution of international tax crimes. The leak of the "Panama Papers," which revealed a list of U.S. taxpayers utilizing offshore bank accounts, has increased pressure and rhetoric calling for a crackdown on international offshore tax activities.[52] Calls for tax transparency and enforcement against what is perceived as unfair tax evasion have strengthened and found their way onto the front pages of newspapers.[53]

The Department of Justice has made more comments as to the willingness of the Department to utilize stronger unilateral measures. The DOJ has frequently reiterated its commitment to using John Doe summons in order to compel the information necessary to prosecute tax evasion in foreign accounts.[54]

In light of the use of tax enforcement strategies like FATCA, which seek increase information transparency, it is particularly important for international cooperation to succeed. As this paper will describe further, in promoting effective access to information for prosecutors, there will be significant differences between harmonized international regimes and systems in which each country implements its own punitive and unilateral information acquisition mechanisms.[55]

Particularly under a new presidential administration, there is great uncertainty over tax policy. Even looking beyond simple prosecutorial decisions, policymakers ought to carefully

consider the implications of domestic tax policy on alienating multilateral tax coordination.[56] During such a critical time for the direction of tax policy, policymakers ought to appreciate the importance of developing a coherent strategy for international coordination and to align prosecutorial actions with that strategy.

d. Overview of Prosecutorial Methods

Before delving into the concerns associated with various unilateral tax enforcement mechanisms, I briefly discuss the various tools available to U.S. prosecutors.

In order for the Service to enforce the Internal Revenue Code, it is authorized to gather information to assist with investigations. I.R.C. § 6201 gives the Service the power to issue summons and § 7602 authorizes some of the procedures used to collect information from the summons. A summons must meet several requirements in order to be valid.[57] In addition, there are a variety of other procedural and notice requirements.[58]

Although this paper focuses on the rising prominence of these two specific types of summons, it is important to note that summons and coercive actions can take many forms.[59]

One of these unilateral summons is the John Doe summons. A John Doe summons is a summons authorized by I.R.C. §§ 7609(c)(3) and 7609(f) which allows the Service to issue a summons for information or evidence related to an investigation for a person or group of non-identified individuals.[60] Unlike with a traditional summons, a John Doe summons allows the Service to obtain information about taxpayers whose identity is unknown (thus the name John Doe Summons), which is particularly valuable when pursuing cases against accountholders in tax shelters.[61]

Unlike with a traditional summons, the Service must get leave from a federal Court for a summons to get information and documents for John Doe summons. Furthermore, the Service

must meet several requirements under I.R.C. § 7609(f): "that—(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons, (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources." John Doe summonses have been used with increasing frequency, particularly in the international context to obtain otherwise unobtainable information..[62]

The other type of unilateral summons that prosecutors have increasingly focused on are *Bank of Nova Scotia* summons. These summons are now part of an arsenal of unilateral tools that are increasingly relied upon by the Department of Justice.[63]

The type of summons is named after *In re Grand Jury Proceedings (Bank of Nova Scotia),* 691 F.2d 1384 (11th Cir. 1982). In the case, a grand jury issued a subpoena requiring a bank to produce records which it owned in the Bahamas. The Eleventh Circuit held that it was no excuse for the bank that compliance with the subpoena might break Bahamian bank secrecy laws. Although it recognized the potential foreign conflicts, the court noted that it "simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states."[64]

Most recently and prominently, in *U.S. v. UBS AG*, the DOJ utilized a *Bank of Nova Scotia* summons to require that a Singaporean bank provide records regarding a taxpayer who was located outside of U.S. jurisdiction.[65] Because the government had no ability to serve a summons on the taxpayer or compel the production of records from him directly, the bank served a subpoena on the U.S branch of the bank in order to get information from the bank's foreign

headquarters. Furthermore, the United States does not have a tax treaty or a tax information exchange agreement (TIEA) with Singapore.[66] As a result, the summons was the only feasible way in which the Service could get access to the needed information. The summons created a tricky situation for the bank: either the Singaporean branch had to release records pertaining to the taxpayer in violation of Singaporean bank secrecy law, or the U.S. branch would be subject to penalty for not complying with the summons.[67] Ultimately, after the client consented to the summons, UBS complied with providing the requested information.[68]

Because of issues related to comity and the burdens of compelling violation of foreign laws, summonses of this nature require a higher threshold for authorization.[69]

The Service is authorized to impose penalties for a failure to comply with summons under § 6038A, which grants to the Service discretion in determining adjustments and costs available to reporting companies. As part of this discretion, the Service may designate a related person of the foreign taxpayer in question to act as an "agent for service of summons within the United States" and provide the requisite documents.[70] This provision essentially allows the Service to impose the penalty on a related person (or often a bank branch) of the taxpayer to further pressure the financial institution to provide the information. This of course places foreign banks with American branches into difficult situations such as in the *Bank of Nova Scotia* case. The Service has used this penalty discretion to further extend the reach of its unilateral prosecutorial tools to those jurisdictions which were previously havens for information.

Commentators have long noted that the United States must coordinate with other non-tax haven countries to curb tax evasion internationally. The Gordon Report in 1980 commented that "[t]he United States alone cannot deal with tax havens. The policy must be an international one by the countries that are not tax havens to isolate the abusive tax havens. The United States

should take the lead in encouraging tax havens to provide information to enable other countries to enforce their laws."[71]

Against the background of mounting pressure to crack down on tax evasion, there is now an important moment for how U.S. strategy will proceed. The way in which the IRS and DOJ decide to pursue tax evasion cases will shape American positioning in international tax cooperation moving forward.[72] Before suggesting any specific policy solutions, policymakers must first understand the importance of tax coordination as well as the benefits of unilateral or multilateral actions. Thus the next section provides a discussion of international tax coordination and the role that U.S. actions play in shaping the prospect for effective international regimes.

IV. International Tax Coordination and Strategy

In the pursuit of tax evaders who are beyond the borders of the United States, prosecutors are faced with strategies that vary in how unilateral or multilateral they are. Given the development of various unilateral and multilateral movements in international tax cooperation, policymakers must carefully consider how to position U.S. tax strategy with respect to other countries'. In this section, I describe the pros and cons of both unilateral and multilateral strategies by modeling the tax coordination problem through game theory. I ultimately conclude that the form of unilateralism exhibited by recent U.S. prosecutions and summons are likely to be costly for the United States' and the international community's tax prosecution efforts. I also address several counterarguments and conclude that, although unilateralism may be successful in leading to global coordination and regimes in some cases, the current U.S. strategy is unlikely to contribute toward such a regime.

a. The Stag Hunt, Generally

One simplified way in which the tax coordination challenge can be modeled is through the lens of game theory. I model the coordination challenge as a form of the "stag hunt" game and use this to suggest implications of the unilateral strategies that the United States is employing.[73] The stag hunt is often attributed to Rosseau:

> Was a deer to be taken? Every one saw that to succeed he must faithfully stand to his post; but suppose a hare to have slipped by within reach of any one of them, it is not to be doubted that he pursued it without scruple, and when he had seized his prey never reproached himself with having made his companions miss theirs.[74]

The game envisions a line of hunters who must coordinate in order to catch a stag—the most desirable outcome. They must stay loyal to each other and to the goal of catching the stag in order to succeed. But each hunter is also tempted by the opportunity to hunt hare, something each is able to do successfully on his or her own. But that action by an individual (or by enough individuals) undermines the coordination required for the group to successfully catch the stag, which is ultimately a greater prize for each of the hunters.

A simplified payoff for the stag hunt game might look as follows:

	Hunt Stag	Hunt Hare
Hunt Stag	3,3	0,1
Hunt Hare	1,0	1,1

For the Stag Hunt game to be an apt description for the tax coordination game, several assumptions must be true. First, there must be some sort of payoff to a hunter's hunting hare—or unilaterally pursuing tax crimes—even though coordination would also be possible. However,

such a result must be suboptimal for the player. Second, there must be a greater payoff to cooperation by the actors. Third, there must be some sort of temptation for actors to act unilaterally and it must be true that unilateral defection undermines the possibility for the optimal, Pareto-improving move to a cooperative solution. I first establish these assumptions in the context of the international tax coordination problem before moving on to the implications of the stag hunt on U.S. strategy moving forward.

b. The Unilateral Nash Equilibrium

There are several reasons that a country has an incentive to unilaterally pursue tax cheats aggressively in the same way that a hunter has an incentive to hunt hare. First, at the country-level, as a matter of strategy, prosecuting tax crimes and using aggressive unilateral strategies is likely to yield short-term and more certain gains than on relying on a stag hunt cooperation to create a multilateral regime. If a country does not believe in the prospects for successful cooperation or expects other countries to defect, then the optimizing choice for the country is to also defect.

Subnational actors, too, have their own incentives to pursue unilateral strategies. Mounting pressure, as discussed above, has brought pressure on tax enforcers in the U.S. to take visible action to prosecute crimes and collect revenue. Prosecutors and tax agents have incentives to increase tax revenue, immediately strengthen the tax system, and fulfill duties of their jobs. Smaller prosecutorial and unilateral actions have payoffs in terms of smaller and shorter-term revenue gains. They may also be driven by political or individual actor-level payoffs from pursuing short-term tax wins.

Acting unilaterally certainly results in some gains. Prosecution and litigation by unilateral methods have resulted in some settlements and tax penalties. American courts have generally

resolved comity analyses in favor of criminal investigations. For example, the Fifth Circuit recognized in *Field*, 532 F.2d at 408, that "this country allows wide discretion to investigatory bodies in obtaining information concerning bank activities" (citing *United States v. Miller*, 425 U.S. 435 (1976)).[75]

However, aggressive unilateral tax prosecution is nonetheless suboptimal—just as hunting the hare is—for several reasons. First, unilateral solutions often incur higher enforcement costs. One of the criticisms levied against FATCA is that despite its potentially large revenue gains, it incurs significant compliance costs for FFIs, foreign governments, and taxpayers as well as large enforcement costs for the U.S. government.[76] As opposed to a regime that includes automatic information reporting, summonses are generally not self-enforcing. If a summonsed party protests or refuses to comply, the Service must make an affirmative showing to have the summons enforced.[77] The result is that drawn-out litigation is required just to prosecute individual cases. For example, the UBS case mentioned above was pursued over the prosecution of one individual.[78] Particularly in an uncertain budgetary environment, enforcement efforts are already strained for the IRS.[79] When compared to more systematic regimes, there is no consistent access to information and not as consistent a way to detect tax cheats.

Another potential cost of a unilateral approach is that there may also be an increase in cross-border evasion for investors in foreign countries. Dhammika Dharmapala, for example, describes a model in which compliance requirements resulting from reporting requirements could place a burden on FFIs, which might turn around to charge higher fees to resident investors in those countries.[80] As a result, the cost of tax compliance would increase for those investors and they would be less likely to invest through FFIs with U.S. reporting requirements.[81] The result, of course, is that those countries are less likely to be compliant and more likely to take

their evasion activities abroad. With a comprehensive multilateral regime, however, the foreign resident investors would not simply be able to move their investments and evasion activities abroad because any countries, which funds are moved to, would provide information reporting to the resident investor's home country.

c. The Multilateral Nash Equilibrium

On the other hand, countries also prefer a regime under which all countries are cooperating to create a multilateral system. This is likely the case for several reasons.[82] First, efforts to crack down on tax evasion are more successful with more countries involved in a regime. If more developed countries that are looking to crack down on tax evasion participate in the regime, there is more pressure for offshore tax institutions to cooperate in a regime. Offshore banks would be less financially able to refuse customers from regime countries. As Itai Grinberg suggests, a coercive regime that requires information exchange for multiple sovereigns is more likely to be successful because "[o]therwise, noncooperative jurisdictions and institutions benefit from defecting from the emerging regime, because they can become repositories of choice for tax evaders' assets without paying a significant price for making that business decision. As long as the United States is the only country exercising coercive authority to ensure compliance, defection from the emerging regime remains a possibility."[83]

Similarly, if there are a greater number of would-be-tax-havens participating in such a regime, then fewer offshore financial centers would be available for tax evasion activities. Part of the need for recent unilateral measures arose precisely because evaders were able to move their funds away from financial centers such as Switzerland where the United States has used more punitive measures against countries such as Singapore. As the number of available locations to

which to flee decrease, enforcement mechanisms are likely to become more effective and the costs for evaders to locate to one of a small number of havens is likely to increase.

Commentators have often recognized that multilateral tax regimes may benefit from network effects. For example, having a multilateral network of uniform tax treaties that rely on common standards may create a stable regime in which other states would wish to participate.[84] Similarly, cooperative regimes can be effective in encouraging deterrence against other individual countries decisions to be tax havens.[85]

One might also question whether the strategy to wait for a multilateral solution is likely to pay off at all. A critic might argue that if countries have been unable to coordinate to create an international regime up to now, they are likely to inevitably fail. If there is no prospect for success anyway, would the United States not benefit from simply moving forward with unilateral strategies to capture as much revenue as possible? A critic could argue that if there is no way to capture a stag that comes along anyway, the second-best solution for the hunters is simply to hunt hare.

However, information sharing agreements and cooperation to prosecute international tax crimes do represent a ripe area for multilateral success. As Itai Grinberg suggests, "Information-sharing agreements, which come with a strong logic of appropriateness associated with transparency and can be described as producing nonrival benefits, are thus one category of agreement that is likely to be implemented" because "preference are aligned and distributive problems are largely absent among the major economies."[86] This comports with this Article's game theory model of the coordination problem—states can cooperate in order to each extract large quantities of tax revenues from establishing a cooperative regime to curb tax evasion. States (particularly those with financial leverage) are aligned in wanting more transparency from

would-be-havens. Indeed, having a coercive, critical mass of influential economies is one of the keys to establishing effective international agreements and regimes.[87] Currently, information exchange mechanisms are not sufficient to curb evasion in a meaningful sense.[88] Multilateral cooperation is more likely to succeed in creating an effective regime.

d. The Temptation of the Hare and the Importance of Cooperation

A key assumption in order for the stag hunt to accurately describe this international tax enforcement coordination problem is for unilateral actions to make the success of multilateral actions less likely. For countries like the United States, resisting the temptation of pursuing unilateral actions is important for broader international tax strategy. Indeed, another name for stag hunt is the "assurance game" because of the importance for players to signal to other players that they are willing to cooperate to achieve the optimal coordination solution.[89]

As described, John Doe summons and *Bank of Nova Scotia* summons can harm foreign relations in two ways. First, such actions are certainly at odds with the interests of tax havens such as Singapore. The summonses often require financial institutions to violate secrecy laws in the country in which documents are located. These sorts of actions may alienate key partners for cooperation in order to get access to key records. Forging ahead with unilateral summons may indicate a lack of commitment to a multilateral regime and may show a disrespect for other countries' financial laws. Second, the use of unilateral strategies may also have the effect of alienating non-haven countries that might be key partners in implementing a successful regime. For example, other important financial economies who may have interests in establishing an information exchange program to curb evasion may find themselves less likely to commit to a multilateral strategy due to U.S. unilateral action.

The comity analysis applied by the courts in cases such as *Bank of Nova Scotia* and *Vetco* draws upon Section 40 of the Restatement (Second) of Foreign Relations Law and takes into

account a variety of factors including the "(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."[90] In these cases, the courts are deciding whether the tax enforcement interests in the United States justify upholding a summons, compliance with which might require a violation of foreign law.

In resolving these issues, U.S. courts have consistently found that there is a strong interest in allowing for expansive criminal prosecutions even if they involve foreign subsidiaries, the comity analysis has more frequently decided in favor of U.S. law enforcement over the concerns of foreign governments.[91] Thus unilateral summons are likely to succeed, in the sense that summons will likely be enforceable. Nonetheless, as described above, the "success" in one sense may be detrimental to an ultimately more effective cooperative strategy.

One counterargument to the criticism of unilateral action is that the United States' taking an aggressive and unilateral strategy could actually spur a global regime to combat tax evasion. For example, Reuven Avi-Yonah has suggested that when the United States has utilized "constructive unilateralism" in international tax, U.S. actions have often successfully paved the way for international regimes and consistency.[92] He argues although FATCA was initially interpreted as a "unilateral U.S. power grab," the standards imposed by the regime eventually led to IGAs and multilateral agreements on information exchange.[93] As an example, he argues that the United States redefined transfer pricing standards and began using a "gold standard" that entrenched the classical "arm's length standard."[94] The result was the development of a set of standards that provided clarification and stability to a landscape that lacked consistent rules.[95]

Furthermore, a proponent of American unilateralism might point to the experience of FATCA as a suggestion of further success to come—FATCA began as a unilateral measure but eventually encouraged other countries into signing IGAs for multilateral exchange of information.[96] Although the enforcement effort began with American-imposed standards, other countries eventually adopted similar requirements in their own designs to combat offshore evasion. This development of international information exchange turned a regime that had been solely American into one that was more global.[97]

For FATCA to be successful, Congress turned to multilateral solutions in order to resolve issues of conflicts of laws.[98] FATCA was initially unworkable from a foreign relations standpoint, with its "one-way reporting to the IRS," often forcing financial institutions to choose between accepting U.S. business and violating local law or refusing U.S. business.[99] Fortunately for the workability of a multilateral solution, Congress was able to turn to coordination through international standard-setting to make information exchange a common standard.[100] The reporting standards, which were developed in conjunction with five large European countries, initially, and then later with the G20, allowed for a structure in which taxpayers could report to their resident country's government.[101] Such a structure not only embedded FATCA within an internationally workable scheme but also spurred other countries to recognize that signing on to the regime could bolster their own efforts in combatting tax evasion.[102]

There are, however, some key differences between FATCA and the unilateral summons being pushed by U.S. prosecutors today. First, although FATCA and today's summons both began with a similar unilateral drive, the differences in characteristics make FATCA more likely to succeed in achieving multilateral cooperation than the summons. Those critical differences

can determine whether a unilateral effort dovetails into a cooperative regime or ultimately undermines cooperation

Second, the decision to use John Doe summons and *Bank of Nova Scotia* summons are made at the agency or individual level. As this article has discussed, the incentive for individual agents or DOJ prosecutors encourages aggressive unilateral prosecution. FATCA, on the other hand, was a congressionally enacted policy that allowed the United States to standardize a system for information reporting. FATCA was not a strategy for winning any individual case or prosecuting any one individual. As a result, policymakers were also able to work with other countries to improve upon and make more widespread requirements such as those developed by FATCA.[103] The nature of the unilateral summons being pursued today is not part of a systematic approach to international tax enforcement reform that conforms with a strategy to create an international regime that brings in other countries.

Similarly, it is not clear how these sorts of unilateral action could translate to multilateral action. The use of prosecutorial strategies is unsuited to leading to multilateral solutions for several reasons. First, the use of summons and aggressive prosecution are one-off instances of curbing evasion. Ultimately, a win for the DOJ results in tax information in the summons and not to other information. FATCA could force financial intermediaries spanning many countries could potentially provide information on many taxpayers, a single prosecutorial victory might not string together to other cases in any meaningful way. Second, it is not clear how the United States might create a coalition around the prosecutorial process of summons. In the case of *Bank of Nova Scotia* summons, for example, there are no standards being imposed for information exchange or procedures for tax information. Rather, the enforcement mechanism is provided by

statutory authority granted to the Service to impose penalties for failing to comply with summons.[104]

Part of what enabled the success of FATCA in 2012 was Treasury's decision to call for an intergovernmental implementation of FATCA with five European countries.[105] In other words, there must be some mechanism or force that allows the unilateral actions to galvanize an international coalition with enough leverage that the coercive persuasion of the regime alters tax havens' or evaders' behaviors.

It is also important to note that MAATM and the other multilateral regimes currently in place are still far from a complete solution.[106] The pressure to use unilateral prosecutorial methods to address evasion in certain jurisdictions because no other enforcement options exist should provide some indication that the problem is not yet solved. Information exchange and multilateral cooperation is not yet an effective solution. The multilateral regimes and agreements being established still do not encompass much of the world and notably exclude many important tax havens (as evidenced by the pressure placed on prosecutors to use unilateral summons to fill in the gaps in global tax transparency).

e. Implications of the Stag Hunt on the Tax Coordination Problem.

The "stag hunt" has key differences from the more widely-known prisoner's dilemma, which has significant implications in thinking about tax strategy. The prisoner's dilemma game has only one Nash equilibrium—the payoffs generate a dominant strategy for each player—that predicts mutual defection.[107] The prisoner's dilemma's payoffs are such that, even if the players are in a state of cooperation, each player still has an incentive to defect.[108]

The stag hunt has two pure strategy Nash equilibria. If both players are defecting, just as in the traditional prisoner's dilemma, there is no incentive to cooperate. In the tax context, if

other countries are aggressively pursuing tax evaders with unilateral and punitive measures, an attempt by one country to seek a multilateral regime and information sharing is likely to result in a decrease in tax revenues. In other words, if a hunter sees that the other players are hunting hares, she would not succeed in hunting a stag even if she pursued that strategy. However, if both players are cooperating, there is no incentive for any party to defect. From a tax perspective, in a world with a successful multilateral regime and little evasion, individual punitive actions are likely to yield little revenue but would incur higher costs.

The benefit of describing this tax coordination problem as a stag hunt is that the exercise sheds valuable light on how policymakers should solve the problem. One notable takeaway is that both the scenario under which all players cooperate and the scenario under which all players defect are Nash equilibria. As a result, the stakes may be even higher at this critical juncture for whether to pursue a unilateral or multilateral strategy because both scenarios are stable solutions. If the United States and other countries can credibly abstain from pursuing unilateral policies, then the payoffs may be a large tax revenue windfall because of the lasting stability of a multilateral cooperation regime. As discussed previously, hunters have no incentive to defect and chase the hare if cooperation is succeeding in capturing the stag. On the other hand, unilateral defections are also particularly costly, not simply for the opportunity cost associated with a successful multilateral regime but because a unilateral regime is also likely to sustain. Once such defection occurs, it may be unlikely that multilateral cooperation occurs.

Second, the stag hunt also emphasizes the importance of a single actor's signaling to other actors that they will commit to cooperating. Particularly if the stag hunt game is more broadly analyzed with more than two players, the United States has a particularly important role to play. Because of its financial and international influence, the United States can lend credibility

to a multilateral regime to allow it to successfully extract revenue from would-be-evaders. The involvement of the United States can be particularly important in lending credibility to a successful multilateral regime. Indeed, the defection of a financially influential country such as the United States from a regime is likely to have a more adverse effect on the likelihood of the regime's success.

V. Recommendations

Even before describing specific policy changes, it is worth noting that the analysis in this paper provides for just one example of a common phenomenon: in many cases, multilateralism may be desirable but also very difficult to achieve. The most important lesson may be that absent a change in domestic institutions or some way to align short-term incentives with long-term policy goals, the United States is unlikely to foster cooperation toward a successful multilateral regime.

While as a country, the United States might benefit from a longer-term strategy that leads to a multilateral regime, there are forces pushing prosecutors and policymakers to seek short-term tax gains. The misaligned incentives of individual Service agents and Department of Justice prosecutors present challenges for implementing a coherent U.S. international tax strategy going forward. Absent a change in policy or incentives, prosecutors are likely to continue chasing hares and put at risk the international community's ability to capture the possible stag of creating a global tax regime that maximizes tax revenues and minimizes tax evasion.

The stag hunt model described above suggests several ways in which policymakers might think about altering elements of the game to make international cooperation more likely. For example, policymakers might think about trying to increase the payoffs from multilateral cooperation. Policymakers could also take steps to decrease the payoffs (or increase the costs) of

unilateral action for the actors making those decisions. In addition, policymakers could take steps toward signaling the commitment of the United States to other hunters that they will seek a multilateral solution. I provide specific recommendations toward each of these ends.

Increasing the payoffs of actions consistent with multilateral cooperation and decreasing the payoffs of unilateral action are both possible ways to discourage prosecution strategies that jeopardize the success of long-term international tax coordination. There are several ways in which policy might alter incentives. One informal solution is for officials at Treasury and the IRS to recognize the value of being judicious in their enforcement. Because individual prosecutors are, of course, likely to use the most aggressive available methods to win a case, the decision to avoid unilateral methods might have to be made at a broader level. The leadership of the Treasury or IRS or DOJ Tax Division could decide not to aggressively pursue those cases in which information would have to be subpoenaed in such a way to force FFIs to violate local laws. Similarly, those leaders and public officials could lighten the rhetoric impressing the importance of prosecuting tax crimes that require unilaterally extracting information from foreign jurisdictions with the use of aggressive summons. Certainly, even those leaders face a host of pressures, both from elected officials and from the public, to crack down on international tax evasion. Nonetheless, Treasury, IRS, and DOJ officials can emphasize the international tax prosecution successes achieved through multilateral cooperation and information sharing agreements. Certainly, the information sharing regimes that have been established with many countries already present opportunities for prosecution and public highlighting of actions taken by prosecutors.

Similarly, officials can continue to push forward various voluntary disclosure programs that are not only successful at bringing international tax crimes to light but also do not require

the use of aggressive unilateral action. For example, the DOJ has touted its Offshore Compliance Initiative, which, in conjunction with the Swiss Bank Program, has used cooperation with financial intermediaries and foreign governments to collect more than $1 billion in penalties.[109] The IRS's Offshore Voluntary Disclosure Program ("OVDP") has been highlighted by the Service for bringing in 55,800 taxpayers into the program as of October 2016, resulting in over $9.9 billion in taxes, interest, and penalties since 2009.[110] These programs represent some of the successful efforts by tax enforcement and prosecutors to aggressively pursue international tax crimes. Policymakers and decisionmakers may want to look to and praise these sorts of programs—those that bring in revenue while avoiding unilateral summons—in order to publicly reward those actions that move forward a U.S. strategy consistent with multilateral cooperation. The less that decisionmakers push for the use of unilateral summons, the less prosecutors will feel that those methods must be used as part of an effective strategy to prosecute tax evasion. Because there are no monetary incentives or other tangible extrinsic incentives that could discourage the use of unilateral summons, these sorts of public pressures and statements may be needed to nudge prosecutorial behavior.

There may be slightly more formal ways in which decisionmakers could move tax strategy away from counterproductive unilateral strategies as well. For example, the Assistant Attorney General of the Tax Division could decide that as a divisional policy, prosecutors will not use John Doe Summons or *Bank of Nova Scotia* summons for situations in which doing so would raise comity issues. In extreme cases in which prosecuting a case would necessarily undermine multilateral cooperation, prosecutors might even decline to prosecute. Of course, both the informal and formal suggestions are only possible courses of action and this paper does not seek to establish one specific, definitive solution.

The U.S. should also make multilateral cooperation more appealing for itself and other states by pushing more strongly for other states to participate in information sharing or other cooperative regimes. For example, one of the methods used to encourage cooperation by the leaders of the G20 in 2009 was to stand together in identifying and threatening countermeasures against countries that did not participate in tax information exchange.[111] Many countries that had previously refused to participate in information exchange complied with information exchange standards as a result of pressure.[112] Similarly, the United States may, with the cooperation of other countries, continue pressuring would-be-havens to increase their transparency. Some of the countermeasures developed by the G20 included tools such as considering tax transparency in the design of aid programs, using withholding taxes to encourage tax transparency, and using tax treaties to encourage information exchange.[113] Policymakers should turn their attention to these actions, which, although involving pressure and using U.S. leverage, attempt to bolster and expand the network of countries participating in a multilateral approach to curbing tax evasion. The payoffs to unilateral prosecution would be decreased—there would be fewer jurisdictions in which using unilateral summons would be necessary to yield tax revenue. Conversely, the payoffs to multilateral action would be increased—cooperating with the other hunters has bigger payoffs because there is more information being exchanged and a great number of taxpayers included in the regime.

One way in which policymakers can try to signal commitment and foster cooperation is to encourage prosecutors to seek those prosecutorial actions that are least likely to entrench the United States into a Nash equilibrium with no tax coordination. In situations in which unilateral actions is necessary, there may still be ways to avoid unilateral actions that are particularly one-off, punitive solutions to individual cases. From a tax perspective, even if policymakers or

prosecutors feel the need to extract short-term wins, they should do so in a way that still lends itself to an eventual multilateral solution. The partial success of FATCA in leading to multilateral movements was due to its ability to invite multilateral cooperation. As described above, *Bank of Nova Scotia* summons and John Doe summons generally do not present those opportunities because they pursue case-by-case wins and do not establish any regime or procedure for information-sharing generally.

VI. Conclusions

As pressures mount in the United States and abroad for governments to act decisively against international tax evasion, policymakers in the United States are left with a challenging decision. On the one hand, there have at their disposal a newly evolving set of unilateral, punitive tools. On the other hand, they have opportunities to demonstrate U.S. commitment to multilateral solutions to combat tax evasion. With high stakes to the successful international coordination over tax evasion and the lasting consequences of policy choices made today, the choice between unilateral and multilateral approaches is particularly important.

This paper has presented an analysis of the tax coordination problem as a stag hunt game. The analysis suggests that, in contrast to the incentives and rhetoric guiding U.S. tax strategy today, prosecutors and policymakers must adhere to a multilateral strategy. Supporting multilateral solutions and avoiding unilateral tools is likely to ultimately have greater payoffs for the United States. Unilateral tools such as John Doe summons and *Bank of Nova Scotia* summons are likely to earn short-term small wins but likely to alienate potential multilateral partners and unlikely to lead to any sort of sustainable multilateral cooperation.

The conclusion this paper provides is thus that the current unilateral approach to curbing tax evasion is suboptimal. The tax coordination problem reflects a common challenge—a

multilateral solution may be optimal but there are many forces at play that make such cooperation difficult. The current approach being taken of emphasizing unilateral summons is unlikely to yield effective solutions to continuing international tax evasion.

This paper makes several recommendations for policymakers to encourage prosecutorial strategies consistent with multilateral coordination and discourage unilateral actions detrimental to coordination. Policymakers ought to show restraint in situations in which unilateral actions might be taken. Lastly, U.S. policymakers should emphasize multilateral solutions, both in highlighting their importance to domestic prosecutors and in cooperating with leaders in other countries to continue to push for agreements concerning international tax enforcement.

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[1] GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 35 (2015).
[2] *Id*.
[3] Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 310 (2012).
[4] *Id.* at 317-18 (suggesting that 25 percent of all Latin American wealth and 33 percent of Middle Eastern and African wealth are held offshore).
[5] Peter Dietsch & Thomas Rixen, *Global Tax Governance: What It Is and What It Matters* in GLOBAL TAX GOVERNANCE: WHAT IS WRONG WITH IT AND HOW TO FIX IT 1 (ed. by Peter Dietsch & Thomas Rixen 2016).
[6] ZUCMAN, *supra* note 1, at 107.
[7] *Id.* at 105.
[8] Studies have provided estimates such as $60 billion revenue lost in 2004. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 110TH CONG., STAFF REP. ON TAX HAVENS BANKS AND U.S. TAX COMPLIANCE 1 (2008) (citing Kimberly A. Clausing, *Multinational Firm Tax Avoidance and Tax Policy*, 62 NAT'L T. J. 703 (2007); Zucman provides an estimate of roughly $130 billion of tax avoidance per year. ZUCMAN, *supra* note 1, at 105.
[9] Byrnes and Kleinfeld, FATCA and CRS compliance § 1.01 1-7 (citing IRS, OVERVIEW TAX GAP FOR FINANCIAL YEAR 2006.).
[10] *Id.* at 1-4.
[11] STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 8, at 9.
[12] Joseph Guttentag and Reuven Avi-Yonah, *Closing the International Tax Gap* in BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION 102 (Max B. Sawicky ed. 2005).
[13] Dietsch & Rixen, *supra* note 5, at 10.
[14] ZUCMAN, *supra* note 1, at 47.
[15] Grinberg, *supra* note 3 at 314 (citing Steven Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. 605, 648-53 (2008)).
[16] *Id.*
[17] For example, the U.S.-Swiss MLAT was, for most of its history, ineffective for requiring information exchange related to "tax fraud." Jane G. Song, *The End of Secret Swiss Accounts?: The Impact of the U.S. Foreign Account Tax Compliance Act (FATCA) on Switzerland's Status as a Haven for Offshore* Accounts, 35 NW. J. OF INT'L L. & BUS. 687, 695 (2015).
[18] *Id.* at 315.
[19] Byrnes and Kleinfeld, *supra* note 9, at 1-9 – 1-10.
[20] For example, in the case of UBS, U.S. residents were still able to utilize UBS accounts as tax evasion mechanisms by setting up various entity structures that exempted them from the reporting and withholding requirements. *Grinberg, supra* note 3, n. 72 at 326.

[21] *Id.* at 315.
[22] *Id.*; Song, *supra* note 17, at 696.
[23] Song, *supra* note 17, at 696.
[24] *See, e.g.*, *Tax Haven Banks and U.S. Tax Compliance, Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 11-14 (2008) (statement of Douglas Shulman, Comm'r, Internal Revenue Service); STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 8, at 3 (noting that there was a "particular concern in this investigation [as to] the extent to which tax haven banks may be manipulating their reporting obligations.").
[25] http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx. The required information includes names, addresses, and other information about accountholders, as well as some financial information about the account. Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 TAX NOTES 1245, 1246 (2014).
[26] Grinberg, *supra* note 3, at 334.
[27] I.R.C. § 1471. The withholding tax is a significant 30 percent of any passthru payments. I.R.C. §§ 1471(a), (d).
[28] I.R.C. § 1471; *see also* Grinberg, *supra* note 3, at 335.
[29] *See, e.g.*, Grinberg, *supra* note 3, at 336; Dhammika Dharmapala, *Cross-border Tax Evasion Under a Unilateral FATCA Regime*, 141 J. OF PUBLIC ECON. 29, 31 (2016).
[30] Blank & Mason, *supra* note 25, at 1246-47 (2014).
[31] Jeff N. Mukadi, *FATCA and the Shaping of a New International Tax Order*, 66 TAX NOTES INT'L 1227, 1231 (2012).
[32] XAVIER OBERSON, INTERNATIONAL EXCHANGE OF INFORMATION IN TAX MATTERS: TOWARDS GLOBAL TRANSPARENCY 157 (2015).
[33] Byrnes and Kleinfeld, *supra* note 9, at 1-24.
[34] Itai Grinberg, *Does FATCA Teach Broader Lessons About International Tax Multilateralism* in *Matters* in GLOBAL TAX GOVERNANCE: WHAT IS WRONG WITH IT AND HOW TO FIX IT 162 (ed. by Peter Dietsch & Thomas Rixen 2016).
[35] Grinberg, *supra* note 3, at 322.
[36] Byrnes and Kleinfeld 1-25 – 1-26.
[37] Byrnes and Kleinfeld 1-25.
[38] Reuven S. Avi-Yonah, *Constructive Unilateralism: U.S. Leadership and International Taxation*, 42 INT'L TAX J. 17, 21 (2016). To date, the United States has successfully negotiated IGAs or related agreements with at least 113 jurisdictions. U.S. Department of the Treasury, *Foreign Account Tax Compliance Act (FATCA)*, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.
[39] Blank & Mason, *supra* note 25, at 1247. For a more detailed discussion of the development of model IGAs and differences between models, see OBERSON, *supra* note 32, at 158-59.
[40] Avi-Yonah, *supra* note 38, at 21.
[41] *Id.* at 2. To date, the MAATM has been signed but not ratified by the United States. *Id.*
[42] STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 8, at 10-11 (citing "Tax Administration: IRS's Information Exchanges with Other Countries Could Be Improved through Better Performance Information," prepared by U.S. Government Accountability Office (GAO), Report No. GAO-11-730 (Sept. 2011) (explaining that the U.S. had more than one agreement with a number of jurisdictions), http://www.gao.gov/assets/590/585299.pdf.
[43] Blank & Mason, *supra* note 25, at 1248.
[44] *Id.*
[45] For example, the OECD's Forum on Harmful Tax Practices has coordinated taxing of foreign portfolio income flowing through tax havens; Graetz & Grinberg, Michael J. Graetz & Itai Grinberg, *Taxing International Portfolio Income*, 56 TAX L. REV. 537, 579-80 (2003) (citing ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 37-59 (1998); similarly, the OECD BEPS project is a multilateral effort to prevent multinational enterprises' tax avoidance through profit-shifting and exploiting of mismatches in tax rules across international jurisdictions. OECD, *About BEPS and the Inclusive Framework.* For discussions of BEPS in the context of multilateralism see, for example, Dhammika Dharmapala, *Base Erosion and Profit Shifting: A Simple Conceptual Framework* (Coase-Sandor Inst. for Law & Econ. Working Paper No. 703, 2014); Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L. J. 1137 (2016).
[46] *See* Song, *supra* note 17 at 706.
[47] *Song*, *supra* note 17 at 5.
[48] *See* Lynnley Browning, *Seeking Bank Secrecy in Asia*, N.Y. TIMES (2010); Neil Gough, *Singapore, a Rising Home for Quiet Money, Comes Under Pressure*, N.Y. TIMES (2017).

[49] For example, the Senate Subcommittee on Investigations has suggested in a report that "DOJ and IRS enforcement efforts to hold U.S. tax evaders and Swiss banks accountable for misconduct have bogged down. . . . DOJ has ceded control over the information collection process and ultimate authority over what information it will receive from a foreign government intent on secrecy and limiting the disclosure of bank information – information essential to effective U.S. investigations and prosecutions of U.S. tax evasion. . . . DOJ has also done little to collect the unpaid U.S. taxes that continue to be owed on billions of dollars of assets that were hidden in offshore accounts." *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts: Hearing Before the Permanent Subcomm. On Investigations of the Sen. Comm. On Homeland Sec. & Governmental Affairs*, 113th Cong. 114 (2014).
[50] *Id*. at 141.
[51] *Id*. at 141-46. Prosecution authority includes the use of tools such as plea agreements in Deferred Prosecution Agreements ("DPAs") or Non-Prosecution Agreements ("NPAs"). The U.S. Senate Permanent Subcommittee on Investigations' provided a report in which the key recommendations were for the United States to " (1) Improve Prosecution of Tax Haven Banks and Hidden Offshore Account Holders . . . (2) Increase Transparency of Tax Haven Banks that Impede U.S. Tax Enforcement . . . (3) Streamline John Doe Summons . . . (4) Close FATCA Loopholes . . . (5) Ratify Revised Swiss Tax Treaty." *Id.* at 7-8.
[52] *See, e.g.*, Nathan J. Richman, *Panama Paper Raise Publicity for U.S. Tax Enforcement Efforts*, 82 TAX NOTES INT'L 461 (2016) (providing coverage of the Panama Papers leaks).
[53] *E.g.* Eric Lipton & Julie Creswell, *Panama Papers Show How Rich United States Clients Hid Millions Abroad*, N.Y. TIMES (2016).
[54] *See, e.g.*, Caroline D. Ciraolo, Acting Assistant Att'y Gen., Dep't. of Justice, Remarks at the Federal Bar Association Tax Law Conference (Mar. 4, 2016).
[55] Mukadi, *supra* note 31, at 1232.
[56] *See, e.g.*, Nathan J. Richman, *Border Adjustment Treaty Damage Could Hinder Tax Enforcement*, 154 TAX NOTES 1185 (2017) (arguing that a destination-based cash flow tax could undermine treaties, which could in turn make information exchange through treaty requests less feasible).
[57] For a detailed discussion of requirements, see, *U.S v. Powell*, 379 U.S. 48, 55 (1964). *See also* I.R.C. § 7602.
[58] *See* Harris Bonnette, Jr., *The IRS and Their Pesky Summonses: A Primer on Enforcement and Common Defenses*, 90-DEC FLA. B. J. 36, 36-38 (2016).
[59] Bruce Zagaris, *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?*, 35 GEO. WASH. INT'L L. REV. 331, 357-62 (2003).
[60] Internal Revenue Manual 25.5.7.2. The use of these summons under the Code were upheld by the Court in *U.S. v. Bisceglia*, 420 U.S. 141 (1975).
[61] I.R.M. 25.5.7.2
[62] *See, e.g.*, In re Tax Liabilities of John Does, No. 1:15-mc-23475 (S.D. Fla. Sept. 16, 2015) (order granting *ex parte* petition for leave to serve "John Doe" summon after the IRS filed for leave to serve a summons on Citibank NA and Bank of America NA for information related to Belizean accounts.). However, John Doe summons are increasingly used today but do not necessary implicate international tax coordination or foreign relations. *E.g.*, *In re* Tax Liabilities of Doe, No. 3:16-CV-06658, 2016 U.S. Dist. LEXIS 184200 (N.D. Ca. 2016) (serving John Doe summons for taxpayer information from a corporation on users of virtual currency). John Doe summons are simply attempts to gather information from unknown taxpayer, but they are not necessarily international. *See, e.g , In re* Does, 671 F.2d 977 (6th Cir. 1982), United States v. Pittsburgh Trade Exch., Inc., 644 F.2d 302 (3d Cir. 1981).
[63] For an overview of various unilateral methods used by the United States in order to get documents and information for tax prosecutions from abroad, see Bruce Zagaris, *supra* note 59, at 357-60.
[64] *Bank of Nova Scotia* 691 F.2d at 1391 (quoting *In re* Grand Jury Proceedings, U.S. v. Field, 532 F.2d 404, 410 (5th Cir. 1976)).
[65] United States of America v. UBS AG, Case No. 1:16-mc-20653-UU (S.D.N.Y. 2016). For a general discussion of the background of the case, see Marie Sapirie, *U.S. Eyes UBS Accounts in Singapore in Latest Offshore Effort*, 150 TAX NOTES 1225 (2016).
[66] Nathan Richman, *Ciraolo Says UBS Summons Proper Regardless of Client Consent*, 83 TAX NOTES INT'L 44 (2016).
[67] It is worth noting that the United States has accessed foreign records abroad in several other ways. *E.g.* U.S. v. Vetco Inc., 691 F.2d 1281 (9th Cir. 1981) (upholding an order of a summons in a criminal investigation issued to a U.S. company for records held by its Swiss subsidiary, despite Vetco Inc.'s claim that complying with the summons would violate the Swiss laws protecting the confidentiality of business records.). Courts have also previously issued subpoenas to U.S. branches of financial institutions for records located in branches and subsidiaries located abroad.

E.g. In re Matter of Tax Liabilities: John Does, 1991 U.S. Dist. Lexis 9704, at *1 (No. C-88-0137 Misc) (later vacated on Mar. 11, 1992).
[68] Nathan Richman, *supra* note 66, at 44.
[69] FRANK P. CIHLAR ET. AL., DEPARTMENT OF JUSTICE TAX DIVISION: SUMMONS ENFORCEMENT MANUAL 74-75 (2014).
[70] IRS Prac. & Proc. 13.05[6][b] (citing I.R.C. § 6038A(e)).
[71] RICHARD A. GORDON, TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS – AN OVERVIEW (1981).
[72] Robert T. Kudrle suggests that "if the U.S. political picture changes sufficiently before components of a new regime are firmly embedded in international practice, the policy window may shut with American cooperation delayed indefinitely." Kudrle, *supra* note 85, at 1180.
[73] For an overview of this game, see BRIAN SKYRMS, THE STAG HUNT AND THE EVOLUTION OF SOCIAL STRUCTURE (2003).
[74] JEAN-JACQUES ROSSEAU, THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 116 (ed. and introduced by Susan Dunn 2002).
[75] *See also, e.g.*, U.S. v. Toyota Motor Corp., 569 F. Supp. 1158 (C.D. Cal. 1983); In re Grand Jury Subpoena (Mark Rich and & Co., AG), 707 F.2d 663 (2d Cir. 1983), *cert. denied,* 463 U.S. 1215 (1983). *But see* U.S. v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983) (denying the summons in a case involving comity issues with Greece).
[76] Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet,* 67 EMORY L. J. (forthcoming) pg. 54-58.
[77] IRS PRAC. AND PROC. 13.05
[78] To be fair, Hsiaw was a former telecommunications executive. Neil Gough, *Singapore, a Rising Home for Quiet Money, Comes Under Pressure*, N.Y. TIMES (2017). Nonetheless, the point stands that cases are often for individual taxpayers, one at a time.
[79] Byrnes and Kleinfeld, *supra* note 9, at 1-30.
[80] Dharmapala, *supra* note 29, at 35.
[81] *Id.* at 31-36.
[82] This critical assumption deserves a deeper discussion. Some commentators suggest that a regime like FATCA or automatic information exchange actually benefits the United States at the expense of other countries. Lukas Hakelberg, *Redistributive Tax Co-operation: Automatic Exchange of Information, US Power and the Absence of Joint Gains* in GLOBAL TAX GOVERNANCE: WHAT IS WRONG WITH IT AND HOW TO FIX IT 125 (Peter Dietsch & Thomas Rixen eds. 2016). Hakelberg argues that, because larger countries tend to have higher tax rates, the move toward transparency is likely to benefit larger countries and the flow of capital away from smaller countries make them worse off. He argues that there may be a theoretically possible Pareto-involving reform in which developed countries compensate havens for their lost revenue, but argues that such a result is very unlikely in practice. *Id.*
[83] Grinberg, *supra* note 34, at 166.
[84] Tsilly Dagan, *Tax Treaties as a Network Product*, 41 BROOK. J. INT'L L. 1081, 1088-89 (2016); Grinberg, *supra* note 83, at 166.
[85] "As the emerging regime matures, systematic failures of will or competence by any single jurisdiction will bring greater attention and—at least if the backsliding state lacks overall power—retaliation beyond anything yet seen." Robert T. Kudrle, *Tax Havens and the Transparency Wave of International Tax Legalization*. 37 U. PA. J. INT'L L. 1153, 1180 (2016).
[86] Grinberg, *supra* note 45, at 1196.
[87] *Id.* at 1196.
[88] In the context of foreign portfolio income, see, Graetz & Grinberg, *supra* note 45, at 582.
[89] Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 SO. CAL. L. REV. 209, 220-21 (2009).
[90] Restatement (Second) of Foreign Relations Law § 40.
[91] *E.g.* U.S. v. Vetco Inc., 691 F.2d 1281, 1289 (9th Cir. 1981) ("There is a strong American interest in collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries. . . . [Switzerland's] interest is diminished in this case, where the parties are subsidiaries of American corporations.").
[92] Reuven S. Avi-Yonah, *supra* note 38; *see also* Michael J. Graetz & Itai Grinberg, *supra* note 45, at 584 (2003) (speaking to FATCA, "[E]nlisting the aid of financial intermediaries is an innovative step toward greater enforcement, one that seems likely to take on greater importance in the years ahead. And perhaps unilateral actions such as these will spur additional multilateral coordination and cooperation.").
[93] Avi-Yonah *supra* note 38, at 21.

[94] Avi-Yonah *supra* note 38, at 20. He also provides examples such as the inclusion of foreign tax credits in tax treaties, foreign investment fund (FIF) legislation, taxing income of controlled foreign corporations (CFCs), taxing foreign investment in real property, portfolio interest exemptions, branch profit taxes, and anti-hybrid rules. *Id.* at 20-21. Although providing several examples in which constructive unilateralism has fallen short, Avi-Yonah concludes that "constructive unilateralism is still the most promising way forward." *Id.* at 24.
[95] *Id.* at 20.
[96] OBERSON, *supra* note 32, at 163-164. FATCA did not begin with primarily bilateral or multilateral intentions. *See* Edward Tanenbaum, *Here They Come: FATCA Intergovernmental Agreements*, 41 TAX MGMT. INT'L J. 623, 623 ("[FATCA] was steamrolling down on a unilateral basis without any immediate serious attention being given to the pursuit of bilateral or multilateral alternatives to FATCA."); Lukas Hakelberg, *supra* note 82, at 133 ("When [FATCA] passed in March 2010, no intergovernmental approach was envisaged.").
[97] Avi-Yonah, *supra* note 38, at 21.
[98] Grinberg, *supra* note 34, at 162.
[99] *Id.* at 160.
[100] *Id.* at 170.
[101] *Id.* at 162.
[102] Blank & Mason, *supra* note 25, at 1249-50.
[103] Grinberg, *supra* note 98, at 170.
[104] See earlier discussion of ability to impose penalties on U.S. branches of banks and see discussion surrounding *supra* note 67.
[105] *See* Tanenbaum, *supra* note 96, at 623.
[106] Avi-Yonah, *supra* note 38, at 24 (noting that "MAATM has potential as a deterrence device" but that it does not present a fruitful as solution in the tax treaty context as constructive unilateralism).
[107] In the prisoner's dilemma, there is a dominant strategy: no matter what the other player does, a player has a strategy (defecting) that will always make them better off than the other strategy (cooperating). A rational player will always defect, which results in the noncooperative solution. The stag hunt, on the other hand, has no such dominant strategy.
[108] These payoffs do not describe the stag hunt. A hunter is perfectly content to continue cooperating to catch a stag even if the opportunity to hunt a hare presents itself, as long as they believe others will continue cooperating. There is no unilateral payoff for a hunter to defect if they know that the successful hunt of a stag is likely.
[109] Press Release, Department of Justice, Justice Department Reaches Final Resolutions Under Swiss Bank Program (Dec. 29, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-final-resolutions-under-swiss-bank-program.
[110] Press Release, Internal Revenue Service, Offshore Voluntary Compliance Efforts Top $10 Billion; More Than 100,000 Taxpayers Come Back into Compliance (Oct. 21, 2016), https://www.irs.gov/uac/newsroom/offshore-voluntary-compliance-efforts-top-10-billion-more-than-100000-taxpayers-come-back-into-compliance.
[111] Itai Grinberg, *Beyond FATCA: An Evolutionary Moment for the International Tax System* 2 (Working Draft, 2012), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1162&context=fwps.
[112] *Id.*
[113] Declaration on Strengthening the Financial System – London Summit, 2 April 2009, Leaders of the G20 (2009), http://www.g20.utoronto.ca/2009/2009ifi.pdf.