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“Americans: We Love You, But We Can’t Afford You”: How the Costly U.S.-Canada FATCA Agreement Permits Discrimination of Americans in Violation of International Law

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COMMENT

**“AMERICANS: WE LOVE YOU, BUT WE
CAN’T AFFORD YOU”: HOW THE COSTLY
U.S.-CANADA FATCA AGREEMENT
PERMITS DISCRIMINATION OF AMERICANS
IN VIOLATION OF INTERNATIONAL LAW**

YVONNE WOLDEAB *

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* Yvonne Woldeab is a 2016 J.D. Candidate at American University Washington College of Law. Thank you to the Editorial Board of the *American University International Law Review*, whose diligent and talented efforts made this production possible. I would like to devote this article to my beautiful and dazzling mother, Almaz, who lifts me up with her love, confidence, and support every day. I am so proud and grateful to be your daughter.

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I. INTRODUCTION

On February 20, 2014, National Public Radio (“NPR”) reported a record high number of American citizens renouncing their citizenship worldwide.¹ In 2012, 932 individuals renounced their

1. See Ari Shapiro, *Why More Americans are Renouncing U.S. Citizenship*,

U.S. citizenship or terminated their U.S. residency (termed “expatriating”).² In 2013 this number surged to 2,999, the highest number in history, and almost thirteen times the number of expatriates only five years earlier.³ Even more are expected to renounce their citizenship in 2014 and 2015 due to the newly implemented law.⁴ The NPR article reported, “[w]hile individual reasons for renouncing may vary from person to person, experts in the field say the recent dramatic spike has more to do with the 2010 tax law [the Foreign Account Tax Compliance Act] than any other factor.”⁵

In 2010, Congress passed the Foreign Account Tax Compliance Act (“FATCA”),⁶ which requires all foreign financial institutions (“FFIs”) doing business with the United States to collect information about their U.S. accountholders and disclose that information to the Internal Revenue Service (“IRS”).⁷ If an FFI does not fully comply

NPR (Feb. 20, 2014), <http://www.npr.org/blogs/parallels/2014/02/20/275937138/why-more-americans-are-renouncing-u-s-citizenship> (attributing the thirty percent increase from 2012 to 2013 to changes in international tax law).

2. See Andrew Mitchel & Ryan E. Dunn, *2013 Expatriations Increase by 221%*, INT’L TAX BLOG (Feb. 6, 2014), http://intltx.typepad.com/intltx_blog/2014/02/2013-expatriations-increase-by-_.html (highlighting that between 1998 and 2009, the number of American expatriates maintained a gradual incline from 398 to 742, but dramatically increased after the passage of the Foreign Account Tax Compliance Act in 2009).

3. See Shapiro, *supra* note 1 (describing the recent increase of expatriates as a “sudden spike”); Mitchel & Dunn, *supra* note 2 (explaining the increase of expatriates from 1998 to 2013 as a symptom of changes in tax law); see also Quarterly Publication of Individuals Who Have Chosen to Expatriate, 79 Fed. Reg. 7504 (Feb. 7, 2014) (providing a quarterly notice of individuals who expatriate).

4. See Alex Newman, *Amid IRS Abuse, Record Number of Americans Give Up U.S. Citizenship*, NEW AM. (Dec. 9, 2013), <http://www.thenewamerican.com/us-news/congress/item/17134-amid-irs-abuse-record-number-of-americans-give-up-u-s-citizenship> (stating that recent tax reforms will make expatriation more attractive to U.S. citizens).

5. Shapiro, *supra* note 1.

6. Hiring Incentives to Restore Employment Act, H.R. 2847, 111th Cong. § 501 (2010). Congress passed FATCA legislation in a large legislative package directed at job creation. The provisions implementing FATCA are contained in sections 1471 through 1474 of the Internal Revenue Code. For more details about FATCA’s provisions, see sources cited *infra* note 7.

7. See generally *Foreign Account Tax Compliance Act*, INTERNAL REVENUE SERV., <http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-FATCA> (last updated Jan. 13, 2015) [hereinafter *FATCA History*] (providing brief background information about FATCA); *Resource Center*:

with FATCA's requirements, including the requirement to identify all U.S.-held accounts, the act imposes a thirty percent withholding on U.S. payments passing through the institution.⁸

Unsurprisingly, the reaction to FATCA from the international community has included opposition, as many claim the U.S. tax law is an overreaching and onerous breach of privacy and foreign sovereignty.⁹ In response to public comments on FATCA, and the realization that FFIs would attempt to avoid FATCA by refusing to serve U.S. clientele abroad, the U.S. Department of the Treasury published a Model FATCA Agreement ("U.S. Model")¹⁰ that includes an addendum with an anti-discrimination provision explicitly prohibiting FFIs from discriminating against U.S. persons.¹¹ Currently, the United States has FATCA agreements

Foreign Account Tax Compliance Act (FATCA), U.S. DEP'T OF TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last updated Dec. 8, 2014) [hereinafter *Resource Center: FATCA*] (providing detailed information about FATCA, including press releases and model intergovernmental agreements).

8. See *FATCA History*, *supra* note 7 ("U.S. financial institutions and other U.S. withholding agents must both withhold 30% on certain payments to foreign entities that do not document their FATCA status and report information about certain non-financial foreign entities.").

9. See, e.g., Lynnley Browning, *Analysis: Critics Say New Law Makes Them Tax Agents*, REUTERS (Aug. 19, 2011), <http://www.reuters.com/article/2011/08/19/us-usa-tax-fatca-idUSTRE77138220110819> (quoting an American senior finance executive in Hong Kong as stating FATCA is "America's most imperialist act since it invaded the Philippine Islands in 1899"); *id.* (noting that backlash from numerous foreign banks led to the U.S. Department of the Treasury delaying the implementation date of FATCA).

10. See *Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden*, U.S. DEP'T OF TREASURY (July 26, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx> [hereinafter *Treasury Releases Model*] (announcing the release of the first two versions of the U.S. Model developed in conjunction with France, Germany, Italy, Spain, and the United Kingdom); see also *Resource Center: FATCA*, *supra* note 7 (explaining that the U.S. Department of the Treasury currently has multiple versions of the model agreement, one for agreements reached before the enactment of FATCA and one for agreements reached after the enactment).

11. See, e.g., *Model 1 IGA Annex II*, U.S. DEP'T OF TREASURY (Nov. 4, 2013), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Annex-II-to-Model-1-Agreement-11-4-13.pdf> [hereinafter *Annex II*] ("The Financial Institution must not have policies or practices that discriminate against opening or maintaining Financial Accounts for individuals who are Specified U.S. Persons and residents of [Canada].").

signed and in effect with fifty-six jurisdictions;¹² of these, all except Canada’s contain the U.S. Model anti-discrimination provision in the final FATCA agreement.¹³ The U.S.-Canada Income Tax Convention (“ITC”),¹⁴ which memorializes the FATCA agreement between the United States and Canada, not only omits the anti-discrimination clause, but provides no other similar protections for U.S. persons within the ITC.

As predicted, since the passage of Canada’s FATCA, Americans in Canada have repeatedly complained of being shut out from doing business in Canadian financial institutions¹⁵—exactly what the anti-discrimination clause in the U.S. Model would have served to prevent. The inability of these individuals to access such basic financial services limits their ability to, among many other limitations, efficiently manage finances with checking and savings accounts, pay bills or rent online or with debit and credit cards, tax plan, job hunt, or apply for certain tax credits.¹⁶

Given the sweeping changes that FATCA brings to the international tax information exchange arena, and because discrimination on the basis of U.S. national origin is one of the anticipated consequences of FATCA, should Canada be precluded from omitting the U.S. Model’s anti-discrimination clause from its tax treaty? This Comment analyzes whether Canada’s FATCA, which omits the U.S. Model’s anti-discrimination clause, is a violation of Canada’s obligations under the International Covenant

12. See *Resource Center: FATCA-Archive*, U.S. DEP’T OF TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx> (last updated Jan. 8, 2015) (listing another fifty-six jurisdictions that signed FATCA agreements, but have not reached an agreement in substance like the fifty-six jurisdictions mentioned above).

13. Agreement Between the Government of the United States of America and the Government of Canada 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, U.S.-Can., Feb. 5, 2014, T.I.A.S. 14-627 [hereinafter U.S.-Can. FATCA Agreement].

14. Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, U.S.-Can., Sept. 26, 1980, 1469 U.N.T.S. 189 [hereinafter Income Tax Convention]; see U.S.-Can. FATCA Agreement, *supra* note 13.

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

on Civil and Political Rights (“ICCPR”),¹⁷ a multilateral human rights treaty that guarantees individuals freedom from discrimination on the grounds of, among other protected classes, national origin.¹⁸ This Comment argues that Canada’s FATCA, absent an anti-discrimination clause, violates the ICCPR.

Part II of the Comment presents a background of the international tax compliance framework, discusses relevant case law that led to the passage of the U.S. FATCA in 2010, and highlights key provisions of the law. Part III analyzes Canada’s recently passed FATCA agreement (“Canada’s FATCA”),¹⁹ which omits the anti-discrimination clause of the U.S. Model. This Part argues that the omission of the anti-discrimination clause is a violation of international law, *vis-à-vis* its incongruity with the anti-discriminatory purpose of the ICCPR.²⁰ Part III also asserts that, pursuant to the Vienna Convention on the Law of Treaties (“Vienna Convention”),²¹ the Supreme Court of Canada should find the anti-discrimination clause in the U.S. Model persuasive to its interpretation of FATCA.

Part IV recommends that (1) Canada amend its FATCA to include the U.S. Model’s anti-discrimination clause; (2) the United States should subsidize the cost of FATCA’s implementation in Canada to prevent discrimination against U.S. persons in Canada; or (3) the United Nations’ Human Rights Committee should find that Canada’s FATCA, absent anti-discrimination protections, violates the ICCPR.²² Finally, the Comment concludes that Canada’s FATCA, as it is currently set forth, violates the ICCPR because it does not effectively guarantee protection from discrimination.²³

17. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1979) [hereinafter ICCPR].

18. *See id.* arts. 2(2), 26 (“[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . national . . . origin.”).

19. An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014, c. C-31 (Can.).

20. *See* discussion *infra* Part III.

21. Vienna Convention on the Law of Treaties art. 15, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

22. *See* discussion *infra* Part IV.

23. *See* discussion *infra* Part V.

II. BACKGROUND

Unique amongst developed countries, the United States taxes its citizens on worldwide income.²⁴ This means that no matter where a U.S. citizen or resident lives, or where the income is earned, he or she must file annual income tax returns and pay associated taxes.²⁵

A. INTERNATIONAL TAX COMPLIANCE FROM THE UNITED STATES’ PERSPECTIVE: A BRIEF OVERVIEW

Because the United States collects federal income tax primarily through “voluntary compliance,” a process where a taxpayer or entity assesses and self-reports its own tax liability, and makes the appropriate tax payments to cover the liability, the IRS continuously combats underreporting of tax liability, non-filing of tax returns, and underpayment of taxes.²⁶ In combatting these problems, one successful method of enforcement for the IRS is to require withholding of estimated taxes.²⁷ This occurs when the payor of taxable income, such as an employer, is required to withhold a portion of a taxable payment (such as withholding a percentage of wages from an employee) and submits the payment to the IRS for

24. See 26 U.S.C. § 61 (2014) (defining income to include “all income from whatever source derived”); see also Don Whiteley, *Canada Capitulates on FATCA Agreement*, BC BUS. (Feb. 7, 2014), <http://www.bcbusiness.ca/finance/canada-capitulates-on-fatca-agreement> (“The U.S. is one of only two countries in the world (the other is Eritrea) that levies income tax based on citizenship rather than residence.”).

25. See 26 U.S.C. § 911 (governing the filing of income tax for citizens and residents of the United States living abroad); *id.* § 6012 (requiring “[e]very individual having for the taxable year gross income” to file income tax returns). See generally *Information for U.S. Citizens or Dual Citizens Residing Outside the U.S.*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/Newsroom/Information-for-U.S.-Citizens-or-Dual-Citizens-Residing-Outside-the-U.S.> (last updated Feb. 12, 2014) (providing general tax filing information and instructions for U.S. citizens who live outside the United States, including the requirement that all U.S. citizens must file “federal income tax return[s] for any tax year in which [their] gross incomes [are] equal to or greater than the applicable exemption amount and standard deduction”).

26. See generally Mark R. Van Heukelom, Note, *The Foreign Account Tax Compliance Act and Foreign Insurance Companies: Better to Comply than To Opt Out*, 39 IOWA J. CORP. L. 155, 158 (2013) (providing an overview of income tax collection through voluntary compliance).

27. *Id.* (citing Lily Kahng, *Investment Income Withholding in the United States and Germany*, 10 FLA. TAX REV. 315, 323 (2011)).

application towards the employee's tax obligation.²⁸ At the end of the taxable year, if the withholding paid to the IRS equals the taxpayer's obligation, the IRS has fully collected the liability.²⁹ Indeed, the IRS states that when income is reported dually to both the IRS and the taxpayer (such as wages in the previous example), the income has a ninety-nine percent likelihood of being reported on the taxpayer's return.³⁰

On the other hand, in cases where dual reporting is not required, this percentage drops to just forty-four percent.³¹ Consequently, in the realm of international taxation—where withholding has rarely been practical due to differing tax assessments and requirements around the world—U.S. tax compliance and effective tax enforcement issues are much more complex.³²

1. Voluntary Compliance Measures

The IRS has recognized that U.S. taxpayers with international income sources or dual citizenship might not file their U.S. income taxes properly, intentionally or not.³³ In addition, differing local laws governing bank secrecy and information privacy have made it difficult for the IRS to reliably determine the accuracy of a tax filing.³⁴ As a result, both the taxpayer and the IRS have been at the mercy of various voluntary compliance procedures to help ensure proper filing.

28. *Id.*

29. *Id.*

30. Karl Kuepper, Oliver von Schweinitz & Mark Orlic, *How FATCA Will Impact Financial Services in Germany*, INT'L TAX REV. (Dec. 12, 2012), <http://www.internationaltaxreview.com/Article/3130149/How-FATCA-will-impact-financial-services-in-Germany.html>.

31. *See id.* (remarking that an example where dual reporting is not required is capital gains earned in overseas accounts).

32. *See* Van Heukelom, *supra* note 26, at 158 (noting that voluntary compliance is less effective internationally than domestically) (citing Melissa A. Dizdarevic, Comment, *The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before*, 79 FORDHAM L. REV. 2967, 2972 (2011)).

33. *See Information for U.S. Citizens or Dual Citizens Residing Outside the U.S.*, *supra* note 25 (recognizing that some taxpayers who are dual citizens of the United States and a foreign country may fail to timely file).

34. *See* Van Heukelom, *supra* note 26, at 157-58 (stating that differences in national laws can create conditions for tax fraud across borders).

The IRS implemented two primary methods of voluntary compliance in international taxation. The first is the U.S. taxpayer’s disclosure of foreign bank accounts in a Report of Foreign Bank and Financial Accounts (“FBAR”), submitted annually to the U.S. Department of the Treasury.³⁵ The FBAR requires the taxpayer to report information about foreign financial accounts exceeding \$10,000, or face fines and penalties.³⁶ However, because the FBAR is a method of self-reporting, it has not been particularly effective in curtailing taxpayer noncompliance.³⁷

Thus, in 2000 the IRS implemented a second method of voluntary disclosure known as the Qualified Intermediary (“QI”) program.³⁸ In the QI program, participating FFIs volunteer to “withhold and report” tax on subjected income in exchange for certain benefits” from the IRS.³⁹ Critics of the QI program have pointed out that although “this scheme induced foreign banks to cooperate with the IRS, the complicated and often indirect nature of international financial transactions limited the scheme’s effectiveness.”⁴⁰

2. *The Swiss Bank Scandal*

Given the tame nature of these voluntary approaches, some argued that, until recently, the United States did not take international tax evasion seriously.⁴¹ The increasing gap between the taxes owed to

35. See generally *New Legislation Could Affect Filers of the Report of Foreign Bank and Financial Accounts, but Potential Issues are Being Addressed*, U.S. DEP’T OF TREASURY (Sept. 29, 2010), <http://www.treasury.gov/tigta/auditreports/2010reports/201030125fr.html> (providing an overview of the Bank Secrecy Act of 1970 and the IRS’s subsequent creation of the Form FBAR to assist taxpayers in complying with the Bank Secrecy Act).

36. *Id.*; see Mitchel & Dunn, *supra* note 2 (explaining that the standard penalty for unintentional failure to file the FBAR is \$10,000 per Form per year; the penalty for willful failure to file is the greater of \$100,000 or fifty percent of the account balance at the time of the violation).

37. See Van Heukelom, *supra* note 26, at 158.

38. See generally *Qualified Intermediary Frequently Asked Questions*, INTERNAL REVENUE SERV., <http://www.irs.gov/Businesses/International-Businesses/Qualified-Intermediary-Frequently-Asked-Questions> (last updated Jan. 27, 2015) (providing an overview of the Qualified Intermediary program).

39. Van Heukelom, *supra* note 26, at 158.

40. *Id.* (noting that the drawback of the QI program is that most foreign income subject to U.S. taxation passes through U.S. withholding agents, rather than Qualified Intermediaries).

41. See Lee A. Sheppard, *Will U.S. Hypocrisy on Information Sharing*

the IRS on international transactions and the taxes actually collected each year from these sources,⁴² compounded by the need to raise revenue during the 2008 American economic crisis, have prompted drastic change in U.S. tax collection efforts.⁴³

In 2009, former banker Bradley Birkenfeld of UBS bank, a bank participating in the IRS's voluntary QI program in Switzerland, turned tax evasion into worldwide news when he blew the whistle on his bank's scheme to defraud the IRS.⁴⁴ In *United States v. UBS*

Continue?, TAX ANALYSTS 1, 3 (Jan. 23, 2013), <http://www.taxanalysts.com/www/features.nsf/Articles/OC26B2CFD92F1FBE85257AFC004E8B38?OpenDocument> (highlighting that tax evasion was not taken seriously before the 2009 Swiss Bank case discussed *infra* Part II).

42. *Compare* 156 CONG. REC. S1635-36 (daily ed. Mar. 17, 2010) (statement of Sen. Levin) (estimating that tax-dodging schemes cost the Federal Treasury \$100 billion a year), with Frederic Behrens, Comment, *Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand*, WIS. L. REV. 205, 207 (2013) (estimating that offshore personal income tax evasion results in \$40-70 billion in revenue lost yearly), and Kuepper, *supra* note 30 ("The gross tax gap has grown . . . since [the IRS's] previous estimate for tax year 2001, increasing from \$345 billion to \$450 billion for tax year 2006."). The deficit varies depending on the measure used (e.g., annual, gross, and net losses).

43. *See* Shapiro, *supra* note 1 (commenting that the economic recession coupled with the UBS Swiss Bank scandal gave lawmakers a chance to "bring in massive sums of money and stop tax cheats at the same time"); *see, e.g.*, Pasquantino v. United States, 544 U.S. 349, 353 (2005) (rejecting the long-standing "revenue rule," which prohibited enforcement of foreign tax laws in domestic courts, thereby allowing the prosecution of Americans who violated Canadian tax law in U.S. courts).

44. *See, e.g.*, Lynnley Browning, *Wealthy Americans Under Scrutiny in UBS Case*, N.Y. TIMES (June 6, 2008), http://www.nytimes.com/2008/06/06/business/worldbusiness/06tax.html?_r=1& (providing background information on Mr. Birkenfeld); Miles Costello, *US Claims UBS 'Colluded' Behind Secrecy Laws*, TIMES ONLINE (July 18, 2008), <http://www.thetimes.co.uk/tto/business/industries/banking/article2157858.ece>; Carlyn Kolker, *Union Charter's Birkenfeld Resigns After Arrest in Tax Scheme*, BLOOMBERG (June 4, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=akUn9kowFOVk> (shedding light on the indictment against Mr. Birkenfeld who helped Igor Olenicoff hide \$200 million of assets in foreign countries); Evan Perez, *Offshore Tax Evasion Costs U.S. \$100 Billion, Senate Probe of UBS, LGT Indicates*, WALL ST. J. (July 17, 2008), <http://www.wsj.com/articles/SB121624391105859731>; Laura Saunders & Robin Sidel, *Whistleblower Gets \$104 Million*, WALL ST. J. (Sept. 11, 2012), <http://www.wsj.com/articles/SB10000872396390444017504577645412614237708>. Other tax evasion scandals unfolded during the same time period, however the UBS case appeared to attract the most attention in the United States.

AG,⁴⁵ the U.S. government sued Switzerland’s largest bank to try to force disclosure of the identities of approximately 52,000 American customers who allegedly hid their secret Swiss accounts from U.S. tax authorities.⁴⁶ According to the U.S. Department of Justice’s Complaint, U.S. customers failed to report and pay taxes on income earned from accounts that held about \$14.8 billion in assets.⁴⁷ Acting Assistant Attorney General for the Department’s Tax Division, John A. DiCiccio, commented that “[a]t a time when millions of Americans are losing their jobs, their homes and their health care, it is appalling that more than 50,000 of the wealthiest among us have actively sought to evade their civic and legal duty to pay taxes.”⁴⁸ Under threat of criminal proceedings, UBS paid \$780 million in fines to the IRS and turned over the names of more than 4,000 U.S. taxpayers who had maintained Swiss bank accounts.⁴⁹

UBS Bank, previously a QI, demonstrated the weakness of the voluntary compliance system.⁵⁰ The Swiss Bank case sparked debate about U.S. efforts in ensuring tax compliance overseas and propelled

45. No. 09-60033, 2009 U.S. Dist. LEXIS 66739 (S.D. Fla. July 7, 2009).

46. See *id.* at *2 (seeking to compel UBS to disclose records of the “John Doe” class of U.S. taxpayers); Peter Nelson, Note, *Conflicts of Interest: Resolving Legal Barriers to the Implementation of the Foreign Account Tax Compliance Act*, 32 VA. TAX REV. 387, 391 (2012) (noting that UBS misled U.S. authorities by hiding the true residency status of their U.S. accountholders and thereby allowed them to escape U.S. taxation).

47. *United States Asks Court to Enforce Summons for UBS Swiss Bank Account Records*, U.S. DEP’T OF JUSTICE (Feb. 19, 2009), <http://www.justice.gov/opa/pr/united-states-asks-court-enforce-summons-ubs-swiss-bank-account-records>.

48. *Id.*

49. See *Excerpts from IRS Commissioner Doug Shulman’s Press Remarks on UBS*, INTERNAL REVENUE SERV. (Aug. 19, 2009), <http://www.irs.gov/uac/Excerpts-from-IRS-Commissioner-Doug-Shulman%27s-Press-Remarks-on-UBS> (explaining that this action sends the message to all U.S. taxpayers that their efforts to hide assets will fail); *IRS to Receive Unprecedented Amount of Information in UBS Agreement*, INTERNAL REVENUE SERV. (Aug. 19, 2009), <http://www.irs.gov/uac/IRS-to-Receive-Unprecedented-Amount-of-Information-in-UBS-Agreement> (stating that UBS turned over all requested information); *UBS Enters Into Deferred Prosecution Agreement*, U.S. DEP’T OF JUSTICE (Feb. 18, 2009), <http://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement> (announcing that UBS Bank admitted to helping U.S. taxpayers hide accounts from the IRS, and that the bank agreed to identify those customers, and pay \$780 million in fines, penalties, interest, and restitution).

50. See Sheppard, *supra* note 41, at 5 (stating that there is no requirement that banks “rat out U.S. customers hiding behind foreign entities”).

Congress to change its approach towards tax havens and shelters.⁵¹ Thus began the enactment of an international tax compliance scheme that shifts from voluntary to mandatory compliance.

B. THE SHIFT TO MANDATORY COMPLIANCE: THE UNITED STATES PASSES FATCA

In the wake of the Swiss Bank scandal, Congress passed FATCA as part of the 2010 Hiring Incentives to Restore Employment Act.⁵² The law aims to “advance U.S. tax collection and enforcement efforts abroad and recoup the estimated hundreds of billions of dollars lost each year due to tax evasion.”⁵³ The primary reason FATCA departs so drastically from previous methods of foreign asset disclosure, such as the FBAR and QI program, is that for noncompliant FFIs, FATCA imposes a mandatory thirty percent withholding of payments passing from U.S. payors to the institution.⁵⁴

In brief, FATCA requires that any FFI⁵⁵ that intends to invest in a U.S. asset (whether for itself or a client): sign a contract with the IRS in which it promises to review existing accounts to identify all U.S. persons;⁵⁶ implement procedures to monitor new accounts for the

51. See ERIKA K. LUNDER & CAROL A. PETTIT, CONG. RESEARCH SERV., R43444, REPORTING FOREIGN FINANCIAL ASSETS UNDER TITLES 26 AND 31: FATCA AND FBAR 6 (2014) (commenting that the shortcomings of the voluntary compliance programs, along with the UBS case, influenced Congress to enact more stringent reporting requirements, such as those presented in FATCA).

52. H.R. 2847, 111th Cong. § 501 (2010).

53. *Id.*

54. See Behrens, *supra* note 42, at 209 (stating an unintended consequence is that “FFIs facing heavy compliance costs might determine that it is easier to drop American clients and investments than to comply with FATCA.”). The withholding threatens a substantial source of revenue for financial institutions involved with U.S. payors.

55. See 26 U.S.C. § 1471(d)(5) (2010) (defining “financial institutions” as any foreign entity that collects deposits in the fashion of a bank; maintains financial assets for others as a substantial portion of its business; or is primarily in the business of investing in a wide range of securities or other interests); see also *FATCA Information for Foreign Financial Institutions and Entities*, INTERNAL REVENUE SERV., <http://www.irs.gov/Businesses/Corporations/Information-for-Foreign-Financial-Institutions> (last updated July 11, 2014) (detailing the requirements that FACTA places on foreign banks).

56. See I.R.S. Notice 2011-34, 2011-19 I.R.B. 765 (May 9, 2011) (defining “U.S. person” as an individual or entity with any of these U.S. indicia: U.S.

same purpose; agree to provide the IRS with annual information about these accounts;⁵⁷ and agree to deduct and withhold a thirty percent tax for any accountholders that will not comply.⁵⁸ If a financial institution is deemed noncompliant in these requirements, then U.S. payors must withhold thirty percent of the gross payments made to U.S. accountholders.⁵⁹

1. Canada’s Reaction to FATCA

Not surprisingly, the international community—especially FFIs and those who would experience the trickledown effect of harm caused to those institutions—reacted with outrage over FATCA.⁶⁰ FATCA’s incongruity with other foreign privacy, bank secrecy, access to banking, and discrimination laws is a top concern for Canadian financial institutions and bankers.⁶¹ Banks were particularly worried they would be compelled to collect and disclose information about U.S. customers, only to be sued by those

citizenship or lawful permanent resident (green card) status; a U.S. birthplace; a U.S. residence address or a U.S. correspondence address (including a U.S. P.O. box); standing instructions to transfer funds to an account maintained in the United States, or directions regularly received from a U.S. address; an “in care of” address or a “hold mail” address that is the sole address with respect to the client; or a power of attorney or signatory authority granted to a person with a U.S. address).

57. See 26 U.S.C. § 1471(c)(1) (information about U.S. accountholders disclosed to the IRS includes the accountholder’s name, address, tax identification number, account numbers and balances, and gross receipts and withdrawals for each account).

58. See *id.* § 1471(b)(1)(D)(i) (applying the tax to all passthru payments).

59. See Behrens, *supra* note 42, at 214 (calling it a “penalty for failure to report tax obligations.”); *IRS and Treasury Department Propose “Phase-In” of FACTA Requirements*, SULLIVAN & CROMWELL LLP 2 (July 15, 2011), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_FATCA_Postponed_Deadlines.pdf (characterizing the payments as “withholdable payments”). In addition, if any foreign laws prohibit disclosure of the information because of conflict of local law rules, the financial institution must submit a waiver. I.R.C. § 1472.

60. See, e.g., Browning, *supra* note 9 (noting Australia, Switzerland, Hong Kong, the European Banking Federation, and the Institute of International Bankers’ discontent with FATCA).

61. See *Canada and U.S. Reach Agreement on Foreign Account Tax Compliance Act*, DEP’T OF FIN. CAN. (Feb. 5, 2014), <http://www.fin.gc.ca/n14/14-018-eng.asp> [hereinafter *Canada and U.S. Reach Agreement*] (describing concerns of the Canadian banking community as including conflict of laws issues, such as the Canadian Access to Basic Banking Services Regulations and the Personal Information Protection and Electronic Documents Act and FACTA).

customers for privacy, due diligence, and discrimination claims.⁶² Local Canadian laws, such as the Access to Basic Banking Services Regulations (“ABBS”),⁶³ which prohibits banks from requiring identification more than those enumerated in the law (none of which includes the identification sources that FATCA requires institutions to collect),⁶⁴ and the Canadian Charter of Rights and Freedom (“Canadian Charter”), which prohibits discrimination,⁶⁵ could be violated in the financial institution’s pursuit of identifying U.S. persons within the meaning of FATCA.⁶⁶

Debates during the passage of the Canadian legislation implementing FATCA illuminated Canadians’ disdain for the law and the feeling that the United States was overreaching in its approach to international tax compliance.⁶⁷ For example, U.S.-born

62. *See id.* (commenting on the fear from Canadian financial institutions of being forced to disclose information regarding U.S. taxpayers); *see also* Letter from Peter van Dijk, Senior Vice President of Taxation, TD Bank Fin. Grp., to the Honorable Michael Mundaca, Assistant Sec’y, Dep’t of Treasury, and the Honorable Douglas H. Shulman, Comm’r, Internal Revenue Serv. (Apr. 4, 2011) (voicing concern from TD Bank Financial Group); Patrick Cain, *Dual Citizens Sue Feds Over FATCA Tax Deal with U.S.*, GLOBAL NEWS (Aug. 12, 2014), <http://globalnews.ca/news/1504452/dual-citizens-sue-feds-over-fatca-deal-letting-banks-pass-info-to-irs> [hereinafter Cain, *Dual Citizens*] (discussing a lawsuit based on U.S. constitutional grounds filed by Canadian-U.S. dual citizens regarding the FATCA deal).

63. Access to Basic Banking Services Regulations, SOR/2003-184 (Can.).

64. *See id.* (allowing for only one source of photo identification).

65. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter] (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”). The US-Canada legislation implementing FATCA requires information-gathering and disclosure procedures that effectively treat individuals differently and adversely based on an immutable personal characteristic, citizenship—whether or not acknowledged or desired by the individual.

66. *See, e.g.*, Letter from Peter van Dijk to Michael Mundaca & Douglas Shulman, *supra* note 62 (suggesting FATCA alternatives to the IRS Commissioner).

67. *See, e.g.*, 147 PARL. DEB., H.C. (6th ser.) (2014) 071 (Can.) (“[T]he U.S. has no right to impose sanctions on Canadian banks. It says it does. We should challenge it in international court.”).

Canadian Parliament member Elizabeth May stated during the parliamentary debate:

It is clear that FATCA is advantageous for the United States alone. There is nothing in it to help Canadians. As the lawyers and legal experts explained, the only reason why the Government of Canada accepted this agreement, which will violate the rights of Canadians, is that the U.S. government threatened to impose sanctions on our banks.⁶⁸

2. The U.S. Model Anti-Discrimination Clause

From 2010 through 2012, in an attempt to help clarify and implement FATCA, the U.S. Department of the Treasury and the IRS published a series of preliminary notices and proposed regulations.⁶⁹ Based on the public comments received, in January 2013, the IRS issued final regulations for FATCA, asserting that bilateral intergovernmental agreements would facilitate the exchange of tax compliance information.⁷⁰ The U.S. Department of Treasury published the U.S. Model that would serve as a starting point for bilateral negotiations between the United States and FATCA partner countries.⁷¹

The U.S. Model allows FFIs to be “deemed compliant,” and therefore not subject to the thirty percent withholding, so long as they meet certain conditions.⁷² In addition, the agreement allows the home country of an FFI to take responsibility for collecting the information disclosures (as opposed to requiring the foreign financial institution to report directly to the IRS), thereby relieving the

68. *Id.*

69. See I.R.S. Notice 2011-53, 2011-32 I.R.B. 124 (Aug. 8, 2011) (discussing withholding, documentation, and reporting requirements); I.R.S. Notice 2011-34, 2011-19 I.R.B. 765 (May 9, 2011) (explaining the reporting requirements imposed on FFIs); I.R.S. Notice 2010-60, 2010-37 I.R.B. 329 (Sept. 13, 2010) (notifying stakeholders of important FATCA implementation information).

70. See T.D. 9610, 2013-15 I.R.B. 766 (referencing the joint view of Treasury and the IRS).

71. *Treasury Releases Model*, *supra* note 10.

72. *Treasury and IRS Issue Final Regulations to Combat Offshore Tax Evasion*, U.S. DEP’T OF TREASURY (Jan. 17, 2013), <http://www.treasury.gov/press-center/press-releases/Pages/tg1825.aspx> (clarifying and verifying obligations of FFIs).

institution of liability for disclosing information in violation of privacy laws.⁷³

Moreover, as the Treasury Regulation notes, “[t]he final regulations also add as a condition . . . that ‘the FFI not have policies or practices that discriminate against opening or maintaining accounts for U.S. individuals that are resident in the local FFI’s country.’”⁷⁴ Among the agreement’s many complex and technical requirements, this anti-discrimination clause is the only provision that directly and expressly defends against the discrimination that U.S. persons abroad would soon face as a result of FATCA’s implementation.

3. *The U.S.-Canada Income Tax Convention Implementing FATCA*

FATCA is not the first agreement of its kind for the United States or Canada. Before FATCA, the United States had bilateral income tax conventions (“ITCs”) with sixty-five countries.⁷⁵ These ITCs are largely based on model language from the Organisation for Economic Co-operation and Development (“OECD”).⁷⁶ Canada has an even larger network of preexisting bilateral tax treaties, amounting to approximately ninety-two.⁷⁷ These tax treaties generally allow the taxes of residents of one treaty country to be reduced from taxes of the other treaty country to prevent double

73. *See id.* In reference to the potential for FATCA to violate Canadian privacy laws, Canadian Finance Minister Jim Flaherty stated, “Canada engaged in lengthy negotiations with the U.S. government to address our concerns and, as a result, significant exemptions and other relief were obtained.” *Canada and U.S. Reach Agreement*, *supra* note 61. Accounts that will not be reportable under FATCA include: Registered Retirement Savings Plans, Retirement Income Funds, Disability Savings Plans, and Tax-Free Savings Accounts. In addition, small deposit-taking institutions, such as credit unions, with assets of less than \$175 million will be exempt. *Id.*

74. 78 Fed. Reg. 5874, 5890 (Jan. 28, 2013).

75. Charles Gustafson, *The USA*, in *THE IMPACT OF THE OECD AND UN MODEL CONVENTIONS ON BILATERAL TAX TREATIES* 1149 (Michael Lang et al. eds., 2012).

76. *MODEL TAX CONVENTION ON INCOME AND ON CAPITAL* (Org. Econ Co-Operation & Dev. July 22, 2010).

77. *See* Catherine Brown & Martha O’Brien, *Canada*, in *THE IMPACT OF THE OECD AND UN MODEL CONVENTIONS ON BILATERAL TAX TREATIES* 203, n.1 (Michael Lang et al. eds., 2012) (explaining that Canada is an open economy dependent on trade, with a large network of bilateral tax treaties).

taxation of the same income.⁷⁸ Furthermore, to safeguard against tax evasion, the ITCs typically provide for the exchange of tax information between governments upon request when related to specific criminal or civil tax matters that are under investigation.⁷⁹

The United States’ ITCs are based on the U.S. Model Income Tax Convention, but vary from country to country.⁸⁰ The United States and Canada signed their ITC, named the Convention with Respect to Taxes on Income and on Capital, in 1980.⁸¹ To implement FATCA, in 2014 the United States and Canada signed an intergovernmental agreement, and the Canadian Parliament passed the agreement as law under the existing U.S.-Canada ITC⁸² as an agreement to “Improve International Tax Compliance through Enhanced Exchange of Information.”⁸³

C. TAX TREATY INTERPRETATION

When interpreting treaty provisions, it is common to refer to the Vienna Convention on the Law of Treaties.⁸⁴ Article 31 of the Vienna Convention states that treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁸⁵ In addition to the treaty text, the Vienna Convention

78. See JONATHAN SCHWARZ, SCHWARZ ON TAX TREATIES 21 (3d ed. 2013) (“[A]most all tax treaties were bilateral and principally aimed at preventing double taxation.”).

79. See *id.* (allowing for mutual benefits via information sharing).

80. See Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, U.S.-U.K., Dec. 31, 1975, 31 U.S.T. 5668 (resembling the OECD Model Convention); see also Gustafson, *supra* note 75, at 1150 (noting that the U.S. Treasury has declined to embrace the OECD Model for its basic treaty negotiating position).

81. Income Tax Convention, *supra* note 14.

82. Agreement Between the Government of the United States of America and the Government of Canada 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, U.S.-Can., Feb. 5, 2014, T.I.A.S. No. 14-627.

83. See An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014, c. C-31 (Can.).

84. See Gustafson, *supra* note 75, at 1150 (stating that the Vienna Convention often “represents the ‘best evidence’ of customary international law with respect to treaty interpretation and administration”).

85. See Vienna Convention, *supra* note 21, art. 31(1) (instructing that the

explains that the “context” includes “[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”⁸⁶

Canadian courts have repeatedly held that this interpretation is the primary rule for interpreting its tax treaty with the United States. For example, in *TD Sec. (USA) LLC v. R*,⁸⁷ the Tax Court of Canada interpreted whether the Canada-U.S. ITC provided Canadian residency status (and therefore certain treaty benefits) to a U.S.-based bank with a branch office in Canada.⁸⁸ The court referred to not only the ITC’s text, but OECD Model documents and the U.S. Department of the Treasury’s Technical Explanation of the treaty to aid its interpretation.⁸⁹ The Tax Court concluded that the surrounding documents provided persuasive instruction on the ITC’s intent and ultimately applied treaty benefits to the bank.⁹⁰ The decision illustrated the court’s practical approach in interpreting and applying ITC provisions.⁹¹

D. CANADA’S ACCESSION TO THE ICCPR

The United Nations General Assembly adopted the ICCPR, a core international human rights treaty, on December 16, 1966.⁹² The Canadian government acceded to the ICCPR in May 1976 and thereupon became bound to its terms.⁹³

Pursuant to articles 2(2) and 26 of the ICCPR, Canada agreed to respect human rights and ensure their application without

primary source for treaty interpretation is the ordinary meaning of the text of the treaty itself).

86. *Id.* art. 31(2)(b).

87. [2010] 5 C.T.C. 2426 (Can.).

88. *Id.* ¶ 50.

89. *Id.* ¶ 61.

90. *Id.* ¶ 97.

91. *See also Crown Forest Indus. Ltd. v. Canada*, [1995] S.C.R. 802 (Can.) (exemplifying the cases before the Supreme Court of Canada that are interpreting this world).

92. ICCPR, *supra* note 17.

93. *See* Privy Council Decision no. 1976-1156, May 18, 1976. The ICCPR entered into force formally in Canada in August 1976. Canada acceded to the Optional Protocol to the ICCPR, as well.

discrimination to all individuals within its territory and subject to its jurisdiction.⁹⁴ Specifically, Canada vowed, “[w]here not already provided for by existing legislative or other measures,” it would “take the necessary steps . . . to adopt such laws or other measures as may be necessary to *give effect* to the rights recognized in the present Covenant.”⁹⁵

Article 26 of the ICCPR expressly guarantees all persons equal and effective protection against discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.⁹⁶

Upon accession to the treaty, Canada committed itself to ensure that any individual whose ICCPR rights were violated would receive an effective remedy under national law.⁹⁷ Thus far, Canada has declared that it still stands by that 1976 commitment.⁹⁸

III. ANALYSIS

The omission of the anti-discrimination clause in Canada’s FATCA is in direct conflict with the ICCPR’s guarantee of freedom from discrimination on the basis of national origin.⁹⁹ This section

94. ICCPR, *supra* note 17, art. 26.

95. *Id.* art. 2(2) (emphasis added).

96. *Id.* art. 26.

97. *Id.* art. 2(3).

98. *See id.* art. 40 (stating that ICCPR State Parties are required to submit reports on the measures they have adopted which give effect to ICCPR rights); U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Sixth Periodic Reports of States Parties Due in October 2010 – Canada*, ¶¶ 7-10, U.N. Doc. CCPR/C/Can/6 (Apr. 9, 2013), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2f6&Lang=en (“Canada wishes to emphasize that the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal (CHRT) have a broad mandate with respect to discrimination complaints.”); *see also Reporting to the Human Rights Committee: The Canadian Experience*, 38 CAN. Y.B. INT’L L. 261, 283-84 (2000) (providing an overview of the first four reports submitted by Canada).

99. *See* ICCPR, *supra* note 17, art. 26.

analyzes the incongruity of Canada's FATCA with the ICCPR, specifically: how Canada's FACTA allows FFIs to discriminate in violation of ICCPR article 26; Canada's failure to pass legislation protecting rights found in article 2 of the ICPPR; and the lack of an applicable exception under the United Nations Human Rights Committee ("HRC")'s discrimination jurisprudence.¹⁰⁰ This section also analyzes the persuasiveness of the U.S. Model FATCA Agreement's anti-discrimination clause to the Supreme Court of Canada's interpretation of the U.S.-Canada ITC.

A. BECAUSE CANADA'S FATCA CONSTITUTES FEDERAL LAW, IT MUST BE CONGRUENT WITH THE STANDARDS SET FORTH IN THE ICCPR.

Intergovernmental agreements ("IGAs"), like those the United States is bilaterally negotiating with foreign countries to implement FATCA, are the result of voluntary negotiations among federal governments, and not binding in and of themselves.¹⁰¹ Only when a federal law is subsequently passed to implement the IGA does the law become binding and is thereafter required to comply with other federal and international law. Thus, although an IGA implementing FATCA cannot violate international law, a federal law and other international law implementing FATCA can.¹⁰²

On February 4, 2014, Canada signed the U.S.-Canada IGA and then released federal legislation to implement FATCA as part of Canada's budget bill on March 28, 2014,¹⁰³ despite widespread

100. See also Whiteley, *supra* note 24 (arguing that FATCA likely violates several other international treaties, such as the North American Free Trade Agreement and the World Trade Organization as well).

101. See Arthur Benz, *Multilevel Parliaments in Canada and Europe*, 66 INT'L J. 109, 122 (2010-2011) ("[N]o constitutional provision stipulates obligatory cooperation.").

102. See *id.* (providing a deeper discussion about the sovereignty of the individual provinces in Canada, stating, "[a]s a rule, intergovernmental agreements allow individual provinces to opt out if they are not concluded bilaterally between the federal government and an individual province." Because the federal law implements FATCA, all provinces are included).

103. See An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014, c. C-31 (Can.) (noting that the enacted Canadian law is substantially similar to the U.S.-Canada IGA, including its lack of the non-discrimination clause).

criticism and public opposition.¹⁰⁴ The Canadian law implementing FATCA became obligated to meet the standards set forth by the ICCPR once the bilateral IGA between the United States and Canada resulted in Canadian federal law.¹⁰⁵

**B. CANADA’S FATCA VIOLATES ARTICLE 26 OF THE ICCPR,
BECAUSE IT CANNOT “GUARANTEE” U.S PERSONS PROTECTION
FROM DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN
WITHOUT AN ANTI-DISCRIMINATION CLAUSE.**

The U.S. Department of the Treasury added an anti-discrimination clause to the U.S. Model specifically because public comments, reports, and studies revealed the likelihood that FFIs would refuse to open new financial accounts and maintain existing accounts for Americans abroad, in order to avoid FATCA’s reach.¹⁰⁶ Canada’s reason for omitting the anti-discrimination clause from its final legislation implementing FATCA is unclear;¹⁰⁷ however, Canada is a

104. See, e.g., Browning, *supra* note 9 (quoting finance executives from Washington, D.C., Australia, Switzerland, Hong Kong, and Canada, all speaking out against FATCA); *FATCA and the Canada-U.S. Intergovernmental Agreement (IGA): Information for Clients*, CANADIAN BANKERS ASS’N, <http://www.cba.ca/en/consumer-information/40-banking-basics/597-fatca-and-the-canada-us-intergovernmental-agreement-iga-information-for-clients> (last modified July 2, 2014) [hereinafter *FATCA Information for Clients*] (“We understand that the U.S. government is attempting to reduce tax evasion, but we have publicly opposed FATCA as the wrong way to go about it.”).

105. Benz, *supra* note 101, at 101.

106. See T.D. 9610, 2013-15 I.R.B. (noting the addition of the anti-discrimination clause in response to public comments received about FATCA). The U.S. Congress contemplated the discriminatory consequences of FATCA, as demonstrated by the February 2013 introduction of H.R. Bill 597, the “Commission on Americans Living Abroad Act.” See Commission on Americans Living Abroad Act, H.R. 597, 113th Cong. § 4 (2013) (intending to establish a commission to study how federal laws and policies affect U.S. citizens living in foreign countries); *id.* (“Federal policies and requirements that affect the ability of a United States citizen living in a foreign country to access foreign and domestic financial institutions, including requirements under chapter 4 of the Internal Revenue Code of 1986 (commonly known as the ‘Foreign Account Tax Compliance Act.’)”).

107. The law implementing Canada’s FATCA provides:

(1) Beginning on or before July 1, 2014, the Financial Institution *must have* policies and procedures . . . to *prevent* the Financial Institution from providing a Financial Account to any Nonparticipating Financial Institution and to monitor whether the Financial Institution opens or maintains a Financial Account for any Specified U.S. Person who is not a resident of Canada

country with strong negotiating and bargaining power,¹⁰⁸ and presumably would choose to apply the law with as little consequence to Canadian business and economy as possible.

Still, the effects of the omission are clear and the problems FATCA has caused for U.S. persons in Canada are far-reaching.¹⁰⁹ Since enactment of the law, Americans in Canada (and others defined as “U.S. persons” under FATCA) have complained that banks are locking them out, refusing to open new accounts, and that they are unable to access basic financial services.¹¹⁰ Some Americans in Canada have found themselves unable to open retirement planning

(2) Such policies and procedures must provide that if any Financial Account held by a Specified U.S. Person . . . is identified, the Financial Institution must report such Financial Account as would be required if the Financial Institution were a Reporting Canadian Financial Institution . . . or close such Financial Account.

An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014, c. C-31, § III(A)(1)-(2) (Can.) (emphasis added). *But see FATCA Information for Clients, supra* note 104 (responding to the question, “Do U.S. account holders face discrimination or the possibility of having their accounts closed?” with “No. The FATCA requirement that Canadian financial institutions close accounts or refuse to offer services to U.S. persons in certain circumstances has been eliminated under the IGA.”).

108. *See* Brown & O’Brien, *supra* note 77, at 204 (describing Canada as a wealthy, capital-exporting nation with the ability to diverge from model agreements).

109. *See, e.g.,* Drew Hasselback, *Anti-FATCA Group Hires U.S. Lawyer*, FIN. POST (Oct. 29, 2014), <http://business.financialpost.com/2014/10/29/anti-fatca-group-hires-u-s-lawyer/> (discussing renunciation as a means to avoid FATCA consequences is an increasingly expensive option, since the U.S. Department of State raised the fee to renounce citizenship from \$450 to \$2,350); *73% of Americans Abroad Consider Giving Up Passport Due to FATCA*, VALUE WALK (Oct. 26, 2014), <http://www.valuwalk.com/2014/10/americans-renounce-citizenship-fatca/#comments> (“[M]any non-U.S. banks and other financial institutions will no longer work with Americans which can make living outside the U.S. achingly complicated.”); Robert W. Wood, *Canadians File Suit to Block FATCA and Prohibit Handover of U.S. Names to IRS*, FORBES (Aug. 12, 2014), <http://www.forbes.com/sites/robertwood/2014/08/12/canadians-file-suit-to-block-fatca-and-prohibit-handover-of-u-s-names/> (reporting on a legal claim filed stating that FATCA violates equal protection of the law without discrimination).

110. *See American Citizens Abroad Comments on FATCA*, BLOOMBERG BNA TAX & ACCOUNTING CTR. (Feb. 8, 2012), *available at* <https://americansabroad.org/files/6813/4192/6083/acastatementapril2012s.pdf> (commenting that “FATCA has turned Americans abroad into pariahs in the international financial world” and “[d]ue to FATCA, foreign banks accounts are being closed”). The Annex to the article contains numerous first-hand reports from U.S. citizens around the world experiencing discrimination.

and investment opportunities, access job and rental opportunities, utilize tax planning services, or seek other tax advantages available to Canadians.¹¹¹ Indeed, NPR reported in early 2014 that as a result of the law, foreign banks have “decided to wash their hands of American account-holders. . . . Congress wanted to catch tax cheats. But the net also snagged Americans whose foreign bank accounts let them pay their bills in the countries they now call home.”¹¹² Without an anti-discrimination clause—or at least some form of anti-discriminatory protection—in the law, Canada cannot uphold its duty to “guarantee” all persons protection from impermissible discrimination, as required by ICCPR article 26.

*1. Burdensome Costs of Implementing FATCA in Canada
Incentivizes and Permits Discrimination Rather than Guarding
Against it.*

Complying with FATCA has not been an insignificant undertaking for foreign governments and financial institutions. In Canada, where the population of American citizens is approximately one million—the highest population of Americans outside of the United States¹¹³—the law’s effects are particularly consequential. FATCA has cost Canadian banks approximately \$750 million Canadian dollars in due diligence and preparation expenses as of July 2014.¹¹⁴ Rough estimates show that average compliance cost is approximately five to ten million dollars per financial institution, or an aggregate total of one to two trillion dollars.¹¹⁵ Despite the law’s intention to reduce

111. See, e.g., Cain, *Dual Citizens*, *supra* note 62 (complaining of Canadian Charter violations).

112. Shapiro, *supra* note 1.

113. See Rita Trichur, *U.S. Expats Sue Over Canadian Deal to Tell Washington About Their Accounts*, WALL ST. J. (Aug. 12, 2014), <http://online.wsj.com/articles/expats-in-canada-sue-over-u-s-effort-to-collect-taxes-abroad-1407856738> [hereinafter Trichur, *U.S. Expats*].

114. Rita Trichur, *Canada Banks Tally Their Tax-Compliance Tab*, WALL ST. J. (July 27, 2014), <http://online.wsj.com/articles/canada-banks-tally-their-tax-compliance-tab-1406504252> [hereinafter Trichur, *Canada Banks*].

115. See Peter R. Altenburger et al., *FATCA: U.S. Legislation with Broad Consequences for Many*, SWISS-AM. CHAMBER COM. (Sept. 11, 2010), http://www.amcham.ch/members_interests/p_business_ch.asp?s=7&c= (noting that the expense is recognized to be greater than its immediate returns); see also JOINT COMM. ON TAXATION, 111TH CONG., ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT TO THE SENATE

legal impediments of compliance,¹¹⁶ these costs are crippling and preventatively high for many institutions.¹¹⁷

As a result, it is unsurprising that some FFIs, especially small, provincial banks who typically only serve a limited number of clients, simply cannot afford to maintain U.S. persons as customers under the new law. To address this, Canada's FATCA specifically considers such institutions (termed "local banks") to be "deemed-compliant."¹¹⁸ This means that those banks that have less than fifty million dollars in assets on their balance sheets, are not-for-profit (e.g., certain credit unions and co-ops) and as long as they do not target U.S. clientele (among other requirements), they do not have to implement procedures to comply with the law.¹¹⁹

Therefore, it is only the larger, for profit, nonexempt Canadian financial institutions that are caught in FATCA's web—the same institutions that would most likely be expected to uphold anti-discriminatory policies and practices. Without an anti-discrimination clause in the agreement, they are seemingly *permitted* to make the choice: serve U.S. customers (and pay to comply with the law) or refuse them (and avoid the implementation costs).¹²⁰ So long as the cost of managing American business under FATCA exceeds the cost of losing American business altogether, these institutions have an economic incentive to choose the latter.

AMENDMENT TO THE HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 2847, THE "HIRING INCENTIVES TO RESTORE EMPLOYMENT ACT" 6-10 (2010) (providing estimated numbers for 2010 through 2020); Trichur, *Canada Banks*, *supra* note 114 (stating that the Treasury anticipates \$729 million in annual revenue from the law).

116. T.D. 9610, 2013-15 I.R.B. 768.

117. See Behrens, *supra* note 42, at 217 ("The high cost of compliance . . . simply outweighs the benefits of FATCA.").

118. See An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014, c. C-31, § III(A)-(C) (Can.).

119. *Id.* § III(C)(3).

120. See, e.g., *The Foreign Account Tax Compliance Act (FATCA)*, DLA PIPER LLP 3, <http://files.dlapiper.com/files/Uploads/Documents/FATCA-Alert.pdf> ("Many FFIs no longer are accepting US accountholders or making it very expensive for a US holder to open an account.") (last visited Feb. 18, 2015); *Why FATCA is Bad for America-Update*, AM. CITIZENS ABROAD, <https://americansabroad.org/issues/fatca/fatca-bad-america/> (last updated Aug. 29, 2014) ("Because of [FATCA], some foreign banks have refused to do business with Americans.").

To the extent that Canadian financial institutions have refused to deal with U.S. accountholders, it is likely because FATCA’s burdensome costs incentivize such discrimination.¹²¹ Thus, because Canada removed the only provision that would have safeguarded Americans from this discriminatory treatment, with no other safeguard employed to replace it, Canada’s FATCA does not meet the bar of guaranteeing effective protection of U.S. persons from discrimination on the basis of their national origin, as required by article 26 of the ICCPR.¹²²

C. CANADA’S FAILURE TO GIVE EFFECT TO THE RIGHTS PROTECTED BY THE ICCPR THROUGH ADEQUATE LEGISLATION ALSO VIOLATES ICCPR ARTICLE 2.

Canada’s decision not to enact an anti-discrimination clause would not run afoul of ICCPR article 2 if other existing legislation already provided similar protection.¹²³ In Canada, there are at least three existing laws that appear to provide anti-discriminatory protections: (1) the U.S.-Canada ITC’s preexisting “Nondiscrimination Article”¹²⁴; (2) the Access to Basic Banking Services Regulations, which prohibit Canadian banks from requiring identification more than those enumerated in the law;¹²⁵ and (3) the Canadian Charter, which prevents discrimination on the basis of, among other protected classes, national origin.¹²⁶ However, none of these laws provide

121. See, e.g., Scott D. Michel & H. David Rosenbloom, *FATCA and Foreign Bank Accounts: Has the U.S. Overreached?*, VIEWPOINTS, May 30, 2011, at 709 (“[I]t is becoming more and more apparent that in the well-intentioned effort to find tax cheats hiding money overseas, the U.S. government has not only overplayed its hand, but has enacted an extensive and expensive new regulatory scheme that defies common sense.”).

122. ICCPR, *supra* note 17, art. 26.

123. Article 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Id. art. 2(2).

124. See Income Tax Convention, *supra* note 14, art. 8.

125. Access to Basic Banking Services Regulations, SOR/2003-184 (Can.).

126. Canadian Charter, *supra* note 65, c. 11, § 15.

unambiguous protection for U.S. persons who will be unable to open and maintain financial accounts as a result of FATCA.

First, the U.S.-Canada ITC contains a “Nondiscrimination Article.”¹²⁷ The article protects individuals in each treaty country *specifically* from discriminatory *taxation*, i.e., tax laws in either country that would result in double taxation of the same income.¹²⁸ The article provides that in Canada, U.S. nationals must not be subjected to “more burdensome” taxation than similarly situated Canadian nationals.¹²⁹ Likewise, the remaining provisions of the article specify that certain classes of individuals (such as married persons), entities, and payments (such as the deductibility of certain types of expenses) shall not be subjected to discriminatory *taxation*.¹³⁰

However, this Nondiscrimination Article has no relation to the kind of discrimination at hand.¹³¹ It does not provide protection in the case of opening and maintaining financial accounts, as the U.S. Model anti-discrimination clause attempts to provide,¹³² and as a result, U.S. persons in Canada are not protected from discrimination under this article.

Second, Canadian laws that seemingly give effect to the ICCPR’s protection from discrimination include the Access to Basic Banking

127. Income Tax Convention, *supra* note 14, art. XXV.

128. *Id.*

129. *Id.*

130. *Id.*

131. See STEF VAN WEEGHEL, THE IMPROPER USE OF TAX TREATIES: WITH PARTICULAR REFERENCE TO THE NETHERLANDS AND THE UNITED STATES 36 (1998) (“Non-discrimination Articles which are based on the OECD Model Conventions furthermore contain specific provisions relating to non-discriminatory taxation in respect of permanent establishments, to deductibility of certain payments, including royalty and interest payments.”); see also Manal Corwin, Treasury Deputy Assistant Sec’y, Opening Statement at the Senate Committee on Foreign Relations (June 7, 2011), *available at* <http://www.treasury.gov/resource-center/tax-policy/Documents/OTPTest-2011-6-7-Corwin-SenFR.pdf> (discussing the non-discrimination article as preventing discriminatory taxation only in the context of the application of the tax code).

132. See Arthur J. Cockfield, *The Limits of the International Tax Regime As a Commitment Projector*, 33 VA. TAX R. 59, 105 (2013) (“The fact that FATCA . . . focus[es] on reporting and penalties for nonreporting (instead of new tax measures), however, may mean that the tax treaty, which only covers taxation measures, will not offer relief to U.S. persons living in Canada.”).

Services Regulations.¹³³ The ABBS provides some indirect protection to U.S. persons, along with other nonresidents living in Canada, from financial institutions turning them away by limiting the type of identification that banks can require to open an account.¹³⁴ U.S.-identifying information is not included within the list of identification sources; therefore, a bank would seemingly be unable to require it in order to open an account.

However, in this respect, the ABBS directly conflicts with FATCA’s requirement that all financial institutions request and receive documentation that will confirm whether each accountholder is a “U.S. Reportable Account.”¹³⁵ Although the ABBS may continue to be applicable for non-U.S. accountholders, such as nonresidents living in Canada, it will not provide protection to U.S. persons under FATCA, because the law implementing FATCA will override the ABBS.¹³⁶

Finally, the Canadian Charter, passed in 1982, contains an equal protection clause that protects individuals from discrimination by the government.¹³⁷ Consistent with the ICCPR, the Charter specifically guarantees protection from discrimination on the basis of national origin.¹³⁸

133. See Access to Basic Banking Services Regulations, SOR/2003-184 (Can.) (limiting ID requirements to a Canadian drivers’ license, Canadian passport, or Canadian certificate of citizenship, and other Canadian documents.). The exclusive list does not include proof regarding U.S. citizenship or residency.

134. *Id.*

135. An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014, c. C-31, art. 4(1)(a) (Can.).

136. In fact, a primary reason for federal passage of the U.S.-Canada IGA was to respond to concerns that direct implementation of FATCA by Canadian financial institutions would conflict with local laws that prohibit banks from collecting and disclosing such information.

137. See Canadian Charter, *supra* note 65, c. 11, § 15 (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”); see, e.g., Cain, *Dual Citizens*, *supra* note 62 (alleging violations of civil rights under article 15 of Canadian Charter).

138. See Canadian Charter, *supra* note 65, c. 11, § 15 (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law . . . without discrimination based on . . . national or ethnic origin”).

However, the law's passage does not necessarily give rise to the protections under the law. The ICCPR draws this distinction in article 2 by stating Canada must also "take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights."¹³⁹ The ABBS is an example of a law that Canada adopted to give effect to the rights protected by the Charter (albeit not the rights Americans need protected as a result of FATCA).¹⁴⁰ Simply passing the Charter does not solve the problem; it is incumbent upon Canadian lawmakers to pass specific legislation that carries out the guarantees of the Charter.

Including the anti-discrimination clause of the U.S. Model, at a minimum, would help give effect to the rights protected by the Charter and the ICCPR. Canada's FATCA, absent the anti-discrimination clause, has not given effect to the rights that all individuals in Canada should enjoy. Consequently, the existing legislation in Canada violates article 2 of the ICCPR.

1. Omitting the Anti-Discrimination Clause Does Not Further FATCA's Stated Purpose; Therefore, an Exception to the ICCPR Does Not Apply.

In international law jurisprudence, just as in domestic U.S. law, discrimination is permitted to a certain extent and in certain circumstances.¹⁴¹ The U.S. Supreme Court has held that a law that discriminates (or impedes a fundamental right) must be narrowly tailored to serve a compelling government interest.¹⁴² Similarly, in

139. ICCPR, *supra* note 17, art. 2(2).

140. Access to Basic Banking Services Regulations, SOR/2003-184 (Can.).

141. *Holy Monasteries v. Greece*, App. 13092/87, ¶ 92 (Eur. Ct. H.R. Dec. 9, 1994). ("It is important to note that the right to non-discrimination does not prohibit all differences in treatment in the exercise of the rights and freedoms."). *See also Andrejeva v. Latvia*, App. No. 55707/00, ¶ 81 (Eur. Ct. H.R. Feb. 18, 2009); *see, e.g., Human Rights Comm., Derksen v. Netherlands*, Commc'n No. 976/2001, ¶ 9.2, U.N. Doc. CCPR/C/80/D/976/2001 (2004); *Human Rights Comm., Müller v. Namibia*, Commc'n No. 919/2000, ¶ 6.7, U.N. Doc. CCPR/C/74/D/919/2000 (1999); *Human Rights Comm., Pauer v. Austria*, Commc'n No. 716/1996, ¶ 7.3 U.N. Doc. CCPR/C/65/D/716/1996 (1999); *Human Rights Comm., Broeks v. Netherlands*, Commc'n No. 172/1984, ¶ 13, U.N. Doc. CCPR/C/OP/2 (1990); *Human Rights Comm., Vos v. Netherlands*, Commc'n No. 218/1986, ¶ 11.3, U.N. Doc. CCPR/C/35/D/218/1986 (1989); *see also Andrejeva v. Latvia*, App. No. 55707/00, ¶ 81 (Eur. Ct. H.R. Feb. 18, 2009).

142. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that parents'

cases before the HRC, which reviews international human rights violations under the ICCPR, the HRC emphasizes a parallel standard.¹⁴³

For example, in *Fedotova v. Russian Fed’n*,¹⁴⁴ the Russian government convicted the plaintiff, a gay rights activist, of violating an ordinance prohibiting public actions aimed at “the propaganda of [homosexuality] among minors.”¹⁴⁵ In review of the legal argument, the HRC reminded the international community of its jurisprudence that “not every differentiation based on the grounds listed in article 26 of the [ICCPR] amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate.”¹⁴⁶ The HRC noted that in this instance, although the Russian law pursued a legitimate state interest—the protection of public morals, health, rights and interests of minors—it was not based on reasonable and objective criteria; the law only prosecuted propaganda of homosexuality, as opposed to propaganda of both heterosexuality and homosexuality.¹⁴⁷ The HRC found this distinction unjustifiable, concluded that Russia violated the

fundamental right to freedom of religion outweighed the state’s interest in educating children); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the First Amendment of the Constitution required the government to demonstrate a compelling interest before denying unemployment compensation); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that laws permitting the compulsory sterilization of criminals are unconstitutional if the sterilization law treats similar crimes differently).

143. See ICCPR, *supra* note 17. In accordance with the ICCPR Protocol, the HRC reviews claims of alleged ICCPR violations and issues reports of its findings of fact and conclusions of law.

144. Human Rights Comm., *Fedotova v. Russian Fed.*, Commc’n No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010 (2012).

145. *Id.* ¶¶ 2.1, 10.6. The plaintiff argued to the HRC that the bar on “propaganda” violated her right to freedom from discrimination on the basis of sexual orientation under article 26 of the ICCPR when she was victimized for holding posters that declared “I am proud of my homosexuality” and “Homosexuality is normal” during a peaceful gay pride assembly in Moscow. *Id.* ¶¶ 2.2, 3.4.

146. *Id.* ¶ 10.6.

147. See *id.* (noting that there was no evidence that allowed for making a distinction between heterosexual and homosexual propaganda).

plaintiff's article 26 rights, and compelled Russia to make the relevant provisions of the law compatible with the ICCPR.¹⁴⁸

In Canada, the stated legitimate objective of the U.S.-Canada ITC implementing FATCA is to prevent “evasion with respect to taxes on income and on capital,” including through the exchange of tax information.¹⁴⁹ The omission of an anti-discrimination clause that would prevent financial institutions from employing “policies or practices that discriminate against opening or maintaining Financial Accounts”¹⁵⁰ for U.S. persons is inapposite to the government purpose for the law. The government interest of preventing tax evasion and promoting the exchange of tax information cannot be served when its target tax citizens—U.S. persons abroad—are prevented from opening and maintaining accounts abroad.

Like the Russian ordinance that only targeted homosexual propaganda among minors as opposed to all sexual propaganda among minors, the omission of the anti-discrimination clause from Canada's FATCA only permits closing of accounts held by U.S. persons, as opposed to an objective criterion, such as permitting the closing of accounts held by all noncompliant accountholders (which is already a FATCA requirement).¹⁵¹ Therefore, omission of the U.S. Model anti-discrimination clause is not rationally related to, or in furtherance of, FATCA's stated purpose of preventing tax evasion. The HRC would hold that Canada must enact legislation prohibiting discriminatory treatment by banks or provide some other rational reason why this government sanctioned imposition of a fundamental right should be permissible under the ICCPR.

D. THE VIENNA CONVENTION INSTRUCTS THE SUPREME COURT OF CANADA TO VIEW THE ANTI-DISCRIMINATION CLAUSE OF THE U.S. MODEL FATCA AS PERSUASIVE.

A strong body of recent Canadian case law concludes that tax treaty interpretation includes not only language of the relevant tax

148. *See id.* ¶¶ 10.7-12.

149. *See* Income Tax Convention, *supra* note 14, art. 30 (providing an alternative means of meeting the U.S. objectives under FATCA—by relying on existing provisions for information exchange under the Canada-U.S. ITC).

150. *Annex II, supra* note 11, at 6.

151. *See* 26 U.S.C. § 1471(f)(2) (2010) (requiring the closure of any noncompliant accounts without a waiver).

treaty, but extrinsic materials that aid the interpretation of the treaty as well.¹⁵² In *Crown Forest Indus. Ltd. v. Canada*,¹⁵³ the Supreme Court of Canada stated that the ITC between Canada and the United States was based on the OECD Model Convention and held that the OECD Model of 1977 and OECD Commentaries had “high persuasive value” in interpreting the definition of the word “resident” in the treaty.¹⁵⁴ Particularly illustrative of this rule, in *TD Sec. (USA) LLC* the Tax Court of Canada held that OECD documents could be used as extrinsic aids to interpret a tax treaty.¹⁵⁵ In that case, the court found that a key instrument of the Canada-U.S. ITC at issue was the U.S. Department of the Treasury’s Technical Explanation, which the Canadian government recognized as an accurate reflection of understandings reached in the course of negotiations regarding the interpretation and application of the treaty.¹⁵⁶ The Tax Court explained that the U.S. Treasury Technical Explanation provides a “workable” solution consistent with the purpose and context of the Treaty.¹⁵⁷

Because the Vienna Convention calls for the interpretation of treaties to include not only the text of treaties but also the context of the treaty, the Supreme Court of Canada may give official Model Agreements, such as the U.S. Model FATCA Agreement, high persuasive value if the Court analyzes the intention of the U.S.-Canada ITC implementing FATCA.

In addition, some tax treaties are explicitly required to meet the obligations of human rights conventions. The United Kingdom, for example, passed the Human Rights Act of 1988, which required that

152. *Accord* Am. Income Life Ins. Co. v. R., [2008] D.T.C. 3631 (Can.) (finding that the OECD Model and U.N. Models aided interpretation of the U.S.-Canada ITC and drew the inference that the absence of an “insurance clause” from the OECD Model and Canada’s treaty with the United States indicated that the drafters of the treaty intended not to include the U.N. Model’s insurance clause).

153. [1995] S.C.R. 802 (Can.).

154. *Id.* at 803.

155. *See id.* at 815; *see also* *Knights of Columbus v. R.*, [2008] T.C.C. 307 (Can.).

156. *But see* TONNY SCHENK-GEERS, INTERNATIONAL EXCHANGE OF INFORMATION AND THE PROTECTION OF TAXPAYERS 36 (2009) (“Parliamentary documents in the individual states, such as Explanatory Memoranda, going with the concept treaties in the ratification process, do not form part of the context in the sense of the Vienna Convention.”).

157. *TD Sec. (USA) LLC*, 5 C.T.C. at 12.

all U.K. legislation be read and given effect in a way that is compatible with other U.K. law, including compliance with the European Convention on Human Rights of 1951.¹⁵⁸ Commentators have stated that this would increasingly impact issues related to the exchange of information and certain provisions of tax treaties.¹⁵⁹

Here, if a civil suit alleging discrimination under the U.S.-Canada ITC implementing FATCA reaches the Supreme Court of Canada, the Court should view the U.S. Model FATCA Agreement as a persuasive document revealing some valuable context of the treaty. The U.S. Model's inclusion of an anti-discrimination clause shows the United States intends that FATCA be implemented with attached anti-discrimination protection for U.S. persons abroad. Although not binding, and perhaps only as persuasive as the ultimate decision between the treaty negotiators to omit the clause, the inclusion of the protection shows that negotiators contemplated the harm caused to U.S. persons seeking to maintain or open financial accounts in Canada and should be addressed in one form or another.

IV. RECOMMENDATIONS

The ability for a U.S. taxpayer abroad to avoid a tax obligation through misinformation, improper filing, or nondisclosure of foreign-held assets and income has created the need for more aggressive U.S. tax collection efforts.¹⁶⁰ However, this need should not supersede an individual's right to access basic banking and financial services.

While it is clear that Canada was not agreeable to passing FATCA,¹⁶¹ and would want to limit the obligations created for Canadian financial institutions, this does not excuse leaving open to interpretation whether Canadian financial institutions can institute policies and practices that discriminate against U.S. persons in Canada. Canadian and U.S. lawmakers who negotiated the final agreement implementing FATCA in Canada may reveal that the omission of the anti-discrimination clause was not intended to permit

158. SCHWARZ, *supra* note 78, at 128.

159. *Id.* (citing to *Percival v. Commissioners for Her Majesty's Revenue & Customs*, [2013] UKFTT 240 (TC) as an example of an attempt to "impugn the terms of a treaty by operation of the European Convention on Human Rights").

160. See discussion *infra* Part II(A) (discussing the problems with voluntary compliance for U.S. persons abroad).

161. See discussion *infra* Part II(B)(1).

such discriminatory behavior; that, rather, the lawmakers only intended to permit Canadian financial institutions—a private marketplace—to choose who its clientele should be, based on the expensive due diligence demands that are attached to FATCA. If a bank cannot “afford” U.S. customers because of FATCA, then perhaps the bank should not be required to take on the customer.

However, when Canadian lawmakers chose to pass FATCA, and recognized that discrimination was inevitable, the legislators should have employed other remedies (whether legislative, administrative, or judicial) to counteract foreseeable unlawful discrimination. Some feasible remedies include enacting the U.S. Model’s anti-discrimination clause, demanding that the United States subsidize the cost of implementing FATCA, or reducing the cost of U.S. expatriation.

A. CANADA’S FATCA SHOULD BE AMENDED TO INCLUDE ANTI-DISCRIMINATION PROTECTIONS.

One of three solutions to alleviate the discrimination U.S. persons abroad face is to amend the Canadian law implementing FATCA under the U.S.-Canada ITC to include the anti-discrimination clause of the U.S. Model FATCA Agreement or a substantially similar anti-discrimination clause.¹⁶² If Canada adopted the U.S. Model’s clause, the clause would state: “The Financial Institution must not have policies or practices that discriminate against opening or maintaining Financial Accounts for individuals who are Specified U.S. Persons and residents of [Canada].”¹⁶³

The anti-discrimination clause would provide compliant U.S. citizens in Canada with unambiguous protection from discrimination.¹⁶⁴ Although the clause may not stop all, or even most, instances of discrimination in practice,¹⁶⁵ at least those who experience account closings or refusals, despite being compliant with FATCA requirements, would have a source of recourse under the

162. See *Annex II, supra* note 11, at 6.

163. See *id.*

164. See *id.*

165. See, e.g., Michel & Rosenbloom, *supra* note 121 (recounting stories of American citizens who have been shut out by their foreign banks in Switzerland and Germany, despite the presence of an anti-discrimination clause in these FATCA agreements).

U.S.-Canada ITC.

B. THE COST OF FATCA SHOULD BE SUBSIDIZED BY THE UNITED STATES, OR THE COST OF U.S. EXPATRIATION REDUCED.

It is clear that the cause of the discriminatory treatment is not U.S. citizenship alone, but the exceedingly high cost of FATCA compliance, which is attached to U.S. citizenship.¹⁶⁶ Therefore, another option is for the United States to subsidize the cost of FATCA implementation in Canada. Given that FATCA originated in the United States, the United States should consider subsidizing the cost for this American-made imposition. If the expensive burden is somewhat alleviated through a subsidy, banks would not be forced to turn away U.S. customers.

In the alternative, if FATCA's due diligence and compliance costs are not subsidized, and U.S. persons abroad continue to face discrimination, then the cost of expatriating should be made more affordable. Recently, the cost of expatriation in Canada rose from \$450 to \$2,350 (U.S. dollars).¹⁶⁷ This cost is prohibitively expensive for some.¹⁶⁸ In addition, the current wait to expatriate from the United States in Canada can take over a year.¹⁶⁹ Although the solution of relinquishing U.S. citizenship mischaracterizes the problem (a U.S. citizen should not have to change who he or she is in order to avoid unlawful discrimination), if a U.S. citizen decides to expatriate, it should be more affordable to do so.¹⁷⁰ Of course, relinquishing citizenship may not end the discrimination altogether,

166. See Trichur, *U.S. Expats*, *supra* note 113 (claiming the implementation of FATCA costs Canadian banks a total of \$750 million dollars).

167. See Patrick Cain, *Meet the Alberta Man Who Went to Tijuana to Renounce His U.S. Citizenship*, GLOBAL NEWS (Nov. 18, 2014), <http://globalnews.ca/news/1671945/meet-the-alberta-man-who-went-to-tijuana-to-renounce-his-u-s-citizenship/> [hereinafter Cain, *Meet the Alberta Man*] (stating the fee increase took effect on September 12, 2014).

168. See *id.* (noting that a man traveled from Canada to Mexico to renounce his citizenship and saved \$1,800 doing so).

169. *Id.*

170. See Helena Bachmann, *Mister Taxman: Why Some Americans Working Abroad Are Ditching Their Citizenships*, TIME (Jan. 31, 2013), <http://world.time.com/2013/01/31/mister-taxman-why-some-americans-working-abroad-are-ditching-their-citizenships> (commenting that famous singer-performer Tina Turner's renunciation of U.S. citizenship is likely the result of discriminatory treatment).

especially if there are still U.S. indicators present in an individual’s account, such as a U.S. address or spouse who is a U.S. citizen or resident.¹⁷¹

C. THE U.N. HUMAN RIGHTS COMMITTEE SHOULD FIND THAT CANADA’S FATCA VIOLATES THE ICCPR.

Finally, without a legislative or administrative remedy available, another remedy for victims of discrimination is through the court system. Victims can file a complaint to the HRC alleging a violation of their civil rights as guaranteed under the ICCPR articles 2(2) and 26.¹⁷² To be actionable under the ICCPR, plaintiffs must exhaust all administrative remedies available in Canada, which includes first filing a complaint in Canadian courts alleging violation of the Canadian Charter.¹⁷³

In at least one instance, the argument that the Canadian law implementing FATCA violates the Canadian Charter’s equal protection clause has been put forward in a civil complaint.¹⁷⁴ On August 11, 2014, two Canadians with dual citizenship in the U.S. and Canada sued the Canadian federal government for signing the Canadian law implementing FATCA.¹⁷⁵ The plaintiffs are two professional Ontario women who were born in the United States, but have lived in Canada since they were five and have never worked in the United States or filed U.S. tax returns.¹⁷⁶ In their complaint, they allege that the collection and disclosure of their personal information to the U.S. government violates basic principles and civil rights guaranteed by the Canadian Charter, including the right to “the equal protection and equal benefit of the law without discrimination . . . based on race, national or ethnic origin.”¹⁷⁷ The treatment and outcome of this complaint will reveal whether filing a civil suit

171. See I.R.S. Notice 2011-34, 2011-19 I.R.B. (including as reportable under the law U.S. citizens, individuals with a joint accountholder with U.S. indicators, individuals with a U.S. residence address or a U.S. correspondence address, and individuals with a power of attorney or signatory authority granted to a person with a U.S. address).

172. See ICCPR, *supra* note 17, arts. 2, 26.

173. See *id.*

174. See Cain, *Meet the Alberta Man*, *supra* note 167.

175. *Id.*

176. *Id.*

177. *Id.*; Canadian Charter, *supra* note 65, c. 11, § 15(1).

exhausts all administrative actions.

Because the ICCPR guarantees protection against discrimination “on any ground such as . . . national or social origin, . . . birth or other status,”¹⁷⁸ the HRC will likely find that the absence of an anti-discrimination clause from the U.S.-Canada ITC, and the subsequent discrimination based on national origin caused by the law, violates the civil rights protected by the ICCPR. In the face of such disparate treatment of U.S. citizens in Canada, the HRC should require Canada to actively take measures to guarantee the civil protection and nondiscriminatory treatment of individuals within its jurisdiction.

V. CONCLUSION

Canada has the highest number of U.S. citizens living in its jurisdiction outside of the United States. In Canada more than anywhere else, an anti-discrimination clause is necessary to protect U.S. persons who are vulnerable to discrimination under FATCA. Despite the presence of applicable laws that provide general protections against discrimination, the lack of an anti-discrimination clause in Canada’s FATCA agreement creates ambiguity as to how financial institutions are permitted to treat U.S. persons under the law.

Although an anti-discrimination provision would impose FATCA’s costly compliance expenses on Canadian financial institutions, the solution is not to simply circumvent FATCA. If a country is going to pass FATCA into law, the law should properly place the burden of the legislation in the right place. The burden belongs not with the compliant U.S. persons living abroad who have a fundamental right to be free from discrimination, but with the government that believes easy access to information will help find noncompliant taxpayers. Even in the context of international tax compliance and tax treaties, it is necessary that human rights, including the right to be free from discrimination on the basis of one’s national origin, be properly balanced with the needs of a growing, complex economy.

178. ICCPR, *supra* note 17, arts. 2, 26.