University of Miami Law Review

Volume 74
Number 2 *SYMPOSIUM Sin Límites: Law & Business at the Gateway to the Americas*

Article 4

2-20-2020

How Hard Can This Be? The Dearth of U.S. Tax Treaties with Latin America

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Patricia A. Brown, *How Hard Can This Be? The Dearth of U.S. Tax Treaties with Latin America*, 74 U. Miami L. Rev. 359 (2020)
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ARTICLES

How Hard Can This Be? The Dearth of U.S. Tax Treaties with Latin America

PATRICIA A. BROWN*

The United States has fewer tax treaties with countries in Latin America and the Caribbean than the United Kingdom, France, Germany, Spain and even China have with such countries. After first describing ways in which tax treaties reduce barriers to cross-border trade and investment, this Article considers in turn various possible explanations for this situation. It examines, and rejects, the hypothesis that Latin American countries are reluctant to enter into tax treaties in general. It then considers, and rejects, the possibility that Latin American countries are opposed to increased trade and investment from the United States in particular. It then considers the possibility that U.S. tax treaty policy presents insurmountable difficulties to the conclusion of tax treaties. It concludes that U.S. tax treaty policies may present obstacles to successful negotiations with some, but not all, Latin American countries, suggesting that the United States might make more progress by negotiating with some smaller countries if progress cannot be made with, for example, Brazil or Argentina.

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INTRODUCTION

The United States has fifty-eight comprehensive bilateral tax treaties[1] covering sixty-six countries. However, only five[2] are with countries in Latin America or the Caribbean ("LATAM").[3] Tax treaties have been described as "[t]he primary means for eliminating tax

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1 *See United States Income Tax Treaties – A to Z*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last visited Jan. 20, 2020) (listing all of the countries with which the United States has a tax treaty). Nine of those countries (Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan) are described as "former Soviet Republics which are now covered by the treaty with the Commonwealth of Independent States (CIS), formerly known as the Union of Soviet Socialist Republics" *E.g.*, *Belarus – Tax Treaty Documents*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/international-businesses/belarus-tax-treaty-documents (last visited Jan. 20, 2020) (accounting for the discrepancy between the number of treaties and the number of countries covered). The site also includes links to several versions of the U.S. Model Income Tax Convention. *United States Income Tax Treaties – A to Z*, *supra*.

2 *See* Convention Between the Government of the United States of America and the Government of Trinidad and Tobago for the Avoidance of Double Taxation, the Prevention of Fiscal Evasion with Respect to Taxes on Income, and the Encouragement of International Trade and Investment, Trin. & Tobago-U.S., Jan. 9, 1970, 22 U.S.T. 164, T.I.A.S. No. 7047; Convention Between the Government of the United States of America and the Government of Jamaica for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Jam.-U.S., May 21, 1980, 33 U.S.T. 2865, T.I.A.S. No. 10,206; Convention Between Barbados and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Barb.-U.S., Dec. 31, 1984, T.I.A.S. No. 11,090; Convention Between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Together with a Related Protocol, Mex.-U.S., Sep. 18, 1992, S. TREATY DOC. No. 103-7 (1992) [hereinafter Mex.-U.S. Convention]; Convention Between the Government of the United States of America and the Government of the Republic of Venezuela for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Venez., Jan. 25, 1999, T.I.A.S. No. 13,020 [hereinafter U.S.-Venez. Convention].

3 The extension to the Netherlands Antilles of the Convention between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Certain Other Taxes was partially terminated, effective as of January 1, 1988, except with respect to interest and related articles. Convention Between

barriers to trade and investment."[4] If the purpose of tax treaties is to eliminate tax barriers to cross-border trade and investment, one would expect the United States—one of the major investors in LATAM[5]—to have more tax treaties with countries in the region. This Article will explore the differences in tax treaty policy and other circumstances that have created this situation.

Part I of this Article will describe, in general terms, the purpose of tax treaties. Part II will examine the possibility that LATAM countries are reluctant to enter into bilateral tax treaties. Part III will discuss U.S. policies that may prevent the conclusion of treaties with LATAM countries. Part IV will discuss several case studies regarding both successful and less successful negotiations and how lessons drawn from these negotiations may inform future negotiations with LATAM treaty partners. This Article ends with some conclusions about the prospects for additional tax treaties between the United States and LATAM countries.

I. WHY ARE BILATERAL TAX TREATIES NECESSARY?

Tax treaties serve several purposes, including establishing thresholds for taxation, reducing withholding tax rates on residents

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the United States of America and the Netherlands with Respect to Taxes on Income and Certain Other Taxes, Neth.-U.S., Apr. 29, 1948, 62 Stat. 1757; U.S. DEP'T OF STATE, PUB. NO. 9433, 8, at 162 (1988). The remaining articles were effectively terminated by the Protocol between the Government of the United State of America and the Government of the Kingdom of the Netherlands in respect of the Netherlands Antilles Amending Article VIII of the 1948 Convention with respect to Taxes on Income and Certain Other Taxes as Applicable to the Netherlands Antilles, subject to a grandfather clause that protected certain bonds that had been issued through Antilles subsidiaries of U.S. companies. Protocol Between the Government of the United States of American and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles Amending Article VIII of the 1948 Convention with Respect to Taxes on Income and Certain Other Taxes as Applicable to the Netherlands Antilles, Neth.-U.S., Oct. 10, 1995, S. TREATY DOC. No. 104-23 (1996).

[4] *Treaties: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 6 (2004) [hereinafter *2004 Treaties Hearing*] (statement of Barbara M. Angus, International Tax Counsel of the United States Treasury).

[5] *See* U.N. Conference on Trade and Development, *World Investment Report 2019*, U.N. Doc. UNCTAD/WIR/2019, at 48 (2019), https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

of the treaty countries so as to avoid "excessive" taxation, providing a treaty mechanism for relief of double taxation, and establishing some minimal protections against discriminatory treatment by one treaty party of residents or nationals of the other.[6]

To a great extent, most modern tax treaties follow the Organisation for Economic Co-operation and Development ("OECD") Model Tax Convention on Income and on Capital ("OECD Model")[7] or the United Nations Model Double Taxation Convention between Developed and Developing Countries ("U.N. Model"),[8] which itself is based on the OECD Model. The distributive articles of the OECD Model—starting with Income from Immovable Property in Article 6 and ending around Article 21 with Other Income—establish a series of rules that may allow one country (frequently referred to as the "source" country, but sometimes the "host" or "paying" country) to tax a resident of the other country if certain thresholds are met.[9] In some cases, the non-resident country is provided an unlimited right to tax.[10] In other cases, the non-resident country is prohibited from taxing.[11] And in others, the non-resident country is permitted to tax but at a specified maximum rate or only if certain thresholds are met regarding in-State activity.[12]

In general, if the non-resident State is provided the right to tax, then the resident State is required to relieve double taxation.[13] The OECD Model specifies two methods for relieving double taxation.[14] Under Article 23A, the resident State will exempt from taxation the

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[6] *Tax Treaties: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. 7–8 (2006) [hereinafter *Tax Treaties Hearing*] (statement of Patricia A. Brown, Deputy International Tax Counsel (Treaty Affairs), U.S. Dep't of the Treasury).

[7] OECD, MODEL TAX CONVENTION ON INCOME AND CAPITAL: CONDENSED VERSION, intro., para. 13 (2017) [hereinafter OECD MODEL TAX CONVENTION].

[8] Dep't of Econ. & Social Affairs, United Nations, Model Double Taxation Convention Between Developed and Developing Countries, U.N. Doc. ST/ESA/PAD/SER.E/213, at iii, ¶¶ 2, 18 (2017) [hereinafter U.N. Model Tax Convention].

[9] OECD MODEL TAX CONVENTION, *supra* note 7, arts. 6–21.

[10] *Id.* intro., ¶ 20.

[11] *Id.*

[12] *Id.*

[13] *Id.* intro., ¶ 19.

[14] *Id.*

income that may be taxed in the other State.[15] Alternatively, a "Contracting State" may choose the credit method of Article 23B, reducing the resident State tax dollar-for-dollar for the taxes paid to the other State.[16] The OECD Model provides that even countries that generally use the exemption method for relieving double taxation may choose to retain their taxing rights with respect to items of income taxed on a withholding basis by the source State, by using the credit method for withholding taxes.[17]

Although the formal structure of these provisions is quite consistent from treaty to treaty, the details can vary considerably.[18] Capital importing countries, whether developed or developing, frequently argue for higher withholding rates on dividends, interest, royalties, and so-called technical services[19] than the capital exporting countries, which are required to relieve double taxation, would prefer.[20] Countries that import goods and services may argue to expand taxing rights by adopting different thresholds for taxation.[21]

To the extent that these goals are achieved by limiting the source country's right to tax, they can be affected through standardized provisions that are more or less the same across the more than three thousand bilateral tax treaties currently in force around the world.[22] However, in order to effectively mesh one country's tax system with

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[15] *Id.* art. 23A, ¶ 1. Article 23A allows for "exemption with progression" so that the marginal rate applicable to other non-exempt income takes into account the exempt income. *Id.* art. 23A, ¶ 3; *see also id.* cmt. 9. For example, Individual X earns $100 from business activities in Country S and $100 from business activities in Country R, his State of residence. The marginal tax rate in Country R is 20% for the first $150 of income, but 30% for income in excess of $150. Under the Country S-Country R tax treaty, Country R must exempt the $100 earned in Country S from taxation, but it may apply the 30% rate to $50 of Individual X's income.

[16] *Id.* art. 23B, ¶ 1.

[17] *Id.* art. 23A, ¶ 2; *see also id.*, cmt. ¶ 47.

[18] *See* Martin Hearson*, Measuring Tax Treaty Negotiation Outcomes: The Action Aid Tax Treaties Dataset* 10–11 (Int'l Ctr. for Tax & Dev., Working Paper No. 47, 2016).

[19] U.N. Model Tax Convention, *supra* note 8, art. 12A.

[20] *See* Hearson, *supra* note 18, at 9, 11.

[21] *Compare, e.g.*, OECD MODEL TAX CONVENTION, *supra* note 7, arts. 5, 7 (providing more limited taxing rights), *with* U.N. Model Tax Convention, *supra* note 8, arts. 5, 7 (providing more expansive taxing rights).

[22] Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 BROOKLYN J. INT'L L. 973, 975 (2016).

another, so as to avoid double taxation[23] and double non-taxation[24] and to achieve the agreed-upon allocation of tax revenues, treaty negotiators must frequently modify the taxation of their own residents through more customized provisions that deviate not only from the standardized treaty provisions, but also from their own domestic tax laws.[25]

One of the most common ways in which U.S. treaties modify the treatment of U.S. residents in order to alleviate double taxation is by modifying source rules, which otherwise can limit the foreign tax credit available under U.S. domestic law.[26] A version included in many U.S. treaties provides that, if the treaty allows the other Contracting State to tax an item of gross income, as defined under U.S.

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[23] *See, e.g.*, Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.K.-U.S., at 286–87, July, 24, 2001, 2224 U.N.T.S. 247 [hereinafter U.K.-U.S. Convention) (addressing conflicts between the grantor trust rules of the United States and the settlor trust rules of the United Kingdom).

[24] *See, e.g.*, Convention Between the Kingdom of the Netherlands and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, art. 18, Neth.-Bel., June 5, 2001, 2205 U.N.T.S. 385 (allowing the source State to tax pension income if the residence State does not tax such income fully).

[25] *See Income Tax Treaties: Hearing Before the H.R. Subcomm. on Oversight of the Comm. on Ways and Means,* 96th Cong. 115 (1980) [hereinafter *Income Tax Treaties*] (statement of H. David Rosenbloom, Treasury International Tax Counsel, Department of the Treasury) ("The code paints a broad picture for use with all countries. The treaties, as I see it, provide the necessary refinement on a country-by-country basis. I don't think it is possible as a statutory matter to address all the multitude of tax systems that we encounter throughout the world."). Many of these customized provisions are found in treaties with the United States' most important treaty partners—the United Kingdom and Canada—because the sheer volume of trade and investment highlights problems relatively quickly and creates a significant incentive to solve them. *See, e.g.*, U.K.-U.S. Convention, *supra* note 23; Convention Between the United States of America and Canada With Respect to Taxes on Income and on Capital, Can.-U.S., art. XXI, Sept. 26, 1980, T.I.A.S. No. 11087 [hereinafter Can.-U.S. Convention].

[26] DEP'T OF THE TREASURY, TECHNICAL EXPLANATION ACCOMPANYING THE UNITED STATES MODEL INCOME TAX CONVENTION OF NOV. 15, 2006, at 74 (2006), https://www.treasury.gov/press-center/press-releases/Documents/hp16802.pdf; *see also* H. David Rosenbloom, *U.S. Source Rules: Building Blocks of Cross-Border Taxation*, 60 BULL. INT'L TAX'N 386, 386–87 (2006).

law, derived by a resident of the U.S, the U.S. will treat that item of gross income as gross income from sources within the other Contracting State for U.S. foreign tax credit purposes.[27] This provision is intended to ensure that a U.S. resident can obtain a U.S. foreign tax credit for taxes paid to the other Contracting State when the treaty assigns primary taxing rights over an item of gross income to that State.[28]

The importance of re-sourcing rules has occasionally been overlooked.[29] However, the lack of such rules can frustrate the intentions of the treaty negotiators. For example, Article 5(5) of the 1992 tax treaty between the United States and Mexico provides that a foreign enterprise could be taxed in the host country if a person in the host country "habitually processes in the first-mentioned State on behalf of the enterprise goods or merchandise maintained in that State by that enterprise, provided that such processing is carried on using assets furnished, directly or indirectly, by that enterprise or any associated enterprise."[30] The rule would allow Mexico to treat U.S. companies that use Mexican assembly plants ("*maquiladoras*")[31] as having permanent establishments in Mexico.[32] However, under U.S. do-

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[27] *See* DEP'T OF THE TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION, art. 23 (2016) [hereinafter U.S. MODEL TAX CONVENTION].

[28] *See, e.g.*, DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL GAINS 97–98 (2003), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/teus-uk.pdf (discussing paragraph 2 of article 24 of the Convention).

[29] *See, e.g.*, Rosenbloom, *supra* note 26, at 389–90.

[30] Mex.-U.S. Convention, *supra* note 2, art. 5, ¶ 5.

[31] *See* James F. Smith & Chris Kraul, *U.S., Mexico Reach Deal on Factory Tax*, L.A. TIMES (Oct. 30, 1999, 12:00 AM), https://www.latimes.com/archives/la-xpm-1999-oct-30-mn-27797-story.html.

[32] *See* DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION AND PROTOCOL BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICAN AND THE GOVERNMENT OF UNITED MEXICAN STATES FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME 10 (1994), https://www.irs.gov/pub/irs-trty/mexicotech.pdf (discussing Paragraph 5 of Article 5 of the Convention; "This subparagraph is meant to clarify that a dependent

mestic rules, income earned through those permanent establishments would have been treated as U.S.-source income, potentially exposing the companies to double taxation.[33] Article 24(3) of the Mexico-U.S. treaty was modified in 2002 to ensure that the United States would provide relief from double taxation if Mexico taxed a U.S. company in accordance with Article 5(5) of the treaty.[34]

The U.S.-Venezuela treaty dealt with similar issues with source rules.[35] At the time of the treaty negotiations, Venezuela had a territorial system under which it taxed residents and non-residents only on income arising from sources in Venezuela.[36] Because Venezuela could tax only income from sources within Venezuela, there was an obvious incentive for them to take a broad view of what constituted Venezuelan-source income.[37] That resulted, for example, in Venezuela imposing withholding taxes on payments for certain services performed by U.S. persons in the United States.[38] Under U.S. domestic law, the income earned from services performed in the United States is from U.S. sources.[39] U.S. foreign tax credit limitations are intended to ensure that foreign taxes do not reduce U.S. taxation on U.S. source income.[40] Accordingly, unless the recipient of such income also had low-taxed foreign source income from other

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agent that processes inventory of its principal using assets of the principal (or a related enterprise) without itself having ownership of either the inventory or the assets used in the processing, represents a permanent establishment of the principal. This is the case whether or not the dependent agent is a subsidiary of the U.S. enterprise. Because such an agent represents a permanent establishment, the income and assets attributable to its activity are subject to income and assets tax in Mexico.").

[33] *See* Smith & Kraul, *supra* note 31.

[34] DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE PROTOCOL BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED MEXICAN STATES 15 (2002), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/temexico.pdf.

[35] *See* JESSE HELMS, S. COMM. ON FOREIGN RELATIONS, TAX CONVENTION WITH VENEZUELA, S. EXEC. REP. NO. 106-6, at 9 (1999), https://www.congress.gov/106/crpt/erpt6/CRPT-106erpt6.pdf.

[36] *See id.* at 8 (discussing the "Venezuelan Territorial Tax System").

[37] *Id.* at 9–10.

[38] *Id.* at 9.

[39] *See id.*

[40] DEP'T OF THE TREASURY, PUB. 514, FOREIGN TAX CREDIT FOR INDIVIDUALS, at 3 (2018), https://www.irs.gov/pub/irs-pdf/p514.pdf [hereinafter PUB. 514] (discussing the U.S. foreign tax credit).

activities, those U.S. taxpayers could have been subject to double taxation with respect to amounts received from Venezuela.[41] A treaty can prevent double taxation in that case by providing that Venezuela cannot tax income from "business profits" of the service provider unless that service provider has a "permanent establishment" in Venezuela.[42]

Another area where domestic law may be too blunt an instrument is in the treatment of pensions. The OECD Model provides that pensions should be taxable in the state of residence of the recipient of the pension.[43] For example, Individual R has worked all his life for a company that is a resident of Australia, during which he contributed to the company's defined contribution retirement plan. Australia taxes pensions under a "TTE" system—there is no tax deduction or exemption when contributions are made ("T"), the investment income of the fund is taxed ("T") (albeit at a concessionary rate) and distributions from the fund to the beneficiary are not taxed at all ("E").[44] Individual R would like to retire to the United States where his children and grandchildren are living. However, the United States generally taxes pensions under an EET system, pursuant to which contributions to a pension fund are deductible ("E"), investment income of the pension fund is not taxable ("E"), but distributions are taxed ("T").[45] If Individual R moved to the United States, he would be subject to the equivalent of double taxation because he would have been taxed in Australia, either on the value of the contributions made by his employer or on the full value of his compensation without deduction for contributions Individual R

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[41] *See* S. EXEC. REP. NO. 106-6, at 9.

[42] *See id.* at 22. Alternatively, a treaty could provide for a source State taxing right, but also include a re-sourcing rule for any gross income taxed by the source State. *See id.* at 55.

[43] OECD MODEL TAX CONVENTION, *supra* note 7, art. 18.

[44] *See* OECD PROJECT ON FINANCIAL INCENTIVES & RETIREMENT SAVINGS, THE TAX TREATMENT OF RETIREMENT SAVINGS IN PRIVATE PENSION PLANS 1–2 (2018), https://www.oecd.org/daf/fin/private-pensions/Tax-treatment-of-retirement-savings-Policy-Brief-1.pdf; *see also* Rhys Cormick & John A. McLaren, *The Current Retirement System in Australia Needs to be More Attuned to a Mobile International Workforce: A Case for Reform*, 29 AUSTRALIAN TAX FORUM 493, 499–500 (2014).

[45] McLaren, *supra* note 44, at 499–501.

made, and taxed a second time in the United States on the distributions received from the pension fund.[46] In this case, the tax treaty between Australia and the United States does not include a provision that would prevent the United States from taxing any pension to the extent that it would be exempt in the other country.[47]

The provisions implicated in the preceding examples in this Section are some of those that affect trade in goods and services, as opposed to investment. Early tax treaties were primarily about ensuring the appropriate allocation of profits from business activities, particularly when defunct empires begat newly-independent countries.[48] Businesses selling goods into, or providing services in, another country rely on Articles 5 and 7 of the OECD Model, which generally provide that the business profits of an enterprise may be subject to taxation in the host State only when the business has a "permanent establishment" in that State.[49] Article 8 prevents a host State from taxing profits that arise from the operation of ships or aircraft in international traffic, even if the relevant enterprise has a permanent establishment in the host State.[50] The "closed system"[51] of taxing income from employment is found in Articles 15 through 19.[52] The rule that ensures that business executives attending meetings in another State are not subject to tax therein is in Article 15(2).[53] Articles 9 and 25 provide principles for the allocation of

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[46] *Cf. id.* (discussing taxation on pensions in Australia and the United States).

[47] *Compare* Convention Between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Austl.-U.S., arts. 18–19, Aug. 6, 1982, 35 U.S.T. 1999, T.I.A.S. No. 10,773, *with* U.S. MODEL TAX CONVENTION, *supra* note 27, art. 17(1)(b).

[48] *See Convention for the Purpose of Avoiding Double Taxation Between Austria, Hungary, Italy, Poland, Roumania and the Kingdom of the Serbs, Croats and Slovenes*, art. 2–4, April 6, 1922, *reprinted in* LEAGUE OF NATIONS, DOUBLE TAXATION AND FISCAL EVASION: COLLECTION OF INTERNATIONAL AGREEMENTS AND INTERNAL LEGAL PROVISIONS FOR THE PREVENTION OF DOUBLE TAXATION AND FISCAL EVASION 73, 73–74 (1928).

[49] *See* OECD MODEL TAX CONVENTION, *supra* note 7, arts. 5, 7.

[50] *See id.*, art. 8.

[51] *See* Frank P.G. Pötgens, *The "Closed System" of the Provisions on Income from Employment in the OECD Model*, 41 EUROPEAN TAX'N 252, 252 (2001).

[52] OECD MODEL TAX CONVENTION, *supra* note 7, arts. 15–19.

[53] *Id.*, art. 15, ¶ 2.

income between jurisdictions and a mechanism to resolve disagreements between the countries over such allocations.[54]

Article 5, in its current form, allows an enterprise to sell into a jurisdiction without becoming subject to taxation there, unless the enterprise has a physical presence there or a person in the host jurisdiction with the authority to bind the enterprise.[55] Even if the enterprise has a physical presence or person with binding authority in the host State, it will still not be subject to taxation in that State if its activities in the host State fall within a category of "preparatory or auxiliary" activities.[56] Treaties based on the U.N. Model expand these rules somewhat, particularly to deal with the provision of services.[57] Nevertheless, millions of cross-border transactions take place every day under the protection of these provisions.[58]

Imagine a world in which airlines and shipping companies were subject to taxation in every jurisdiction in which they landed or docked. The allocation of income between hundreds of jurisdictions would be difficult, to say the least. For that reason, agreements allocating taxation rights only to the State of residence or otherwise denying taxing rights to the host State were entered into as early as the 1920s.[59] Some might argue that the existence of such agreements obviates the need for tax treaties with respect to transportation activities. However, such agreements do not resolve all the issues arising from the operation of such enterprises in multiple jurisdictions. For example, such enterprises may engage in activities beyond those

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[54] *Id.*, arts. 9, 25.

[55] *Id.*, art. 5, ¶¶ 1–2, 4–6.

[56] *Id.*, art. 5, ¶ 4.

[57] *See, e.g.*, U.N. Model Tax Convention, *supra* note 8, art. 5, cmt. ¶ 9.

[58] *See* ORG. FOR ECON. CO-OPERATION & DEV., OECD WORK ON TAXATION 14 (2018), https://www.oecd.org/tax/centre-for-tax-policy-and-administration-brochure.pdf ("Today [the OECD Model] forms the basis of a network of around 3,000 tax treaties globally, reducing the tax barriers to cross-border trade and investment, as well as assisting in the prevention of tax avoidance and evasion.").

[59] *See, e.g.*, Double Taxation: Shipping Profits, Swed.-U.S., Aug. 9, 1922, 11 Stat. 746; Reciprocal Exemption from Taxation of Air Transport Profits, U.K.-Neth., Aug. 27, 1936, http://foto.archivalware.co.uk/data/Library2/pdf/1936-TS0026.pdf.

exempted under domestic law or such limited shipping agreements.[60] Tax treaties may provide a broader exemption for such activities.

Even if such enterprises are not subject to taxation on their own profits in the host State, the situation may be different with respect to the enterprises' employees.[61] If the employees are subject to tax in the host State, the employer may have withholding obligations.[62] In 2005, the trade association representing Latin American airlines complained that the U.S. Internal Revenue Service was auditing the airlines with respect to their flight crews' income allocable to the United States that exceeded the exemptions provided in U.S. domestic law.[63] The version of Article 14 included in the U.S. Model Income Tax Convention would have prevented U.S. taxation of such flight crew members if they were residents of countries with which the United States had tax treaties.[64]

Some of these problems may be obvious from the beginning of discussions between potential treaty partners, while others may become clear during negotiations, and some only appear once the treaty relationship is established. The United States and Canada, for

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[60] For example, section 883 of the Internal Revenue Code applies to foreign corporations that are "considered engaged in the international operation of ships or aircraft." I.R.C. § 883-1(c)(1) (2018). On the other hand, the U.S. Model Article. 8(3) applies to stand-alone container leasing companies. *See* DEP'T OF TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL GAINS 32 (2002), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/teus-uk.pdf (noting, in respect to Article 8(3), that "[t]his result obtains under paragraph 3 regardless of whether the recipient of the income is engaged in the operation of ships or aircraft in international traffic . . . .").

[61] *See, e.g.*, Caroline Daniel, *Airlines Fear U.S. Income Tax Claim*, FINANCIAL TIMES, Feb. 16, 2005, at 7 (discussing how the IRS claims Latin American airlines may owe taxes for employees when flying over and conducting preflight services in the United States).

[62] *See id.*

[63] *See id.*

[64] *See* U.S. MODEL TAX CONVENTION, *supra* note 27, art. 14.

example, have entered into five protocols to the 1980 tax treaty between the two countries.[65] Having a treaty relationship already in place allows for the resolution of emerging issues more quickly.[66]

Because the rules affecting trade are generally more standardized, more attention tends to be focused on the withholding rates applicable to dividends, interest, and royalties, which affect cross-border investment.[67] In particular, multinational corporations generally are concerned about the "excessive" taxation that they may suffer because source countries impose gross-basis withholding taxes.[68] A representative of U.S.-based multinationals testified:

> In addition, the tax systems of most countries impose withholding taxes, frequently at high rates, on payments of dividends, interest, and royalties to foreigners, and treaties are the mechanism by which these taxes are lowered on a bilateral basis. If U.S. enterprises earning such income abroad cannot enjoy the reduced foreign withholding rates offered by a tax treaty, they are liable to suffer excessive and non-creditable levels of foreign tax and to be at a competitive disadvantage relative to traders and investors from other countries that do have such benefits. Tax treaties serve to prevent this barrier to U.S. participation in international commerce.[69]

Those sentiments were echoed by a representative of foreign-based multinationals with U.S. subsidiaries:

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[65] Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Can.-U.S., at V–VI, Sept. 21, 2007, S. TREATY DOC. No. 110-15 (2008) (listing the prior protocols to the agreement).

[66] *See Tax Treaties Hearing*, *supra* note 6, at 3 (statement of Patricia A. Brown, Deputy International Tax Counsel (Treaty Affairs), U.S. Department of the Treasury).

[67] *See The Japanese Tax Treaty (T. Doc. 108-14) and the Sri Lanka Tax Protocol (T. Doc. 108-9): Hearing Before the S, Comm. of Foreign Relations*, 108 Cong. 31 (2004) (statement of Barbara M. Angus, International Tax Counsel, United States Department of the Treasury).

[68] *See id.* at 32.

[69] *Id.* (statement of William A. Reinsch, President, National Foreign Trade Council).

> Tax treaties help ensure that businesses are not taxed twice on the same income while accounting for concerns of tax avoidance. This is done in part by reducing or eliminating withholding taxes on cross-border income flows between affiliated companies. By ensuring that common business expenses like royalty and interest payments are not subject to double taxation, tax treaties allow insourcing companies to invest more in the very business activities that drive economic growth in the United States.[70]

A potential treaty partner that has shown a willingness to reduce withholding taxes in its negotiations with other countries is, therefore, much more likely to succeed at convincing the United States to enter into tax treaty negotiations than one that has not.

II. ARE LATAM COUNTRIES RELUCTANT TO ENTER INTO TAX TREATIES?

There is a pervasive narrative that tax treaties are one-sided instruments of economic oppression foisted upon developing countries by developed countries.[71] Developing countries are urged to decline to enter into tax treaties because (a) they are not necessary to avoid double taxation and (b) they simply result in revenue transfers from developing countries to developed countries.[72] It is necessary, therefore, to consider whether the lack of tax treaties between the United States and LATAM countries is attributable to a general reluctance on the part of LATAM countries to enter into tax treaties.

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[70] *Treaties: Hearing Before the S. Comm. on Foreign Relations,* 113th Cong. (2014) [hereinafter *2014 Treaties Hearing*] (statement of Nancy L. McLernon, President & CEO Organization for International Investment), https://www.foreign.senate.gov/imo/media/doc/022614AM_Hearing_Testimony%20-%20Nancy_McLernon.pdf.

[71] Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 990–93 (2000).

[72] *See id.* at 990–91.

In 2009, Sebastien Drevet and Victor Thuronyi compared the treaty networks of UN member states with those of OECD members.[73] They found that the average number of tax treaties entered into by OECD members was seventy-two, while the average number of tax treaties entered into by non-OECD members was seventeen.[74] At the time, the LATAM country with the highest number of tax treaties was Mexico, ranked fifty-fifth (tied with Armenia and Vietnam) with thirty-seven treaties.[75] Next was Brazil, ranked seventy-third with twenty-eight treaties.[76] Barbados was seventy-fourth with twenty-six.[77] Venezuela and Trinidad and Tobago were tied at eightieth (with Algeria and Bosnia and Herzegovina) with twenty-four treaties each.[78] Jamaica was eighty-fifth and Chile was eighty-sixth.[79] At the time, Chile had twenty treaties and Argentina had seventeen treaties.[80] Below the non-OECD member average were Ecuador (14), Antigua and Barbuda (12), Guyana (12), St. Kitts and Nevis (12), Dominica (12), St. Lucia (11), St. Vincent and the Grenadines (11), Bolivia (9), Cuba (7), Peru (5), Colombia (4), Uruguay (2), the Dominican Republic (1), Panama (1), Paraguay (1), and Suriname (1).[81] The Bahamas, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua were all listed as having no tax treaties.[82]

Drevet and Thuronyi compiled their tables using the tax treaty database of the IBFD.[83] The database shows that, over the past decade, the number of treaties entered into by LATAM countries has increased, in some cases significantly. Mexico now has sixty tax treaties.[84] Chile now has thirty-three treaties, compared to twenty

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73 *See* Sebastien A. Drevet & Victor Thuronyi, *The Tax Treaty Network of the U.N. Member States*, 54 TAX NOTES INT'L 783, 783–84 (2009).
74 *Id.*
75 *Id.* at 785.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.* at 785–86.
82 *Id.* at 786.
83 *Id.* at 785–86.
84 *Mexico - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation (accessed Jan. 20, 2020).

in 2009.[85] Uruguay has twenty-one, compared to its previous two.[86] Colombia has treaty relationships with twelve countries, more than twice its prior four.[87] Peru has treaty relationships with ten countries, an increase from its previous five.[88] Ecuador has twenty, an increase of six.[89] Brazil increased the number of its treaties to thirty-three from twenty-eight.[90] Argentina added three.[91] Bolivia continues to have nine.[92] Accordingly, the data does not seem to support the idea of a general reluctance to enter into treaties as a significant reason for the lack of tax treaties with the United States.

It is worth considering the treaty networks of these countries in more depth. In many cases, a large proportion of a country's treaty network is made up of treaties with close neighbors and trading part-

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[85] *Compare Chile - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 785. Chile currently has a treaty pending with the United States. *See infra* Section IV.B.3.

[86] *Compare Uruguay - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 785. In addition, Uruguay has four treaties that are currently pending. *See Uruguay*, DELOITTE INT'L TAX SOURCE, https://dits.deloitte.com/#Jurisdiction/105 (last visited Jan. 20, 2020).

[87] *Compare Colombia - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation (accessed Jan. 20, 2020), *and* 2004 Andean Community Income and Capital Tax Convention, May 5, 2004, http://internationaltaxtreaty.com/download/bolivia/dtc/Andean%20Community-DTC-May-2004.pdf (creating a tax treaty relationship among Bolivia, Colombia, Ecuador and Peru), *with* Drevet & Thuronyi, *supra* note 73, at 786.

[88] *Compare Peru - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 786.

[89] *Compare Ecuador - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 786.

[90] *Compare Brazil - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 785.

[91] *Compare Argentina - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 785.

[92] *Compare Bolivia - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 20, 2020), *with* Drevet & Thuronyi, *supra* note 73, at 786.

ners. Peru has treaty relationships with Bolivia, Brazil, Chile, Colombia, Ecuador, and Mexico.[93] Its other treaties are with Canada, Korea, Portugal, and Switzerland.[94] Peru's primary trading partners are China, the United States, Brazil, Switzerland, Korea, Spain, Mexico, and India.[95] In the case of Ecuador, seven of its twenty treaties are with other LATAM countries—Bolivia, Brazil, Chile, Colombia, Mexico, Peru, and Uruguay.[96] Ecuador's non-LATAM treaties are with Belarus, Belgium, Canada, China, France, Germany, Italy, Korea, Qatar, Romania, Russia, Singapore, Spain, and Switzerland.[97] Ecuador's primary export trading partners are the United States, Vietnam, Peru, Chile, Panama, Russia, and China.[98] Its primary import trading partners are the United States, China, Colombia, Panama, Brazil, and Peru.[99] Other treaties appear to be with countries that are likely sources of investment capital.[100]

It appears that a reasonable number of LATAM countries are open to tax treaty negotiations and adept at choosing treaty partners that are likely sources of trade or investment. LATAM countries are, therefore, investing scarce negotiation resources on potential treaty

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[93] *Peru - Treaty Withholding Rates Table*, *supra* note 88.

[94] *Id.*

[95] *World Factbook: Peru* CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/pe.html (last visited Jan. 20, 2020) (listing Peru's import and export partners under "economy" tab).

[96] *Ecuador - Treaty Withholding Rates Table*, *supra* note 89.

[97] *Id.*

[98] *World Factbook: Ecuador*, CENTRAL INTELLIGENCE AGENCY https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html (last visited Jan. 20, 2020) (listing Ecuador's export partners under "economy" tab).

[99] *Id.* (listing Ecuador's import partners).

[100] *See, e.g.*, *Table 1-o: Outward Direct Investment Positions, As of End-2018: Reporting Economy: Germany*, INT'L MONETARY FUND, http://data.imf.org/regular.aspx?key=61227424 (last visited Jan. 20, 2020) (listing Germany as having invested $348 million in Ecuador); *see also Ecuador,* FRANCE DIPLOMATIE: MINISTRY FOR EUROPE & FOREIGN AFFAIRS, https://www.diplomatie.gouv.fr/en/country-files/ecuador/ (last updated June 6, 2017) ("with a stock of about US $500 million, France has positioned itself as the third-largest European investor over the past 15 years . . . .").

partners from which they are likely to see the most benefit. It is surprising, therefore, that the United States is not part of the treaty network in those countries.[101]

There does not seem to be any desire to rebuff trade and investment from the United States. Nine LATAM countries—Argentina, Bolivia, Ecuador, Grenada, Honduras, Jamaica, Panama, Trinidad and Tobago, and Uruguay—have entered into Bilateral Investment Treaties ("BITs") with the United States.[102] BITs are intended "to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports."[103] The United States also has Free Trade Agreements ("FTAs") in place with a number of LATAM countries.[104] FTAs generally include the investor-protection provisions of BITs, along with additional provisions regarding trade in goods and services.[105] LATAM countries that are party to an FTA with the United States are Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Peru.[106] Income taxes generally are carved out of the trade disciplines imposed by BITs and FTAs, the thought being that income taxes should be covered by tax treaties

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[101] *United States - Treaty Withholding Rates Table,* Int'l Bureau for Fiscal Documentation, (accessed Jan. 20, 2020) (listing treaties only with those LATAM countries listed in note 2, *supra*).

[102] *See Bilateral Investment Treaties Currently in Force*, ENF'T & COMPLIANCE, TRADE COMPLIANCE CTR., https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Dec. 26, 2019).

[103] *Bilateral Investment Treaties*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/bilateral-investment-treaties (last visited Dec. 16, 2019).

[104] *See Free Trade Agreements*, ENF'T & COMPLIANCE, TRADE COMPLIANCE CTR., https://tcc.export.gov/Trade_Agreements/Free_Trade_Agreements/index.asp (last visited Dec. 26, 2019).

[105] *Compare* United States – Chile Free Trade Agreement ch. 10, June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file1_4004.pdf, *with* the OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[106] *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements (last visited Dec. 26, 2019) (listing all countries the United States has free trade agreements with).

and not trade agreements.[107] The problem is that the tax treaties have not materialized.

III. THE U.S. PERSPECTIVE ON NEW TAX TREATIES.

A. *Economic Factors Affecting U.S. Tax Treaty Policy*

The United States has a long history with income tax treaties, having entered into comprehensive treaties with France[108] and Sweden[109] as long ago as the 1930s. U.S. tax treaty policy historically reflects a general institutional interest in having an open economy that favors cross-border trade and investment.[110] To the layperson, "[t]ax treaties are important to the overall international economic policy of the United States because they serve to reduce tax barriers to international trade and investment."[111]

Although the United States is a capital-importing country,[112] it is a net aggregate capital-exporter of foreign direct investment

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[107] *See* Hugh J. Ault & Jacques Sasseville, *Taxation and Non-Discrimination: A Reconsideration*, 22 WORLD TAX J. 101, 119 (2010).

[108] *See* Convention and Protocol Between the United States of America and France, Fr.-U.S., Apr. 27, 1932, 49. Stat. 1345.

[109] *See* Convention and Protocol Between the United States of America and Sweden Respecting Double Taxation, U.S.-Swed., Mar. 23, 1939, 54 Stat. 1759.

[110] *Conventions and Protocols on Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital; Treaty Doc. 103-29, Sweden; Treaty Doc. 103-30, Ukraine; Treaty Doc. 103-31, Mexico; Treaty Doc. 103-32, France; Treaty Doc. 103-33, Kazakhstan; Treaty Doc. 103-34, Portugal; Treaty Doc. 104-4, Canada: Hearing Before the Comm. on Foreign Relations U.S. S.*, 104th Cong. 114 (1995) [hereinafter *1995 Hearing*] (statement of Alan P. Larson, Principal Deputy Assistant Secretary for Economic and Business Affairs) ("There is reason to believe that tax policy and tax treaties are becoming more important elements of our international economic infrastructure. As the pace of globalization intensifies and formal barriers to trade and investment recede, tax treatment becomes an even greater factor in making trade and investment decisions.").

[111] Press Release, U.S. Dep't of Treasury, Treasury Secretary John W. Snow Remarks at the US-Japan Income Tax Treaty Signing Ceremony (Nov. 6, 2003), https://www.treasury.gov/press-center/press-releases/Pages/js975.aspx.

[112] Steven Rattner, *Unpacking the Trade Deficit,* N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/unpacking-the-trade-deficit.html ("[C]apital can also be imported to make up for a lagging savings rate and even to finance consumption. With the domestic savings rate low (in part because of a

("FDI").[113] Portfolio debt, primarily corporate and government bonds held by foreign investors, does not rely on treaty claims to provide exemptions from U.S. withholding tax.[114] However, treaties are generally necessary to provide exemptions from withholding tax for related party debt and reductions or exemptions from withholding tax on dividends and royalties.[115] As of the end of 2017, the total amount of foreign direct investment into the United States was just over $4 trillion, $3.3 trillion of which was equity investment.[116] U.S. outward foreign direct investment was just over $6 trillion, with $5.8 trillion as equity.[117] A significant amount of South American investment in United States in particular consists of real property,[118] which also is not affected by tax treaties as treaties generally allow unlimited taxation by the State of source.[119] Accordingly, with respect to the income that tax treaties apply to, income flows generally favor the United States.

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federal budget deficit about to eclipse $1 trillion), we have — in most recent years — been net borrowers.").

113 *Compare Table 1-o: Outward Direct Investment Positions, as of end-2017*: *Reporting Economy: United States,* INT'L MONETARY FUND, data.imf.org/regular.aspx?key=61227424 (last visited Dec. 26, 2019) [hereinafter *Table 1-o: United States*], *with Table 1-i: Inward Direct Investment Positions, as of end-2017: Reporting Economy: United States*, INT'L MONETARY FUND, data.imf.org/regular.aspx?key=61227424 (last visited Dec. 26, 2019) [hereinafter *Table 1-i: United States*].

114 *See* I.R.C. § 871(h), 881(c) (2018).

115 *See id.* § 882(c)(3); *see also* Jefferey L. Rubinger, *Proposed U.S. Model Treaty Provisions May Dramatically Alter International Tax Landscape*, 89 FLA. B.J. 54, 54 (2015).

116 *See Table 1-o: United States*, *supra* note 113.

117 *See Table 1-i: United States*, *supra* note 113.

118 According to the National Association of Realtors, LATAM accounted for 22% of foreign purchases of U.S. residential real estate in 2019, second only to Asia and Oceania at 27%. LAWRENCE YUN & GAY CORORATON, NAT'L ASS'N OF RELATORS, PROFILE OF INTERNATIONAL TRANSACTIONS IN U.S. RESIDENTIAL REAL ESTATE 14 (2019), https://www.nar.realtor/sites/default/files/documents/2019-profile-of-international-activity-in-u-s-residential-real-estate-07-17-2019.pdf.

119 *See* OECD MODEL TAX CONVENTION, *supra* note 7, art. 6

Because payment flows generally favor the United States,[120] the goal has been to reduce withholding taxes and other source taxation as much as possible.[121] However, because it is not always possible to achieve everything desired in a negotiation, the priorities with respect to reductions of withholding taxes have been royalties, interest, and dividends.[122]

There are a number of reasons for the focus on eliminating source-State taxation of royalties. The theoretical justification is that royalties are generated by marketing or industrial intangibles, which require substantial expenditures, either for research and development, in the case of industrial intangibles, or advertising and marketing, in the case of marketing intangibles.[123] Accordingly, royalties are more like business profits than a passive investment, such as dividends or interest.[124] Perhaps even more important is the practical reason that the United States encountered frequent disputes with treaty partners over the definition of royalties and the source of royalties.[125] Eliminating the withholding tax on royalties seems to have

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[120] *See* Matthew Higgins & Thomas Klitgaard, *Income Flows from U.S. Foreign Assets and Liabilities*, LIBERTY ST. ECON. (Nov. 14, 2012), https://libertystreeteconomics.newyorkfed.org/2012/11/income-flows-from-us-foreign-assets-and-liabilities.html.

[121] *See Tax Treaties Hearing*, *supra* note 6, at 4 (statement of Patricia A. Brown, Deputy International Tax Counsel (Treaty Affairs), U.S. Department of the Treasury).

[122] *See* U.S. MODEL TAX CONVENTION, *supra* note 27, arts. 10–12; *see also see also* Pamela A. Fuller, *The Japan-U.S. Income Tax Treaty: Signaling New Norms, Inspiring Reforms, or Just Tweaking Anachronisms in International Tax Policy?*, 40 INT'L LAW. 773, 794 (2006) ("The U.S. Government's objectives for withholding rates, as reflected in the U.S. Model Tax Treaty, are zero percent on royalties and most categories of interest, and 5 percent on dividends received by corporate shareholders holding directly at least 10 percent of voting stock of the payor.").

[123] *See* Fuller, *supra* note 122, at 794–95.

[124] *See id.* at 796 (discussing the difficulty in distinguishing royalties from business profits).

[125] *See id.* at 795.

eliminated those disputes.[126] Finally, the United States exports intangibles;[127] royalty flows always favor the United States.[128]

Ideally, the United States would also like to eliminate all withholding taxes on interest, subject to certain anti-abuse rules.[129] If it cannot do so, the fallback position is to eliminate or at least reduce the gross-basis taxation of types of interest that would constitute business profits, such as interest received by financial institutions.[130] The United States also tries to eliminate withholding taxes on investment income earned by tax-exempt pension funds because such taxes inevitably result in economic double taxation.[131]

The U.S. position with respect to dividends changed about twenty years ago.[132] Prior to that, the United States position was to follow the OECD Model on dividends, providing for a five percent direct dividend rate[133] and a fifteen percent portfolio dividend rate.[134] The Treasury Department only reconsidered this position in

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[126] *See id.* at 794–95

[127] *See* REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME 44 (2007) ("The place of use rule is favorable to the source country which may be surprising because the United States is a net exporter of intangible property"); Mariano Municoy, *Allocation of Jurisdiction on Patent Disputes in the Models Developed by Hague Conference in Private International Law: Asymmetric Countries and the Relationships of Private Parties*, 4 CHICAGO-KENT J. INTELL. PROP. 342, 376–77 (2005).

[128] OLENA DUDAR ET. AL., CTR. FOR EUROPEAN ECON. RES., THE IMPACT OF TAXES ON BILATERAL ROYALTY FLOWS 2 (2015).

[129] *See* U.S. MODEL TAX CONVENTION, *supra* note 27, art. 11 ¶1; Fuller, *supra* note 122, at 797–99; *Tax Treaties Hearing*, *supra* note 6, at 4, 10 (statement of Patricia A. Brown, Deputy International Tax Counsel (Treaty Affairs), U.S. Department of the Treasury).

[130] *See* Fuller, *supra* note 122, at 797; *Tax Treaties Hearing*, *supra* note 6, at 13 (statement of Patricia Brown, Deputy International Tax Counsel (Treaty Affairs), U.S. Department of the Treasury).

[131] OECD MODEL TAX CONVENTION, *supra* note 7, art. 18 cmt. ¶ 69.

[132] *See generally* ROBERT H. DILWORTH ET AL., PRICEWATERHOUSECOOPERS LLP, ZERO WITHHOLDING ON DIRECT DIVIDENDS: POLICY ARGUMENTS FOR A NEW U.S. TREATY MODEL 1113–31 (2000) (arguing for the U.S. to change its position with respect to dividends).

[133] The United States preferred to apply the direct dividend rate at a ten percent ownership threshold rather than the twenty-five percent threshold in the OECD Model. *Compare* U.S. MODEL TAX CONVENTION, *supra* note 27, art. 10, *with* OECD MODEL TAX CONVENTION, *supra* note 7, art. 10.

[134] U.S. MODEL TAX CONVENTION, *supra* note 27, art. 10, ¶ 2*; see also* DILWORTH ET AL., *supra* note 132.

order to conclude an agreement with the United Kingdom.[135] At the time, the United Kingdom was in the process of reforming its corporate tax system, including through the repeal of its advance corporation tax ("ACT").[136] The corporate reform would have two major effects with respect to the United States. First, the ACT served to prevent treaty-shopping into the United States through U.K. companies, as the ACT was to be paid even if a U.K. company had no mainstream corporate tax liability (for example, because the company could use foreign tax credits from foreign investment to offset the U.K. corporate tax liability).[137] Second, the United States agreed in 1975 to a complicated treaty provision that provided certain benefits to U.S. shareholders with respect to the U.K.'s imputation system for taxing corporate profits.[138] This provision, criticized by Charles Kingson in his article "The Coherence of International Taxation" as effectively a tax-sparing provision,[139] by 1999 required the U.S. to provide a foreign tax credit for a tax that never was paid.[140] Accordingly, the United States wanted several things out of the re-

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[135] RICHARD LUGAR, TAX CONVENTION WITH THE UNITED KINGDOM, S. EXEC. RPT. NO. 108-2, at 5 (2003).

[136] *See id.* at 7 (discussing the repeal of ACT by the U.K. and the effect on treaty negotiations between the U.S. and U.K.).

[137] *See* Shawn Carson & Richard Blum, *Changes to the U.K. Partial Imputation System*, 20 INT'L TAX J. 47, 51–52 (1993) (describing how reliefs in the form of foreign tax credits can be used to reduce the mainstream corporate tax).

[138] Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, U.K.-U.S., arts. 10, 23, Dec. 31, 1975, 31 U.S.T. 5668.

[139] Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151, 1215 (1981).

[140] *See* Rev. Proc. 2000-13, § 3.02, 2000-1 C.B. 515 ("A portfolio investor making this election will be treated as having received an additional dividend equal to the gross amount of the tax credit (unreduced by amounts withheld), and as having paid the withholding tax due under Article 10, on the date of the distribution. Thus, the investor must include in income the gross payment deemed received, and may claim a foreign tax credit under Article 23 for the withholding tax treated as paid to the United Kingdom."); *see also* S. EXEC. REP. NO. 108-2, at 7 ("However, in order to account for the recent repeal of the U.K. advance corporation tax and related developments, the proposed treaty also eliminates a provision of the present treaty requiring the United States to provide a foreign tax credit with respect to certain dividends received from U.K. companies.").

negotiation of the tax treaty;[141] the U.K. wanted just one—the elimination of the withholding tax on dividends paid by subsidiaries to their parent companies.[142]

The Treasury essentially concluded that there is no single "right" rate when it comes to dividends.[143] This realization allows negotiators to be very pragmatic in terms of dealing with other countries. In addition, because the U.S. Model Income Tax Convention continued to follow the OECD version of Article 10 with respect to the basic treatment of direct and portfolio dividends,[144] the United States effectively acquired a new bargaining chip to be used in negotiations, as other countries asked the United States to go to zero.[145] Although it took some time to figure out why, it appears that governments were influenced by their multinational corporations.[146] For many of those multinationals, the United States is the most important foreign market.[147] On the other hand, while U.S. companies favor zero dividends generally, no foreign market is as important to them as the United States is to other countries.[148]

By making this concession, the United States was able to achieve a number of important goals over the next few years. In the U.S.-U.K. Treaty, the United States was able to achieve a modern treaty with a "limitation on benefits" provision,[149] override of the

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[141] *See* S. EXEC. REP. NO. 108-2, at 6–8 (discussing the benefits the U.S. would receive from giving the U.K. a zero-withholding rate).

[142] *See id.* at 5–8 (discussing the benefits of the treaty for the U.K.).

[143] *See id.* at 8 (discussing how the zero-rate provision must be looked at on a case-by-case basis before deciding on a proper rate for each future U.S. tax treaty).

[144] *Compare* U.S. MODEL TAX CONVENTION, *supra* note 27, art. 10, *with* OECD MODEL TAX CONVENTION, *supra* note 7, art. 10.

[145] *See Tax Treaties Hearing*, *supra* note 6, at 3 (statement of Patricia A. Brown, Deputy International Tax Counsel (Treaty Affairs), U.S. Department of the Treasury) ("The provision dealing with inter-company dividends was very important to Sweden.").

[146] *Cf.* DILWORTH ET AL., *supra* note 132 (discussing how dividend rates allow for multinational companies to be more competitive in the U.S. and foreign markets).

[147] *See* Kingson, *supra* note 139, at 1172 ("[T]he United States has recently become the 'favorite site' for investments from other industrialized countries . . .").

[148] *See id.*

[149] Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for

domestic tax interest requirement in the information exchange article,[150] an anti-conduit rule applicable in particular to the waiver of the insurance excise tax,[151] and a resolution of a dispute over the proper way to allocate interest expense to permanent establishments of foreign financial institutions.[152]

In exchange for the elimination of withholding taxes on intercompany dividends, Australia agreed to unprecedented reductions in the withholding tax rates on interest and royalties,[153] which was followed by Japan agreeing to reductions in withholding taxes on interest and the elimination of the withholding tax on royalties.[154] The Netherlands, whose treaty with the United States already eliminated the withholding taxes on interest and royalties,[155] agreed to a new limitation on benefits provision that included anti-inversion

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the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.K.-U.S., art. 23, July 24, 2001, T.I.A.S. No. 13,161.

[150] *See id.* art. 27.

[151] *Id*. art. 7, ¶ 5.

[152] Exchange of Letters Between the United Kingdom and United States, Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.K.-U.S., July 24, 2001, T.I.A.S. No. 13,161.

[153] *Tax Convention with the United Kingdom (T. Doc. 107-10) and Protocols Amending Tax Conventions with Australia (T. Doc. 107-20) and Mexico (T. Doc. 108-3): Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 21 (2003) (statement of David Noren, Legislation Counsel, Joint Committee on Taxation).

[154] *The Japanese Tax Treaty (T. Doc. 108-14) and the Sri Lanka Tax Protocol (T. Doc. 108-9): Hearing before the S. Comm. on Foreign Relations*, 108th Cong. 4 (2004) (statement of Barbara M. Angus, International Tax Counsel, United States Department of the Treasury).

[155] *See* Protocol Amending the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Double Taxation with Respect to Taxes on Income, Neth.-U.S., art. 10, Mar. 8, 2004, S. TREATY DOC. No. 108-25; *see also 2004 Treaties Hearing*, *supra* note 4, at 4 (statement of Barbara M. Angus, International Tax Counsel, United States Department of the Treasury).

rules.[156] And Belgium overrode its bank secrecy rules.[157] Although this run of treaty re-negotiations no doubt provided significant benefits to the United States, it also meant that few resources were available to expand the U.S. tax treaty network.

B. *Political Factors Affecting U.S. Tax Treaty Policy*

Tax treaties receive very little attention in the U.S. mainstream press, particularly as compared to trade agreements, which are much more controversial.[158] Tax treaties have also been negotiated by both Democratic and Republican administrations in roughly equal numbers.[159] If there is a difference between political parties, it is largely a matter of nuance.

Traditionally, Republican administrations have placed an emphasis on the benefits of globalization, trade, and investment.[160] In an effort to make U.S. multinationals more "competitive," their domestic tax policy has focused on providing lower corporate rates and exempting foreign business profits from U.S. taxation.[161] In the tax treaty context, this translates to reducing source country taxation by lowering or eliminating gross-basis withholding taxes on passive income and maintaining high thresholds for taxation of business income. Anti-treaty-shopping provisions, primarily the U.S. limitation on benefits provision, are therefore intended to create leverage to lower withholding rates. After many years, Canada's agreement to

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156 *2004 Treaties Hearing*, *supra* note 4, at 4 (statement of Barbara M. Angus, International Tax Counsel, United States Department of the Treasury).

157 *Treaties: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 5 (2007) (statement of John Harrington, International Tax Counsel, Department of the Treasury) (explaining the strengthening of the information exchange article requiring Belgium to provide the U.S. with bank information).

158 *See generally* Patrick Driessen, *Is There a Tax Treaty Insularity Complex?* TAX NOTES TODAY INT'L 745, 745–54 (May 28, 2012).

159 *See* Jason R. Connery et al., *Current Status of U.S. Tax Treaties and International Tax Agreements*, TAX MGMT. INT'L J. (Nov. 29, 2019), https://tax.kpmg.us/content/dam/tax/en/pdfs/2019/update-us-treaties-status-tmij.pdf (listing the dates U.S. tax treaties were entered into).

160 *See* REPUBLICAN NAT'L COMM., 2016 REPUBLICATION PARTY PLATFORM 2 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf.

161 *See id.*

accept the elimination of source-country withholding taxes on interest[162] can be seen as a validation of this policy.

On the other hand, Democratic administrations have shown more concern about the dangers of globalization.[163] Democrats have been much more concerned about tax arbitrage and tax evasion.[164] In the treaty context, these foci are reflected not so much in the terms of agreements, which are fairly consistent with prior practice, but in treaty negotiating priorities. For example, the Clinton Administration was very focused on re-negotiating old treaties to expand information exchange on request and update anti-treaty-shopping provisions.[165] The Obama Administration produced the 2016 U.S. Model Income Tax Convention,[166] which was more focused on the risk of double non-taxation than prior U.S. model treaties or actual U.S. tax treaties.[167] The 2016 Model Income Tax Convention includes a number of provisions, including rules on "special tax regimes," that

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[162] Protocol Amending 1980 Tax Convention with Canada with Respect to Taxes on Income and on Capital, Can.-U.S., art. 6, Sep. 21, 2007, S. TREATY DOC. No. 110-15 (2008) [hereinafter Protocol with Canada] (amending Article 11 of the Convention).

[163] *See* DEMOCRATIC NAT'L COMM., 2016 DEMOCRATIC PARTY PLATFORM 12 (2016), https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf.

[164] *See id.*

[165] *See Bilateral Tax Treaties and Protocol: Estonia–Treaty Doc. 105-55; Latvia–Treaty Doc. 105-57; Venezuela–Treaty Doc. 106-3; Denmark–Treaty Doc. 106-12; Lithuania–Treaty Doc. 105-56; Slovenia–Treaty Doc. 106-9; Italy–Treaty Doc. 106-11; Germany–Treaty Doc. 106-13: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 9, 16 (1999) [hereinafter *1999 Bilateral Tax Treaties and Protocol*] (statement of Philip R. West, International Tax Counsel, Department of the Treasury).

[166] *See generally* U.S. MODEL TAX CONVENTION, *supra* note 27.

[167] *Compare* Preamble to the U.S. MODEL TAX CONVENTION, *supra* note 27, ("The Government of the United States of America and the Government of __________, intending to conclude a Convention for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third states), have agreed as follows"), *with* Preamble to DEP'T OF THE TREASURY, U.S. MODEL INCOME TAX CONVENTION (2006) ("The Government of the United States of America and the Government of -----, desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows").

are aimed at flattening corporate structures by reducing the utility of intermediary companies.[168] However, these provisions have not been included in any signed U.S. tax treaty.[169] Treasury officials have indicated that they are developing a new U.S. Model.[170] However, it remains unclear which of these provisions will be included in that Model.

The Trump Administration's international tax policy is a mix of traditional Republican and Democratic policy goals. As in past Republican administrations, there is a stated goal of making U.S. multinationals more "competitive," by lowering rates and exempting (some) foreign business profits.[171] However, an emphasis on repatriation of intangible property, profits, and runaway plants[172] is more

[168] For a general description of the provisions of the 2016 U.S. Model, see Reuven S. Avi-Yonah, *Full Circle? The Single Tax Principle, BEPS and the New U.S. Model,* GLOBAL TAX'N, May 2016, at 12, 17–20 (2016); U.S. MODEL TAX CONVENTION, *supra* note 27, arts. 3, 10, 11, 12, 12, 21 and 28.

[169] The most recent tax treaty signed by the United States is a proposed treaty with Vietnam, which was signed in 2015. See Connery et al., supra note 159, at 4. It does not include the rules on "special tax regimes," "expatriated entities" or "subsequent changes in law." *See* Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Viet Nam for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income arts. 3, 10, 11, 12 and 21, Viet.-U.S., July 7, 2015, https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Vietnam-7-7-2015.pdf [hereinafter Viet.-U.S. Treaty].

[170] Letter from David Kautter, Assistant Sec'y of the Treasury (Tax Policy), Dep't of the Treasury to Robert Menendez, U.S. Sen. (June 12, 2019) [hereinafter Letter from Kautter to Menendez].

[171] *See* REPUBLICAN NAT'L COMM., *supra* note 160, at 2.

[172] *See* Press Release, Treasury Dep't, Unified Framework for Fixing Our Broken Tax Code (Sept. 27, 2017), https://www.treasury.gov/press-center/press-releases/Documents/Tax-Framework.pdf (press release from the Treasury Department and Congressional Republicans laying out goals for tax reform, including "[e]nding incentives to ship jobs, capital, and tax revenue overseas"); Press Release, U.S. Congressman Lloyd Doggett, Whitehouse, Doggett Call for Action on Tax Haven Bill in Wake of Paradise Papers (Nov. 7, 2017), https://doggett.house.gov/media-center/press-releases/whitehouse-doggett-call-action-tax-haven-bill-wake-paradise-papers (describing proposed legislation that "would limit the ways corporations can game the U.S. tax system by moving jobs and assets abroad.").

consistent with past Democratic concerns, as is a focus on base erosion and tax arbitrage.[173] There is a continued desire to discourage inversions while encouraging foreign investment in the United States.[174]

Because no tax treaty has been signed during the Trump Administration,[175] any discussion of tax treaty policy is mostly conjecture. In the absence of newly-signed agreements, the best indication of the Trump Administration's view may be the fact that it actively supported the tax agreements that were pending before the Senate when President Trump took office.[176] Those agreements were consistent with U.S. tax treaty policy as developed over many years.

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[173] *Compare* U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS 144–46 (1998), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY1999.pdf (explaining the Clinton Administration's proposal to "address tax avoidance through use of hybrids"), *with* Certain Related Party Amounts Paid or Accrued in Hybrid Transactions or with Hybrid Entities 26 U.S.C. § 267A (2018) (enacted in 2017 as part of the Tax Cuts and Jobs Act, Pub. L. 115-97).

[174] CONG. RESEARCH SERVICE, ISSUES IN INTERNATIONAL CORPORATE TAXATION: THE 2017 REVISION (P.L. 115-97), at 29 (2019), https://fas.org/sgp/crs/misc/R45186.pdf.

[175] The last bilateral tax treaty signed by the United States was with Vietnam on July 7, 2015. *See* Connery et al., *supra* note 159, at 4. The United States has not signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which first opened for signature on June 6, 2017. *See Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, ORG. FOR ECON. CO-OPERATION AND DEV., https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (last updated Jan. 23, 2020).

[176] Because U.S. tax treaty policy has been relatively consistent over the years, it is generally the case that an incoming administration, even of a different party, supports tax treaties negotiated by prior administrations. That is not a foregone conclusion, however. In 1981, the incoming Reagan Administration requested the return of treaties with the British Virgin Islands and Cyprus over concerns about treaty shopping. S. COMM. ON FOREIGN RELATIONS, RETURN OF TWO TAX TREATIES, S. EXEC. REP. NO. 97-43, at 3 (1981).

Two of those agreements—protocols with Switzerland[177] and Luxembourg[178]—primarily addressed information exchange for tax purposes.[179] The pending treaties with Hungary[180] and Poland[181] would add[182] anti-treaty-shopping provisions, a goal of multiple administrations. Two protocols, with Japan[183] and Spain,[184] were updates of existing treaties with important treaty partners, resulting in important reductions in withholding rates.[185] Only one agreement, with Chile, would represent a new tax treaty relationship.[186] The Treasury Department's support for these agreements suggests that the Trump Administration's tax treaty policy may be reasonably conventional.

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[177] Protocol Amending Tax Convention with Swiss Confederation, Switz.-U.S., Oct. 2, 1996, S. TREATY DOC. No. 112-12 (2019).

[178] Protocol Amending Tax Convention with Luxembourg, Lux.-U.S., May 20, 2009, S. TREATY DOC. No. 111-8 (2019).

[179] The protocols were approved by the Senate on July 17, 2019. *Id.*; Protocol Amending Tax Convention with Swiss Confederation, *supra* note 177. They entered into force on Sep. 20, 2019 and Sep. 9, 2019, respectively. *See* Press Release, U.S. Dep't of the Treasury, Treasury Welcomes Entry into Force of Tax Protocols with Luxembourg and Switzerland (Sep. 20, 2019), https://home.treasury.gov/news/press-releases/sm781.

[180] Tax Convention with Hungary, Hug.-U.S., Feb. 4, 2010, S. TREATY DOC. No. 111-7 (2017).

[181] Tax Convention with Poland, Pol-U.S., Feb. 13, 2013, S. TREATY DOC. No. 113-5 (2017).

[182] These treaties have not yet been approved by the Senate, as discussed *infra* Section IV.B.3. *See* Annagabriella Colón, *A Look Ahead: Prospects Unclear for U.S. Tax Treaties in 2020*, TAX NOTES INT'L, Jan. 6, 2020, at 23, 23–24

[183] Protocol Amending the Tax Convention with Japan, Japan-U.S., Jan. 24, 2013, S. TREATY DOC. No. 114-1 (2019).

[184] The Protocol Amending the Tax Convention with Spain, Spain-U.S., Jan. 14, 2013, S. TREATY DOC. No. 113-4 (2019).

[185] The protocol with Spain was approved by the Senate on July 16, 2019. *Id.* The protocol with Japan was approved on July 17, 2019. Protocol Amending the Tax Convention with Japan, *supra* note 183. The treaties entered into force on Nov. 27, 2019 and Aug. 30, 2019, respectively. *See* Press Release, US. Dep't of the Treasury, Treasury Announces Action on Tax Protocols with Two Key Trading Partners (Aug. 30, 2019), https://home.treasury.gov/news/press-releases/sm763.

[186] Tax Convention with Chile, Chile-U.S., Jan. 24, 2013, S. TREATY DOC. No. 112-8 (2017) [hereinafter Chile-U.S. Convention]. This treaty has not yet been approved by the Senate, as discussed in Section IV.B.3.

C. *The Curated U.S. Tax Treaty Network*

1. IN GENERAL

As noted above, the United States has fifty-eight comprehensive bilateral tax treaties in force.[187] Thirty-four of those treaties are with OECD members and fewer than thirty are with non-OECD members.[188] This is quite small for a developed country. By contrast, both the United Kingdom[189] and France[190] have well over one hundred treaties in force, while Germany[191] and Spain[192] each have over ninety. Moreover, seventeen of Spain's treaties are with LATAM

[187] *United States Income Tax Treaties – A to Z*, *supra* note 1 (listing all countries with which the United States has tax treaties). In addition to the fifty-eight comprehensive treaties, the United States has a limited tax treaty with Bermuda that covers only insurance activities. Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (on Behalf of the Government of Bermuda) Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters, U.K.-U.S., July 11, 1986, T.I.A.S. No. 11,676. Its application has been further limited by a Congressional override that reinstated the application of the federal excise tax on insurance policies issued by Bermudan insurance companies with respect to U.S.-situs risks, which had been waived by the treaty. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6139, 102 Stat. 3342, 3724 (1988).

[188] *Compare List of OECD Member Countries – Ratifications of the Convention on the OECD*, ORG. FOR ECON. CO-OPERATION & DEV., https://www.oecd.org/about/document/list-oecd-member-countries.htm (last visited Dec. 27, 2019), *with United States Income Tax Treaties – A to Z*, *supra* note 1 (listing all countries with which the United States has tax treaties).

[189] *See United Kingdom - Treaty Withholding Rates Table,* Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[190] *See France - Treaty Withholding Rates Table,* Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[191] *See Germany - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[192] *See Spain - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

countries[193] (even more than the United Kingdom)[194] despite Spain's significantly smaller treaty network. France has eleven treaties[195] and Germany has nine[196] with LATAM countries. Interestingly, China also has just over one hundred tax treaties, including nine with LATAM countries.[197]

It would be very easy for the United States to have a much larger tax treaty network. The United States receives many requests from other countries to negotiate tax treaties every year.[198] Most requests go through an initial three-step evaluation:

> (a) Is there double taxation or other issues that can only be resolved through a treaty?[199]

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[193] *See id.* Spain is a party to tax treaties with Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Jamaica, Mexico, Panama, Trinidad and Tobago, Uruguay, and Venezuela. *Id.*

[194] The United Kingdom has tax treaties or tax treaty-like relationships with Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Chile, Grenada, Guyana, Jamaica, Mexico, Panama, St. Kitts and Nevis, Trinidad and Tobago, Uruguay, and Venezuela. *See United Kingdom - Treaty Withholding Rates Table, supra note 189.* The United Kingdom also has an income tax arrangement with the Cayman Islands, which applies primarily to business profits and the income of individuals, but does not affect treaty withholding rates. *See* Income Tax Treaty, U.K.-Cayman Is., June 15, 2019, Int'l Bureau for Fiscal Documentation, (accessed Jan. 26, 2020).

[195] *See France - Treaty Withholding Rates Table*, *supra* note 190. France has tax treaties with Argentina, Bolivia, Brazil, Chile, Ecuador, Jamaica, Mexico, Panama, St. Maarten, Trinidad and Tobago, and Venezuela. *Id.*

[196] *See Germany - Treaty Withholding Rates Table, supra* note 191. Germany is a party to tax treaties with Argentina, Bolivia, Costa Rica, Ecuador, Jamaica, Mexico, Trinidad and Tobago, Uruguay, and Venezuela. *Id.*

[197] *See China Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020). China has tax treaties with Barbados, Brazil, Chile, Cuba, Ecuador, Jamaica, Mexico, Trinidad and Tobago, and Venezuela. *Id.*

[198] *Bilateral Tax Treaties and Protocol: Hearing Before the S. Comm. on Foreign Relations*, 105th Cong. 8 (1993) (statement of Joseph H. Guttentag, Assistant Secretary for International Tax Affairs, Department of the Treasury) ("The Department of the Treasury receives regular and numerous requests to enter tax treaty negotiations. As a result it has been necessary for us to establish priorities.").

[199] *See id.* ("Another priority is to conclude treaties or protocols that are likely to provide the greatest benefits to United States taxpayers, such as when economic relations are hindered by tax obstacles.").

(b) Is there sufficient trade and investment to justify a treaty?[200]

(c) Are there any deal-breakers?[201]

These are considered in more detail in the remainder of this Section.

a. *Issues that Need to be Resolved by Treaty*

The preceding Sections described some of the reasons why a tax treaty may be necessary even if each of the treaty partners includes provisions in their domestic laws that relieve double taxation.[202] Differences in characterization and source can be resolved through general or customized provisions,[203] although it is true that the OECD Model does little to address those issues.[204] The primary incentive for a new tax treaty almost always will be the prospect of reducing "excessive" withholding taxes—those gross basis withholding taxes that result in the recipient being taxed more heavily than if it had paid tax on a net basis in either Contracting State.[205]

The countries that do not satisfy this threshold typically are those that do not have a generally applicable income tax. The United States will not usually enter into a tax treaty if there is no possibility

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200 *See id.* ("We also try to conclude treaties with countries that have the potential to be significant trading partners.").

201 See Bilateral Tax Treaties and Protocol: Hearing on Treaty Docs. 105-55, 105-57, 106-3, 106-12, 105-56, 106-9, 106-11, 106-13 Before the S. Comm. On Foreign Relations, 106th Cong. 16 (1999) (statement of Philip R. West, Int'l Tax Counsel, U.S. Dep't of the Treasury) ("Information exchange is one of the handful of issues that we discuss with the other country before beginning formal negotiations because it is one of a very few issues that we consider non-negotiable . . . . A second aspect of U.S. tax treaty policy to deal with avoidance and evasion is to include in all treaties comprehensive provisions designed to prevent 'treaty shopping.').

202 *See supra* Part II.

203 *See* DEP'T OF THE TREASURY, TECHNICAL EXPLANATION ACCOMPANYING THE UNITED STATES MODEL INCOME TAX CONVENTION OF SEPT. 20, 1996, at 1–2 (1996) (explaining that the Model is only a starting point and negotiations with countries will lead to different, custom provisions).

204 *See generally* OECD MODEL TAX CONVENTION, *supra* note 7.

205 *See Pending Bilateral Tax Treaties and OECD Tax Convention: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 47 (1990) (statement of Frank Kittredge, President, National Foreign Trade Council).

of double taxation as between the two countries.[206] One effect of this policy was the 1984 notice of termination of the extension of the 1945 U.K.-U.S. tax treaty to the United Kingdom's overseas territories, many of them in the Caribbean, and the United States' refusal to enter into replacement treaties with many of those countries.[207]

This policy also means that the United States does not have tax treaties with countries in the Gulf Cooperation Council ("GCC")—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates ("U.A.E.")[208]—despite significant amounts of U.S. investment in those countries.[209] While some GCC countries now impose corporate taxes, in several cases those taxes are imposed only on foreign enterprises (Kuwait),[210] the oil and gas industry (Bahrain),[211] oil and gas and foreign banks (U.A.E.),[212] resident companies and permanent establishments of foreign enterprises (Saudi

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[206] *Protocol Amending the Tax Convention with Spain: Hearing on Treaty Doc. 113-4 Before the S. Comm. On Foreign Relations* 113th Cong. (2014) (statement of Robert Stack, Deputy Assistant Secretary (International Tax Affairs), U.S. Dep't of the Treasury) ("With certain countries there simply may not be the type of cross-border tax issues that are best resolved by a treaty. For example, if a country does not impose significant income taxes, or imposes tax on a strictly territorial basis (that is, it exempts not only dividend income but all foreign source income from taxation by reason of its foreign source), there is little possibility of unresolved double taxation of cross-border income, given the fact that the United States provides foreign tax credits to its citizens and residents regardless of the existence of an income tax treaty. Under such a circumstance, it would not be appropriate to enter into a comprehensive tax treaty with that particular country because doing so would result in a unilateral concession of taxing rights by the United States.").

[207] *See* Omri Marian, *Unilateral Responses to Tax Treaty Abuse: A Functional Approach*, 41 Brook. J. Int'l L. 1157, 1171 (2016), available athttp://scholarship.law.ufl.edu/facultypub/765.

[208] *Cf. See United States Income Tax Treaties – A to Z, supra* note 1 (listing all of the countries with which United States has a tax treaty).

[209] *See Table 1-o: United States*, *supra* note 113 (listing the United States as investing $423 million in Bahrain, $296 million in Kuwait, $1.8 billion in Oman, $8.2 billion in Qatar, $11.1 billion in Saudi Arabia, and $16.8 billion in U.A.E.).

[210] *Kuwait - Corporate Taxation - Country Tax Guides*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[211] *Bahrain - Corporate Taxation - Country Tax Guides*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[212] Although there is a theoretical corporate tax on entities in all sectors, in practice taxation is limited to the oil and gas and financial sector. *See United Arab*

Arabia),[213] or income arising in that country (Qatar).[214] Thus, a tax treaty is unlikely to provide much relief from host State taxation in those countries. The primary effect of such treaties would be to reduce U.S. withholding taxes on investment income earned by residents of the other States. While some countries will enter into tax treaties to provide incentives for inward investment,[215] the United States does not.

b. *Is There Sufficient Trade and Investment to Justify a Tax Treaty?*

A much more difficult hurdle for most developing countries to overcome is the issue of whether there is sufficient trade and investment to justify a treaty.[216] This consideration by itself disqualifies many African countries, for example, where the amount of U.S. outward investment is in the low millions.[217]

It is hard to define how much trade and investment is "enough" to justify a tax treaty. The United States signed a tax treaty with Vietnam in 2015,[218] where the current stock of U.S. outward foreign

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Emirates - Corporate Taxation - Country Tax Guides, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[213] *Saudi Arabia - Corporate Taxation - Country Tax Guides*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[214] *Qatar - Corporate Taxation - Country Tax Guides*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020).

[215] France, for example, has entered into tax treaties that eliminate most source-basis withholding taxes with all of the GCC countries. *See France – Treaty Withholding Rates Table,* Int'l Bureau for Fiscal Documentation, (accessed Jan. 15, 2020). Because those countries do not impose withholding taxes or, generally, tax their own residents on foreign source income, the treaties are not primarily to prevent double taxation. It can be assumed, therefore, that the purpose is to encourage investment in France by GCC investors. See Eric M. Zolt, *Tax Treaties and Developing Countries* 72 TAX L. REV. (forthcoming) for a general discussion of tax treaties as investment incentives.

[216] *See* OECD MODEL TAX CONVENTION, *supra* note 7, art. 27 cmt. ¶ 1 (discussing what negotiating states need to consider before entering a treaty, including the trade and investment flows).

[217] *See Table 1-o: United States*, *supra* note 113 (listing outward investment of the United States).

[218] Viet.-U.S. Treaty, *supra* note 169; *see also United States and Vietnam Sign First Income Tax Treaty*, ERNST & YOUNG LLP (July 15, 2015), https://www.ey.com/gl/en/services/tax/international-tax/alert--united-states-and-vietnam-sign-first-income-tax-treaty.

direct investment was about two billion dollars at the end of 2017.[219] Countries with the lowest amount of U.S. outward foreign direct investment with which the United States nevertheless has tax treaties are Latvia ($71 million),[220] Estonia ($72 million),[221] and Lithuania ($154 million).[222] Those treaties represent a special circumstance, however, as those countries took the position that they were not covered by the tax treaty between the Soviet Union and the United States because they were occupied countries.[223] Accordingly, there was some pressure to negotiate new agreements to cover investments in those countries that were made before the break-up of the Soviet Union.[224] Moreover, the three countries negotiated treaties together, as their treaty policies were quite similar.[225] Currently, the real foreign direct investment position with respect to those countries is now close to three hundred million dollars.[226]

After the Baltic States, the lowest in terms of stocks of investment from the United States are Jamaica ($167 million), Sri Lanka

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[219] *See Table 1-o: United States*, *supra* note 113 (listing the outward investment of the U.S. in Vietnam as two billion dollars).

[220] *See* Convention Between the United States of America and the Republic of Latvia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Lat.-U.S., Jan. 15, 1998, S. TREATY DOC. No. 105-57 (1998); *Table 1-o: United States*, *supra* note 113.

[221] *See* Convention Between the United States of America and the Republic of Estonia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Est.-U.S., Jan. 15, 1998, S. TREATY DOC. No. 105-56 (1998); *Table 1-o: United States*, *supra* note 113.

[222] *See* Convention Between the United States of America and the Republic of Lithuania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Lith.-U.S., Jan. 15, 1998, S. TREATY DOC. No. 105-55 (1998); *Table 1-o: United States*, *supra* note 113.

[223] Lawrence Juda, *United States' Nonrecognition of the Soviet Union's Annexation of the Baltic States: Politics and Law*, 6 J. BALTIC STUDIES 272, 274 (1975); Peep Kalamäe, *Baltic States – United States Treaty Status*, TAX NEWS SERVICE 344, 344 (1995).

[224] *See 1999 Bilateral Tax Treaties and Protocol, supra* note 165, at 21 (statement of Philip R. West, International Tax Counsel, Department of the Treasury) (explaining the competitive disadvantage for U.S. buinesses in the Baltics due to their competitors having tax treaties with them already, decreasing taxation on their operations).

[225] *See id.* at 35 (prepared statement of Lindy Paull, Chief of Staff of Joint Comm. on Taxation).

[226] *See Table 1-o: United States*, *supra* note 113 (totaling outward investment between Estonia, Latvia, and Lithuania at $297 million).

($168 million), Tunisia ($279 million), Slovenia ($369 million), Ukraine ($398 million), and Morocco ($412 million).[227] The other U.S. tax treaty counterparts below $1 billion of U.S. outward investment are Bangladesh ($460 million), Pakistan ($518 million), Malta ($601 million)—however, Maltese FDI in the United States is almost $1.6 billion[228]—and Bulgaria ($848 million).[229]

As a result, it can be assumed that the minimum amount of U.S. foreign direct investment to be "sufficient" is no more than somewhere between $150 million and $300 million. If so, there are a number of LATAM countries that currently do not have tax treaties with the United States that would satisfy the threshold. These include Argentina ($14.9 billion), Aruba ($190 million), Bahamas ($23.3 billion), Bolivia ($598 million), Brazil ($68 billion), Cayman Islands ($331 billion), Chile ($26 billion),[230] Colombia ($7.2 billion), Costa Rica ($2 billion), Dominican Republic ($2 billion), Ecuador ($981 million), El Salvador ($3 billion), Guatemala ($1 billion), Honduras ($1.4 billion), Nicaragua ($187 million), Panama ($4.7 billion), Paraguay ($179 million), Peru ($6.3 billion), St. Kitts and Nevis ($612 million), St. Lucia ($357 million), and Uruguay ($1.6 billion).[231]

Over the decades, the Treasury Department's tax treaty efforts in LATAM have focused on Brazil[232] and Argentina.[233] Tax treaty negotiations with Colombia have taken place,[234] but it is unclear where they stand. The Treasury Department perhaps should broaden

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[227] *Table 1-o: United States*, *supra* note 113.

[228] *Table 1-i: United States*, *supra* note 113.

[229] *Table 1-o: United States*, *supra* note 113.

[230] *See* Chile-U.S. Convention, *supra* note 186; *see also infra* Part IV.B.3.

[231] *Table 1-o: United States*, *supra* note 113.

[232] *See* BRAZ.-U.S. BUS. COUNCIL, U.S. CHAMBER OF COMMERCE, A ROADMAP TO A U.S.-BRAZIL TAX TREATY 1 (2019), https://www.brazilcouncil.org/wp-content/uploads/2019/03/Roadmap-U.S.-Brazil-Tax-Treaty_1.pdf ("For decades the U.S. and Brazil, the two largest economies and democracies in the Western Hemisphere, have attempted to lay the groundwork for a bilateral tax treaty (BTT)").

[233] *See* Press Release, U.S. Dep't of the Treasury, Remarks by U.S. Treasury Secretary Lew at Meeting with Argentine Finance Minister Prat-Gay (Sep. 26, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl5060.aspx.

[234] *See* Sarah Carpenter, *Colombia, U.S. Negotiating Tax Treaty*, TAX NOTES INT'L, Oct. 10, 2016, at 153, 153.

its view. The six parties to the Dominican Republic-Central American Free Trade Agreement (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic)[235] together host almost ten billion dollars of U.S. foreign direct investment,[236] suggesting that a joint negotiation similar to that with the Baltics could be a useful way forward. Peru, Ecuador, Bolivia, and even Paraguay could also be considered.

c. *Are There Any Deal-Breakers?*

Once the Treasury Department determines that a new treaty relationship will provide sufficient benefits, it then determines whether there are any deal-breakers that would prevent the successful conclusion of an agreement.[237] The primary issues that have prevented negotiations with developing countries in the past have been (1) the U.S.'s insistence on including a "limitation on benefits" provision to prevent treaty-shopping, (2) an information exchange provision that overrides both bank secrecy and "domestic tax interest" requirements, and (3) the inability of the United States to agree to a "tax-sparing" provision.[238] While the OECD has made significant

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[235] *See CAFTA-DR (Dominican Republic-Central America FTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited Dec. 27, 2019).

[236] *See Table 1-o: United States*, *supra* note 113.

[237] *See generally* U.S. MODEL TAX CONVENTION, *supra* note 27, at 1 (discussing the polices behind the U.S. Model Income Tax Treaty).

[238] *See* DEP'T OF THE TREASURY, EARNINGS STRIPPING, TRANSFER PRICING AND U.S. INCOME TAX TREATIES 73, 78–80 (2007), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Earnings-Stripping-Transfer-Pricing-2007.pdf (explaining the need to prevent treaty-shopping through the inclusion of limitations on benefits provisions); Reuven Avi-Yonah, *If Not Now, When? U.S. Tax Treaties with Latin America After TCJA*, 2019 INT'L TAX J. 51, 51 (2019) (discussing how the United States refuses to grant tax sparing provisions, leading countries to decline to enter treaties with the United States).

progress on the issues of treaty-shopping[239] and exchange of information[240] for tax purposes, some countries, such as Brazil, may still take the position that any reduction in source-State taxation must be accompanied by a tax-sparing provision.[241] Unless these issues can be resolved, the United States generally will not move forward.

IV. HOW DIFFICULT CAN IT BE?

Although the United States has a relatively small tax treaty network,[242] the network includes a number of countries that are significantly less important to the U.S. economy than many of the countries of Latin America.[243] This Part will first discuss, as a general matter, whether the U.S. policies create irreconcilable differences. It will then focus on three case studies that may provide some lessons for the future in order to determine whether that limited treaty network is inevitable.

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239 *See* ORG. FOR ECON. CO-OPERATION AND DEV., PREVENTING THE GRANTING OF TREATY BENEFITS IN INAPPROPRIATE CIRCUMSTANCES, ACTION 6 2015 FINAL REPORT 17–20 (2015), https://www.oecd-ilibrary.org/docserver/9789264241695-en.pdf?expires=1577475586&id=id&accname=guest&checksum=66BE62630086EC0207E2D132B8EF1F22.

240 *See* OECD MODEL TAX CONVENTION, *supra* note 7, art. 26, ¶¶ 4–5.

241 *See* BRAZ.-U.S. BUS. COUNCIL, *supra* note 232, at 3 (noting that Brazil has signed tax treaties with Singapore and Switzerland that do not include tax sparing credits). However, those tax treaties with Singapore and Switzerland are not yet in force. *See Brazil - Treaty Withholding Rates Table*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 8, 2020).

242 *See United States Income Tax Treaties – A to Z*, *supra* note 1 (listing all of the countries with which United States has a tax treaty).

243 *See, e.g.*, *Top U.S. Trade Partners: Ranked by 2017 Total Import Value for Goods (in Millions of U.S. Dollars)*, U.S. DEP'T OF COMMERCE (2017), https://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf (showing Chile, Colombia, Argentina, and Peru as being among the top trade partners of the U.S.).

A. *Is U.S. Tax Treaty Policy the Problem? (Reluctance Revisited)*

The most important recurring theme in this Article has been the goal of the United States, particularly in treaties with other developed countries, to reduce withholding rates to the extent possible.[244] This desire is usually inconsistent with the goals of developing countries.[245] It has been said that "[t]he developing country partners often [have] conflicting objectives [which] are attracting U.S. capital and technology, while, at the same time, preserving scarce revenues."[246] To put it more bluntly: "Developing countries badly need both to attract foreign capital and to raise revenue by taxing that capital; but the more they tax, the less they attract."[247]

Eduardo Baistrocchi posits that developing countries resolve this dilemma by signing tax treaties that look like the OECD and U.N. Models because of strong network effects that allow for "competition within a compatible standard."[248] That is, once a basic technology is in place, competitors can differentiate themselves through features that appeal to different customers.[249]

The use of the OECD Model as a template for an actual treaty provides for a common understanding of terms that are identical to those in the OECD Model.[250] What seems less understood is that the use of language that differs from the OECD Model clearly indicates

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[244] *See 2014 Treaties Hearing*, *supra* note 70 (statement of Nancy L. McLernon, President & CEO Organization for International Investment).

[245] *See* Kingson, *supra* note 139, at 1159–60 (discussing the goals of countries like Brazil and how those goals tend to conflict with those of the United States).

[246] *Tax Conventions With: The Russian Federation, Treaty Doc. 102-39; United Mexican States, Treaty Doc. 103-7; The Czech Republic, Treaty Doc. 103-17; The Slovak Republic, Treaty Doc. 103-18; and the Netherlands, Treaty Doc. 103-6. Protocols Amending Tax Conventions With: Israel, Treaty Doc. 103-16; The Netherlands, Treaty Doc. 103-19; and Barbados, Treaty Doc. 102-41: Hearing Before the S. Comm. on Foreign Relations*, 103th Cong. 19 (1993) (statement of Leslie B. Samuels, Assistant Secretary for Tax Policy, Department of the Treasury).

[247] Kingson, *supra* note 139, at 1159.

[248] Eduardo Baistrocchi, *The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications*, 2008 BRIT. TAX REV. 356, 358–60 (2008).

[249] *See id.* (explaining that a compatible standard allows competitors to focus their efforts on "non-agreed dimensions").

[250] *See* OECD MODEL TAX CONVENTION, *supra* note 7, at I-1, ¶¶ 2–3.

that the parties reject the result that would be provided by the OECD Model and, in some cases, also the U.N. Model. The use of the OECD Model template facilitates the negotiation of treaties that deviate because the use of standard language for the majority of the treaty, to which both parties agree, [251] allows the negotiators to spend more time on the issues where their positions diverge.[252]

Arguments that treaties based on the OECD Model are bad for developing countries[253] therefore miss the point that most developing countries are not entering into treaties that are identical to the OECD Model.[254] Wim Wijnen and Jan de Goede have directed a research project that catalogs the prevalence of various provisions found in the U.N. Model that occur in 1,811 treaties entered into between 1997 and 2013.[255] Although some provisions occur more often than others, their research suggests that developing countries have a fair amount of bargaining strength to achieve results that are important to them. For example, of the 1,811 treaties studied, 1,579

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[251] *See id.* at I-4 (discussing the purpose of the OECD Model Convention).

[252] Of course, standard language has also developed with respect to some common deviations from the OECD Model, again because of the network benefits of using standardized language.

[253] *See, e.g.*, Dagan, *supra* note 71, at 939 ("In this Article, I show that these ubiquitous treaties are not necessary for preventing double taxation. Rather, they serve much less heroic goals, such as easing bureaucratic hassles and coordinating tax terms between the contracting countries, and much more cynical goals, particularly redistributing tax revenues from the poorer to the richer signatory countries."). However, in contrast to Kingson's article, *supra* note 139, at 1210–62, which discusses specific provisions of specific tax treaties with which he disagreed, Dagan's article, *supra*, cites to no actual tax treaties. In their discussion of the model tax treaties and developing nations, Kim Brooks and Richard Krever also cite only to secondary sources, although those sources occasionally cite to actual treaties. *See generally* Kim Brooks & Richard Krever, *The Troubling Role of Tax Treaties*, *in* 51 TAX DESIGN ISSUES WORLDWIDE 159–78, (Geerten M. M. Michielse & Victor Thuronyi eds., 2015).

[254] *Compare* OECD MODEL TAX CONVENTION, *supra* note 7l, *with* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Braz.-India, arts. 12–15, Apr. 26, 1988, https://www.incometaxindia.gov.in/pages/international-taxation/dtaa.aspx (1992) (differing from the OECD Model in the taxation of royalties and other forms of income).

[255] *See* Wim Wijnen & Jan de Goede*, The UN Model in Practice 1997-2013*, 68 BULL. INT'L TAX'N 118, 118 (2014); *see also* Willem F.G. Wijnen & Marco Magenta, *The UN Model in Practice*, 51 BULL. INT'L FISCAL DOCUMENTATION 574, 574 (1997).

(approximately 87%) allowed the source State to tax royalties.[256] Of the treaties between an OECD member and non-OECD member, 85% allowed for taxation of royalties by the source State.[257] As between two non-OECD members, 94% of treaties provide for taxation of royalties by the source State, while only 72% of treaties between two OECD members did so.[258] Moreover, 42% of the treaties included a rule expanding the definition of a permanent establishment to include the furnishing of services in a source State for a specified period (most often six months, but sometimes as low as one month).[259] Again, the adoption rate for this provision was highest (58%) among treaties between two non-OECD members, but still significant (35%) in treaties between an OECD member and a non-OECD member, and between two OECD members (17%).[260] Although the percentage of treaties adopting other provisions is frequently lower than for these examples, such alternative provisions still occur in hundreds of treaties.[261]

The fact that these provisions occur at relatively high rates both in treaties between two OECD member countries and two non-OECD member countries suggests that another common assumption is flawed. Commentators frequently argue that treaties between OECD members are "reciprocal" or "symmetric,"[262] which explains why countries are willing to reduce source State taxation. On the other hand, treaties between OECD members and non-OECD members are "asymmetric."[263] If things were that simple, one would not

[256] Wijnen & de Goede, *supra* note 255, at 129–30.

[257] *Id.*

[258] *Id.*

[259] *Id.* at 122.

[260] *Id.*

[261] For example, 1,234 treaties out of the sample include a modification to the definition of "royalties" that allows the source State to tax rental payments relating to the leasing of equipment. *Id.* at 130.

[262] *See* Baistrocchi, *supra* note 248, at 357 n.8 ("The symmetric tax treaty network refers to tax treaties in which there are approximately equal investment flows between contracting states. Tax treaties concluded between developed countries (such as the US-UK tax treaty) or between developing countries (such as the Argentina-Brazil tax treaty) are examples of symmetric tax treaties.").

[263] *See id.* at 353 ("The asymmetric tax treaty network consists of bilateral tax treaties concluded between developed and developing countries. The word 'asym-

expect 72% of treaties between two OECD members[264] to provide a positive withholding rate on royalties.

Wijnen and de Goede note that they make a simplifying assumption by distinguishing between OECD and non-OECD countries as proxies for developed and developing countries.[265] There are "resource rich" countries that, while not members of the OECD, are also not developing countries as defined by the World Bank.[266] Moreover, some "emerging market" countries are significant capital exporters as well as capital importers.[267]

Even those observations do not reflect the complexity of bilateral economic relationships. Baistrocchi described the United States as having thirty-four asymmetric treaties (those with non-OECD countries) and twenty-nine symmetric treaties (those with other OECD member States).[268] However, comparing stocks of inward and outward foreign direct investment shows that even fewer U.S. treaties are symmetric.[269] For example, France's FDI in the United States was close to three times the amount of U.S. FDI in France as of the end of 2017.[270] The Japan-to-United States ratio was about

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metric' denotes unequal investment flows between contracting states: while developing countries normally are capital importers, developed countries habitually are capital exporters.").

[264] *See* Wijnen & de Goede, *supra* note 255, at 129–30.

[265] *See id.* at 119.

[266] *Id.*

[267] *Id.*

[268] *See* Baistrocchi, *supra* note 248, at 356. Baistrocchi was writing in 2008, before Estonia, Israel, Latvia, Lithuania, and Slovenia became members of the OECD. *See* ORG. FOR ECON. CO-OPERATION AND DEV., OECD ANNUAL REPORT 2008, at 115 (2008), https://www.oecd.org/newsroom/40556222.pdf (listing the thirty member countries of the OECD in 2008); *Where: Global Reach*, ORG. FOR ECON. CO-OPERATION AND DEV., https://www.oecd.org/about/members-and-partners/ (last visited Dec. 22, 2019) (listing all current OECD member countries and the year joined, including Estonia, Israel, Latvia, Lithuania, and Slovenia). Presumably, U.S. tax treaties with those countries, which fell into the "asymmetric" category at the time of his writing, became "symmetric" when they joined the OECD, demonstrating the essential meaninglessness of this categorization.

[269] *Compare Table 1-i: United States*, *supra* note 113, *with Table 1-o: United States*, *supra* note 113.

[270] *Compare Table 1-i: United States*, *supra* note 113, *with Table 1-o: United States*, *supra* note 113.

the same.[271] Both Germany and Spain had about twice the amount of FDI in the United States as the amount of U.S. FDI into those countries.[272] Eight other OECD member States—Australia, Austria, Belgium, Canada, Denmark, Finland, Italy, and Sweden[273]—were roughly symmetrical, frequently with the other OECD country's FDI in the United States exceeding U.S. FDI into that State.[274] The bilateral FDI relationships with the other twenty-three OECD members were asymmetric in favor of the United States, some to a striking degree.[275]

Examining FDI stocks for some other OECD members provides further evidence that the OECD/non-OECD assumption oversimplifies. For example, Argentina's stock of FDI in Mexico was $2.5 billion as of the end of 2017,[276] while Mexico's reciprocal position in Argentina was $661 million,[277] the opposite of what would be predicted. On the other hand, Brazil's FDI position in Mexico was $906 million,[278] while Mexico's position in Brazil was $9.5 billion,[279] in line with the assumption. Similarly, Mexico's FDI position in Colombia was $4.9 billion,[280] almost five times that of Colombian FDI in Mexico.[281] Mexico's FDI position in Chile was $2.7 billion,[282]

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[271] *Compare Table 1-i: United States*, *supra* note 113, *with Table 1-o: United States*, *supra* note 113.

[272] *Compare Table 1-i: United States*, *supra* note 113, *with Table 1-o: United States*, *supra* note 113.

[273] *See Where: Global Reach*, *supra* note _ (listing the current OECD members and the year each country ratified the OECD Convention).

[274] *Compare Table 1-i: United States*, *supra* note 113, *with Table 1-o: United States*, *supra* note 113.

[275] *Compare Table 1-i: United States*, *supra* note 113, *with Table 1-o: United States*, *supra* note 113.

[276] *Table 1-i: Inward Direct Investment Positions, as of end-2017: Reporting Economy: Mexico*, INT'L MONETARY FUND, http://data.imf.org/regular.aspx?key=61227424 (last visited Dec. 22, 2019) [hereinafter *Table 1-i: Mexico*].

[277] *Table 1-o: Outward Direct Investment Positions, as of end-2017: Reporting Economy: Mexico*, INT'L MONETARY FUND, http://data.imf.org/regular.aspx?key=61227424 (last visited Dec. 22, 2019) [hereinafter *Table 1-o: Mexico*].

[278] *Table 1-i: Mexico*, *supra* note 276.

[279] *Table 1-o: Mexico*, *supra* note 277.

[280] *Id.*

[281] *Table 1-i: Mexico*, *supra* note 276.

[282] *Table 1-o: Mexico*, *supra* note 277.

almost twice that of fellow OECD-member Chile's FDI position in Mexico.[283]

Almost all of Chile's treaties[284] are asymmetric, but in opposite directions.[285] In general, its treaties with other OECD member countries are asymmetric with Chile being the capital importer.[286] Its treaties with non-OECD members generally are asymmetric with Chile being the capital exporter.[287] Chile's position as both capital importer and capital exporter was foreseen by those who developed Chile's tax treaty policy in the 1990s.[288]

It is likely that one of the "emerging market" economies to which Wijnen and de Goede refer[289] is China, which has introduced its "Belt and Road" initiative to develop infrastructure in both developing and developed countries.[290] Interestingly, the International Monetary Fund's country reports on China show only FDI into China.[291] To discover where China is investing, it is necessary to

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283 *Table 1-i: Mexico*, *supra* note 276.

284 *See Chile - Treaty Withholding Rates Table,* Int'l Bureau for Fiscal Documentation, (accessed Jan. 8, 2020).

285 *Compare Table 1-o: Outward Direct Investment Positions, as of end-2017: Reporting Economy: Chile*, INT'L MONETARY FUND, http://data.imf.org/regular.aspx?key=61227424 (last visited Dec. 27, 2019) [hereinafter *Table 1-i: Chile*], *with Table 1-i: Inward Direct Investment Positions, as of end-2017: Reporting Economy: Chile*, INT'L MONETARY FUND, http://data.imf.org/regular.aspx?key=61227424 (last visited Dec. 27, 2019) [hereinafter *Table 1-o: Chile*].

286 For example, Australia invests $772 million into Chile, but Chile only invests $37 million into Australia. *Compare Table 1-i: Chile*, *supra* note 285, *with Table 1-o: Chile*, *supra* note 285.

287 For example, Chile invests $13.3 billion into Brazil, whereas Brazil only invests $5.1 billion in Chile. *Compare Table 1-o: Chile*, *supra* note 285, *with Table 1-i: Chile*, *supra* note 285.

288 *See* Patricia Brown et al., *Insiders' View of Treaty Negotiations*, *in* REPORT OF PROCEEDINGS OF THE SIXTY-FIRST TAX CONFERENCE, at 25:5–25:6 (2009).

289 *See* Wijnen & de Goede, *supra* note 255, at 119 ("[T]here is an increasing group of developing countries with emerging economics that have become significant capital exporters.").

290 *See* Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELATIONS (May 21, 2019), https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

291 *See Table 1-o: Outward Direct Investment Positions, as of end-2017: Reporting Economy: China*, INT'L MONETARY FUND, http://data.imf.org/regular.aspx?key=61227424 (last visited Dec. 22, 2019) [hereinafter *Table 1-o: China*].

look at other countries' inward investment charts.[292] For example, Mexico's charts show about $731 million of FDI from China into Mexico,[293] with no Mexican FDI into China.[294] Likewise, Chile shows no FDI from China,[295] and just over $100 million of Chilean investment into China.[296]

Martin Hearson is doing important empirical work that looks at investment asymmetries to determine how they affect particular provisions of treaties.[297] He determines "that neither investment asymmetry nor power dynamics alone are sufficient to explain the outcome of treaty negotiations."[298] In fact, Hearson's review of actual treaties reveals the following:

> much of the conventional wisdom about tax treaty negotiations is partial at best. The clear trend towards declining source taxing rights in WHT provisions is counterbalanced by greater source taxing rights in other areas. There is important variation across region, development status and type of treaty partner. Longstanding OECD members are not necessarily the toughest negotiators with developing countries, in comparison to emerging economies.[299]

A review of the actual terms of U.S. tax treaties is likely to bear this out. Although the reduction of withholding rates is an important goal of U.S. tax treaty policy, it is also true that the United States does not achieve those goals in every tax treaty.[300] Rather, the "hallmark" of U.S. tax treaty policy is "achieving the best deal it [can] with each treaty partner."[301] In fact, the majority of U.S. tax treaties

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[292] *See, e.g.*, *Table 1-i: Mexico*, *supra* note 276; *Table 1-i: Chile*, *supra* note 285.
[293] *See Table 1-i: Mexico*, *supra* note 276.
[294] *See Table 1-o: Mexico*, *supra* note 277.
[295] *See Table 1-i: Chile*, *supra* note 285.
[296] *See Table 1-o: Chile*, *supra* note 285.
[297] *See* Hearson, *supra* note 18, at 20–25.
[298] *Id.* at 24.
[299] *Id.* at 25.
[300] *See* Brown et al., *supra* note 288, at 25:8.
[301] *Id.* at 25:7.

continue to provide for a positive withholding rate on royalties.[302] This is due in large part to the number of provisions that, from the U.S. perspective, are non-negotiable.[303] If many provisions are non-negotiable, concessions will have to be made with respect to other provisions. While the Joint Committee on Taxation has mused about whether "developing country concessions" were appropriate with respect to particular tax treaties,[304] upward deviations from U.S. preferred withholding rates were not raised as issues during the Senate's review of the U.S. treaties with Japan,[305] Bulgaria,[306] or Chile.[307]

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[302] *See generally* TABLE 1. TAX RATES ON INCOME OTHER THAN PERSONAL SERVICES UNDER CHAPTER 3, INTERNAL REVENUE CODE, AND INCOME TAX TREATIES, INTERNAL REVENUE SERV. (2019), https://www.irs.gov/pub/irs-utl/Tax_Treaty_Table_1_2019_Feb.pdf. Close to forty U.S. treaties provide for some level of source State taxation with respect to at least some categories of royalties. *Id.*

[303] *See supra* Part II.

[304] *See* STAFF OF THE JOINT COMM. ON TAXATION, JCX-4-06, EXPLANATION OF THE PROPOSED INCOME TAX TREATY BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF BANGLADESH 61 (2006), http://www.jct.gov/x-4-06.pdf ("An issue is whether these developing-country concessions represent appropriate U.S. treaty policy, and if so, whether Bangladesh is an appropriate recipient of these concessions.").

[305] *See generally* STAFF OF THE JOINT COMM. ON TAXATION, 108th CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY BETWEEN THE UNITED STATE AND JAPAN (Comm. Print 2004) (discussing a large number of potential issues, none of which was the 10% general withholding rate on interest).

[306] *See generally* STAFF OF THE JOINT COMM. ON TAXATION, 110th CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY BETWEEN THE UNITED STATES AND BULGARIA (Comm. Print 2008) (listing only two issues, the treatment of students, trainees, teachers and researchers and whether the rule allowing the provision of services to constitute a permanent establishment was acceptable).

[307] *See generally* STAFF OF THE JOINT COMM. ON TAXATION, 113th CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY BETWEEN THE UNITED STATES AND CHILE (Comm. Print 2014) (listing two potential issues, treaty-shopping and exchange of information and collection assistance, but accepting positive withholding rates on interest and royalties).

B. *Three Case Studies*

1. BRAZIL.

Brazil and the United States signed a tax treaty in 1967.[308] It was abandoned[309] after the Senate entered two reservations.[310] The subject of one—a deduction for charitable contributions made to entities in the other State[311]—might now be less controversial as it has been included in treaties with Canada,[312] Israel,[313] and Mexico.[314] The other, relating to the extent to which tax treaties should provide incentives for U.S. investment in Brazil,[315] is still relevant today, as discussed below.

To understand the problem with the Brazilian treaty, it is necessary to consider a little history. In 1957, the United States signed a treaty with Pakistan that included a "tax-sparing credit."[316] There are several forms of such a credit; in this case, the United States would have been obligated to give a foreign tax credit against U.S. tax otherwise due for taxes that Pakistan had forgiven pursuant to an

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308 *Convention Between the Government of the United States of America and the Government of the United States of Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income, Mar. 13, 1967, Braz.-U.S. in* 8 WALTER H. DIAMOND & DOROTHY B. DIAMOND, INTERNATIONAL TAX TREATIES OF ALL NATIONS 56, 56 (1976) [hereinafter Braz.-U.S. Convention].

309 *Cf.* TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2019, at 49 (2019), https://www.state.gov/wp-content/uploads/2019/06/2019-TIF-Bilaterals-6.13.2019-web-version.pdf (listing current tax treaties the United States has with Brazil).

310 S. EXEC. RPT. No. 5, at 1–3 (1968).

311 *Id.* at 3.

312 *See* Can.-U.S. Convention, *supra* note 25, art. XXI.

313 *See* Protocol Amending the Convention Between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income, Isr.-U.S., art. 15-A, May 30, 1980, S. TREATY DOC. No. 96-48 (1980).

314 *See* Mex.-U.S. Convention, *supra* note 2, art. 22.

315 S. EXEC. RPT. No. 5, at 2.

316 *See* Convention Between the Government of the United States of America and the Government of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. XV, Pak.-U.S., July 1, 1957, 10 U.S.T. 984 (1957) [hereinafter Pak.-U.S. Convention].

investment incentive program.[317] Pakistan argued that, absent the tax-sparing credit, the benefits of the incentive program would accrue to the U.S. government, not to the U.S. investors.[318] While U.S. business interests were, not surprisingly, in favor of the tax-sparing credit, opposition was based on the fact that the foreign tax credit was intended to place investment in the United States by U.S. taxpayers on an equal footing with investment outside the United States by U.S. taxpayers.[319] The tax-sparing credit would violate that principle by favoring foreign investment.[320] As it turned out, Pakistan abolished the incentive program so the Senate did not have to take a firm position, but its discomfort with the provision was clear and it entered a reservation to a provision that would have provided the tax-sparing benefits retroactively to two companies.[321]

The 1967 Brazil-U.S. treaty did not include a tax-sparing credit.[322] Instead, the treaty included an investment credit that gave eligible investors a credit equal to 7% of investments made in Brazil by U.S. residents.[323] In exchange, Brazil agreed to reductions in its otherwise-applicable withholding taxes on investment income.[324]

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[317] *See* Pak.-U.S. Convention, *supra* note 316, art. XV(1) ("For the purposes of this credit there shall be deemed to have been paid by a United States domestic corporation the amount by which such Pakistan taxes (other than the business profits tax) have been reduced . . . ").

[318] *Double Taxation Conventions: Hearing Before the S. Comm. on Foreign Relations on Income Tax Convention with Austria; Supplementary Income Tax Convention with Canada; Supplementary Income Tax Protocol with Japan; and Income Tax Convention with Pakistan,* 85th Cong. 13–14 (1957) ("[O]ther countries had a valid complaint that . . . what they forewent in the way of taxes merely put something into the United States Treasury instead of encouraging economic development there.").

[319] *See* Letter from Stanley S. Surrey, Professor of Law, Harvard Law Sch., to Carl Marcy, Senator, Senate Comm. on Foreign Relations (Jan. 22, 1958).

[320] James R. Hines Jr., *Tax Sparing and Direct Investment in Developing Countries in* INTERNATIONAL TAXATION AND MULTINATIONAL ACTIVITY 39, 45–46 (James R. Hines Jr. ed., 2001) (noting how the Pakistan treaty encouraged foreign investment by American investors at the expense of investment in the United States).

[321] *See* Mahesh C. Bijawat, *Tax Sparing: An Instrument to Retain and Attract Foreign Capital*, 6 J. INDIAN L. INST. 236, 240.

[322] *See* Braz.-U.S. Convention, *supra* note 308, art. 7.

[323] *Id.*

[324] *See* Technical Memorandum of Treasury Department Concerning United States-Brazil Income Tax Convention, *in Tax Conventions with Brazil, Canada,*

The Senate entered a reservation preventing the investment credit from taking effect, which in turn would have allowed Brazil to revert to its domestic withholding rates on dividends, interest, and royalties.[325] Accordingly, the treaty would have allowed little in the way of benefits, which led to its abandonment.

Brazil continues to see a linkage between tax-sparing credits and reductions in withholding rates.[326] Because the United States cannot agree to a tax-sparing credit, the possibility of meaningful reductions in withholding rates seems low.

In principle, a treaty that does not reduce withholding rates can be justified by other benefits, such as establishing thresholds for taxation by the host State.[327] This might be true, for example, in the case of a country that has expansive domestic rules regarding the taxation of business profits. However, because Brazil imposes withholding tax on most payments made by Brazilian companies[328] and

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and Trinidad and Tobago: Hearing Before S. Comm. on Foreign Relations, 90th Cong. 101, 106 (1967) (("If Brazil considers that any modification or amendment as a result of this paragraph materially and adversely affects the credit allowed by this article, Brazil may, by giving notice to the United States through diplomatic channels, treat such modification or amendment as a suspension of the credit under Article 29(6)(b) and suspend the reduced rates for dividends, interest, and royalties (Articles 12, 13, and 14).").

325 S. Exec. Rpt. No. 5, at 2 ("It would not be in the best interests of the United States to encourage investments abroad by this device.").

326 *See* Deborah Toaze, *Tax Sparing: Good Intentions, Unintended Results*, 49 CANADIAN TAX J. 879, 885 (2001) (noting Brazil's continued insistence on the inclusion of a tax-sparing provision as one of the major reasons why the U.S. and Brazil do not have a tax treaty); *but see* BRAZ.-U.S. BUS. COUNCIL, *supra* note 232, at 6 (noting that Brazil has recently signed two treaties that do not include tax-sparing credits).

327 *See generally, e.g.*, Arrangement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Cayman Islands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, June 15, 2009, Int'l Bureau for Fiscal Documentation (including provisions on the taxation of individuals and of business profits, but no reductions of withholding taxes).

328 *Brazil - Corporate Taxation - Country Tax Guides - 7.3.4 Withholding Taxes*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 16, 2020).

limits deductions with respect to payments of interest[329] and royalties,[330] it generally does not seek to expand the definition of "permanent establishment," which could lead to more net basis taxation rather than the gross-basis withholding taxes that Brazil prefers.[331] In addition, Brazil's domestic transfer pricing rules do not conform to the OECD's arm's length principle,[332] which is understood to have been the reason that Germany terminated its treaty with Brazil in 2005.[333] Accordingly, it is hard to see what benefits to taxpayers would justify the effort to negotiate a treaty.

2. VENEZUELA

It might seem unlikely to the casual observer that the United States' only tax treaty with a South American country is with Venezuela. The explanation is relatively simple—Citgo. The acquisition of Citgo, a major U.S. petroleum company, by the Venezuelan state oil company between 1986 and 1990, made the relationship between the United States and Venezuela less one-sided.[334] Moreover, governments generally prefer not to pay taxes to other governments. This created an incentive for Venezuela to reduce U.S. withholding taxes on profit remittances from Citgo.

Still, negotiations had languished over other issues until 1998, when it appeared that Hugo Chávez would become president of

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[329] *Brazil - Corporate Taxation - Country Tax Guides - 1.4.5 Interest*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 16, 2020).

[330] *Brazil - Corporate Taxation - Country Tax Guides - 1.4.6 Royalties*, Int'l Bureau for Fiscal Documentation, (accessed Jan. 16, 2020).

[331] Sergio André Rocha, *Agency Permanent Establishment 'Brazilian Style': Taxation of Profits Earned Through Commission Merchants, Agents and Representatives*, 41 INTERTAX 444, 444 (2013) ("This matter is discussed much more in the international forum and has never aroused much interest on the part of the Brazilian revenue authorities.").

[332] *See* Napoleão Dagnese, *Is Brazil 'Developed'? Termination of the Brazil-Germany Tax Treaty*, 34 INTERTAX 195, 197 (2006).

[333] *See id.* at 195.

[334] *See* Katherine Blunt, *Citgo Saga: How the Houston Refiner's Future Became So Uncertain*, HOUSTON CHRONICLE, https://www.houstonchronicle.com/business/energy/article/CITGO-13261273.php (last updated Sept. 30, 2018) ("When Petróleos de Venezuela became the sole owner of Citgo Petroleum in 1990, the state-owned oil company known as PDVSA was among the largest and most profitable energy companies in the world.").

Venezuela.[335] Negotiations became more urgent, and the treaty was signed a week before Chávez became president.[336] Although it was initially unclear whether the new regime would embrace the agreement, the economic arguments in its favor became even stronger after Venezuela announced plans to shift from a territorial to a worldwide tax system starting in 2001.[337]

3. CHILE

If the U.S.-Venezuela tax treaty is a story of successfully turning deadlines into opportunities, the lack of a treaty with Chile can be largely attributed to bad timing. Until the 1990s, Chile entered into agreements directly with investors rather than tax treaties with governments.[338] By the mid-1990s, Chile decided on a tax treaty policy that balanced the reality that it was likely to be a destination for inbound investment by more developed countries with its belief that it would also be an exporter of capital.[339] Chile's first treaties after establishing this policy were with Canada and Mexico in 1998, followed by Ecuador in 1999.[340] That is, negotiations with the United States were deferred in favor of negotiations with countries that do not push hard for reductions in withholding rates. Chile affirmatively wished to have as uniform a set of agreements as possible, and

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[335] *See* S. EXEC. REP. No. 106-6, at 14–15 (1999) (discussing how the changing political situation in Venezuela was a factor in the U.S.'s willingness to negotiate a treaty).

[336] U.S.-Venez. Convention, *supra* note 2. Chávez became president in February 1999. *See* Brian A. Nelson, *Hugo Chávez: President of Venezuela*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Hugo-Chavez (last visited Dec. 22, 2019).

[337] *See* S. EXEC. REP. NO. 106-6, at 11 ("The Committee is encouraged that Venezuela is moving from its current territorial tax system to a worldwide tax system. The new worldwide tax system is expected to be more similar to that of the United States and, thus, would be more consistent with one of the principal purposes of the treaty—to avoid double taxation.").

[338] *See* Brown et al., *supra* note 288, at 25:5.

[339] *Id.*

[340] *See* OECD, THE REPUBLIC OF CHILE: STATUS OF LIST OF RESERVATIONS AND NOTIFICATIONS AT THE TIME OF SIGNATURE 2-4, http://www.oecd.org/tax/treaties/beps-mli-position-chile.pdf (last visited Dec. 22, 2019).

so it offered to include most-favored nation provisions in its treaties.[341]

Even though negotiations began towards the end of the Clinton Administration,[342] they could not be concluded until Chile's laws allowed for the exchange of bank information for tax purposes.[343] The treaty was signed on February 4, 2010.[344] Because of this delay in completing negotiations, the Chile treaty fell into the Senate limbo created by Senator Rand Paul's hold on tax treaties.[345]

The ability of a single U.S. Senator to cause the U.S. tax treaty program to come to a halt is not intuitive. Under the U.S. Constitution, the Senate must give advice and consent to the ratification of treaties, including tax treaties.[346] That approval must be by "two thirds of the Senators present."[347] In general, treaties are reviewed by the Senate Foreign Relations Committee based on a technical analysis done by the Staff of the Joint Committee on Taxation and then voted on in a business meeting.[348] Senators are then asked if they have any objections to the treaties being approved by "unanimous consent"—a process that avoids the need for debate on the Senate floor.[349] This process had worked relatively smoothly for decades.[350] However, it also allowed Rand Paul to hold up the tax

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[341] *See* Press Release, Chilean Tax Administration, Int'l Bureau for Fiscal Documentation News, MFN Clauses in Chilean Tax Treaties with Argentina, Australia, France, Sweden and Uruguay (July 11, 2019).

[342] Robert Goulder, *U.S. Enters Tax Treaty Negotiations with Chile*, TAX NOTES TODAY INT'L (Jan, 25, 2000), https://www.taxnotes.com/tax-notes-today-international/treaties/us-enters-tax-treaty-negotiations-chile/2000/01/25/1bwjk.

[343] These changes were made in December 2009. *See* ORG. FOR ECON. CO-OPERATION & DEV., TAX CO-OPERATION 2010: TOWARDS A LEVEL PLAYING FIELD 50 (2010), https://read.oecd-ilibrary.org/taxation/tax-co-operation-2010_taxcoop-2010-en#page1.

[344] *See* Chile-U.S. Convention, *supra* note 186.

[345] Diane Ring, *When International Tax Agreements Fail at Home: A U.S. Example*, 41 BROOK. J. INT'L L. 1185, 1198-99 (2016).

[346] U.S. CONST. art. II, § 2, cl. 2.

[347] *Id.*

[348] *See About Us: Other*, JOINT COMM. ON TAX'N, https://www.jct.gov/about-us/other.html (last visited Dec. 22, 2019).

[349] Ring, *supra* note 345, at 1196–97.

[350] *Treaties: A Historical Overview*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm (last visited Nov. 8, 2019) ("During its first 200 years, the Senate approved more than 1,500 treaties and rejected only 21.").

treaties for a considerable period as Senate floor time is a scarce commodity.[351]

Finally, in the summer of 2019, Senate Majority Leader Mitch McConnell decided to move forward a number of tax agreements that had been pending for, in some cases, close to a decade.[352] However, in the second piece of bad timing for Chile, there was a new wrinkle around changes that had been made to U.S. domestic law by the 2017 Tax Cuts and Jobs Act.[353] This law included a number of provisions that were potentially inconsistent with U.S. tax treaty obligations.[354] In particular, there were questions regarding the Base Erosion Anti-Abuse Tax ("BEAT").[355] Under the "later in time" principle, a statute can override an earlier treaty, and vice versa.[356] There is debate over whether the BEAT overrides the non-discrimination provisions of existing treaties.[357] In any case, the Treasury Department obviously was nervous about the possibility that treaties that enter into force after the BEAT was enacted could override the BEAT.[358] Accordingly, they asked Senate Democrats to enter a reservation to pending treaties (including the treaty with Chile) to "clarify" that the BEAT would apply under those treaties.[359] Instead, Treasury's request was made public.[360] Four protocols to existing treaties that ostensibly do not present the issue moved forward and

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351 *See* Ring, *supra* note 345, at 1197.

352 Jim Tankersley, *Senate Approves Tax Treaties for First Time In Decade*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/business/tax-treaties-vote.html.

353 Natalie Olivo, *After Nearly 10 Years, Tax Treaties May Face More Delays*, LAW360 (Aug. 2, 2019), https://www.law360.com/corporate/articles/1183525.

354 *See* H. David Rosenbloom & Fadi Shaheen, *The TCJA and the Treaties*, TAX NOTES TODAY INT'L 1057, 1057–58 (Sept. 9, 2019).

355 *See* H. David Rosenbloom & Fadi Shaheen, *The BEAT and the Treaties,* TAX NOTES INT'L 53, 53, 56 (Oct. 1, 2018).

356 *Id.* at 56 ("When an irreconcilable conflict is found, the provision that is later in time generally controls.").

357 *Id.* at 59.

358 *See* Olivo, *supra* note 353.

359 *See* Letter from Robert Menendez, U.S. Senator, to Steven T. Mnuchin, Sec'y of the Treasury, Dep't of the Treasury (June 11, 2019) ("All we know at this point is that the Department would like to see the reservation applied to the treaties with Chile, Hungary, and Poland.").

360 *Id.*

were approved by the Senate.[361] Three full treaties, which squarely present the issue, were consigned once again to limbo.[362] Press reports indicate that Senator McConnell's decision to allocate floor time to the tax treaties might have been motivated by a potential investment in Kentucky by a Spanish company, and therefore a desire to approve the pending protocol with Spain.[363] This suggests that (a) no tax treaty will move forward until the Treasury Department addresses the issue directly, through treaty provisions or protocols, and (b) future treaties should be presented in bundles that generate substantial interest in the business community (preferably benefitting projects in Kentucky).

CONCLUSION

The world is a complicated place. Countries have very different views of their national interests, and those views are more nuanced than outside observers can begin to understand. It is therefore folly to make general statements about what is in the interests of developing countries or of any subset of developing countries.

What is clear is that, even looking only at Latin America, countries have different reasons for not having tax treaties with the United States. In relatively few cases has a treaty foundered solely over a desire by one state to have higher withholding rates or a more expansive host state exercise of taxing rights. In some cases, it has just been a matter of bad timing for a treaty that generally was consistent with U.S. treaty policies.

The good news is that it therefore should be possible for the United States to reach agreements with a number of LATAM countries where there is a significant bilateral economic relationship. However, it might be productive to focus on smaller countries that have already shown an interest in encouraging investment from the

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[361] *See* Tankersley, *supra* note 352 (noting that the agreements with Switzerland, Japan, Luxembourg, and Spain were all approved by the U.S. Senate).

[362] Olivo, *supra* note 353 (explaining that the treaties with Chile, Poland, and Hungry are "unlikely to move through the Senate with the same relative ease" as the four protocols).

[363] *See* Tankersley, *supra* note 352 (detailing how Spain-based Acerinox employs 1,500 workers in Kentucky).

United States rather than a "blockbuster" like Brazil, where substantial barriers to an agreement remain.