WILL TAX TREATIES AND WTO RULES 'BEAT' THE BEAT?

By Rebecca M. Kysar*

I. BACKGROUND

The strengthening of U.S. taxation of inbound transactions through the creation of the new Base Erosion and Anti-abuse (BEAT) is one of the more innovative aspects of the Tax Cuts and Jobs Act of 2017 (TCJA).[1] The BEAT has created a host of issues ranging from interpretation, implementation,[2] and, the subject of this issue, the relationship with U.S. international obligations.

The BEAT functions as an alternative minimum tax, adding back in certain deductible payments to foreign related parties to constitute a "modified taxable income" base.[3] The BEAT liability is the excess of 10% of that base over the taxpayer's regular tax liability.[4] Notably for our purposes, although it functions similarly to the now repealed corporate alternative minimum tax, the BEAT does not allow foreign tax credits in the calculation of modified taxable income. Also important is the fact that the tax effectively disallows deductions for payments to foreign related persons but not domestic ones. In addition to raising WTO concerns, these features make the BEAT vulnerable to charges that it violates the more than sixty tax treaties to which the United States is a party, although commentators disagree on the severity of these accusations.[5] The BEAT also introduces thorny issues of constitutional and foreign relations law regarding the process by which Congress may override treaties. Although I will outline all of these issues in this Essay, I will focus my own analysis on the latter controversy to argue that Congress need not express its intent to override treaties in order to do so. This is particularly the case in the tax context.

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[1] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[2] There are numerous technical problems and unanswered questions left open by BEAT, as others have explored. *See, e.g.*, Jasper L. Cummings, *Selective Analysis: The Beat*, 158 TAX NOTES 1757,1763 (March 26, 2018) (discussing whether Congress intended royalties to escape the BEAT through incorporation into cost of goods sold); Laura Davison, *Most Wanted: Tax Pros' Technical Corrections Wish List*, BLOOMBERG (Apr. 13, 2018) (discussing ambiguity regarding which payments are included and how to aggregate income); Martin A. Sullivan, *Can Marked-Up Services Skip the BEAT?*, 158 TAX NOTES 705 (2018) (discussing ambiguity as to whether marked-up services are included in the BEAT base); Martin A. Sullivan, *Marked-Up Services and the BEAT, Part II*, 158 TAX NOTES 1169 (2018) (same).

[3] I.R.C. § 59A.

[4] *Id.* The BEAT rate is 5% for 2018 before going up to 10% through 2025. For tax years after 2025, the rate is scheduled to go up to 12.5%. *Id.*

[5] *Compare* H. David Rosenbloom, *International Aspects of U.S. 'Tax Reform'—Is This Really Where We Want to Go?*, INTERNATIONAL TAX REPORT (Jan. 2, 2018) (arguing that the BEAT violates tax treaties), *and* H. David Rosenbloom and Fadi Shaheen, *The BEAT and the Treaties*, 92 TAX NOTES INT'L 53 (Oct. 1, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229532 [https://perma.cc/95HM-CZPV] (same), *with* Reuven S. Avi Yonah, *Beat It: Tax Reform and Tax Treaties* (Jan. 1, 2018), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1260&context=law_econ_current [https://perma.cc/T8QL-W8PP] (arguing that the BEAT does not violate tax treaties), Bret Wells, *Get with the BEAT*, TAX NOTES (Feb. 19, 2018) (same), *and* Reuven Avi-Yonah & Bret Wells, *The BEAT and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen* (unpublished manuscript) (Oct. 3, 2018 draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232974. [https://perma.cc/39QU-V5VQ].

II. POSSIBLE TAX TREATY VIOLATIONS

A. Double Tax Relief

Article 23 of the U.S. Model Income Tax Convention requires treaty partners to grant a foreign tax credit for income tax of the treaty partner "in accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof)."[6] Since the BEAT offers no foreign tax credit, it may be inconsistent with the "general principle" of Article 23.

There are, however, cogent arguments that the BEAT does not violate Article 23. One possible counter is that the BEAT is simply a limitation on the foreign tax credit and therefore does not violate the credit's general principle. This is because a portion of regular tax liability still receives relief from double taxation in the form of foreign tax credits.[7] Another argument is that the BEAT may not be a "covered tax" under Article 2 of the treaties since it is an alternative regime to the income tax and therefore not subject to the requirements of Article 23.[8] The definition of what constitutes a covered tax, however, is notoriously vague.[9]

B. Nondiscrimination

Another possible route to treaty violation is the nondiscrimination requirements of Article 24.[10] Paragraph 5 of that article provides that treaty partners cannot tax residents of the other treaty country more heavily than its own residents.[11] Arguably, the BEAT violates this nondiscrimination clause because a foreign-owned U.S. entity will be subject to the BEAT regime whereas a U.S.-owned U.S. entity will not be.

Another view, however, is that the BEAT applies regardless of who *ultimately* owns the corporation.[12] Although a harsher result applies to foreign companies that were formerly U.S. companies, such disparate treatment is likely within the savings clause of the treaties, which allows the United States to tax its residents, and former residents, under its own domestic law.[13]

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[6] *See* United States Department of the Treasury, U.S. Model Income Tax Convention, art. 23 (2016).
[7] Avi-Yonah & Wells, *supra* note 5.
[8] *See* U.S. Model Income Tax Convention, *supra* note 6, art. 2 ("covered taxes are "federal income taxes imposed by the Internal Revenue Code or "any identical or substantially similar taxes that are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes").
[9] Many of our treaty partners have enacted new taxes in the past several years that are of questionable status with regard to the treaties' scope. *See, e.g.*, Roland Ismer and Christoph Jescheck, *The Substantive Scope of Tax Treaties in a Post BEPS World: Article 2 OECD MC (Taxes Covered) and the Rise of New Taxes*, 45(5) INTERTAX 382, at 386-87 (2017).
[10] Unlike with Article 23, Article 24 applies regardless of whether the BEAT constitutes a "covered tax." *See* U.S. Model Income Tax Convention, *supra* note 6, art. 24.
[11] *See* U.S. Model Income Tax Convention, *supra* note 6, art. 24(5).
[12] *See* Avi-Yonah, *supra* note 5;Wells, *supra* note 5.
[13] *Id.*

It is also conceivable that the BEAT violates Paragraph 4 of the nondiscrimination article, which commands that foreign residents be entitled to deductions "under the same conditions" as U.S. residents.[14] The BEAT regime, however, is not equivalent to the denial of a deduction and interest, royalties, and other items remain fully deductible. Instead, the BEAT merely subjects the tax benefit conferred by deducting interest, royalties, and other items to the 10% tax. In contrast, denying a tax deduction would increase the tax on the item by 21%, not 10%.[15]

C. Treaty Override?

One may also take a drastically different view as to the consequences that flow from the BEAT's conflict with the tax treaties. One understanding is that if the BEAT overrides treaties, courts must abide by the "later in time" rule to nonetheless apply the BEAT as written, omitting foreign tax credits and encompassing nondeductible payments to residents in treaty country.[16] Under the U.S. Constitution, treaties and statutes are both "supreme law" and the Court has held that, when there is a conflict between the two, the one enacted "later in time" will prevail.

A contrary view invokes *Cook v. United States* to stand for the proposition that "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[17] Under this view, courts must reconstruct the statute to allow for deductions for otherwise deductible payments to related persons residents in treaty countries and foreign tax credits for foreign taxes paid to treaty countries.[18] The *Cook* Court itself cabined its reasoning as to resolving "any doubt as to the construction of the statute."[19]

The best reading of the *Cook* doctrine, in my view, is that it is a canon of statutory interpretation requiring interpretive harmony between treaties and statutes but only where possible, i.e. where the statute is ambiguous. Congress unambiguously chose not to provide foreign tax credits against BEAT liability even though a prior version of the inbound regime would have done so.[20] It also failed to enact a carve-out for payments to residents of treaty countries.

In this manner, the *Cook* doctrine can be seen as a variation on the *Charming Betsy* canon, which is used to construe statutes as to avoid treaty violations.[21] Moreover, the language in *Cook* should be confined to its rather unusual facts--interpreting the reenactment of a statute that preceded a later enacted treaty. In these rare circumstances, it can be inferred that Congress's intent was to not abrogate the treaty.[22]

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[14] *See* U.S. Model Income Tax Convention, *supra* note 6, art. 24(4).
[15] Avi-Yonah, *supra* note 5.
[16] Rebecca M. Kysar, Unravelling the Tax Treaty (unpublished manuscript) (draft on file with author); Whitney v. Robertson, 124 U.S. 190, 195 (1888).
[17] Rosenbloom and Shaheen, *supra* note 5 (citing Cook v. United States, 288 U.S. 102 (1933)).
[18] Rosenbloom and Shaheen, *supra* note 5.
[19] Cook v. United States, 288 U.S. 102, 120 (1933). The *Cook* court used this language in the context of agency action. Because the agencies interpreted the subsequently enacted statute consistent with the prior one, the Court used this consistency to illustrate that the later enacted statute did not override the treaty.
[20] Reuven Avi-Yonah, *Guilty as Charged: Reflections on TRA17*, 157 TAX NOTES 1131, 1135 (Nov. 20, 2017).
[21] AM. LAW INST., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 109 (1987). *See also* Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).
[22] Kysar, *supra* note 16.

It follows that if the later enacted statute clearly conflicts with a previous treaty, the statute will control. The conflict between the two is the expression of Congress's will to override the treaty, even though it may not explicitly mention such overrides either in the legislative history or the statute.[23]

Query also whether Section 7852(d), the legislative history of which indicated it was enacted as a codification of the last in time rule, changes the equation. That section provides that " "For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law."[24] Although the statutory language is rather general, the reason for the vagueness in the language was that the final versions of Sections 894(a) and 7852 were drafted as a compromise between the House's position that the tax reform act at issue would prevail over unmentioned conflicts with tax treaties (effectively overriding a court's ability to construe the two harmoniously), and the IRS's position that a statute must explicitly override a treaty in order for it to take precedence.[25]

Rosenbloom and Shaheen further argue that, Congress cannot change the rule in *Cook* as a constitutional matter and so Section 7852 should be dismissed as having any constitutional relevance. It is my view that the intent of Congress in enacting Section 7852 was essentially to leave the existing caselaw in place, which merely requires interpretive harmony between treaties. Yet even if instead we construe Section 7852 to run contrary to *Cook*, if *Cook* is interpreted as a statutory interpretation canon, then Congress very well may have the constitutional power to change the interpretive rules. There is an open debate as to whether Congress can enact rules of

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[23] At times, the Court has supported this view. Predating the *Cook* case, in *Whitney v. Robertson*, for instance, the Court stated that "when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed . . . The duty of the courts is to construe and give effect to the latest expression of the sovereign will." *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888). In another case, *Alvarez-Sanchez v. United States*, the Court held that the latter in time rule applied even when the Court assumed Congress did not intend to abrogate the treaty. *See, e.g.*, Alvarez y Sanchez v. United States, 216 U.S. 167, 175-76 (1910). The Cook court did not purport to overrule these cases. These cases can be read consistently with *Cook* if the language of *Cook* is confined to its facts. Admittedly, however, the Court has not been entirely consistent, even within an opinion. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, the Court referred to the *Cook* doctrine as a "canon of construction against finding repeal of a treaty in ambiguous congressional action, only to later state that "legislative silence is not sufficient to abrogate the treaty." *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). Perhaps we could reconcile these two statements by stating that explicit legislative statements to abrogate the treaty are necessary when the statute is ambiguous but not when the statute is clear in its conflict. Some disagreement remains among lower courts. The D.C. Circuit, for instance, has taken an inconsistent approach in the area. *Compare, e.g.*, Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 878 (D.C. Cir. 2006) ("The canon applies only to ambiguous statutes ….")*, with* Owner-Operator Independent Drivers Association v. United States Department of Transportation, 724 F.3d 230, 234 (D.C. Cir. 2013) ("[A]bsent some clear and overt indication from Congress, we will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous."). Still the common approach of lower courts, and the one followed by the Restatement on Foreign Relations Law, is that Congress construes statutes to avoid treaty violations "where fairly possible."

[24] I.R.C. § 7852(d).

[25] *See* Irwin Halpern, *United States Treaty Obligations, Revenue Laws, and New Section 7852(d) of the Internal Revenue Code*, 5 FLA. INT'L L.J. 1 (1989); *see also* Kathleen Matthews, *Treasury Encouraged by Finance Treaty Override Substitute*, 40 TAX NOTES 662 (1988).

interpretation, but there is a strong argument that, indeed, it can in many circumstances, including this one.[26]

Rosenbloom and Shaheen also argue that Congress has indicated its intent *not* to override the treaties. In the Senate Committee on Finance's markup session, Tom Barthold, Chief of Staff for the Joint Committee on Taxation, responded to a Senator's question about the interaction between the legislation and the treaties by saying that "[The BEAT] is structured as an alternative tax compared to the income tax. So I think our view is that there is not a treaty override inherent in that design."[27] Rosenbloom and Shaheen argue that it is plausible Congress used Barthold's statement as its working assumption, thus indicating congressional intent not to override.[28]

Recent academic analyses suggest that the revenue estimators are indeed a powerful influence upon the legislative process and therefore courts should use their analyses as indicative of Congressional intent.[29] These arguments, however, are made in the particularly salient context of revenue scores. Since JCT staff are not elected officials, it may be difficult to simply impute congressional intent from their statements in the record concerning working assumptions on the legislation.

One further observation—I have previously argued that tax treaties are likely unconstitutional because, as self-executing Article II treaties, they omit the House from the treaty process.[30] This is in tension with the Origination Clause, which requires all revenue legislation to originate in the House. The constitutional infirmity also supports the argument to allow for *more* treaty overrides in the tax context. Indeed, in order for the House to protect its constitutional prerogative, it engages in overrides of tax treaties with a greater frequency than other international agreements.[31] Although

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[26] Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). In categorizing rules of interpretation that derive from the Constitution, Rosenkranz distinguishes between "constitutional starting point" rules and other rules of interpretation, such as "constitutional default rules" that Congress can opt out of using clear statements. *Id.* at 2099. The question thus becomes whether the *Cook* rule that treaties be expressly overridden is constitutionally required no matter Congress's views on the matter. In effect, under Rosenbloom and Shaheen's view, the Court has created a clear statement rule, allowing Congress to override treaties through statutes enacted later in time but only if they expressly do so. This, in turn, is an interpretation of the last in time rule, which is an interpretation of the Supremacy Clause. Under this view, it may be that Congress cannot default out of the judicial scheme. Under my view, however, *Cook* did not create a clear statement rule but instead created an interpretive rule that operated given the unique facts at issue in *Cook*. Using Rosencranz's typology, the clear expression of intent language in *Cook* and the *Charming Betsy* canon should be viewed as a constitutional starting point rule, which can be changed by Congress. In this manner, through enactment of I.R.C. § 7852, Congress may have rejected any ostensible duty to clearly express overrides in the tax context.

[27] *Open Executive Session to Consider an Original Bill Entitled the "Tax Cuts and Jobs Act" (Cont'n Nov. 14, 2017): Hearing on H.R. 1 Before the S. Comm. on Finance*, 115th Cong. 163 (2017) (question from Sen. Benjamin L. Cardin, D-Md.).

[28] Rosenbloom and Shaheen, *supra* note 5.

[29] Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 764 (2014); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying To Do*, 84 U. CHI. L. REV. 177, 182 (2017); Clint Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179 (2017) (proposing a JCT canon of interpretation).

[30] Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1 (2013).

[31] Reuven Avi Yonah, *International Tax as International Law* (John M. Olin Center for Law and Econ., Paper No. 04-007, 2004).

the availability of congressional overrides does not cure the constitutional defect,[32] it does allow the House to participate at least somewhat to formulate revenue policy in an area from which it is otherwise omitted. Clear expression of intent to override will likely prove to be a delicate matter from a foreign relations perspective, which Congress may not want to pursue. To quell the House's ability to override treaty by requiring clear expression of intent would lay in further tension with the Origination Clause.

Finally, there is some historical precedent for allowing treaty overrides without clear statements. Since the enactment of section 7852(d) in 1988 and prior to the enactment of the 2017 tax bill, there have been at least three instances in which Congress has enacted statutes that conflict with the treaties while being silent on the issue in both the statutory text and legislative history.[33] In 2004, Congress enacted an excise tax on nonresident alien "insiders" of an expatriating U.S. corporation.[34] In 2008, Congress imposed a transfer tax on gifts or bequests from an expatriate.[35] In 2010, Congress enacted the net investment income tax, which can apply to foreign source income without foreign tax credit allowances.[36] In none of these cases have courts mandated that the statutes be rewritten to accommodate the treaties.[37]

Regardless of how one comes out on the issue, it is a fascinating question of foreign relations and constitutional law as to how Congress must express its intention to override treaties in order to be successful at doing so, and the implications of this debate reach far beyond tax law although tax law presents further wrinkles on the question.

III. WORLD TRADE ORGANIZATION ("WTO" ISSUES)

The BEAT is also in tension with WTO obligations and may be viewed as a forbidden tariff. Since tax on interest and royalties do not fall within the scope of the agreements, however, only the BEAT's application on imports of depreciable property from related parties and imports from certain inverted corporations will implicate them.[38] As a result, the level of WTO-covered import activity subject to the BEAT may be insufficient to provoke our trading partners[39] and certainly does not rise to the level of concerns that the foreign-derived intangible income (FDII) regime

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[32] Kysar, *supra* note 30, at 48-49.
[33] Thomas S. Bissell, *Treaty Overrides Where the Code's Legislative History is Silent*, BLOOMBERG (July 14, 2016), https://www.bna.com/treaty-overrides-codes-n73014444693/.
[34] I.R.C. § 4985.
[35] I.R.C. § 2801.
[36] I.R.C. § 1411.
[37] There is some precedent for the Service to rewrite statutes to accommodate treaties, however, Congress has rejected its authority to do so, citing the Supremacy Clause and last in time rule. *See* S. REP. NO. 445, 100TH CONG., 2D SESS. 371 (1988) (citing Notice 87-5, 1987-1 C.B. 416).
[38] Reuven Avi-Yonah, *Tit for Tax: How Will Other Countries React to the Tax Cuts and Jobs Act?* (U. Mich. Law & Econ. Research Paper No. 17-022, U. Mich. Pub. Law Research Paper No. 581, Dec. 17, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089052 [https://perma.cc/8SS7-FNVJ].
[39] Kamin et al., The Games They Will Play: Tax Games, Roadblocks and Glitches Under the 2017 Tax Overhaul, 103 MINN. L. REV (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089423 [https://perma.cc/77UG-MSVA].

creates.[40] The BEAT's WTO concerns also stand in contrast to the proposed and then abandoned House excise tax proposal.[41] Because it applied to cost of goods sold, the excise tax would have caused more substantial WTO issues, as well as more significant tax treaty issues.[42] Unfortunately, the gain for compliance with international law also allows taxpayers to circumvent the BEAT by packaging IP as cost of goods sold.[43]

IV. REACTION FROM TREATY PARTNERS

Finally, how our treaty partners will respond to these issues is a "known unknown." For instance, on the one hand, will accusations of the United States heedlessness towards its obligations under international law reduce its negotiating power going forward? On the other hand, perhaps the threat of the BEAT itself will increase the United States' leverage as our partners try to negotiate their way out of it. The WTO issues presented by the legislation are even more uncertain as it is unclear whether Congress itself would repeal FDII or the BEAT provisions in the face of an adverse WTO ruling. As a result, our trading partners may opt to pursue countervailing measures against the United States instead of taking the challenge to the WTO's dispute settlement body.[44]

V. CONCLUSION

In summary, the thorny issues raised by the BEAT's relationship with U.S. international agreements will prove both vexing and fascinating to tax practitioners and academics, our treaty partners, international trade lawyers, and even constitutional law theorists. Among these questions are whether the BEAT violates the nondiscrimination and double tax relief requirements of our treaties. If so, does this constitute a treaty override? How must Congress express intention to override treaties? Does the BEAT also create WTO problems by constituting a forbidden tariff? And, finally, how will our treaty partners respond to these issues?

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[40] *See* Rebecca Kysar, *The Senate Tax Plan Has a WTO Problem*, MEDIUM (Nov. 12, 2017), https://medium.com/whatever-source-derived/the-senate-tax-plan-has-a-wto-problem-guest-post-by-rebecca-kysar-31deee86eb99 [https://perma.cc/C6JQ-3CW6]. *See also* Reuven S. Avi-Yonah, *Does the United States Still Care About Complying with Its WTO Obligations?*, 9 COLUM. J. TAX L. TAX MATTERS 12 (2018), https://journals.cdrs.columbia.edu/wp-content/uploads/sites/10/2018/04/Avi-Yonah-9-2-TM.pdf [https://perma.cc/5GK6-MFDS].

[41] Tax Cuts and Jobs Act of 2017, H.R. 1 (Nov. 2, 2017), § 4303. *See* Reuven S. Avi-Yonah & Nir Fishbien, *Once More, with Feeling: The 'Tax Cuts and Jobs' Act and the Original Intent of Subpart F*, at 12 n.32 (Univ. of Mich. Pub. Law Research Paper No. 578; Univ. of Mich. Law & Econs., Research Paper No. 17-020, 2017), https://ssrn.com/abstract=3074647 [https://perma.cc/WX4X-XFZE] (discussing the WTO and tax treaty problems presented by the House excise tax).

[42] Reuven S. Avi-Yonah, *How Terrible Is the New Tax Law? Reflections on TRA17?* (U. Mich. Pub. Law Research Paper No. 586, U. Mich. Law & Econ. Research Paper No. 18-002, Feb. 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095830 [https://perma.cc/4R5C-RHHH].

[43] Kamin et al., *supra* note 39.

[44] Harry Ballan, *U.S. WTO Violations: Will This Time Be Different?*, 9 COLUM. J. TAX L. TAX MATTERS 14 (2018), https://journals.cdrs.columbia.edu/wp-content/uploads/sites/10/2018/04/Ballan-9-2-TM.pdf [https://perma.cc/6PPE-QPXE].

I raise one final question, and that is whether the United States should continue to care about protecting its network of tax treaties.[45] Arguably, the treaties have outlasted their useful life, creating a system of international taxation that has resulted in double non-taxation rather than alleviated double taxation, their stated purpose. There is little evidence substantiating the claim that the treaties increase foreign direct investment, and this may be especially the case for countries like the United States who do not benefit from reputational advantages gained by entering into the treaties. Recent scholarship laments the revenue losses imposed by the treaty system on developing countries,[46] but even developed countries may lose revenue if they are capital-importing, a position in which the United States now finds itself (in contrast to when the treaty network was first established).[47] Furthermore, the treaty system impedes fundamental reform of the international tax system, as this discussion makes evident. Congress wishes to increase source-based taxation, and the treaties are limiting their ability to do so. Although some clever workarounds were enacted, it is unclear if they will ultimately succeed, and the fact that Congress operated in their shadow of the treaties likely reduced the new inbound regime's scope and effectiveness, for instance by omitting cost of goods sold.[48]

[45] For further discussion of this issue, see Kysar, *supra* note 16. *See also* Tsilly Dagan, *The Tax Treaties Myth*, 32(4) N.Y.U. J. INT'L L. & POL. 939 (2000); Brett Wells & Cym H. Lowell, *Income Tax Treaty Policy in the 21st Century: Residence vs. Source*, 5 COLUM. J. TAX L. 1 (2014).

[46] Kim Brooks and Richard Krever, *The Troubling Role of Tax Treaties*, *in* 51 TAX DESIGN ISSUES WORLDWIDE, SERIES ON INTERNATIONAL TAXATION 159-78 (Geerten M. M. Michielse & Victor Thuronyi eds., 2015); *see, e.g.*, Allison Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639 (2005); John Avery Jones, *Are Tax Treaties Necessary?*, 53 TAX L. REV. 1, 2 (1999); Richard Vann, *International Aspects of Income Taxation*, *in* TAX LAW DESIGN AND DRAFTING 725 (Victor Thuronyi ed., 1998) ; Alex Easson, *Do We Still Need Tax Treaties?*, 54 BULL. INT'L TAX'N 619 (2000); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000); Lee Sheppard, *How Can Vulnerable Countries Cope With Tax Avoidance?*, 69 TAX NOTES INT'L 410 (2013).

[47] Kysar, *supra* note 16.

[48] *Id.*