HOW THE U.S. CONSTITUTION SHAPES INTERNATIONAL TAX LAW: INSTRUMENT CHOICE IN TAX AGREEMENTS

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ABSTRACT

The U.S. Constitution's Treaty Clause, which requires Senate approval by a two-thirds vote for treaties, has significantly influenced the development of international tax law. This Article examines the implications of Senate supermajority requirements on bilateral and multilateral tax treaties and agreements, alternative instruments, relevant international tax standards, and global tax governance.

Historically, tax treaties have been approved exclusively as Article II treaties requiring Senate approval. The difficulty of entering into treaties with the United States has influenced the instrument choice and design of U.S. and international tax standards. To address this challenge, several U.S. and international tax reforms have employed "treaty avoidance" strategies, including coordinated unilateralism and reliance on executive agreements. While these approaches may circumvent the need for Senate approval, they may result in second-best solutions, violate existing treaty obligations, or raise additional concerns, such as extraterritoriality and lack of legitimacy.

This Article examines the increasing use of executive agreements. Since 2011, while approval of U.S. bilateral tax treaties has nearly ceased, there has been a significant increase in executive agreements, primarily for information exchange for tax purposes. Furthermore, the use of congressional-executive agreements in international taxation may continue to expand, drawing on precedents from international trade law and other legal fields. For example, the Biden administration considered implementing the Pillar One reform through a congressional-executive agreement—an approach that may be followed in future international tax reforms. In addition, pending legislation would provide statutory treaty-like tax benefits and approve a tax treaty with Taiwan as a congressional-

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executive agreement. These developments represent an erosion of the tradition of approving tax treaties as Article II treaties and a shift toward greater reliance on alternatives, such as the use of executive agreements.

Nonetheless, it remains uncertain to what extent executive agreements will replace Article II treaties in the international tax domain. Failure to revisit the instrument choice in international taxation may compromise U.S. interests and global cooperation as the U.S. treaty ratification process makes it unlikely that the United States will participate in any future convention for global tax governance. If other countries enhance their international tax cooperation without U.S. participation, this may lead to further bifurcation of the international tax governance system. This would raise the risk of eroding U.S. influence in global tax matters, potentially leading to international standards less favorable to U.S. stakeholders. A bifurcated system without U.S. participation may result in standards inferior to those that could have been achieved with U.S. participation.

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INTRODUCTION

International tax cooperation is needed to address various global challenges, including combating cross-border tax avoidance and evasion, allocating taxing rights over the revenues of cross-border businesses, and reducing compliance and administrative costs.[1] Treaties generally serve as important legal instruments for coordination among states to address transnational problems.[2] However, the supermajority requirement for treaty approval in the U.S. Senate makes it difficult and even unfeasible to implement international tax reforms through treaties with U.S. participation. This Article examines the implications of Senate supermajority requirements on bilateral and multilateral tax treaties and agreements, alternative instruments, international tax standards, and the broader landscape of global tax governance.

The U.S. Constitution's Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make

1. *See, e.g.*, EU TAX OBSERVATORY, GLOBAL TAX EVASION REPORT 2024 (2024), https://www.taxobservatory.eu//www-site/uploads/2023/10/global_tax_evasion_report_24.pdf [https://perma.cc/F5ZL-TF86].

2. *See generally* RICHARD GARDINER, TREATIES (2023).

Treaties, provided two thirds of the Senators present concur."[3] Additionally, Senate rules require a sixty-senator majority to end debate and proceed to a vote on a treaty or a bill.[4] As discussed in Part I, U.S. international agreements generally fall into two categories: Article II treaties, which require the Senate's advice and consent, and executive agreements that do not require such Senate approval. There has been a longstanding debate, which has not been resolved by the courts, on whether Article II treaties are fully interchangeable with congressional-executive agreements.[5]

Historically, tax treaties have been exclusively approved as Article II treaties, as discussed in Part II.[6] Since 2011, Senator Rand Paul has blocked the approval of tax treaties, and the Senate has resorted to cloture votes to end debate and approved treaties and protocols on two occasions.[7] During the same period, there has been a sharp increase in bilateral executive agreements for information exchange for tax purposes.[8] However, executive agreements have not been adopted instead of Article II treaties in tax matters more broadly. This may change if the U.S.-Taiwan Expedited Double-Tax Relief Act is enacted. This pending legislation—passed by the House of Representatives in early 2025 and now before the Senate—provides statutory treaty-like tax benefits and a new statutory framework for approving a tax treaty as a congressional-executive agreement.[9]

The Treaty Clause has influenced international tax standards and reforms, as discussed in Part III. The United States is party to one multilateral tax treaty—the Convention on Mutual Administrative Assistance in Tax Matters (MAAC)—approved in 1991 as an Article II treaty.[10] The United States has not joined subsequent multilateral tax agreements, including the 2010 protocol amending the MAAC, the BEPS Multilateral Instrument in 2017 (MLI), and the 2023 multilateral convention to implement Amount A of Pillar One.[11] The Biden administration considered implementing Pillar One's convention through a congressional-executive agreement but did not

3. U.S. CONST. art. II, § 2, cl. 2. Throughout this Article, any reference to Senate approval of Article II treaties means the Senate's advice and consent with respect to these treaties.

4. *See generally* VALERIE HEITSHUSEN, CONG. RSCH. SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE (2017). While this Article focuses on the Treaty Clause's supermajority requirement, Senate rules concerning cloture and budget reconciliation are also relevant, as discussed *infra* Parts II and III. A detailed discussion of these rules is outside the scope of this Article.

5. *See infra* Part I.

6. Tax treaties discussed here are generally bilateral conventions between the U.S. government and the governments of other countries for the avoidance of double taxation and the prevention of tax evasion. For further discussion, see IRS PUB. NO. 901, U.S. TAX TREATIES (2024), https://www.irs.gov/pub/irs-pdf/p901.pdf [https://perma.cc/G8ZC-NMZK].

7. *See infra* Section II.A.

8. *See infra* Section II.B.

9. *See infra* Section II.C.

10. *See infra* Section III.A.

11. *See infra* Section III.B.

carry out this plan. It remains uncertain whether future tax treaties and conventions will be implemented as congressional-executive agreements.[12]

The difficulty of entering into treaties with U.S. participation has affected the form and contents of several international tax standards. Designing a standard that likely requires a treaty reduces the likelihood of U.S. participation, as illustrated by Pillar One.[13] To address this challenge, several international tax standards follow what we call "treaty avoidance" strategies, which include (i) coordinated unilateralism—implementing reforms through the coordinated adoption of domestic rules in different countries without any formal international agreement[14]—and (ii) reliance on agreements the United States can implement as executive agreements.[15] These strategies affect both the form of the legal instruments and the contents of the legal norms. For example, to combat tax avoidance by multinational enterprises (MNEs), the United States can conduct information exchange through executive agreements and strengthen transfer pricing rules through Treasury regulations, but it is unlikely to join a treaty that changes taxing rights or tax collection mechanisms. While standards employing these treaty avoidance strategies may circumvent the need for Senate approval, they may represent second-best solutions, violate existing treaty obligations, or raise additional concerns, such as extraterritoriality, as seen in Pillar Two.[16]

This issue has broader implications for global tax governance. As discussed in Part IV, global tax governance is becoming increasingly bifurcated: There is a growing split between the United States and other countries that enhance multilateral cooperation among themselves. While the Senate approved the OECD Convention in 1961, U.S. lawmakers have strongly criticized the role the OECD plays in promoting international tax reforms. The Biden and Trump administrations have opposed the United Nations' work on developing a UN Framework Convention on International Tax Cooperation.[17] Even if the rest of the world accepts the U.S. administration's demands, it is far from certain that a two-thirds majority in the Senate would approve any treaty that aims to increase international cooperation on tax matters. These trends raise risks to U.S. interests, as non-participation in multilateral treaties may erode U.S. influence in global tax matters and lead to international standards less favorable to U.S.

12. *See infra* Section III.B.
13. *See infra* Section III.B.
14. *See infra* Section III.C.
15. *See infra* Section III.C.
16. *See infra* Section III.C.
17. *See infra* Part IV.

stakeholders. It may also result in standards inferior to those that would have been achieved with U.S. participation.[18]

This Article is organized as follows: Part I provides general background on the instrument choice in U.S. international agreements. Part II examines the impact of Senate supermajority requirements on U.S. bilateral tax agreements. Part III explores the implications of the difficulty of entering into treaties with the United States on the instrument choice and design of international tax standards. Part IV considers the implications on global tax governance.

I. INSTRUMENT CHOICE IN U.S. INTERNATIONAL AGREEMENTS

In general, U.S. international agreements are either treaties or executive agreements.[19] U.S. treaties (referred to as Article II treaties) enter into force after they receive the Senate's advice and consent by a two-thirds majority and are ratified by the President upon exchanging signed ratification instruments with the treaty partners.[20] Executive agreements are entered into by the executive branch without the Senate's advice and consent under the Treaty Clause.[21] There are three categories for such agreements. First, congressional-executive agreements are authorized under legislation enacted by Congress either before or after the agreements are concluded. Second, executive agreements can be made under authority provided in an existing treaty. Third, "sole" executive agreements can be made without any legislation or treaty where the agreements are based on the President's constitutional powers.[22]

There has been a longstanding, unresolved debate on whether congressional-executive agreements are interchangeable with Article II treaties.[23] As described by Oona Hathaway:

> Since at least the 1940s, most scholars of U.S. international lawmaking have fallen into two broad camps—opposite sides in what is often called "the interchangeability debate." On one side stand those who argue that congressional-executive agreements and Article II treaties are and should be treated as wholly interchangeable. On the

18. *See infra* Part IV.

19. *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB11048, INTERNATIONAL AGREEMENTS (PART I): OVERVIEW AND AGREEMENT-MAKING PROCESS (2023), https://www.congress.gov/crs-product/LSB11048 [https://perma.cc/Q6GG-UFKF].

20. *See id.*; U.S. CONST. art. II, § 2, cl. 2.

21. *See* MULLIGAN, *supra* note 19, at 2.

22. *See id.*

23. *See id.* For an in-depth discussion of this debate, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1243–48 (2008).

> other are those who say that they are not and should not be: treaties and congressional-executive agreements have appropriately separate spheres that can be described and justified with legal and analytical reasons.[24]

According to the Congressional Research Service, "[j]udicial opinions thus far have not resolved this issue, in part because courts have dismissed constitutional challenges to executive agreements as non-justiciable political questions or for lack of standing."[25]

At a high level, how would the interchangeability debate apply to tax treaties?[26] Are tax treaties and conventions—traditionally approved as Article II treaties—interchangeable with congressional-executive agreements? The "full interchangeability" camp would argue that such treaties and conventions could be approved as congressional-executive agreements.[27] If Congress approves the U.S.-Taiwan Expedited Double-Tax Relief Act, discussed in Part II below, it will set a precedent for a congressional-executive agreement used instead of an Article II treaty for a bilateral tax treaty.[28]

Another position is that tax treaties and conventions should be approved exclusively as Article II treaties. The main factor supporting this position is the longstanding, exclusive practice of approving tax treaties as Article II treaties.[29] As discussed in Part III, a proposal to depart from this practice was criticized by Republican senators as "a dramatic shift from past precedent."[30] A variation of this position is that a convention that amends treaties approved as Article II treaties must also be approved as an Article II treaty.[31]

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24. *Id.* at 1243.

25. MULLIGAN, *supra* note 19, at 2. For further discussion, see Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1, 49–51, 55 (2013).

26. A comprehensive discussion of the interchangeability debate in this context is outside the scope of this Article. This short discussion outlines some of the key positions on this issue.

27. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. e (AM. L. INST. 1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.").

28. *See infra* Section II.C.

29. *See generally* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001) (analyzing historical practices to establish constitutional norms).

30. Letter from Mike Crapo et al., U.S. Sens., to Janet Yellen, Sec'y, Dep't of the Treasury (Dec. 22, 2021), https://www.finance.senate.gov/imo/media/doc/republican_letter_to_treasury_oecd.pdf [https://perma.cc/WKZ7-ZPR4].

31. This position was raised by Republican senators in the context of Pillar One. *See infra* Section III.B. However, regular tax legislation can override existing tax treaties. A convention approval through regular legislation is not substantially different from any other treaty override. For a discussion of treaty overrides, see the sources cited *infra* note 57.

The contrary position is that tax treaties require congressional-executive agreements or implementing legislation.[32] Rebecca Kysar argues that tax treaties fall within the scope of the Origination Clause,[33] which should not be overridden by the Treaty Clause, and thus require bicameral approval.[34] She acknowledges that the bicameral approval mechanism she suggests "would be a dramatic deviation from tax treaty-making in the United States."[35] According to John Yoo's thesis, "Congress can resort to congressional-executive agreements in areas over which Congress already possesses plenary constitutional authority, such as international trade and finance."[36] He further notes that "[n]ot only are congressional-executive agreements acceptable, but in areas of Congress's Article I, Section 8 powers, they are—in a sense—constitutionally required."[37] Yoo acknowledges that the practice of approving tax treaties as Article II treaties is inconsistent with his thesis, but he explains that Congress has chosen to implement tax treaty obligations through sections of the Internal Revenue Code (the Code) and can override treaties through legislation.[38]

Executive agreements have become the primary instruments for international agreements involving the United States. As observed by Bradley and Goldsmith, "over the course of American history, the U.S. government in making binding international obligations has come to rely much more heavily on executive agreements . . . than on treaties."[39] While treaties represented 69 percent of the U.S. international agreements between

32. Kysar, *supra* note 25, at 5.

33. U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); Kysar, *supra* note 25, at 24–28.

34. Kysar, *supra* note 25, at 6.

35. *Id.* at 5. She further notes that congressional-executive agreements may be easier to enact than Article II treaties. *See id.* at 36 n.221 ("In some circumstances, however, congressional-executive agreements may be easier to enact than Article II treaties. After all, the two-thirds requirement of the Treaty Clause exceeds the simple majority vote required to pass a congressional-executive agreement. At least partially due to the high voting requirement of the Treaty Clause, nearly fifty treaties remain pending before the Senate, with the oldest dating back to 1949. Although congressional-executive agreements may be subject to a filibuster, such an act entails political costs and can be overcome by a lower sixty-vote supermajority on cloture. Additionally, some congressional-executive agreements follow a fast track process that waives the possibility of a filibuster. *See, e.g.*, Trade Act of 1974 § 151, Pub. L. No. 93-617, 88 Stat. 1978, 2001 (1975) (codified at 19 U.S.C. § 2191 (2006)) (expired 2007). Also, Article II treaties proceed through the Senate Foreign Relations Committee, while congressional-executive agreements move through the relevant subject matter committees. As a result, congressional-executive agreements may face less opposition when the subject matter committees are less hostile to the international agreement than the Senate Foreign Relations Committee. Of course, the opposite may also be true." (citations omitted)).

36. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 821 (2001).

37. *Id.* at 823.

38. *Id.* at 811 n.218.

39. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1209 (2018).

1789 and 1839, they have represented less than 7 percent since World War II.[40] The continued exclusive approval of tax treaties as Article II treaties appears somewhat anomalous given this general trend and the approval of agreements in another area of international economic law—trade agreements—as executive agreements.

International trade agreements have long been approved as congressional-executive agreements. As Spiro noted, "[t]he use of the congressional-executive agreement for trade-related undertakings has not merely been routine, but exclusive; there does not appear to be a single important postwar trade agreement that was approved as an Article II treaty."[41] For example, the North American Free Trade Agreement (NAFTA), the U.S.-Mexico-Canada Agreement (USMCA) and the agreement establishing the World Trade Organization (WTO) were all entered into through congressional-executive agreements.[42] Until the early 1930s, international trade agreements were generally approved as Article II treaties, which resulted in very few major trade agreements.[43] However, following the Smoot-Hawley tariffs, "Congress began a decades-long trend of ceding the authority to lay and collect customs duties to the executive branch."[44] This trend included the Reciprocal Trade Agreements Act of 1934 (authorizing the president to negotiate reciprocal bilateral trade agreements and to adjust tariff rates), the Trade Expansion Act of 1962 (broadening this authority to include multilateral trade negotiations),[45] and the Trade Act of 1974 (providing the president with a "fast-track" authority to enter into trade agreements subject to an *ex post* congressional

40. *See id.* at 1210.

41. Spiro, *supra* note 29, at 1002.

42. CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R47679, CONGRESSIONAL AND EXECUTIVE AUTHORITY OVER FOREIGN TRADE AGREEMENTS, at 3 (2023), https://www.congress.gov/crs_external_products/R/PDF/R47679/R47679.1.pdf [https://perma.cc/KN9F-YV5P].

43. Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, *in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325, 331 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998) ("As a practical matter, the congressionally set tariff proved to be nonnegotiable. Under his foreign policy powers, the president could always negotiate a tariff reduction treaty with another country. However, the measure would not just require the approval of two-thirds of the Senate but implicitly require House approval as well because it would involve a revenue matter. Knowing that the executive could not commit to the implementation of any signed agreement, foreign countries were reluctant to negotiate with the United States. Just three major trade agreements—with Canada (1855–66), Hawaii (1876–1900), and Cuba (1903–34)—were enacted during this period."). Several laws authorized the executive branch to negotiate and reduce tariffs, although "these measures . . . amounted to half-hearted tinkering and proved to be short lived." *Id.* at 332.

44. Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power Over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/ [https://perma.cc/BD2U-RDNS].

45. *See id.*

approval).[46] Recent years have seen an increase in trade agreements where it is unclear "to what extent they are based on the President's inherent constitutional authority versus powers Congress has delegated or ceded to executive agencies."[47]

International investment agreements represent another interesting example. In general, international investment agreements are either standalone bilateral investment treaties or investment chapters in free trade agreements.[48] Bilateral investment treaties have been approved as Article II treaties, subject to the Senate's advice and consent.[49] In contrast, investment chapters in free trade agreements have been approved as congressional-executive agreements as their approval follows the framework that applies to such agreements.[50]

The State Department generally considers several factors when determining the appropriate form for an agreement.[51] These factors include, among others, congressional preferences, past U.S. practice and general international practice for similar agreements, the effect of the agreements, and the need for implementing legislation.[52] Nonetheless, the choice between congressional-executive agreements and Article II treaties is ultimately political, given that there has never been a successful constitutional challenge against such a choice.[53]

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46. ZIRPOLI, *supra* note 42, at 7–8. The "fast-track" trade authority, formally known as the Trade Promotion Authority (TPA), was used to negotiate and implement bilateral and regional free-trade agreements. The TPA "expired on July 1, 2021, leaving this framework for congressional-executive trade agreements unavailable unless Congress chooses to reauthorize it." *Id.* at 5.

47. ZIRPOLI, *supra* note 42, at ii. The ongoing debate on these sole executive agreements or "hybrid" agreements in trade is outside the scope of this Article.

48. Matthew Schaefer, *Self-Executing International Agreements and Private Rights of Action: Revisiting the 4th Restatement of Foreign Relations Law in the Context of International Trade and Investment Agreements*, 45 U. PA. J. INT'L L. 743, 764 (2024) ("The first United States BIT entered into force in 1989, and the most recent one with Rwanda entered into force in 2012. The United States also has an investment chapter in its free trade agreements with twenty additional countries that have provisions mimicking BIT provisions, i.e., essentially BITs engrafted into free trade agreements, but those trade agreements with investment chapters are approved as [congressional-executive agreements].").

49. *See id.*; MARTIN A. WEISS & SHAYERAH I. AKHTAR, CONG. RSCH. SERV., IF10052, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (IIAs) 1 (2022), https://www.congress.gov/crs-product/IF10052 [https://perma.cc/YN83-FYAP].

50. *See* Schaefer, *supra* note 48, at 764.

51. 11 U.S. Dep't of State, Foreign Affs. Manual § 720 (2006), https://fam.state.gov/fam/11fam/11fam0720.html [https://perma.cc/NR94-3788].

52. *Id.* § 723.3.

53. *See* Yoo, *supra* note 36, at 771–73; ZIRPOLI, *supra* note 42, at 7 ("As a practical matter, courts are unlikely to entertain claims that congressional-executive FTAs are an unconstitutional alternative to treaties, as at least one appellate court has dismissed such a lawsuit as presenting a 'political question' to be decided by Congress and the President.").

II. IMPACT ON BILATERAL TAX AGREEMENTS

This Part examines how the Senate supermajority requirements have impacted the bilateral tax agreements entered into by the United States. Section A examines the obstacles that have almost halted Senate approval of new U.S. bilateral tax treaties. Section B explores the sharp rise in executive agreements in tax matters. Section C considers the proposed U.S.-Taiwan Expedited Double-Tax Relief Act, which could enable the approval of a bilateral tax treaty as a congressional-executive agreement for the first time.

A. U.S. Bilateral Treaty Network

Tax treaties are negotiated and signed by the executive branch, submitted to the Senate for approval as Article II treaties, and then come into effect after the President exchanges signed ratification instruments with the respective treaty partners.[54] These treaties are "self-executing" in the sense that they require no additional legislation to be implemented.[55] This self-executing operation is supported by section 894(a)(1) of the Code, which states that the provisions of the Code "shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer."[56] While a treaty does not require legislation to take effect, Congress can enact laws overriding tax treaties.[57]

The U.S. bilateral income tax treaty network covers over sixty jurisdictions.[58] The United States' first income tax treaty was signed with

54. Diane Ring, *When International Tax Agreements Fail at Home: A U.S. Example*, 41 BROOK. J. INT'L L. 1185, 1194–97 (2016).

55. *See id.* at 1195. For further discussion on whether tax treaties are self-executing, see Kysar, *supra* note 25, at 22–23.

56. I.R.C. § 894(a)(1). *See* Ring, *supra* note 54, at 1195. *Cf.* Kysar, *supra* note 25, at 24 (contending that tax treaties fall within the scope of the Constitution's Origination Clause and thus require bicameral approval); U.S. CONST. art. I, § 7, cl. 1.

57. For a discussion of treaty overrides, see, for example, Reuven S. Avi-Yonah, *Tax Treaty Overrides: A Qualified Defense of U.S. Practice*, *in* TAX TREATIES AND DOMESTIC LAW 65, 69 (Guglielmo Maisto ed., 2006); Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677 (2001); Mark J. Wolff, *Congressional Unilateral Tax Treaty Overrides: The "Latter in Time Doctrine" Is Out of Time!*, 9 FLA. TAX REV. 699 (2009).

58. *United States Income Tax Treaties – A to Z*, IRS (Jan. 3, 2026), https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z [https://perma.cc/5R9H-CPLS]. The treaties with Russia and Belarus have been partially suspended. *Id.* The treaty with Hungary has been terminated. *Id.* For a discussion of the different functions of tax treaties, see Reuven S. Avi-Yonah, *Double Tax Treaties: An Introduction*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 99 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Reuven Avi-Yonah, Guest Editorial, *Does the US Need Tax Treaties?*, 54 INTERTAX 244 (2026); Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1755 (2020).

France in 1932 and approved by the Senate in the same year.[59] Most income tax treaties were entered into between 1970 and 2010.[60] The last new tax treaty—with Chile—was approved by the Senate in 2023.[61] All of these tax treaties and the protocols amending these treaties were approved as Article II treaties.[62] In addition, estate and gift taxes are covered under separate Article II treaties with several treaty partners.[63] While the U.S. tax treaty network covers most of the country's trading partners, it "has substantial gaps and is much less extensive than the treaty networks of other countries, such as the United Kingdom or the Netherlands."[64]

Prior to 2011, the need to obtain Senate advice and consent by a two-thirds vote did not hinder the expansion of the U.S. bilateral tax treaty network. While the Senate raised objections to certain elements of some treaties, most treaties and protocols were approved.[65] The "Senate generally gave its advice and consent to these treaties within a year or two of their signing."[66] Several factors may explain this bipartisan support; namely, (1) tax treaties generally reduce taxes and have long been supported by the business community, (2) they were not viewed as a partisan issue, and (3) Senate partisanship was generally lower.

This pattern of bipartisan support has changed since Senator Rand Paul joined the Senate in 2011.[67] Senator Paul has objected to information-sharing provisions of tax treaties, which he claims violate taxpayers' right to privacy under the Fourth Amendment.[68] He also contends that disclosing U.S. taxpayers' information to foreign tax authorities violates the taxpayers' due process rights.[69] Due to his objections, there has not been unanimous consent in the Senate to move to a vote on tax treaties and protocols.[70] While

59. *See* Reuven Avi-Yonah, Guest Editorial Note, *The First US Tax Treaty and Its Influence*, 52 INTERTAX 5, 5–6 (2024). France ratified the treaty in 1935. *See id.*

60. *See Table 3. List of Tax Treaties*, IRS (Sept. 26, 2025), https://www.irs.gov/pub/irs-lbi/table-3-list-of-tax-treaties.pdf [https://perma.cc/5T2V-WBNH]; *United States Income Tax Treaties – A to Z*, *supra* note 58.

61. Tax Convention, U.S.-Chile, Feb. 4, 2010, S. TREATY DOC. NO. 112-8 (entered into force Dec. 19, 2023).

62. Spiro, *supra* note 29, at 1003 n.195 ("Extradition, bilateral investment, and tax agreements, for example, all appear exclusively to have been concluded as Article II treaties.").

63. *Estate & Gift Tax Treaties (International)*, IRS (Sept. 8, 2025), https://www.irs.gov/businesses/small-businesses-self-employed/estate-gift-tax-treaties-international [https://perma.cc/5KK2-JKFJ].

64. Rocco V. Femia & Layla J. Aksakal, *The Use of Tax Treaty Status in Legislation and the Impact on U.S. Tax Treaty Policy*, 58 TAX NOTES INT'L 341, 341 (2010).

65. *See, e.g.*, *id.* at 342 n.5 (discussing the Senate's objections to treaties with Brazil and Argentina).

66. *Senate Gives Advice and Consent to Ratification of Four Bilateral Tax Treaties*, 113 AM. J. INT'L L. 818, 818 (2019).

67. *See id.*

68. *See* Ring, *supra* note 54, at 1197.

69. *See id.* at 1197–98.

70. *See Senate Gives Advice and Consent to Ratification of Four Bilateral Tax Treaties*, *supra* note 66, at 819.

the Senate can invoke cloture and end the debate with a sixty-senator vote, this has been done in this context only twice since 2011: to approve the protocols amending the treaties with Spain, Switzerland, Japan, and Luxembourg in 2019,[71] and to approve a new treaty with Chile in 2023.[72] Other tax treaties, such as the treaties signed with Croatia, Poland, and Vietnam, as well as the 2010 protocol amending the MAAC, are still awaiting Senate approval.[73]

As noted by Diane Ring:

> [A]lthough a single senator's power to block legislation may seem adequately counterbalanced by the option of cloture, the practical realities of pursuing cloture limit its effectiveness. Tax treaties, which apply only to cross-border taxpayers, were unlikely to have been a priority issue for most U.S. voters. When the treaties were sent back to the Senate Foreign Relations Committee, other more controversial matters and treaties occupied the forefront of foreign policy discussions . . . .[74]

Considering the difficulty of approving bilateral tax treaties and protocols due to Senator Paul's objections and the apparent lack of political pressure on Senator Paul outside the legislative process, it is possible that U.S. presidential administrations have not prioritized expanding and updating the U.S. tax treaty network.

It is not the Treaty Clause's two-thirds vote requirement that limits the U.S. government's ability to expand and update its bilateral treaty network—these treaties typically enjoy overwhelming support when they reach a vote in the Senate.[75] However, the ability of a senator to block a vote and the need for a cloture vote to overcome it under Senate rules have made it hard to expand and update the U.S. treaty network.

B. Executive Agreements

This Section discusses the increasing use of executive agreements in tax matters. Over the past decade especially, while approval of U.S. bilateral tax treaties has nearly ceased, there has been a significant increase in

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71. *See Senate Gives Advice and Consent to Ratification of Four Bilateral Tax Treaties*, *supra* note 66, at 819–20.

72. 169 CONG. REC. S2157–58 (daily ed. June 21, 2023).

73. *See* JASON R. CONNERY, SETH GREEN & QUYEN HUYNH, KPMG LLP, CURRENT STATUS OF U.S. TAX TREATIES AND INTERNATIONAL TAX AGREEMENTS 4–5, 10 (Jan. 1, 2026).

74. Ring, *supra* note 54, at 1201.

75. The protocols with Spain, Japan, Switzerland, and Luxembourg, and the treaty with Chile were approved by the votes of at least 93 senators. 169 CONG. REC. S2157–58; *Senate Gives Advice and Consent to Ratification of Four Bilateral Tax Treaties*, *supra* note 66, at 819–20.

bilateral executive agreements, primarily for information exchange for tax purposes.

1. Tax Information Exchange Agreements (TIEAs)

These agreements generally resemble the information exchange clauses in U.S. income tax treaties.[76] Current TIEAs cover many low-tax jurisdictions and tax havens, as well as countries in Central and South America with which there is no tax treaty.[77]

Entering TIEAs with specific Caribbean Basin countries is explicitly authorized under Code section 274(h)(6)(C)(i), which provides that "[t]he Secretary is authorized to negotiate and conclude an agreement for the exchange of information with any beneficiary country." The term "beneficiary country" includes Bermuda and any beneficiary country under section 212(a)(1)(A) of the Caribbean Basin Economic Recovery Act.[78] This section does not authorize entering information exchange agreements with non-beneficiary countries (i.e., countries that are not "beneficiary countries" within this definition).

Section 274(h) further provides that an exchange of information agreement shall generally

> provide for the exchange of such information (not limited to information concerning nationals or residents of the United States or the beneficiary country) as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure

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76. *See Tax Information Exchange Agreements (TIEAs)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/tax-information-exchange-agreements-tieas [https://perma.cc/HC6T-9ZYQ]; U.S. MODEL INCOME TAX CONVENTION, art. 26 (U.S. DEP'T OF THE TREASURY, 2016). While these agreements aim to deter and detect tax evasion, their effectiveness might have been limited. *See, e.g.*, David M. Kemme, Bhavik Parikh & Tanja Steigner, *Tax Havens, Tax Evasion and Tax Information Exchange Agreements in the OECD*, 23 EUR. FIN. MGMT. 519, 521 (2017). However, these agreements and the information exchange provisions in tax treaties can be seen as an important step in developing the information exchange framework that later evolved into more effective automatic exchange of information standards.

77. For a complete list of TIEAs in force, see CONNERY ET AL., *supra* note 73, at 9–10 (listing the following jurisdictions as having TIEAs in force with the United States: Antigua & Barbuda, Argentina, Aruba, Bahamas, Bermuda, Brazil, British Virgin Islands, Cayman Islands, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, Gibraltar, Grenada, Guernsey, Guyana, Honduras, Hong Kong, Isle of Man, Jersey, Liechtenstein, Marshall Islands, Mauritius, Monaco, Netherlands Antilles, Panama, Peru, Singapore, St. Lucia, Uruguay; this publication also lists TIEAs with Mexico, Barbados, Jamaica, and Trinidad & Tobago that were subsequently replaced with tax treaties with the United States).

78. I.R.C. §§ 212(a)(1)(A), 274(h)(6)(B), (C)(i).

> provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares.[79]

The position that Congress has authorized the executive branch to enter information exchange agreements with non-beneficiary countries has relied on a broad judicial interpretation of the now-repealed section 927(e)(3). Section 927(e)(3) provided that the term "foreign sales corporation" (FSC) shall not include any foreign corporation unless there is between the corporation's country and the United States "a bilateral or multilateral agreement described in section 274(h)(6)(C) (determined by treating any reference to a beneficiary country as being a reference to any foreign country . . .)." Unlike section 274(h)(6)(C), section 927(e)(3) did not explicitly authorize the executive branch. It merely granted special status to specific foreign corporations where there is an information exchange agreement with the country of such corporations.

Yet, the Fifth Circuit in *Barquero v. United States*[80] found that section 927(e)(3) "authorizes the President to enter into TIEAs" with any country, not only specific beneficiary countries. The court stated:

> Prior to 1986, only beneficiary countries that had entered into TIEAs with the United States could serve as host countries for FSCs. However, Congress, through the 1986 amendments, opted to allow any foreign country to enter into a TIEA and become eligible to be a host country . . . . If the Executive lacked the power to enter into TIEAs with non-beneficiary countries, the 1986 amendment to § 927(e)(3) would serve no apparent purpose—an absurd result. Thus, we believe §§ 274(h)(6)(C) and 927(e)(3), when read together, provide specific congressional authorization for the President's decision to enter into the challenged TIEA.[81]

Congress repealed section 927 in 2000 as part of the repeal of the FSC regime,[82] following a successful WTO challenge.[83] After the repeal of this

79. I.R.C. § 274(h)(6)(C)(i). I.R.C. § 274(h)(6)(C)(ii) allows for the nondisclosure of certain qualified confidential information sought for civil tax purposes if specific requirements are met. I.R.C. § 274(h)(6)(D) provides that such exchange of information agreement "shall be treated as an income tax convention for purposes of section 6103(k)(4)," which permits the disclosure of a return or return information to foreign competent authorities "to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement." I.R.C. § 6103(k)(4). I.R.C. § 274(h)(6)(D) also provides that the "Secretary may exercise his authority under subchapter A of chapter 78 to carry out any obligation of the United States under an agreement referred to in subparagraph (C)."

80. 18 F.3d 1311, 1314 (5th Cir. 1994).

81. *Id.*

82. FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, § 2, 114 Stat. 2433, 2433.

83. Susan Morse, *Why FATCA Intergovernmental Agreements Bind the U.S. Government*, 70 TAX NOTES INT'L 245, 246 (2013).

section, there is no statutory authorization for entering into exchange of information agreements with countries other than specific Caribbean Basin countries. Consequently, one could argue that the executive branch has had no statutory pre-approval to enter into information exchange agreements with non-beneficiary countries since 2000.[84] Susan Morse, expressing a different view, noted that the repeal of section 927 "need not be interpreted as a congressional retreat from the endorsement of Treasury's negotiations of TIEAs," partly because this section was repealed for an unrelated trade reason.[85] She further noted that "the U.S. has over the last several years entered into a significant number of TIEAs that follow the OECD's information-on-request model. These are generally treated as valid agreements despite the lack of Senate advice and consent."[86] The weakness in this position is that congressional-executive agreements must have legislation approving them either ex ante or ex post. There is no such legislation for any agreement signed with non-beneficiary countries since 2000. Thus, the legal status of such agreements is questionable.

2. *FATCA Intergovernmental Agreements (IGAs)*

The Foreign Account Tax Compliance Act (FATCA), enacted in 2010, requires foreign financial institutions (FFIs) to identify their U.S. account holders and report them directly to the Internal Revenue Service.[87] FFIs that fail to comply with FATCA face steep penalties in the form of a 30 percent withholding tax on certain U.S. source payments.[88] The FATCA

84. Agreements with non-beneficiary countries entered after the repeal of I.R.C. § 927 include, among others, TIEAs with Brazil, Colombia, Costa Rica, Ecuador, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Liechtenstein, Mauritius, Monaco, Panama, Singapore, and Uruguay. CONNERY ET AL., *supra* note 73, at 9.

85. Morse, *supra* note 83, at 246. Congress repealed the FSC rules following World Trade Organization rulings.

86. *Id.*

87. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, §§ 501–535, 124 Stat. 71, 97–115 (2010). For further background about FATCA, see WILLIAM H. BYRNES, LEXISNEXIS GUIDE TO FATCA AND CRS COMPLIANCE (2025); Noam Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*, 22 FLA. TAX REV. 77 (2018). FATCA is described by the IRS as "an important development in U.S. efforts to combat tax evasion by U.S. persons holding accounts and other financial assets offshore." *Summary of FATCA Reporting for U.S. Taxpayers*, IRS (Sept. 18, 2025), https://www.irs.gov/businesses/corporations/summary-of-fatca-reporting-for-us-taxpayers [https://perma.cc/7WFG-D995]. Empirical studies have documented multi-billion-dollar reductions in investment flows from tax havens following FATCA implementation. *See, e.g.*, Lisa de Simone, Rebecca Lester & Kevin Markle, *Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)*, 58 J. ACCT. RSCH. 105 (2020). As discussed below, much of the global FATCA implementation is facilitated under the IGAs. While FATCA has significantly increased tax transparency, more reforms are required in order to counter tax evasion effectively. *See, e.g.*, Noam Noked, *Tax Evasion and Incomplete Tax Transparency*, 7 LAWS, issue no. 3, art. no. 31 (2018); Noam Noked & Zachary Marcone, *The International Response to the U.S. Tax Haven*, 48 YALE J. INT'L L. 177 (2023); Noam Noked & Zachary Marcone, *Closing the "Shell Bank" Loophole*, 64 VA. J. INT'L L. 119 (2023).

88. I.R.C. § 1472(a).

Intergovernmental Agreements (IGAs) follow two models.[89] Under Model 1 IGAs, FFIs report the required information to their domestic tax authorities, which then pass it on to the IRS. Under Model 2 IGAs, FFIs report the information directly to the IRS.[90] Since around the time FATCA implementation started in 2014, more than 100 jurisdictions have entered into IGAs (most of which follow Model 1) with the U.S. Treasury.[91] These IGAs offer several advantages for governments and FFIs, including government-to-government reporting under Model 1 IGAs (thereby removing problems of domestic-law restrictions on direct reporting from FFIs to the IRS), fewer withholding tax obligations and risks, somewhat simpler compliance obligations, and broader exemptions.[92] The IRS has entered into around eighty FATCA competent authority arrangements (CAAs) with IGA partners, covering many financial centers and offshore jurisdictions.[93]

FATCA itself does not provide any statutory pre-approval for IGAs. Section 1474(f) authorizes the Treasury Secretary to "prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of, and prevent the avoidance of, this chapter."[94] In addition, section 1471(b)(2) generally provides that an FFI may be treated as meeting the FATCA requirements if it meets the requirements prescribed by the Treasury Secretary or is a member of a class of FFIs with respect to which the Secretary has determined that the application of FATCA is not required to carry out the purposes of FATCA.[95] While these sections authorize the Treasury Secretary to promulgate regulations and issue guidance, they do not include any congressional authorization to enter into international agreements.

The preamble to the FATCA regulations explains that the IGAs aim to "facilitate the effective and efficient implementation of FATCA in a manner that removes domestic legal impediments to compliance, fulfills FATCA's policy objectives, and further reduces burdens on FFIs located in partner

89. *FATCA Information for Governments*, IRS (Feb. 5, 2026), https://www.irs.gov/businesses/corporations/fatca-governments [https://perma.cc/9BPG-TJ2J].

90. *See id.*

91. For a list of the IGAs, see *Foreign Account Tax Compliance Act*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act [https://perma.cc/R2KN-ANUY].

92. For further discussion, see Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*, *supra* note 87, at 85–86.

93. *See Competent Authority Arrangements*, IRS (Jan. 15, 2026), https://www.irs.gov/individuals/international-taxpayers/competent-authority-arrangements [https://perma.cc/F6D2-4J4N]. The CAAs are made pursuant to the IGAs to implement the procedures provided therein.

94. I.R.C. § 1474(f).

95. I.R.C. § 1471(b)(2).

jurisdictions."[96] However, the FATCA regulations do not identify the legal basis for these agreements. Different versions of the IGAs have been developed for situations where there is a preexisting tax treaty or TIEA and situations where there is no such agreement in place.[97]

As observed by Allison Christians, the legal pedigree of IGAs is uncertain.[98] These agreements are not congressional-executive agreements because there is no statutory pre-authorization for the Treasury Department to enter into them.[99] Several IGAs have been entered into with jurisdictions with which there is no tax treaty or TIEA in place.[100] Such agreements cannot be considered as executive agreements entered into under the authority of an existing treaty. Several IGAs are with non-beneficiary countries and jurisdictions (such as Hong Kong and Singapore) with which TIEAs have been entered after the repeal of section 927(e)(3), putting into question the validity of these TIEAs and the respective IGAs.[101] Regarding IGAs with treaty jurisdictions, Christians questions whether the IGAs can be considered as agreements entered into under the authority of an existing treaty.[102] She argues that the IGAs go far beyond interpreting existing treaty provisions, as "their purpose is to incorporate a newly enacted U.S. law," which overrides treaties "by more than doubling the typical rate of tax called for under the treaty unless the new information gathering and reporting regimes are adopted and implemented."[103] Furthermore, other countries (with some exceptions) have treated the IGAs as international agreements that override existing treaties and require internal ratification in order to come into effect.[104] In response, Morse argues that the IGAs could be considered as treaty-based agreements pursuant to the information exchange provisions in U.S. treaties. She further contends that FATCA is consistent with U.S. treaties because it "only imposes an information requirement relating to certification of treaty eligibility in order to avoid a withholding tax."[105]

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96. Preamble to Final Regulations Relating to Information Reporting by FFIs and Withholding on Certain Payments to FFIs and Other Foreign Entities, 78 Fed. Reg. 5874, 5874–78 (Jan. 28, 2013) (to be codified at 26 C.F.R. pts. 1, 301).

97. *Foreign Account Tax Compliance Act*, *supra* note 91.

98. *See* Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why It Matters)*, 69 TAX NOTES INT'L 565 (2013).

99. *See id.* at 566. As discussed in Section II.B.1, there is little support for the position that IGAs with non-beneficiary countries should be considered exchange of information agreements pre-authorized by Congress under I.R.C. § 274(h)(6)(C)(i).

100. *See Foreign Account Tax Compliance Act*, *supra* note 91.

101. *See supra* Section II.B.1.

102. *See* Christians, *supra* note 98, at 566–67.

103. *See id.* at 567.

104. *Id.*

105. Morse, *supra* note 83, at 247. She also expresses the position that the IGAs bind the U.S. government as administrative guidance even if they are not legally valid as international agreements. *Id.*

If IGAs are not congressional-executive agreements or agreements entered into under the authority of an existing treaty, the remaining category is sole executive agreements. Christians noted, "Sole executive agreements are extremely controversial in U.S. law. Constitutional scholars either reject them outright as a viable alternative to treaties and congressional-executive agreements or begrudgingly allow that they might be viable for administrative or routine matters."[106]

The Sixth Circuit in *Crawford v. Department of the Treasury* dismissed a constitutional challenge to the validity of the IGAs on standing grounds.[107] The plaintiffs argued that the IGAs are "unconstitutional sole executive agreements that exceed the scope of the President's constitutional power because they are not authorized by Congress through the ordinary legislative process."[108] They contended that:

> [T]he only constitutionally permissible means by which the executive branch may make international agreements are by the Treaty Clause, an Act of Congress, a provision in an existing treaty, or the President's independent constitutional foreign-affairs power—which Plaintiffs claim does not include the power to impose a tax or to create a tax-collection mechanism like the IGAs.[109]

However, as noted, these claims were dismissed on standing grounds.[110]

3. *Competent Authority Agreements for Country-by-Country Reporting*

The OECD published the country-by-country reporting (CbCR) standard in 2015.[111] It is an important part of the OECD's project on Base Erosion and Profit Shifting (the BEPS project), which aims to curb cross-border corporate tax avoidance.[112] CbCR requires in-scope MNEs to report certain information about their operations in every jurisdiction where they

106. *See* Christians, *supra* note 98, at 567.
107. Crawford v. Dep't of the Treasury, 868 F.3d 438, 450 (6th Cir. 2017).
108. *Id.*
109. *Id.*
110. *Id.* For further discussion, see ERIKA K. LUNDER & CAROL A. PETTIT, CONG. RSCH. SERV., R44616, FATCA REPORTING ON U.S. ACCOUNTS: RECENT LEGAL DEVELOPMENTS 10–11 (2016).
111. *See* OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING, ACTION 13: 2015 FINAL REPORT 9 (2015), https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/10/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report_g1g58cf0/9789264241480-en.pdf [https://perma.cc/VJC3-3A3L]. For further discussion on CbCR and its importance, see TRADE UNION ADVISORY COMM. TO THE OECD, THE CASE FOR MAKING COUNTRY-BY-COUNTRY PUBLIC (2016), https://tuac.org/wp-content/uploads/2017/12/1606t_beps_cbc-rev-1.pdf [https://perma.cc/5GJX-BFYY] (noting that CbCR "is rightly considered to be a game changer on the anti-tax avoidance front"); Noam Noked, *Public Country-by-Country Reporting: The Shareholders' Case for Mandatory Disclosure*, 90 TAX NOTES INT'L 1501 (2018).
112. *See* OECD, *supra* note 111.

operate.[113] After the MNE's ultimate parent entity (UPE) files the report for the whole MNE with the UPE jurisdiction's tax authority, the UPE jurisdiction is expected to share the reported information with other jurisdictions where the MNE group operates if there is an information exchange relationship with these jurisdictions and they meet certain requirements regarding confidentiality and appropriate use.[114]

The U.S. government started implementing CbCR in 2016 without any new legislation or treaty.[115] The U.S. Treasury imposed the reporting obligations on U.S. MNEs by promulgating regulations pursuant to section 6038 of the Code.[116] This section provides that the Treasury Secretary may prescribe reporting requirements for U.S. persons with respect to any foreign business entity they control.[117] This information may include the foreign business's name, principal place, nature, country of incorporation, balance sheet, and transactions with the U.S. person or entities controlled or owned by that person; information regarding other U.S. owners; and "any other information which is similar or related in nature" to the information items above.[118] It is uncertain whether this section authorizes the Treasury Secretary to mandate the reporting of all the information required under CbCR. Jason Osborn and Warren Payne note,

> Although section 6038 provides Treasury with the authority to collect a variety of data, it does not explicitly authorize Treasury to collect some of the information required for the full implementation of [CbCR]. For example, section 6038 does not clearly authorize Treasury to collect information on profits or losses or employees, each of which is explicitly required under [CbCR].[119]

To facilitate the exchange of the CbCR information, the IRS entered into over fifty CAAs for the CbCR information exchange.[120] These CAAs were

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113. *Id.*

114. *Id.* at 23.

115. *See* JAMES R. MCTIGUE, JR. ET AL., U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-103, INTERNATIONAL TAXATION: INFORMATION ON THE POTENTIAL IMPACT ON IRS AND U.S. MULTINATIONALS OF REVISED INTERNATIONAL GUIDANCE ON TRANSFER PRICING 7 (2017), https://www.gao.gov/assets/gao-17-103.pdf [https://perma.cc/X56S-98F8]; JANE G. GRAVELLE, CONG. RSCH. SERV., R44900, BASE EROSION AND PROFIT SHIFTING (BEPS): OECD/G20 TAX PROPOSALS 26 (2021).

116. Treas. Reg. § 1.6038-4.

117. I.R.C. § 6038(a)(1).

118. *Id.*

119. Jason M. Osborn & Warren S. Payne, *OECD Releases Country-by-Country Reporting Implementation Package; U.S. Implementation Unclear*, MAYER BROWN (June 15, 2015), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/06/oecd-releases-countrybycountry-reporting-implement/files/get-the-full-report/fileattachment/150615-update-tax-it.pdf [https://perma.cc/3TR4-A9AN].

120. *Country-by-Country Reporting Jurisdiction Status Table*, IRS (July 14, 2025), https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table [https://perma.cc/8U8T-5YH4].

made pursuant to a TIEA, tax treaty, or the MAAC.[121] The IRS notes,

> The IRS will exchange Form 8975 information automatically with tax authorities with which the United States enters into a bilateral Competent Authority Arrangement. However, a U.S. MNE group's information will only be exchanged with those countries in which the U.S. MNE group reports doing business. Exchanged information is confidential and protected pursuant to the applicable legal instrument permitting exchange.[122]

Osborn and Payne question whether the Treasury had the authority to enter into these CAAs and conduct this information exchange. They note that "section 6038 does not provide any authority for Treasury to share that information with other countries. Although U.S. tax treaties permit Treasury to share certain information with the treaty partner the scope of the information sharing in [CbCR] may exceed what Treasury is authorized to provide to the treaty partner."[123] However, this critique is questionable where the CAA is entered into pursuant to a valid agreement authorizing the automatic exchange of information for tax purposes.

4. Shipping and Aviation Agreements

The final category of commonly used international tax agreements includes shipping and aviation agreements. The U.S. government has entered into over forty reciprocal shipping and aviation agreements.[124] Sections 872(b) and 883(a)(1) provide a reciprocal exemption for income from certain shipping and aviation activities if the other country provides an equivalent exemption to U.S. taxpayers. Treasury regulations provide that an "equivalent exemption may exist where the foreign country . . . exchanges diplomatic notes with the United States, or enters into an agreement with the United States, that provides for a reciprocal exemption for the purpose of section 883."[125] The IRS has published revenue rulings containing "a list of countries that grant an equivalent exemption as

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121. *See id.* For the three model CAAs, see *Country-by-Country Reporting Guidance*, IRS (May 20, 2025), https://www.irs.gov/businesses/international-businesses/country-by-country-reporting-guidance [https://perma.cc/D4FG-KYV5].

122. *U.S. Multinational Enterprises*, IRS (Jan. 16, 2026), https://www.irs.gov/businesses/international-businesses/us-multinational-enterprises [https://perma.cc/4F6F-6LKT].

123. Osborn & Payne, *supra* note 119.

124. CONNERY ET AL., *supra* note 73, at 14–15.

125. Treas. Reg. § 1.883-1(h)(1)(iii) (an equivalent exemption may also exist where the foreign country generally does not impose income tax or provides an exemption for the shipping or aviation income, "either by statute, decree, income tax convention, or otherwise"); Treas. Reg. § 1.872-2(a)(2) does not mention the option of exchanging a diplomatic note or entering into an agreement with the United States.

evidenced by a diplomatic note exchanged with the United States."[126] These publications also include a list of countries that grant an equivalent exemption to U.S. corporations without an agreement with the United States.[127]

These are sole executive agreements. They are unlikely to be considered congressional-executive agreements because there is no statutory authority for the executive branch to enter into these agreements. They are not entered into pursuant to any existing treaty.

These agreements serve an important role in implementing the reciprocal statutory shipping and aviation exemptions. The executive branch needs to determine which countries grant an equivalent exemption to the reciprocal U.S. exemption. The agreements' main function is to confirm that the foreign jurisdiction provides a reciprocal exemption, which provides certainty regarding the application of the U.S. statutory exemption. The statutory U.S. reciprocal exemption is self-executing in the sense that it applies automatically if the relevant foreign country grants a similar exemption to U.S.-owned ships.[128] As discussed in the next section, pending legislation proposes adopting a similar model for statutory reciprocal treaty-like tax benefits that apply if the other jurisdiction provides similar benefits.

C. United States-Taiwan Expedited Double-Tax Relief Act

While U.S. administrations have increased the use of executive agreements for information exchange for tax purposes, tax treaties have remained within the domain of the Senate's advice and consent authority. This may soon change if Congress passes the United States-Taiwan Expedited Double-Tax Relief Act.[129] The House of Representatives passed this bill in January 2025, and it is now in the Senate Committee on Finance.[130] The bill includes two parts. The first part (titled "United States-Taiwan Expedited Double-Tax Relief Act") provides statutory treaty-like tax benefits to Taiwanese residents, provided that Taiwan reciprocates by granting similar benefits to U.S. persons.[131] This follows the model of the

126. Rev. Rul. 2008-17, 2008-12 I.R.B. 626, 626–27. This Revenue Ruling updated the previous ruling. Rev. Rul. 2001-48, 2001-2 C.B. 324.

127. *See* Rev. Rul. 2008-17, 628–32; *see also* Rev. Rul. 2001-48.

128. *See* Jim Border, *U.S. Ends Hong Kong Transportation Agreement: The 'Principle of Least' Upended?*, LAW OFF. OF JAMES R. BORDER (June 28, 2022), https://globaltaxes.net/2022/06/28/u-s-ends-hong-kong-transportation-agreement-the-principle-of-least-upended/ [https://perma.cc/HA79-JHD7].

129. H.R. 33, 119th Cong. (as passed by House, Jan. 15, 2025).

130. *Id.*

131. *Id.* sec. 102, § 894(e)(1) ("This section shall not apply to any period unless the Secretary has determined that Taiwan has provided benefits to United States persons for such period that are reciprocal to the benefits provided to qualified residents of Taiwan under this section."); *id.* § 894(e)(2) ("The

shipping and aviation statutory reciprocal exemption but expands it to broader treaty benefits, such as reduced withholding taxes on dividends, interest, and royalties, and other standard tax treaty provisions. The bill provides the Treasury Secretary with the authority to determine that Taiwan provides reciprocal benefits [132] and to issue regulations or guidance consistent with the provisions of the U.S. model income tax treaty.[133]

The second part of the bill (titled "United States-Taiwan Tax Agreement Authorization Act") provides a statutory framework for a tax treaty to be approved as a congressional-executive agreement. After determining that Taiwan provides reciprocal tax benefits to U.S. persons, "the President is authorized to negotiate and enter into a tax agreement relative to Taiwan."[134] The agreement should conform to the U.S. model treaty and will take effect upon the enacting of certain legislation and confirmation by the Treasury Secretary that Taiwan has taken the actions required to implement the agreement.[135] The President is required to consult with Congress during the negotiations.[136] After an agreement is reached, it must be approved by Congress in so-called "Approval Legislation" (to be referred to the Committee on Foreign Relations in the Senate) and "Implementing Legislation" (to be referred to the Committee on Finance in the Senate). The Ways and Means Committee in the House of Representatives will hear both the Approval Legislation and the Implementing Legislation.[137]

The bill acknowledges that the United States has addressed issues of double taxation with foreign countries through bilateral Article II tax treaties.[138] However, "[d]ue to Taiwan's unique status, the United States is unable to enter into an article II tax treaty with Taiwan, necessitating an agreement to address issues with respect to double taxation."[139] The "Statement of Policy" in the bill notes, "It is the policy of the United States to . . . continue to provide for bilateral tax relief with sovereign states to address double taxation and other related matters through entering into bilateral income tax conventions, subject to the Senate's advice and consent to ratification pursuant to article II of the Constitution."[140] Thus, Congress signals that this innovation—approving a tax treaty as statutory reciprocal

President or his designee is authorized to exchange letters, enter into an agreement, or take other necessary and appropriate steps relative to Taiwan for the reciprocal provision of the benefits described in this section.").

132. *Id.*
133. S. 199, 119th Cong. sec. 102, § 894A(f) (2025).
134. H.R. 33 sec. 203(a).
135. *Id.* sec. 203(b)(4).
136. *Id.* sec. 204.
137. *Id.* sec. 207.
138. *Id.* sec. 210(a)(1).
139. *Id.* sec. 210(a)(3).
140. *Id.* sec. 210(b)(2).

treaty-like benefits and a congressional-executive agreement—is intended exclusively for Taiwan. While this statement may reflect Congress's future intentions, it is unlikely to resolve any constitutional issues arising from using a congressional-executive agreement rather than the Article II treaty process. If the Constitution mandates approval of bilateral tax treaties as Article II treaties, considerations unique to Taiwan and Congress's intent to continue Article II approvals for other treaties are unlikely to justify an exception.

Both parts of the bill are unprecedented and may affect future developments of U.S. tax treaties and agreements. When approving tax treaties as Article II treaties would be challenging, Congress may prefer to pass legislation granting statutory treaty-like tax benefits conditioned on reciprocity. It is possible that such legislation can be passed through a reconciliation process, subject to a simple majority vote in the Senate in addition to a simple majority vote in the House of Representatives.[141]

Moreover, approving this tax treaty as a congressional-executive agreement sets a precedent in the interchangeability debate concerning tax treaties, as it establishes that tax treaties may be approved as either Article II treaties or congressional-executive agreements.[142] The bill's Statement of Policy explains that this mechanism is not intended to change the U.S. policy of approving tax treaties as Article II treaties.[143] Nonetheless, this is a break in tradition and a precedent that may be followed in the future.

III. IMPACT ON INTERNATIONAL TAX STANDARDS

This Part explores how the difficulty of entering into treaties with the United States has influenced the instrument choice and design of international tax standards. Section A discusses the only multilateral tax convention to which the United States is a party. Section B examines the failed Pillar One reform, which the Biden administration considered implementing through a congressional-executive agreement. Section C discusses international tax standards which employ treaty avoidance strategies.

141. *See generally* BILL HENIFF JR., CONG. RSCH. SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2022); MEGAN S. LYNCH & JAMES V. SATURNO, CONG. RSCH. SERV., R44058, THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION (2021). Whether such legislation would satisfy the requirements of the Byrd rule is beyond the scope of this Article.

142. *See supra* text accompanying note 24. Notably, the requirement to approve an agreement by the Foreign Relations Committee means that it cannot be approved by budget reconciliation, and thus it may need a cloture vote of sixty senators to end debate. See the sources cited *supra* note 141 for information about the budget reconciliation process.

143. *See supra* text accompanying note 140.

A. Convention on Mutual Administrative Assistance in Tax Matters

The MAAC is the only multilateral tax treaty to which the United States is a party.[144] It was developed by the OECD and the Council of Europe in 1988 and subsequently amended in 2010.[145] According to the OECD, the MAAC "is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance,"[146] with the participation of over 150 jurisdictions.[147] The convention facilitates various administrative assistance forms, including all types of information exchange, simultaneous tax examinations, assistance in recovery of tax claims, and other forms of administrative assistance.[148]

The United States signed the original 1988 convention in 1989, and the Senate approved it as an Article II treaty in 1991.[149] It entered into force in 1995.[150] The U.S. administration signed the 2010 protocol amending the convention and submitted it for the Senate's advice and consent in 2012.[151] As discussed in Part II, the protocol has not proceeded to a Senate vote because of Senator Paul's objection.[152] This makes the United States the only country that is a signatory to the original convention but not to the 2010

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144. *See* CONNERY ET AL., *supra* note 73, at 9.

145. For further background, see *Convention on Mutual Administrative Assistance in Tax Matters*, OECD, https://www.oecd.org/en/topics/convention-on-mutual-administrative-assistance-in-tax-matters.html [https://perma.cc/W9F9-GURH] [hereinafter *OECD, Topics: MAAC*]. For a discussion of the 2010 protocol and its amendments, see S. EXEC. REP. NO. 114-8 (2016), https://www.congress.gov/committee-report/114th-congress/executive-report/8/1 [https://perma.cc/8DXS-6SPB].

146. *Id.* For further discussion on the MAAC and its importance, see Michael Littlewood, *Multilateral Tax Reform*, *in* INTERNATIONAL TAX AT THE CROSSROADS 193, 207–08 (Craig Elliffe ed., 2023).

147. *Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters*, OECD (Feb. 17, 2026), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/convention-on-mutual-administrative-assistance-in-tax-matters/status_of_convention.pdf [https://perma.cc/3L5C-VVEB] [hereinafter *Jurisdictions Participating in the MAAC*].

148. *See OECD, Topics: MAAC*, *supra* note 145.

149. *See Jurisdictions Participating in the MAAC*, *supra* note 147, at 6. The approval was subject to several reservations, which excluded assistance in recovery of taxes, as well as other provisions. *See* Bruce Zagaris, *OECD Convention on Mutual Administrative Assistance in Tax Matters*, 24 INT'L LAW. 872 (1990).

150. Convention on Mutual Administrative Assistance in Tax Matters, June 28, 1989, S. TREATY DOC. NO. 101-15 (entered into force Apr. 1, 1995), https://www.state.gov/wp-content/uploads/2019/02/95-401-Multilateral-Taxation-OECD.pdf [https://perma.cc/7KPN-5544]; Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, May 27, 2010, S. TREATY DOC. NO. 112-5, https://www.congress.gov/treaty-document/112th-congress/5/document-text [https://perma.cc/8XQ3-4G36].

151. *Id.* at III ("The proposed Protocol amends the existing Convention in order to bring it into conformity with current international standards on exchange of information, as reflected in the Organization for Economic Co-operation and Development's (OECD) Model Tax Convention on Income and Capital and the current U.S. Model Income Tax Convention. Furthermore, it updates the existing Convention's rules regarding the confidentiality and permitted uses of exchanged tax information, and opens the existing Convention to adherence by countries other than OECD and Council of Europe members.").

152. *See supra* Section II.A.

protocol.[153] Unlike with the four tax treaty protocols approved in 2019 and the new tax treaty with Chile in 2023, the Senate has not used cloture to end debate on the protocol amending the MAAC.

B. Pillar One

This attempted international tax reform has stalled because of congressional inaction.[154] Pillar One, agreed upon in 2021 by the Biden administration and over 130 jurisdictions, aims to change the way the residual profits of large MNEs are taxed.[155] If implemented, this reform would allocate certain residual profits (referred to as "Amount A") of in-scope MNEs to market jurisdictions.[156] This reform would apply to MNEs with a global turnover above 20 billion euros and profitability above 10 percent.[157] Amount A will be calculated as 25 percent of the in-scope MNEs' residual profits, defined as profits in excess of 10 percent of revenues.[158] Market jurisdictions where goods are used or services are consumed will have the right to tax the Amount A allocated to them.[159]

Amount A is to be implemented through a multilateral convention (MLC), which was originally expected to be signed in 2022 and become effective in 2023.[160] In addition to the MLC, countries may need to enact domestic laws and regulations for the implementation of Pillar One.[161] The OECD published the MLC in October 2023 after a long delay.[162] By design,

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153. *See Jurisdictions Participating in the MAAC*, *supra* note 147.

154. *See* Noam Noked, *"Congress-Proof" International Tax Reforms*, 100 TUL. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5256594 [https://perma.cc/E8JA-H4TB].

155. *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD (Oct. 8, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [https://perma.cc/3XZ4-DQZU] [hereinafter *Statement on a Two-Pillar Solution*]. For further discussion on Pillar One and its potential importance, see REUVEN S. AVI-YONAH & YOUNG RAN (CHRISTINE) KIM, THE INTERNATIONAL TAX REVOLUTION (2025); John Vella, *What Is Wrong with the International Business Tax System?*, 27 J. INT'L ECON. L. 596 (2025).

156. *See Statement on a Two-Pillar Solution*, *supra* note 155, at 1–3.

157. *Id.* The threshold is expected to decrease to 10 billion euros after seven years of successfully implementing Pillar One and a one-year review period. *Id.*

158. *Id.*

159. *Id.* at 2. The OECD estimated in 2023 that Pillar One is "expected to allocate taxing rights on about USD 200 billion in profits to market jurisdictions annually," which is "expected to lead to annual global tax revenue gains of between USD 13–36 billion, based on 2021 data." *See* Press Release, OECD, Revenue Impact of International Tax Reform Better than Expected (Jan. 18, 2023), https://www.oecd.org/en/about/news/press-releases/2023/01/revenue-impact-of-international-tax-reform-better-than-expected.html [https://perma.cc/E2D3-LQNN].

160. *See Statement on a Two-Pillar Solution*, *supra* note 155, at 3.

161. *See id.*

162. *Multilateral Convention to Implement Amount A of Pillar One*, OECD (Oct. 11, 2023), https://www.oecd.org/en/topics/sub-issues/reallocation-of-taxing-rights-to-market-jurisdictions/multilateral-convention-to-implement-amount-a-of-pillar-one.html [https://perma.cc/MK6J-A595].

the MLC can only come into effect if the United States ratifies it. This is because the MLC will take effect when it is ratified by countries "representing a total of 600 points or more as set out in Annex I" of the MLC.[163] The United States is allocated 486 points out of a total of 999 points,[164] which means that meeting the 600-point threshold requires U.S. ratification. Since the publication of the MLC in 2023, it has not been opened for signature,[165] likely because the U.S. government is not expected to ratify it.

The conventional way for the United States to implement Pillar One would require Senate approval for the MLC as an Article II treaty and a legislative amendment to the Code.[166] According to Mindy Herzfeld, "domestic legislation might still be needed because the dispute resolution process contemplated by Congress requires the IRS to negotiate and sign off on matters involving U.S. taxpayers using authority the agency doesn't already have."[167] Other elements of Pillar One may also require legislation.[168]

However, the MLC was unlikely to ever receive two-thirds support in the Senate. As Herzfeld observed, the "U.S. Senate has struggled to ratify even bilateral tax agreements in recent years, and there is even less likelihood of ratification of a multilateral agreement with uncertain benefits for the U.S. fisc and potentially detrimental impact on U.S. benefits."[169]

Given this reality, the Biden administration considered alternative ways to implement Pillar One without approving it as an Article II treaty. Mindy Herzfeld noted, "[m]embers of the Biden administration have repeatedly said they are looking for ways to implement [Pillar One] that would not involve Senate ratification of a multilateral tax treaty. None of those paths are linear, and it is far from certain whether any can be accomplished."[170] Then-Treasury Secretary Janet Yellen stated in a Senate hearing in 2022 that "the ratification requires Congress's approval. I think there is no doubt

163. *Id.* at art. 48(b).

164. *Id.* at Annex I, tbl.2.

165. *See Pillar One Update from the Co-Chairs of the Inclusive Framework on BEPS*, OECD (Jan. 13, 2025), https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/pillar-one-update-co-chair-statement-inclusive-framework-on-beps-january-2025.pdf [https://perma.cc/S4V6-TCY3].

166. *See* Doug Sword & Cady Stanton, *A Look Ahead: World Still Moving on OECD Work, Even with Stasis on Capitol Hill*, 113 TAX NOTES INT'L 149, 150 (2024).

167. Mindy Herzfeld, *Can the United States Make Good on Its International Tax Commitments?*, 104 TAX NOTES INT'L 731, 734 (2021).

168. For example, the United States may need to change its charging provisions or source rules to tax foreign income classified as Amount A allocated to the United States.

169. Mindy Herzfeld, *How to Think About How the U.S. Congress Thinks About International Tax Reforms*, 2022 BRITISH TAX REV. 504, 525.

170. Herzfeld, *supra* note 167, at 735.

about it, but the form that that needs to take is still to be determined."[171] Neil MacBride, the Treasury Department's general counsel, said in his nomination hearing that Pillar One implementation "could occur through several means, such as through an Article II treaty, a congressional executive agreement, or through legislation overriding the existing treaties."[172]

On October 8, 2021, Senators Mike Crapo, James Risch, and Pat Toomey—then the ranking members of the Senate Finance, Foreign Relations, and Banking Committees, respectively—sent a letter to Secretary Yellen noting that they were "extremely concerned with the Administration's recent suggestions it is considering circumventing the Senate's constitutional treaty authority."[173] They referred to the possibility of implementing Pillar One through a congressional-executive agreement or legislation overriding existing treaties. They argued that "the nature of changes required to implement Pillar One necessitates the conclusion of a treaty, not a congressional-executive agreement or other legislative override." They expressed the position that significant changes to Article II treaties should be approved through an Article II treaty.[174] The letter noted, "Bypassing this process to override our bilateral tax treaties would irreparably erode the exclusive treaty authority the Constitution provides to the Senate."[175] Additionally, the letter raised concerns about U.S. companies' competitiveness if Pillar One were to be implemented without a multilateral treaty that provides a binding dispute resolution system.[176] Finally, the letter criticized the Biden administration for failing to "meaningfully consult our members on the potential treaty or legislative action that would be necessary to fully carry out the Pillar One agreement."[177] In another letter from December 2021, the Republican members of the Senate Finance Committee raised similar concerns, stating that "any suggestion that Pillar One can be implemented absent treaty

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171. *The President's Fiscal Year 2023 Budget: Hearing Before the S. Comm. on Fin.*, 117th Cong. 15 (2022) (testimony of Treasury Sec'y Yellen).

172. Herzfeld, *supra* note 167, at 731.

173. Letter from Mike Crapo, James E. Risch & Pat Toomey, U.S. Sens., to Janet Yellen, Sec'y of the Treasury (Oct. 8, 2021), https://www.finance.senate.gov/imo/media/doc/crapo_risch_toomey_letter_to_treasury.pdf [https://perma.cc/4C3R-N3PA].

174. *Id.* at 2 ("This fundamental change in taxing rights would require provisions within all of the United States' existing bilateral tax treaties to be modified or overridden. Each of these bilateral tax treaties was approved in the same manner—by a two-thirds vote of the Senate. Sweeping changes to modify these treaties and alter long-established protocols under these agreements must be processed through the same constitutionally mandated process.").

175. *Id.*

176. *Id.* This argument does not explain why a multilateral agreement (with a binding dispute resolution system) cannot be approved through a congressional-executive agreement together with implementing domestic legislation.

177. *Id.*

ratification is a dramatic shift from past precedent and calls into question the binding nature of any such agreement, thereby threatening the very tax certainty that many of our companies, and this Administration, claim to seek under Pillar One."[178]

These letters argue that an Article II treaty is not interchangeable with a congressional-executive agreement in this context. The fact that the interchangeability debate has not been resolved by the courts adds to the uncertainty regarding potential constitutional challenges: There is a risk that courts may void the MLC if it is approved as a congressional-executive agreement. As noted by Herzfeld, "[t]he odds of such an agreement holding up become even slimmer once the judiciary is taken into account."[179]

Eventually, the Biden administration did not make any public effort to advance Pillar One, which was described as "dead on arrival" in Congress.[180] The fact that the MLC takes effect only if the United States ratifies it gives a minority in the Senate (assuming the MLC should be approved as an Article II treaty) a veto power over the international rollout of Pillar One.[181] Robert Goulder asked, "[w]hy delegate effective veto power to the United States when it's abundantly clear that the MLC will never get close to 67 votes in the Senate?"[182] He noted,

> Seen for what it is, the MLC's point system is the equivalent of the French revolutionaries asking Louis XVI for permission to storm the Bastille. The point scheme makes sense only if you accept the premise that nothing can happen in international taxation without U.S. consent. OK, I get that it's the world's biggest economy—but if those are the ground rules, why bother to contemplate transformative change when the United States is content with the status quo?[183]

Even if Pillar One were to be implemented through legislation authorizing a congressional-executive agreement, it is unclear whether the required legislation could be passed through the reconciliation process to avoid the sixty-vote threshold for cloture in the Senate.[184] Herzfeld commented that "it's really questionable whether the reconciliation process

178. Letter from Mike Crapo et al. to Janet Yellen, *supra* note 30.

179. *See* Herzfeld, *supra* note 169, at 525.

180. *See, e.g.*, Reuven Avi-Yonah & Ajitesh Kir, *Building the Gateway: Why the Two Pillars Need Each Other*, 52 INTERTAX 591 (2024).

181. *See* Noked, *supra* note 154.

182. Robert Goulder, *Expectations for 2024: Pillar 1 Finds an Off-Ramp*, 112 TAX NOTES INT'L 1819, 1820 (2023).

183. *Id.*

184. Robert Goulder, *Pillar 1, Tax Treaties and Congressional Approval*, FORBES: TAX NOTES (Aug. 11, 2021), https://www.forbes.com/sites/taxnotes/2021/08/11/pillar-1-tax-treaties-and-congressional-approval/ [https://perma.cc/7JA5-ZGM4].

could be used for something like an international agreement."[185] In particular, it is doubtful whether Pillar One's dispute resolution mechanism satisfies the requirements under the Byrd rule.[186]

There are several lessons from the Pillar One saga. First, an international tax reform that requires U.S. Senate approval as an Article II treaty is likely to fail absent broad, bipartisan support. Second, future U.S. administrations may try to break from tradition and approve international tax reforms as congressional-executive agreements. While such agreements are more likely to be approved than Article II treaties, especially if they can be passed through the reconciliation process, it is uncertain whether this route is viable, either politically or constitutionally.

C. *"Treaty Avoidance" Strategies*

In addition to the failure of Pillar One, the difficulty of entering into treaties with the United States has influenced the development of other international tax standards. The most important impact has been the adoption of what we refer to as "treaty avoidance" strategies by U.S. administrations and foreign governments in the design of international tax standards: designing international tax reforms that can be implemented effectively without needing U.S. Senate approval for an Article II treaty.[187]

The first relevant category comprises standards that do not require any form of international agreement or treaty. Pillar Two,[188] changes to transfer pricing rules,[189] and some other international tax standards and reforms follow what has been described as "coordinated unilateralism" in international taxation. According to Ruth Mason, coordinated unilateralism involves "nonbinding standards that reflect pooled technical expertise, are set cooperatively, and are implemented via domestic law or administrative regulation rather than a treaty."[190] Rebecca Kysar stated that "the structure of the global tax deal shows that leveraging 'coordinated unilateralism,' or domestic measures that are heavily synchronized and enforced through multilateral processes, is a promising avenue for international economic governance as opposed to pursuing true multilateral treaties. Such

185. *Id.*

186. Herzfeld, *supra* note 167, at 734–35 (discussing whether the MLC would satisfy the requirements of the Byrd rule). This discussion is outside the scope of this Article.

187. *See* Noked, *supra* note 154 (discussing design strategies that do not require any congressional action).

188. *See id. See generally* AVI-YONAH & KIM, *supra* note 155 (further discussing Pillar Two and its importance).

189. These include various changes, such as BEPS Actions 8–10 and Pillar One's Amount B, among others. *See* Noked, *supra* note 154.

190. *See* Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 374 (2020).

unilateralism is most likely effective when coupled with mechanisms incentivizing adoption or discouraging defection."[191]

The second relevant category includes standards that require international agreements that can be entered into as executive agreements. As noted, TIEAs have been implemented through executive agreements. CbCR has been implemented through Treasury regulations and executive agreements (CAAs) that facilitate the information exchange pursuant to existing treaties, the MAAC, or TIEAs, which can also be entered into as executive agreements.[192] The Crypto-Asset Reporting Framework could be partially implemented in a similar manner.[193]

When considering the use of executive agreements in lieu of Article II treaties in this context, it is helpful to distinguish between two distinct issues concerning the approval of tax agreements as Article II treaties. The first is the difficulty of approving bilateral tax treaties due to Senator Paul's objections. The second is the broader congressional opposition to certain international tax reforms, such as Pillar One. Executive agreements have been used to address, to some extent, the first problem by entering into TIEAs and other executive agreements that would have likely been blocked had they been submitted to the Senate as Article II treaties. However, it would be difficult for the executive branch to use executive agreements without congressional approval to address the second problem. To implement controversial reforms, congressional-executive agreements with explicit congressional approval are likely to face fewer political and legal challenges than agreements without clear congressional authorization.

Multilateral treaties continue to play an important role, but only where U.S. non-participation does not undermine the treaties' purpose. A notable example is the Multilateral Instrument (MLI)—a multilateral convention used to modify bilateral tax treaties to implement reforms from the BEPS project.[194] Since its opening in 2017, over 100 jurisdictions, including

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191. *See* Rebecca M. Kysar, *The Global Tax Deal and the New International Economic Governance*, 74 TAX L. REV. 171, 180–81, 240 (2024).

192. *See supra* Section II.B.3.

193. *See* Noked, *supra* note 154. Legislation is required for the reporting of controlling persons of entity crypto owners because "[t]he IRS does not have authority to require digital asset exchanges to report on controlling persons of many shell companies and therefore cannot provide that information to other countries." PRESIDENT'S WORKING GRP. ON DIGIT. ASSET MKTS., NAT'L ECON. COUNCIL, STRENGTHENING AMERICAN LEADERSHIP IN DIGITAL FINANCIAL TECHNOLOGY 137 (2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Digital-Assets-Report-EO14178.pdf [https://perma.cc/7B5N-FPZH]. It appears that other reporting obligations under this reporting standard can be implemented within the existing statutory framework. *Id.*

194. *BEPS Multilateral Instrument*, OECD, https://www.oecd.org/en/topics/sub-issues/beps-multilateral-instrument.html [https://perma.cc/6TDL-8HPB].

nearly all OECD countries, have signed it.[195] The United States, however, has indicated no intention to join it.[196] Unlike Pillar One, U.S. non-participation does not prevent other countries from adopting the relevant reforms by joining the MLI. The broad participation of many states—including EU member states, the United Kingdom, India, China, and others—shows that the rest of the world is able and willing to enter into treaties to implement international tax standards, leaving room for treaties where they can serve their role without U.S. participation.[197]

These strategies impose constraints on the possible forms of legal instruments and the contents of legal norms. For example, to address problems of tax avoidance or evasion, the U.S. government can conduct information exchange standards like CbCR through executive agreements and strengthen transfer pricing rules through regulations. However, considering the difficulty of obtaining Senate approval for a treaty, the United States is unlikely to join treaties that change the allocation of taxing rights or adopt tax collection mechanisms.[198] This means that treaty avoidance strategies may lead to second-best reforms where the best solutions require treaties with U.S. participation. These strategies may raise additional concerns. Pillar Two, for example, has been criticized for potentially violating existing tax and investment treaties and for applying extraterritorial measures lacking legitimacy.[199] Another concern is that future U.S. administrations may find it easier to withdraw from executive agreements and reverse the actions of previous administrations.[200] Legislation offers more stability, and there is a debate on the President's power to terminate treaties.[201]

Proponents of treaty avoidance strategies would argue that they provide solutions where treaty-based standards are not feasible given the likely inability to implement them with U.S. participation. Concerns raised by

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195. *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD (Jan. 12, 2026), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-mli/beps-mli-signatories-and-parties.pdf [https://perma.cc/Q2HF-ESZS].

196. *See* GRAVELLE, *supra* note 115, at 27.

197. *See* Noked, *supra* note 154.

198. Pillar One is an example of a treaty that changes the allocation of taxing rights, as discussed *supra* Section III.B. Anonymous withholding models were previously considered as measures to tackle offshore tax evasion, but automatic information exchange standards have been preferred over withholding models. *See* Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304 (2012).

199. For an in-depth discussion, see Noked, *supra* note 154.

200. *See* Christians, *supra* note 98, at 565; Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1615 (2018) (discussing the President's unilateral authority to terminate congressional-executive agreements).

201. For further discussion, see Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247 (2013); Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J.F. 432 (2018).

these strategies should be assessed against the benefits from the relevant standards.[202]

IV. IMPACT ON GLOBAL TAX GOVERNANCE

This Part considers how the difficulty of entering into treaties with the United States may influence developments in global tax governance, including the risks of growing bifurcation and problems arising from U.S. non-participation.

The global tax governance system is decentralized.[203] In general, countries' fiscal sovereignty means that each country can adopt its own tax rules independently.[204] However, international cooperation is needed to address problems of tax avoidance and evasion, resolve disputes, allocate taxing rights, and reduce compliance and administration costs.[205]

The OECD is the leading international organization in international tax policy.[206] The United States is a founding member of the OECD and its largest funder.[207] The U.S. Senate approved the Convention on the Organisation for Economic Co-operation and Development[208] as an Article II treaty in 1961.[209] Especially over the past decade, the OECD has played a central role in developing international tax reforms, negotiating with both OECD and non-OECD countries, reaching agreements, and monitoring

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202. *See* Eichensehr, *supra* note 201; Koh, *supra* note 201.

203. *See* H. David Rosenbloom, Noam Noked & Mohamed S. Helal, *The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum*, 15 FLA. TAX REV. 57, 77–78 (2014); for a discussion of various aspects of global tax governance and a review of the extensive literature, see Irma Mosquera Valderrama, *Global Tax Governance*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TAX LAW 1007 (Florian Haase & Georg Kofler eds., 2023).

204. *See* Tsilly Dagan & Alice Pirlot, Special Feature Editorial, *Global Tax Governance: Taking Stock of the Past and Looking Forward*, 27 J. INT'L ECON. L. 591, 591 (2024).

205. For further discussion on the need for global tax cooperation, see Martin Hearson & Thomas Rixen, *The Political Science of Global Tax Governance*, *in* RESEARCH HANDBOOK ON INTERNATIONAL TAXATION 218 (Yariv Brauner ed., 2020); Matti Ylönen & Yauri Finér, *Global Tax Governance*, *in* HANDBOOK ON CRITICAL POLITICAL ECONOMY & PUBLIC POLICY 341 (Christoph Scherrer, Ana Garcia & Joscha Wullweber eds., 2023).

206. Arthur J. Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-commerce Tax Challenges*, 8 YALE J.L. & TECH. 136, 149–61 (2006).

207. *Member Countries' Budget Contributions*, OECD, https://www.oecd.org/en/about/budget/member-countries-budget-contributions.html [https://perma.cc/R8AY-4XJF] (showing that the United States contributes 18% of the OECD budget).

208. Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 [hereinafter OECD Convention].

209. Richard Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?*, 11 INT'L LAW. 529, 529–30 (1977) (noting that the Senate's consent was given "with the interpretation and explanation of the intent of the Senate that nothing in the Convention . . . confers any power on the Executive to bind the United States to substantive matters beyond what the Executive now has, or to bind the United States without compliance with applicable procedures imposed by domestic law" (quoting OECD Convention, *supra* note 208, 12 U.S.T. at 1751)).

their implementation.[210] As observed by Miranda Stewart, "[t]he OECD has been quite successful in building global governance of tax administration."[211]

Per the OECD Convention, the OECD's decisions and recommendations "shall be made by mutual agreement of all the Members" and "[n]o decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures."[212] This consensus requirement raises concerns that OECD policies may reflect the lowest common denominator agreed upon by all OECD members.[213] Nevertheless, the OECD Secretariat has managed to reach consensus on significant international tax reforms, such as the Common Reporting Standard (2014), the BEPS project (2015), and the Two-Pillar reforms.[214]

Importantly, the OECD has played a key role in developing international tax standards that can be implemented without any congressional action.[215] This has angered U.S. lawmakers, with one arguing that the "OECD global tax project is effectively controlled by Europe" and that "the deck is stacked against America at the OECD."[216] Another Republican lawmaker noted that "[m]y colleagues in the House of Representatives and I are already working to revoke funding for the OECD. We should not be the largest funding source for an organization that wants to collude to steal away U.S. jobs and tax revenues."[217] Against this backdrop, it appears unlikely that the Senate will approve any new treaty to facilitate a global governance mechanism for international tax reforms that may not be aligned with U.S. interests.

The United Nations is now working toward establishing a UN Framework Convention on International Tax Cooperation (the UN Tax Convention).[218] This initiative responds to shortcomings in the current

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210. *Centre for Tax Policy and Administration*, OECD, https://www.oecd.org/en/about/directorates/centre-for-tax-policy-and-administration.html [https://perma.cc/L9EZ-6XAV].

211. Miranda Stewart, *International Institutions in Global Tax Governance*, 27 J. INT'L ECON. L. 618, 619 (2025).

212. OECD Convention, *supra* note 208, art. 6.

213. *See* Rosenbloom et al., *supra* note 203, at 65.

214. *See, e.g.*, Mason, *supra* note 190 (discussing the OECD's work on the BEPS reforms and its role in global tax governance).

215. *See* Noked, *supra* note 154.

216. *Biden's Global Tax Surrender Harms American Workers and Our Economy: Hearing Before the Subcomm. on Tax of the H. Comm. on Ways & Means*, 118th Cong. 2 (2023) (statement of Rep. Mike Kelly, Chairman, Subcomm. on Tax).

217. Ron Estes, Letter to the Editor, *OECD Pillar 2 Is a Bad Deal for America*, 179 TAX NOTES FED. 1031, 1032 (2023).

218. For further background, see Leopoldo Parada, *International Cooperation on Tax Matters at the United Nations*, 5 CARIB. TAX L.J. 10 (2024); STEVEN DEAN, ERIN RYU & DANNA LOPEZ-FLORES, BOSTON UNIV. GLOBAL DEV. POL'Y CTR., GEGI POL'Y BRIEF NO. 031, BACK TO THE FUTURE: HOW THE PRE-OECD GLOBAL TAX LANDSCAPE OFFERS LESSONS FOR TODAY (2025), https://www.bu.edu/gdp/files/2025/04/GEGI-PB-031-FIN.pdf [https://perma.cc/R6RM-CYPS].

system, which arguably lacks adequate legitimacy and inclusiveness.[219] The convention aims to transform global tax governance, as its objectives are to "[e]stablish fully inclusive and effective international tax cooperation in terms of substance and process" and "[e]stablish a system of governance for international tax cooperation capable of responding to existing and future tax and tax-related challenges on an ongoing basis."[220] Both the Biden and Trump administrations have opposed this project, citing concerns that the convention may not follow a consensus-based approach to decision making.[221]

In February 2025, the U.S. government walked out of the negotiations, stating the following:

> The United States takes this opportunity to state firmly and clearly that the goals of a future UN Framework Convention on International Tax Cooperation are inconsistent with U.S. priorities and represent unwelcome overreach. We do not plan to participate further in this organizational session, process, or negotiating United Nations Framework Convention on International Tax Cooperation text.
>
> . . . .
>
> . . . The United States intends to reject the outcomes of this Framework Convention process and oppose them. We welcome others to join us in opposition.[222]

Even if the UN Tax Convention met the U.S. government's requirements—including its demand for consensus-based decision making similar to the OECD—there is no guarantee that the convention would be

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219. *See, e.g.*, Shu-Yi Oei & Diane M. Ring, *The Conflictual Core of Global Tax Cooperation*, 16 WORLD TAX J. 663, 663 (2024); Irma Johanna Mosquera Valderrama, *Inaugural Lecture on the Acceptance of Her Position as Professor of Tax Governance at Leiden University: Global Tax Governance: Legitimacy and Inclusiveness. Why it Matters* (June 30, 2023), https://globtaxgov.weblog.leidenuniv.nl/files/2023/06/33_009140-Oratie-Mosquera-Valderrama-total-2.pdf [https://perma.cc/Q2ZK-DGGV]; Afton Titus, *The Role of the United Nations in Ensuring Equitable Tax Policies for Developing Countries*, 27 J. INT'L ECON. L. 624 (2025); Assaf Harpaz, *Global Tax Wars in the Digital Era*, 75 AM. U. L. REV. 77 (2025).

220. Kudzai Mataba, *UN Convention on Tax: What Happened at Recent Negotiations, and What's Next?*, INT'L INST. FOR SUSTAINABLE DEV. (Feb. 14, 2025), https://www.iisd.org/articles/explainer/United-Nations-International-Tax-Convention-Negotiations [https://perma.cc/KZ86-UNKP].

221. *See* Jonathan Shrier, U.S. Deputy Representative to the U.N. Econ. & Soc. Council, *Explanation of Vote on the United Nations Framework Convention on International Tax Cooperation* (Aug. 16, 2024), https://usun.usmission.gov/explanation-of-vote-on-the-united-nations-framework-convention-on-international-tax-cooperation/ [https://perma.cc/YQ9M-234Q].

222. Jonathan Shrier, U.S. Acting Representative to the U.N. Econ. & Soc. Council, *Statement at the Session for the Intergovernmental Negotiating Committee on the U.N. Framework Convention on International Tax Cooperation* (Feb. 3, 2025), https://usun.usmission.gov/statement-at-the-session-for-the-intergovernmental-negotiating-committee-on-the-un-framework-convention-on-international-tax-cooperation/ [https://perma.cc/3ESJ-K7V2].

approved by the Senate as an Article II treaty. The Republican stance on the OECD and international tax governance indicates that the Senate may oppose any treaty aiming to facilitate international tax coordination and reforms. Consequently, the U.S. government may have little bargaining power in the negotiations, as it cannot reliably commit to participating in any treaty for global tax governance even if its requirements are met. This may influence other countries to design the convention without regard to the U.S. position given its likely non-participation.

The international tax system is becoming increasingly bifurcated, with different international tax standards applying to the United States and the rest of the world.[223] If countries enhance their cooperation through a treaty-based tax governance framework without U.S. participation, it will likely further exacerbate this bifurcation. From a U.S. perspective, this may erode U.S. influence in global tax matters. It may also lead to international tax standards less favorable to U.S. stakeholders. However, the United States will likely continue to have a significant influence even if it remains outside international tax standards and governance mechanisms.[224] Other countries would need to address problems arising from U.S. non-participation, which may undermine the effectiveness of certain international tax standards.[225]

CONCLUSION

The Treaty Clause and other Senate supermajority requirements have shaped international tax law by forcing both U.S. administrations and the global tax community to seek alternative legal instruments instead of treaties and laws requiring a supermajority approval. At the U.S. domestic level, the near-century-long tradition of approving tax treaties as Article II

223. The most notable examples are automatic exchange of information standards (the United States implements FATCA, whereas the rest of the world implements CRS) and Pillar Two (U.S. MNEs should be exempted from top-up taxes (the Income Inclusion Rule and the Undertaxed Profits Rule) under the "side-by-side" safe harbor). As of January 2026, the United States is the only jurisdiction identified by the OECD as having a tax system that qualifies for this safe harbor. *See Central Record for Purposes of the Global Minimum Tax: Qualified SbS Regimes*, OECD (Jan. 5, 2026), https://www.oecd.org/en/topics/sub-issues/global-minimum-tax/central-record-of-legislation-with-transitional-qualified-status.html# [https://perma.cc/7BK2-BBF9]. This is unsurprising, as this safe harbor was designed to exclude U.S. MNEs from the IIR and UTPR. While some other jurisdictions may qualify for the safe harbor in the future, most countries implementing Pillar Two or affected by it are unlikely to qualify. For the safe harbor requirements, see OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY – GLOBAL ANTI-BASE EROSION MODEL RULES (PILLAR TWO), SIDE-BY-SIDE PACKAGE (2026), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/side-by-side-package.pdf [https://perma.cc/M2QP-YMRB].

224. For example, this influence has recently been seen in the agreement to adopt a "side-by-side" system, which will benefit U.S. MNEs. *See* OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *supra* note 223.

225. *See* Noked, *supra* note 154.

treaties may be eroding. While the approval of Article II treaties in the Senate has almost ceased since 2011, there is a sharp increase in the use of executive agreements for information exchange for tax purposes. The pending legislation for approving a tax treaty with Taiwan as a congressional-executive agreement may serve as a precedent for future international tax agreements. Future administrations may attempt to pass multilateral tax reforms as congressional-executive agreements, as considered by the Biden administration for Pillar One. Yet it remains uncertain whether and to what extent executive agreements will be used instead of Article II treaties in tax matters in the future.

At the international level, the inability to enter into tax treaties with the United States has influenced the legal design of several international tax reforms. Several reforms employ treaty avoidance strategies, such as coordinated unilateralism and reliance on executive agreements. However, standards employing these strategies may produce inferior outcomes and raise additional concerns such as treaty violation, extraterritoriality, and lack of legitimacy.

The global tax governance landscape is likely to become more bifurcated if other countries enhance their cooperation through treaties, which the Senate is unlikely to approve. This raises the risks of eroding U.S. influence in global tax matters, potentially leading to international standards less favorable to U.S. stakeholders and inferior to those that would have been achieved with U.S. participation. Understanding these effects is important for policymakers, academics, practitioners, and others seeking solutions to the problems of cross-border tax avoidance and evasion.