The World Tax Order and Taiwan: An Appraisal

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About the Author

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Introduction

As many people are currently discussing an important reform of international tax rules[1] and the tensions surrounding Taiwan,[2] it is worthwhile to consider the tax aspect of Taiwan's relationship with the world. Legal rules govern both Taiwan's outbound investment and inbound investment in Taiwan. Even the People's Republic of China (P.R.C., *zhonghua renmin gonghe guo*, or 中華人民共和國) receives Taiwan's outbound investment,[3] and Taiwan receives inbound investment from the P.R.C.[4] At a time when tit-for-tat politics catches almost all the attention, a less well-known aspect of international law demonstrates both a cause for optimism and a problem. Taiwan has its own legal rules, and Taiwan has bilateral treaties or agreements with its friends. However, when there are multilateral efforts to face the challenges of an important issue, Taiwan has often been left out. This article discusses Taiwan's engagement with the world tax order.

The Republic of China (R.O.C., *zhonghua minguo*, or 中華民國) on Taiwan effectively controls 36,197 square kilometers (13,974 square miles), including Penghu, Kinmen, and Matsu. It has a population of approximately 23 million. In addition, the R.O.C. is the highest authority that effectively controls this area. Taiwan was the thirteenth-largest merchandise exporter and the twelfth-largest merchandise importer in 2022.[5]

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1. *See, e.g.*, Press Release, OECD, OECD Reports Strong Progress to G20 on International Tax Reforms (July 17, 2023), https://www.oecd.org/tax/oecd-reports-strong-progress-to-g20-on-international-tax-reforms.htm [https://perma.cc/FN5C-P7TE]; Reuven Avi-Yonah et al., *A New Framework for Digital Taxation*, 63 Harv. Int'l L.J. 279, 282 (2022); *Minimum Corporate Taxation*, Eur. Comm'n, https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation_en [https://perma.cc/AVL2-CH2T] (last visited Oct. 7, 2023).

2. *See, e.g.*, Amy Chang Chien et al., *Taiwan Holds an Election That Could Reshape Global Affairs*, N.Y. Times (Jan. 12, 2024), https://www.nytimes.com/2024/01/12/world/asia/taiwan-election-china.html [https://perma.cc/TG4P-UGZP]; Chris Buckley et al., *In a Setback for Beijing, Taiwan Elects Lai Ching-te as President*, N.Y. Times (Jan. 13, 2024), https://www.nytimes.com/2024/01/13/world/asia/taiwan-election-china-us.html [https://perma.cc/U3SA-YVL3]. When "Taiwan" is mentioned in contemporary discourse, it often refers to the Republic of China (the R.O.C.). In order to be accessible to a broad audience, this article uses "Taiwan" and "the R.O.C." interchangeably. *See also infra* notes 6-10 and accompanying text.

3. Dep't. of Inv. Rev., Ministry of Econ. Affs., ROC, *Monthly Report for December 2023*, https://dir.moea.gov.tw/download-file.jsp?id=x5LIGxhIGwg%3d (last visited Feb. 9, 2024). In 2023, the R.O.C. government approved 328 projects of outward investment to the P.R.C., with the total amount of investment at US$3,036,819,000. From 1991, the year when the statistics began to be collected, to December 2023, the R.O.C. government approved 45,523 projects of outward investment to the P.R.C., with the total amount of investment at US $206,365,417,000.

4. *Id.* In 2023, the R.O.C. government approved 30 projects of inward investment from the P.R.C., with the total amount of investment at US$29,691,000. From 2009, the year when the statistics began to be collected, to December 2023, the R.O.C. government approved 1,586 projects of inward investment from the P.R.C., with the total amount of investment at US$2,595,946,000.

5. The ranking excluded the trade among members of the European Union.

Because of its economic prowess and strategic importance, the R.O.C. on Taiwan is an important economic entity in the world.

At least a short explanation is required for the relationship between the R.O.C. on Taiwan and the P.R.C. The Wuchang Revolution on October 10, 1911 led to the establishment of the R.O.C. on January 1, 1912.[6] The Kuomintang (KMT) ruled most of China from 1928 to 1949,[7] when they lost most of the territory to the Chinese Communist Party. On October 1, 1949, the Chinese Communist Party declared the establishment of the P.R.C.[8] On Taiwan, Penghu, Kinmen, and Matsu, the government led by Chiang in 1950 has continued to exist and function under the official name of the Republic of China.

The dispute between the P.R.C. and the R.O.C. has focused mainly on the issue of public international law. Four attributes are often considered essential for a state: a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.[9] Due to the decentralized nature of, or the absence of centralized law enforcement in, the international legal system, no single state may, over the objections of other states, render an authoritative decision on whether an entity possesses these four qualifications. At the same time, each state is bound to treat all states, including those to which recognition is withheld, with due respect.[10]

Whether the R.O.C. on Taiwan is a state or not is sometimes understood as choosing between two theories of recognition.[11] Under the declaratory theory of recognition, a state's existence depends solely on whether the entity in question satisfies the four essential attributes to

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See Chinese Taipei Trade Profile, WTO (2023), https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/TW_e.pdf [https://perma.cc/22ED-VCM6].

6. *See, e.g.*, Immanuel C.Y. Hsü, The Rise of Modern China 468–70 (4th ed. 1990).

7. *See id*. at 518, 535, 645.

8. *See id.* at 645.

9. Article 1 of the Montevideo Convention on the Rights and Duties of States, entered into force on Dec. 26, 1934. ("The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.") *See also* Restatement (Third) The Foreign Rels. L. of the U.S. § 201 (Am. L. Inst. 1987). ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its government, and that engages in, or has the capacity to engage in, formal relations with other such entities.")

10. Restatement (Third) The Foreign Rels. L. of the U.S. § 201 (Am. L. Inst. 1987); Restatement (Third) The Foreign Rels. L. of the U.S. § 202 (Am. L. Inst. 1987). ("A state is not required to *accord* formal recognition to any other state but is required to treat as a state an entity meeting the requirements of § 201, except [the entity has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.]")

11. Huang-Chih Chiang & Jau-Yuan Hwang, *On the Statehood of Taiwan: A Legal Reappraisal*, *in* The "One China" Dilemma 57, 67 (Peter C.Y. Chow ed., 2008). *For the two theories of recognition, see e.g.*, Lori Fisler Damrosch & Sean D. Murphy, International Law: Cases and Materials 282–84 (7th ed. 2019).

qualify as a state. Recognition, therefore, is only declaratory of the statehood that exists before any act of recognition by other states. Under the constitutive theory of recognition, however, the act of recognition itself is one of the constitutive elements of statehood. Without other states' acts of recognition, under the constitutive theory of recognition, an entity cannot be a state.

Under the declaratory theory of recognition, the R.O.C.'s capacity to enter into agreements with other jurisdictions is not called into doubt by the fact that many jurisdictions do not *accord* the R.O.C. formal recognition. On the other hand, the P.R.C. challenges the idea that Taiwan can govern itself and enter into agreements with other jurisdictions, which is more consistent with the constitutive theory of recognition. In addition, the fact that the P.R.C. emphasized the number of states that maintain formal diplomatic relationships with the R.O.C. on Taiwan[12] suggests that the P.R.C. supports the constitutive theory of recognition, at least on the question of Taiwan.

Each jurisdiction has its own legal rules. Bilaterally, jurisdictions may sign and ratify tax treaties or agreements. Multilaterally, jurisdictions may try to develop multilateral solutions to common problems. As set out in Part I of this article, Taiwan has done its part to promote international trade and investment and address the problem of double taxation. As discussed later, Taiwan has a network of thirty-five tax treaties where bilateral agreements—with important objectives such as avoiding double taxation—govern an issue. In contrast, when a multilateral effort regulates an issue, Taiwan faces the costly if not daunting challenge of joining.

Between 1949 and 1978, both the P.R.C. and the R.O.C. maintained that only one Chinese state existed, and each argued that they had the proper authority to govern and internationally represent the combined territory of the P.R.C. and the R.O.C. The United Nations General Assembly resolved in 1971 to recognize the representatives of the Government of the P.R.C. as the only legitimate representatives of China to the United Nations.[13] Since 1978, things have become more complicated. For our purposes, three statements help illustrate the complexities of the issue. First, according to the U.S. Department of State, "The U.S. and Taiwan enjoy a robust unofficial relationship. The 1979 U.S.-P.R.C. Joint Communique switched diplomatic recognition from Taipei to Beijing. In the Joint Communique, the U.S. recognized the Government of the People's Republic of China as the sole legal government of China, acknowledging the Chinese position that there is but one

12. *See, e.g.*, Natasha Frost & Chris Buckley, *Taiwan Loses Ally to China After Electing President Loathed by Beijing*, N.Y. Times (Jan. 15, 2024), https://www.nytimes.com/2024/01/15/world/asia/taiwan-nauru-china-election.html?searchResultPosition=3 [https://perma.cc/V43C-LA8W]; Amy Chang Chien & Emiliano Rodríguez Mega, *In Blow to Taiwan, Honduras Switches Relations to China*, N.Y. Times, Mar. 25, 2023, at A10. https://www.nytimes.com/2023/03/25/world/asia/taiwan-honduras-china-relations.html [https://perma.cc/Z5MN-FC8H].

13. G.A. Res. 2758 (XXVI) (Oct. 25, 1971).

China and Taiwan is part of China."[14] Second, in the R.O.C. on Taiwan, President Tsai Ing-wen, in her 2021 National Day Address delivered on the R.O.C.'s 110th Double Tenth National Day Celebration, stated, "The Republic of China came to Taiwan in 1949, 72 years ago.[15] Over these past 72 years, we have gone from poverty to prosperity, from authoritarianism to democracy, and from uniformity to diversity. Slowly but surely, we remade the Republic of China (Taiwan) into what it is today."[16] Third, the P.R.C. released a white paper on August 10, 2022, titled "The Taiwan Question and China's Reunification in the New Era."[17]

Part I sets out Taiwan's legal rules regarding income tax. Part II discusses Taiwan's thirty-five bilateral treaties or agreements with its friends. Part III introduces the P.R.C. tax law and the U.S. tax law for cross-border activities that implicate Taiwan. Part IV discusses some major multilateral efforts to reform the international tax system, and the creativity that may be required for Taiwan to be included. Overall, this article discusses Taiwan's engagement with the world tax order.

I. Taiwan's Tax Law for Cross-Border Activities

Legal rules govern Taiwan's outbound investment and inbound investment in Taiwan. Under these rules, the income earned through

14. *U.S.-Taiwan Relations*, U.S. Dept. of State, https://www.state.gov/countries-areas/taiwan [https://perma.cc/L55G-KQWW] (last visited Sept. 24, 2023).

15. In 2021, the Kuomintang criticized Tsai for emphasizing 1949 over 1911 or 1912. *See* Sherry Hsiao, *National Day: Sun Yat-sen's ROC Founding Deserves Respect, Chu Says*, Taipei Times (Oct. 11, 2021), https://www.taipeitimes.com/News/taiwan/archives/2021/10/11/2003765905 [https://perma.cc/VW8Y-X5DT]. The Wuchang Revolution on October 10, 1911 successfully led to the establishment of R.O.C. on January 1, 1912. See *supra* note 6. October 10 has been celebrated as National Day in the R.O.C. on Taiwan.

16. Office of the President, *President Tsai delivers 2021 National Day Address*, Office of the President of Republic of China (Taiwan) (Oct. 10, 2021), https://english.president.gov.tw/News/6175 [https://perma.cc/4HMS-Y67K].

17. The Taiwan Affairs Office of the State Council and the State Council Information Office of the People's Republic of China, *White Paper: The Taiwan Question and China's Reunification in the New Era*, Embassy of the People's Republic of China in the United States of America (Aug. 10, 2022), http://us.china-embassy.gov.cn/eng/zgyw/202208/t20220810_10740168.htm [https://perma.cc/56U8-RA3C] (The most relevant part of the White Paper is "On October 1, 1949, the People's Republic of China (PRC) was founded, becoming the successor to the Republic of China (1912–1949), and the Central People's Government became the only legitimate government of the whole of China. The new government replaced the previous KMT regime in a situation where China, as a subject under international law, did not change and China's sovereignty and inherent territory did not change. As a natural result, the government of the PRC should enjoy and exercise China's full sovereignty, which includes its sovereignty over Taiwan. As a result of the civil war in China in the late 1940s and the interference of external forces, the two sides of the Taiwan Straits have fallen into a state of protracted political confrontation. But the sovereignty and territory of China have never been divided and will never be divided, and Taiwan's status as part of China's territory has never changed and will never be allowed to change.")

such cross-border investment has to be taxed by governments, whether they are the R.O.C., the P.R.C., or so-called "third places" (*disan di*) such as the U.S., Japan, Singapore, the Netherlands, etc. As economic activities are complicated, these tax rules are necessarily complicated as well.

Taiwan's tax law first deals with the activities that do not implicate the P.R.C., Hong Kong, or Macau. Then, Taiwan's tax law deals with the activities that implicate the P.R.C. Last but not least, even though Hong Kong and Macau are part of the P.R.C., Taiwan's tax law treats the activities that implicate Hong Kong or Macau differently or preferentially. This Part explains each of these distinct treatments in turn.

Between 1949 and 1987, all forms of contacts between the P.R.C. and the R.O.C., such as transportation, communication, and mail, were prohibited by both governments. The P.R.C.'s and R.O.C.'s lifting of restrictions on travel in 1987 marked a thaw in their bilateral relationship.[18] Gradually, the R.O.C. and the P.R.C. develop their respective framework for dealing with the other side.

The Preface to the "Amendments to the R.O.C. Constitution"[19] and the Eleventh Constitutional Amendment,[20] which have been effective since May 1, 1991, authorized the R.O.C.'s Legislative Yuan to lay the legal foundation for the R.O.C.-P.R.C. relationship. One purpose set out in the Preface to the Amendments is "to meet the needs of the time before our country is unified."[21] The Eleventh Amendment more specifically states that "[t]he rights, obligations, and other matters between the people of the free area and the people of the Mainland Area, can be governed by special legislations." It is the Eleventh Amendment that authorizes the R.O.C. Legislative Yuan to enact the *Act Governing*

18. *See* Hsü, *supra* note 6, at 913.

19. The Romanization of the title is: *zhonghua minguo xianfa zengxiu tiaowen* (中華民國憲法增修條文). For the political contexts during which the constitutional amendments were passed, *see, e.g.*, Shao-chuan Leng & Cheng-yi Lin, *Political Change in Taiwan: Transition to Democracy?*, 136 China Q. 805, 808–12 (1993); Tse-Kang Leng, The Taiwan-China Connection: Democracy and Development Across the Taiwan Straits 21–24, 45–51 (1996).

20. The Eleventh Amendment was the Tenth Amendment before the renumbering on July 21, 1997. The Amendments to the R.O.C. Constitution were enacted on April 22, 1991, and took effect on May 1, 1991. Subsequently, the Amendments to the R.O.C. Constitution were amended six times, and the amendments each time took effect on, from the first to the most recent, May 28, 1992, August 1, 1994, July 21, 1997, September 15, 1999, April 25, 2000, and June 10, 2005. The texts of all the amendments can be found at the Database for Legal System (*falü xitong*; 法律系統) set up by the Legislative Yuan (*lifa yuan*; 立法院) of the R.O.C. *Legislative Yuan Legal System,* R.O.C. Legislative Yuan, https://lis.ly.gov.tw/lglawc/lglawkm [https://perma.cc/6HS6-4H7K] (last visited Mar. 13, 2025); *see also Additional Articles of the Constitution of the Republic of China,* Laws and Regulations Database of The Republic of China (Taiwan), https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002 [https://perma.cc/2W8F-8YSC] (last visited Mar. 9, 2025).

21. The Romanization of the quoted text is as follows: *wei yinying guojia tongyi qian zhixuyao* (為因應國家統一前之需要).

Relations between Peoples of the Taiwan Area and the Mainland Area.[22] It has been the R.O.C.'s most important legislation on its side of the P.R.C.-R.O.C. relationship since it became effective on July 31, 1991. Article 2 of the *Act* provides the following important definitions: The "Taiwan Area" is defined as Taiwan, Penghu, Kinmen, Matsu, and "other areas currently governed by the government."[23] "Mainland Area" is defined as "the territory of the Republic of China that is not Taiwan Area."[24] The "people of the Taiwan Area" are "the people who register their residence in the Taiwan Area."[25] The "people of the Mainland Area" are "the people who register their residence in the Mainland Area."[26]

The complexity of the R.O.C. tax code is considered a weakness in some regards. In another sense, it is a strength. In addition to the usual complexity of operating a modern tax regime, the R.O.C. law has to accommodate the special circumstances that exist between the P.R.C. and the R.O.C. To dismiss the special circumstances that exist between the P.R.C. and the R.O.C. as unnecessary is simple but only ostensibly so, as that has not been the case since 1949.[27] On the other hand, the stability and prosperity that has existed between the P.R.C. and the R.O.C. since 1987 suggests the possibility that can be created and sustained by such rules. Therefore, these rules, as well as their complexity, are worth our consideration.

A. *Taiwan's Tax Law for Activities Not Implicating the P.R.C., Hong Kong, or Macau*

The R.O.C.'s law-making power is exerted by the Legislative Yuan alone.[28] The Executive Yuan, headed by the Premier and led by the

22. The Romanization of its title is as follows: *Taiwan Diqu Yu Dalu Diqu Renmin Guanxi Tiaoli* (臺灣地區與大陸地區人民關係條例). English translations of this statute can be found at Mainland Affairs Council Republic of China (TAIWAN), https://www.mac.gov.tw/en/News_Content.aspxn=4F2E0C155DF44564&sms=2C46F5E37DC2E1D2&s=1403D3EA1BC2B0B9 (last visited Nov. 24, 2024). An earlier discussion of the statute is Ada Koon Hang Tse, *The Emerging Legal Framework for Regulating Economic Relations Between Taiwan and the Mainland*, 6 J. Chinese L. 137 (1992).

23. The Romanization of the quoted text is as follows: *zhengfu tongzhi quan suoji zhi qita diqu* (政府統治權所及之其他地區).

24. The Romanization of the quoted text is as follows: *Taiwan diqu yiwai zhi zhonghua minguo lingtu* (臺灣地區以外之中華民國領土).

25. The Romanization of the quoted text is as follows: *zai Taiwan diqu sheyou huji zhi renmin* (在臺灣地區設有戶籍之人民).

26. The Romanization of the quoted text is as follows: *zai dalu diqu sheyou huji zhi renmin* (在大陸地區設有戶籍之人民).

27. The R.O.C. currently taxes the income earned in the Mainland Area (or the P.R.C.) and addresses the problem of double taxation by granting a tax credit for the taxes paid to the P.R.C. In contrast, the R.O.C. exempts from its income taxation income earned in Hong Kong, Macau, and other places in the world such as the U.S., Germany, and Japan. The differential treatment accorded by the R.O.C. to the Mainland Area (or the P.R.C.) is an additional layer of complexity for individual taxpayers and corporate taxpayers. *See infra* notes 62-74 and accompanying text.

28. Constitution of the Republic of China, art. 62.

President, may promulgate regulations to implement the statutes passed by the Legislative Yuan.[29]

The main types of taxes in Taiwan, according to the fiscal take in 2022, are income taxes (51.7 percent), consumption taxes (16.7 percent), securities transaction taxes (5.4 percent), commodity taxes (4.8 percent), customs duties (4.4 percent), land value taxes (2.9 percent), land value increment taxes (2.8 percent), and house taxes (2.6 percent).[30] As approximately the twelfth largest merchandise exporter and importer, Taiwan has created a tax law with cross-border aspects more nuanced than can be set out in this short space. As income tax accounts for more than half of Taiwan's tax revenue, I shall try to provide an overview of the R.O.C.'s exertion of its jurisdiction to impose income tax.

1. Jurisdiction over Person

The basis for the R.O.C.'s tax jurisdiction over individual persons[31] is their domicile in the area of the R.O.C., while the basis for the R.O.C.'s tax jurisdiction over profit-seeking enterprises is a fixed place of business (*guding yingye changsuo*) or dependent agent (*yingye daili ren*) in the area of the R.O.C. To be sure, Article 2 of the Income Tax Act taxes only R.O.C.-source income (defined by Article 8 of the same Act) and exempts from taxation foreign-source income whether earned by an individual person domiciled in the R.O.C. or not. However, Article 3 of the Income Basix Tax Act (*suode jiben shui e tiaoli*) imposes income tax on foreign-source income earned by individuals domiciled in the R.O.C. or by profit-seeking enterprises that have a fixed place of business or dependent agent in the R.O.C.

Anyone who derives income from the R.O.C. has to pay taxes to the R.O.C. on such income under Article 8 of the R.O.C.'s Income Tax Act.[32] In the Income Tax Act, Article 8 uses the term "R.O.C.-source income" (*zhonghua minguo laiyuan suode*), while in the *Act Governing the Relations between the People of Taiwan Area and the People of the Mainland Area*, the term "Mainland Area-source income" (*dalu diqu laiyuan suode*) is used.

29. Central Regulation Standard Act, art. 3 (*Zhongyang Fagui Biaozhun Fa*; 中央法規標準法); Administrative Procedure Act (*Xingzheng Chengxu Fa*; 行政程序法), arts. 150–162.

30. Dep't. of Statistics, *Preliminary Total Net Tax Revenue for October 2023, Table 4: Total Net Tax Revenue in Recent Years*, Ministry of Finance, R.O.C. (Nov. 9, 2023), https://service.mof.gov.tw/public/Data/statistic/news/11210/6859_11210.xlsx [https://perma.cc/BAX3-BT8N].

31. *See also*, Restatement (Third) The Foreign Rels. L. of the U.S. § 411 (1) (Am. L. Inst. 1986). ("A state may exercise jurisdiction to tax a person, natural or judicial, on the basis of (a) nationality, (b) domicile, or (c) residence.")

32. Taiwan defines several types of taxable income and imposes taxes on "other income" that does not fall into the listed categories. Certain types of income are taxed separately with different tax rates. Unlike some jurisdictions, Taiwan does not provide a lower tax rate for capital gains.

Additionally, domestic (resident) corporate taxpayers have to pay taxes to the government of Taiwan on their worldwide income, and Taiwan addresses the issue of double taxation by allowing for a foreign tax credit. Foreign (non-resident) corporations have to pay taxes only on the income derived from Taiwan.[33] If a foreign (non-resident) corporation earns income sourced in Taiwan through a fixed place of business or a dependent agent habitually exercising the authority to conclude contracts on its behalf, then the foreign (non-resident) corporation is legally obligated to file a tax return, and the taxable income is computed on a net basis.[34] If a foreign (non-resident) corporation earns income sourced in Taiwan without having a fixed place of business or dependent agent in Taiwan, then the foreign (non-resident) corporation is not legally obligated to file a tax return, and the taxable income is computed on a gross basis.[35] The distinction between domestic (resident) and foreign (non-resident) corporations is drawn by reference to the location of the head office (*zong jigou*) or the place of incorporation.[36]

Like many jurisdictions,[37] these income tax rules are implemented through the withholding mechanism. The R.O.C. government imposes the obligation to withhold taxes on residents who make monetary payments to non-residents under Articles 88 and 89 of the Income Tax Act. Article 88, Paragraph 1 of the Income Tax Act lists (1) dividends, (2) payments made to a foreign profit-seeking enterprise having neither fixed place of business nor dependent agent in the R.O.C., (3) payments to profit-seeking enterprises engaged in international transportation, and (4) payments to foreign motion picture leasing enterprises as four types

33. *See also*, Restatement (Third) The Foreign Rels. L. of the U.S. § 411 (2) (Am. L. Inst. 1986). ("A state may exercise limited jurisdiction to tax a person, natural or judicial, on the basis of (a) presence or doing business in its territory, or (b) ownership of property located in its territory.")

34. Taiwan's Income Tax Act, art. 41. Taxation on a net basis means that expense deductions are allowed per the relevant law.

35. Taxation on a gross basis means that no deductions are allowed for expenses or losses in previous years.

36. Article 43–4 was added to Taiwan's Income Tax Act to establish the Place of Effective Management (PEM) rule. The amendment was passed by the Legislative Yuan on July 12, 2016, and enacted by the President on July 27, 2016. Its Paragraph 4 authorizes the MOF to promulgate regulations to enforce Paragraphs 1–3. Although the MOF promulgated the Regulations Governing Application of the Place of Effective Management on May 23, 2017, its Article 12 states that the MOF shall later announce the date on which the Regulations take effect. As the MOF has not announced the date on which the Regulations take effect, the PEM rule has not taken effect. If the PEM rule takes effect in the future, any foreign enterprise that meets all of three requirements is regarded as an enterprise effectively managed in Taiwan and, therefore, shall be deemed as having its head office in Taiwan. The three requirements are: (i) The decisionmaker who makes significant decisions is an individual resident in Taiwan or a profit-seeking enterprise with its head office in Taiwan, or the place where significant decisions are made is in Taiwan. (ii) Financial statements, records of accounting books, or minutes of board meetings or shareholder meetings are prepared or kept in Taiwan. (iii) Primary business activities occur in Taiwan.

37. *See, e.g.*, Bret Wells, International Taxation 131–32 (5th ed., 2022).

of income for which withholding is required by law only when the payment recipients are not residents in the R.O.C. Any person who has the withholding obligation under Article 88 must withhold and transmit to the Treasury (*guoku*) the taxes within ten days of making payment to a nonresident recipient.[38] The resident payers should also, within ten days of making payments, issue withholding certificates (*koujiao pingdan*), and, after examination by a tax authority, give them to the non-resident payees.[39] Special rules exist for enterprises in the business of international shipping and motion picture leasing.[40]

In order to offer sufficient details for the term "R.O.C.-source income" in Article 8 of the Income Tax Act, the Ministry of Finance of the R.O.C. (MOF)[41] promulgated "Guidelines for the Determination of Income from Sources in the Republic of China under Article 8 of the Income Tax Act"[42] (hereafter referred to as the R.O.C. Source Rules) in 2009.[43] For example, the term "profits from the operation of industry, commerce, agriculture, forestry, fishery, animal husbandry, mining, and

38. Taiwan's Income Tax Act, art. 92, ¶¶ 1-2.

39. *See id*.

40. The "Standards of Withholding Rates for Various Incomes" (*Gelei Suode Koujiao Lu Biaozhun*; 各類所得扣繳率標準) provide for special rates of withholding for enterprises in the business of international shipping and motion picture leasing. Its Article 9 states that, if a profit-seeking enterprise engaged in international shipping of which the head office is located outside of Taiwan, with the approval of the MOF, ten percent of the business revenue earned within Taiwan shall be its R.O.C.-source income, and twenty percent of such income shall be withheld by the payer as taxes. Its Article 9 also states that, pursuant to Article 25 of the Income Tax Act, if a profit-seeking enterprise is engaged in construction, the provision of technical services, or the leasing of machinery or equipment, of which the head office is located outside of Taiwan, with the approval of the MOF, fifteen percent of the business revenue earned within Taiwan shall be its R.O.C.-source income, and twenty percent of such income shall be withheld by the payer as taxes. Its Article 10 states that, if a foreign motion picture leasing enterprise has no branch within Taiwan, twenty percent of the profit-seeking enterprise income calculated pursuant to Article 26 of the Income Tax Act shall be withheld by the payer as taxes.

41. The Ministry of Finance (MOF) is part of the Executive Yuan or the executive branch.

42. The Romanization of the title is: *suode shuifa di ba tiao guiding zhonghua minguo laiyuan suode rending yuanze* (所得稅法第八條規定中華民國來源所得認定原則). Although the concepts of the "R.O.C." and the "Taiwan Area" may be sensitive, Article 16 of the R.O.C. Source Rules states that the R.O.C. Source Rules shall apply *mutatis mutandis* to where the individual, judicial person, organization, or other institution of the Mainland Area has income from sources in the Taiwan Area under Article 25 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area.

43. It was promulgated by Decree No. Tai-Tsai-Shui-09804900430 issued by the MOF on September 3, 2009. It was first revised by Decree No. Tai-Tsai-Shui-10604704391 issued by the MOF on January 2, 2018. Then, it was revised by Decree No. Tai-Tsai-Shui-10804544260 issued by the MOF on September 26, 2019. Then, it was revised by Decree No. Tai-Tsai-Shui-11000061702 issued by the MOF on December 16, 2021. Most recently, it was revised by Decree No. Tai-Tsai-Shui-11204568350 issued by the MOF on October 13, 2023.

metallurgy enterprises within the R.O.C." in Article 8, Subparagraph 9 of the Income Tax Act[44] was defined by Article 10, Paragraph 1 of the R.O.C. Source Rules to refer to the profits derived from the business conduct of selling products or rendering or performing services within the R.O.C.

Article 10, Paragraph 2 deals with electronic services.[45] First, it stipulates that a profit-seeking enterprise *outside* the R.O.C. selling electronic services to individuals or profit-seeking enterprises within the R.O.C. is also "engaged in business conduct *within* the R.O.C." In other words, a profit-seeking enterprise *outside* the R.O.C. selling electronic services to individuals or profit-seeking enterprises within the R.O.C. derives R.O.C.-source income taxable by the R.O.C. government. Despite such an expansive rule, however, if the electronic service in question satisfies one of the following two requirements, the profit so derived is not R.O.C.-source income: (1) the service such as a single-user software or electronic book is produced outside the R.O.C. and then transmitted, downloaded, and saved into a computer or mobile device through the Internet or other electronic medium, without any participation or assistance by any person resident in the R.O.C.; or (2) the service is sold through the Internet or other electronic medium but performed or rendered at a physical location outside the R.O.C.

Business conduct referred to in Article 10, Paragraph 1 may be undertaken both within and outside the R.O.C. Under Article 10, Paragraph 3, if a profit-seeking enterprise can provide documentary evidence showing a clear division between the business conduct within the R.O.C. and the business conduct outside the R.O.C., as well as their relative contribution to the income, the R.O.C. tax authority will only treat the income derived from business conduct within the R.O.C. as income sourced from, and therefore subject to tax, by the R.O.C. However, if the business conduct referred to in Paragraph 1 is performed and completed by a foreign profit-seeking enterprise outside of the R.O.C. and meets any of the following three conditions, the income so earned is not considered R.O.C.-source income: (1) it has no fixed place of business or dependent agent within the R.O.C.; (2) it has a dependent agent within the R.O.C., but the agent does not concern the business from which the income is derived; or (3) it has a fixed place of business within the R.O.C., but it doesn't participate in or help such business.

According to Article 10, Paragraph 4, when a foreign profit-seeking enterprise sells goods to anyone within the R.O.C. and meets any of the following conditions, it derives no R.O.C.-source income: (1) the head office of the foreign profit-seeking enterprise directly sells physical goods to the customers within the R.O.C.; (2) the foreign profit-seeking

44. The translation of subdivisions of code provisions from Chinese language into English language warrants a brief note. Article 8 of the Income Tax Act consists of eleven subparagraphs (*Kuan*). In contrast, Article 7 of the Income Tax Act consists of five paragraphs (*Xiang*).

45. The phrase "electronic services" is defined by Article 4, Paragraph 2.

enterprise sells to the customers within the R.O.C. either directly or through a domestic profit-seeking enterprise (distributor) standard software, including software downloadable through the Internet, shrink-wrap software, or pre-packaged software that is saved on a disc, and neither the customer nor the distributor has a right to reproduce, modify, or display publicly the standard software; or (3) the foreign profit-seeking enterprise with no fixed place of business or dependent agent within the R.O.C. directly sells physical goods to customers within the R.O.C. through the Internet and the customers declare these goods as their own at the R.O.C. Customs and collect them at the same time.

2. Jurisdiction over Income

Even when the R.O.C. has no jurisdiction over a *taxpayer*, the R.O.C. may have jurisdiction over the *income* derived by that taxpayer.[46] In other words, anyone who derives income from the R.O.C. has to pay taxes on such income.[47] As stated earlier, Article 8 of the Income Tax Act defines the "income sourced in the R.O.C.,"[48] and the MOF promulgated R.O.C. Source Rules in 2009 in order to provide more details.

a. Dividends (by Corporations) and the Distribution of Profits (by Partnerships)

Corporations often distribute dividends to their shareholders at the discretion of their board of directors. The "dividends distributed by companies incorporated and registered in accordance with the Company Act (*Gongsi Fa*) of the R.O.C. and by foreign companies authorized by the government of the R.O.C. to operate within the R.O.C." are R.O.C.-source income under Article 8, Subparagraph 1 of the Income Tax Act. Article 2, Paragraph 1 of the R.O.C. Source Rules explains that the profits remitted abroad by the branch of a foreign company established within the R.O.C. are not R.O.C.-source income. In addition, Paragraph 2 of the same Article clarifies that, where a foreign company has been permitted by the R.O.C. to offer stocks or Taiwan Depositary Receipts (TDRs)[49] in the R.O.C., and to have its securities listed and traded on a securities exchange market within the R.O.C., the dividends distributed by the foreign company to its shareholders are not R.O.C.-source income for these shareholders.

While Article 8, Subparagraph 1 of the Income Tax Act deals with dividends (*guli*), Article 8, Subparagraph 2 of the same Act deals with profits (*yinyu*). Article 3 of the R.O.C. Source Rules explains that the term "profits distributed by profit-seeking enterprises organized in the

46. *See also*, RESTATEMENT (THIRD) THE FOREIGN RELS. L. OF THE U.S. § 411 (3) (Am. L. Inst. 1986). ("A state may exercise jurisdiction to tax (a) property located in its territory, or (b) a transaction that occurs, originates, or terminates in its territory or has some other substantial connection to the state.")

47. R.O.C.'s Income Tax Act, art. 8.

48. The Romanization of the quoted text is: *Zhonghua minguo laiyuan suode* (中華民國來源所得).

49. The Romanization of its title is: *Taiwan cuntuo pingzheng* (臺灣存託憑證).

form of a cooperative or a partnership within the R.O.C." in Article 8, Subparagraph 2 of the Income Tax Act refers to the profit distributed by a cooperative incorporated and registered in the R.O.C. under the Cooperative Act (*hezuo she fa*), or to the profit distributed (or profit that should have been distributed) by a sole proprietorship or partnership registered in the R.O.C.

b. Interest

Lenders frequently engage in transactions where they lend principal to a borrower, recoup the principal of the debt, and earn interest income. The "interest derived from governments of various levels of the R.O.C., from judicial persons within the R.O.C. and individuals residing in the R.O.C." is subject to source taxation in Taiwan.[50] Article 5 of the R.O.C. Source Rules explains that Article 8, Subparagraph 4 of the Income Tax Act covers the interest derived from public debts, company bonds, financial bonds, short-term commercial papers, deposits, beneficiary securities, asset-backed securities issued pursuant to the Financial Asset Securitization Act[51] and the Real Estate Securitization Act,[52] and other types of loans.[53] Paragraph 2 of the same Article states that, where a foreign company incorporated and registered in accordance with foreign law is permitted by the competent securities authority of the R.O.C. to issue corporate bonds in the R.O.C. or to have its foreign corporate bonds issued under foreign law traded on the over-the-counter markets in the R.O.C., the interest payment does not constitute R.O.C.-source income for the recipients.

The type of loan or the purpose for which it is used does not control the nexus between interest income and Taiwan. However, under Article 4, Subparagraph 22 of the Income Tax Act, the interest income earned by foreign governments, international development institutions, and foreign financial institutions is, if compliant with legal requirements, exempt from income taxation by the R.O.C. government.

c. Royalties

Owners of intellectual property may earn royalty income by licensing to users the right to make use of their intellectual property. In Taiwan, the "royalty derived from patents, trademarks, copyrights, secret formulas, and franchises by virtue of their being made available for use by other persons within the R.O.C." is R.O.C.-source income under

50. It should be noted that interest not derived from governments of various levels of the R.O.C., from judicial persons within the R.O.C. and individuals residing in the R.O.C. may still be subject to income taxation in Taiwan if they are profits arising from businesses within the R.O.C. (Income Tax Act, art. 8, ¶ 9).

51. The Romanization of its title is: *Jinrong Zichan Zhengquan Hua Tiaoli* (金融資產證券化條例).

52. The Romanization of its title is: *Bu Dong Chan Zhengquan Hua Tiaoli* (不動產證券化條例).

53. *Cf.*, Reuven S. Avi-Yonah et al., U.S. International Taxation: Cases and Materials 64–89 (4th ed., 2019).

Article 8, Subparagraph 6 of the Income Tax Act.[54] Article 7, Paragraph 1 of the R.O.C. Source Rules explains that the method of earning royalty income under Article 8, Subparagraph 6 of the Income Tax Act includes not only the payment of a royalty, but also a right to participate in profits, or company shares obtained from licensing intangible assets for use within the R.O.C. Article 7, Paragraph 1 of the R.O.C. Source Rules also sets out the types of intangible property to which Article 8, Subparagraph 6 of the Income Tax Act applies: (1) intangible assets that are registered, such as copyrights, patents, trademarks, business rights, trade names, or brand names; and (2) intangible assets that are not registered, such as secret formulas and know-how (including secret prescriptions or production processes, designs or models, plans, trade secrets, information or specialized knowledge relating to industrial, commercial, or scientific experience, business privileges (*texu quanli*), marketing channels, client information, distribution rights, and other proprietary rights). According to Article 7, Paragraph 1, the term "secret formulas" refers to methods, technology, production processes, formulas, programs, designs, and other information that can be applied in production, marketing, or operation, are not widely known to the persons in the same trade, and have actual or potential economic value.

Article 7, Paragraph 2 of the R.O.C. Source Rules states that where a profit-seeking enterprise within the R.O.C. has been granted licenses to use intangible assets within the scope of Paragraph 1, the royalty payable for use of such intangible assets during the course of the contracted processing, manufacturing, or research outside the R.O.C. shall be regarded as R.O.C.-source income and be subject to income tax by the R.O.C. However, according to Article 7, Paragraph 2, if a profit-seeking enterprise within the R.O.C. contracts with a foreign profit-seeking enterprise for processing or manufacturing work, and the foreign profit-seeking enterprise's intangible assets are licensed and used without paying a royalty separately, no R.O.C.-source income arises.

Article 7, Paragraph 3 of the R.O.C. Source Rules states that, if the intangible assets in Paragraph 1 are provided through the Internet or other electronic medium for use within the R.O.C., it does not constitute an offering or sale of electronic services under Article 4, Paragraph 2 and Article 10, Paragraph 2 of the R.O.C. Source Rules, and, instead, Article 7 applies.

If a profit-seeking enterprise develops a technology jointly with a foreign enterprise pursuant to their contract, both jointly own resulting intellectual property rights in accordance with the contractual terms,[55] and each co-developer derives a reasonable benefit with neither royalty payments nor tax avoidance, its research and development expenses are not considered R.O.C.-source income, as stated in Article 14 of the R.O.C. Source Rules.

54. *Cf.*, *id.*, 44–64.

55. *Cf.* WELLS, *supra* note 37, at 107–111.

The issue of rent is distinct from, but might be relevant to, the issue of royalties. Article 6 of the R.O.C. Source Rules defines the term "rent derived from the leasing of property (*caichan*) situated within the R.O.C." in Article 8, Subparagraph 5 of the Income Tax Act as the rent derived from leasing the following types of properties in the R.O.C.: (1) real estate, such as buildings and land, within the R.O.C.; and (2) two types of movable property: (I) movable property registered in the R.O.C., such as a vessel, aircraft, or vehicle; along with securities (*youjia zhengquan*) permitted by the competent securities authority of the R.O.C. to be issued or traded on a securities exchange market within the R.O.C., such as stocks, bonds, TDRs, and other securities; and (II) properties such as machinery, vessels, aircraft, vehicles, office equipment, satellite transponders, and the Internet equipment provided directly or indirectly for use within the R.O.C.

d. Income From the Sale of Property

In Taiwan, Article 8 of the R.O.C. Source Rules defines the term "profits from transaction of properties within the R.O.C." in Article 8, Subparagraph 7 of the Income Tax Act as the income derived from transactions involving the following three types of property within the R.O.C.: (1) real estate, (2) movable property, and (3) intangible property.[56] Different rules apply to these different types of property.

First, profits derived from selling real estate located within the R.O.C. are R.O.C.-source income, regardless of the place where the contract is signed or other factors.

Second, the rule for profits derived from selling movable property (*dong chan*) is divided into two categories. First, selling the movable property registered in the R.O.C., such as a vessel, aircraft, and vehicle, leads to R.O.C.-source income or loss. Selling securities, such as stocks and bonds, issued or traded on the R.O.C.'s securities exchange market as permitted by the competent securities authority of the R.O.C. also gives rise to R.O.C.-source income. However, selling securities permitted by the competent securities authority of the R.O.C. to be traded outside of the R.O.C. does not give rise to R.O.C.-source income. The second category is further divided into three sub-categories, and the income derived from selling movable property in any of the following circumstances is R.O.C.-source income: (i) where the transfer of movable property requires transportation and its place of origin is within the R.O.C.; (ii) where the transfer of movable property requires no transportation and its location is within the R.O.C.; and (iii) where the movable property is sold through an auction and the auction is held at a physical place within the R.O.C.

56. Jurisdictions differ on the design of these rules. For example, Section 861(a)(6) of the Internal Revenue Code of the United States, which treats inventory property differently than it does other types of tangible property, does not find a comparable provision in the law of the R.O.C. Cf. WELLS, *supra* note 37, at 66–74.

Third, profits derived from selling intangible property registered under the laws of the R.O.C. are R.O.C.-source income. The profits derived from selling intangible property that is not registered under the laws of the R.O.C. are R.O.C.-source income if the seller is an individual person domiciled within the R.O.C. or a profit-seeking enterprise whose head office is within the R.O.C. However, profits derived from selling intangible property registered under foreign law are not R.O.C.-source income.

e. Income From the Rendering of Services

Article 4 of the R.O.C. Source Rules deals with the income from services.[57] Paragraph 1 defines the term "remuneration for services rendered within the R.O.C." in Article 8, Subparagraph 3 of the Income Tax Act differently for individual persons and profit-seeking enterprises. First, for individual persons, the term refers to the salaries, wages, income from professional practice (*zhixing yewu suode*), or other income derived from the services performed or rendered within the R.O.C. Second, for profit-seeking enterprises, the term refers to any income from services rendered in any of the following three circumstances: (1) the services are rendered within the R.O.C.; (2) the services have to be rendered both within and outside the R.O.C.; or (3) the services are rendered outside the R.O.C., but the "involvement and assistance"[58] by an individual or profit-seeking enterprise residing in the R.O.C. is necessary for the rendering of such services.

According to Paragraph 2, where an individual or profit-seeking enterprise outside the R.O.C. renders any of the following electronic services (*dianzi laowu*) to another individual or profit-seeking enterprise within the R.O.C., such services shall be regarded as services rendered within the R.O.C.: (1) the services are downloaded through the Internet, saved into computers or mobile devices, and then used; (2) the services are used on the Internet without being downloaded or saved into any device; or (3) the services are used through the Internet or through other electronic medium.

Under Paragraph 4, where the services in Paragraph 1 are rendered outside the R.O.C. and meet one of the following conditions, the remuneration derived by the foreign profit-seeking enterprise shall not be regarded as R.O.C.-source income: (1) the foreign profit-seeking enterprise has no fixed place of business or dependent agent within the R.O.C.; (2) the foreign profit-seeking enterprise has a dependent agent within

57. Jurisdictions differ in their design of their domestic rules relating to taxing the rendering of services. Cf, Pasquale Pistone, *Taxation of Employment*, *in* Research Handbook on International Taxation 65–77 (Yariv Brauner ed., 2020); Andrés Báez Moreno, *Taxation of Cross-Border Services*, *in* Research Handbook on International Taxation 78–96 (Yariv Brauner ed., 2020).

58. According to Article 4, Paragraph 3, the phrase "involvement and assistance" refers to the supply of resources such as equipment, manpower, specialized knowledge, or technology, but excludes circumstances where the buyers provide only basic background information or communication such as notification or confirmation.

the R.O.C., but such agent is not authorized to provide the particular services; or (3) the foreign profit-seeking enterprise has a fixed place of business within the R.O.C., but the fixed place of business doesn't help provide the particular services.

Article 4, Paragraph 5 states that Article 10, Paragraph 3 shall apply *mutatis mutandis*[59] to the income calculation for the remuneration derived for the services rendered per Subparagraph 2 or 3 of Article 4, Paragraph 1. In other words, if a profit-seeking enterprise can provide documentary evidence showing a clear division between the services performed within the R.O.C. and the services performed outside the R.O.C., as well as their relative contribution to the income, the R.O.C. tax authority will only treat the income derived from services performed within the R.O.C. as income sourced from, and therefore subject to tax by, the R.O.C. However, if the business conduct referred to in Paragraph 1 is performed and completed by a foreign profit-seeking enterprise outside of the R.O.C. and meets any of the following three conditions, the income so earned is not considered R.O.C.-source income: (1) the foreign profit-seeking enterprise has no fixed place of business or dependent agent within the R.O.C.; (2) the foreign profit-seeking enterprise has a dependent agent within the R.O.C., but the agent does not concern the services for which the remuneration is paid; or (3) the foreign profit-seeking enterprise has a fixed place of business within the R.O.C., but it doesn't participate in or help the performance or rendering of the services.

However, the location where services are performed or rendered does not always control whether the remuneration for such services is R.O.C.-source income. For example, Article 4, Paragraph 6 states that if a foreign profit-seeking enterprise's performance of services within the R.O.C. amounts to the operation of industry, commerce, agriculture, forestry, fishery, animal husbandry, mining, or metallurgy enterprises within the R.O.C., then the source rule for income derived from the operation of industry, commerce, agriculture, forestry, fishery, animal husbandry, mining, or metallurgy enterprises (Article 8, Subparagraph 9 of the R.O.C.'s Income Tax Act) applies. In other words, the source rule for income derived from the rendering of services (Article 8, Subparagraph 3 of the R.O.C.'s Income Tax Act) does not apply in such a circumstance.

For another example, under Article 8, Subparagraph 8 of the R.O.C.'s Income Tax Act, the "remuneration for services performed by the employees sent abroad by the government of the R.O.C. and the remuneration for services performed by employees outside the R.O.C. for their employer within the R.O.C." are R.O.C.-source income only to the extent such remuneration is exempt from income tax in the jurisdiction

59. The Latin phrase "mutatis mutandis" is used in this article to mean that a rule in a situation is applied in another situation with the necessary changes having been made. In other words, the situations are different, but the rules are similar or the same.

where the employee is. The purpose of this rule is twofold. First, this rule accords equal treatment to the employees of employers within the R.O.C., regardless of the locations where such employees perform their services. Second, this rule helps avoid double taxation by treating the remuneration earned by an employee as R.O.C.-source income only when such income is not taxed by the jurisdiction where the employee performs the services.

f. Pensions

Pension payments are subject to withholding at the source in Taiwan under Article 89 of the Income Tax Act. In other words, whether the pension fund paying the pension resides in Taiwan is the decisive question. Whether the pension recipient was employed in Taiwan right before retirement is less important. If the recipients believe that the pension payments are not R.O.C.-source income, they may request a refund of the taxes withheld. The pension payments made by foreign pension funds to the retirees currently domiciled in Taiwan may be considered "other income derived within the R.O.C" under Article 8, Subparagraph 11 of the Income Tax Act.

g. Source Rules for Other Types of Income

Some other provisions of the R.O.C. Source Rules are set out below. Article 11 defines the term "awards or grants obtained from participating in various skill contests, games, or lotteries, etc. within the R.O.C." in Article 8, Subparagraph 10 of the Income Tax Act as the awards or grants obtained from skill contests, games, or lotteries that take place within the R.O.C. Article 12 defines the term "any other income obtained within the R.O.C." in Article 8, Subparagraph 11 of the Income Tax Act as any other income that cannot be specifically categorized according to Article 8, Subparagraphs 1 to 10 of the same Act.

As the question which source rule applies depends on the nature of the particular item of income, how should one identify the proper source rule when a transaction involves two or more types of income? Article 13 of the R.O.C. Source Rules concerns "comprehensive services" (*zonghe xing yewu fuwu*), through which foreign profit-seeking enterprises earn multiple types of income from one transaction. A rticle 13, Paragraph 1 requires the R.O.C. tax authority to identify each type of income involved and classify each type of income according to its nature. Paragraph 2 further states that if the comprehensive service in Paragraph 1 involves the operation of industry, commerce, agriculture, forestry, fishery, animal husbandry, mining, or metallurgy enterprises within the R.O.C., such business conduct shall be identified in accordance with Article 8, Subparagraph 9 of the Income Tax Act. If it does not fit the description provided for in Subparagraph 9, but the remunerations fit the descriptions provided for in Subparagraphs 3, 4, 5, 6, 7, or 11 of Article 8 of the Income Tax Act, the R.O.C. tax authority has to identify each type of income and categorize them accordingly per these subparagraphs.

B. *Taiwan's Tax Law for Activities Implicating the P.R.C. (or Mainland China)*

The tax aspect of the bilateral relationship between the P.R.C. and the R.O.C. is similar to that between two states that have not signed a bilateral tax treaty, in the sense that both the P.R.C. and the R.O.C. collect their own taxes and enforce only their own tax laws. The P.R.C. and the R.O.C. signed the Cross-Strait Agreement on Avoidance of Double Taxation and Enhancement of Tax Cooperation[60] on August 25, 2015,[61] but it was not ratified by the R.O.C.[62]

Articles 24, 25, and 25–1 of the *Act Governing the Relations between the People of Taiwan Area and the People of the Mainland Area* are about income taxes. Article 24 consists of three paragraphs. Paragraph 1 requires any individual, judicial person, organization, or other institution of the Taiwan Area having income derived from sources in the Mainland Area to pay income tax on such income together with the income derived from sources in the Taiwan Area. According to the second half of Paragraph 1, the amount of tax already paid in the Mainland Area may be deducted from the amount of the income tax payable to the R.O.C. government. Put differently, while Article 8 of the Income Tax Act sets out the notion of "income derived from sources in the R.O.C.,"[63] Article 24 distinguishes between the notion of "income derived from sources in the Taiwan Area"[64] and the notion of "income derived from sources in the Mainland Area."[65] At the operational level, Article 24 makes a dis-

60. Ministry of Finance (Taiwan), *The "Cross-Strait Agreement on Avoidance of Double Taxation and Enhancement of Tax Cooperation"* (Aug. 31, 2015), https://www.mof.gov.tw/Eng/download/19423 [https://perma.cc/YQH3-D2ZW].

61. The Cross-Strait Agreement on Avoidance of Double Taxation and Enhancement of Tax Cooperation was signed by the Straits Exchange Foundation (SEF), authorized by the R.O.C., and the Association for Relations Across the Taiwan Straits (ARATS) authorized by the P.R.C. The Executive Yuan (or Cabinet) of the R.O.C. authorized the SEF to sign agreements with the ARATS. *See*, Chi Chung, *International Law and the Extraordinary Interaction Between the People's Republic of China and the Republic of China on Taiwan*, 19 Ind. Int'l & Comp. L. Rev. 233, 268-270 (2009).

62. In March 2014, protesters occupied the Legislative Yuan, the R.O.C.'s legislative body, to protest against the Cross-Strait Service Trade Agreement (*haixia liang an fuwu maoyi xieyi*). The protesters successfully prevented the Cross-Strait Service Trade Agreement from being ratified. *See*, André Beckershoff, *The Sunflower Movement: Origins, Structures, and Strategies of Taiwan's Resistance against the 'Black Box'*, *in* Taiwan's Social Movements under Ma Ying-Jeou: From the Wild Strawberries to the Sunflowers 113 (Dafydd Fell ed., 2017). Even though the Executive Yuan authorized the SEF to sign the Cross-Strait Agreement on Avoidance of Double Taxation and Enhancement of Tax Cooperation with the ARATS on August 25, 2015, it was similarly not ratified by the Legislative Yuan of the R.O.C.

63. The Romanization of the quoted text is as follows: *zhonghua minguo laiyuan suode* (中華民國來源所得).

64. The Romanization of the quoted text is as follows: *Taiwan diqu laiyuan suode* (臺灣地區來源所得).

65. The Romanization of the quoted text is as follows: *dalu diqu laiyuan suode* (大陸地區來源所得).

tinction between the Taiwan Area and the Mainland Area. Even though the R.O.C. Constitution taking effect since December 25, 1947, may refer to and purport to govern both the Taiwan Area and the Mainland Area, the constitutional amendment in 1991 authorizes the R.O.C.'s Legislative Yuan to make distinctions such as that in Article 24 so that the R.O.C. may have legal rules to govern cross-border activities between the P.R.C. and R.O.C.

Article 24 is particularly noteworthy for another reason. The R.O.C. government requires Taiwan residents working in the P.R.C. to pay income tax on their salary income in the P.R.C. to the R.O.C., but the amount of taxes paid to the P.R.C. on the same item of income may be credited[66] against their tax liability to the R.O.C. The R.O.C. government, however, does not require its citizens working in other countries to pay taxes to the R.O.C. on their income earned outside of the R.O.C.

As stated earlier, the R.O.C. uses the credit method to relieve double taxation for profit-seeking enterprise income tax. However, double taxation has to occur for a single taxpayer to claim the tax credit. Interestingly, Article 24, Paragraph 2 purports to offer a relief by imposing a tax. Specifically, it states that if any judicial person, organization, or other institution of the Taiwan Area permitted[67] by the R.O.C. to make investment in the Mainland Area through a subsidiary or enterprise it establishes in any third place (e.g., Cayman Islands, Singapore) derives investment income from its subsidiary or enterprise in the third place, the portion of such investment income that came from the (grandson)[68] subsidiary or enterprise in the Mainland Area shall be deemed to be "income derived from sources in the Mainland Area" and taxed by the R.O.C.[69] This designation of "income derived from sources in the Mainland Area" leads to the rule in the latter part of the same Paragraph that the amount of income tax paid in the Mainland Area and the third place on the investment income derived from sources in the Mainland Area may be deducted from the amount of the income tax payable to

66. Some jurisdictions exempt from domestic taxation the income derived from overseas sources. Some jurisdictions tax the income derived from overseas sources but grant credits to address double taxation. *See, e.g.*, WELLS, *supra* note 37, 303–310.

67. The question whether or not permission is given is governed by Article 35 of the Act Governing the Relations between the People of Taiwan Area and the People of the Mainland Area.

68. I use the word "grandson" to denote the indirect relationship between the parent company in the R.O.C., on the one hand, and the invested company in the P.R.C., on the other hand.

69. As stated earlier, Article 24, Paragraph 1 refers to the notion of "income derived from sources in the Mainland Area." *See supra* note 65 and accompanying text. In contrast, Article 24, Paragraph 2 deals with the income derived from sources in third places. These places are "third" places because they are neither the Taiwan Area nor the Mainland Area. Even though some incomes are not derived from the Mainland Area, they are defined as "income derived from sources in the Mainland Area" by Article 24, Paragraph 2.

the R.O.C. government. Enacted in 2002, Paragraph 2 offers indirect[70] tax credit for judicial persons, organizations, or other institutions of the Taiwan Area permitted by the R.O.C. to make investment in the Mainland Area through a subsidiary or enterprise established in third places. With the help of Article 24, paragraph 2, a parent company may claim a tax credit for the taxes paid by another legal person on such investment income in a third place and in the Mainland Area. Article 24, Paragraph 3 states that the total amount to be credited in accordance with the preceding two paragraphs may not be greater than the amount of the additional income multiplied by the applicable tax rate of the Taiwan Area.

Article 25 consists of six paragraphs. Paragraph 1 states that any individual, judicial person, organization, or other institution of the Mainland Area having income derived from sources in the Taiwan Area shall pay R.O.C. income tax on such income.

Paragraph 2 states that any individual of the Mainland Area residing or staying in the Taiwan Area for 183 days or more in a taxable year[71] shall file a comprehensive income tax (or personal income tax, *zonghe suode shui*) return for the income derived from sources in the Taiwan Area, and the taxing provisions applicable to the people of the Taiwan Area shall apply *mutatis mutandis*.

Paragraph 3 states that any judicial person, organization, or other institution of the Mainland Area that has a fixed place of business or a dependent agent in the Taiwan Area shall pay profit-seeking enterprise income tax on the income derived from sources in the Taiwan Area, and the taxing provisions applicable to the profit-seeking enterprises in the Taiwan Area shall apply *mutatis mutandis.* If any judicial person, organization, or other institution of the Mainland Area does not have any fixed place of business but has a dependent agent in the Taiwan Area, its profit-seeking enterprise income tax shall be paid by such agent, who also bears the obligation to file a return with the competent tax authority in Taiwan. However, if any judicial person, organization, or other institution of the Mainland Area receives dividend or partnership income resulting from its investment in the Taiwan Area, the amount shall not be included in its business income but shall be subject to withholding at the statutory rate.

Paragraph 4 states that any individual of the Mainland Area staying in the Taiwan Area for less than 183 days in a taxable year and any judicial person, organization, or other institution of the Mainland Area without any fixed place of business or dependent agent in the Taiwan Area is not required to file a tax return, and their tax liabilities for their income derived from sources in the Taiwan Area shall be satisfied by the amount withheld by the payer or tax withholder (*koujiao yiwu ren*) in accordance with the statutory rate and transmitted directly to the R.O.C.

70. Michael J. Graetz, Foundations of International Income Taxation 176-79 (2003).

71. According to Article 11, Paragraph 6 of the R.O.C.'s Income Tax Act, the term "taxable year" refers to every year from January 1 to December 31.

Treasury. If an item of income does not fall within the scope of withholding per the R.O.C.'s Income Tax Act, the income-earner (taxpayer) shall file a tax return and pay tax in accordance with R.O.C. law. If any individual of the Mainland Area cannot file a tax return on his or her own, he or she is required by R.O.C. law to authorize any individual of the Taiwan Area or any profit-seeking enterprise with a fixed place of business in the Taiwan Area to fulfill the filing and paying obligations on his or her behalf. Paragraph 5 states that the relevant provisions of the Income Tax Act shall govern such withholding matters.[72]

Article 25–1 consists of two paragraphs. Paragraph 1 states that, for any individual, judicial person, organization, or other institution of the Mainland Area, or any company in any third place of which he or she is a shareholder, permitted[73] to invest in the Taiwan Area, the dividends paid by the invested company in the Taiwan Area and the partnership income distributed to a partner shall be subject to a twenty-percent withholding tax. I n other words, no income tax return has to be filed with the R.O.C. government. However, if the person deriving such dividend income or partnership income stays in the Taiwan Area for 183 days or more in a taxable year, he or she has to file an income tax return in accordance with Paragraph 2 of Article 25.

According to Article 25-1, Paragraph 2, if any director, manager, or technician of any judicial person, organization, or other institution of the Mainland Area which is permitted by the R.O.C. government to make an investment in the Taiwan Area stays in the Taiwan Area because of his or her temporary work such as investment, factory building, market research, etc. for 183 days or less in a taxable year, the salary income earned by such director, manager, or technician and paid outside the Taiwan Area by their employer is not income derived from sources in the Taiwan Area and, therefore, not subject to tax by the R.O.C.

C. *Taiwan's Tax Law for Activities Implicating Hong Kong or Macau*

The Act Governing the Relations with Hong Kong and Macau[74] took effect in the R.O.C. on April 2, 1997. Article 62 authorized the Executive Yuan to decide on the date on which the portions of the Act would indeed apply (*shixing*). On June 19, 1997, the Executive Yuan announced

72. Paragraph 6 authorizes the MOF to promulgate withholding regulations and submitted them to the Executive Yuan for approval. No separate set of withholding regulations exist for the people of the Mainland Area; rather, Article 1 of the "Standards of Withholding Rates for Various Incomes" lists Article 25, Paragraph 6 as one of the bases upon which the regulations are promulgated. It should be noted that another withholding rule—Article 25–1 of the *Act Governing the Relations between the People of Taiwan Area and the People of the Mainland Area*—was passed by the Legislative Yuan on Oct. 9, 2003 and enacted into law on Oct. 29, 2003.

73. The question whether permission shall be given is governed by Article 73 of the Act Governing the Relations between the People of Taiwan Area and the People of the Mainland Area.

74. The Romanization of its title is: *Xianggang Aomen Guanxi Tiaoli* (香港澳門關係條例).

that the portion relating to Hong Kong would take effect beginning on July 1, 1997. On November 16, 1999, the Executive Yuan announced that the portion relating to Macau would take effect beginning on December 20, 1999. Of the provisions of the Act, three—Articles 28, 29, and 29–1—involve income taxes.

Article 28 consists of three paragraphs. Paragraph 1 states that "an individual person of the Taiwan Area"[75] does not have to pay income taxes to the R.O.C. government on the income earned from or in Hong Kong or Macau. Paragraph 2 states that a judicial person, group or other institution of the Taiwan Area earning income from or in Hong Kong or Macau must pay income taxes to the R.O.C. on such income, but a tax credit is granted against the R.O.C. tax liabilities for the taxes paid on such income along with the tax credit for foreign taxes paid on foreign income (*guowai suode*; 國外所得). Paragraph 3 caps the amount of the tax credit at the sum of the foreign income and the taxable income earned from or in Hong Kong or Macau multiplied by the applicable R.O.C. tax rate. When calculating the cap on the amount of tax credit, foreign income and the taxable income earned from or in Hong Kong or Macau are pooled together, rather than divided into separate categories. In other words, from the perspective of taxpayers, the rules allow averaging and some planning.

Article 29 consists of two paragraphs. Paragraph 1 states that a Hong Kong or Macau resident earning income from or in the Taiwan Area shall be taxed by the R.O.C. on such income. Paragraph 2 states that a judicial person, group, or other institution of Hong Kong or Macau earning income from or in the Taiwan Area shall be taxed by the R.O.C. on such income in the same way as a profit-seeking enterprise whose head office is located outside of the R.O.C.

Article 29–1 consists of two paragraphs. Paragraph 1 states that the income earned by enterprises engaged in shipping or air transport between the Taiwan Area and Hong Kong or Macau may be taxed at a reduced rate or may be tax-exempt. Paragraph 2 authorizes the R.O.C.'s MOF to reach agreements (*xieyi*) with Hong Kong and Macau and have them approved by the R.O.C.'s Executive Yuan. *The Taiwan-Macau Agreement to Avoid Double Taxation of Air Transport*[76] was signed on December 10, 2015, announced by the R.O.C. on February 7, 2018, and took effect on December 29, 2017.[77]

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75. The Romanization of the quoted text is: *Taiwan diqu renmin* (臺灣地區人民). Article 2 of the *Act Governing the Relations between the People of Taiwan Area and the People of the Mainland Area* defines a person of the Taiwan Area as a person who registers his or her residence (*huji*; 戶籍) in Taiwan Area.

76. The Romanization of the title is: *Taiwan Yu Aomen Bimian Hangkong Qiye Shuangchong Keshui Xieyi* (臺灣與澳門避免航空企業雙重課稅協議).

77. *Taiwan and Macau Agreement to Avoid Double Taxation for Aviation Enterprises*, Laws and Regulations Database of the Republic of China (Taiwan) (Dec. 10, 2015), https://law.moj.gov.tw/LawClass/LawAll.aspx?PCODE=Q0070052 [https://perma.cc/S6WJ-XQRY].

II. Bilateral Tax Treaties (Agreements)

While the R.O.C.'s absence from international organizations is well-known as of 2024, lesser known is the fact that the R.O.C. or Taiwan has 35 treaty (agreement) partners. They are, in the order in which the bilateral treaty (agreement) took effect, as follows: Singapore (Jan. 1, 1982), Indonesia (Jan. 12, 1996), South Africa (Sept. 12, 1996), Australia (Oct. 11, 1996), New Zealand (Dec. 5, 1997), Vietnam (May 6, 1998), Gambia (Nov. 4, 1998), Eswatini (Feb. 9, 1999), Malaysia (Feb. 26, 1999), North Macedonia (June 9, 1999), the Netherlands (May 16, 2001), United Kingdom (original agreement on Dec. 23, 2002; amending protocol on Dec. 23, 2021), Senegal (Sept. 10, 2004), Sweden (Nov. 24, 2004), Belgium (Dec. 14, 2005), Denmark (Dec. 23, 2005), Israel (Dec. 24, 2009), Paraguay (June 3, 2010), Hungary (Dec. 29, 2010), France (Jan. 1, 2011), India (Aug. 12, 2011), Slovakia (Sept. 24, 2011), Switzerland (Dec. 13, 2011), Germany (Nov. 7, 2012), Thailand (Dec. 19, 2012), Kiribati (June 23, 2014), Luxembourg (July 25, 2014), Austria (Dec. 20, 2014), Italy (Dec. 31, 2015), Japan (June 13, 2016), Canada (Dec. 19, 2016), Poland (Dec. 30, 2016), Czech Republic (May 12, 2020), Saudi Arabia (Nov. 1, 2021), and the Republic of Korea (Dec. 27, 2023).[78]

Some of them do not carry the word "treaty" in their titles, but that, in my view, does not affect the legal character of such legally binding commitments. The R.O.C.'s MOF negotiated these income tax treaties or agreements based on the bilateral relationship between the R.O.C. and the foreign country, including its laws and economy.

Income tax treaties are authorized by the R.O.C.'s Legislative Yuan through Article 5 of the Tax Collection Act[79] to take effect after the Executive Yuan approves the income tax treaties. No ratification is required. In addition, Article 124 of the Income Tax Act states that if an income tax treaty (*suode shui xieding*) provides for a rule different (*tebie*) from that of the Income Tax Act, the provision of the income tax treaty (agreement) prevails over that of the Income Tax Act. The R.O.C. adopts the monist theory on the relationship between its domestic law and international law. Tax treaties that take legal effect in the R.O.C. do not require any other implementing legislation. A treaty to which Taiwan is a contracting party may be applicable within Taiwan without further domestic legislation.[80] It is ideal to read the R.O.C.'s tax treaties and the domestic law of the R.O.C. so as to provide a harmonious result, i.e., without

78. The texts of these treaties (or agreements) are available at the Web site of the R.O.C.'s Ministry of Finance, *Treaty Network*, Ministry of Finance, R.O.C., https://www.mof.gov.tw/Eng/singlehtml/264?cntId=82780 [https://perma.cc/MX9D-CC4S] (Aug. 21, 2024).

79. The Romanization of its title is: *shuijuan jizheng fa* (稅捐稽徵法).

80. Conclusion of Treaties Act, art. 11, ¶ 2, (*tiaoyue dijie fa*;條約締結法) https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=E0020021 [https://perma.cc/GFG5-LXHS].

conflicts.[81] If a conflict is unavoidable, then the R.O.C.'s treaty commitments prevail over the R.O.C.'s domestic law.[82]

The tax treaty (agreement) policy goals of the R.O.C. are to eliminate double taxation, prevent tax evasion, improve bilateral investment activities, and enhance cultural and academic cooperation.[83] When negotiating income tax agreements, the R.O.C. considers the OECD model, the UN model, and both contracting parties' political and fiscal status, economics, and trade.[84]

Tax treaties are entered into following the negotiations between the R.O.C.'s MOF and its counterpart of the partner jurisdiction. After signing the tax treaty, the R.O.C.'s MOF seeks approval from the R.O.C.'s Executive Yuan (the Cabinet). The R.O.C.'s Legislative Yuan authorizes the MOF through the Income Tax Act to sign tax treaties on behalf of the R.O.C. No ratification is needed for a tax treaty or agreement to take effect.

Some of Taiwan's tax treaties have been amended or are currently in the process of being renegotiated. For instance, the tax agreement between Taiwan and the United Kingdom (hereafter referred to as the Taiwan-UK tax agreement) was amended in 2021.[85]

Article 2, Paragraph 3 of the Taiwan-UK agreement as amended in 2021[86] states:

> "The existing taxes to which this Agreement shall apply are in particular:
> (a) in the territory in which the taxation law administered by the United Kingdom HM Revenue and Customs is applied:
> …
> (b) in the territory in which the taxation law administered by the Taxation Administration, Ministry of Finance, Taipei is applied:
> (i) the profit seeking enterprise income tax;

81. Ministry of Justice, R.O.C., Letter No. Fa-Can-20108 issued on November 19, 1988 (法參字第 20108 號).

82. *Id*.

83. Dep't. of Int'l Fiscal Affairs, *Treaty Policy*, Ministry of Finance, R.O.C. (Jan. 26, 2021), https://www.mof.gov.tw/Eng/singlehtml/264?cntId=82775 [https://perma.cc/G997-8Y6N].

84. *Id*.

85. Its full title is "Protocol Amending the Agreement between the British Trade and Cultural Office, Taipei and the Taipei Representative Office in the United Kingdom for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, and the Annex Thereto, signed at London on 8 April 2002." Protocol to the UK/Taiwan Double Taxation Agreement, Web site of the United Kingdom government (Dec. 23, 2021), https://assets.publishing.service.gov.uk/media/624d8752e90e072a026021b6/Protocol_to_the_UK_Taiwan_Double_Taxation_Agreement.odt [https://perma.cc/52JX-D6L9].

86. *Agreement Between the Taipei Representative Office in the United Kingdom and the British Office Taipei for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital Gains and the Prevention of Tax Evasion and Avoidance*, Ministry of Finance, R.O.C. (Aug. 19, 2021), https://www.mof.gov.tw/Eng/download/a9cedd04246a42bb88b1c282d9e4343b [https://perma.cc/YEP6-8GRF].

(ii) the individual consolidated income tax; and

(iii) the income basic tax."

On the surface, Article 6 of the Amending Protocol is only a technical provision to clarify the taxes covered by the Taiwan-UK tax agreement. Observers of the Taiwan question of course will notice the way in which Taiwan was referred to—"the territory in which the taxation law administered by the Taxation Administration, Ministry of Finance, Taipei is applied." On the one hand, a person may dismiss such reference as unnecessary. On the other hand, it has proven to be a practical way to help businesses and individuals enjoy the benefits of a tax treaty.

The R.O.C. emphasizes both the certainty of legal form and the economic substance of the relevant transactions or arrangements.[87] An entity that is treated as fiscally transparent under the tax law of either the R.O.C. or its treaty (agreement) partner may fall short of being a resident of a contracting jurisdiction, as the definition of "resident" has to be, taking the Canada-Taiwan agreement as an example, "any *person* who, under the laws of that territory, is *liable to tax* therein by reason of the person's domicile, residence, place of incorporation, place of management or any other criterion of a similar nature."[88] (emphasis added)

The Regulations Governing the Application of Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income[89] (Agreement Application Regulations) were promulgated by the R.O.C.'s MOF with the authorization of Article 80, Paragraph 5 of the R.O.C.'s Income Tax Act. Chapter 2, consisting of Articles 5–17, defines the concepts commonly seen in the provisions of the tax treaties to which Taiwan is a party. Such concepts include residents, permanent establishment, royalties, capital gains, employment income, etc. Article 2 of the Agreement Application Regulations states that Taiwan's tax treaties should be applied first. However, if the matter is not covered by the pertinent treaty to which Taiwan is a contracting party, Taiwan's domestic law, including the Agreement Application Regulations should be applied. Additionally, if Taiwan's domestic law gives the taxpayer more advantage (*youli*) than does the pertinent tax treaty, Taiwan's domestic law should be applied.

The treaty-specific anti-avoidance rule in Taiwan is a clause within this administrative regulation. Article 4, Paragraph 4 of the Agreement Application Regulations requires that tax authorities apply tax treaties on the basis of the economic substance of the factual circumstances and

87. *See* Taxpayer Rights Protection Act, art. 7 (*Nashuizhe Quanli Baohu Fa*; 納稅者權利保護法) https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0340142 [https://perma.cc/APW3-MHR7].

88. Arrangement between the Canadian Trade Office in Taipei and the Taipei Economic and Cultural Office in Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, § 4, https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/taiwan-arrangement-2016.html [https://perma.cc/SAR8-DCES].

89. The Romanization of its title is: *Shiyong Suode Shui Xieding Chahe Zhunze* (適用所得稅協定查核準則).

the attribution and enjoyment of the substantive economic benefits arising out of such circumstances. Article 4, Paragraph 5 states that when a tax authority finds that one of the principal purposes of the transaction or arrangement is to directly or indirectly evade or decrease tax obligations, defer the payment of tax, obtain a tax refund, or receive other types of treaty benefits inconsistent with the meaning (*yizhi*) of the applicable treaty (agreement) provision, the tax authority should apply the anti-abuse provision of the particular treaty. If the treaty does not provide an anti-abuse provision, the tax authority should apply the rules addressing tax avoidance as set out in the Taxpayer Rights Protection Act.

When two members of a corporate group are residents in different states or jurisdictions and enter into a contractual relationship, the price[90] of such a transaction affects the income earned and income tax payable by these two members in the relevant states or jurisdictions. When one government finds fault with the price charged in a related-party transaction and adjusts the price, the other contracting party of the same corporate group wants to make a corresponding adjustment to its tax filing with its resident state or jurisdiction. Article 9, Paragraph 2 of the OECD Model Tax Convention provides for corresponding adjustments that appear in most of Taiwan's tax treaties. The tax authority of Taiwan makes a corresponding adjustment when it believes such an adjustment is warranted. If a multinational enterprise requests a corresponding adjustment, but the tax authority does not consider the request reasonable, a mutual agreement procedure (MAP) may be initiated.

Articles 40 and 41 of the Agreement Application Regulations are related to MAPs. Article 40 states that the tax authorities should describe the facts and reasons in Chinese and English when consulting with a treaty (agreement) partner's competent authority. They should then send a letter to the Department of International Fiscal Affairs to begin a mutual agreement or consultation. Article 41 authorizes the MOF to set out the procedural requirements for a person seeking to initiate the MAP.

On June 25, 2018, Taiwan promulgated the Regulations Governing the Mutual Agreement Procedure under Income Tax Treaties.[91] Articles 13 and 14 are particularly relevant concerning Taiwan's MAP. Article 13 consists of three paragraphs. Article 13, Paragraph 1 states that Taiwan's competent authority shall notify the applicant and the relevant tax authority in Taiwan within 30 days of reaching a mutual agreement. Article 13, Paragraph 2 states that if the mutual agreement requires actions or enforcement in Taiwan, the relevant tax authority shall take action within 90 days of the mutual agreement. Furthermore, Taiwan's domestic rules on the relevant periods for the actions or enforcement shall also apply,

90. Such a price is called the transfer price. The body of law with regard to such a transfer price is called transfer pricing.

91. The Romanization of its title is: *Shiyong Suode Shui Xieding Xianghu Xieyi Chengxu Zuoye Yaodian* (適用所得稅協定相互協議程序作業要點).

if the applicable tax treaty does not exclude from application Taiwan's domestic rules. Article 13, Paragraph 3 states that if Taiwan's competent authority finds that the applicant has withheld information about significant matters, intentionally offered wrong information, or intends to evade tax liabilities through fraud or improper methods, Taiwan's competent authority may notify the competent authority of the treaty (agreement) partner and rescind the mutual agreement.

Article 14 sets out five circumstances in which Taiwan's competent authority shall (*de*; 得) notify the competent authority of the treaty (agreement) partner that the MAP is terminated and notify the applicant and the relevant tax authority in Taiwan within 30 days: (1) any contracting jurisdiction unilaterally eliminates double taxation; (2) the applicant withdraws the application; (3) Taiwan's competent authority or tax authority notifies the applicant to submit materials required for the mutual agreement procedure, but the applicant fails to submit such materials by the deadline; (4) the applicant hides significant information, intentionally offers wrong information, or intends to evade taxes through fraud or improper methods; or (5) other reasons that prevent the competent authority of the contracting states from engaging in the MAP or from reaching an agreement.

James Crawford opined that, as the R.O.C. has not claimed or declared separate statehood, the R.O.C. or Taiwan is not a state.[92] Anthony Aust has adopted Crawford's view and further opined that, therefore, the trade deals or tax agreements that the R.O.C. or Taiwan has with other jurisdictions are not treaties.[93] I respectfully disagree with Aust's opinions which I quote below:

> Yet the government on Taiwan still claims to be the government of all China, and has therefore *not* claimed *separate* statehood for Taiwan. The trade deal between China and Taiwan, which ended tariffs on hundreds of products traded between China and Taiwan, was therefore not embodied in a treaty. Nor is the Cross-Straits Economic Cooperation Framework Agreement of 19 June 2010 a treaty. Although drawn up as one, and having the provisions one expects to find in a treaty, it is expressed to be between the Straits Foundation and the Association for Relations Across the Taiwan Strait, that is, 'front organisations' for China and Taiwan . . . .The liaison offices (not diplomatic missions) in Taipei of over a dozen states, including Australia, the Netherlands, New Zealand, Sweden and the United Kingdom, have concluded 'agreements' with Taiwan on matters such as double taxation. As such states do not regard Taiwan as a state, the agreements, though containing some treaty-type language, are not treaties. In addition, the clear, public and repeated position of such states that they do not recognize Taiwan the government of China, is sufficient to dispel any idea that the agreements are treaties. China

92. James Crawford, The Creation of States in International Law 198–221 (2d ed. 2006).

93. Anthony Aust, Modern Treaty Law and Practice 57–58 (3rd ed. 2013).

> is aware of the agreements, but is not known to have objected.[94] (emphasis original but footnotes omitted)

I disagree with Aust for four reasons. First, Aust's statement that "the government on Taiwan still claims to be the government of all China, and has therefore not claimed separate statehood for Taiwan" is inaccurate. Although the government on Taiwan has not claimed separate statehood or independence, it stopped claiming to be the government of all of China in 1991 when amending the R.O.C. Constitution.

Second, if the "agreements" between Taiwan and the states that do not recognize Taiwan as a state are not treaties, what is the legal nature of such agreements? On topics such as the avoidance of double taxation, are there any other tools or instruments that jurisdictions or governments may utilize to exercise their public authority? The answer in tax law is a clear "no" because tax liabilities have to be clearly determined in accordance with the law. Similarly, denying the Cross-Straits Economic Cooperation Framework Agreement of June 19, 2010[95] the status of a treaty obscures the fact that it was intended to satisfy the World Trade Organization requirements for a free trade agreement.

Third, Aust's statement that "China is aware of the agreements, but is not known to have objected" is misleading. The P.R.C. does not and has not sought to bless the R.O.C.'s or Taiwan's tax agreements with other jurisdictions. When the tax agreement between the R.O.C. and Canada was announced, the P.R.C. protested.[96] When the potential tax agreement between the R.O.C. and the U.S. was discussed, protest was anticipated.[97]

Fourth and perhaps more fundamentally, there is a distinction between recognition as a state and treating a non-recognized entity as a state. Some jurists have opined that although recognition is a political act and a state may deny recognition to another state, every state has a legal obligation to treat the non-recognized entity as if it were recognized as a state. "A state is not required to *accord* formal recognition to the government of another state, but is required to treat as the government of another state a regime that is in effective control of that state, except [for a 'regime as the government of another state if its control has been

94. *Id*.

95. Elizabeth Chien-Hale, *Introductory Note to the Economic Cooperation Framework Agreement Between the Straits Exchange Foundation and the Association for Relations Across the Taiwan Strait*, 50 I.L.M. 440 (2011). *See also* Hans H. Tung & Yun-Han Chu, *Signaling Peace: A Theory of the ECFA and a Peace Dividend beyond the Taiwan Strait*, *in* Taiwan and the 'China Impact': Challenges and Opportunities 110–129 (Gunter Schubert ed., 2016).

96. Nathan Vanderklippe, *China Warns After Canada, Taiwan Reach Economic 'Arrangement'*, Globe and Mail (Jan. 15, 2016), https://www.theglobeandmail.com/news/world/canada-taiwan-reach-economic-arrangement-despite-chinese-efforts-to-bar-closer-ties/article28209532 [https://perma.cc/C7ZM-JT93].

97. Mackenzie Hawkins, *US Lawmakers Near Taiwan Tax Deal, Risking Anger From China*, Bloomberg (Jan. 16, 2024), https://www.bloomberg.com/news/articles/2024-01-16/us-lawmakers-near-taiwan-tax-deal-risking-anger-from-china [https://perma.cc/Z3KC-Z97X].

effected by the threat or use of armed force in violation of the United Nations Charter.']"[98]

Aust referred to Taiwan's agreements with other jurisdictions, noted the fact that they contained treaty-type language, ended the analysis only for their lack of the status of a treaty and, therefore, concluded that they are not within the scope of modern treaty law. While Aust's analysis may be challenged for the aforementioned legal reasons, it is also worth considering for a moment the policy reasons for challenging his position. Treaties are abided by not only because of the enforcement mechanism, but also because the contracting parties have interests or incentives to commit themselves to treaties. The enforcement mechanism for international law is sometimes weak, but "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[99] Even though the R.O.C. or Taiwan may be denied recognition as a state in the eyes of some jurisdictions or commentators, the same dynamic of rule compliance may still apply to the R.O.C.'s external relations.[100]

III. The Law on the Other Side

Legal rules govern Taiwan's outbound investment and the inbound investment in Taiwan. There are legal rules not only on the side of Taiwan, but also on the other side. Many countries have in place the relevant rules. In this article, I focus on the P.R.C. law and the U.S. law.

A. *The P.R.C. Tax Law for Activities Implicating Taiwan*

As stated earlier, the P.R.C. and the R.O.C. signed the Cross-Strait Agreement on Avoidance of Double Taxation and Enhancement of Tax Cooperation on August 25, 2015, but it was not ratified by the R.O.C.[101] Accordingly, the P.R.C. and the R.O.C. collect their own taxes and enforce only their own tax laws. This Subpart sets out the basics of the P.R.C. tax law.

Visitors to the Web site of the Taiwan Affairs Council of the State Council of the P.R.C. may find some general ideas about the P.R.C.'s legal framework regarding Taiwan. The Constitution of the People's Republic of China[102] alludes to Taiwan in its Preamble, stating that "Taiwan is part of the solemn territory of the People's Republic of China,"[103] and

98. Restatement (Third) The Foreign Rels. L. of the U.S. § 203 (Am. L. Inst. 1987). Subsection (2) states that, "A state has an obligation not to recognize or treat a regime as the government of another state if its control has been effected by the threat or use of armed force in violation of the United Nations Charter."

99. Louis Henkin, How Nations Behave 47 (2d ed. 1979).

100. *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997).

101. *See supra* note 61 and accompanying text.

102. The Romanization of its title is as follows: *zhonghua renmin gonghe guo xianfa* (中華人民共和國憲法).

103. The Romanization of the quoted text is as follows: *Taiwan shi Zhonghua*

that "finishing the unification of the homeland is the solemn duty of all Chinese people, including Taiwan compatriots."[104]

Anti-Secession Law[105] was enacted by the P.R.C.'s National People's Congress on March 14, 2005, and has been in effect since then. Article 2 states that "only one China exists in the world;"[106] "both the Mainland and Taiwan are parts of the single Chinese state;"[107] "the sovereignty and territorial integrity of China cannot be divided;"[108] and that "upholding state sovereignty and territorial integrity is an obligation shared by all Chinese people, including Taiwan compatriots."[109]

The *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*[110] was promulgated by the State Council on December 17, 1991 and has been in effect since May 1, 1992. It was amended on June 14, 2015, and the amendment took effect on July 1, 2015.[111] Its Article 2 defines "Mainland residents" (*dalu jumin*) as those P.R.C. citizens (*zhongguo gongmin*) residing on the Mainland and "Taiwan residents" as those P.R.C. citizens residing on Taiwan. The *Law Protecting Investments by Taiwan Compatriots*[112] was enacted by the Standing Committee of the P.R.C.'s National People's Congress on March 5, 1994, has been in effect since then, and was amended on September 3, 2016 and December 28, 2019.[113]

Renmin Gonghe Guo de shensheng lingtu de yibufen (台灣是中華人民共和國的神聖領土的一部分。).

104. The Romanization of the quoted text is as follows: *wancheng tongyi zuguo de daye shi baogua Taiwan tongbao zainei de quan Zhongguo renmin de shensheng zhize* (完成統一祖國的大業是包括台灣同胞在內的全中國人民的神聖職責).

105. The Romanization of its title is: *fan fenlie guojia fa* (反分裂國家法).

106. The Romanization of the quoted text is as follows: *shijie shang zhiyou yige Zhongguo* (世界上只有一個中國).

107. The Romanization of the quoted text is as follows: *dalu he Taiwan tongshu yige Zhongguo* (大陸和台灣同屬一個中國).

108. The Romanization of the quoted text is as follows: *Zhongguo de zhuquan he lingtu wanzheng burong fenge* (中國的主權和領土完整不容分割).

109. The Romanization of the quoted text is as follows: *weihu guojia zhuquan he lingtu wanzheng shi baogua Taiwan tongbao zainei de quan Zhongguo renmin de gongtong yiwu* (維護國家主權和領土完整是包括台灣同胞在內的全中國人民的共同義務).

110. The Romanization of its title is as follows: *Zhongguo Gongmin Wanglai Taiwan Diqu Guanli Banfa* (中國公民往來台灣地區管理辦法). Its full text is at http://www.gwytb.gov.cn/zt/zylszl/rules/xzfl/201101/t20110123_1724634.htm [https://perma.cc/6UP2-7NB2] (last visited Feb. 9, 2024).

111. *Decision of the State Council on Amending the "Regulations on the Administration of Chinese Citizens' Travel to and From the Taiwan Region"*, National Immigration Administration of the P.R.C. (June 19, 2019), https://www.nia.gov.cn/n741440/n741547/c757608/content.html [https://perma.cc/24L8-RWBP].

112. The Romanization of its title is as follows: *Zhonghua Renmin Gonghe Guo Taiwan Tongbao Touzi Baohu Fa* (中華人民共和國臺灣同胞投資保護法). Its full text is at http://www.gwytb.gov.cn/zt/zylszl/rules/jjfl/202004/t20200416_12265988.htm [https://perma.cc/RN4T-V5BX] (last visited Feb. 9, 2024).

113. Law of the People's Republic of China on Protection of Investment by Taiwan Compatriots, Ministry of Com. of the P.R.C. (Dec. 31, 2019), https://tfs.mofcom.gov.cn/fl/art/2021/art_a86f26772e504762b966ef95af80cb53.html [https://

While the Enterprise Income Tax Law of the People's Republic of China[114] does not mention Taiwan, Article 131 of the Implementation Regulations of the Enterprise Income Tax Law of the People's Republic of China[115] states that Paragraphs 2 and 3 of Article 2 of the Enterprise Income Tax Law apply to the enterprises established in the Hong Kong Special Administrative Region, Macau Special Administrative Region, and Taiwan. Article 2, Paragraph 2 of the P.R.C.'s Enterprise Income Tax Law defines "resident enterprises" as the enterprises established in the territory of China and the enterprises established in accordance with the laws of foreign states or foreign jurisdictions but with the actual management institution in the territory of China. Article 2, Paragraph 3 of the P.R.C.'s Enterprise Income Tax Law defines "nonresident enterprises" as the enterprises established in accordance with the laws of foreign states or foreign jurisdictions and with the actual management institution outside the territory of China but with an institution or place of business in the territory of China, and the enterprises that do not have an institution or place of business in the territory of China but has income sourced in the territory of China. In my view, Article 131 of the Implementation Regulations of the Enterprise Income Tax Law of the P.R.C. refers to Hong Kong, Macau, and Taiwan as foreign jurisdictions rather than foreign states, and the phrase "territory of China" used in Article 2 of the Enterprise Income Tax Law of the P.R.C., as a result, does not include Hong Kong, Macau, and Taiwan.[116] It is because Article 131 of the Implementation Regulations of the Enterprise Income Tax Law of the P.R.C. distinguishes Hong Kong, Macau, and Taiwan from other places to which Paragraphs 2 and 3 of Article 2 of the Enterprise Income Tax Law apply.

B. *The U.S. Tax Law for Activities Implicating Taiwan*

Before discussing the U.S. tax law for activities that may implicate Taiwan, it is necessary to recount the U.S policy "guided by"[117] the Taiwan

perma.cc/F5U3-A2A9].

114. The Romanization of its title is as follows: *Zhonghua Renmin Gonghe Guo Qiye Suode Shui Fa* (中華人民共和國企業所得稅法). The Enterprise Income Tax Law of the People's Republic of China, Nat'l People's Cong. of the People's Republic of China, https://fgk.chinatax.gov.cn/zcfgk/c100009/c5193018/content.html [https://perma.cc/MM48-KLZ2] (last visited Oct. 8, 2023).

115. The Romanization of its title is as follows: *Zhonghua Renmin Gonghe Guo Qiye Suode Shui Fa Shishi Tiaoli* (中華人民共和國企業所得稅法實施條例). Implementation Regulations of the Enterprise Income Tax Law of the People's Republic of China, State Council of the People's Republic of China (Apr. 29, 2019), http://big5.www.gov.cn/gate/big5/www.gov.cn/gongbao/content/2019/content_5468940.htm [https://perma.cc/67ZV-M9GX].

116. *See also* Jinyan Li, International Taxation in China: A Contextual Analysis 1 (2016) (stating that Hong Kong, Macau, and Taiwan "are regarded as 'foreign' jurisdictions for purposes of domestic tax laws and tax treaties").

117. *See*, *e.g.*, Press Statement, U.S. Sec'y of State, On Taiwan's Election (Jan. 13, 2024), https://www.state.gov/on-taiwans-election [https://perma.cc/4F52-EJ9T] . ("We look forward to working with Dr. Lai and Taiwan's leaders of all parties to advance our shared interests and values, and to further our longstanding unofficial relationship,

Relations Act, three Joint Communiques between the P.R.C. and the U.S., and the Six Assurances.

The Taiwan Relations Act[118] came into effect in 1979, shortly after the United States terminated government relations between the U.S. and the governing authorities on Taiwan. It states, among other things, that:

> For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with the law.[119]

In other words, even though the United States terminated governmental relations between the U.S. and the governing authorities on Taiwan on December 31, 1978, the U.S. pledges to continue to honor its treaties and other international agreements with the governing authorities on Taiwan.

In the Shanghai Communique in 1972, the P.R.C. and the U.S. stated their respective positions with respect to Taiwan. It should be noted that their disagreement is so deep and irreconcilable that the P.R.C. and the U.S. had to state their respective positions in two different paragraphs so that their positions could be accurately put down on paper. The P.R.C. position holds that "Taiwan is a province of China which has long been returned to the motherland," that "the liberation of Taiwan is China's internal affair in which no other country has the right to interfere;" that "all US forces and military installations must be withdrawn from Taiwan," and that "the Chinese Government firmly opposes any activities which . . . advocate that 'the status of Taiwan remains to be determined.'"[120]

The U.S. position, in contrast, is less specific than the P.R.C. position. The U.S. purports to reaffirm "its interest in a peaceful settlement

consistent with the U.S. one China policy as guided by the Taiwan Relations Act, the three Joint Communiques, and the Six Assurances.")

118. Taiwan Relations Act, Pub. L. No. 96–8, 93 Stat. 14 (1979) (codified at 22 U.S.C. §§ 3301–3316 (1982)).

119. Taiwan Relations Act § 4(c), 22 U.S.C. § 3303(c).

120. U.S.-PRC Joint Communique (1972), P.R.C.-U.S., Feb. 28, 1972, 11 I.L.M. 443, https://www.ait.org.tw/u-s-prc-joint-communique-1972 [https://perma.cc/DC9Y-9S6W] , ("The two sides reviewed the long-standing serious disputes between China and the United States. The Chinese side reaffirmed its position: the Taiwan question is the crucial question obstructing the normalization of relations between China and the United States; the Government of the People's Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China's internal affair in which no other country has the right to interfere; and all US forces and military installations must be withdrawn from Taiwan. The Chinese Government firmly opposes any activities which aim at the creation of 'one China, one Taiwan', 'one China, two governments', 'two Chinas', an 'independent Taiwan' or advocate that 'the status of Taiwan remains to be determined'".)

of the Taiwan question by the Chinese themselves," namely "all Chinese on either side of the Taiwan Strait."[121]

In the Joint Communique on the Establishment of Diplomatic Relations,[122] Taiwan was mentioned two times. First, the communique states, "The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan." Second, it states, "The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China."

In the U.S.-P.R.C. Joint Communique on August 17, 1982,[123] Taiwan was mentioned in six paragraphs—Paragraphs 1, 2, 4, 5, 6, and 7. Paragraph 1[124] and Paragraph 2[125] set out the background by stating the negotiating history.

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121. *Id.* ("The U.S. side declared: The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves. With this prospect in mind, it affirms the ultimate objective of the withdrawal of all U.S. forces and military installations from Taiwan. In the meantime, it will progressively reduce its forces and military installations on Taiwan as the tension in the area diminishes. The two sides agreed that it is desirable to broaden the understanding between the two peoples. To this end, they discussed specific areas in such fields as science, technology, culture, sports and journalism, in which people-to-people contacts and exchanges would be mutually beneficial. Each side undertakes to facilitate the further development of such contacts and exchanges.")

122. U.S.-PRC Joint Communique (1979), P.R.C.-U.S., Dec. 15, 1978, 18 I.L.M. 272, https://www.ait.org.tw/u-s-prc-joint-communique-1979 [https://perma.cc/9Y7L-MT6G].

123. U.S.-PRC Joint Communique (1982), P.R.C.-U.S., Aug. 17, 1982, 21 I.L.M. 1147, https://www.ait.org.tw/u-s-prc-joint-communique-1982 [https://perma.cc/PSF3-W3DZ]

124. *Id.* Paragraph 1 states that, "In the Joint Communique on the Establishment of Diplomatic Relations on January 1, 1979, issued by the Government of the United States of America and the People's Republic of China, the United States of America recognized the Government of the People's Republic of China as the sole legal Government of China, and it acknowledged the Chinese position that there is but one China and Taiwan is part of China. Within that context, the two sides agreed that the people of the United States would continue to maintain cultural, commercial, and other unofficial relations with the people of Taiwan. On this basis, relations between the United States and China were normalized."

125. *Id.* Paragraph 2 states that, "The question of United States arms sales to Taiwan was not settled in the course of negotiations between the two countries on establishing diplomatic relations. The two sides held differing positions, and the Chinese side stated that it would raise the issue again following normalization. Recognizing that this issue would seriously hamper the development of United States–China relations, they have held further discussions on it, during and since the meetings between President Ronald Reagan and Premier Zhao Ziyang and between Secretary of State Alexander M. Haig, Jr. and Vice Premier and Foreign Minister Huang Hua in October 1981."

Paragraph 4 sets out the P.R.C. position. It states that "the Chinese government reiterates that the question of Taiwan is China's internal affair. The Message to the Compatriots in Taiwan issued by China on January 1, 1979, promulgated a fundamental policy of striving for Peaceful reunification of the Motherland. The Nine-Point Proposal put forward by China on September 30, 1981 represented a Further major effort under this fundamental policy to strive for a peaceful solution to the Taiwan question." In other words, the P.R.C. set out a policy for a peaceful solution to the Taiwan question.

The U.S. position is set out in Paragraphs 5 and 6. Paragraph 5 states that "the United States Government attaches great importance to its relations with China, and reiterates that it has no intention of infringing on Chinese sovereignty and territorial integrity, or interfering in China's internal affairs, or pursuing a policy of 'two Chinas' or 'one China, one Taiwan.' The United States Government understands and appreciates the Chinese policy of striving for a peaceful resolution of the Taiwan question as indicated in China's Message to Compatriots in Taiwan issued on January 1, 1979 and the Nine-Point Proposal put forward by China on September 30, 1981. The new situation which has emerged with regard to the Taiwan question also provides favorable conditions for the settlement of United States–China differences over the question of United States arms sales to Taiwan." In other words, the U.S. asserts that the U.S. and the P.R.C. have differences over the question of U.S. arms sales to Taiwan. The U.S. thinks that the U.S. arms sales to Taiwan is legal and justified, while the P.R.C. disagrees. The U.S. also opines that the policy of striving for a peaceful resolution "provides favorable conditions for the settlement" of such U.S.-P.R.C. differences.

Paragraph 6 states, "Having in mind the foregoing statements of both sides, the United States Government states that it does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final resolution. In so stating, the United States acknowledges China's consistent position regarding the thorough settlement of this issue." In this paragraph, the U.S. states that "it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final resolution," but it does not provide any specific time frame. In addition, this paragraph is made "having in mind" the P.R.C.'s policy of striving for peaceful resolution and the U.S. view that the P.R.C.'s policy striving for peaceful resolution "provides favorable conditions for the settlement" of U.S.-P.R.C. differences.

Paragraph 7 states "In order to bring about, over a period of time, a final settlement of the question of United States arms sales to Taiwan, which is an issue rooted in history, the two governments [the P.R.C. and

the U.S.] will make every effort to adopt measures and create conditions conducive to the thorough settlement of this issue," and that the P.R.C. and the U.S. agree that they will try to "create conditions conducive to the thorough settlement of this issue." In other words, the issue has not been settled.

The Six Assurances were unilaterally given to the R.O.C. in 1982 by the U.S. Secretary of State, George Shultz, through American Institute of Taiwan Director, James Lilley.[126] Although it was given in 1982, it was not known to the public until more recently. The diplomatic cable was declassified by the U.S. government only in 2020.[127] Specifically, the Six Assurances are the following: (1) the U.S. has not agreed to set a date for ending arms sales to Taiwan; (2) it has not agreed to consult with the P.R.C. on arms sales to Taiwan; (3) it will not play a mediation role between Taipei and Beijing; (4) it has not agreed to revise the Taiwan Relations Act; (5) it has not altered its position regarding sovereignty over Taiwan; and (6) it will not exert pressure on Taiwan to enter into negotiations with the P.R.C.

After briefly exploring the deep political disagreements between the U.S. and the P.R.C. demonstrated by these statements, it is time to move to the more technical aspects of international tax law. Certainly, there is a disconnect between the political disagreement and sensitivity, as set out above, and the technical aspects of tax law in the following pages. The disconnect itself is an achievement, because the rules that undergird the trade and investment in the status quo demonstrates the possibility of handling practical problems despite the seemingly ubiquitous question of sovereignty.[128] Between the P.R.C. and the R.O.C., as their respective domestic rules deal with the problem of avoiding double taxation, the question of sovereignty seemingly ubiquitous in bilateral

126. American Institute in Taiwan, *1982 Declassified Cable: Arms Sale to Taiwan & Various Guarantees to Taiwan* (*1982 nian jiemi dianbao: duitai junshou duitai gexiang baozheng*; 1982年解密電報：對台軍售＆對台各項保證), Am. Inst. in Taiwan (Mar. 30, 2022), https://www.ait.org.tw/declassified-cables-taiwan-arms-sales-six-assurances-1982 [https://perma.cc/LP9F-FT2G]. On the Chinese-language version of the Web site, the word "guarantee" (*baozheng*; 保證) was used. On the English-language version of the Web site, however, the word "assurance" was used. I do not know the implications of the difference between "guarantee" and "assurance." However, given the importance of such guarantees or assurances, it should be noted.

127. Eric Chang, *Declassified Taiwan Assurances, Arms Sales Cables Released by US*, Taiwan News (Sept. 1, 2020), https://www.taiwannews.com.tw/en/news/3999261 [https://perma.cc/HW8D-QV9U].

128. Professor Gabriella Blum describes islands of agreement even during armed conflicts. As the P.R.C. and R.O.C. have not engaged in armed conflicts for decades, there is a possibility that they can again avoid armed conflicts. Gabriella Blum, Islands of Agreement: Managing Enduring Armed Rivalries 19 (2007). ("Islands of agreement are areas of asylum from which the conflict may be excluded and within which the rivals may be able to exchange some mutual commitments and be reminded of their respective interests. The islands do not dry out the sea; large or small, they are always surrounded by the flood. But where they succeed in standing dry, peaceful relations reign at the heart of ongoing tension and even belligerency.")

relationship has been avoided. To be sure, a bilateral tax agreement was signed but not ratified between the P.R.C. and the R.O.C.,[129] which stands in contrast with the achievement in the U.S.-R.O.C. relationship in terms of handling practical problems. Between the U.S. and the R.O.C., the technical aspects of tax law in the following pages demonstrate the possibility of establishing bilateral rules or binding commitments.

The tax aspect of the bilateral relationship between the U.S. and the R.O.C. is similar to a relationship between two states that have not signed a bilateral tax treaty, in the sense that both the U.S. and the R.O.C. collect their own taxes and enforce only their own tax laws.[130] More accurately, as of May 2024, there is no comprehensive tax treaty between the R.O.C. and the U.S. However, the R.O.C. and the U.S. have a bilateral agreement to exempt from income tax the income earned from the international operation of ships and aircrafts.

The agreement between American Institute in Taiwan (AIT)[131] and Taipei Economic and Cultural Office (TECRO)[132] to exempt shipping income from tax was negotiated via and embodied in an exchange of notes.[133] On May 31, 1988, Philip T. Lincoln, Jr., Chief of the Economic/Commercial Section of the American Institute in Taiwan sent a two-page letter to James W.C. Wang, Chief of the Business Division of the Coordination Council for North American Affairs, to propose the conclusion of an agreement to exempt from income tax income derived by "residents/citizens and corporations of the territory represented by the other party from the international operation of ships and aircraft."[134] Upon receiving the letter, James Wang replied on the same day to confirm receipt of the letter, repeat the contents of the two-page letter, and confirm CCNAA's acceptance of to the above proposal. Wang further stated that Lincoln's

129. *See* Ministry of Finance (Taiwan), *supra* note 60.

130. The U.S. tax rules governing cross-border transactions are known to be complicated. I do not intend to provide detailed discussion in this article.

131. The American Institute in Taiwan is a nonprofit corporation incorporated under the laws of the District of Columbia to conduct and carry out programs, transactions, and other relations with respect to Taiwan. *See* Taiwan Relations Act §§ 6-9, 11, 12, 22 U.S.C. §§ 3305-08, 3310, 3311.

132. The TECRO is Taiwan's unofficial office in the U.S. *See About TECRO,* Taipei Economic and Cultural Representative Office in the United States (April 5, 2024), https://www.taiwanembassy.org/us_en/post/5.html [https://perma.cc/Q3JC-YJVW]; Taiwan Relations Act § 10.

133. Although some commentators like Aust reject the idea that the R.O.C. or Taiwan may enter into treaties with other jurisdictions, it may be helpful to note that the "exchange of instruments constituting a treaty" is a means of expressing consent to be bound by a treaty listed in Article 11 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331.

134. Letter from Phillip T. Lincoln, Jr., Chief Econ./Com. Section, Am. Inst. in Taiwan, to James W.C. Wang Chief, Bus. Div. Coordination Council for N. Am. Affs., (May 31, 1988) (on file with the American Institute in Taiwan), https://uploads.mwp.mprod.getusinfo.com/uploads/sites/68/2022/03/165.pdf [https://perma.cc/YB74-UZDG].

proposal together with Wang's reply constituted an agreement which would enter into force on May 31.

The two-page agreement consists of five terms without numbering. The first provision states:

> The AIT, in accordance with sections 872(b) and 883(a) of the Internal Revenue Code, and 22 U.S.C. 3305, agrees to exempt from tax gross income derived from the international operation of ships or aircraft by individuals who are residents of the territory represented by CCNAA (other than citizens of the territory represented by AIT) and corporations organized in the territory represented by CCNAA. This exemption is granted on the basis of equivalent exemptions granted by CCNAA to citizens of the territory represented by AIT (who are not residents of the territory represented by CCNAA) and to corporations organized in the territory represented by AIT (which are not subject to tax by the territory represented by CCNAA on the basis of residence).

The word (and idea) of representation is used in the provision to allow or enable the U.S. and the R.O.C. to use the exemption method to deal with the problem of double taxation. In everyday English, it says that the AIT, in accordance with the U.S. law, agrees to exempt from tax gross income derived from the international operation of ships or aircraft by individuals who are residents of the R.O.C. (other than U.S. citizens) and corporations organized in the R.O.C. It also says that the exemption is conditioned upon the equivalent exemptions granted by the R.O.C. to U.S. citizens (who are not residents of the R.O.C.) and to corporations organized in the U.S. (which are not subject to tax by the R.O.C. on the basis of residence). It should be noted that the provisions itself does not refer to the U.S., the R.O.C., or Taiwan. The provision itself says only the territory represented by AIT and the territory represented by the CCNAA. Even though people know that the territory represented by AIT is the U.S., the diplomats chose to draft the provision to avoid reference to the U.S. Or, the diplomats chose to draft the provision to avoid reference to the R.O.C. or Taiwan, and reference to the U.S. also has to be avoided as well.

Then, the second provision[135] defines the scope of application of the tax exemption. As the character of the agreement is bilateral rather

135. *Id.* at 3 –4. It says the following:
"In the case of a corporation, the exemption shall apply only if the corporation meets either of the following conditions: (1) more than fifty percent of the value of the corporation's stock is owned, directly or indirectly, by individuals who are residents of the territory represented by CCNAA or of a country which grants a reciprocal exemption to citizens and corporations of the territory represented by AIT; or (2) the corporation's stock is primarily and regularly traded on an established securities market in the territory represented by CCNAA, or is wholly owned by a corporation whose stock is so traded and which is also organized in the territory represented by CCNAA. For purposes of the exemption from taxation by the territory represented by AIT, subparagraph (1) will be considered to be satisfied if the corporation is a 'controlled foreign corporation' under the Internal Revenue Code."

than multilateral, the benefits of such an agreement cannot be extended to corporations the majority of whose shares are owned by residents of other jurisdictions.

The third provision defines the concept of "gross income" as used in the agreement. As defined, "gross income" includes the following: all income derived from the international operation of ships or aircraft, including income from the rental of ships or aircraft on a full (time or voyage) basis; income from the rental of containers and related equipment which is incidental to the international operation of ships or aircraft; and income from the rental on a bareboat basis of ships and aircraft used for international transport.

The fourth provision states that "[t]he AIT considers that this letter, together with the CCNAA's reply letter confirming that CCNAA agrees to these terms, constitutes an agreement which shall enter into force on the date of CCNAA's reply letter and shall have effect with respect to taxable years beginning on or after January 1, 1987." The fifth provision states that "[e]ither party may terminate this agreement by giving written notice of termination."

The 1988 agreement applies only to the income derived from the international operation of ships and aircrafts, and, therefore, there is a need for a comprehensive tax treaty (or agreement). As of May 2024, it is likely to be realized by the enactment of the United States-Taiwan Expedited Double-Tax Relief Act (hereafter referred to as the EDTRA), under which a new section 894A will be added to the Internal Revenue Code (IRC) to provide to "qualified residents of Taiwan" benefits that are similar to those provided in the 2016 United States Model Income Tax Convention ("U.S. Model Tax Treaty"). Interestingly, the EDTRA distinguishes between the notions of "effective date" and "applicability." Although the EDTRA becomes effective as of the date of enactment, its provisions apply only after the U.S. Treasury Secretary, in consultation with the AIT and the TECRO in the United States, has determined that Taiwan has granted benefits to U.S. persons for such period that are reciprocal to the benefits provided to a qualified resident of Taiwan.

"Given Taiwan's very unique status precluding it from remedying double taxation through an income tax treaty, we remain committed to solutions that will unlock investment, create more jobs, and lead to greater shared prosperity," said a press release signed by House Ways & Means Committee Chairman Jason Smith, Senate Finance Committee Ranking Member Mike Crapo, House Ways & Means Committee Ranking Member Richard E. Neal, and Senate Finance Committee Chairman Ron Wyden.[136]

136. Press Release, U.S. House Comm. on Ways & Means, Smith, Crapo, Neal, and Wyden Release Discussion Draft of Bill Providing Relief for U.S. and Taiwanese Workers and Bus. from Double Tax'n (July 12, 2023), https://waysandmeans.house.gov/2023/07/12/smith-crapo-neal-and-wyden-release-discussion-draft-of-bill-providing-relief-for-u-s-and-taiwanese-workers-and-businesses-from-double-taxation

The provisions include four broad categories: (1) reduction of withholding taxes; (2) application of permanent establishment rules; (3) treatment of income from employment; and (4) determination of qualified residents of Taiwan, including rules for dual residents. The U.S. Congress describes these four categories by reference to the analogous provisions of the U.S. Model Tax Treaty.[137]

The U.S. House of Representatives included the EDTRA as part of the Tax Relief for American Families and Workers Act of 2024 and passed it on January 31, 2024. It has not been passed by the U.S. Senate and has not been signed into law by the U.S. President.[138] However, the important point is that efforts such as the EDTRA have been made to

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[https://perma.cc/NYX6-BFW4]. *See also Crapo Statement at Taiwan Tax Legislation Markup*, U.S. Senate Comm. on Fin. (Sept. 14, 2023), https://www.finance.senate.gov/imo/media/doc/0914_crapo_statement.pdf [https://perma.cc/VLL9-QKGW]. ("Taiwan is our largest trading partner with whom we do not have an income tax treaty. Normally, Congress enters into a tax treaty with a country to alleviate the double tax burden on cross-border investment. However, Taiwan's unique status precludes it from dealing with double tax issues through a traditional tax treaty. The process we are considering today should not be viewed as a new template to shortcut or end-around tax treaties. Absent this very unique circumstance, the proper path for considering bilateral income tax treaties should be through the Foreign Relations Committee, led by Chairman Menendez and Ranking Member Risch. However, Taiwan's very unique status requires a very unique solution: it requires this Committee's expertise to make direct changes to the tax code to deliver treaty-like benefits for American and Taiwanese workers and businesses operating across our borders. These direct changes to the tax code will unlock cross-border investment and provide businesses and workers much-needed certainty in four main areas, all of which are in the scope of a traditional tax treaty.")

137. According to the U.S. Congress, the provisions of the EDTRA generally track the provisions of the U.S. Model Tax Treaty. The provisions on the reduction of withholding taxes generally track articles 10, 11, and 12 of the U.S. Model Tax Treaty. The permanent establishment rules generally track articles 5 and 7 of the U.S. Model Tax Treaty. The treatment of income from employment generally tracks article 14 of the U.S. Model Tax Treaty. The determination of qualified residents of Taiwan and the tie-breaker rules for dual residents generally track articles 4(1), 4(3) and article 22 of the U.S. Model Tax Treaty. Jason Smith et al., *Technical Explanation of United States-Taiwan Expedited Double-Tax Relief Act,* U.S. House Comm. On Ways & Means, https://gop-waysandmeans.house.gov/wp-content/uploads/2023/07/Taiwan-Tax-technical-explanation-7.12.23-For-Release.pdf [https://perma.cc/QK9W-T8TW] (last visited Sept. 29, 2023).

138. On October 29, 2024, the U.S. Department of the Treasury announced that the U.S. and Taiwan, "under the auspices of the American Institute in Taiwan (AIT) and the Taipei Economic and Cultural Representative Office in the United States (TECRO), will begin negotiations on a comprehensive agreement to address double taxation issues." Although the EDTRA remains a draft legislation, the press release states that the first round of negotiations is expected to take place "in the coming weeks." The press release also states that the Congress "remains a vital partner to address this issue." Press Release, U.S. Dept. of the Treasury, U.S. and Taiwan to Begin Negotiating A Comprehensive Tax Agreement To Address Double Tax'n (Oct. 29, 2024), https://home.treasury.gov/news/press-releases/jy2693 [https://perma.cc/ZA32-RMZ5].

make AIT-TECRO agreements operational like a tax treaty or to achieve the objective of avoiding double taxation.

IV. Multilateral Efforts in International Tax

Although many policymakers are discussing an essential reform of international tax rules, the discussion is incomplete without examining Taiwan's place in the world tax order. First, as discussed above, thirty-five tax treaties or agreements exist between partner jurisdictions and the R.O.C.[139] In other words, Taiwan has a network of thirty-five tax treaties or agreements. Many of these treaties do not bear the word "treaty" in their titles, but they are binding, reciprocal legal commitments made by Taiwan and its treaty (agreement) partners. Businesses and individuals pay taxes and receive tax credits under such binding, reciprocal legal commitments by Taiwan and its treaty (agreement) partners. These treaties or agreements, coupled with the domestic law of some jurisdictions, have helped Taiwan's trade and investment relationships despite political sensitivities.

Second, the Taiwan question works differently in the corporate and tax world. Corporations may control their "nationality," or the basis on which they pay taxes on their worldwide income, by incorporating a subsidiary,[140] engaging in an inversion transaction,[141] or moving management to another jurisdiction.[142] Through these mechanisms in corporate law, a company incorporated in Taiwan may benefit from the treaty network of another jurisdiction, say Singapore or the Netherlands. These opportunities, offered by corporate and tax laws and Taiwan's network of tax treaties, have enabled Taiwan's business relationships with many parts of the world.

An examination of the status quo improves our understanding of the problems that Taiwan faces. With the help of its friends and allies,

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139. The P.R.C. objects to the idea that the R.O.C. has the capacity to enter into treaties with other jurisdictions. The R.O.C. disagrees. Article 2, Paragraph 1, Subparagraph (a) of the Vienna Convention on the Law of Treaties states that "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, *supra* note 133, at 3.

140. *See, e.g.*, Reuven S. Avi-Yonah, *Does Customary International Tax Law Exist?*, *in* Research Handbook on International Taxation 2, 3 (Yariv Brauner ed., 2020) (noting that a resident can easily form a non-resident corporation and earn foreign-source income through that corporation).

141. *See, e.g.*, Press Release, U.S. Dept. of the Treasury, Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations (Apr. 4, 2016), available at https://home.treasury.gov/news/press-releases/jl0404 [https://perma.cc/UX8B-349H].

142. *See, e.g.*, Miranda Stewart, Tax and Government in the 21st Century 305 (2022). ("It is difficult to envisage directors flying to corporate board meetings located in specific jurisdictions around the world in future, so even the practical test of central or effective management and control may become increasingly difficult to locate.")

Taiwan may have achieved much in many aspects. However, as the world attempts to meet upcoming challenges in climate change, the digital economy, etc., Taiwan is often denied direct participation. As Abram Chayes and Antonia Handler Chayes argued, "sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life."[143] Although Taiwan is a member of the World Trade Organization, it is excluded from the United Nations and several other international organizations, such as the World Health Organization. Although Taiwan's legislators, regulators, and judges interact with their counterparts in other jurisdictions, including those in the People's Republic of China, presence within the United Nations and many other international organizations matters, and Taiwan's inability to participate in these international organizations does harm the Taiwanese people's interests. For example, when France and the U.S. disagree on the issue of digital services tax[144] that implicate many policymakers, businesses, and consumers around the world, Taiwanese people have to watch from afar this important discussion. Although Taiwan can enact its own tax laws and enter into treaties or agreements with other jurisdictions, Taiwan has not been included in multilateral efforts to reform the international tax rules.[145] Taiwan must be creative in pursuing or accepting functional equivalents. Drawing on the idea that the capacity to participate in global governance is a new form of sovereignty, perhaps we can appreciate that Taiwan's autonomy since 1949 is not enough in today's interconnected world tax order.

The fact that Taiwan has not been included in multilateral efforts to reform the international tax rules has not to date mattered much, because there has been no multilateral institution on tax.[146] However, things are changing. First of all, the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (hereafter referred to as the BEPS MLI)[147] is an apt example of the difficulties faced by Taiwan during the transformation of a global framework of bilateral tax relationships into a multilateral one. In September 2013, G20 Leaders endorsed the Action Plan on Base Erosion and Profit

143. Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 27 (1998).

144. *See infra* note 168.

145. Dong-Ching Day, *China's Multilateralism and Its Impact on Cross-Strait Relations: A View from Taipei*, *in* China Turns to Multilateralism: Foreign Policy and Regional Security 249–50 (Guoguang Wu & Helen Lansdowne eds., 2008). ("China is afraid of creating the image of two Chinas, so that the two sides of Taiwan Strait are not able to settle economic disputes under the structure of the WTO . . . The more powerful China is, the greater its influence is to keep Taiwan from joining multilateral organizations.")

146. *See*, *e.g.*, Ruth Mason, *The Transformation of International Tax*, 114 Am. J. Int'l L. 353, 355–356 (2020).

147. *Id.* at 373–374.

Shifting (BEPS).[148] Of the 13 final reports that were published in 2015, one is to develop a multilateral treaty to amend bilateral tax treaties and implement specific measures.[149] The signing ceremony for the BEPS MLI was held on June 7, 2017, and it entered into force on July 1, 2018.[150] As of October 29, 2024, 104 jurisdictions have ratified, accepted, or approved the BEPS MLI, covering around 1,850 bilateral tax treaties.[151]

On its website, the R.O.C.'s MOF notes that the R.O.C. is neither a member of the Inclusive Framework on BEPS of the Organisation for Economic Cooperation and Development (OECD) nor a party to the MLI. The MOF also notes that the R.O.C., as a member of the global community, has committed itself to supporting and implementing international anti-avoidance tax measures.[152] Furthermore, the majority of the R.O.C.'s thirty-five avoidance-of-double-taxation agreements, according to the R.O.C.'s self-assessments, meet the Actions on Base Erosion and Profit Shifting (BEPS) Minimum Standards as outlined in the Final Reports published in 2015.[153]

Despite the R.O.C.'s willingness to implement treaty-based anti-avoidance measures, it has not been able to sign or ratify the MLI. To solve the problem of being an outlier of the multilateral effort to address

148. G20 Research Group, *G20 Leaders' Declaration*, University of Toronto, https://www.g20.utoronto.ca/2013/2013-0906-declaration.html [https://perma.cc/SU5Y-AGEQ] (last visited Jan. 29, 2025). For an overview of the OECD, G20, and the Inclusive Framework, *see* Allison Christians, *International Tax Organizations*, *in* Research Handbook on International Taxation 29–43 (Yariv Brauner ed., 2020).

149. The 13 Final Reports are available at the website of the OECD, at https://www.oecd.org/en/publications/reports.html?orderBy=mostRelevant&page=0&minPublicationYear=2015&maxPublicationYear=2015&facetTags=oecd-content-types%3Apublications%2Freports%2Coecd-policy-issues%3Api109%2Coecd-languages%3Aen [https://perma.cc/8NBZ-MDR2] (last visited Oct. 18, 2024). The Final Report for Action 15: Developing a Multilateral Instrument is also available at the website of the OECD, at https://www.oecd.org/en/publications/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report_9789264241688-en.html [https://perma.cc/QC5A-B9NG].

150. *BEPS Multilateral Instrument*, Organisation for Economic Co-operation and Development, available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm [https://perma.cc/67M3-FA7Y] (last visited Sept. 24, 2023). *See also Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 29 October 2024*, https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-mli/beps-mli-signatories-and-parties.pdf/_jcr_content/renditions/original./beps-mli-signatories-and-parties.pdf [https://perma.cc/598P-2RYA].

151. *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 29 October 2024*, *supra* note 150.

152. Ministry of Finance, A Glance at Taiwan's Position, explained by reference to the "Template Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting," https://www.mof.gov.tw/Eng/singlehtml/264?cntId=84076 [https://perma.cc/H646-YB67] (last visited Mar. 10, 2025).

153. *Id*.

tax treaty shopping, the R.O.C. issued its "preliminary positions" on some of the issues covered by the MLI on its website.[154]

In addition, the G20 and the OECD formed the Inclusive Framework, about which Taiwan can gather information only through its friends and allies, but not on its own. In other words, Taiwan is denied a voice in discussing such important matters.

On October 8, 2021, 136 jurisdictions of the so-called Inclusive Framework, led by the OECD and the G20, expressed their intent to reform international corporate taxation in the digitalized economy.[155] The global tax deal consists of two distinct "pillars."

The most significant part of Pillar One is to, through a multilateral treaty,[156] create a new taxing right — Amount A. Amount A allocates a portion of a multinational enterprise's profits to market jurisdictions based on a formula.[157] Amount A will only apply to multinational enterprises with twenty billion or more euros in worldwide revenue and pre-tax profit divided by revenue above ten percent.[158] Then the new rule allocates Amount A to a jurisdiction when the multinational enterprise derives sufficient amount of revenue from that jurisdiction.[159] The signing ceremony for the multilateral treaty implementing Pillar One was scheduled on December 18, 2023 to be held by the end of June 2024,[160] but Co-Chairs of the Inclusive Framework on BEPS, Marlene Nembhard-Parker and Tim Power,[161] announced on January 13, 2025 that Inclusive Framework members have not reached a consensus on Pillar One.[162]

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154. *Id*.

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/content/dam/oecd/en/topics/policy-issues/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/6WQV-YZQF] . It should be noted that the People's Republic of China and Hong Kong are among the 136 jurisdictions.

156. The Multilateral Convention to Implement Amount A of Pillar One, https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/cross-border-and-international-tax/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf [https://perma.cc/3ZWF-4SSV] (last visited Jan. 29, 2025).

157. *Id.* at arts. 4–7.

158. *Id.* at art. 3, ¶ 1.

159. *Id.* at art. 8, ¶ 1. In the case of a Jurisdiction with a Gross Domestic Product of 40 billion euros or more, the amount of revenue is 1 million euros. In the case of a Jurisdiction with a Gross Domestic Product of less than 40 billion euros, the amount of revenue is 250,000 euros.

160. *Update to Pillar One Timeline by the OECD/G20 Inclusive Framework on BEPS*, OECD (Dec. 18, 2023), https://www.oecd.org/tax/beps/update-pillar-one-timeline-beps-inclusive-framework-december-2023.pdf [https://perma.cc/DP9M-HZLE].

161. *Pillar One Update from the Co-Chairs of the Inclusive Framework on BEPS*, OECD (Jan. 13, 2025), https://www.oecd.org/en/about/news/announcements/2025/01/pillar-one-update-co-chair-statement-oecd-g20-inclusive-framework-on-beps.html [https://perma.cc/S4AA-LKY6].

162. *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/

Pillar Two purports to impose a minimum tax on multinational enterprises that have 750 million or more euros in revenue.[163] If a subsidiary's taxes divided by income in a jurisdiction is below the minimum fifteen percent rate, the parent entity must include such under-taxed income as parent company income and pay the additional taxes to its residence jurisdiction.[164] In other words, the residence jurisdiction of the parent company asserts a right to tax when the residence jurisdiction of its subsidiary does not impose enough tax. If the residence jurisdiction of the parent entity has not enacted or chooses not to enact this income inclusion rule, an affiliated company's deduction of the payment to the parent company will be denied in the affiliated company's residence jurisdiction.[165] In other words, the residence jurisdiction of an affiliated company asserts a right to tax when both the residence jurisdiction of the subsidiary and the residence jurisdiction of the parent company do not impose enough tax. The implementation of Pillar Two does not require a standalone treaty because these Pillar Two rules set out the order in which individual jurisdictions assert a right to tax, and one individual jurisdiction may assert a jurisdiction to tax under Pillar Two rules through its domestic legislation when a relevant jurisdiction does not tax the multinational group up to the minimum level.[166]

Several obstacles stand in the way of these two "pillars" coming true. First, the implementation of Pillar One requires a multilateral treaty, and persuading so many jurisdictions to ratify the multilateral treaty would be challenging, if not impossible. Ratifying the treaty in the U.S. through the Senate would be difficult, given the Republican opposition.[167] In addition, Russia and the P.R.C. were among the jurisdictions that agreed to the global tax deal in 2021. However, their relationships with other jurisdictions have worsened after the outbreak of the armed conflict in Ukraine. Second, even though Pillar One requires abandoning digital services taxes (DSTs)[168] in order to establish a new regime, the

policy-issues/beps/pillar-one-update-co-chair-statement-inclusive-framework-on-beps-january-2025.pdf [https://perma.cc/6V7W-NRHZ].

163. *The Pillar Two Rules in a Nutshell*, OECD, https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/pillar-two-model-rules-in-a-nutshell.pdf [https://perma.cc/L5AY-FU4A] (last visited Jan. 29, 2025).

164. *Id*.

165. *Id*. Denying the affiliated entity's deduction of the payment to the parent entity in the affiliated entity's residence jurisdiction means that the affiliated entity has to pay more taxes to the government of its residence jurisdiction.

166. Ruth Mason, *A Wrench in GLOBE's Diabolical Machinery*, 107 Tax Notes Int'l 1391, 1392 (2022).

167. Natasha Sarin & Kimberly Clausing, *Debunking 5 Republican Arguments Against the Global Minimum Tax*, Wash. Post (Aug. 7, 2023), https://www.washingtonpost.com/opinions/2023/08/07/global-minimum-tax-republican-arguments [https://perma.cc/7KDV-95SH] (disagreeing with five arguments against the global tax deal: 1. It threatens U.S. tax sovereignty. 2. It is an unconstitutional giveaway to foreign governments. 3. It harms the competitiveness of U.S. businesses. 4. It hurts workers by harming the companies they work for. 5. It harms U.S. government revenue).

168. France's Digital Services Tax (DST), for example, is three percent of a

jurisdictions that adopt the DST may be unwilling to give up their taxing power. As of 2022, DSTs are in effect in the United Kingdom, France, and fifteen other countries.[169] Even more jurisdictions are adopting or considering to adopt DSTs. For example, the Digital Services Tax Act of Canada came into force on June 28, 2024.[170] Third, the United Nations General Assembly adopted a resolution by a vote of 111 to 46, with ten abstentions, on December 22, 2023,[171] to develop a U.N. framework convention on international tax cooperation.[172] In other words, the so-called "global" tax deal through the Inclusive Framework led by the OECD and the G20 in 2021 will face competition from the United Nations. The forty-six U.N. members who voted against the resolution included, among others, the U.S., U.K., and several European Union member states.[173]

Regardless of the feasibility of a global tax deal coming true, the R.O.C. has not been allowed in either the Inclusive Framework or the United Nations. The R.O.C. is therefore unable to discuss, let alone ratify, the multilateral convention that allocates Amount A under Pillar One. To be sure, the R.O.C. on Taiwan has friends and allies. However, the P.R.C. has been an important player in the Inclusive Framework and the G20, and the P.R.C. has generally opposed Taiwan's participation in the multilateral forums. Similarly, although the United Nations resolution purports to adopt a more inclusive approach to international tax cooperation,[174] ironically the R.O.C. on Taiwan has an even smaller chance of participation given the P.R.C.'s insistence that the United Nations is an organization for which statehood is required.

The reality is that Taiwan and its friends must be creative in designing functional equivalents to multilateral tax treaties. As demonstrated earlier, solving the problem of double taxation of direct investment between the U.S. and Taiwan requires creativity. Creativity may as well transform from euphemism into irony when the P.R.C. with its current

company's revenues generated from two particular categories of "taxable services"—"digital interface" services and "targeted advertising" services. It is a tax calculated as a ratio of revenue, rather than income. U.S. Trade Representative, Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974 (Dec. 2, 2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf [https://perma.cc/885E-JB7F]; *see also*, *Section 301-Digital Services Taxes*, Off. U.S. Trade Representative, https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes [https://perma.cc/L3G4-4N8G] (last visited Aug. 8, 2024).

169. Avi-Yonah, Kim & Sam, *supra* note 1, at 282.

170. *Digital Services Tax*, Canada Revenue Agency, https://www.canada.ca/en/services/taxes/excise-taxes-duties-and-levies/digital-services-tax.html [https://perma.cc/EU47-5JTB] (last modified Nov. 7, 2024).

171. U.N. GAOR, 78th Sess., 50th (resumed) plen. mtg. at 7, U.N. Doc. A/78/PV.50 (Resumption 1) (Dec. 22, 2023).

172. G.A. Res. 78/230, at 4 (Dec. 22, 2023).

173. Supra note 171.

174. *Id.; see also* Leopoldo Parada, *International Cooperation on Tax Matters at the UN: A Turning Point in History*, Caribbean Tax L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714506 [https://perma.cc/GT3Q-GCKK].

policy is part of the institutional framework that Taiwan's people may benefit from. As stated earlier, the G20, the OECD, and the Inclusive Framework are discussing a multilateral convention for the "first pillar" of its reform proposal. As the P.R.C. is a member of both the G20 and the Inclusive Framework, Taiwan's path to joining such multilateral efforts despite the P.R.C.'s objections is narrow.

Conclusion

The fact that power politics between the R.O.C. and the P.R.C. or between the P.R.C. and the U.S. catches almost all the attention may make people too pessimistic. Through a survey of the legal rules that undergird the tax aspect of the trade and investment that involve Taiwan, this article seeks to demonstrate the contours of something intriguing. To be sure, it may not be a solution, but a better understanding of the problems helps devise solutions. Given the complexity of contemporary economy and the related issues, my discussion of the relevant rules is necessarily incomplete. Regardless, it indeed is part of the status quo surrounding Taiwan or the R.O.C.

There are reasons for optimism. Help may come in multiple forms. As the P.R.C. receives Taiwan's outbound investment, and Taiwan receives inbound investment from the P.R.C., the P.R.C. and the R.O.C. may work out a solution, albeit unlikely in the short term.[175] In another sense, the fact that no armed conflicts have broken out between the P.R.C. and the R.O.C. since 1958 itself is a kind of solution. Some commentators point to P.R.C. President Xi Jinping's words to pursue unification with Taiwan, while they pay less attention to Xi's statement that there was no plan to use military action against Taiwan in 2027 or 2035.[176] As the R.O.C.'s Vice-President Hsiao Bi-khim said, "Taiwan should 'trust, but verify.'"[177]

In addition, Taiwan and its friends may work out creative solutions, which should not be dismissed as anomalies. As demonstrated earlier, double taxation may be addressed in more than one way. To be sure, innovations may come at a price. For example, Taiwan's agreements with other jurisdictions were dismissed by commentators like Anthony Aust as lacking the status of a treaty and therefore not within the scope of modern treaty law.[178] For another example, the tax agreement between the R.O.C. and the U.S. authorized by the EDTRA may not itself have the force of law, and, therefore, be different from a tax treaty that the U.S. has with other jurisdictions. Or, to put it more bluntly, an agreement

175. *See supra* note 62.

176. Ken Moriyasu, *Why Xi Tried to Assure U.S. He Has No Plans for Taiwan Invasion*, Nikkei Asia (Nov. 18, 2023), https://asia.nikkei.com/Politics/International-relations/APEC/Why-Xi-tried-to-assure-U.S.-he-has-no-plans-for-Taiwan-invasion [https://perma.cc/74UB-3CL4].

177. Central News Agency, *'Trust, but Verify' Xi's Denial: Hsiao Bi-khim*, Taipei Times (Nov. 24, 2023), https://www.taipeitimes.com/News/front/archives/2023/11/24/2003809629 [https://perma.cc/HP3B-3AML].

178. *See supra* note 93 and accompanying text.

authorized by the EDTRA may be considered "inferior" to a formal tax treaty by some people. On the other hand, under U.S. law, a conflict between a treaty and domestic legislation is resolved by the later-in-time rule; in other words, any treaty, regardless of whether it has the force of law, may fail to prevail over domestic legislation in the U.S.[179] In the meantime, both the U.S. and the R.O.C. have incentives to honor their commitments under the bilateral tax agreement. These incentives—reducing double taxation, encouraging bilateral investment, etc.—are the reasons why they sign and implement these tax agreements in the first place, not to mention the extraordinary efforts they put into the innovation undergirding such a tax agreement. The idea of regarding an agreement authorized by the EDTRA to be "inferior" to a formal tax treaty puts too much emphasis on formality and misses the practical aspect of the status quo.

Institutions develop over time, and dismissing innovations as anomalies hardly helps with regards to the nature of and momentum for devising innovations. I hope the institutions related to Taiwan may develop over time, not only for the benefit of the people in Taiwan, but also for the benefit of the people elsewhere.[180]

179. *See* Avi-Yonah, Kim & Sam, *supra* note 1, at 305–308.

180. Economic exchanges including trading relationships enhance the welfare of all participants. *See* Kimberly Clausing, Open: The Progressive Case for Free Trade, Immigration, and Global Capital (2019); Douglas A. Irwin, Against the Tide: An Intellectual History of Free Trade (1996).