DRAFT 3/8/25

WAS THE NIIT A TREATY OVERRIDE?

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Three court decisions have recently addressed the interaction of the Net Investment Income Tax (NIIT) and US tax treaties. The issue was whether the treaty provided an independent basis for crediting a foreign tax against the NIIT, because no such credit is available under the Code.[2] First, in *Toulouse*, the Tax Court held that there was no treaty-based credit.[3] Second, in *Christensen*, the Court of Federal Claims held that a treaty-based credit was available, distinguishing *Toulouse*.[4] Third, in *Bruyea*, the Court of Federal Claims issued a broader opinion that allowed the credit.[5]

Importantly, *Bruyea* addressed an issue that was missing from the first two opinions, namely whether the NIIT was a treaty override. This issue has wider implications than on the NIIT, because the court`s opinion raises the possibility that no 21st century tax legislation overrode US tax treaties.[6] In particular, it raises doubts about the applicability of the BEAT to taxpayers who are residents in a treaty country.[7] Because of the significant revenue implications of holding that the BEAT does not apply in treaty situations, Congress should fix the problem in this year`s tax legislation.[8]

In both *Toulouse* and *Christensen*, the courts focused on the interpretation of the prevention of double taxation article (Article 24) of the US-France tax treaty. *Bruyea* went further and accepted the position advocated by H. David Rosenbloom and Fadi Shaheen

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[1] I would like to thank Fadi Shaheen and Bret Wells for helpful comments.

[2] Section 901 provides for a foreign tax credit against taxes imposed under chapter 1 (income taxes) of the Code, while the NIIT (section 1411) is not in chapter 1.

[3] *Toulouse v. Commissioner*, 157 T.C. 49 (2021).

[4] *Christensen v. United States*, No. 20-935T (Fed. Cl. 2023), currently on appeal.

[5] *Bruyea v. United States*, Court of Federal Claims, Case 1:23-cv-00766-MHS (Dec. 5, 2024)

[6] On the interaction of tax treaties and domestic law see Avi-Yonah, *Tax Treaty Override: A Qualified Defense of US Practice,* in G. Maisto (ed.), Tax Treaties and Domestic Law (2006), 65*;* Avi-Yonah, *Pacta Sunt Servanda? The Problem of Tax Treaty Overrides,* 2022(1) British Tax Rev. 15 (2022)*;* Avi-Yonah, *The Dubious Constitutional Origins of Treaty Overrides: A Response to Rosenbloom and Shaheen,* 26 Florida Tax Rev. 287 (2023)*;* H. David Rosenbloom and Fadi Shaheen, *Treaty Override: The False Conflict Between Whitney and Cook,* 24 Florida Tax Review 375 (2021).

[7] See Rosenbloom and Shaheen, *The BEAT and the Treaties*, 92 Tax Notes International (2018); Rosenbloom and Shaheen, *The TCJA and the Treaties,* 95 Tax Notes International 1057 (September 2019); but see Bret Wells and Avi-Yonah, *The Beat and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen,* 95 Tax Notes International 383 (2018).

[8] The proposed «Defend American Jobs and Investment" Act (H.R. 591) includes an explicit treaty override, so that it does not raise this issue unless that language is omitted in reconciliation. See Avi-Yonah, UTPR column.

that there was an independent treaty credit and therefore the absence of a credit under the Code does not affect the availability of the credit under the treaty.[9]

As I pointed out at the time, neither *Toulouse* nor *Christensen* addressed the question whether the treaty applied in the first place, because the NIIT was enacted after the treaty and therefore could be seen as a treaty override.[10] It can certainly be argued (as Rosenbloom and Shaheen believe) that the override issue is irrelevant because there is no conflict between the treaty and the statute: the statute applies for purposes of the Code based credit, and the treaty provides a credit independent of the statute. On the other hand, one can also argue that Congress intended that there will be no foreign tax credit (either Code or treaty based) applied against the NIIT, because the purpose of the NIIT was to fund Obamacare, and that purpose is partially frustrated if there is no NIIT revenue from wealthy US citizens living in treaty countries. The NIIT creates double taxation in non-treaty cases because there is no foreign tax credit against it, and Congress may have intended that result even if a treaty applies. In that case, the treaty override issue is relevant.[11]

In *Bruyea,* the override issue was raised by the government, and the court addressed it directly, holding that the NIIT was not an override. It is worth examining this section of the opinion in detail to explain why it is misguided.

First, the court explained the treaty override rule—

> A later-enacted statute controls over a *directly conflicting* treaty provision. *Bell*, 169 F.3d at 1386. This is known as the "last-in-time rule." *Kappus*, 337 F.3d at 1057 ("When a statute conflicts with a treaty, the later of the two enactments prevails over the earlier under the last-in-time rule." (discussing *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888)); *Whitney*, 124 U.S. at 195 ("The duty of the courts is to construe and give effect to the latest expression of the sovereign will."). Moreover, Congress has codified, in 26 U.S.C. § 7852(d)(1), the "last-in-time principle as applied to tax treaties and statutes." *Kappus*, 337 F.3d at 1057 (discussing 26 U.S.C. § 7852(d)(1)).[12]

This is fine as far as it goes, even though *Whitney* was dicta, and *Kappus* supports the government position.[13] It is also significant that the court cites the codified version of the

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[9] See Rosenbloom and Shaheen, **Toulouse: No Treaty-Based Credit?**

[10] See Avi-Yonah, *Is the Net Investment Income Tax a Treaty Override? Reflections on Toulouse,* 104 Tax Notes Int'l 41 (October 4, 2021)*;* Avi-Yonah, *Credit Where it`s Due? Reflections on Christensen,*112 Tax Notes Int`l 1377 (Dec 4, 2023).

[11] Ibid.

[12] *Bruyea*, supra.

[13] *Whitney* was dicta because the Court found no conflict between the treaty and the statute. The treaty override rule as a holding stems from two earlier cases, *The Cherokee Tobacco,* 78 US 616 (1870) and the *Head Money Cases*, 112 US 580 (1884). See Avi-Yonah, The Dubious, supra. On *Kappus* see below.

treaty override rule, because as discussed below, the legislative history of the codification supports the government`s position.

Next, the court states that--

> Here, the parties do not dispute that the NIIT was enacted after the operative Treaty provisions on which Mr. Bruyea relies to support his claim. But the "last-in-time rule" only has significance if the NIIT indeed conflicts *directly* with the treaty. The government's mere talismanic invocation of the "last- in-time rule" does not mean it is applicable or that it resolves the salient question.
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> Now, Mr. Bruyea concedes that if Congress had enacted a later statute that *expressly* precluded any foreign tax credit — or any Treaty-based credit — from being applied to the NIIT, such a provision would control over the Treaty, and he would not have a viable claim here. Pl. MSJ at 24 ("Later enacted statutes can override a treaty if Congress intends to do so, but . . . Congress did not intend an override when enacting the NIIT."). In other words, such a hypothetical statute would control even if the Treaty lacked the U.S. Law Limitation (contained within Art. XXIV, ¶ 1, Clause [2]). That, of course, necessarily means that the U.S. Law Limitation is completely irrelevant to the "last-in-time rule," which, again, is a background rule that would apply even if the Treaty did not contain the U.S. Law Limitation. We can thus put the U.S. Law Limitation to the side for now and concentrate solely on whether the "last-in-time rule" applies here in some dispositive way.[14]

This paragraph raises the key issue: Is it necessary for Congress to "expressly" indicate its intention to override the treaty for a valid treaty override to happen, which is the position of Rosenbloom and Shaheen.[15] It is that position that has broad implications, because it would mean that the BEAT cannot usually apply in treaty situations because Congress did not explicitly indicate an intent to override upon enacting the BEAT in the TCJA.[16] As discussed below, I do not agree with their position, because it is based on a misreading of the two relevant Supreme Court cases and on ignoring the legislative history of the codification of the treaty override rule.[17]

The court continues by stating that--

> The first major problem for the government's argument, according to Mr. Bruyea, is that "[b]ecause there has not been an explicit Congressional override, long-

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[14] Bruyea, supra.
[15] See Rosenbloom and Shaheen, The BEAT and the Treaties, supra, and Rosenbloom and Shaheen, False Conflict, supra.
[16] The BEAT would not apply to deductible items covered by the treaty such as interest and royalties, which are the most important payments covered by it.
[17] See also Avi-Yonah and Wells, supra, for additional arguments why it is clear that Congress intended the BEAT to apply in treaty situations.

> established case law requires that the NIIT and the Canada Treaty should be read harmoniously to give effect to both." Pl. MSJ at 25. Mr. Bruyea is correct. This Court must attempt to harmonize Treaty and statutory provisions: "Where a treaty and a statute 'relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either.'" *Kappus*, 337 F.3d at 1056 (quoting *Whitney*, 124 U.S. at 194, and citing *Xerox Corp.*, 41 F.3d at 658)).
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> In *Kappus*, the United States Court of Appeals for the District of Columbia Circuit declined to attempt to harmonize the Canada Tax Treaty with 26 U.S.C. § 59(a)(2), the statute at issue in that case. 337 F.3d at 1056. There, the D.C. Circuit acknowledged that "[t]he question of whether the Treaty and statute can be harmonized as the government suggests is an extremely close one." The court concluded, however, that "[i]t is not . . . a question that [the court] need resolve" because the plaintiffs *conceded* that the Treaty and statute were in "irreconcilable conflict" — indeed, the plaintiffs "contend[ed] that harmonization is not possible" — and the D.C. Circuit found that the statute was last in time. *Id*[18].

Here, the problem is that *Kappus* actually supports the government`s position, because the DC Circuit held that the enactment of the limitation of the foreign tax credit to 90% of the foreign tax for AMT purposes in the 1986 tax reform overrode earlier treaties. It is true that in that case, the court cited the fact that TAMRA in 1988 clarified that a treaty override was intended by various provisions of the 1986 tax reform, including the AMT foreign tax credit limitation. But the court did **not** hold that this clarification was essential for a treaty override to take place. It stated that—

> Although § 59(a)(2) did not specifically address the relationship between its requirements and those of applicable tax treaties, Congress clarified that relationship shortly thereafter...
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> Accordingly, because the latest expression of the United States' sovereign will on the subject of the Kappuses' foreign tax credit is 26 U.S.C. § 59(a)(2), that statute prevails over the Treaty, and we are obligated to enforce it. We conclude that, to the extent they are in conflict, section 59(a)(2) of the Internal Revenue Code prevails over the provisions of the U.S.-Canada Tax Treaty.[19]

Section 59(a)(2) was enacted in 1986, while the TAMRA clarification was enacted in 1988. There is absolutely no indication in *Kappus* that the DC Circuit believed that the section was not a valid treaty override between 1986 and 1988. Moreover, at the same time that Congress enacted the clarification, it stated in the legislative history that a treaty override

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[18] *Bruyea*, supra.
[19] *Kappus v. United States,* 337 F3d 1953 (DC Cir., 2003).

does not require an explicit statement by Congress, and there is no indication that the DC Circuit rejected that statement.[20]

Similarly, in *Lindsey v. Commissioner*[21], the Tax Court likewise had to determine whether the AMT regime under section 59 that did not allow for full use of U.S. FTC relief violated U.S. treaty obligations to provide double tax relief under the Canada-U.S. treaty. The taxpayer urged the court to harmonize the application of section 59 so that it would not restrict the use of U.S. FTC relief. The Tax Court rejected that argument and applied section 59 without adjustment, saying the later-in-time rule applied. This decision also cites but does not rely on the TAMRA clarification, and does not suggest that there was no treaty override before TAMRA.

The court in *Bruyea* continues by stating that--

> Mr. Bruyea does not concede the "irreconcilable conflict" point here and he is correct not to do so. Because neither the NIIT nor any other I.R.C. provision *expressly* precludes the application of the Treaty-based tax credit Mr. Bruyea claims, this Court further agrees with Mr. Bruyea that we can dispense with the "last-in-time rule" on that basis alone. Simply put, the fact that the I.R.C. provides for foreign tax credits only in Chapter 1 does not *expressly* preclude the Treaty's serving as an independent source for such a credit against the NIIT (*i.e.*, just because the NIIT is located elsewhere within the I.R.C.).
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> Again, if Congress, after the Treaty's ratification, had enacted a provision mandating that "the NIIT shall not be subject to any foreign tax credit," this case would be over (and decisively so, in favor of the government). But this Court cannot *infer* such a meaning or result — and read the I.R.C. as if such express language exists — merely because the NIIT was placed in a separate chapter of the IRC. *See, e.g.*, *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." (citing *Cook*, 288 U.S. at 120, amongst other cases)); *In re Rath*, 402 F.3d 1207, 1219 (Fed. Cir. 2005) (Bryson, J., concurring) (applying *Cook*).
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> In *Trans World Airlines*, the Supreme Court explained that "[l]egislative silence is not sufficient to abrogate a treaty." 466 U.S. at 252 (citing *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)). There, the Supreme Court concluded that "[n]either the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the

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[20] See Senate Report 100-445, 100th Cong., 2nd Sess., Tit. I, XII H. 1 (Relationship with Treaties), explaining sec. 112(aa) of S. 2238 (IRC sec. 7852) (the "Senate Report"), discussed below.
[21] 98 T.C. 672 (1992), *aff'd* 15 F.3d 1160 (D.C. Cir. 1994).

> repealing Act itself, make any reference to the [treaty]" at issue in that case. *Id*. To the contrary, explained the Court, the legislation at issue "was unrelated to the [treaty]." *Id*. The same is true in this case. The government has pointed to no express textual or extrinsic evidence — literally, nothing — even remotely suggesting that Congress's placement of the NIIT outside of Chapter 1 was intended to preclude a Treaty-based tax credit. *See* Def. MSJ at 23-24. Nor does any such evidence likely exist.

This paragraph goes to the heart of the matter: Did the Supreme Court require that Congress state its intention to override explicitly for a treaty override to exist, as Rosenbloom and Shaheen argue?[22]

In my opinion, neither of the Supreme Court opinions cited establish a general principle that Congress must state explicitly that a statutory provision overrides a treaty for such an override to take effect.[23] *Cook v. United States* (1933) involved a statute enacted in 1922, a treaty limiting the statute deliberately in 1924, and a word-by-word reenactment of the statute in 1930. The IRS argued that the re-enacted statute overrode the treaty, but the Court rejected this argument, holding that —

> The Treaty was not abrogated by reenacting § 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. **A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed**. *Chew Heong v. United States,* 112 U. S. 536; *United States v. Payne,* 264 U. S. 446, 264 U. S. 448. Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the reenacted section itself, make no reference to the Treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its reenactment.[24]

Cook was not a general modification of the rule that later treaties can override earlier statutes by requiring an explicit Congressional statement to that effect. Both of the cases cited, *Chew Hong* and *Payne,* involved harmonizing a later statute with an earlier treaty, and therefore it is clear that the Court thought it was harmonizing, not modifying the later in time rule to require an explicit statement for any override. The outcome can easily be explained by the unique facts, namely that the treaty was expressly negotiated to limit the reach of statute, the United States continued to observe the treaty, and there was nothing in the legislation or in the legislative history suggesting that Congress considered the treaty when it reenacted the statute (which unlike the treaty applied universally, not just to the

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[22] Rosenbloom and Shaheen, False Conflict, supra.
[23] For a more extended discussion see Avi-Yonah, Dubious, supra.
[24] *Cook v. United States*, 288 US 102 (1933) (emphasis added).

UK). *Cook* is therefore not a general constitutional rule that every statute that is repugnant with an earlier treaty must yield unless Congress explicitly stated otherwise.

In *TWA v. Franklin* (1984) the Court held as follows:

> There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in **ambiguous** congressional action. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States,* 288 U. S. 102, 288 U. S. 120(1933). Legislative silence is not sufficient to abrogate a treaty. Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention. The repeal was unrelated to the Convention; it was intended to give formal effect to a new international monetary system that had, in fact, evolved almost a decade earlier.... In these circumstances, we are unwilling to impute to the political branches an intent to abrogate a treaty without following appropriate procedures set out in the Convention itself.[25]

This case as well is an affirmation of the treaty override rule, not a modification. The treaty in *TWA* was an important multilateral convention, and the statute was a purely domestic piece of legislation with no relationship to the treaty. The United States continued to observe the treaty. Under these circumstances, the Court wanted more from Congress to override the treaty. This too is a case of harmonization and not the adoption of a general rule requiring an explicit statement of Congressional intent for all overrides.

The difference between *Cook* and *TWA* and *Kappus* illustrates why the two Supreme Court cases should not be read to require an explicit statement of Congressional intent for all treaty overrides. In both *Cook* and *TWA*, it was very likely based on the facts that Congress did not intend an override, and that is why the Court harmonized the treaty and the statute in both cases by emphasizing that there was no explicit Congressional statement of an intent to override. That is also why the Court in *TWA* emphasized that the actions of Congress in that case (and in *Cook*, which it cites) were “ambiguous”. In *Kappus*, on the other hand, it was clear that Congress intended an override, because every US tax treaty requires granting the foreign tax credit, and the AMT limitation was intended to partially deny the credit for AMT purposes in all cases. That is why *Kappus* did not require a Congressional statement of intent to override.

Similarly, in the NIIT situation, it is not clear that Congress intended an override, so it was reasonable to require such a statement. From that perspective the result in *Bruyea* was correct, but the *Bruyea* opinion goes much further by requiring a statement in all cases,

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[25] TWA v Franklin Mint Co., 446 US 743 (1984) (emphasis added).

including cases like the BEAT where it is also clear that Congress intended an override.[26] Such a position misapplies *Cook* and *TWA*.

The court in *Bruyea* addresses the government`s argument that an express statement is not needed for a treaty override as follows--

> The government's argument, however, is even more ambitious, rejecting the need for any specificity in the later-enacted provision to overrule the Treaty. According to the government, the general rule that "a Congressional intention to modify a treaty by statute must be clearly expressed" does not apply to tax cases; rather, the government asserts, "a different standard applies under the [Internal Revenue] Code." Def. MSJ at 42 n.20. In particular, the government points to 26 U.S.C. § 7852(d)(1), which provides that "[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being treaty or law." The government thus asserts that "treaties have no preferential status over *tax* statutes, and there need be no explicit statement of Congressional intent that the Code will prevail in case of conflict with a treaty." Def. MSJ at 42 n.20 (citing S. Rep. No. 100-445 at 325-26 (1988)).
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> The government cannot get the mileage out of 26 U.S.C. § 7852(d)(1) it desires. As the D.C. Circuit recognized — citing the same Senate Report as the government here — "this provision was intended to codify the last-in-time principle as applied to tax treaties and statutes." *Kappus*, 337 F.3d at 1057. And, indeed, that is all the statute's plain language accomplishes. The government is wrong; tax statutes aren't different than other statutes vis-à-vis treaties.
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> To be clear, neither this Court nor Mr. Bruyea takes any issue with the "last-in-time" principle in general. The question is simply whether it applies here. The Court continues to answer that question in the negative. Because 26 U.S.C. § 7852(d)(1) does nothing more than codify the "last-in-time rule," as the D.C. Circuit recognized, the statute itself does nothing more than beg the question *whether there is, in fact, a necessary conflict* between the NIIT statute, on the one hand, and the Treaty, on the other. The government answers that question in the affirmative based on the NIIT's placement — and despite any textual evidence that its placement in Chapter 2A was intended to defeat the Treaty-based tax credit. Mr. Bruyea, in contrast, correctly points to the general rule that this Court should not manufacture a

[26] See Avi-Yonah and Wells, supra. If there is no override, the BEAT will not apply in most of the cases in which it should apply, namely payments of interest and royalties to multinationals based in treaty jurisdictions, and becomes incredibly easy to avoid altogether because there are US treaties with no limitation on benefits.

> conflict between the statute and the Treaty by implication. That is precisely what this Court established *infra*, and 26 U.S.C. § 7852(d)(1) does not change this Court's analysis.
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> *Kappus* further demonstrates why the government is flat wrong. In that case, I.R.C. § 59(a)(2) — the tax statute at issue that conflicted with the Treaty — was subject to yet another TAMRA provision that specified that § 59(a)(2) was "intended to apply notwithstanding any inconsistent treaty obligations[.]" 337 F.3d at 1057 (discussing TAMRA, § 1012(aa)(2), codified at 26 U.S.C. § 861 note, and citing S. Rep. No. 100-45 at 319). According to the D.C. Circuit, "TAMRA thus made it crystal clear that Congress intended [§ 59(a)(2)] to supercede any preexisting treaty obligation with which it conflict[s]." *Id.* at 1058. Here, in contrast, the Treaty and the NIIT statute may be harmonized and, relatedly, there is no similar "crystal clear" congressional language like that in *Kappus*, indicating that the NIIT's placement was designed to "supercede" a Treaty-based tax credit.[27]

As noted above, it is not clear whether Congress intended the NIIT to override treaties, and arguments can be made for both sides. But *Kappus* does not support the taxpayer`s position, because there would have been a treaty override in that case without TAMRA since the court did not hold that there was no override between 1986 and 1988, and the cited Senate Report discussed below clearly states that there would be an override.

The court in *Bruyea* concludes by stating that--

> Finally, if the government were correct that 26 U.S.C. § 7852(d)(1) somehow vitiates the Supreme Court's instruction that "a Congressional intention to modify a treaty by statute must be clearly expressed[,]" Def. MSJ at 42 n.20, we would expect to see some clear authority to that effect. The government notably quotes no language from the Senate Report or *any* case law so holding. And that is because there is no support for the government's assertion. To the contrary, the D.C. Circuit in *Kappus* recognized — as does this Court — the continued vitality of the Supreme Court's general rule that "statutes and treaties should be harmonized if possible," even in tax cases. *Kappus*, 337 F.3d at 1059 n.7 (citing *Whitney*, 124 U.S. at 194, and the Federal Circuit's decision in *Xerox Corp.*, 41 F.3d at 658). Indeed, the D.C. Circuit instructed that "[t]he best way to harmonize § 59(a)(2) with [later-enacted] protocols [amending the Treaty] is to *assume the latter were not intended to repeal the former*." *Id.* (emphasis added). And that is precisely how this Court approaches the NIIT. Moreover, this Court again notes that, quite unlike the plaintiffs in *Kappus*, Mr. Bruyea does not concede a conflict between the Treaty and a statute. Nor, for that matter, does the government point to

[27] *Bruyea*, supra.

> language — "crystal clear," *id.* at 1058, or otherwise — making a conflict between the Treaty and the NIIT "irreconcilable," *id.* at 1056, or making them "absolutely incompatible," *id.* at 1059.
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> To side with the government, this Court would have to disregard the Federal Circuit's instruction in *Xerox Corp.* that "unless it is impossible to do so, treaty and law must stand together in harmony." *Kappus*, 337 F.3d at 1059 n.6 (quoting *Xerox Corp.*, 41 F.3d at 658). This Court has done its best to implement that instruction and the result favors Mr. Bruyea.[28]

This analysis is wrong.[29] There is in fact clear support for the government`s position that no explicit Congressional statement is needed for an override, namely *Kappus* itself (as well as *Lindsey*). Moreover, contrary to the court`s opinion, the legislative history of section 7852(d) clearly stated that no Congressional statement is needed for a treaty override in tax cases, and that was the point of enacting the section (otherwise, if it just codified the normal last in time rule, it would not be needed). The Senate Report cited by the opinion states that—

> In view of what the committee believes is the correct treatment of treaty-statute interactions, then, the committee finds it disturbing that some assert that a treaty prevails over later enacted conflicting legislation in the absence of an explicit statement of congressional intent to override the treaty; that it is treaties, not legislation, which will prevail in the event of a conflict absent an explicit and specific legislative override. **The committee does not believe this view has any foundation in present law.** Moreover, the committee believes that it is not possible to insert an explicit statement addressing each specific conflict arising from a particular act in the act or its legislative history; for in the committee's view, it is not possible for Congress to assure itself that all conflicts, actual or potential, between existing treaties and proposed legislation have been identified during the legislative process of enacting a particular amendment to the tax laws. In the absence of a clear statement that legislation prevails over prior treaties, dubious tax avoidance schemes, in the committee's view, have been suggested...
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> The committee believes that a basic problem that gives rise to the need for a clarification of the equality of statutes and treaties is the complexity arising from the interaction of the Code, treaties, and foreign laws taken as a whole. The committee notes that the United States has over 35 income tax treaties, some of extreme complexity, plus additional treaties bearing on income tax issues. In addition, the application of United States tax law to complex business transactions exacerbates

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[28] *Bruyea*, supra.

[29] It is also arguably dicta, because there was no need to render an opinion on whether an explicit Congressional statement is needed in all treaty override cases, since in the NIIT case Congress`intent to override was "ambiguous". See *TWA*, supra.

> these complexities. The committee does not believe that Congress can either actually or theoretically know in advance all of the implications for each treaty, or the treaty system, of changes in domestic law, and therefore Congress cannot at the time it passes each tax bill address all potential treaty conflict issues raised by that bill. This complexity, and the resulting necessary gaps in Congressional foreknowledge about treaty conflicts, make it difficult for the committee to be assured that its tax legislative policies are given effect unless it is confident that where they conflict with existing treaties, they will nevertheless prevail.[30]

Rosenbloom and Shaheen have argued that the Senate Report is irrelevant because they view *Cook* and *TWA* as controlling Supreme Court authority for the proposition that Congress must explicitly state its intent to override in all cases as a constitutional matter.[31] But as explained above, both cases are easily distinguishable from normal treaty overrides because they involved ambiguous statutes, and the Senate Report discusses and distinguishes them as harmonizing cases.

Thus, the *Bruyea* opinion is wrong on the broader treaty override issue, and this mistake has much wider implications that whether the NIIT can be offset by foreign tax credits, because it affects the interaction of the BEAT with tax treaties.[32] The BEAT is in direct conflict with the non-discrimination article of every US tax treaty, but if it is not an override, then it does not apply to the most important cases it covers (interest and royalty payments to affiliates resident in treaty jurisdictions). It also becomes extremely easy to avoid because some US treaties do not contain a limitation on benefits (LOB) provision, and in other cases the LOB is easy to plan around.[33]

If a treaty override requires an explicit statement as a constitutional matter under *Cook* and *TWA*, as Rosenbloom and Shaheen believe and the court in *Bruyea* agrees, then Congress must make its intent to override explicit in the statute in all cases. But if as argued above the Court did not intend to modify the general rule in *Cook* and *TWA*, then Congress can legislate (as it did for tax law in 1988) that a later statute can override an earlier tax treaty without any explicit statement to that effect.

This outcome is important because in the 21st century Congress has been enacting tax legislation by using the budget reconciliation process in the Senate to avoid a filibuster, and under the budget reconciliation rules as interpreted by the Senate parliamentarian, it is likely that no explicit legislative statement of an intent to override can be included in the

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[30] Senate Report, supra (emphasis added).
[31] Rosenbloom and Shaheen, False Conflict, supra.
[32] See Rosenbloom and Shaheen, The Beat and the Treaties, supra, and Avi-Yonah and Wells, supra.
[33] See Avi-Yonah, *Limitation on Benefits or Principal Purpose Test? Part 1,* 115 Tax Notes Int`l 865 (August 5, 2024); Avi-Yonah, *Limitation on Benefits or Principal Purpose Test? Part 2,* 115 Tax Notes Int`l 1033 (August 12, 2024).

legislation.[34] This is why the two leading examples of tax treaty overrides in recent years, the NIIT and the BEAT, both do not contain statements of congressional intent to override. Therefore, Rosenbloom and Shaheen have argued that they do not apply in cases where there is a treaty in place, which is clearly contrary to Congressional intent for the BEAT, but according to them follows from the Court`s statements in *Cook* and *TWA* that an explicit statement is required.[35] This result would not be possible if the 1988 codification applies.

Ideally, the Supreme Court would take up a case involving this issue, and clarify that no explicit Congressional statement is needed for a treaty override in tax cases. But in the meantime, Congress should include a statement that the BEAT was intended to override treaty in this year`s tax legislation. That is easy if some tax legislation is passed on a bipartisan basis, but even if it is only done via reconciliation, the revenue implications for the BEAT are important enough for the Senate to overrule the parliamentarian if she nevertheless decides that such a statement cannot be included in the legislation.[36]

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[34] See Girts, Adam, Yossarian's Treaty: A Proposal to Solve the Treaty Override v. Byrd Rule Catch-22 When Implementing Multilateral Treaties (May 21, 2022). Available at SSRN: https://ssrn.com/abstract=4203605 or http://dx.doi.org/10.2139/ssrn.4203605.

[35] Rosenbloom and Shaheen, The BEAT, supra; Rosenbloom and Shaheen, False Conflict, supra.

[36] This would also be necessary if the legislation includes H.R. 591, the "Defend American Jobs and Investment Act" introduced by Ways and Means chair Jason Smith, which includes an explicit override that could be challenged under the Byrd rule. See Avi-Yonah, Is the UTPR Extraterritorial or Discriminatory?, TNI (3/17/25).