NO, YOU REALLY DON’T HAVE TO PAY: PROTECTING TAX HAVENS

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I. INTRODUCTION

The old adage “the only two certainties in life are death and taxes” is certainly true for most of the population.\(^1\) From prince to pauper, every man must eventually pay his due to two entities: the Grim Reaper and the IRS. Corporations, however, fare better than the rest of us in this regard; they have many of the same legal rights as flesh and blood humans with the added benefit of not having to be concerned with mortality.\(^2\) Ironically, this means that taxes are in some ways more certain even than death. This has in no way discouraged corporations from attempting to evade the only remaining inevitability of their existence. Even corporations that have not managed to entirely avoid taxes have been largely successful in limiting their exposure.\(^3\) Similarly, rather than trying to increase their tax revenue, many nations have deliberately lowered their tax rate in order to motivate foreign businesses to bring them jobs and increased capital.\(^4\) Perhaps no country has been more successful at enticing corporations with attractive tax benefits than Ireland.\(^5\) However, the competition between nations for lucrative transnational investments can easily breed resentment, and nations unwilling to offer such beneficial terms to foreign investors feel that their more open-handed counterparts are engaging in unfair competition.\(^6\) This produces significant

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\(^1\) Fred Shapiro, *Quotes Uncovered: Death and Taxes*, FREAKONOMICS (Feb. 17, 2016), http://freakonomics.com/2011/02/17/quotes-uncovered-death-and-taxes/. Commonly attributed to Benjamin Franklin, the actual quotation may have instead originated from Christopher Bullock or Edward Ward. Id.


\(^4\) See, e.g., Tim Wallace, *Ireland Slashes Corporation Tax to Just 6.25pc—but There’s a Catch*, TELEGRAPH (Oct. 14, 2015), http://www.telegraph.co.uk/finance/budget/11929790/Ireland-slashes-corporation-tax-to-just-6.25pc-but-theres-a-catch.html (documenting a dip in the Irish corporate tax rate from 12.5% to 6.5% for companies that engage in qualified research and development work with Irish employees).


\(^6\) Brussels Puts Pressure on Dublin to Close Tax Loopholes, TELEGRAPH (Oct. 10, 2014), http://www.telegraph.co.uk/finance/economics/11153053/Brussels-puts-pressure-on-Dublin-to-close-tax-loopholes.html (documenting threats by the European Commission to launch an investigation of Irish tax practices unless it increases its rate of effective corporate taxation).
complications, most notably in the European Union (EU). While each member state maintains its sovereignty, there is also a supranational body, the European Commission, that ensures that members do not engage in unfair commercial practices. This does not necessarily mean that countries offering low tax rates to multinational corporations are in violation of their obligations within the European community. Realistically, however, this is often the result as companies frequently negotiate agreements with individual corporations that extend to them a reduction on the country’s already low corporate tax rate.

When confronted with potential unfair taxation, the European Commission can attempt to rectify a competitive imbalance by requiring that the nation that gave a company preferential tax treatment reassess the company’s taxes to appropriate rates. Because it is primarily American corporations that are lured into making off-shore investments in nations with beneficial tax structures, tax reassessments pose significant challenges to the U.S. government.

The United States then has to address the problem of having some of its largest and most well-known multinational corporations face staggering amounts of newly assessed back-taxes. The most obvious concern is addressing backlash from the private sector for what it perceives as an unfair revision of an agreement with a foreign government. However, the United States has a more direct concern than quelling corporate anger over an increased tax bill. An increase in the amount of taxes paid by a corporation to foreign nations will reduce the amount of taxes payable to the IRS once the funds reach U.S. shores. This represents a rather novel problem: a country is compelled to collect taxes from a corporation at the expense of the corporation’s home country, which directly loses its own tax revenue as a result. This therefore presents the question that this note will answer: What

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10 Campbell, supra note 3.
avenues, if any, are available to the United States, under domestic and international law, in order to retaliate against a perceived unjust taxation of American corporations?

Commentators have noted an obscure portion of the U.S. Internal Revenue Code (IRC) that would allow the President to unilaterally double the taxes assessed on corporations that originate from any nation subjecting U.S. companies to discriminatory taxation. However, this provision of the code has never been exercised, and its current status in light of modern American jurisprudence and the international treaty obligations of the United States is uncertain. Current scholarship focuses almost exclusively on how tax policy relates to trade policy and does not contemplate the legality of a specific provision of domestic law being used in retaliation for taxes being reassessed by a supranational body.

Setting aside the political feasibility of any increase in U.S. taxes assessed against foreign corporations, this Note will evaluate the legal feasibility of the use of § 891 of the IRC as a retaliatory measure to increase taxes assessed by the European Commission against multinational corporations based in the United States. First, this Note will explore the background that has given rise to this legal issue. Next, it will assess the likelihood of domestic legal complications arising as a result of the use of an antiquated statute. This Note will then examine any relevant international legal ramifications of such use, including the bilateral tax treaties that the United States maintains with individual EU member states, as well as the obligations it bears as a member of the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD).

II. FACTUAL BACKGROUND

Over the past few years, Ireland has become an increasingly attractive tax haven for multinational corporations. Taking into account only its nominal corporate tax rate, Ireland is one of the most attractive investment locations in Europe. This has precipitated a severe backlash from multiple nations.

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17 Kyle Pomerleau & Emily Potosky, Corporate Income Tax Rates Around the World, 2016 TAX FOUNDATION (Aug. 18, 2016), http://taxfoundation.org/corporate-income-tax-rates-around-world-2016 (comparing international corporate tax rates and demonstrating that Ireland has one of the twenty lowest global tax rates, less than a third of the rate in the United States).
most notably France and Germany, who championed a failed attempt to establish a common European Union corporation tax rate.\textsuperscript{18} Failing to enact change through other avenues, the European community turned to the European Commission which accelerated their investigation into a number of American companies residing in various European states including Luxembourg and the Netherlands.\textsuperscript{19}

In June of 2014, the European Commission turned its attention to Ireland and initiated an investigation into the tax treatment the nation had extended to Apple, specifically focusing on the decision of Irish courts to grant Apple tax rates well below one percent.\textsuperscript{20} For its part, Ireland insists that its conduct was in keeping with standards set by the European Commission.\textsuperscript{21} Ultimately, the European Commission assessed a fine of over $14 billion to be placed on Ireland for violating EC standards, with some estimates putting the final amount as high as $19 billion.\textsuperscript{22}

The decision generated controversy for multiple reasons. On a broad level, this decision of the European Commission raised issues of sovereignty because it directly contravened a clear ruling by a national court on a traditionally domestic legal matter.\textsuperscript{23} More specifically, Ireland and the United States objected to the decision on two grounds. First, they contended the European Commission departed from precedent in determining that Apple’s tax agreement constituted impermissible state aid, and they alleged that the shift in standards was grounded in political motivations rather than


\textsuperscript{20} State Aid: Ireland Gave Illegal Tax Benefits to Apple, supra note 11.

\textsuperscript{21} See, e.g., Henry McDonald, Irish Government Split over Immediate Appeal Against Apple Tax Bill, THE GUARDIAN (Aug. 31, 2016), https://www.theguardian.com/technology/2016/aug/31/ireland-government-split-apple-tax-bill-immediate-appeal (noting that while the majority of Irish political opinion was in favor of appealing the Apple ruling in order to stay attractive to other multinational corporations, a vocal minority advocated for taking the considerable payout and using it for domestic welfare).


an unbiased application of tax policy. Second, from a policy standpoint, the ruling would detract from Ireland’s attractiveness to businesses and U.S. tax revenues.

The United States has thus far been unsuccessful in attempting to dissuade the European Commission from imposing these increased taxes through normal diplomatic channels. At the time of writing, the ruling is currently pending appeal, but should it stand, would represent a considerable shift in the international tax system that would be detrimental to both the United States and tax haven countries.

The United States does not possess the right to intervene directly in the appeal of the European Commission’s fine on Apple. It is an interested party, but it is not being ordered to assess back taxes on any corporations. Therefore, it is appropriate to examine possible domestic avenues that would allow the federal government to exert pressure in defense of American corporations. Section 891 of the IRC appears to present the most direct way to allow the United States to implement retaliatory taxation.

Section 891 provides that “[w]henever the President finds that, under the laws of any foreign country, citizens or corporations of the United States are being subjected to discriminatory . . . taxes, the President shall so proclaim and the rates of tax . . . shall . . . be doubled in the case of each citizen and corporation of such foreign country. . . .” On its face, the law appears to

24 The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings, supra note 12 (noting that the Apple case appears to deviate from precedent in two ways: First, the Commission seems to have conflated two factors used to determine impermissible state aid rather than analyzing them separately, as was the norm. Second, the Commission compares the treatment of Apple to domestic corporations, rather than other multinational corporations, which was the norm). See also Romero J.S. Tavares et al., The Intersection of EU State Aid and U.S. Tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors, 19 FLA. TAX REV. 121, 186 (2016) (“State aid investigations are well-established under EU law, but tax-specific investigations based on tax rulings have only recently been considered by the EU Commission and were mostly driven by the political climate surrounding the G20-OECD BEPS Project.”).


26 The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings, supra note 12, at 5 (indicating that the Department of the Treasury is considering possible responses to what it perceives as the unfair targeting of American companies).

27 Kadet, supra note 25.

28 REUTERS, supra note 14.

give complete discretion to the President in regards to determining what constitutes discriminatory taxation and when such discrimination calls for the imposition of retaliatory measures. The implementation of retaliation to that degree would certainly carry significant political implications. Nevertheless, the language relating to discriminatory taxation in § 891 certainly appears to map roughly to the recent language espoused by the Treasury Department.

III. LEGAL BACKGROUND

Before investigating the implications of this tax provision in a domestic and international context, it is necessary to briefly discuss the international legal tax structure. For purposes of this Note, three key areas are particularly relevant: bilateral tax treaties establishing basic principles of taxation between two nations, OECD measures adopted via consensus to ensure fairness in tax policy and reduce the abuse of corporate tax havens, and the WTO policy of forwarding tax disputes to the Dispute Settlement Body (DSB) when they are perceived as protectionist measures.

At the broadest level, international tax law is dictated by a series of bilateral treaties. The United States maintains sixty-six different bilateral treaties with various nations. Under these treaties, residents of each signatory nation are assessed a reduced tax rate on certain types of income originating in the foreign state. Types of income not specified in a treaty, or residents of nations with which the U.S. has no treaty are subject to normal domestic and foreign tax rates.

This bilateral, ad-hoc structure differs significantly from the perhaps more well-known international trade structure. There have been recent efforts to modernize the international tax system. However, it remains largely

30 Id.
31 Reuters, supra note 14 (noting the level of escalation that retaliatory taxation would likely entail).
32 The European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings, supra note 12 (noting that the European Commission was unfairly targeting American companies in assessing back taxes).
34 Id. For example, a foreign resident pays reduced U.S. taxes on income originating in the United States and vice-versa.
35 Id.
36 See generally Brauner, supra note 15 (discussing the nature of the international trade regime as a more integrated multi-lateral system and comparing it to a slightly dated tax system which relies on bilateral treaties).
anachronistic compared to its more advanced trade counterpart which relies on the WTO and multilateral treaties.37

Although some treaties vary slightly in their exact terms, the majority of tax treaties are based off of a set model. The United States has established a Model Income Tax Convention to serve as a template for its bilateral treaties.38 This template in turn was heavily influenced by the OECD Model Tax Convention, which is provided to help equalize tax treatment among its member states.39

Tax treaties generally have two primary goals: eliminating double taxation and preventing tax evasion.40 These goals attempt to strike a balance between ensuring entities do not pay duplicative taxes to two separate nations, while also guaranteeing that tax revenue is eventually paid to one of the nations.

However, the key provision of U.S. tax treaties to keep in mind for purposes of this analysis are the nondiscrimination clauses, which are a constant presence in the U.S. tax treaty template.41 Generally stated, nondiscrimination clauses prohibit a government from levying a higher tax rate against a foreign national protected under the treaty than the government could levy against one of its own citizens.42 Nondiscrimination would appear to summarily defeat the purpose of § 891, but two other key factors must be kept in mind. First, it is a key principle of trade law that retaliatory measures can be applied to countries employing unfair trade practices;

41 See, e.g., Sanford H. Goldberg & Peter A. Glicklich, Treaty-Based Nondiscrimination: Now You See It Now You Don’t, 1 FLA. TAX REV. 51 (1992) (noting that the nondiscrimination clause of tax-treaties provides the main prohibition against engaging in retaliatory taxation).
42 United States Model Income Tax Convention, supra note 38, at 54 (“Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith that is more burdensome than the taxation and connected requirements to which nationals of that other Contracting State in the same circumstances . . . .”).
international tax law is similar enough that an argument advocating temporary retaliation could not be rejected out of hand.\textsuperscript{43}

Second, and perhaps most importantly, unlike the international trade regime, which possesses an independent enforcement mechanism through the WTO, most tax treaties have no independent dispute resolution mechanism.\textsuperscript{44} Arbitration is mentioned as a recourse in the majority of U.S. tax treaties, but it almost always requires the consent of both parties, or at minimum, a lack of their objection.\textsuperscript{45} International tax relies entirely upon agreement for dispute resolution. This lack of an independent adjudicatory method is a rarity in the context of modern international law and a fact that makes an analysis of the legality and implications of § 891 of the U.S. tax code particularly intriguing.

In addition to the strict terms of tax treaties, two supranational entities have a significant impact on the structure of the international tax regime: the OECD and the WTO. Because the OECD serves primarily in a monitoring and advisory capacity seeking to bring greater cohesion to tax treaties between member states, it cannot directly force states to comply with its standards or recommendations.\textsuperscript{46} However, OECD commentaries and recommendations are often given significant weight by domestic courts in interpreting a nation’s tax treaty obligations.\textsuperscript{47} Notably however, U.S. courts rely on OECD commentaries less frequently as interpretive tools because “the United States--uniquely among major sovereigns--publishes a highly detailed technical explanation of its tax treaties at the time each such treaty is

\textsuperscript{43} Derek Devgun, \textit{International Fiscal Wars for the Twenty-First Century: An Assessment of Tax-Based Trade Retaliation}, 27 \textit{Law \& Pol’y Int’l Bus.} 353, 376 (1996) (noting that retaliation is permissible in an international trade regime and the similarities between trade and tax).

\textsuperscript{44} See, e.g., Goldberg & Glicklich, \textit{supra} note 41, at 52 (noting that international tax relies entirely on bilateral negotiation and arbitration by mutual agreement in order to resolve any possible tax disputes).

\textsuperscript{45} Compare United States Model Income Tax Convention, \textit{supra} note 38, at 58 (providing for arbitration unless “the competent authorities of the Contracting States have agreed prior to the date on which the arbitration otherwise would be submitted that the particular case is not suitable for resolution through arbitration”), and Technical Explanation of the Protocol Signed at Berlin on June 1, 2006 Amending the Convention Between the United States of America and The Federal Republic of Germany, IRS (Sept. 23, 2016), https://www.irs.gov/pub/irs-trty/germanyte07.pdf (requiring mandatory arbitration for certain provisions, but notably not specifically including violations of non-discrimination), with Technical Explanation of the Convention Between the Government of the United States of America and Government of Ireland, IRS (Sept. 23, 2016), https://www.irs.gov/pub/irs-trty/iretech.pdf (allowing for arbitration, but noting “[n]othing in this provision requires that any case be submitted for arbitration”).

\textsuperscript{46} See generally Grinberg, \textit{supra} note 37 (providing a thorough review of the effect of OECD measures including new recommendations resulting from the BEPS plan).

\textsuperscript{47} \textit{Id.} at 1184.
sent to the United States Senate for ratification. However, OECD measures still provide valuable insight into movement of international tax policy towards greater consolidation and therefore bear further consideration.

The OECD has recently reinvigorated its attempts to standardize tax policy and combat tax avoidance through its comprehensive Base Erosion and Profit Shifting project (BEPS). The project addresses fifteen distinct areas of action and provides recommendations for each. Of particular interest to this Note are the final two actions. Action 14 aims to improve dispute resolution by improving mutual agreement procedure (MAP) measures, and Action 15 calls for the development of a multilateral instrument to modify current bilateral treaties.

These measures are non-binding and will doubtless take a considerable amount of effort to be put into force. However, they represent a considerable step towards the harmonization of tax treaties. In particular, Action 14 has resulted in multiple nations committing to implementation of mandatory binding arbitration for dispute resolution.

In addition to the OECD, the WTO also plays a role in determining international tax policy. Compared to the OECD, the WTO addresses tax policy far less frequently, but resolves issues in a much more direct fashion. Although the WTO concerns itself primarily with trade and not taxes, its DSB will not hesitate to address tax related disputes when they appear to be direct or indirect barriers to trade. Stated another way, the WTO is both

48 Id. at 1185.
50 Id.
52 Making Dispute Resolution Mechanisms More Effective, Action 14: 2015 Final Report, supra note 51, at 10 (noting that Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States have “declared their commitment to provide for mandatory binding MAP arbitration in their bilateral tax treaties”).
willing and well-situated to take action when a tax provision violates the fundamental standard of National Treatment (NT).\textsuperscript{53}

Over the past twenty years, just under ten percent of disputes submitted to the DSB have centered around tax policy.\textsuperscript{54} These interventions however, are largely limited to instances where a tax is adjusted selectively to apply to certain products to replicate the effects of a tariff.\textsuperscript{55} One seminal case held that a U.S. rule allowing “a partial tax exemption for the income of a foreign corporate subsidiary derived from handling sales of US exports . . .” violated the European Commissions standards because it provided a considerable effective tax reduction in certain income originating from exports.\textsuperscript{56} Therefore, if a tax provision is perceived as substantively affecting trade terms, then regardless of the dispute resolution mechanism of the individual tax treaty, the WTO provides an efficient forum for the provision to be challenged. Furthermore, decisions by the WTO have been effective in producing changes in underlying domestic tax law, albeit slowly.\textsuperscript{57}

Lastly, before analyzing the feasibility of § 891, the interaction between domestic law and international tax treaty obligations must be discussed. Under U.S. law, IRC provisions are required to incorporate treaty obligations.\textsuperscript{58} However, treaties and laws affecting revenue are both accorded equal authority under domestic law.\textsuperscript{59}

In practice, this means that tax treaty overrides can be accomplished only through a statute enacted later in time.\textsuperscript{60} Unsurprisingly, such overrides are

\textsuperscript{53} See Brauner, \textit{supra} note 15 (discussing that of the two key trade provisions underlying the WTO, National Treatment and Most Favored Nation Status, only National Treatment is reflected in bilateral tax treaties leaving the WTO on uncertain footing when considering issues involving Most Favored Nation Status).


\textsuperscript{55} Id. at 17 (noting that income taxes were generally not viewed as subject to WTO provisions because they are not taxes on products).

\textsuperscript{56} Id. at 35–36.

\textsuperscript{57} See Brauner, \textit{supra} note 15, at 252–53 (“Despite strong political resistance, which fed a long and costly legislative process, the United States recently repealed these [prohibited export tax] subsidies.”).

\textsuperscript{58} 26 U.S.C.A. § 894(a)(1) (West 2016) (“The provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer.”).

\textsuperscript{59} 26 U.S.C.A. § 7852(d)(1) (West 2016) (“For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.”).

\textsuperscript{60} Devgun, \textit{supra} note 43, at 373; \textit{see also} Cook v. United States, 288 U.S. 102, 120 (1933) (noting that a treaty obligation is not “abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed”).
not viewed favorably by other nations or the OECD. However, the United States is noted as a “particularly heavy user of treaty override,” particularly when attempting to prevent treaty shopping. Specifically related to the recent Apple tax dispute, several senators have advocated taking retaliatory action in response to the European Commission’s reassessment of Apple’s tax bill.

IV. ANALYSIS

Keeping in mind the number of different legal regimes influencing U.S. international tax policy, would it be legally feasible for the United States to invoke § 891 of the IRC in response to the increased taxes assessed by the European Commission against Apple? Any attempt to invoke this provision would be subject first to challenges under domestic law and then would be subject to a response under tax treaty provisions, OECD policy, and WTO standards. Ultimately, while the exercise of § 891 would not likely be upheld by domestic courts or international tribunals, it would be unlikely to produce negative consequences in the short term and would therefore serve as a powerful signal of the United States’ objection to recent actions by the European Commission.

A challenge to the execution of § 891 under domestic law would be the first significant obstacle to its implementation. Any party challenging the use of the statute would have a relatively strong case that it would be impermissible under a governing bilateral tax treaty. In general, because § 891 was passed in 1934, it would necessarily be earlier in time to any U.S. bilateral tax treaty. National treatment is a key portion of all U.S. tax treaties, and by its very nature, the double taxation authorized by § 891 treats certain foreign nationals differently from U.S. citizens. The implementation of § 891 would seemingly contradict any such treaty and the treaty would be

61 See Grinberg, supra note 37, at 1192 (“In the late 1980s, when the United States enacted two tax treaty overrides, the OECD issued a report that quite scathingly condemned such behavior, and that report received equal levels of support from common law and civil law countries alike”); id. at 1192–93 (making an interesting note that despite the poor reception given to treaty overrides, two countries ostensibly committed to enacting BEPS Action 14, Australia and the United Kingdom, proposed and enacted treaty overrides respectively “in reaction to the BEPS project”).


64 REUTERS, supra note 14.
accorded precedence. However, there are three possible responses to the objection that U.S. treaties are later in time than § 891.

First, the United States could target the provision against a nation with which it has no tax treaty. This would be a uniquely direct solution, as there would be no grounds for a party to object that there was a violation of treaty provisions. Furthermore, this solution is attractive because it is essentially not the state levying increased taxes against American corporations that the United States takes objection to. Rather, the European Commission, which is compelling its member states to assess these higher taxes, is the source of the problem. Therefore, while it may be unconventional, the United States could implement § 891 against a state that is a member of the European Commission but with which the United States has no tax treaty. Although there are not many nations which fit this criteria, Croatia presents at least one opportunity to implement this unique strategy.65

Second, the United States could assert that it is within the President’s discretion to implement the statute as a temporary response to unfair taxation and that the use of the statute is not designed to change the fundamental obligations between the United States and the targeted nation. This argument would assert on policy grounds that the purpose of § 891 was to allow for the President to employ temporary retaliatory measures. In contrast, it could be argued that the primary goal of a national treatment provision in bilateral tax treaties is to ensure that there is no recurring discriminatory application of tax rules. Therefore, even if the application of § 891 constitutes a technical violation of a bilateral treaty, a court may be willing to allow the statute to be implemented because of the unique circumstances resulting in its use.

Finally, Congress could act directly to address the argument by passing a statute expressly reaffirming the President’s authority to utilize § 891. This would allow the legislature to clearly indicate an intention to allow the President to implement double taxation despite U.S. treaty obligations. Congress would likely enact a statute utilizing one of two designs. Either the statute would broadly authorize the application of § 891 against any state, regardless of treaty obligations, or the statute could authorize the use of § 891 against only one specific nation. Either measure would clearly resolve any dispute regarding the supremacy of § 891 over U.S. treaty obligations and ensure that domestic courts would not present a barrier to the imposition of a retaliatory tax.

65 U.S. Tax Treaties, supra note 16 (listing nations with which the U.S. has a tax treaty, but not including Croatia).
If tensions rise to the point that the President seriously considers implementing § 891 as a retaliatory measure, it would likely not prove difficult to receive a Congressional blessing on this action in the form of an affirming statute. This is particularly true if the Republican Party retains control of both chambers of Congress, given that a retaliatory measure would seem to agree with the party’s current stance on globalism in general. In the absence of express Congressional approval, while there is a compelling argument to permit temporary retaliation against a foreign state, there is a considerable likelihood that an exercise of § 891 against a nation with which the United States has a tax treaty would be struck down by domestic courts.

Even if a retaliatory tax goes unchallenged in domestic law, general bilateral treaty obligations would present difficulties to the United States. Assuming that the United States does indeed target a nation with which it shares a bilateral treaty instead of letting a nation with no treaty stand as proxy for the European Commission, a retaliatory tax would almost certainly be challenged under the terms of the treaty as a violation. This would result even if domestic law determines that § 891 supersedes the treaty.66

The exact impact of a violation of a bilateral tax treaty would depend greatly upon which nation the tax was levied against. The United States would be faced with essentially no ill-consequences if it levied the tax against a nation, like Ireland, without a mandatory arbitration clause.67 On the other hand, if the tax was levied against a nation like Germany with a mandatory arbitration provision, the United States would run the risk of being forced to either participate in arbitration in which it would likely lose, or simply refuse to engage in arbitration and guarantee an adverse ruling.68

The United States would therefore be well-served to ensure that any nation it targets for retaliatory taxation does not have a mandatory arbitration provision in its bilateral tax treaty. However, even if the treaty does call for mandatory arbitration, the United States might not necessarily have an adverse result if it can argue that its actions do not constitute a specific trigger for such a mandatory provision.69 However, even if binding

66 See Han, supra note 40, at 49 (noting that while the United States can override a pre-existing treaty under domestic law, it does not have that same right under international law).
67 See Technical Explanation of the Convention Between the Government of the United States of America and Government of Ireland, supra note 45, at 92 (“[W]here the competent authorities have been unable to resolve a disagreement regarding the application or interpretation of the Convention, the disagreement may, by mutual consent of the competent authorities and the affected taxpayers, be submitted for arbitration.”).
68 See id. at 38 (requiring mandatory arbitration in certain circumstances).
69 Id. at 38–39 (noting that mandatory arbitration is required in cases alleging violations of four different treaty Articles, but not including Article 24 which mandates the principle of nondiscrimination).
arbitration is not specifically called for in nondiscrimination disputes, it may still be possible for a STATE to argue that a doubled tax rate also implicates a treaty article where binding arbitration is required. Therefore, unless targeting a nation like Germany conveys a significant political advantage over targeting a nation like Ireland, the United States should forgo the risk of being compelled to submit to arbitration.

If the United States successfully evades challenges under domestic law and dispute resolution mechanisms under a relevant bilateral treaty, it is likely to face immediate condemnation from the OECD. Because the OECD has no binding enforcement mechanisms and its measures are all advisory, the United States would not be assessed direct penalties by the entity. Despite this, there would be significant intangible costs associated with such a dramatic break from OECD policy. Because the OECD has made a concerted effort to unify tax policy and encourage nations to adopt mandatory, binding dispute resolution procedures, any effort by the United States to circumvent the principles behind these policies would not be viewed favorably.

However, nations deciding to override treaties to the detriment of OECD goals are certainly not unheard of, and the United States would be able to make a plausible argument that the temporary use of retaliatory measures is justified by what it perceives as an unjust targeting of its corporations. In light of these factors, the United States would likely be able to mitigate any adverse reaction from the OECD by ensuring that a retaliatory tax is implemented for a brief time as a signaling measure.

The final obstacle to the use of § 891 as a response to European Commission tax measures is WTO obligations. Should the WTO decide to intervene and issue a ruling against the United States, there would be a considerably more direct adverse impact than would result from any potential action that could be taken by the OECD. However, the WTO would only intervene if the use of § 891 constituted an impermissible barrier on trade.

Obviously, the doubling of the income tax rate for citizens of a certain country would not constitute a traditional trade barrier because it is not limited by product type. Further, the tax shift would not be limited by the source of a foreign residents income, so the WTO would likely have difficulty in determining that § 891 would constitute an indirect trade barrier. The only avenue by which the WTO could make such a determination would be in finding that doubling income tax on foreign citizens is impermissible because it indirectly affects trade by considerably discouraging foreign investment. Because the movement of both goods and services falls under the purview of the WTO, the DSB could determine that attempts to prevent
foreign citizens from providing services under the same conditions as domestic residents would be impermissible.

However, such a determination is unlikely. First, the WTO generally shows at least some degree of deference to cases in which it feels that retaliation is justified. For reasons noted earlier, the United States could certainly argue that the steps taken by the European Commission provide such justification. Second, such a finding would be at the limits of what sort of taxation could possibly be viewed as constituting impermissible trade barriers. Because the WTO relies upon Member States to accept their decisions in order to provide them legitimacy, the DSB will likely be wary of limiting the ability of Member States to set their own tax policy in these types of cases. Lastly, while the WTO is not hesitant to issue rulings on tax disputes when appropriate, it certainly recognizes that its primary role is to regulate trade, not tax. Therefore, there is a considerable incentive for the WTO to decline to intervene and allow any resulting dispute to be worked out either bilaterally or in an alternative forum. Unless the application of § 891 significantly escalated tensions and thereby contributed to a series of retaliatory measures affecting not just tax, but trade as well, the WTO would likely not exercise jurisdiction over a resulting case.

V. CONCLUSION

Corporations dedicate considerable effort to minimizing their tax bill, and likewise nations use their tax policy to attract jobs and capital investment to their shores. Traditionally, states have been relatively free to set their own tax rates without interference by other entities. However, the desire to attract especially large American multinational corporations has fostered resentment among various members of the European Community. A number of these states feel that these corporations have been granted fundamentally unfair tax rates by other members of the community. With an extremely generous effective tax rate extended to Apple in Ireland as a prime example, the supranational bodies of the European Union have begun to take action.

Recently, the European Commission ordered the Irish government to collect a significant amount of taxes from Apple. This step offended not only Irish notions of sovereignty, but also cut against the ability of nations to negotiate an equitable division of tax revenue from each other’s citizens. Accordingly, both the Irish government and the U.S. Department of the Treasury have expressed considerable consternation at these actions since they threaten to detrimentally impact key sources of tax revenue and foreign investment.
This raises the question of what avenues are available for the United States to take steps to retaliate against what it views as unfair interference by a supranational body. Despite recent movement towards a greater degree of cohesion, international tax law is still a large body of laws. Where the WTO traditionally governs international trade, international tax is instead built upon numerous bilateral treaties between individual states, the use of the OECD as a forum for discussion of policy and best practices, and occasional intervention by the WTO when a tax policy is concluded to adversely affect trade.

Section 891 of the IRC allows the U.S. President to double the income tax of citizens of foreign states when those states are engaging in discriminatory taxation. The statute presents the most direct avenue for retaliation against action by the European Commission, but it would be subject to several layers of legal challenges if invoked.

From a domestic standpoint, the law would be subject to significant challenges unless Congress decided to enact a statute indicating that § 891 preempts any relevant bilateral treaty prohibiting nondiscrimination. However, if a statute were to be authorized, it would be likely that the United States could evade international legal challenges at least long enough to send a strong message to the European Commission. Because most tax treaties do not mandate arbitration in case of a dispute, and the WTO is the only supranational entity that issues direct penalties for unjust taxation, but exercises limited reach in that area, the use of § 891 represents a feasible step to respond to the European Commission from a legal perspective.