which portend more expansive regulation through statutes and administrative actions—will have a chilling effect on U.S. investment in China.

As with the controls issued in 2022 on exporting sophisticated chips and chip manufacturing equipment to China, the goals of the outbound investment program will only be realized if they are a part of a coordinated multinational initiative. This is especially true since U.S. investment in China is relatively small (five percent of all foreign investment there in 2021 and 2022) and has been contracting, currently at twenty-year low.[38] For this reason, the administration consulted with allies and partners as it drafted the order and the ANPR.[39] For this reason too, it has encouraged other governments to impose similar restrictions. In its statement in May, the Group of Seven's leaders, at the United States' urging, noted that capital controls "could be important to complement existing tools of targeted controls on exports and inbound investments."[40] The same language appeared in the Joint Statement of the EU-U.S. Trade and Technology Council shortly thereafter.[41] In June, the European Commission announced that it is "examin[ing] possible measures to address security risks related to outbound investments, with a view to proposing an initiative by the end of" 2023.[42] Germany, the United Kingdom, and other countries are considering actions as well.[43]

## *The Senate Provides Its Advice and Consent to Ratification of U.S.-Chile Tax Treaty After Eleven Years*

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By a vote of 95–2, the Senate on June 22, 2023, approved a resolution of advice and consent to the ratification of a tax treaty between the United States and Chile.[1] The treaty[2] had

BLOOMBERG (Aug. 15, 2023), *at* https://www.bloomberg.com/news/articles/2023-08-15/blackrock-fund-managers-brace-for-even-more-scrutiny-over-china.

[38] *See* Hutzler, *supra* note 32; Rappeport & Swanson, *supra* note 31; *see also* Emily S. Weinstein & Ngor Luong, *U.S. Outbound Investment into Chinese AI Companies* 1 (Feb. 2023), *at* https://cset.georgetown.edu/wp-content/uploads/CSET-U.S.-Outbound-Investment-into-Chinese-AI-Companies.pdf [https://perma.cc/HRJ2-B7RL] ("[B]etween 2015 and 2021, 167 U.S. investors participated in 401 investment transactions—or 17 percent of 2,299 global investment transactions—into Chinese AI companies.").

[39] *See* Treasury Fact Sheet, *supra* note 5.

[40] White House Press Release, G7 Leaders' Statement on Economic Resilience and Economic Security (May 20, 2023), *at* https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-leaders-statement-on-economic-resilience-and-economic-security [https://perma.cc/UST7-9EQC].

[41] *See* Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden (May 31, 2023), *at* https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2992 [https://perma.cc/VQ8E-WE3F].

[42] European Commission, Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy," at 11 (June 20, 2023), *at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023JC0020 [https://perma.cc/5B8Q-EYL4].

[43] *See* Strategy on China of the Government of the Federal Republic of Germany (2023), *at* https://www.auswaertiges-amt.de/blob/2608580/317313df4795e104f1ea3263d41860d8/china-strategie-en-data.pdf [https://perma.cc/G9XW-C8TZ]; White House Press Release, The Atlantic Declaration: A Framework for a Twenty-First Century U.S.-UK Economic Partnership (June 8, 2023), *at* https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/08/the-atlantic-declaration-a-framework-for-a-twenty-first-century-u-s-uk-economic-partnership [https://perma.cc/2UHW-HZJQ].

[1] *See* 169 CONG. REC. S2209 (June 22, 2023) [hereinafter Resolution of Advice and Consent].

[2] *See* Convention Between the Government of the United States of America and the Government of the Republic of Chile for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to

been signed by the two countries in February 2010 and transmitted to the Senate in May 2012, but it had not been considered by the full Senate in the ensuing eleven years, although the Senate Foreign Relations Committee had favorably reported it out four times by near-unanimous votes under both Democratic and Republican leadership.[3] The delay in scheduling a floor vote had nothing to do with the treaty insofar as it pertained to Chile or taxes. Senator Rand Paul has opposed every tax treaty and protocol since he joined the Senate in 2011 because of privacy concerns with their exchange of information provisions.[4] Deprived by Senator Paul of unanimous consent to proceed to a vote, successive majority leaders were reluctant to move forward on resolutions of advice and consent. Passage of the 2017 Tax Act created an additional hurdle for all pending tax treaties, as they needed to be reconciled with that law's international tax provisions.[5] Overcoming Senator Paul's opposition,[6] the Senate in July 2019 approved four tax treaty protocols that had been on hold for from four to just under nine years.[7] But until its vote on the treaty with Chile in 2023, the Senate had not approved a new bilateral tax agreement since a 2010 agreement with Malta.[8] The treaty with Chile went forward only with the inclusion of two reservations, both designed to reconcile the treaty with the 2017 law.[9] Neither addressed privacy.[10] The Senate acted because of the growing strategic importance to the United States of trade with Chile, which has the world's largest reserves of lithium, the mineral critical for the rechargeable batteries that run electric vehicles, smartphones, solar panels, and much else.[11] Chile's Congress, which ratified the treaty in 2015, will need to re-approve it with the reservations. Once in force, the treaty will be just the

Taxes on Income and Capital, with a Protocol Signed the Same Day, S. Treaty Doc. 112–8 (2012) [hereinafter U.S.-Chile Tax Treaty].

[3] *See* S. Exec. Rept. 113-9 (2014); S. Exec. Rept. 114-4 (2016); S. Exec. Rept. 117-1 (2022); S. Exec. Rept. 118-1 (2023).

[4] The U.S.-Chile Tax Treaty, similar to other tax treaties, provides that the contracting states "shall exchange such information as is foreseeably relevant for carrying out the provisions [of the treaty or the parties' domestic laws concerning taxes] including information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention." U.S.-Chile Tax Treaty, *supra* note 2, Art. 27(1).

[5] *See* Pub. L. 115–97, 131 Stat. 2054 (Dec. 22, 2017).

[6] *See* Kaustuv Basu & Nancy Ognanovich, *McConnell Shows Who's Boss After 9-Year Battle Over Tax Treaties*, Bloomberg Tax (Oct. 23, 2019), *at* https://news.bloombergtax.com/daily-tax-report/mcconnell-shows-whos-boss-after-9-year-battle-over-tax-treaties.

[7] *See* 165 Cong. Rec. S4876 (July 17, 2019) (Japan); 165 Cong. Rec. S4875 (July 17, 2019) (Switzerland); 165 Cong. Rec. S4878 (Luxemburg); 165 Cong. Rec. S4850 (July 16, 2019) (Spain); *see also* Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 812, 818 (2019).

[8] *See* 156 Cong. Rec. S5976 (July 15, 2010).

[9] It is unusual for the Senate to add reservations to a tax treaty. Prior to the Chile treaty, the last time that occurred was when the Senate approved the U.S.-Italy treaty in 1999. *See* 145 Cong. Rec. S14225 (Nov. 5, 1999).

[10] *See* text at notes 16–23 *infra*. The resolution of advice and consent also included two declarations. The first declared the treaty self-executing (which is the norm for tax treaties). *See* Resolution of Advice and Consent, *supra* note 1, Sec. 3(1). The second declared that "[i]n light of substantial changes made to the international provisions of the Internal Revenue Code in 2017, . . . future tax treaties need to reflect such changes appropriately" and in particular in regard to "addressing relief of double taxation." *Id.*, Sec. 3(2). The latter declaration was included because some senators were concerned that the reservation to Article 23(1), see text at note 22 *infra*, was not broad enough to protect against double taxation should the foreign tax credit rules in the tax code change (particularly Section 960). *See* 169 Cong. Rec. S2215–S2216 (June 22, 2023) (statements of Senators Mike Crapo and James Risch).

[11] To consider the resolution of advice and consent, the Senate invoked cloture by a 97–2 vote. *See* 169 Cong. Rec. S2157 (June 21, 2023).

second tax treaty with a South American country, following one with Venezuela concluded in 1999.

Bilateral tax treaties generally encourage investment by reducing or eliminating double taxation and creating greater tax certainty. This is accomplished in part through setting reduced tax rates on, or establishing exemptions from, foreign taxation on foreign source income. The bulk of the treaty is composed of such rules, often intricate, setting maximum rates for different types of income that Chile and the United States can impose on each other's residents for the income sourced in their territory, or exempting residents of the other state from taxes on that income. Treaties also facilitate investment through mitigating double taxation by providing that credits shall be allowed by a state for the income taxes paid by its residents to the other state.[12] Under these provisions reducing or eliminating taxes imposed by one state on the residents of the other and requiring foreign tax credits, the treaty will reduce or eliminate the Chilean taxes paid by U.S. persons, the U.S. taxes paid by Chileans, and the income double-taxed on both.[13]

Because U.S. citizens and residents are subject to U.S. income tax on their worldwide income, the treaty will generally not reduce the total taxes paid by U.S. persons (that is, the amount paid to Chile and the United States combined) below that which is owed under U.S. rates.[14] Consequently, the treaty's main benefit to U.S. residents is the reduction in Chilean taxes when Chilean rates are higher than U.S. rates. That is important because it allows U.S. businesses to compete on a level playing field against businesses from third countries that currently pay lower Chilean rates due to the tax treaties their countries have in place with Chile. The set rates also establish certainty—and hence predictability—for U.S. persons regarding Chilean taxes. Additionally, the treaty's double taxation provision will provide clarity to U.S. residents regarding what Chilean taxes are creditable.[15]

The two reservations to the treaty address changes to the tax code enacted by the 2017 law. The first reservation[16] preserves the right of the United States to impose a tax under the law's "Base Erosion and Anti-Abuse Tax" (BEAT) provisions.[17] The BEAT rules discourage multinational corporations from making "base erosion payments" from the United States to foreign jurisdictions that would result in their reduced U.S. tax liability. Some analysts have concluded that the BEAT rules are inconsistent with the treaty's articles pertaining to foreign tax credits and nondiscrimination. If that is true, under U.S. law's "latter-in-time" rule, the treaty's provisions would take precedence over BEAT's and thus abrogate BEAT's application

[12] *See* U.S.-Chile Tax Treaty, *supra* note 2, Art. 23.

[13] To preclude treaty shopping, the U.S.-Chile treaty includes a standard "limitation on benefits" article that defines the "qualified persons" who are entitled to the benefits of the treaty. *Id.* Art. 24. It also includes a typical nondiscrimination article. *Id.* Art. 25.

[14] The protocol to the treaty includes a "savings clause" that allows both parties to continue to tax its citizens and residents according to their own laws notwithstanding the treaty. *See* U.S.-Chile Tax Treaty, *supra* 2, Protocol, para. 4.

[15] U.S. law unilaterally provides relief from double taxation through foreign tax credits and other means. *See, e.g.*, 26 U.S.C. §§ 245A, 901, 903, 960. In the absence of a treaty provision, however, there can be a lack of clarity as to whether particular foreign taxes qualify for the credit. There is also decreased certainty, as U.S. law can be amended.

[16] *See* Resolution of Advice and Consent, *supra* note 1, Sec. 2(1).

[17] *See* 26 U.S.C. § 59A.

in the U.S.-Chile context.[18] The first reservation ensures that, even if there is a conflict between the law and the treaty, BEAT will still apply. The reservation's text tracks precisely the language included in the U.S.-Croatia Bilateral Tax Treaty that was signed in December 2022 (and awaiting transmittal to the Senate).[19]

The second reservation reflects the 2017 law's repeal of Section 902 of the tax code and the adoption in its place of Section 245A. Section 902's "deemed paid credit" allowed a U.S. minimum ten percent shareholder of a foreign corporation from which the shareholder received dividends to take a proportionate foreign tax credit for the foreign corporation's foreign income taxes.[20] Section 245A instead allows the U.S. ten percent shareholder of a foreign corporation to take a deduction for the foreign source dividends received from the foreign corporation.[21] The reservation deletes the text of Article 23(1) of the treaty requiring the allowance of foreign tax credits, which was drafted in light of Section 902, and replaces it with one based on Section 245A.[22] This reservation also tracks precisely the language included in the new U.S.-Croatia tax treaty.[23]

Impetus for the Senate's action after eleven years came from concern that the United States would lose access to Chile's abundant lithium reserves. Chile supplies 40 percent of U.S. lithium imports.[24] Though the United States has significant lithium reserves itself, it lacks the capacity to produce them, currently operating only one mine. The Biden administration has supported the development of additional production and domestic processing facilities, as have states like California, but the demand for lithium is growing quickly and significantly, outpacing U.S. domestic development.[25] North Carolina-based Albemarle Corp., the world's third largest lithium producer, is one of only two companies licensed to produce lithium in Chile.[26] (The other is Sociedad Química y Minera de Chile, which is partially owned by China's Tianqi Lithium Corp.) Albemarle is currently taxed in Chile under a special waiver that gives it the same rate as that which applies to companies from countries with tax treaties with Chile, such as China.[27] The waiver will expire in 2027, at which point, absent a tax treaty, the rate

[18] *See* 26 U.S.C. §§ 894(a), 7852(d)(1); Kappus v. Commissioner of Internal Revenue, 337 F.3d 1053, 1056 (D.C. Cir. 2003).

[19] Convention Between the Government of the United States of America and the Government of the Republic of Croatia for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, Art. 1(9) (Dec. 7, 2022), *at* https://home.treasury.gov/system/files/131/Treaty-Croatia-12-7-2022.pdf [https://perma.cc/3ZJ8-7J5G] [hereinafter U.S.-Croatia Tax Treaty].

[20] *See* 26 U.S.C. § 902 (repealed).

[21] *See* 26 U.S.C. § 245A.

[22] *See* Resolution of Advice and Consent, *supra* note 1, Sec. 2(2).

[23] *See* U.S.-Croatia Tax Treaty, *supra* note 19, Art. 23(2).

[24] *See* U.S. Geological Survey, Mineral Commodity Summaries 2023, at 108 (2023), *at* https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf [https://perma.cc/SC3R-PNYB].

[25] *See, e.g.*, White House Press Release, Fact Sheet: Securing a Made in America Supply Chain for Critical Minerals (Feb. 22, 2022), *at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/22/fact-sheet-securing-a-made-in-america-supply-chain-for-critical-minerals [https://perma.cc/M76R-YT88]; Ivan Penn & Eric Lipton, *The Lithium Gold Rush: Inside the Race to Power Electric Vehicles*, N.Y. TIMES (May 6, 2021), *at* https://www.nytimes.com/2021/05/06/business/lithium-mining-race.html.

[26] *See* Julie Steinberg & Rhiannon Hoyle, *A Onetime Paper Maker Is Now the King of Lithium*, WALL ST. J. (June 1, 2023), *at* https://www.wsj.com/articles/a-onetime-paper-maker-is-now-the-king-of-lithium-99421b8c.

[27] The U.S.-Chile Tax Treaty does not set a minimum business profits tax, but its non-discrimination clause requires that nationals of one state cannot be subject to taxation in the other state that is "more burdensome" than the latter imposes on its own nationals. *See* U.S.-Chile Tax Treaty, *supra* note 2, Art. 25(1). The 35% rate is that which applies to large Chilean businesses.

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will increase 9 percent, from 35 percent to 44 percent, making Albemarle less competitive. Senator Chuck Schumer explained that the treaty "expands investment in one of the most mineral-rich regions in the world—critical for making EV batteries and other clean tech. It will ensure that Chinese competitors won't continue to have the edge over U.S. companies in the race for lithium and other minerals when it comes to Chile."[28] Senator James Lankford emphasized that "US investors will have stronger access to Chile's deposits of critical minerals like lithium and copper to help reduce our dependence on China and other hostile nations."[29]

Changing patterns of international trade, investment, and politics promise the negotiation of new tax treaties, the revision of old ones, and the termination or suspension of others. Some new treaties (like that with Croatia) have been finalized and signed but not yet sent to the Senate.[30] Others (with Norway and Romania) reportedly have been finalized but not signed.[31] Still others (with Israel, Switzerland, and Vietnam) are being renegotiated.[32] Congress is also considering legislation that would authorize the negotiation of a tax agreement with Taiwan.[33] Two previously transmitted tax treaties, with Hungary and Poland, from 2010 and 2014 respectively, remain pending in the Senate.[34] Both were drafted to replace existing treaties and will need to be updated to take into account the 2017 law.[35] On July 8, 2022, the United States notified Hungary that it was terminating the 1979 treaty, apparently due to Hungary's opposition to adoption of the EU directive that would implement Pillar Two of the Two-Pillar Solution global tax agreement.[36] Hungary eventually dropped its opposition, and the directive was agreed to by European Council in December

[28] See 169 CONG. REC. S2209 (June 22, 2023).

[29] Lankford Supports Chilean Tax Treaty (June 22, 2023), *at* https://www.lankford.senate.gov/news/press-releases/lankford-supports-chilean-tax-treaty [https://perma.cc/S7YC-VWVF].

[30] *See* U.S. Dep't of the Treasury Press Release, United States, Croatia Sign Income Tax Treaty (Dec. 7, 2022), *at* https://home.treasury.gov/news/press-releases/jy1148 [https://perma.cc/CQ4S-N24L]. Aside from Hungary, which had a treaty that is now terminated, see note 36 *infra*, Croatia is the only EU member state without a bilateral tax treaty with the United States. The newly drafted treaty is the first based on the United States's 2016 model treaty and the first negotiated following the enactment of the 2017 law. Accordingly, the Croatia treaty emphasizes, in its limitation on benefits article and other provisions, the prevention of the treaty's misuse through the manipulation of business structures. And, as noted, see text at notes 19 and 23 *supra*, it comports with changes in the tax code enacted by the 2017 law. Its text will likely serve as a model for future treaties.

[31] *See* Isabel Gottlieb, *Treasury Working on Moving Forward New, Updated Tax Treaties*, BLOOMBERG TAX (Sept. 7, 2022), *at* https://news.bloombergtax.com/daily-tax-report-international/us-working-on-negotiations-for-updated-tax-treaties.

[32] *See id.* A treaty with Vietnam was signed in 2015, but it is being renegotiated.

[33] *See* S. 1457, 118th Cong., 1st Sess. (2023); H.R. 4729, 118th Cong., 1st Sess. (2023).

[34] *See* Convention Between the Government of the United States of America and the Government of the Republic of Hungary for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, S. Treaty Doc. 111-7 (2010); Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, S. Treaty Doc. 113-5 (2014).

[35] *See* Convention Between the Government of the United States of America and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, S. Treaty Doc. 96-24 (1979); Convention Between the Government of the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Income, S. Treaty Doc. 94-1 (1975).

[36] *See* Jacob Katz Cogan, Contemporary Practice of the United States, 116 AJIL 858, 868 (2022). Termination of the treaty with Hungary became effective on January 8, 2023. However, in accordance with its provisions, it will continue to have effect in certain respects until January 1, 2024.

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2022, but the treaty was still terminated.[37] In August 2023, Russian President Vladimir Putin signed a decree suspending provisions of nearly forty bilateral tax treaties, including one with the United States, due to "the commission of unfriendly actions by a number of foreign states."[38]

## *The United States Seeks to Counter China's "Economic Coercion" Through Enhanced Cooperation and Coordination*

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The United States has for years criticized Chinese economic coercion.[1] In a series of statements made jointly with other states and the European Union earlier this year, the United States escalated its disapproval of Chinese actions (albeit indirectly) and announced cooperative measures to combat them. At the G7 Summit in Hiroshima in May,[2] the leaders noted the "disturbing rise in incidents of economic coercion that seek to exploit economic vulnerabilities and dependencies," "express[ed] serious concern" regarding such coercion, and "call[ed] on all countries to refrain from its use."[3] Shortly thereafter, the EU-U.S. Trade and Technology Council expressed the "concern" of the European Union and the United States "with the continued use of economic coercion."[4] In early June, the governments of Australia, Canada, Japan, New Zealand, the United Kingdom, and the United States endorsed a Joint Declaration Against Trade-Related Economic Coercion and Non-Market Policies and Practices that "express[ed] . . . shared concern [regarding economic coercion] and affirm[ed] [a] commitment to enhance international cooperation in order to effectively deter and address" it.[5] A couple of weeks later, the European Commission and the EU High

[37] *See* Gabriela Baczynska & Jan Strupczewski, *EU Strikes Deal with Hungary Over Ukraine Aid, Tax Plan, Recovery Funds*, Reuters (Dec. 12, 2022), *at* https://www.reuters.com/world/europe/eu-wrangles-with-hungary-over-ukraine-aid-tax-plan-billions-risk-2022-12-12; Council Directive (EU) 2022/2523 (Dec. 14, 2022).

[38] *See* Указ Президента Российской Федерации от 08.08.2023 № 585 [Decree of the President of the Russian Federation of August 8, 2023 No. 585], *at* http://publication.pravo.gov.ru/document/0001202308080005.

[1] *See, e.g.*, U.S. Dep't of State Press Release, The Administration's Approach to the People's Republic of China (May 26, 2022), *at* https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china [https://perma.cc/FM3R-8N4Z]; Kate Lyons, *US Secretary of State Warns Pacific Leaders About "Coercion" in Veiled Swipe at China*, Guardian (June 1, 2021), *at* https://www.theguardian.com/world/2021/jun/02/antony-blinken-warns-pacific-leaders-about-coercion-in-veiled-swipe-at-china.

[2] The G7 includes Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

[3] G7 Leaders' Statement on Economic Resilience and Economic Security (May 20, 2023), *at* https://www.g7hiroshima.go.jp/documents/pdf/session5_01_en.pdf [https://perma.cc/A7EA-N7GV] [hereinafter G7 Leaders' Statement]. The Leaders' Statement built upon the trade ministers' statements in September 2022 and April 2023. *See* G7 Trade Ministers' Statement (Sept. 15, 2022), *at* http://www.g7.utoronto.ca/trade/220915-statement.html [https://perma.cc/QR6R-HEK2]; G7 Trade Ministers' Statement (Apr. 4, 2023), *at* https://www.mofa.go.jp/files/100487108.pdf [https://perma.cc/7G8S-EH8P].

[4] Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden (May 31, 2023), *at* https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2992 [https://perma.cc/2E3F-U2B8] [hereinafter EU-U.S. Joint Statement].

[5] Joint Declaration Against Trade-Related Economic Coercion and Non-market Policies and Practices (June 9, 2023), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/joint-declaration-against-trade-related-economic-coercion-and-non-market-policies-and-practices [https://perma.cc/4VV9-Q8YN] [hereinafter Joint Declaration].