The Implications of Tax Residence for Human Rights

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ABSTRACT

Several concurrent trends have increased the importance of tax residence. Global labour mobility and increasing acceptance of dual citizenship means that more individuals will work in more than one country over their career. Increases in cross-border automatic exchange of tax information via the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) has brought questions of tax residence into the forefront as financial institutions perform the required due diligence regarding their clients. Lingering tax residence of emigrants is more than just an inconvenience. Incompatible tax rules and excessive compliance costs are an affront to the sovereignty of the destination jurisdiction and an unreasonable limitation on the rights of individuals to emigrate. The US practice of claiming all citizens as tax residents is especially egregious in this regard. International consensus is needed that individuals should generally be tax resident in only one jurisdiction at a time.

I INTRODUCTION

Tax residence is more relevant now than ever. Try to open a bank account in just about any country and one of the first questions you are asked is "what country(ies) you are a tax resident of?" But what gives a country jurisdiction to claim a person as tax resident? And how does that claim affect the ability of an individual to move between countries, either temporarily or permanently? That is, how do tax residence and the rules for changing tax residence impede the ability of a person to exercise their right to mobility? And, once tax residence is changed, there is the issue of how existing assets, particularly retirement savings, are taxed.

Most countries claim tax jurisdiction over individuals on the basis of residence or domicile. Where this results in an individual being considered a tax resident in multiple countries, tax treaties often assign residence to one country or the other. However, this is never the case for US citizens residing outside the US. Due to the unique practice of using citizenship as the basis for tax residence, and the saving clause the US inserts in all of its tax treaties, nonresident US citizens are almost always tax residents of two countries – the US and the country where they live. The right to a nationality is a basic human right.[1] But, what are the rights and obligations that attach to citizenship, as distinct from the rights and obligations that attach to residing within a country? Jurisdiction to tax is often associated with government services and benefits provided mainly to residents of the country. Indeed, all countries levying personal income tax claim tax jurisdiction over non-citizens who reside within their borders.

Being tax resident in two or more countries involves more than just double reporting. While double taxation is somewhat avoided through foreign tax credits or offsets, the application of two sets of rules for determining worldwide taxable income inevitably means that some tax benefits provided by one country are lost when applying the tax rules of a different country. Furthermore, the imposition of worldwide taxation on the residents of other countries represents an erosion of sovereignty for those countries. The resident country may provide tax incentives or social welfare payments that are taxed by the other country claiming the individual as a tax resident. The dual tax resident, for example, often has few, if any, opportunities for tax-advantaged retirement savings. International consensus should be built that individuals should have the right to be considered tax-resident in only one country at a time. When we allow more than one country to claim an individual as a tax resident, it is more than an inconvenience. Continuing to assert tax residence interferes with an individual's right to move from one country to another and makes it difficult for the individual to integrate financially into the economy

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1 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (UDHR) art 15(1) <https://www.un.org/en/universal-declaration-human-rights/>.

where they live. The imposition of two separate sets of tax rules will require complex, often impossible, compliance, which violates the US taxpayer rights to a fair and just tax system.[2]

While the US has used citizenship as a basis for asserting jurisdiction to tax nonresidents since the Civil War, the practice has become untenable as the nature of citizenship has changed and as the mobility of individuals between countries has increased in the past century.[3] With this changing nature of citizenship, the fact that a person has citizenship of a country no longer implies a connection to that country that rises to the level of domicile or residence. As the US grants citizenship based on either birth in the US or parental citizenship, there is a growing recognition of the existence of "Accidental Americans" who were unaware of either their US citizenship or the tax obligations that go with it.[4] The proliferation of countries recognising dual citizenship is not well understood among the general population.[5]

Multiple tax residence impacts more than just the individual taxpayer. When one country taxes the worldwide income of the residents of other countries, there are several impacts on the economy and government budget of the host countries. For example, individuals who cannot take advantage of retirement savings incentives may find themselves more likely to utilise means-tested government benefits where they live. Applying controlled foreign corporation rules to businesses run by the residents of other countries can impact the local economy of the host country because the extra tax burden will handicap the affected business, reducing employment and other economic activity. Differences in tax timing can lead to transfers of capital from the host country to the country of origin in the form of double taxation. And rules that restrict the "foreign" investments of nonresident taxpayers can cause investment distortions that drain capital from the host country.

This paper explores tax residence from an international perspective. In section II we explore the implications of tax residence and, in particular, the difficulties encountered when subject to worldwide taxation by two or more countries simultaneously. Section III considers the human rights issues raised by using taxation to restrict the right of individuals to move between countries.

II WHY DOES TAX RESIDENCE MATTER?

Tax residence is the assertion of tax jurisdiction over an individual based on some connection between the individual and the jurisdiction, and is generally seen as granting a country the right to tax a person's foreign source income. That is, taxpayers who are tax residents of a country are often taxed by that country on their worldwide income. For most countries, tax residence is based on some combination of physical presence in the country and domicile, a more permanent concept of economic connection

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[2] 26 USC § 7803(a)(3)(j) (2015).

[3] Maarten Vink et al, 'The international diffusion of expatriate dual citizenship' (2019) 7(3) *Migration Studies* 362 shows that 47% of countries tolerated dual citizenship by their expatriates in 1960, while 75% tolerate dual citizenship by 2018.

[4] See, eg, Allison Christians, 'Human Rights at the Border of Tax Sovereignty' (27 February 2017) , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924925>; Peter J Spiro, 'Citizenship Overreach' (2017) 38 (Winter) *Michigan Journal of International Law* 167.

[5] In 2017 and 2018, even some Australian members of Parliament were unable to correctly disclose their citizenship status. See, eg, 'Fact file: the dual citizenship crisis' *ABC News* (online, 6 December 2017) <https://www.abc.net.au/news/2017-12-06/fact-file-the-dual-citizenship-scandal/9147418>; Paul Karp, 'Australia citizenship crisis reignites as senator and four MPs quit' *The Guardian* (online, 9 May 2018) <https://www.theguardian.com/australia-news/2018/may/09/australia-citizenship-crisis-reignites-as-senator-and-four-mps-quit>.

to the country. The United States is unique in conferring tax resident status on citizens, regardless of where they actually reside and where their lasting economic connections lie.[6]

Jurisdiction to tax based on residence is not to be confused with source jurisdiction which is based on a connection between the taxing country and the income itself, rather than the individual earning the income. Tax residence is an assertion of jurisdiction over the individual, whereas taxation of income at source is an assertion of jurisdiction over the income or the asset earning income.

Double taxation, defined as a tax claim by two countries over the same income simultaneously, can occur when a given item of income is sourced in one country and earned by a tax resident of a different country (source-residence conflicts), or when two different countries have conflicting source rules (source-source conflicts), or when an individual is claimed as a tax resident by two (or more) countries simultaneously (residence-residence conflicts, or dual tax residency). Where an individual is claimed as a tax resident by two countries simultaneously, she is subject to the full domestic tax rules of two different countries, and these rules can be incompatible.

Tax residence also matters because many countries apply different tax rules to residents and nonresidents. Nonresidents are often taxed through withholding at source at fixed tax rates. Residents often receive the benefit of progressive tax rates, a tax-free threshold, the ability to deduct allocable expenses from gross income, and/or preferential tax rules for particular types of income.

A *Defining Residence*

Tax residence is an assertion of tax jurisdiction over the individual taxpayer and not just over the income earned. This jurisdiction is asserted based on a connection between the taxpayer and the sovereign nation collecting tax. Countries have differing rules on what it takes to become a tax resident, but these can be divided into three overlapping concepts: physical presence; domicile, or long-term economic connection; and nationality or immigration status. Often the rules are slightly different for inbound and outbound taxpayers, and it is generally easier to *become* a tax resident than it is to break tax residence.

In determining presence, many countries apply a bright line test such as treating as resident anyone who spends 183 days in the country. The United States, for example, applies a substantial presence test which considers presence over a three-year period, the tax year in question and the two prior years, weighting current year presence more heavily than prior year presence.[7] Many countries also consider domicile or close economic ties, especially for departing residents. Determining domicile is highly dependent on individual facts and circumstances, making domicile tests harder to administer than bright line presence tests. Finally, a small number of countries also include citizenship or immigration status (generally permanent residence) among the factors considered when determining whether an individual is to be taxed as a resident on their worldwide income. The use of citizenship by the US has been defended as being an administrable proxy for domicile.[8] The argument is that tests based on domicile are based on facts and circumstances, which can make domicile difficult to administer and create uncertainty for the taxpayer. Citizenship, however, is a clear, bright line indicator of connection with a country, making it an easy to administer proxy for domicile. As we will discuss below, however,

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[6] See, eg, Robert L Palmer, 'Toward Unilateral Coherence in Determining Jurisdiction to Tax Income' (1989) 30(1) *Harvard International Law Journal* 1; Daniel Shaviro 'Taxing Potential Community Members' Foreign Source Income' (2016) 70 (Fall) *Tax Law Review* 75; Ruth Mason, 'Citizenship Taxation' (2016) 89 (January) *Southern California Law Review* 169.

[7] 26 USC § 7701(b)(3) (2018).

[8] Edward A Zelinsky, 'Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler' (2017) 38 (Winter) *Michigan Journal of International Law* 271.

citizenship is no longer a particularly good proxy for domicile, and the US's use of citizenship as an immutable determinant of tax residence imposes excessive burdens on those citizens whose closer economic ties are with other countries. Non-US countries that consider citizenship in determining tax residence generally have provisions to treat citizens as nonresident after they have spent a certain amount of time outside of the country or have developed closer economic ties to a new domicile.[9]

Table 1 summarizes the tax residence rules reported to the OECD for the implementation of the Common Reporting Standard (CRS), which requires financial institutions to report financial accounts to the countries where the account holder is a tax resident. From the table we can see that the vast majority of countries use some combination of presence and domicile without considering immigration status or citizenship.

Table 1: Factors considered in determining Tax Residence

Residence Factor	*Countries*	*Percentage*
Domicile	65	79.27%
Physical Presence	68	82.93%
Immigration Status / citizenship	7	8.54%
N=82		

Source: Tax residence factors reported to the OECD for the purpose of enforcing the Common Reporting Standard. Countries that do not tax the foreign source income of tax residents are excluded. Compiled by the authors from data retrieved from *https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/* on 24 Sept 2019.

Most income tax treaties contain an article that acts as a residence tiebreaker with tax residence awarded to the country where the taxpayer's ties are closest, which resolves most claims of dual tax residence.[10] The US, however, is exceptional in this regard. Not only does the US claim all US citizens and permanent residents as tax residents, regardless of where they live, work, or have other economic ties, but the US also insists that all of its tax treaties contain a "saving clause" which does not allow US citizens to use the residence tiebreaker article to break US tax residence.

B *Multiple Tax Residence*

Why is it important to avoid dual tax residence? After all, resident jurisdictions generally allow a credit for tax paid to source jurisdictions. Thus, when an individual is a dual tax resident, Country A will generally allow a credit for taxes paid to Country B on income sourced in Country B and *vice versa*. Double taxation is avoided, so there doesn't appear on the surface to be any particular problem with dual tax residence. If all countries followed the same tax rules and did not discriminate against "foreign" income, then the main cost to the individual would be the duplication in compliance costs (not insignificant). But, in the real world we cannot assume away differences in national tax systems.

There are three criteria that are generally used in evaluating tax systems: fairness (do similarly situated taxpayers pay similar amounts of tax), efficiency (the tax system should not drive economic decisions), and administrability (can the tax be collected without excessive cost to either the taxpayer or tax

[9] See, eg, Argentina's summary of tax residency rules submitted to the OECD at https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Argentina_Tax_Residency.pdf which states "Argentine citizens will lose the resident status when they become permanent residents in a foreign state, or when they stay uninterruptedly in a foreign country for at least twelve (12) months."

[10] See, eg, Article 4 paragraph 2 of OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Publishing, 2019) 30 <https://doi.org/10.1787/g2g972ee-en> .

collection agency).[11] Multiple tax residence raises a series of issues that can be evaluated under all three of these criteria. As noted above, while multiple tax residence is often eliminated by treaty, it always affects US citizens who are normally resident in other countries.

1 *Different tax rules for foreign assets*

Many countries have rules that discourage foreign investment either as a way to stem capital outflow or to reduce tax avoidance and evasion. Examples include rules for Controlled Foreign Corporations (CFCs),[12] the US Passive Foreign Investment Company (PFIC) rules,[13] and various foreign trust rules.[14] While it is understandable that a country might want to protect their domestic tax base, these rules pose real problems for dual tax resident individuals. Any investment they have will be treated as a foreign investment by at least one of the countries that claims them as a tax resident. While it is beyond the scope of this paper to examine the details of any particular set of these rules, it is easily demonstrated that, when applied to dual tax residents, different rules for foreign assets violate both the fairness and efficiency criteria. Dual tax residents running a small business could be subject to CFC rules while similar businesses in the same country are not. The nature of the punitive rules for foreign assets or investments will be a factor in the decision about where to invest. Where the taxpayer is normally resident in country A, but also claimed as a tax resident by country B, any distortions in their investment decisions in favour of country B will represent a drain of capital from country B, violating the principle that tax rules should not drive economic decisions. Where a country routinely claims as tax residents individuals who are normally resident in other countries, as the US does under citizenship-based taxation, any differences in tax consequences based on the location of an asset are inherently problematic – nonresident taxpayers are not taxed similarly to similarly situated domestic taxpayers and nonresident taxpayers are encouraged to move capital out of the country where they live to the country claiming them as a tax resident.

2 *Different concepts of income*

Under US tax law, any increase in wealth is income and is taxable unless specifically exempted by the US tax code. Other countries, adopt a less expansive definition of income. For example, prior to 1982, Australia did not tax capital gains, a practice that continues in New Zealand.[15] National income tax laws are clearly not uniform in defining their tax base. The differences will be due to historical accident or active public policy decisions. Any policy decisions are partially unwound when individuals are claimed as tax residents by multiple countries. Where the taxpayer is normally resident in country A, but also claimed as a tax resident in country B, country B will end up collecting tax on income sourced in country A that is included in the country B concept of income but is not included in the country A concept of income. This will disadvantage the taxpayer relative to their country A neighbours who are not also tax residents of country B, violating the principle of fairness. Additionally, where country B claims as tax residents individuals who are normally resident in a number of other countries, the incidence of country B's claim of worldwide taxation will differ between country B taxpayers depending on which country they choose to live in, again violating the principle of fairness.

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[11] See, eg, Michael S Kirsch, 'Taxing Citizens in a Global Economy' (2007) 82 (May) *New York University Law Review* 443; Mason (n 6).

[12] See Brian J Arnold, 'A comparative Perspective on the U.S. Controlled Foreign Corporation Rules' (2012) 65 (3) *Tax Law Review* 473.

[13] Explained in Monica Gianni, 'PFICs Gone Wild' (2014) 29 *Akron Tax Journal* 29.

[14] See, eg, Peter Koerver Schmidt, 'Taxation of Income in Foreign Trusts: Denmark Introduces a New Anti-avoidance Rule Targeting the Use of Foreign Trusts' (2016) 44 (2) *Intertax* 185; Pravir Tesiram and Stephen Law, 'Proposed reforms to New Zealand foreign trust rules' (2017) 23 (2) *Trusts & Trustees* 179.

[15] Andrew Maples and Sue Yong, 'The Tax Working Group and Capital Gains Tax in New Zealand – A Missed Opportunity?' (2019) 21 (2) *Journal of Australian Taxation* 66.

3 *Different rates of tax*

Individual income tax rates vary widely across the world. Where an individual is claimed as a tax resident by two countries, their effective income tax rate is generally the larger of the two rates. This is not generally seen by scholars as double taxation. However, income tax is not the sole component of a country's tax system. Where the balance between income, consumption, and wealth taxes differs between countries, what really matters is the overall tax burden imposed on individuals. Furthermore, taxes pay for local services. Where tax rates are very low, individuals may be required to pay for services that are covered by tax revenues in other countries. Equity between taxpayers is impossible to measure when taxpayers are normally resident in different countries.

4 *Tax law as an instrument of public policy*

Many countries use their tax law to further public policy goals. Tax concessions can incentivize retirement savings,[16] socially desirable investment,[17] or homeownership.[18] Where a taxpayer is a dual tax resident, many of these incentives are no longer available. What country A gives, country B takes away, since the rules to qualify for these tax incentives are often country-specific. For a US taxpayer to take advantage of tax deferral on their retirement savings, they must invest through a qualified plan that meets all of the requirements in the Internal Revenue Code. For an Australian taxpayer to take advantage of similar tax deferral they must invest through an Australian superannuation fund or a self-managed fund organised and controlled in Australia. These requirements are mutually exclusive. Therefore, unless the Australia/US tax treaty provides otherwise, the retirement savings of US citizens resident in Australia will be taxed currently by one country or the other. [[equity argument – but natural that countries want to incentivise behaviour inside their borders – this is an argument for not systematically including as tax residents those who are normally physically outside the country]]

5 *Compliance issues*

Multiple tax residence raises a number of compliance issues which, though they may not affect the actual amount of tax paid, can represent a significant cost to the taxpayer. Duplicate compliance under different rules, in different currencies, possibly using different tax periods, and possibly including special disclosures for "foreign" assets, will often mean that the taxpayer must hire expensive professionals to handle their international tax compliance. In the case of Accidental Americans and those who have permanently emigrated from the US, citizenship taxation treats a taxpayer's wholly domestic (to their country of residence) economic life as a series of cross-border transactions involving complex international tax rules.[19]

Being subject to the full domestic tax rules of two or more countries simultaneously results in not only higher taxes and compliance costs, but also makes it nearly impossible for the individual to take advantage of domestic tax incentives created by the country where they actually live. The increase in global mobility means that increasing numbers of taxpayers will have to deal with these problems, at

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[16] For example, Australia has tax incentives for retirement savings through superannuation, while the US has tax deferred retirement savings through 401(k) accounts or Individual Retirement Accounts.

[17] For example, the US created Opportunity Zones in 2017; see Joseph Bennett, 'Lands of Opportunity: An Analysis of the Effectiveness and Impact of Opportunity Zones in the Tax Cuts and Jobs Act of 2017' (2018) 45(2) *Journal of Legislation* 253.

[18] For example, the US incentivises homeownership through a combination of allowing a deduction for mortgage interest expense and exempting a portion of the capital gain on the sale of a primary residence. Australia and Canada provide incentives by exempting all of the capital gain on the sale of a primary residence.

[19] Allison Christians, 'A Global Perspective on Citizenship-Based Taxation' (2017) 38 (Winter) *Michigan Journal of International Law* 193, 197.

least temporarily. However, most can plan their way out of the dual tax residence predicament. Unfortunately for US citizens, there are only two ways to avoid dual tax residence: move to the US, or renounce US citizenship. As discussed in Section III **Error! Reference source not found.**below, this raises a number of human rights issues.

C *Citizenship as a basis for tax residence*

The US has used citizenship as a basis for determining tax residence since 1864.[20] In 1924, the US Supreme Court upheld the practice of taxing nonresident citizens on their foreign source income in *Cook v Tait*.[21] Since 1924, the jurisdiction of the US to tax the foreign source income of nonresident citizens has not had any serious judicial challenge, though there has been vigorous academic debate on the topic.[22]

1 *Changing nature of citizenship*

The nature of citizenship has changed greatly in the nearly 100 years since *Cook v Tait*. In prior centuries, citizenship was understood as perpetual allegiance to the sovereign, but over time countries have recognised the right first to change citizenship, then to accumulate multiple citizenships.[23] Dual citizenship is much more prevalent in the 21st century than it was in the first half of the 20th century. By 2018, three-quarters of the countries in the world allowed citizens to retain their citizenship upon naturalizing in another country.[24] This reflects the increasing importance of individual rights, a reduction in discrimination between men and women upon marriage, increasing political pressure from expatriates, a reduction in international conflict and an increase in the role of supra-national bodies in defining and protecting human rights.[25] The US, in particular, has made citizenship easy to obtain as the only major developed country to grant citizenship to almost all individuals born in the country.[26] In addition, US court cases, starting with *Afroyim v Rusk*[27] have virtually eliminated any automatic termination of citizenship when another citizenship is acquired or exercised. To lose US citizenship under US nationality law, merely performing one of the expatriating acts enumerated in the statute[28] is not sufficient. The expatriating act must be performed with the intention of losing US citizenship. While US nationality law does not require loss of citizenship to be documented, losing US citizenship for tax purposes requires documentation of loss of citizenship through the issuance of a Certificate of Loss of Nationality (CLN).[29] Since 2014, the US Department of State has charged USD2350 to issue a CLN.[30] Thus, while the global conception of citizenship has moved from permanent allegiance to something more like club membership, the US has made it easier to obtain and harder to discard US citizenship.

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[20] For a history of US taxation of nonresident citizens see Bernard Schneider, 'The End of Taxation without End: A New Tax Regime for U.S. Expatriates' (2012) 32 (1) *Virginia Tax Review* 3.

[21] *Cook v Tait*, 265 US 47 (1924).

[22] See, for example, Kirsch (n 11) or Zelinsky (n 8) arguing for the use of citizenship, and Spiro (n 4), Christians (n 4, n 19), Schneider (n 20) or Mason (n 6) arguing against the taxation of nonresident citizens.

[23] Peter J Spiro, 'Dual Nationality and the Meaning of Citizenship' (1997) 46(4) *Emory Law Journal* 1411.

[24] Vink et al (n 3) 363.

[25] Vink et al (n 3) 364.

[26] Spiro (n 4) at 171.

[27] *Afroyim v Rusk* 387 US 253 (1967).

[28] 8 USC § 1481 (2018).

[29] 26 USC § 877A(g)(4) (2018).

[30] Prior to 13 Jul 2010, there was no cost for applying for a CLN. The fee for renunciations was raised to USD 450 (75 FR 36522) at that time, then to USD 2350 as of 6 September 2014 (79 FR 51247). The fee for documenting a prior relinquishment was raised from 0 to USD 2350 as of 9 November 2015 (80 FR 53704).

2 *Arguments for basing tax residence on citizenship*

Zelinsky[31] argues that citizenship is an administrable proxy for domicile. As noted above, citizenship is an objective indicator, which isn't based on subjective circumstances that can make determination difficult and time consuming. Citizens, by retaining their citizenship, are assumed to have decided that they have some connection to the country. As international mobility and the incidence of multiple citizenship increases, however, the degree of connection implied by retention of citizenship has diminished. Furthermore, as the US enacts more financial and tax compliance obstacles to relinquishing citizenship, it is no longer clear that retaining citizenship is an indication of continuing connection sufficient to warrant taxation of worldwide income. According to Kirsch,[32] citizenship confers benefits on the citizen. US citizens receive government protection and assistance in the event of a crisis overseas, have the right to vote in federal elections, and have the right to enter the US at any time. However, in many cases government protection granted to US citizens is paid for on a fee for service basis. For example, the US government charges commercial rates for evacuations in the event of a crisis.[33]

Shaviro[34] argues that the use of citizenship by the US is not as unique as it appears. The use of domicile and other criteria focused on past residence means that other countries end up taxing nonresidents as well. In addition, relatively few nonresident US citizens live in low tax jurisdictions where they would owe US tax (especially after application of the Foreign Earned Income Exclusion[35]). These arguments fail to recognise the very real difficulties caused by differences in national tax systems as discussed above.

3 *Arguments against basing tax residence on citizenship*

Bernard Schneider sums up the arguments against citizenship-based taxation saying "In an era of economic globalization and increased personal mobility, worldwide taxation of nonresidents is increasingly dysfunctional."[36] As discussed above, the nature of citizenship has changed substantially over the past century. With the increasing prevalence of dual and multiple citizenship, mere citizenship is no longer as strong an indicator of the location of an individual's lasting personal and economic ties. Citizenship no longer implies that the citizen is sufficiently connected to the country of citizenship to warrant taxation as a domestic taxpayer. As noted by Allison Christians, this is particularly apparent when it comes to "Accidental Americans".[37] Accidental Americans are US citizens with very tenuous ties to the US. They may have received US citizenship by birth in the US to non-US parents or by birth to a US citizen parent outside the US. In most cases they are dual citizens from birth, and they identify more closely with their non-US citizenship.

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[31] Zelinsky (n 8).

[32] Kirsch (n 11).

[33] In the recent evacuation of US citizens from Wuhan, China during the novel coronavirus crisis, evacuated citizens were charged $1,000 for the flight. See James T Areddy and Liza Lin, 'U.S. Sets Second Evacuation of Americans From China', *The Wall Street Journal* (online, 5 February 2020) <https://www.wsj.com/articles/u-s-sets-second-evacuation-of-americans-from-china-11580837124>. Meanwhile, the Australian government backed down from their original decision to charge Australian citizen evacuees and provided the chartered flights at government expense. See Katharine Murphy, 'Coronavirus: government backs down on $1,000 charge for Wuhan evacuees', *The Guardian* (online, 2 February 2020) <https://www.theguardian.com/world/2020/feb/02/coronavirus-government-backs-down-on-1000-charge-for-wuhan-evacuees>.

[34] Shaviro (n 6) 79-83.

[35] 26 USC § 911 (2018).

[36] Bernard Schneider, 'The End of Taxation without End: A New Tax Regime for U.S. Expatriates' (2012) 32(1) *Virginia Tax Review* 1,1.

[37] Christians (n 19) 197-217.

The US claim of tax jurisdiction over nonresident citizens is contrary to international norms and counter-intuitive to those who are not experts in US law.[38] Furthermore, by imposing US tax residence on nonresident US citizens, those individuals are disadvantaged in saving and investing where they live. As the US extends its reach through automatic information exchange and FATCA, it becomes more difficult for US citizens to live normal financial lives outside of the US. Essentially, with citizenship taxation, the US has created a financial barrier to emigration.

III HUMAN/TAXPAYER RIGHTS ISSUES RAISED

As discussed above, individuals who are claimed as a tax resident by two different countries face more than inconveniences; they face violations of their fundamental human rights. This includes the right to move from one country to another, the right to work and free choice of employment, equality in dignity and rights, freedom from the arbitrary deprivation of one's nationality and the right to return to one's own country. Further, in claiming as US tax residents those citizens who live outside the United States, the United States is violating its own Taxpayer Bill of Rights and in particular the right to a fair and just tax system and the right to be informed. Finally, when the United States claims as US tax residents persons who do not live in the United States, it is not only violating the rights of those persons but also the rights of the countries where US citizens live – namely the right of those countries to self-determination.

A *The Right to Move from One Country to Another*

Moving in search of a better life is a key driver behind the development of human civilization. The right to move, to distance oneself, even to run away, is one of the most fundamental guarantees of human liberty.[39] In 1868 the United States Congress itself stated: "[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and pursuit of happiness."[40]

Human rights champion José D. Inglés described the right to leave one's country as essential for "personal self-determination."[41] In 1999 the United Nations Human Rights Committee stated that "liberty of movement is an indispensable condition for the free development of a person."[42]

The right to move from one country to another has not only been affirmed by defenders of human rights and even the United States Congress; it is also enshrined in not one, not two, not three but *four* international human rights instruments. Each contains a clause in essence stating:

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[38] Christians (n 19) 227.

[39] Dimitry Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28(43) *Connecticut Journal of International Law* 43, 47 <https://ssrn.com/abstract=1847769>.

[40] *An Act Concerning the Rights of American Citizens in Foreign States*, HR768 (40th) Ch. 249 (27 July 1868) <https://www.loc.gov/law/help/statutes-at-large/40th-congress/session-2/c40s2ch249.pdf>.

[41] Dimitry Kochenov (n 39) 47, quoting José D. Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country. Including His Own, and to Return to His Country*, U.N. Doc. E/CN.4/Sub.2/220/Rev.l, U.N. Sales No. 64.XIV.2, 9 (1963).

[42] Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999), 2 <https://www.refworld.org/pdfid/45139c394.pdf>.

"Everyone has the right to leave any country, including his own, and to return to his country."[43]

The reiteration of the right to leave one's country for another in four international human rights instruments underscores the fundamental importance of this right. Further, while the United States is notoriously reluctant to sign much less ratify international human rights instruments,[44] it has both signed and ratified two the four international human rights instruments containing this clause: the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD).[45]

Imposing multiple tax residencies on individuals violates their right to leave a country for another in an insidious manner. While US citizens can remove themselves from the physical territory of the United States, they can never remove themselves from the fiscal territory of the United States. Because of punitive tax rules they find themselves shut out from many investments, from retirement planning, from entrepreneurial opportunities, and from holding many kinds of assets, including owning their home or other real estate jointly with their spouse.[46]

Rather than an obstacle as obvious as physical restraint at the border, individuals with multiple tax residencies instead are faced with a variety of fiscal restraints at multiple touch points in their lives. This has multiple – and significant – repercussions. It prevents the individual from integrating in their communities and within their very own families. Given the importance of money and access to assets and finance for normal living much less physical survival, the ultimate effect of these restraints is to deprive the individual of access to essential means of life.

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[43] The four instruments are: (1) *Universal Declaration of Human Rights* (UDHR) (n 1) art 13. The United States voted in favour of adoption of the UDHR by the UN General Assembly; (2) *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) (ICCPR) art 12 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; (3) *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (ICEAFRD) art 5(d)(ii) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>; and (4) *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* GA Res 45/158 (18 December 1990) (ICRMW) art 8 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>.

[44] 'Human Rights & the US: How Has the United States Handled Human Rights Issues in the Past & Today?' *The Advocates for Human Rights* (Web Page) <https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states>.

[45] United Nations Treaty Collection, 'International Covenant on Civil and Political Rights', Status as at 6 February 2020 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec>; United Nations Treaty Collection, 'International Convention on the Elimination of All Forms of Racial Discrimination'' Status as at 6 February 2020 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en>.

[46] Laura Snyder, 'Dispelling the Myth of the Wealthy American Expat, or Are Americans Free to Live Outside the United States?' (Conference Paper, Diasporas: An Inclusive Interdisciplinary Conference, 1-2 December 2019), 2-3 <http://www.progressiveconnexions.net/wp-content/uploads/2019/11/LauraSnyder_draftpaper-ver2.pdf>, citing two surveys of Americans living overseas: John Richardson and Laura Snyder, 'Survey Dispels Myth Of Wealthy Americans Abroad And Why Middle Class Americans Abroad Are Forced To Renounce U.S. Citizenship: Introduction', *Tax Connections* (Web Page, 6 November 2019) <https://www.taxconnections.com/taxblog/survey-dispels-myth-of-wealthy-americans-abroad-and-why-middle-class-americans-abroad-are-forced-to-renounce-u-s-citizenship/#.XcmWrTNKjIX>; and Democrats Abroad, 'Tax Filing from Abroad: Research On Nonresident Americans And U.S. Taxation', *Democrats Abroad* (March 2019) <https://www.democratsabroad.org/carmelan/tax_filing_from_abroad_2019_research_on_nonresident_americans_and_u_s_taxation>.

As for those who seek to escape by renouncing US citizenship, two additional hurdles lie in their path: (1) a renunciation fee of USD2,350, the world's highest,[47] and (2) for many, an exit (or departure) tax in an amount as high as 39.6% of the value of the ex-US citizen's worldwide assets (realized or not) as of the day of expatriation.[48]

Article 12 of the ICCPR allows for restrictions to be placed upon a person's freedom to leave a country, including their own. However, this may occur only under exceptional circumstances. As CCPR General Comment No. 27 explains, any restrictions may only be for the purposes of protecting "national security, public order, public health or morals, or the rights and freedoms of others."[49] Any restrictions must also meet each of the criteria below:

- Be "necessary in a democratic society,"
- Be proportionate to the interest to be protected;
- Be appropriate to achieve their protective function;
- Be the least intrusive instrument amongst those which might achieve the desired result; and
- Not impair the essence of the right.[50]

It is difficult to imagine how the fiscal restraints the United States places upon its citizens living overseas could be justified as necessary for the protection of national security, public order, public health or morals, or the rights and freedoms of others. The exit tax – a fiscal restraint the United States places upon those seeking to renounce citizenship – is even more difficult to justify on any of these grounds. The US State Department has defended the high renunciation fee (again, USD2,350) as a response to high demand and paperwork,[51] but given it is more than twenty times the average fee for other high-income countries this explanation is difficult to understand.[52]

Given the profound effect these restraints have on an individual's ability not just to live a normal life but to access assets and finance – again, essential means of physical subsistence in the modern world – there is no credible argument that the restraints are "necessary in a democratic society," much less

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[47] Robert W. Wood, 'U.S. Has World's Highest Fee to Renounce Citizenship', *Forbes* (online, 23 October 2015) <https://www.forbes.com/sites/robertwood/2015/10/23/u-s-has-worlds-highest-fee-to-renounce-citizenship/#5f214c2d47de>.

[48] 'Expatriation Tax,' *Internal Revenue Service* (Web Page, 20 December 2019) <https://www.irs.gov/individuals/international-taxpayers/expatriation-tax>; see also Robert W. Wood, 'Renounce U.S., Here's How IRS Computes 'Exit Tax'', *Forbes* (online, 27 February 2017) <https://www.forbes.com/sites/robertwood/2017/02/27/renounce-u-s-heres-how-irs-computes-exit-tax/#557f611e287d>. Assets are taxed as if disposed on the day before renouncing. If the disposition would be taxed as a capital gain, then there is a USD725,000 exclusion and gains in excess of that amount would be taxed at up to 23.8%. If the disposition would be taxed as ordinary income (such as would be the case for "foreign" retirement plans), then there is no exclusion and the tax rate could be as high as 39.6%.

[49] *CCPR General Comment No. 27: Article 12 (Freedom of Movement)* (n 42) 3 <https://www.refworld.org/docid/45139c394.html>. Some limitations on the ability to renounce citizenship are considered permissible under the ICCPR, but only a very small number. The most notable is to prevent statelessness. Others include the need to have adequate mental capacity, not having unfulfilled military service obligations, and not being subject to criminal investigation. William Thomas Worster, 'Human Rights Law and the Taxation Consequences for Renouncing Citizenship' (2017) 62(85) *St. Louis University Law Journal* 85, 97 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3073563>.

[50] CCPR General Comment No. 27: Article 12 (Freedom of Movement) (n 42) 3 <https://www.refworld.org/docid/45139c394.html>.

[51] Wood, 'U.S. Has World's Highest Fee' (n 47).

[52] 'Comparison of Fees and Procedures for Renouncing Citizenship in Various Countries', Isaac Brock Society (Forum Post, 27 August 2014 <http://isaacbrocksociety.ca/2014/08/22/comparison-of-fees-and-procedures-for-renouncing-citizenship-in-various-countries/comment-page-1/>.

proportionate, appropriate, or the least intrusive for any interest that the United States may purport to seek to protect.

Indeed, it would be difficult to argue that the exit tax does not violate Article 12 of the ICCPR given that as far back as 1975 the US Department of the Treasury expressly stated that the exit tax is an effort to deter or punish tax-motivated expatriation. And US courts have agreed, stating that this tax is "enacted to forestall tax-motivated expatriation" and "designed to discourage voluntary expatriation."[53]

More recently, Emmanuel Saez and Gabriel Zucman of the University of California, Berkeley, have defended the exit tax for the very reason that it deters expatriation. It is for this very reason that they support increasing the exit tax to 40% of the individual's net worth – because this would, they expressly state, "greatly reduce," if not "effectively eliminate incentives to expatriate for tax reasons."[54] And Saez and Zucman go further: they defend the United States' system of citizenship-based taxation because it makes the country "much less vulnerable than other countries to *mobility threats*"[55] (emphasis added). When not just the exit tax but the United States' entire system of citizenship-based taxation are defended in this manner it is difficult to argue that they do not violate Article 12 of the ICCPR not to mention Article 13 of the Universal Declaration of Human Rights.[56]

In sum, the fiscal restraints that the United States places upon its citizens living overseas impair the essence of the fundamental right of any citizen to leave their country. Fiscally, for as long as they are citizens, they cannot leave.

B *The Right to Work, Free Choice of Work and Freedom from Discrimination in Work*

Work is essential for material subsistence, for socialization and for self-actualization.[57] At the same time, it is essential that a person's work be freely chosen. Free choice of work is important not only to prevent slavery[58] but also for self-actualization: freely chosen (as opposed to forced) work is essential for human dignity, self-esteem and self-respect[59] and for the full development of human capacities.[60] Freedom from discrimination in hiring as well as promotion is equally essential for human dignity, self-esteem and self-respect.

The importance of work, of freely chosen work, and of work free from discrimination is amplified in today's world where precarity of employment is the norm. In particular, in the United States, nearly half the population works in "low-quality," low-paying jobs.[61] In December, 2018, no less than United

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[53] Worster (n 49) 100.

[54] Emmanuel Saez and Gabriel Zucman, 'Progressive Wealth Taxation' (Conference Paper, Brookings Papers on Economic Activity, BPEA Conference Drafts, 5-6 September 2019) 25, 27 <https://www.brookings.edu/wp-content/uploads/2019/09/Saez-Zucman_conference-draft.pdf>.

[55] Ibid 3.

[56] Saez and Zucman relegate expatriation, or the "threat" of it, from a question of human rights to "primarily a policy variable." Ibid 25.

[57] Pablo Gilabert, 'Labor Human Rights and Human Dignity' (2015) 42(2) *Philosophy and Social Criticism* 171, 178 <https://doi.org/10.1177/0191453715603092>.

[58] Ibid 173.

[59] Ibid 178.

[60] Ibid 181.

[61] Jack Kelly, 'The Frightening Rise in Low-Quality, Low-Paying Jobs: Is This Really a Strong Job Market?' *Forbes* (online, 25 November 2019) <https://www.forbes.com/sites/jackkelly/2019/11/25/the-frightening-rise-in-low-quality-low-paying-jobs-is-this-really-a-strong-job-market/#6cb2be874fd1>; Aimee Picchi, 'Almost Half of All

States Senator Marco Rubio penned an article in *the Atlantic* deploring the lack of dignity in work across the country.[62]

Like the right to move from one country to another, work-related rights are also enshrined in several human rights instruments. These instruments protect (among other work-related rights): (1) the right to work, (2) the free choice of employment,(3) freedom from discrimination in employment, notably on the basis of national origin, and (4) equal opportunity for promotion in employment, subject to no considerations other than those of seniority and competence.[63]

As was the case for the right to leave one's country for another, the reiteration in several international human rights instruments of the rights to work, to free choice of work, and to freedom from discrimination in work underscores the equally fundamental importance of these rights.

When the United States imposes its tax system upon its citizens living overseas it violates these fundamental human rights with respect to work in multiple ways:

1) As an extension of the right to move from one country to another: by restraining this right the United States also restrains the right of Americans to pursue work opportunities in other countries.

2) To the extent an American would prefer to pursue work opportunities outside the United States but does not do so because of the severe consequences of living under two tax systems, their work in the United States cannot be described as "freely chosen."

3) Many Americans working overseas face discrimination in hiring and promotion as well as with respect to entrepreneurial opportunities as a result of their status as US persons: Many non-US employers do not want to hire and/or promote US citizens and many non-US entrepreneurs refuse to partner with US citizens because of the tax consequences and overall financial instability a US person introduces to the enterprise.[64]

Americans Work in Low-Wage Jobs', *CBS News* (online, 2 December 2019) <https://www.cbsnews.com/news/minimum-wage-2019-almost-half-of-all-americans-work-in-low-wage-jobs/>.

[62] Marco Rubio, 'America Needs to Restore Dignity of Work: The American Dream is About the Opportunity to Earn Happiness—and the Government has a Responsibility to Facilitate That', *Atlantic* (online, 13 December 2018) <https://www.theatlantic.com/ideas/archive/2018/12/help-working-class-voters-us-must-value-work/578032/>.

[63] The three instruments are: (1) UDHR (n 1) art 23(1); (2) ICEAFRD (n 43) art 5(e)(i); (3) *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR) arts 2, 6(1), and 7(c) <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. As discussed at note 45, the United States has signed and ratified the ICEAFRD. The United States has signed but not ratified the ICESCR. United Nations Treaty Collection, 'International Covenant on Economic, Social and Cultural Rights', Status as at 6 February 2020 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>.

[64] Laura Snyder '"I Feel Threatened By My Very Identity" Report On US Taxation and FATCA Survey Part 1: Data', *Citizenship Solutions* (25 October 2019), 33 <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-1-Data.pdf>; Laura Snyder '"I Feel Threatened By My Very Identity" Report On US Taxation and FATCA Survey Part 2: Comments', *Citizenship Solutions* (25 October 2019) 11, 13, 15-16, 22, 44-46, 58, 80 <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-2-Comments.pdf>; Laura Snyder '"I Feel Threatened By My Very Identity" Report On US Taxation and FATCA Survey Part 3: Case Study', *Citizenship Solutions* (25 October 2019) <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-3-Case-Study.pdf>; Democrats Abroad (n 46) 6 <https://www.democratsabroad.org/carmelan/tax_filing_from_abroad_2019_research_on_nonresident_americans_and_u_s_taxation>.

4) For those Americans who have created their own small business overseas, many find themselves in severe financial hardship, with some being forced to close, as a result of recent changes to US tax law which impose severe penalties on overseas businesses owned by US citizens. In addition, many Americans living overseas who would like to create their own businesses have refrained from doing so out of fear that their businesses will suffer the same fate.[65]

In sum, the imposition of US tax residency on persons who do not live in the United States results in frequent violations of their fundamental human rights to work, to free choice of work, and to freedom from discrimination in work.

C *Equality in Dignity and Rights*

For Immanuel Kant, the protection of dignity of the person means that a person should be afforded liberties allowing them to live in accordance with ends that they freely chose. By enjoying all liberties, a person can be an autonomous agent with the ability to define their own destiny independently. To achieve this, the state must not take actions which threaten or violate an individual's enjoyment of all fundamental rights and freedoms.[66]

The dignity of a person cannot be respected and protected if there is no recognition of fundamental rights and freedoms that equally apply to all people, irrespective of their gender, economic status, or nationality.[67] Together with the right to life, the right to human dignity or dignified treatment is viewed as a pillar of social empowerment, social transformation, and economic development.[68]

Kenneth Karst makes this analysis less abstract. For him, equality is denied when a person is treated as an inferior, when they are treated in a manner that differentiates them from others in such a way that they do not belong, they are not quite human, they are stigmatized.[69] For Karst, an essential element of equality is freedom from stigma.[70]

Equality in dignity and rights is also enshrined in a number of human rights instruments. These instruments provide that "All human beings are born free and equal in dignity and rights" and that they are "equal before the law" free of any discrimination on the basis of national origin.[71]

By imposing the US tax system on persons who reside overseas, the United States violates the principle of equality in dignity and rights in several manners:

1) Also discussed above, US citizens overseas are stigmatized by potential employers and entrepreneurial partners who fear the tax and financial consequences of employing/partnering with a US citizen.

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[65] Snyder, 'Survey Part 1' (n 64) 18; Snyder, 'Survey Part 2' (n 64) 5, 8, 16, 34-35, 51-56, 58, 60, 65; Snyder, 'Survey Part 3' (n 64); Democrats Abroad (n 46) 4, 5, 25-27.

[66] Callixte Kavuro, 'The Value of Human Dignity in the Refugee Protection' (April 2019) 5(1) *African Human Mobility Review*, 1510, 1512 <http://sihma.org.za/wp-content/uploads/2019/04/Calliste-Kavuro.pdf>, quoting Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Yale University Press, 1785) 8-31.

[67] Ibid 1513.

[68] Ibid 1522.

[69] Kenneth L. Karst, 'Why Equality Matters' (1983) 17(2) *Georgia Law Review* 245, 248-49 <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1048&context=lectures_pre_arch_lectures_sibley>.

[70] Ibid 249. Kavuro shares this view: Kavuro (n 66) 1531.

[71] The three instruments are: (1) UDHR (n1) art 1; (2) ICCPR (n 43) art 26; (3) ICEAFRD (n 43) art 5. As discussed at note45, the United States has signed and ratified both the ICCPR and the ICEAFRD.

2) As also discussed above, US citizens living overseas are deprived of the opportunities for tax-advantaged retirement savings and other investments.

3) US citizens living overseas cannot invest in most mutual funds available to others in their country of residences because of penalizing taxation of PFICs under US tax rules.[72]

4) US citizens are stigmatized by overseas financial planners who prefer not to deal with the complications a US citizen client presents.[73]

5) US citizens are stigmatized in their own families, when their names are kept off of titles to family assets located outside the US in order to avoid the imposition of US capital gains tax upon sale.[74]

The end result of each of these instances of stigma is that Americans overseas are not, as Kant described, afforded the liberties that allow them to live in accordance with the ends they freely chose. They are not "autonomous agents" with the ability to define their destinies independently. Instead, their financial as well as social destinies – which are their means of survival – are defined by the requirement that they conform to two different tax systems.

D *Freedom from the Arbitrary Deprivation of One's Nationality and the Right to Return to One's Country*

First Hannah Arendt[75] and then United States Chief Justice Earl Warren[76] described citizenship as "the right to have rights." That is, Arendt explained, while simply being a human being should be enough to protect fundamental human rights, in reality it is not sufficient. Because the modern institution of the state is grounded on the principle of national and territorial sovereignty, human rights can only be protected through citizenship of a state.[77]

Underscoring the importance of citizenship, Warren wrote:

> Denationalization [is] the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.[78]

Both Arendt and Warren were speaking in the context of statelessness, where the deprivation of citizenship results in the person not being a citizen of any country. Warren describes statelessness as "a condition deplored in the international community of democracies."[79] Statelessness is, indeed, a deplorable condition. Under any conditions losing a citizenship that one does not want to lose is

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[72] Laura Saunders, 'Fidelity Bans U.S. Investors Overseas from Buying Mutual Funds', *Wall Street Journal* (online, 1 July 2014) <https://www.wsj.com/articles/fidelity-bans-overseas-investors-from-buying-mutual-funds-1404246385>.

[73] Sarah O'Brien, 'Americans Working Abroad Face Unexpected Financial Issues', *CNBC* (online, 21 May 2015) <https://www.cnbc.com/2015/05/21/americans-working-abroad-face-unexpected-financial-issues.html>.

[74] See, eg, Snyder, 'Survey Part 3' (n 64).

[75] Leila Faghfouri Azar, 'Hannah Arendt: The Right to Have Rights', *Critical Legal Thinking* (online, 12 July 2019) <http://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights/>.

[76] *Trop v Dulles*, 356 US 86, 102 (1957) <https://www.law.cornell.edu/supremecourt/text/356/86#ZO-356_US_86n34>.

[77] Azar (n 75).

[78] *Trop v Dulles* (n 76) 101.

[79] Ibid 102.

deplorable, even if, by virtue of dual citizenship, it does not result in statelessness. Losing a citizenship means losing membership in a community; it means losing one's rights in that community. The European Court of Human Rights has underscored the importance of nationality as an inherent part of a person's social identity and as such determined that it is a protected element of private life.[80]

A very important element of citizenship is the right to enter and remain in the country of one's citizenship. When a person is deprived of a citizenship, they are relegated to the status of foreigner, and as such are deprived of the right to enter that country as well as to remain on a long-term basis. As a foreigner, they may (or not) be allowed to visit, and, if allowed, is permitted to stay only for a temporary period.

Freedom from the arbitrary deprivation of one's nationality and the right to return to one's country are enshrined in a number of human rights instruments. They state, in essence, "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality,"[81] and "everyone […] has the right to return to his country."[82]

When the United States imposes US tax residency on persons who reside overseas it leads to the arbitrary deprivation of citizenship. An additional (among many) consequence of this loss of citizenship is the loss of the right to return to one's country.

Many Americans living overseas have found that being subjected to tax residency in two countries simultaneously makes normal life impossible. They report being unable to engage in retirement planning,[83] being subject to double or penalizing taxation on retirement or investment income,[84] the heavy burden of completing complex US tax returns each year,[85] the fear of draconian penalties in the event of an innocent mistake,[86] foreign spouses angry and resentful about the intrusion of the United States government into their financial lives,[87] feeling financially vulnerable because they are not able to hold title to family assets,[88] being unable to operate a viable business.[89] One stated that US citizenship means "being unable to live without severe restrictions on my life and with the ever present threat of financial ruin."[90] Another stated: "citizen based taxation is ruining our lives, [it is] unfair [and] I can't take the stress and anxiety it gives me anymore."[91]

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80 Hélène Lambert, 'Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees' (1 October 2014) UNHCR Paper, Legal and Protection Policy Research Series, Division of International Protection, 27, <http://dx.doi.org/10.2139/ssrn.2521076>.

81 UDHR (n 1) art 15(2).

82 The instruments are: (1) UDHR (n 1) art 15(2); (2) ICCPR (n 43) art 12(4); (3) ICEAFRD (n 43) art 5(d)(ii); (4) ICRMW (n 43) art 8(2). As discussed at note 45, the United States has ratified both the ICCPR and the ICEAFRD.

83 Laura Snyder 'Survey Part 2' (n 64) 3, 7-9, 12-16, 18-19, 22, 28, 31-32, 36-37, 51, 54, 63, 65, 69, 76, 77, 84-85, 91-92.

84 Ibid 3, 7-8, 10, 12-14, 16-17, 28-32, 55-56, 58-59, 76-77, 79, 84-85; Democrats Abroad (n 46) 5, 12, 22-23, 31, 35.

85 Snyder, 'Survey Part 2' (n 64) 4-5, 8-11, 14-28, 30, 32-34, 37, 52-53, 59-60, 64-69, 71-80, 83-86, 91; Democrats Abroad (n 46) 1, 4, 6, 12, 13-15, 17, 21-23.

86 Snyder, 'Survey Part 2' (n 64) 4-5, 7-8,10-11, 13-18, 22, 29 30-31, 35, 52-53, 61, 63-65, 71, 73, 75, 79, 82, 85, 91; Democrats Abroad (n 46) 13, 15, 20.

87 Snyder, 'Survey Part 2' (n 64) 3, 5, 7, 12-13, 14, 16, 24-25, 27, 43, 58-59, 67, 69, 76-77, 79, 85, 87; Democrats Abroad (n 46) 15, 26.

88 Snyder, 'Survey Part 2' (n 64) 3-5, 7-8, 14, 43-44, 53, 61, 63, 74, 88; Democrats Abroad (n 46) 19.

89 Snyder, 'Survey Part 2' (n 64) 3-5, 12-13, 16, 19, 34-36, 51-58, 65, 77, 79, 80-82, 84-85, 90; Democrats Abroad (n 46) 5, 6, 26-27.

90 Snyder, 'Survey Part 2' (n 64) 83.

91 Ibid 82.

Many of these persons feel they have no choice but to renounce. They are by no means happy to do so: they report that on the day they renounced, they felt "angry,"[92] "sad,"[93] "torn up,"[94] "grief,"[95] "sick in my stomach,"[96] "heavy heart,"[97] "devastated,"[98] "fraught,"[99] and "holding back tears."[100] One did "burst into tears"[101] and another vomited.[102]

One former US citizen wrote:

> On the day of my renouncement I was in a fugue state, the only way for me to emotionally survive. Once there I just wanted to punch, kick, scream at the consular official, tell her how much I HATED the US government but obviously that was not the correct behaviour. I don't think I really heard what she was saying, just put my hand up, signed my name, took a moment to stare right into her eyes and left.
>
> Since that day I live with rage, sorrow, relief and confusion about who I am. I am not a REAL Canadian, I am no longer an American, it feels groundless. In reality it doesn't really matter but yet it does somehow. Americans abroad have become refugees without refuge, US out to destroy them, home nations will not protect them. We are the citizenry of no one, it is actually terrifying and NO ONE CARES.[103]

Another former US citizen wrote:

> [R]enunciation [is] not one of those things you "get over" [...] I didn't feel I had any choice. If I had a choice, I'd still be American.[104]

And another:

> I felt betrayed by the US and will NEVER forgive them for forcing me to renounce my citizenship; it was part of who I am.[105]

The United Nations Human Rights Council has stated that the question of arbitrary deprivation of nationality does not comprise the loss of nationality "voluntarily" requested by the individual.[106]

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[92] Ibid 76, 78, 81, 85.

[93] Ibid 78, 82; Comment by "Marji Irish," posted 19 November 2015 at 7:40 am, in Rachel Heller, 'My Renunciation Day', *Rachel's Ruminations* (online, 15 November 2015)< https://rachelsruminations.com/renunciation-day/>; Comment by "Rachel," posted 14 February 2018 at 7:40 am, in Heller, 'My Renunciation Day'; '"Why I Gave Up My US Passport,"' *BBC News Magazine* (online, 2 October 2013) <https://www.bbc.com/news/magazine-24338387>.

[94] Comment by "Ruth," posted 19 November 2015 at 5:41 pm, in Heller, 'My Renunciation Day' (n 93).

[95] Heller, 'My Renunciation Day' (n 93).

[96] Snyder, 'Survey Part 2' (n 64) 79.

[97] Ibid 80.

[98] Ibid 78, 82.

[99] Heller, 'My Renunciation Day' (n 93).

[100] Snyder, 'Survey Part 2' (n 64) 82.

[101] Heller, 'My Renunciation Day' (n 93).

[102] '"Why I gave up my US passport"' *BBC News Magazine* (n 93).

[103] Snyder, 'Survey Part 2' (n 64) 75.

[104] Comment by "Ruth," posted 19 November 2015 at 5:41 pm, in Heller, 'My Renunciation Day' (n 93).

[105] Snyder, 'Survey Part 2' (n 64) 75.

[106] Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 25th sess, A/HRC/25/28 (19 December 2013) 3 n4 <https://www.refworld.org/docid/52f8d19a4.html>.

It is difficult to see any voluntary nature in the testimony above. To the contrary, it is clear that these former US citizens did not want to stop being US citizens; this is evidenced in their sadness, their anger, their vomiting and their tears. Their objective was to escape from the conditions that made it impossible for them to live normal lives outside the United States – to escape from the laws that were "out to destroy them" and from which the countries where they reside failed to protect them. They felt coerced to renounce – under patent duress – as the only path to safety available to them.

The United States has not directly acknowledged the coercive effect that its tax laws have on persons living outside the United States, and notably it has not directly acknowledged that they compel many to renounce US citizenship. However, the United States did indirectly acknowledge this when on 6 September 2019 it published a "Joint Foreign Account Tax Compliance Act (FATCA) FAQ: Joint Frequently Asked Questions (FAQ) from the Department of the Treasury, the Department of State, the Internal Revenue Service, and the Social Security Administration on Obtaining Social Security Numbers, Expatriation, and Tax Implications."[107] In this lengthy title alone the United States recognizes that its taxation (as well as banking) policies are causing persons living overseas to "give up"[108] their US citizenship – that there is a direct causal link between the imposition of US tax residency on persons who live outside the United States and their loss of US citizenship.

The United Nations Human Rights Council has also explained that even when statelessness is not at play, "States must weigh the consequences of loss or deprivation of nationality against the interest that it is seeking to protect, and consider alternative measures that could be imposed." The loss or deprivation of nationality that does not serve a legitimate aim or is not proportionate is arbitrary and therefore prohibited.[109]

The United States has not offered any explanation of any kind as to what legitimate aim its taxation policies as they apply to overseas residents serves or what interests it is seeking to protect. The United States has not provided any justification for its policies that compel persons to "give up" their US citizenship. The United States has not explained in what manner such a result is proportionate to the interest(s) it is seeking to protect, nor has it explained what other measures it has considered or why those other measures are not viable alternatives.

Indeed, there is no legitimate reason for the United States to link taxation to US citizenship and thereby impose tax residency not only on US residents (regardless of citizenship) but also on nonresidents (because they are citizens). Some argue that US citizenship is a privilege not a right and that as such there is a price to be paid for it, in the form of taxation. But if US taxation was, in fact, a "price" for US citizenship then the US would not – and should not – tax non-citizen residents of the country nor would – or should – the country tax the US-sourced income of nonresidents. Or, inversely, as soon as non-citizens become subject to US taxation they would also become citizens.

The fact that the United States does subject non-citizens to income taxation means that US taxation is not a "price" for US citizenship; it is assessed for entirely different reasons. To impose tax residency on one subset of a population for one reason (because they are residents regardless of citizenship) while imposing tax residency on a different subset of a population for a different reason (because they

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[107] 'Joint Foreign Account Tax Compliance Act (FATCA) FAQ: Joint Frequently Asked Questions (FAQ) from the Department of the Treasury, the Department of State, the Internal Revenue Service, and the Social Security Administration on Obtaining Social Security Numbers, Expatriation, and Tax Implications', *Travel.State.Gov* (online, 6 September 2019) < https://travel.state.gov/content/travel/en/international-travel/while-abroad/Joint-Foreign-Account-Tax-Compliance-FATCA-FAQ.html>.

[108] Ibid Question 10.

[109] Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality* (n 106) 16.

are citizens regardless of residence) would be discriminatory. It would violate the ICEAFRD which prohibits discrimination on the basis of national origin. Further, as provided in the human rights instruments cited above, citizenship is a human right – not a privilege. As such, the suggestion that it should be subject to any payment at all – let alone to the other heavily burdensome restrictions placed upon persons living overseas – is abhorrent.

E *The Taxpayer Bill of Rights*

The United States Congress enacted the Taxpayer Bill of Rights (TBOR) in 2015.[110] This enactment did not establish new rights for US taxpayers; rather, it combined existing rights found in various tax laws, regulations and policies and put them in one place, making them easier to identify.

The creation of the TBOR is credited principally to Nina Olson, the former National Taxpayer Advocate for the United States. She is often quoted as saying "At their core, taxpayer rights are human rights."[111]

The manner by which the United States imposes US tax residency on persons living outside the United States violates two Rights in fundamental ways.

1 *The Right to a Fair and Just Tax System*

According to this Right, US taxpayers "have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely."[112]

The simple fact of the US imposing its tax code on persons who live overseas constitutes a fundamental violation of this right. This is because the US tax code applies the exact same rules regardless of the taxpayer's residence; in doing so it fails to consider the fact that the circumstances of a person living overseas are entirely different from those of a person living in the United States. US tax laws heavily penalize foreign investments, foreign retirement plans, foreign banks accounts and foreign unearned income.[113] It is relatively easy for most domestic taxpayers to avoid foreign investments, foreign retirement plans, foreign banks accounts and foreign unearned income.[114] It is essentially impossible for overseas taxpayers to avoid them and the longer an American lives overseas the more impossible it becomes. Absolutely nothing in the content or the application of the US tax system considers the dramatic differences in circumstances that affect the overseas taxpayer's underlying liabilities, ability to pay, or ability to provide information timely. The United States Internal Revenue Code expects

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[110] 'Taxpayer Bill of Rights', *Internal Revenue Service*, (Web Page, 21 December 2019) <https://www.irs.gov/taxpayer-bill-of-rights>; Enacted as 26 USC § 7803(a)(3) (2015) <https://www.law.cornell.edu/uscode/text/26/7803>.

[111] Andrew R. Roberson, 'The Taxpayer Bill of Rights: A Primer and Thoughts on Things to Come' (Spring 2018) 37(3) *ABA Tax Times* <https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/18may/18may-pbm-roberson-the-taxpayer-bill-of-rights/>.

[112] 'Taxpayer Bill of Rights' (n 110).

[113] John Richardson, 'The United States Imposes a Separate and More Punitive Tax System on US Dual Citizens Who Live in Their Country of Second Citizenship', *Citizenship Solutions* (Blog Post, 12 March 2019) <http://citizenshipsolutions.ca/2019/03/12/the-united-states-imposes-a-separate-and-more-punitive-tax-system-on-us-dual-citizens-who-live-in-their-country-of-second-citizenship/>; See also Jacqueline Bugnion, 'Concerns About the Taxation of Americans Resident Abroad' (24 August 2015) *Tax Notes* 861-66 <https://adcsovereignty.files.wordpress.com/2015/09/bugnion-08-24-15.pdf>.

[114] A notable exception is immigrants to the United States, to the extent they retain assets located in their countries of origin and/or they inherit assets located in their country of origin.

Americans overseas to live their lives as if they were in the United States; this is impossible for them to do.

2 *The Right to Be Informed*

According to this Right, “Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.”[115]

US taxpayers live in nearly every country of the world. Each country has its own – different – tax system. Not every country has a tax treaty with the United States; for those that do, each treaty is different. These circumstances mean that for each country where US taxpayers live, the information they need in order to know how to comply with US tax laws also differs. Just one example: from country to country, it is often not clear which specific kinds of income qualify under the US foreign earned income exclusion or what specific non-US tax is eligible for a foreign tax credit.

Nothing in IRS forms, instructions or publications takes these differences into account. Instead, the information the IRS provides for overseas taxpayers is one-size-fits-all for all countries, leaving overseas taxpayers little understanding of what they need to do in their situations to comply with US tax laws.[116] They are left with two choices: either risk making a mistake and incurring the resulting penalties or pay high fees to a private tax consultant.

Further, many overseas taxpayers speak little to no English. IRS forms, instructions and publications are complex documents that often even native English speakers struggle to understand. Today the IRS offers limited instructions and publications in a highly limited number of foreign languages: Spanish, Korean, Chinese, Russian, and Vietnamese.[117] This list does not even begin to cover the multitude of native languages that non-English speaking US taxpayers living around the world speak, such as French, German, Italian, Japanese, Arabic, Swedish, Norwegian, Finnish, Danish, Dutch, Portuguese, Czech, Slovenian, Croatian, Indonesian, Thai, Hebrew, Greek, Hindi, Turkish, Farsi, Polish, Latvian, Lithuanian, Estonian, Bulgarian, Romanian, Malay, Bengali, Punjabi, Tamil, etc.

In the absence of IRS documentation and services that are specific to the circumstances of each country where US taxpayers live and in languages they can understand, the United States is in violation of the Right to Be Informed.

F *The Right of Self-Determination*

It is not just individuals who are the victims of the human rights abuses that result from the imposition of dual tax residency on Americans living overseas. Countries or, more precisely, “peoples” (explained below) as a collective are also victims.

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[115] ‘Taxpayer Bill of Rights’ (n 110).

[116] See, for example, this page on the IRS website: ‘Taxpayers Living Abroad’ *Internal Revenue Service*, (Web Page, 15 January 2020) <https://www.irs.gov/individuals/international-taxpayers/taxpayers-living-abroad>.

[117] See, for example, this page on the IRS website: ‘Help Available at IRS.gov in Different Languages and Formats’ *Internal Revenue Service*, (Web Page, 2 January 2020) < https://www.irs.gov/newsroom/help-available-at-irsgov-in-different-languages-and-formats>.

Notably, this occurs when the decisions and policies of one state have an effect in another state such that the power of the people of the second state to make their own decisions and apply their own policies within their state is undermined.

This occurrence is particularly egregious when it results in the violation of the right of a subset of the group or the group as a whole to participate effectively in the economic and political life of the country.[118]

Article 1 of the ICCPR enshrines this right:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[119]

United Nations Human Rights Committee has explained that the right of self-determination is of particular importance because "its realization is an essential condition for the effective guarantee and observance of *individual* human rights and for the promotion and strengthening of those rights."[120] (emphasis added). In other words, in the absence of the right of self-determination, the other rights discussed in this paper would be more difficult to protect.

When the United States imposes tax residency upon residents of another country it is violating the other country's right to self-determination. This is because it prevents the people of that country from freely determining their economic and social development. For example, many countries where US citizens live have made policy decisions to not tax certain kinds of income, such as welfare benefits, pension proceeds, or capital gains on the sale of a residence. When those countries make such a policy decision it is for their own policy reasons. For example, it could be because taxpayers have certain kinds of income at vulnerable times in their lives (unemployment, disability, old age, death of a spouse) and the country in question has determined that during those vulnerable periods it wants the taxpayer to have the full benefit of those types of income. When the United States nevertheless taxes that income (which it normally does given that neither the foreign earned income exclusion nor foreign tax credits would apply), this directly overrides the policy determinations of the country where the US citizen lives and deprives residents (who are often also citizens) of that country of a portion of their means of subsistence.

In addition, the policies of many countries encourage spouses and other family members to hold joint title to family assets. This facilitates estate planning as well as access to family assets upon the death of a spouse or other family member. When the US imposes tax residency upon a person living in another country, the result is often an economic ostracization of the US citizen from their family. That

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[118] Hurst Hannum, 'The Right of Self-Determination in the Twenty-First Century' (1998) 55(3) *Washington and Lee Law Review* 773, 777 <https://scholarlycommons.law.wlu.edu/wlulr/vol55/iss3/8/>.

[119] ICCPR (n 43) art 1.

[120] Human Rights Committee (HRC), *CCPR General Comment No. 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples*, 21st sess (13 March 1984) 1 <https://www.refworld.org/docid/453883f822.html>.

is, the US citizen is prevented from holding title to family assets located outside the United States in order to shield the assets from US capital gains tax.[121] This does not just leave the US citizen financially vulnerable; it also thwarts both the economic and social development of the country in the manner its lawmakers intended.

Finally, because foreign pension plans and other foreign investments are subject to heavy US tax penalties, many Americans living overseas find themselves unable to plan or save effectively for their retirement.[122] The result is the increased probability that when they retire they will not have sufficient financial resources and will become public charges in the countries where they live. Further, as discussed above, these tax penalties encourage Americans overseas to move capital out of the country where they live to the United States. Both of these results thwart the economic development of the country where an American lives in the manner its lawmakers intended.

In this manner, when the United States imposes tax residency upon persons who live in other countries, the United States violates both Article 1(1) and well as Article 1(2) of the ICCPR. It does this by not only infringing upon the free pursuit of the economic and social development of those countries but also by depriving residents of those countries of their means of subsistence.

IV CONCLUSION

The combination of a rise in global mobility, the diminishment of meaningful "domicile", an increase in multiple citizenships, the ease of obtaining citizenship and an internet-centric world has resulted in more opportunities for multiple tax residence. For the reasons described, multiple tax residence is an affront to the sovereignty of nations and to the rights of the individual. As a result, it is in the interests of the global community to limit multiple tax residence.

For the most part multiple tax residence is eliminated through international tax treaties which typically include a tax treaty tie breaker – resulting in individuals becoming a tax resident of only one country. The United States – the only country to make citizenship a sufficient condition for tax residency – has always insisted on a "saving clause" in their tax treaties. In simple terms (and subject to narrow exceptions specified in the treaty), the saving clause obliges the treaty partner to agree that the United States can impose taxation (according to US domestic law) on those who the United States – in its sole discretion – defines as US citizens. The effect of the saving clause is that the United States reserves the right to impose taxation on:

1. US expatriates: American citizens who are temporarily living outside the United States,

2. US emigrants: American citizens who live permanently outside the United States but who are still US citizens and may also be citizens of the treaty partner country and/or another country, and

3. Accidental Americans: Citizens and residents of the treaty partner country who have never lived in the United States (other than a US place of birth) or had any connection to the United States (this category includes persons born outside the United States to a US citizen parent).

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[121] John Richardson and Laura Snyder, '"How Do I Protect Myself?" A Case Study in the Marginalization of Americans Living Overseas', *Tax Connections* (Web Page, 7 May 2019) <https://www.taxconnections.com/taxblog/how-do-i-protect-myself-a-case-study-in-the-marginalization-of-americans-living-overseas-part-1-of-4/#.XjFLgWhKjIX>.

[122] See, for example, Karen Alpert, 'Investing with One Hand Tied Behind Your Back—An Australian Perspective on United States Tax Rules for Nonresident Citizens' (8 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097931>.

The effect of the saving clause is that the United States imposes worldwide taxation on individuals who are tax residents and citizens of other countries and do not live in the United States. Although theoretically true for years, the advent of the 2010 Foreign Account Tax Compliance Act (FATCA)[123] has moved US citizenship-based taxation from the theoretical to the practical. It can be argued that the United States is using the combination of FATCA and citizenship-based taxation to create "US tax residents" in treaty partner countries.[124] US treaty partners need to understand this problem and take this into consideration when determining the cost of acquiescing to the inclusion of a saving clause in future treaties.

We respectfully submit that it is possible to include a generalized "saving clause" on the understanding that the clause would not apply to individuals who were tax residents and citizens of the treaty partner country.

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[123] 'Foreign Account Tax Compliance Act (FATCA)', US Department of the Treasury (Web Page, 1 January 2020) <https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx>.

[124] John Richardson, 'FATCA: The 2010 "Tax Evasion Law" That's "Now an Extra-Territorial Money-Sucking Machine"', *American Expat Financial News Journal* (online, 22 October 2019) <https://americanexpatfinance.com/opinion/item/282-fatca-the-2010-tax-evasion-law-that-s-now-an-extra-territorial-money-sucking-machine>.