THE POLITICAL QUESTION DOCTRINE – AN INAPPROPRIATE ROADBLOCK TO THE LIMITATION ON BENEFITS SAFETY VALVE

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ABSTRACT

Tax treaties serve several purposes, including "the elimination of impediments to international commerce resulting from the double taxation of international transactions" by, *inter alia*, the reduction or elimination of dividend withholding taxes.[1] *Starr International Company, Inc. v. United States* concerns an attempt by a Swiss domiciliary to pay lower United States withholding taxes pursuant to the then applicable tax treaty between the United States and Switzerland.[2] The focus of this Article is narrow but important. It addresses significant policy questions regarding the scope of the political question doctrine with respect to certain tax matters. Specifically, this Article will analyze whether the Circuit Court of Appeals for the District of Columbia was correct in rejecting the Government's position that a taxpayer's refund suit must be dismissed as a nonjusticiable political question. The court rejected the Government's position because it involved the U.S. competent authority's decision to deny it reduced dividend withholding tax under Article 22(6) of the U.S. –Switzerland Tax Treaty, the Limitation on Benefits' "safety valve."[3]

The Court of Appeals correctly decided in *Starr International* that Starr International's refund lawsuit should not have been dismissed on grounds that it presented a nonjusticiable political question. Starr International asserted that "the political question doctrine is reserved for cases that implicate sensitive policy judgments by a coordinate branch, not for ordinary cases of treaty interpretation."[4] The court determined that this assertion was proper.[5] The court applied the standard established by *Zivotofsky v. Clinton*: the political question doctrine applies in cases where "there is 'a lack of judicially discoverable and manageable standards for resolving' the question before the court," and cases that entail "significant foreign policy implications."[6] Although

1. Johansson v. United States, 336 F. 2d 809, 813 (5th Cir. 1964). Professor Reuven S. Avi-Yonah, however, has opined that "the main purpose of tax treaties is not to prevent double taxation, which is generally prevented by unilateral exemption or credit, but to implement the benefits principle by shifting the tax on passive income from the source to the resident country, while allowing the source country to tax active income if it is attributable to a PE [permanent establishment] within it." REUVEN S. AVI-YONAH, ADVANCED INTRODUCTION TO INTERNATIONAL TAXATION 51 (2d ed. 2019).

2. 910 F.3d 527, 529 (D.C. Cir. 2018).

3. *Id.* at 530.

4. Reply Brief for Appellant at 25, Starr Int'l Co. v. United States, 910 F.3d 527 (D.C. Cir. 2018) (No. 17-5238).

5. *Starr Int'l*, 910 F.3d at 533–34.

6. Zivotofsky v. Clinton, 566 U.S. 189, 197, 214 (2012).

additional criteria for applying the political question doctrine are set forth in *Baker v. Carr*, none are germane. While there is certainly a role in our judicial system for the political question doctrine, *Starr International* was a clearly inappropriate venue. The interests of tax policy would have been better served if the Government had not attempted to impose an inappropriate roadblock to the Limitation on Benefits' safety valve.

I. INTRODUCTION

Tax treaties serve several purposes, including "the elimination of impediments to international commerce resulting from the double taxation of international transactions,"[7] by, *inter alia*, the reduction of or elimination of dividend withholding taxes.[8] *Starr International Company, Inc. v. United States* concerns an attempt by a Swiss-domiciled company, Starr International, to "avail itself of a bilateral tax treaty . . . [in order] to reduce its tax rate on U.S.-source dividend income."[9] The focus of this Article is narrow but important. It addresses significant policy questions regarding the scope of the political question doctrine as applied to certain tax matters. Specifically, this Article explores whether the Circuit Court of Appeals for the District of Columbia was correct in rejecting the Government's position that Starr International's refund suit must be dismissed as a nonjusticiable political question. Starr International's suit primarily involved the U.S. competent authority's decision to deny dividend withholding tax under Article 22(6) of the U.S.–Swiss. Tax Treaty (Treaty).

"The United States has entered into bilateral tax treaties for over three-quarters of a century . . . ."[10] These treaties "overlay the domestic international tax rules of the United States, which consist of two regimes: one governing the international activities of United States persons abroad and one governing the activities of foreign persons in the United States."[11] The receipt of U.S.

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7. Johansson v. United States, 336 F.2d 809, 813 (5th Cir. 1964).

8. *Starr Int'l*, 910 F.3d at 529.

9. *Id.* A new protocol with Switzerland was ratified by the United States Senate on July 17, 2019. *See, e.g.*, Jad Chamseddine, *Senate Finishes Tax Protocols, Sets Sights on Treaties Next*, TAXNOTES (July 18, 2019), https://www.taxnotes.com/tax-notes-today-federal/treaties/senate-finishes-tax-protocols-sets-sights-treaties-next/2019/07/18/29r4h. One important feature of the new protocol is mandatory binding arbitration of unresolved competent authority cases.

10. Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1, 21 (2013) (footnote omitted).

11. *Id.*

source dividends by Starr International falls within the latter regime. As to the relationship of tax treaties to federal statutes, such as the Internal Revenue Code, Article VI, Section 1, Clause 2 of the U.S. Constitution provides: "Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[12] Professors Boris I. Bittker and Lawrence Lokken comment that "[t]he Supreme Court has construed this provision to put statutes and treaties on a common footing."[13] They further point out that "courts . . . try to harmonize treaties and statutes,"[14] but if they cannot be reconciled, "the conflict is generally resolved by applying an ancient common law rule, originally formulated for conflicts between statutes, that the one adopted last controls."[15] This "last in time" methodology has been subject to criticism.[16] To be clear, there is no issue in *Starr International* as to the Treaty's override of the statutory dividend withholding tax if the Treaty's Limitations on Benefits provision, discussed below, is inapplicable.[17]

For many years, the United States has required any tax treaty it enters into to include a provision denying benefits "where [these benefits] are likely to flow primarily to residents of third countries."[18] This objective, aimed at preventing what is commonly referred to as "treaty shopping," is addressed in the Treaty in Article 22 Limitations on Benefits.[19] The most recent U.S. Model Income Tax Convention (Model Tax Treaty) and its recent predecessors also have similar provisions.[20] According to the

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12. U.S. CONST. art. VI, § 1, cl. 2.

13. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 65.4.2 (3d ed. 2018) [hereinafter BITTKER & LOKKEN].

14. *Id.* (footnote omitted).

15. *Id.* (footnote omitted).

16. *See, e.g.*, Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 709–13 (2001) (making a persuasive argument "that a contracting state may not unilaterally alter its treaty obligations").

17. *See* I.R.C. § 881(a) (2010); *infra* Section II.A.

18. BITTKER & LOKKEN, *supra* note 13, at ¶ 67.3.3 (footnote omitted).

19. Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Switz.–U.S., art. XXII, Oct. 2, 1996, S. Treaty Doc. No. 105-8, 1996 WL 903835 [hereinafter 1996 U.S.–Swiss Convention].

20. The most recent U.S. Model Income Tax Convention dated February 17, 2016 and titled, "Convention Between the Government of the United States of America and the Government_____ for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income" (2016 U.S. Model Tax Treaty) has made significant changes generally, further tightening the scope of Article 22. *See, e.g.,* J. Ross Macdonald, "*Time Present and Time Past*": *U.S. Anti-Treaty Shopping History, Policy and Rules (Or,*

Treaty's legislative history, Article 22 is intended "to prevent the inappropriate use of the treaty by third-country residents."[21] Since Starr International could not pass the objective numeric tests in Article 22 for meriting Treaty benefits,[22] in order to obtain the reduced dividend withholding rates generally available under Article 10 of the Treaty,[23] the company required discretionary relief in the form of U.S. "[c]ompetent [a]uthority approval" under Article 22(6).[24] The Court of Appeals noted that "[a] Swiss taxpayer will be denied relief under Article 22(6) if the U.S. competent authority determines that obtaining benefits under the Treaty was one of Starr International's 'principal purposes' in establishing itself in Switzerland."[25] Article 22(6) of the Treaty, and its equivalent in other tax treaties, has been referred to as the "safety valve test."[26] It gives the applicable competent authority the ability to provide discretionary relief to a taxpayer after consultation with its treaty counterpart where the taxpayer failed

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"Well, Stanley, That's Another Nice Mess You've Gotten Us Into."), 70 TAX LAW. 5 (2016); James J. Tobin, *The New U.S. Model Treaty Is Out!*, 45 TAX MGMT. INT'L J. 298 (2016); Lee A. Sheppard, *News Analysis: Why the New U.S. Model Treaty?*, 82 TAX NOTES INT'L 727 (2016).

21. S. EXEC. REP. NO. 105–10, at 3 (1997).

22. The government summarized some of the key mechanical tests in Article 22 of the Treaty as follows: "The treaty's limitation on benefits provisions allow a Swiss corporation that derives income from the United States to obtain benefits if , *inter alia*, (i) it does so in connection with the 'active conduct of a trade or business in Switzerland (*id*. art 22(1)(c)); (ii) it is publicly traded on a recognized exchange, or is owned by a company traded on such an exchange (*id*. art. 22(1)(e)); or (iii) in the case of certain treaty benefits, the ultimate beneficial owners of more than 30% of the corporation's shares would qualify for benefits under Article 22, more than 70% of such owners would qualify for benefits or live in certain countries, and less than half of a corporation's deductible expenses were paid or payable to persons not eligible for treaty benefits (*id.* art 22(3)(a))." Brief for Appellees at 3–4, Starr Int'l Co. v. United States, 910 F.3d 527 (D.C. Cir. 2018) (No. 17-5238).

23. Article 10(2) of the U.S.–Swiss. Tax Treaty provides in pertinent part that "if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed (a) 5 percent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 10 percent of the voting stock of the company paying the dividends; (b) 15 percent of the gross amount of the dividends in all other cases." 1996 U.S.–Swiss Convention, *supra* note 19, at art. X, ¶ 2. Starr International "claimed that it was entitled to a dividend tax rate of 5% for part of 2007 and of 15% for the remainder of 2007." Brief for Appellees at 10, *Starr Int'l*, 910 F.3d 527 (No. 17-5238).

24. 1996 U.S.–Swiss Convention, *supra* note 19, at art. XXII, ¶ 6 ("A person that is not entitled to the benefits of this Convention pursuant to the provisions of the preceding paragraphs may, nevertheless, be granted the benefits of the Convention if the competent authority of the State in which the income arises so determines after consultation with the competent authority of the other Contracting State.").

25. *Starr Int'l*, 910 F.3d at 529 (citing DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME 72 [hereinafter TREATY TECHNICAL EXPLANATION]).

26. Macdonald, *supra* note 20, at 328–32, 334–35.

to meet the objective Limitation on Benefits tests in Article 22 but "whose residence in the other State can be explained by factors other than a purpose to derive treaty benefits."[27] This latter objective is referred to as the principal purpose test.[28] Article 22(6) of the Model Tax Treaty contains a revised version of this provision.[29]

After the Service denied Starr International's request for relief under Article 22(6), Starr International brought a refund claim of approximately $38 million in the District Court for the District of Columbia, asserting that its move to Switzerland was not principally to avail itself of treaty benefits.[30] The Government first argued that Starr International's refund claim was unreviewable "because the determination was committed to agency discretion by law."[31] Initially, the district court rejected the Government's assertion in *Starr I*.[32] After the Government filed a motion requesting the court reconsider its determination, the court held in *Starr II* that it could not hear Starr International's refund suit on the ground that it raised "a nonjusticiable political

27. *Starr Int'l*, 910 F.3d at 531 (quoting TREATY TECHNICAL EXPLANATION, supra note 25, at 60).

28. *Id.* (indicating that relief under Article 22(6) depends on whether Starr International's principle purpose of doing business in that country was to obtain benefits under the Convention. If a taxpayer's principle purpose of business was to obtain these benefits, relief under Article 22(6) ordinarily will not be granted).

29. DEP'T OF THE TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION, ART. 22, ¶ 6, (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx ("If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 of this Article, nor entitled to benefits under paragraph 3, 4 or 5 of this Article, the competent authority of the other Contracting State may, nevertheless, grant the benefits of this Convention, or benefits with respect to a specific item of income, taking into account the object and purpose of this Convention, but only if such resident demonstrates to the satisfaction of such competent authority a substantial nontax nexus to its Contracting State of residence and that neither its establishment, acquisition or maintenance, nor the conduct of its operations had as one of its principal purposes the obtaining of benefits under this Convention. The competent authority of the Contracting State to which the request has been made shall consult with the competent authority of the other Contracting State before either granting or denying a request made under this paragraph by a resident of that other Contracting State.").

30. Brief for Appellant at 4, *Starr Int'l*, 910 F.3d 527 (No. 17-5238) ("Before the move, Starr resided in Ireland and qualified for the same 15% withholding tax rate *automatically* under the U.S.-Irish Treaty.") (emphasis in original); *id.* at 5 (Starr International's relocation "was prompted by unforeseen litigation risks and poor regulatory environment for charities (like Starr's charitable owner) in Ireland."); *id.* at 17 ("[I]ts economic value would reside almost entirely within the contracting states, specifically within Switzerland, and would not be routed to a non-signatory country.").

31. Brief for Appellant at 19, *Starr Int'l*, 910 F.3d 527 (No. 17-5238).

32. Starr Int'l Co. v. United States (*Starr I*), 139 F. Supp. 3d 214, 231 (D.D.C. 2015).

question."[33] Starr International "then amended its complaint to bring a claim under the Administrative Procedure Act (APA), challenging the IRS's denial of treaty benefits as arbitrary and capricious."[34] The district court granted the Government's motion for summary judgment on this latter claim in *Starr III*, the last chapter out of the District Court for the District of Columbia.[35]

When the decision was appealed to the D.C. Circuit Court of Appeals, the circuit court properly decided against the Government on the issue of whether Starr International's refund suit should be dismissed because it raised a nonjusticiable political question.[36] Given the fact that Article 22(6) relief is "discretionary" on the part of the U.S. competent authority,[37] Starr International's position on the merits, i.e., that the IRS "misinterpreted federal law in denying the company a refund,"[38] appears to be difficult to support. Even if this was not the case, as elaborated upon below, the Government's attempt to dismiss Starr International's refund lawsuit based on the political question doctrine was an inappropriate roadblock to the Limitation on Benefits safety valve.

II. *STARR INTERNATIONAL* LITIGATION & THE SAFETY VALVE EXCEPTION TO LIMITATION ON BENEFITS PROVISION

A. Background & Starr I

Starr International Company, Inc. was "once the largest shareholder of American International Group (AIG)."[39] The District Court for the District of Columbia first observed in *Starr*

33. Starr Int'l Co. v. United States (*Starr II*), No. 14-cv-01593 (CRC), 2016 WL 410989, at *2 (D.D.C. Feb. 2, 2016).

34. *Starr Int'l*, 910 F.3d at 529–30.

35. Starr Int'l Co. v. United States (*Starr III*), 275 F. Supp. 3d 228, 251 (D.D.C. 2017).

36. *Starr Int'l*, 910 F.3d at 535.

37. The U.S. Treasury Department's Technical Explanation of Article 22(6) provides in relevant part, "Paragraph 6 provides that a resident of one of the Contracting States that is not otherwise entitled to the benefits of the Convention may be granted benefits under the Convention by the competent authority of the other Contracting State. This *discretionary* provision is included in recognition of the fact that, with the increasing scope and diversity of international economic relations, there may be cases where significant participation by third country residents in an enterprise of a Contracting State is warranted by sound business practice or long-standing business structures and does not necessarily indicate a motive of attempting to derive unintended Convention benefits." TREATY TECHNICAL EXPLANATION, *supra* note 25, at 72 (emphasis added).

38. *Starr Int'l*, 910 F.3d at 534.

39. *Id.* at 531.

I that the "dispute traces its roots to the heralded falling out between AIG and its then-CEO Maurice R. Greenberg."[40]

The legendary Maurice R. "Hank" Greenberg had "built [AIG] into a global insurance powerhouse and shaped an entire industry during nearly 40 years at the company's helm . . . [but was forced to] step[] down as chief executive after a series of run-ins with regulators . . . ."[41] Further, he was subsequently forced to resign as Chairman.[42] Hank Greenberg has been described as the "prime mover" at both AIG and Starr International for many years.[43]

Starr International "began as a thriving international insurance business" founded by its namesake Cornelius Vander Starr.[44] From its Panama headquarters, the company primarily focused on attracting business for U.S insurance companies by owning and managing agencies abroad beginning in 1943.[45] During the 1970s, Starr International "merged most of its operating entities into AIG and became AIG's largest shareholder."[46]

Although Starr International is a for-profit company, it is unique in that it is owned by a charitable organization.[47] During the years at issue in this case, Starr International's voting stock "ha[d] little direct economic value" and was held "by individuals with close ties to" Greenberg.[48] Greenberg himself owned some of this voting stock.[49] In addition to being CEO and chairman of AIG, Greenberg was also chairman of Starr International.[50] After Greenberg stepped down as CEO of AIG, "[Starr International]

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40. Starr Int'l Co. v. United States (*Starr I*), 139 F. Supp. 3d 214, 219 (D.D.C. 2015) (citation omitted).

41. Gretchen Morgenson, *Chief Is Leaving Insurance Giant; Inquiries Mount*, N.Y. TIMES (Mar. 15, 2005), https://www.nytimes.com/2005/03/15/business/chief-is-leaving-insurance-giant-inquiries-mount.html; *see also Starr I*, 139 F. Supp. at 220 (indicating that Greenberg was under investigation by New York State's Attorney General).

42. Starr Int'l Co. v. Am. Int'l Grp., 648 F. Supp. 2d 546, 548 (S.D.N.Y. 2009).

43. *Am. Int'l*, 648 F. Supp. 2d at 548.

44. Brief for Appellant at 9, *Starr Int'l*, 910 F. 3d 527 (No. 17-5238).

45. *Id.*

46. *Id.* at 9–10.

47. Starr Int'l Co. v. United States (*Starr III*), 275 F. Supp. 3d 228, 249 (D.D.C. 2017). The government explained that during the time at issue "Starr's non-voting stock has been held by Swiss AG, a 'Swiss charitable company' owned in turn by Starr International Foundation, which is now a 'Swiss charitable foundation.'" Brief for Appellees at 9, *Starr Int'l*, 910 F. 3d 527 (No. 17-5238). The government referred to these entities as "putatively charitable organizations . . . ." *Id.* at 6. There is also a New York foundation in the structure. *Starr III*, 275 F. Supp. 3d at 234.

48. Final Brief for Appellees at 5–6, *Starr Int'l*, 910 F. 3d 527 (No. 17-5238).

49. Starr Int'l Co. v. Am. Int'l Grp., 648 F. Supp. 2d 546, 554 (S.D.N.Y. 2009).

50. *Id.* at 551.

remained under Greenberg's domination."[51] The non-voting common stock, "with full residual rights to . . . [Starr International's assets], . . . [was] issued to a charitable trust[] whose ultimate beneficiary was a New York foundation."[52] Towards the end of 2007, the timeframe at issue, Starr International's primary assets were shares of AIG valued at around $16.7 billion.[53]

Starr International's initial objectives were not focused solely or even primarily on "build[ing] value for eventual long range use and distribution to the common stock owners for charitable purposes."[54] According to the district court, "[t]he Charitable Trust was set up as [a] long-term arrangement with multiple goals."[55] The court indicated that "the factors motivating the vesting of [the] corporation's economic value in a charitable trust were not wholly charitable in nature;" rather, Starr International had "intentions to protect AIG from unwarranted hostile bids for change in control and to permit [Starr], as AIG's largest shareholder, to make incentive compensation grants . . . to AIG employees."[56]

After Greenberg's departure from AIG, Starr International "ceased funding AIG's executive-compensation plan."[57] Starr International's charitable mission was allegedly its primary *raison d'etre* after the AIG and Greenberg split in 2005.[58] At least one observer, besides the Government, expressed doubt as to the company's charitable mission's primacy and indicated that "Starr International actually paid out very little to its charitable shareholder."[59]

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51. *Id.* at 548.

52. *Starr III*, 275 F. Supp. 3d at 234.

53. Final Brief for Appellees at 6, *Starr Int'l*, 910 F. 3d 527 (No. 17-5238).

54. *Starr III*, 275 F. Supp. 3d at 234 (quoting *Am. Int'l*, 648 F. Supp. 2d at 558).

55. *Id.* at 235.

56. *Id.* at 234–35.

57. Starr Int'l Co. v. United States (*Starr I*), 139 F. Supp. 3d 214, 220 (D.C. Cir. 2015).

58. Macdonald, *supra* note 20, at 338.

59. *Id.* Macdonald also wrote that a Starr International representative "indicated that Starr International was a for-profit company that was interested in using its funds to rebuild an international insurance business and did not hide the fact that this was its primary intention." *Id.* at n.871. ("In answer to our question as to why [Starr International] paid out such small amounts to charity in comparison to the enormous sums of dividends it received from AIG, the Representatives stated that it was never [Starr International's] intention nor purpose to start making large charitable contributions right away, but rather, they had planned to give bigger and bigger contributions as time went by with the ultimate value given to charity upon the end of the 'Trust Term.'").

Starr International became a Swiss domiciliary in 2006.[60] In 2004, the company decided to move its headquarters to Ireland from Bermuda "to take advantage of the 1997 U.S.-Ireland tax treaty, which automatically reduced Starr's withholding rate on AIG dividends by half."[61] The district court in *Starr I* appeared to doubt the company's reason for relocating operations to Switzerland, stating the reason was "allegedly to protect its assets from an AIG lawsuit."[62] Starr International also indicated that its departure from Ireland was predicated in part on Irish law restrictions limiting its charitable trust's "ability to make donations to non-Irish charities."[63]

Absent relief under the Treaty, Starr International was subject to the statutory thirty percent withholding tax on the AIG dividends imposed on U.S.-source dividends paid to foreign corporations.[64] In 2007, Starr International petitioned the U.S. competent authority for discretionary benefits under Article 22(6) of the Treaty after failing to meet the mechanical test of the Article.[65] After failing to receive a response to this request "but wishing to reserve its right to a refund,"[66] Starr International "sent a 2007 tax-return form to the IRS Service Center in Ogden, Utah, contending that it had overpaid $38,181,246 in taxes—half of its withholdings on AIG dividends . . . [and] wrote 'Protective Refund Claim' on the form header."[67] In October 2010, the U.S. competent authority rejected Starr International's request.[68] After the rejection, Starr International brought a tax refund suit in the District Court for the District of Columbia in September 2014 for the alleged overpayment of withholding taxes for 2007.[69]

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60. *See* Starr Int'l Co. v. United States, 910 F.3d 527, 531 (D.C. Cir. 2018).

61. *Starr I*, 139 F. Supp. 3d at 220. This reference was to a 15% rate. *But see* Brief for Appellant at 11, *Starr Int'l*, 910 F. 3d 527 (No. 17-5238) (arguing that Starr International "qualified for a 5% withholding rate [under the U.S.-Ireland Tax Treaty] during years when it owned more than 10% of AIG's stock") (alteration in original).

62. *Starr I*, 139 F. Supp. 3d at 220; *see also* Brief for Appellant at 12, *Starr Int'l*, 910 F. 3d 527 (No. 17-5238) (discussing how after Greenberg stepped down as CEO of AIG "[a] rift quickly grew between the two organizations [i.e., AIG and Starr International], culminating in a lawsuit brought by Starr against AIG seeking the return of artwork and other tangible property belonging to Starr that AIG refused to relinquish . . . . Later in 2005, AIG filed a counterclaim seeking to obtain Starr's primary asset, the AIG stock.") (alteration in original).

63. Brief for Appellant at 13, *Starr Int'l,* 910 F. 3d 527 (No. 17-5238).

64. I.R.C. § 881(a).

65. *See Starr I*, 139 F. Supp. 3d at 220.

66. *Id.*

67. *Id.* at 220–21.

68. *Id.* at 221.

69. *Id.* The District Court for the District of Columbia did, however, point out Starr International did receive a refund for 2008 on the same Article 22(6) allegation. *Id.*

In its suit, Starr International asserted that the Service had erroneously denied benefits under the Treaty.[70] Starr International asserted that the Service:

> [A]bused its discretion because (1) Starr was not treaty shopping when it relocated to Switzerland, (2) the IRS failed to consult with the Swiss [c]ompetent [a]uthority before denying Starr's request, and (3) the IRS had no legal basis for issuing Starr a 2008 refund while denying its 2007 request based on the same material facts.[71]

The Government contended "that the U.S. [c]ompetent [a]uthority's decision is committed to agency discretion by law and, alternatively, that the Court lacks jurisdiction under the political-question doctrine" to review the U.S. competent authority's decision.[72] In *Starr I,* the district court initially determined "that the discretionary provision of . . . [Article 22(6) of the Treaty] is not categorically nonjusticiable."[73] Furthermore, the Government had "not presented clear and convincing evidence that the discretionary provision was intended to preclude judicial review."[74] The *Starr I* court indicated that its action would not "impinge on the Executive's allegedly exclusive authority to 'formulate and implement foreign policy.'"[75] Nor would "concluding that the IRS abused its discretion here . . . unduly disrespect a coordinate branch of government or embarrass the federal government as a whole."[76] The *Starr I* court thus denied the Service's motion to dismiss Starr International's claim on political question grounds.[77] This writer submits that the court in *Starr I* correctly decided the case. Unfortunately, however, this would not be the district court's last holding on this matter.

One final point made by the *Starr I* court merits the reader's attention. As to whether judicially manageable standards for review exist, the district court observed in *Starr I*:

> [T]he Technical Explanation [to the Treaty with respect to Article 22(6)] provides meaningful standards—namely,

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70. *Id.*

71. *Id.*

72. *Id.* (footnote omitted). The Service also asserted in a counterclaim not before this Court, to recover the refund for 2008. *Id.* at 231 n.3.

73. *Id.* at 226.

74. *Id.* at 228.

75. *Id.* at 230.

76. *Id.* at 231.

77. *Id.* at 231. However, the court also dismissed Starr International's claim that "by failing to consult . . . the Swiss Competent authority" the Service violated their duty under the U.S.–Swiss Tax Treaty. *Id.*

> whether an applicant's principal purpose was treaty shopping—that enable a court to determine whether the IRS abused its discretion in denying treaty benefits. Because this inquiry is not directionless, denials of tax benefits under the discretionary provision are not committed to the IRS's unreviewable discretion.[78]

Despite reversing its stance on the applicability of the political question doctrine, the district court never wavered in its opinion that judicially manageable standards existed here.

B. Starr II

The saga continued with *Starr II*, beginning with the Government's motion to reconsider the decision in *Starr I*. The Government argued that "the Court misapprehended a key aspect of the treaty provision at issue: the requirement that the IRS 'consult' with its Swiss counterparts prior to any final decision to grant treaty benefits."[79] The District Court for the District of Columbia observed in *Starr II* that the Government was arguing that "separation-of-powers principles prevent the Court from forcing the IRS to consult with the Swiss authorities or dictating the outcome of any consultation because doing so would impinge on the Executive's authority to conduct foreign relations."[80] As such, according to the Government, the Court lacked the power to grant Starr International its refund.[81]

The district court was persuaded by the Government's motion and agreed to revise "certain aspects" of its prior ruling.[82] It did not, however, reverse its decision in *Starr I* completely.[83] As noted above, the court reaffirmed that "a manageable standard for assessing whether Starr met certain criteria required to obtain treaty benefits [existed and therefore the] . . . IRS's determination that Starr did not meet the applicable criteria is subject to judicial review."[84] Furthermore, the district court "st[ood] by its ruling that interpreting the terms of the treaty in a manner necessary to determine whether Starr met the applicable criteria would not offend the political-question doctrine."[85] The court also was "not

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78. *Id*. at 229.

79. Starr Int'l Co. v. United States (*Starr II*), No. 14-cv-01593 (CRC), 2016 WL 410989, at *2 (D.D.C. Feb. 2, 2016).

80. *Id.*

81. *Id.*

82. *Id.* at *3.

83. *Id.*

84. *Id.*

85. *Id.*

particularly swayed by the government's argument—which it [viewed] as somewhat of a red herring—that the Court cannot force the IRS to consult with its Swiss counterparts."[86] However, the court did note that consultation is only required under the Treaty Article 22(6) "before a decision to *grant* treaty benefits, whereas here the IRS *denied* benefits to Starr."[87] Where the district court did agree with the Government was in the assertion "that the Court lacks the power to dictate the outcome of the consultation process [with its Swiss counterpart]."[88]

In its revised opinion, the district court stated that it now understood that "the treaty consultation process is a diplomatic exercise that can affect the ultimate outcome of the decision whether to award benefits, and the extent of those benefits, in numerous ways."[89] Accordingly, "it would impinge upon the Executive's prerogative to engage in that process if the Court were to render consultation meaningless or dictate its outcome."[90] "Ordering the IRS to issue Starr a specific monetary refund—prior to any consultation having taken place—" according to the district court in *Starr II* "would do precisely that."[91] The court ultimately concluded that:

> In light of [its] . . . inability and lack of competence to predetermine the outcome of any consultation between the IRS and its Swiss counterparts, and . . . that consultation is a prerequisite to awarding treaty benefits, . . . Starr may not pursue its claim for a tax refund or any other monetary relief.[92]

The district court somewhat strangely noted that "[g]iven the role of the consultation process, 'it may very well be that the U.S. [c]ompetent [a]uthority . . . initially [comes] to a decision preliminarily to grant benefits but ultimately, after the consultation, decides to deny benefits.'"[93] Query why the Swiss counterpart would argue against a decision to effectively provide a dividend withholding reduction coming solely out of U.S.

86. *Id*. at *4.
87. *Id*. at *3–4.
88. *Id*. at *4.
89. *Id*.
90. *Id*. at *4–5.
91. *Id*. at *5.
92. *Id*. at *10–11.
93. *Id*. at *9–10.

government coffers.[94] The only explanation that logically comes to mind is that, through consultation, the Service learns additional information about Starr International that could negatively impact an initial decision to grant relief. However, this scenario is highly unlikely.

The *Starr II* court's analysis of interfering with the Treaty consultation process in general appears perplexing. The Service unilaterally denied Starr International relief under Article 22(6) of the Treaty, which did not require competent authority consultations for rejections but for grants. If the Service had in fact decided preliminarily to grant the benefit, the consultation would likely not have changed the result. Yet the court in *Starr II*, absent a claim of violation of the APA (discussed below), effectively indicated its hands were tied because "dictating the outcome of any consultation . . . would impinge on the Executive's authority to conduct foreign relations."[95] Somehow, the sensible reasoning expressed in *Starr I* became distorted in *Starr II*. The district court's difficulty with the consultation prerequisite conundrum is addressed further in Part III.

The district court believed that Starr International had a potential remedy by pursuing "a claim to set aside the IRS's decision to deny treaty benefits under the judicial-review provision of the [APA] . . . ."[96] The court opined that relief under the APA "is not illusory."[97] That is, Starr International "'could bring a claim under [the APA] . . . seeking to set aside the U.S. [c]ompetent [a]uthority's determination' . . . as arbitrary, capricious or an abuse of discretion."[98] The court indicated that "if Starr 'prevailed on that claim, [it] would be entitled . . . to have the matter remanded to the U.S. [c]ompetent [a]uthority for further actions' consistent with the Court's opinion."[99] Under such circumstances, "the Court would fully expect [and the Service has so represented] . . . that the IRS would not decline to consult with the Swiss [counterpart] . . . ."[100]

In accordance with its reasoning, the district court in *Starr II*, "allow[ed] Starr 21 days to amend its complaint to bring a claim

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94. Brief for Appellant at *57, Starr Int'l Co. v. United States, 910 F. 3d 527 (D.C. Cir. 2018) (No. 17-5238) ("Indeed, it is difficult to imagine the Swiss government having any objection to a Swiss resident receiving treaty benefits impacting only its U.S. taxes.").

95. *Starr II*, 2016 WL 410989, at *2.

96. *Id.* at *5.

97. *Id.* at *17.

98. *Id.* at *14–15.

99. *Id.* at *15.

100. *Id.* at *17.

under the APA to seek to have the IRS's decision to deny it treaty benefits set aside."[101] Among other actions, the court also "grant[ed] in part the government's motion for reconsideration . . . ."[102]

C. Starr III

The next chapter in this journey is *Starr III*.[103] Here, the District Court for the District of Columbia weighed in for the final time with an exceptionally thorough opinion. The focus of *Starr III* was Starr International's "challenges . . . [to] the IRS's denial of treaty benefits as arbitrary and capricious under the [APA]."[104] The company's primary argument was that the Treaty's "primary purpose test [in Article 22(6)] is designed to prevent the practice of 'treaty shopping' and that the IRS applied an erroneous definition of that term in concluding that the company's relocation to Switzerland was largely tax-driven."[105]

Starr International contended that "'treaty shopping' is a precise legal term, covering only those instances where an on-paper resident of a country *not* party to the relevant tax treaty uses an entity that *is* an on-paper resident of a treaty country in order to obtain treaty benefits."[106] The company asserted that "[b]ecause Starr and its subsidiaries were on-paper Swiss residents and the majority of its voting shareholders were U.S. citizens at the relevant time, . . . it could not have been 'treaty shopping' under this definition."[107] The court, however, rejected Starr's interpretation of treaty shopping *vis-a-vis* the Treaty, indicating that its position "cannot be squared with the text of the U.S.–Swiss treaty or its accompanying agency guidance."[108] The district court determined that these "authorities understand 'treaty shopping' as encompassing situations where an entity establishes itself in a treaty jurisdiction with a 'principal purpose' of obtaining treaty benefits."[109] The court concluded that the IRS "reasonably applied . . . [the principal purpose] standard in

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101. *Id.* at *20.
102. *Id.* at *19.
103. 275 F. Supp. 3d 228, 251 (D.D.C. 2017).
104. *Id.* at 231.
105. *Id.* at 232.
106. *Id.* (emphasis in original).
107. *Id.*
108. *Id.*
109. *Id.*

denying treaty benefits to Starr . . . [and as such] the Court decline[d] to set aside its [prior] determination."[110]

The district court explained that the purpose of the Limitations on Benefits provision in Article 22 is to prevent treaty shopping abuse.[111] Article 22 is specifically "aim[ed] to deny benefits to those who establish 'legal entities . . . in a Contracting State with a principal purpose to obtain [treaty] benefits.'"[112] Although determining a taxpayer's principal purpose is difficult, Article 22 provides "a number of objective, mechanical tests meant to identify those treaty-country residents who are worthy recipients of treaty benefits."[113] Article 22's mechanical tests operate according to the Treaty's Technical Explanation, so that satisfaction of any individual test establishes that an entity has a legitimate business purpose for their adopted structure or that this structure has "sufficiently strong nexus to the other Contracting State . . . ."[114] Later in its opinion, the district court characterized these tests as "objective and formalistic."[115] These tests, the court explained, "are based on such factors as an entity's non-profit status, its ownership structure, and the *on-paper* residency of its owners and controlling shareholders. Although the tests vary in complexity, implementing them requires little discretion."[116]

Article 22(6) of the Treaty allows divergence from these criteria for those "entities with legitimate reasons for residing in a treaty nation [that] might nevertheless fail Article 22's rigid mechanical tests."[117] The Treaty's Technical Explanation noted that "while an analysis under . . . [Article 22(6)], may well differ from . . . [the mechanical tests in Article 22,] its objective is the same: to identify investors whose residence in the other State can be explained by factors other than a purpose to derive treaty benefits."[118]

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110. *Id.*

111. *Id.* at 233.

112. *Id.* (quoting TREATY TECHNICAL EXPLANATION, *supra* note 25, at 59).

113. *Id.* at 233.

114. *Id.* (quoting TREATY TECHNICAL EXPLANATION, *supra* note 25, at 59).

115. *Id.* at 243.

116. *Id.*

117. *Id.* at 233–34; *see* TREATY TECHNICAL EXPLANATION, *supra* note 25, at 72 ("A person that is not entitled to the benefits of this Convention pursuant to the provisions of the preceding paragraphs may, nevertheless, be granted the benefits of the Convention if the competent authority of the State in which the income arises so determines after consultation with the competent authority of the other Contracting State.").

118. *Starr III*, 275 F. Supp. 3d at 234 (quoting TREATY TECHNICAL EXPLANATION, *supra* note 25, at 72).

In analyzing Starr International's motivation for being a Swiss resident, the district court determined that in its initial move from Bermuda to Ireland in 2004 there was "abundant evidence that the move . . . was tax-motivated."[119] That is, despite Starr International's assertion at a meeting with the U.S. competent authority that Bermuda had political problems,[120] a lack of skilled workers and professionals, and was "too small of a place for a $20 billion charity,"[121] the court believed the real stimulus for the move was access to the U.S. –Irish Tax Treaty's U.S. dividend withholding tax benefit.[122]

As to the company's next move, i.e., from Ireland to Switzerland, the taxpayer alluded to a variety of motivations, including not only the fact that Starr International's "assets were not sufficiently insulated from litigation in Ireland,"[123] but also that the restrictions on its charitable donations such as "'severe practical limitations on the amounts that could be distributed to donees outside of Ireland.'"[124] Starr International, however, in its application for discretionary relief provided for in Treaty Article 22(6), asserted that its ground for such dispensation "was primarily . . . that its move to Switzerland was motivated by charitable considerations . . . ."[125] In a chart, apparently produced in 2009 but allegedly representing its decision making process prior to relocating from Ireland, Starr International represented to the U.S. competent authority that among the locations it

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119. *Id*. at 235.

120. The term "competent authority" is defined as "the person that the treaty partners designate to administer the treaty's administrative provisions." David N. Bowen, *U.S. Income Tax Treaties — U.S. Competent Authority Functions and Procedures*, T.M. 6880-1st (BNA).The competent authority's functions include: (i) "applying tax treaty provisions by communicating, consulting, and negotiating agreements with treaty partners on the general application of such provisions"; (ii) "requesting and responding to requests for specific information, and otherwise exchanging information routinely and spontaneously, as appropriate"; (iii) "assisting in the collection of tax (to the extent allowed)"; and (iv) more importantly, "negotiating agreements with the other Contracting State concerning taxpayer claims under the applicable treaty provisions." *Id.* In Article 3(1)(f)(ii) of the 1996 U.S.–Swiss Convention "competent authority" is defined as "the Secretary of the Treasury or his delegate." 1996 U.S.–Swiss Convention, supra note 19. In its Brief for the Appellees, the Government noted that "[t]he Secretary of the Treasury's authority to act as competent authority has been delegated to the Commissioner of the IRS's Large Business and International Division, whose authority in turn has been delegated to, *inter alia,* the Deputy Commissioner for the same division." Brief for Appellees at 4 n.2, Starr Int'l Co. v. United States, 910 F. 3d 527 (D.C. Cir. 2018) (No. 17-5238).

121. *Starr III*, 275 F. Supp. 3d at 235.

122. *Id*.

123. *Id*. at 236.

124. *Id*. at 235.

125. *Id*. at 237.

considered as the best place to relocate its residence, Switzerland's positive factors were low local taxes, low litigation risk, and strong charity regulations "with its main potential weakness [being] the U.S. tax consequences which would be '[b]ad (absent 22(6)).'"[126]

Besides its supposedly benign purpose for the move, Starr International contended that it "was 'within the spirit of the objective criteria' of Article 22(2), which confers treaty benefits on certain non-profit organizations."[127] Starr International further argued in its request for Article 22(6) relief "that—given its Swiss residency, beneficial ownership by a Swiss non-profit, and majority-U.S. voting power—it was 'not aware of any policy reason' to deny it treaty benefits."[128] In eventually denying the Starr International's request several years after it was made, the Service explained "the [c]ompetent [a]uthority could not 'conclude that obtaining treaty benefits was not at least one of the principal purposes for moving Starr's management, and therefore its residency, to Switzerland.'"[129]

Its reasoning was based on four key grounds:

- [Starr]'s original incorporation in Panama and its management and control in Bermuda suggest the original corporate structure may have been developed with tax avoidance purposes in mind and/or with a purpose of avoiding the provision of information on [Starr]'s activities to the Internal Revenue Service;

- [Starr]'s re-location to Ireland and its movement of management out of Bermuda a relatively short time before the payment of dividends to [Starr] further suggests that [Starr] was seeking to avail itself of the treaty between the United States and Ireland to avoid U.S. tax on those contemplated dividends;

- The transitory nature of [Starr]'s location in Ireland, which may or may not have been intentionally transitory, and its subsequent movement to Switzerland further suggests its intention of organizing in a treaty jurisdiction to

126. *Id*. at 236; *see also id*. at 248 (In a later reference to that chart, the court referred to the decision matrix as "suspect evidence." "It appears to have been created in 2009, years after the move to Switzerland, and in an effort to convince the Competent Authority that seeking treaty benefits was not a principal motive behind Starr's move.").

127. *Starr III*, 275 F. Supp. 3d at 237.

128. *Id*.

129. *Id*. at 238.

> avail itself of a reduced rate of withholding on U.S. source dividends;
>
> - [Starr] is largely controlled by U.S. individuals and such control is not in accord with recent development of U.S. policy on acceptable corporate ownership for [Limitation on Benefits] purposes.[130]

J. Ross Macdonald thought the underlying reasoning of the U.S. competent authority's decision was "that Starr International was a for-profit corporation and that while the vast preponderance of its economics appeared to be held for the benefit of a charity, in actuality, Starr International was not run principally to benefit the charity."[131] Macdonald believed that the Service viewed the charity "as a mere 'wrapper' to benefit Starr International."[132] In other words, he opined that "as a result of fairly minimal distributions to the charity (wherever located) over [a] historical time frame the U.S. competent authority did not see a sufficient connection between Starr International and the charity."[133]

The district court rejected Starr International's assertion that Treaty Article 22(6) relief should be accorded when a taxpayer is not treaty shopping, which it defined as situations "where an on-paper resident of a country *not* party to the relevant tax treaty uses an entity that *is* an on-paper resident of a treaty country in order to obtain treaty benefits . . . ."[134] Its rationale was as follows: The Treaty's "mechanical tests [were] strikingly similar to Starr's proposed third-country resident test."[135] Nevertheless, the court pointed out no such standard was included in the Treaty even though it would have been "simple" to include it with the other objective criteria.[136] This "omission[, the district court indicated,] is very difficult to explain."[137]

The district court also characterized as "formalistic" Starr International's assertion "that its lack of on-paper ties to third countries, and the prevalence of its on-paper ties to Switzerland and the United States, are alone sufficient to entitle the company to treaty benefits."[138] This methodology of interpreting the Treaty

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130. *Id.*
131. Macdonald, *supra* note 20, at 338.
132. *Id.*
133. *Id.*
134. *Starr III*, 275 F. Supp. 3d at 232.
135. *Id.* at 244.
136. *Id.*
137. *Id.*
138. *Id.* at 243.

the court indicated "is anathema to the 'substance-over-form principles' enunciated by Article 22's Technical Explanation."[139]

The court also found illogical Starr International's proposed test for applying Treaty Article 22(6). According to the court, the section "confers broad discretion on the [c]ompetent [a]uthority . . . [a]nd yet, despite [its] . . . discretionary nature . . . [,] Starr would have the [c]ompetent [a]uthority and the Court read into the provision a mechanical rule that leaves no room for discretion."[140] The district court opined that "[i]t makes no sense to read this *non*-discretionary rule into a discretionary provision."[141]

Another flaw the court found in Starr International's reasoning was that the Treaty's Technical Explanation "is clear . . . [that] the standards that govern Article 22(6) determinations . . . are concerned not with the existence of third-country residency, but rather with an entity's *motivation* for choosing to establish *treaty-country residency*."[142] Thus the focus of the waiver is "a subjective determination of Starr International's *intent*."[143] If, however, Starr International's proposed test was applied, the court observed, it would lead to "a strange result . . . [of] an entity *with* a 'principal purpose' of obtaining treaty benefits . . . nevertheless entitled to benefits under Article 22(6)."[144] The court reiterated its point when it stated that "[m]aking a 'subjective determination . . . of intent' is not an activity that lends itself to precise, objective rules . . . [and Starr International's proposed] reading [of Article 22(6)] would do violence to the structure and spirit of the Article."[145]

The district court also believed that Starr International's definition of treaty shopping was too limited. The court thought Starr International's definition would "narrow the concept to such an extent that even some persons who are not *bona fide* residents of a treaty nation—persons who lack a 'sufficient nexus' to either contracting state—would be entitled to benefits."[146] The court quoted former Deputy Assistant Treasury Secretary Joseph H. Guttentag "that while treaty shopping 'general[ly]' involves a third-country resident, it 'can take a number of forms,' and it is

139. *Id.*
140. *Starr III*, 275 F. Supp. 3d at 244.
141. *Id.* at 245.
142. *Id.*
143. *Id.* (citing TREATY TECHNICAL EXPLANATION, *supra* note 25, at 59).
144. *Id.* at 245.
145. *Id.*
146. *Id.* at 246.

primarily concerned with treaty abuse 'by persons who are not *bona fide* residents of the treaty partner.'"[147] The court indicated that Starr International's very reason for proposing its limited mechanical standard for Treaty Article 22(6) was that "it largely concedes that it was not a *bona fide* resident of Switzerland or the United States at the relevant time."[148] In a footnote, the district court explained why it viewed Starr International's residency in Ireland and Switzerland to be that of form and not substance. "For most of the period between 2003 and 2008, Starr had only one salaried employee, who followed the company from Bermuda, to Ireland, and finally to Switzerland."[149]

The district court reviewed the U.S. competent authority's determination to decide whether it was arbitrary and capricious. The district court rebuked the significance of Starr International's contention that if its U.S. dividend withholding tax reduction would have remained in Ireland, it would have been "automatic in Ireland but discretionary in Switzerland,"[150] meaning that "tax benefits could not have been one of its principal purposes in relocating."[151] Instead, the court opined that the focus of the "principal purpose" inquiry should be "why Starr chose Switzerland over *any other jurisdiction* where it might have moved."[152] The question, the court indicated, was "not simply why Starr chose Switzerland over Ireland . . . ."[153] The court also strongly implied that the initial move of Starr International from Bermuda to Ireland was relevant in the U.S. competent authority's decision making process because the IRS is permitted to consider "the continuity of the historical business and ownership of the foreign corporation."[154] At a later point in its decision, the court stated that "[i]t was reasonable, not capricious, for the [c]ompetent [a]uthority to consider such historical data,"—including its initial incorporation in Panama and reincorporation first in Bermuda and then in Ireland.[155]

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147. *Id.* (citing *Bilateral Tax Treaties and Protocol: Hearing Before the S. Comm. on Foreign Relations*, 105th Cong. 354 (1997)).

148. *Id.* at 246 (footnote omitted).

149. *Id.* at 264 n.12.

150. *Id.* at 247–48 (citation omitted).

151. *Id.* at 248 (citation omitted).

152. *Id.* at 248.

153. *Id.*

154. *Id.* (citing Treas. Reg. § 1.884-5(f)(2) (regarding branch profit regulations) and referencing TREATY TECHNICAL EXPLANATION, *supra* note 25, at 72).

155. *Id.* at 250.

Another defect in Starr International's attack of the U.S. competent authority's analysis is its "acknowledgment that 'U.S. Tax' was one of four key criteria that the company analyzed in deciding on a jurisdiction [which] shows that it 'constituted [a] principal consideration[]' in Starr's calculus."[156] The court stressed that while the matrix "rated [Switzerland] 'bad' for U.S. Taxes . . . it was definitely better in that regard than at least one of the other finalists (Bermuda)."[157] Furthermore, if in fact Starr International "had been afforded discretionary relief—which . . . [it] certainly seems to indicate was expected—then Switzerland would have tied for first place in that category with the other jurisdictions."[158]

The district court dismissed Starr International's assertion that "the [c]ompetent [a]uthority acted arbitrarily and capriciously because it failed to definitively conclude that the text of the Treaty should be overwritten by text in *other* bilateral tax treaties [that favorably address Starr International's particular structure], and because there is no legislative history to the contrary."[159] The court said, "at the very least, it was not unreasonable for the [c]ompetent [a]uthority to decline to read into the treaty a provision that was not there."[160]

This writer has no major qualms with the court's analysis in *Starr III*, with an important proviso that the APA route was inappropriate because "the APA supports a cause of action only when 'there is no other adequate remedy in a court.'"[161] Theoretically, had the APA path been proper, the *Starr III* reasoning appears sound as did its ultimate conclusion that "the [c]ompetent [a]uthority satisfied its obligations under the APA to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[162] Furthermore, from the available information it appears the U.S. competent authority's decision to deny relief was reasonable. What this writer finds very disturbing, however, is the decision by the government to assert that the political question doctrine barred judicial review as well as the decision in *Starr II* which resulted in the district court

156. *Id.* at 248.

157. *Id.* at 249.

158. *Id.*

159. *Id.*

160. *Id.*

161. Starr Int'l Co. v. United States, 910 F.3d 527, 536 (D.C. Cir. 2018) (citing 5 U.S.C. § 704).

162. *Starr III*, 275 F. Supp. 3d at 251 (citing Ark Initiative v. Tidwell, 816 F.3d 119, 127 (D.C. Cir. 2016)).

undertaking an incorrect and circuitous path *vis-à-vis* the APA to weigh in on the merits of Starr International's assertion. Thankfully, the court of appeals analyzed this issue correctly and reached the proper conclusion. The government should take note for future controversies.

D. D.C. Circuit Court of Appeals Decision

The Court of Appeals for the D.C. Circuit held that Starr International's tax refund did not raise a nonjusticiable political question and therefore Starr International could proceed with its tax refund claim.[163] The court denied Starr International's request that it "hold that the IRS misinterpreted and misapplied Article 22(6) and the principal purpose test of the Technical Explanation . . . [and thus is] leav[ing] it to the District Court . . . to consider Starr's arguments in the context of the tax refund action."[164] The court held that Starr International did not have a cause of action under the APA because "[t]he APA supports a cause of action only when 'there is no other adequate remedy in a court.'"[165]

As to the latter conclusion, the court determined Starr International had the normal tax refund claim procedure available to it.[166] The circuit court indicated that I.R.C. § 7422(a) "provides a cause of action for the 'recovery' of a 'tax alleged to have been erroneously or illegally assessed or collected,' . . . which is precisely the relief Starr seeks."[167] In rejecting the Government's assertion that Starr International's case "should be decided under the APA,"[168] the court concluded that a case cited by the Government, *Cohen v. United States*,[169] was inapposite.[170] It observed that the plaintiffs in *Cohen* "sought prospective, non-monetary relief . . . ."[171] In contrast, Starr International "challenges the validity of an individual tax, not IRS procedures, and requests retroactive monetary relief."[172]

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163. *Starr Int'l*, 910 F.3d at 530.
164. *Id.* at 537–538.
165. *Id.* at 536 (citing 5 U.S.C. § 704).
166. *Id.* at 537–38.
167. *Id.*
168. *Id.*
169. 650 F.3d 717 (D.C. Cir. 2011).
170. *Starr Int'l*, 910 F.3d at 536.
171. *Id.*
172. *Id.*

The circuit court began its analysis by quoting the Supreme Court's expression of the political question canon in the famed decision *Baker v. Carr*.[173] It stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[174]

The circuit court pointed out that "[n]one of the *Baker v. Carr* factors are present in Starr's tax refund claim."[175] It stressed that "the Supreme Court has made it clear that application of the political question doctrine is a limited and narrow exception to federal court jurisdiction."[176] The circuit court quoted the Supreme Court, reiterating that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance . . . ."[177] Furthermore, the circuit court, quoting a later Supreme Court decision, stated that "courts have the authority to construe treaties."[178] The circuit court emphasized that the Supreme Court has recognized that "[a] court cannot 'avoid [its] responsibility' to enforce a specific statutory right 'merely because the issues have political implications.'"[179]

Additionally, the circuit court was critical of the district court's determination in *Starr II* "that Starr's refund action was nonjusticiable because granting a refund would 'impinge upon the Executive's prerogative to engage in [the consultation] process'

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173. *Id.* at 533 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

174. *Baker*, 369 U.S. at 217.

175. *Starr Int'l*, 910 F.3d at 534.

176. *Id.* at 533.

177. *Id.* (citing *Baker*, 369 U.S. at 211).

178. *Id.* at 533–34 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

179. *Id.* at 534 (citing Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (quoting another source)).

with Switzerland."[180] The circuit court thought that the lower court's reasoning for its holding was inapt. The circuit court considered it to be ill founded "that a decision about Starr's eligibility for relief . . . would impermissibly 'establish the outcome of any negotiation or consultation between an executive-branch official and representatives of a foreign country.'"[181] Instead, the circuit court underscored that "[o]ur holding does not grant Starr the right to review the consultation . . . [and that] Starr duly concedes that it has no right to challenge the consultation itself."[182]

Without reference to the original district court's decision in *Starr I*, the circuit court echoed the lower court's initial thinking that Treaty "Article 22(6) and the Technical Explanation provide meaningful standards that enable a court to determine whether the IRS's determination was erroneous."[183] The circuit court indicated that this was not a situation wherein "'[t]he federal courts are . . . being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination' . . . ."[184] Rather, the court was "merely tasked with, for instance, the 'familiar judicial exercise' of determining how a statute should be interpreted or whether it is constitutional."[185] The circuit court stated that the tax refund "claim [only] requires a court to 'determine the nature and scope of the duty imposed' on the U.S. [c]ompetent [a]uthority under Article 22(6)."[186] This type of inquiry "call[s] for applying no more than the traditional rules of statutory construction" with respect to the Treaty "and then applying this analysis to the particular set of facts presented" in Starr's case.[187]

The circuit court "remand[ed] the case to the District Court to allow Starr to pursue its claim for a tax refund."[188] It observed that there was some uncertainty as to what would follow this remand but noted that "[o]ne of four possible scenarios will likely play out though the parties and the District Court may consider other ways

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180. *Id.* at 535 (citing Starr Int'l Co. v. United States (*Starr II*), No. 14-cv-01593 (CRC), 2016 WL 410989, at *2 (D.D.C. Feb. 2, 2016)).

181. *Starr Int'l*, 910 F.3d at 535 (citing *Starr II*, 2016 WL 410989, at *4).

182. *Id.*

183. *Id.* at 534.

184. *Id.* (quoting Jaber v. United States, 861 F.3d 241, 248 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 480 (2017)).

185. *Id.* (quoting *Jaber*, 861 F.3d at 248).

186. *Id.* at 535 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

187. *Starr Int'l*, 910 F.3d at 535 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230).

188. *Id.* at 536–37.

to proceed."[189] While the next steps for Starr International are uncertain and the litigation may wrap up without the refund sought, the decision itself should serve other taxpayers with beneficial precedent for avoiding an inappropriate judicial constraint.

E. The Limitations on Benefits Provision and Its Safety Valve

As noted above, the reduced dividend withholding tax provided by Article 10 of the Treaty was subject to the Limitation on Benefits provision contained in Article 22 of the Treaty.[190] This safeguard to treaty benefits is widespread in treaties where the United States is a party.[191]

According to Professors Boris Bittker and Lawrence Lokken in their seminal treatise—*Federal Taxation of Income, Estates and Gifts*—"[s]ince about 1980, the United States has insisted on including in new income tax treaties provisions denying treaty benefits in situations where they are likely to flow primarily to residents of third countries."[192] These so-called "treaty shopping" provisions "limit the unintended use of a U.S. income tax treaty by third country residents."[193] Thus, they are an important condition

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189. *Id.* at 537 (The alternatives listed by the circuit court are: "1. The U.S. Competent Authority could decide to proceed with consultation and might subsequently determine that Starr is entitled to benefits under the U.S.–Swiss Treaty. If the IRS awards Starr the monetary amount it seeks, the case will presumably be moot. 2. The U.S. Competent Authority might consult with its Swiss counterpart and maintain its current position that Starr is not entitled to Treaty benefits . . . If the District Court finds that the IRS should have deemed Starr eligible for benefits under Article 22(6), then the court may award Starr the money it seeks, consultation having already occurred as required under the Treaty. 3. The IRS might choose to maintain its current position without engaging in consultation at this time. If the District Court finds the IRS's position indefensible, it can stay the case pending consultation between the U.S. and Swiss Competent Authorities, as no refund can be granted without consultation. The IRS can return to court and have the opportunity to present any new evidence that may have come to light during consultation. This posture would not afford Starr the right to seek review of the consultation, which is simply part of the IRS's deliberative process. But if the IRS returns to the District Court and cites information obtained during the consultation process as the reason for denying tax benefits, that decision would be reviewable. 4. If the refund action goes forward and the District Court finds the evidence supports the IRS's decision to deny benefits, then judgment may be granted in the Government's favor.").

190. *See* Markus F. Huber & Matthew S. Blum, *Limitation on Benefits Under Article 22 of the Switzerland-U.S. Tax Treaty*, 39 TAX NOTES INT'L 547 (2005) (discussing the many issues raised by the U.S.–Swiss limitation on benefits article) [hereinafter *Huber & Blum*].

191. Macdonald, *supra* note 20, at 31 (citation omitted) (indicating that "the United States is poised to eliminate the last of its remaining easily 'shoppable' treaties.").

192. BITTKER & LOKKEN, *supra* note 13, at ¶ 67.3.3 (citation omitted).

193. Macdonald, *supra* note 20, at 14.

contained in the Model Tax Treaty and its recent predecessors.[194] Professors Bittker and Lokken hypothesize that the reason the Treasury Department is adamant about including a Limitation on Benefits treaty provision lies in the fact that the U.S. "does not have treaties with many nations from which it draws capital, and residents of these countries, being denied direct access to treaty benefits, can be expected to exploit any indirect routes to these benefits that may be open to them."[195] While J. Ross Macdonald agrees that "the U.S. anti-treaty shopping program helped to improve U.S. income tax treaties,"[196] he is critical of how the program has been structured. In this regard, he writes that:

> [T]he U.S. anti-treaty shopping program . . . came at the cost of a staggering increase in complexity in treaty analysis, the burden of which has fallen almost entirely on taxpayers. It is often the case that taxpayers, who most rational observers would see as parties entitled to tax treaty benefits, are justifiably uncertain regarding their treaty entitlement under current U.S. limitation on benefits rules. This is a function of the ambiguity, complexity and lacunae in the existing U.S. anti-treaty shopping rules which are currently structured as a series of objective tests.[197]

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194. *Id.* at 13–14; BITTKER & LOKKEN, *supra* note 13, at ¶ 65.1.6 (noting the U.S. Model Treaty is used by the U.S. Treasury Department "in formulating its initial position in treaty negotiations"). The most recent version of the U.S. Model Treaty was issued in 2016, and its most recent predecessors were issued in 2006 and 1996. *See* DEP'T OF THE TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION (2016); DEP'T OF THE TREASURY, U.S. MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006 (2006); DEP'T OF THE TREASURY, U.S. MODEL INCOME TAX CONVENTION OF SEPTEMBER 20, 1996 (1996). The 2016, 2006, and 1996 Models are available on the Treasury's website at https://www.treasury.gov/resource-center/tax-policy.d. 2018.

195. BITTKER & LOKKEN, *supra* note 13, at ¶ 67.3.3; *see also* Macdonald, *supra* note 20, at 14 (highlighting the contrast between US treaties and OECD Model Treaties by pointing out that "the various OECD Model Treaties do not contain an anti-treaty shopping article (although, since 1977, the OECD Commentaries contemplate that anti-treaty shopping language can be added to a treaty by the Contracting States when desired). While other countries have included treaty shopping limitations in certain of their income tax treaties (particularly those with jurisdictions they perceive to be tax havens) and while the OECD Base Erosion and Profit Shifting (BEPS) initiative has recently focused substantial international attention on this issue, no country has historically carried the attack on treaty shopping as far as the United States.") (footnotes omitted).

196. Macdonald, *supra* note 20, at 29.

197. *Id*. Macdonald's article is very disparaging of the limitations on benefits article in the 2016 U.S. Model Tax Treaty, writing that the U.S. "should reconsider certain aspects of its anti-treaty shopping policy that have exceeded (particularly with respect to the changes made to the limitation on benefits article by the 2016 U.S. Model Treaty) any rational policy regarding treaty shopping." *Id*. at 30. Macdonald advised that "the U.S. tax authorities need to focus more on compliance and less on further tightening the existing anti-treaty shopping rules. Unfortunately, it is always easier to 'tighten the rules' than

In its brief to the circuit court, Starr International heavily relied on the pitfalls surrounding the Limitation on Benefits provision, drawing support from statements by Richard A. Gordon—the then international tax counsel for the Joint Committee on Taxation—at a Senate hearing.[198] In the fact pattern given, a Canadian business (Company A) wanted to invest in a United States venture (Company B). Instead of making a direct investment in the United States business, Company A "would make the investment through a subsidiary holding company (Company C) established in the Netherlands, which had a favorable tax treaty with the United States."[199] Absent a Limitation on Benefits provision, "[b]y virtue of the artificial interposition of Company C, Company A would receive treaty benefits above and beyond the benefits available to a Canadian business investing in the United States."[200] According to Starr International, this was Article 22's "single purpose," i.e., "to prevent the inappropriate use of the treaty by third-country residents."[201]

Starr International did not meet the mechanical tests of Article 22 of the Treaty because "Starr AG and the [Starr International] Foundation were not covered by Article 22(1)(f)."[202] Furthermore, "while Starr AG or the [Starr International] Foundation might qualify for treaty benefits, [contained in Article 22(2) addressing charitable organizations,] Starr International itself could not qualify."[203] This result was in

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actually to try to implement them. This was certainly the tack taken by the Treasury in its revision to the limitation on benefits rules contained in the 2016 U.S. Model Treaty." *Id*. at 31. He also expressed disapproval of Article 22 of the U.S.–Swiss Tax Treaty asserting that "[i]f it is appropriate to state that certain aspects of U.S. limitation on benefits provisions are not well conceived, this has never been more true than in the case of the limitation on benefits article contained in the 1996 U.S.-Switzerland Treaty." *Id*. at 195 (footnote omitted).

198. Brief for Appellant at 6, Starr Int'l Co. v. United States, 910 F.3d 527 (D.C. Cir. 2018) (No. 17-5238) (citing *Tax Treaties: Hearings Before the S. Comm. on Foreign Relations*, 97th Cong. 43 (1981) (statement of Richard A. Gordon, International Tax Counsel, J. Comm. on Taxation)).

199. *Id.*

200. *Id.*

201. *Id.* at 45–46 (quoting S. Exec. Rep. No. 105-10, at 3 (1997)); *see also id.* at 43 (stating "although the technical explanation makes references to third-country residents, it expressly states that residency and other criteria in Article 22's mechanical tests are mere 'surrogates' . . . for intent" as a basis for the government's rejection of Starr International's focus on third-party residents).

202. Macdonald, *supra* note 20, at 337. At a later point in his article Macdonald was more definitive, indicating that "[w]hile the charity *would* qualify for treaty benefits as a resident of Switzerland, Starr International needed the connection of the charity in order for Starr International to qualify for treaty benefits." *Id*. at 338 (emphasis added).

203. *Id.* at 337.

spite of the fact that "the vast preponderance of its economics and vote was owned by U.S. persons and a Swiss charity."[204] Thus, to avail itself of the reduced dividend withholding tax under Article 10, Starr International needed to be accorded relief under Treaty Article 22(6)'s safety valve provision.[205]

Macdonald indicated that the Treasury Department agreed on the necessity of a safety valve test in the Limitation of Benefits clause since it was "aware that the objective tests were mechanical and by their very nature would never completely ensure that all qualifying taxpayers would qualify for treaty benefits."[206] As such, the Treasury "accepted the need to provide a mechanism by means of which persons that, for one reason or another, could not qualify under one of the objective tests could seek relief from the competent authorities."[207] Macdonald explained that "[t]here are two principal versions of the safety valve test."[208] The one utilized in the Treaty "is more generically drafted and can be found in approximately [twenty-six] U.S. income tax treaties."[209]

Markus F. Huber and Matthew S. Blum commented in 2005, writing that they did not believe Article 22(6) of the Treaty would open too many doors.[210] Macdonald also expressed pessimism with the utility of the safety valve provision in general, noting that "based entirely on anecdotal evidence, it is understood that the U.S. competent authority has typically proved to be quite restrictive in extending treaty benefits under this test."[211]

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204. *Id.*

205. *Id.* at 334.

206. *Id.* at 328.

207. *Id.* at 328–29.

208. Macdonald, *supra* note 20, at 329.

209. *Id.* at 331 (citation omitted).

210. *See* Huber & Blum, *supra* note 190, at 567.

211. Macdonald, *supra* note 20, at 333–34 ("[T]he author is aware of only one or two cases where a taxpayer has been granted treaty benefits under this provision. In addition, a former colleague who belongs to the Washington International Tax Study Group, a group made up of approximately 30 to 35 of the most senior international tax lawyers in Washington, D.C., once asked the members how many of them had received rulings for clients under this test. The number who had received such rulings was surprisingly small. Third, and finally, it is also anecdotally reported that the Service has become steadily less willing to give favorable consideration to ruling requests over the past 10 to 15 years. In general, it is understood that cases most likely to be accepted involve the situation where a taxpayer just barely fails to satisfy one of the objective tests (for example, where the public company test required 10% public trading volume and the company's trading volume for the year was only 9.98% or where Starr International's base erosion was slightly in excess of 50%).") .

III. THE POLITICAL QUESTION DOCTRINE AND WHY THE CIRCUIT COURT WAS CORRECT IN HOLDING IT TO BE INAPPLICABLE TO *STARR INTERNATIONAL*

In *Rucho v. Common Cause* in June 2019,[212] the Supreme Court held that partisan gerrymandering claims are beyond the reach of the federal courts, describing the political question doctrine and at least one of its rationales as follows:

> Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction . . . Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]."[213]

Later in its opinion, the Supreme Court expanded on its concern for adjudicating gerrymandering cases without a manageable standard.

> With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust. If federal courts are to 'inject [themselves] into the most heated partisan issues' by adjudicating partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.'[214]

Vieth v. Jubelirer is another case on political gerrymandering in recent history but it preceeds *Rucho* enough to be heavily referenced in a favorable light.[215] In a 5–2 decision, the Court in

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212. 139 S. Ct. 2484 (2019).

213. *Id.* at 2494. Four justices dissented arguing the doctrine was inappropriately applied to the cases at bar, with Justice Kagan concluding her dissent, "[o]f all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent." *Id.* at 2525 (Kagan, J., dissenting).

214. *Id.* at 2498–99 (majority opinion) (citation omitted).

215. *Id.* at 2498. (demonstrating that the crux of the *Rucho* argument was the belief that a standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the

Vieth affirmed the lower court's decision dismissing a claim to enjoin a Pennsylvania General Assembly congressional redistricting plan that was alleged to be in violation of Article I of the Constitution and the Fourteenth Amendment's Equal Protection Clause.[216] After quoting Justice Marshall's celebrated line from *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[217] the Court noted that there are some limits to this rationale. In this regard, Justice Scalia's decision in *Vieth* declared that "[s]ometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[218] The Court decided the political question doctrine barred the claim because of "a lack of judicially discoverable and manageable standards for resolving it."[219]

A landmark case for the political question doctrine was *Baker v. Carr*, [220] although it was somewhat tempered by *Rucho* and *Vieth*. Like *Rucho* and *Vieth*, the case dealt with voting rights. The appellants in *Baker v. Carr* had alleged that:

> [B]y means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the *Fourteenth Amendment to the Constitution of the United States* by virtue of the debasement of their votes."[221]

One of the grounds asserted by the appellees to dismiss the action "rested upon . . . the inappropriateness of the subject matter for judicial consideration—what . . . [the Supreme Court] . . . designated 'nonjusticiability.'"[222] The Court explained that with respect to nonjusticiability, "consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty

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American political process" and with such standards "intervening courts—even when proceeding with best intentions—would risk assuming political, not legal responsibility for a process that often produces ill will and distrust.") (quoting Vieth v. Jubelirer, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring)).

216. *See Vieth*, 541 U.S. at 271–73, 306.

217. *Id.* at 277 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

218. *Id.* (citations omitted).

219. *Id.* at 277–78. This is the second factor given by the Court in Baker v. Carr, 369 U.S. 186, 217 (1962). *See infra* notes 221–33 and accompanying text.

220. 369 U.S. 186 (1962).

221. *Id.* at 187 (emphasis added) (citations omitted).

222. *Id.* at 198.

asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[223] The Court held that "this cause presents no nonjusticiable 'political question.'"[224] The Court indicated that the district court erroneously determined "that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable."[225]

Of particular relevance to the circuit court decision in *Starr International vis-à-vis* the question of the application of the political question doctrine is whether "all questions touching foreign relations are political questions."[226] According to the Court, issues relating to foreign relations might become nonjusticiable political questions where there is a "risk [of] embarrassment to our government abroad."[227] Justice Brennan, writing for the Court, opined that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[228] As to tax treaties in particular, the Court declared that: "[T]hough a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action . . . must be regarded as of controlling importance,' if there has been no conclusive 'governmental action' then a court can construe a treaty and may find it provides the answer."[229]

As to when the courts should determine something to be a nonjusticiable political question, the Court formulated the following analysis which was quoted by the D.C. Circuit Court in *Starr International*:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need

223. *Id.*
224. *Id.*
225. *Id.* at 209.
226. *Id.* at 211 (footnote omitted).
227. *Id.* at 226.
228. *Id.* at 211.
229. *Id.* at 212.

> for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[230]

The Supreme Court stated, with respect to the aforementioned criteria, that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."[231]

Professor Tara Leigh Grove, writing pre-*Rucho v. Common Cause*, saw *Baker v. Carr* as enunciating what she referred to as the "modern political question doctrine, one that could serve, not as a doctrine of judicial restraint (or subservience), but as a source of power."[232] Because the Roberts Court was reticent to address disgraceful gerrymandering in *Rucho v. Common Cause* due to political question underpinnings, this assessment may be questionable today. Nevertheless, this line of cases narrates the evolution of the political question doctrine and indicates that, at the very least, a form of the political question doctrine "has been a feature of our legal system for over two hundred years [commencing with *Marbury v. Madison*]."[233] Professor Grove argues that the political question doctrine employed by the courts until the mid-twentieth century, which she refers to as the "traditional political question doctrine," was "strikingly different from the current version."[234] Professor Grove writes that under the courts' application of the traditional political question doctrine, the courts "did not dismiss as nonjusticiable an issue that

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230. *Id*. at 217. Justice Brennan's *Baker v. Carr* test to determine when to treat an issue as a political question has been subject to much criticism. *See*, *e.g.*, J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 163 (1988) [hereinafter Mulhern].

231. *Baker*, 369 U.S. at 217. Justice Frankfurter analogized his vigorous dissent in this case to the opinion he authored in *Colegrove v. Green* where, with respect to reappointment, he stated "[c]ourts ought not to enter this political thicket." *Id*. at 277–78 (Frankfurter, J. dissenting); Colegrove v. Green, 328 U.S. 549, 556 (1946).

232. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1913 (2015) (footnote omitted) [hereinafter Grove].

233. *Id*. at 1910 (referencing Marbury v. Madison, 5 U.S. 137 (1803)) (footnote omitted). In the renowned case of *Marbury v. Madison*, Chief Justice Marshall declared that "[t]he province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in court." *Marbury*, 5 U.S. at 170. As noted above, the opinion also contained Justice Marshall's even more celebrated statement that "[i]t is emphatically the province and duty of the [courts] to say what the law is." *Id*. at 177. The courts remain the final arbiter of what is or is not a political question.

234. Grove, *supra* note 232, at 1911.

presented a political question but rather enforced and applied the political branches' conclusion."[235] Under this practice, "the courts treated the political branches' determination as a (factual) rule of decision for the case. That was true, even if the courts believed that the political branches were in error."[236]

Under the traditional political question doctrine, "[b]oth federal and state courts were required to enforce and apply the determinations of the federal political branches on 'political questions.'"[237] Professor Grove wrote that under the traditional political question doctrine, "the [older] courts followed the executive's determination, 'whether the executive be right or wrong.'"[238] That is, the political question doctrine was considered to "generally require . . . the courts to treat 'the expressed view of the political department' as 'a rule of decision for the court.'"[239]

A new interpretation of the political question doctrine began to evolve from legal scholars "[b]y the early 1930s . . . [with,] by the mid-twentieth century, the shift largely" completed.[240] "Despite the lack of change in the case law, much of the legal community gradually came to see the 'political question doctrine' as a device that would prohibit federal courts from ruling on certain constitutional issues."[241]

Professor Grove argues that the landmark decision *Baker v. Carr* represented "a new political question doctrine" different from both the traditional political question doctrine and that which had been espoused by the legal community beginning in the early 1930s.[242] She noted that the legal community's interpretation of the political question doctrine was "in serious tension with the Warren Court's vision of its institutional role."[243]

Professor Grove's interpretation of the modern political question doctrine, as articulated by the Court in *Baker v. Carr*, was one that "would no longer enforce the political branches' factual determinations, whether they 'be right or wrong.'"[244] Justice Brennan, writing for the Court in *Baker v. Carr*, articulated the political question doctrine as one where "the Court

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235. *Id*.
236. *Id*.
237. *Id.* (footnote omitted).
238. *See id*. at 1923 (footnote omitted).
239. *Id.* at 1948.
240. Grove, *supra* note 232, at 1948–49.
241. *Id.* at 1912.
242. *Id.* at 1913.
243. *Id.* at 1959.
244. *Id*. at 1913–14 (footnote omitted).

would not 'shut its eyes to an obvious mistake' in the political decision making."[245] Professor Grove, on the other hand, saw the *Baker v. Carr* description of the political question doctrine as one wherein "the Court would independently decide both the legal and factual issues arising in any case or controversy."[246] Furthermore, under the modern political question doctrine of *Baker v. Carr*, the Supreme Court "took control of (what existed of) the constitutional side of the doctrine: 'Deciding whether a matter has in any measure been committed by the Constitution to another branch . . . is a responsibility of this Court *as ultimate interpreter of the Constitution*.'"[247]

About a quarter of a century after *Baker v. Carr*, the Court decided *Japan Whaling Ass'n v. American Cetacean Society*,[248] another case cited by the D.C. Circuit Court in *Starr International*.[249] The question before the Court in *Japan Whaling* was whether, as a consequence of certain federal legislation, the Secretary of Commerce was "required to certify that Japan's whaling practices 'diminish the effectiveness' of the International Convention for the Regulation of Whaling because that country's annual harvest exceeds quotas established under the Convention."[250] The district court held, and the court of appeals affirmed, that "the Secretary of Commerce [was required to] immediately . . . certify to the President that Japan was in violation of the . . . sperm whale quota."[251] After the district court's decision, "Japan's Minister for Foreign Affairs informed the Secretary of Commerce that Japan would . . . withdraw[] . . . its objection to the [International Whaling Commission] moratorium—provided that the United States obtained reversal of the [d]istrict [c]ourt's order."[252]

Japan Whaling stands as an important precedent in political question jurisprudence, now at issue in *Starr International*.[253] The petitioners in *Japan Whaling Association* asserted "that a federal court . . . lacks the judicial power to command the Secretary of Commerce, an Executive Branch official, to dishonor and

245. *Id*. at 1962–63 (quoting Baker v. Carr, 369 U.S. 186, 214 (1962)).
246. Grove, *supra* note 232, at 1914 (footnote omitted).
247. *Id*. (emphasis in original)(footnote omitted).
248. 478 U.S. 221 (1986).
249. Starr Int'l. Co. v. Comm'r, 910 F.3d 527, 534 (D.C. Cir. 2018).
250. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 223 (1986).
251. *Id*. at 229.
252. *Id*.
253. *See id*. at 229–30.

repudiate an international agreement."[254] The Court flatly rejected this argument, restating the *Baker* holding, that "the courts have the authority to construe treaties and executive agreements, and . . . interpreting congressional legislation is a recurring and accepted task for the federal courts."[255] The Court noted, "[T]he challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation."[256] Furthermore, the Court acknowledged the relationship between federal statutes, foreign relations, and "the premier role which both Congress and the Executive play in this field."[257] However, the Court sidestepped the political question doctrine by narrowing the issue to statutory interpretation, finding a judicable controversy.[258]

The next important Supreme Court case discussing the breadth of a court's power concerning the political question doctrine is *Zivotofsky v. Clinton*,[259] a case decided about a half-century after *Baker v. Carr*. *Zivotofsky* involved an American child born in Jerusalem who, along with his parents, wanted to have Israel listed as his place of birth on his passport as permitted by a Congressional statute.[260] The State Department, however, refused his request and declined to follow the Foreign Relations Authorization Act, citing its "longstanding policy of not taking a position on the political status of Jerusalem."[261] A subsequent lawsuit filed by Zivotofsky's parents attempted to force the State Department to follow the statute. However, the district court granted a motion to dismiss the complaint because the suit presented a "nonjusticiable political question" and "Zivotofsky lacked standing."[262] On appeal, the D.C. Circuit concluded that Zivotofsky had standing but the issue became whether the Foreign Relations Authorization Act entitled Zivotofsky to have just "Israel" listed as his place of birth.[263] Finding that additional factual development was in order, the circuit court remanded the case back to the district court.[264] The district court once again

254. *Id.* at 229.
255. *Id.* at 230.
256. *Japan Whaling Ass'n*, 478 U.S. at 230.
257. *Id.*
258. *Id.*
259. 566 U.S. 189 (2012).
260. *Id.* at 191–96.
261. *Id.* at 191.
262. *Id.* at 193.
263. *Id.*
264. *Id.*

found the case to be nonjusticiable, because "resolving Zivotofsky's claim on the merits would necessarily require the court to decide the political status of Jerusalem."[265] This position was then affirmed by the D.C. Circuit, reasoning that "the Constitution gives the Executive the exclusive power to recognize foreign sovereigns, and that the exercise of this power cannot be reviewed by the courts."[266] In a concurring opinion, Judge Edwards, the author of *Starr International*, wrote separately to express his view that the political question doctrine had no application to this case.[267] His concurrence was based on his belief that the federal statute was unconstitutional because "the Constitution gives the power [in question] exclusively to the President."[268]

Chief Justice Roberts, the author of the *Rucho v. Common Cause* opinion, found the political question doctrine to be inapposite in *Zivotofsky*. Writing for the Court, he indicated that the lower courts misconstrued the real issue; the issue was not "to 'decide the political status of Jerusalem,'"[269] but was whether Zivotofsky "may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth."[270] The Court observed that "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be."[271] This was simply a "request . . . that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise."[272] The Court correctly restricted the employment of the political question doctrine, which it characterized as "a narrow exception" to the requirement that courts have "a responsibility to decide cases properly before it" so as not to prevent construing the statute.[273]

Deciding the unsuitability of the political question doctrine in *Starr International*, this writer submits it is considerably less

265. *Id.*
266. *Id.* at 193–94.
267. *Id.* at 194.
268. *Id.*
269. *Id.* at 195.
270. *Id.*
271. *Id.* at 196.
272. *Id.*
273. *Id.* at 194–95.

demanding than what the Court confronted in *Zivotofsky v. Clinton*. Consider the opinion of the sole justice dissenting in *Zivotofsky*, Justice Breyer. He writes that in matters involving certain foreign affairs, there "is a judicial hesitancy to make decisions that have significant foreign policy implications . . . ."[274] He notes the political question has been applied to cases relating to, for example, "the validity of a treaty . . . or upon its continuing existence[,] . . . the existence of foreign states, governments, belligerents, and insurgents[, and] . . . the territorial boundaries of foreign states."[275] What aspect of foreign relations is put in jeopardy when the judiciary permits a tax refund suit to proceed when it involves the correctness of the Service disallowing reduced withholding tax on U.S. sourced dividends? Is it proceeding with the lawsuit in a manner as envisioned by the Circuit Court that will cause "embarrassment from multifarious pronouncements by various departments on one question. . .[?]"[276] Does the government truly believe that the decision of the circuit court in *Starr International* will ruffle any feathers in Bern?

This writer is not unmindful of the implications of the requirement in Article 22(6) of the Treaty for "consultation," albeit not agreement, with the Swiss competent authority before relief can be granted. It certainly caused a major consternation for the district court in *Starr II*. This provision might serve as a potential impediment to a court unilaterally granting a refund, a point acknowledged by the circuit court when it stated that "no refund can be granted without consultation."[277] In this respect, it is admittedly different from a case like *Zivotofsky*, where the court's decision should resolve the entire matter.[278] It would, however, not be unreasonable in this writer's opinion to subscribe to Starr International's position that the consultation process "was meant to be ministerial in nature."[279] Further, given the high probability that Switzerland would not raise any objections to a United States tax benefit being granted to a Swiss resident, it should be permissible for a court to grant a refund. The circuit court did not, however, go this far, balancing its rejection of the application of

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274. *Id*. at 214.

275. *Id.*

276. Baker v. Carr, 369 U.S. 186, 217 (1962).

277. Starr Int'l Co. v. United States, 910 F.3d 527, 537 (D.C. Cir. 2018).

278. To clarify, in *Zivotofsky*, the Supreme Court remanded the case stating that "[h]aving determined that the case is justiciable, we leave it to the lower courts to consider the merits in the first instance." *Zivotofsky*, 566 U.S. 189, 202 (2012).

279. Brief for Appellant at 57, *Starr Int'l*, 910 F.3d 527 (No. 17-5238).

the political question doctrine with any tax relief predicated on consultation with the Treaty counterpart.

Starr International is not a case where failure to treat the matter as a political question will create "the threat of public reaction to judicial activism."[280] The theory for judicial abstinence in this type of case, as described by Professor J. Peter Mulhern (a scholar who does not subscribe to it as a valid justification for a court's actions), is that "[t]he courts must not try to do more than the people will permit them to do. If the courts do not limit their own role, the people will limit it for them. By limiting themselves, the courts can ensure that their most important functions are not impaired."[281] Whether or not one considers this theory, advanced by the eminent constitutional law scholar Dean Jesse Choper, to be a compelling basis for determining a matter to be a political question,[282] it clearly has no bearing in a federal court's consideration of the Starr International refund claim.

It is useful to compare the *Starr International* fact-pattern with those in *Rucho v. Common Cause* and *Vieth v. Jubelier*. Whether one agrees with the judgments in *Rucho* and *Vieth*, and this writer is dubious, one can at least have some empathy for the Court's concern that future courts may have "no legal standards to limit and direct their decisions."[283] As the D.C. Circuit Court of Appeals wrote in *Starr International*, "Article 22(6) and the Technical Explanation provide meaningful standards that enable a court to determine whether the IRS's determination was erroneous."[284] As noted above, this assessment was shared by the district court which maintained this position even upon reconsideration.[285]

The political question doctrine serves a vital function to ensure "the separations of powers."[286] For example, in a relatively

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280. Mulhern, *supra* note 230, at 168.

281. *Id.* at 168–69.

282. Jesse H. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 169 (1980).

283. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

284. *Starr Int'l*, 910 F.3d at 534.

285. In *Starr II*, the district court "reaffirmed its prior holding that a manageable standard exists for assessing whether Starr met the relevant criteria for obtaining treaty benefits. It also reiterated that interpreting the Treaty 'in a manner necessary to determine whether Starr met the applicable criteria would not offend the political-question doctrine.' However, the court dismissed Starr's tax refund claim under 26 U.S.C. § 7422(a) as raising a nonjusticiable political question. As the District Court saw it, ordering the IRS to pay Starr the requested $38 million refund would impinge upon the Executive Branch's exercise of diplomacy in its consultation with the Swiss competent authority, as required under Article 22(6)." *Id.* at 532.

286. *Baker*, 369 U.S. at 210.

recent case, *Jaber v. United States*,[287] a decision cited by the circuit court in *Starr International*,[288] plaintiffs sought "a declaratory judgment stating their family members were killed in the course of a U.S. drone attack in violation of international law governing the use of force, the Torture Victim Protection Act (TVPA), and the Alien Tort Statute (ATS)."[289] They alleged that the family members in question were collateral damage in a U.S. drone strike in Yemen.[290]

In finding the political question doctrine precluded a court's adjudicating this matter, the circuit court declared that "[t]o resolve . . . [the] claims, a reviewing court *must* determine whether the U.S. drone strike in Khashamir [Yemen] was 'mistaken and not justified.'"[291] In contrast to *Zivotofsky*, the court indicated that plaintiffs' claims "would require the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target—to determine, among other things, whether an 'urgent military purpose or other emergency justified' a particular drone strike."[292] The court of appeals indicated that "Plaintiffs' request is more analogous to an action challenging the Secretary of State's independent refusal to recognize Israel as the rightful sovereign of the city of Jerusalem, a decision clearly committed to executive discretion."[293] Applying the political question doctrine so that "the foreign target of a military strike cannot challenge in court the wisdom [that] military action taken by the United States" is certainly a world apart from what the court confronted in *Starr International*.[294]

IV. CONCLUSION

The Court of Appeals for the District of Columbia correctly decided in *Starr International* that Starr International's refund lawsuit should not have been dismissed on grounds that it

287. 861 F.3d 241 (D.C. Cir. 2017).

288. 910 F.3d 527 (D.C. Cir. 2018).

289. *Jaber*, 861 F.3d at 243.

290. *Id.* at 244.

291. *Id.* at 247 (emphasis in original).

292. *Id.* at 249.

293. *Id.*

294. *Id.* at 250 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 851 (D.C. Cir. 2010)). In a very thoughtful concurring opinion in *Jaber*, Judge Brown acknowledged with lament that "the political question doctrine insures that effective supervision of this wondrous new warfare will not be provided by U.S. courts." *Id.* at 250 (Brown, J., concurring). While recognizing that in the absence of judicial review, there is no "check [on] this outsized power," he conceded that "the Judiciary is simply not equipped to respond nimbly to a reality that is changing daily if not hourly." *Id.* at 250, 252.

presented a nonjusticiable political question. Starr International's assertion that "the political question doctrine is reserved for cases that implicate sensitive policy judgments by a coordinate branch, not for ordinary cases of treaty interpretation" was proper.[295] There was no "lack of judicially discoverable and manageable standards for resolving the question before the court" and it did not entail "significant foreign policy implication[s]."[296] Furthermore, none of the other criteria set forth in *Baker v. Carr* for applying the political question doctrine were germane.

There is certainly a role in our judicial system for the courts to apply the political question doctrine, such as in *Jaber*. *Starr International* however, was a clearly inappropriate venue. It is questionable why the Government asserted this ill-chosen roadblock to resolving this matter. The interests of sound tax policy would have been better served if the Government had not contended the political question doctrine barred the court's consideration of this matter.

295. Reply Brief for Appellant at 25, Starr Int'l Co. v. United States, 910 F. 3d 527 (D.C. Cir. 2018) (No. 17-5238).

296. Zivotofsky v. Clinton, 566 U.S. 189,197, 214 (2012).