AN ANALYSIS OF THE 2013 US-POLAND INCOME TAX TREATY[1]

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I. Introduction

On October 8, 1974 the United States of America was witnessing the biggest failure to date in its banking history. A spectacular crash and collapse of the Franklin National Bank of New York was a direct result of grave mismanagement and fraud. While the public eye was directed at the bank's unfortunate downfall, a different story was unfolding on this mild 16°C Tuesday, in Washington DC. Not only was it the commencement of a ground-breaking first official visit to the US by a communist Polish leader, Edwark Gierek,[2] but it was also the first time a head of an Eastern-bloc country (other than the Soviet Union) had been welcomed to the White House. The dinner was hosted that evening at eight o'clock, by then US President Gerald Rudolph Ford, Jr.[3]. Meanwhile, a different kind of affair was taking place as a small crowd gathered in the Department of State. There, two men, an American-German in his fifties, Henry A. Kissinger, the US State Secretary, and a Polish man in his forties, Stefan Olszowski, the Foreign Minister of People's Republic of Poland[4], were about to sign an important Convention. They had all gathered to witness the governments

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1 Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income. English version available from the US Department of the Treasury: (*Treasury.gov*, 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Poland-2-13-2013.pdf> accessed 6 December 2019. Both: Polish and English versions available from Portal Podatkowy website at (*Finanse.mf.gov.pl*, 2018) <https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/> accessed 6 December 2019.

2 First Secretary of the Central Committee of the ruling Polish United Workers' Party in the People's Republic of Poland (I Sekretarz KC PZPR).

3 The White House, the protocol of the evening entitled 'Dinner in honour of his Excellency the First Secretary of the Central Committee of the Polish United Worker's Party and Mrs. Gierek' dated October 8, 1974. (*Fordlibrarymuseum.gov*, 2019) <http://www.fordlibrarymuseum.gov/library/exhibits/dinners/19741008eo.pdf> accessed 6 December 2019.

4 Minister Spraw Zagranicznych Polskiej Rzeczypospolitej Ludowej.

of the United States of America (hereinafter, the "US") and the Polish People's Republic, then still under Communist rule, sign an income tax treaty with the stated purpose of *"avoidance of double taxation and the prevention of fiscal evasion with respect to income, and a related exchange of notes."*[5] It was to be one of the first international agreements in the field of taxation signed by Poland since the end of World War II in 1945. Interestingly, a few years earlier in 1972, Richard Nixon became the first American President to ever visit Poland. The relationship between the two countries was slowly warming up and strengthening. Nearly forty years later, on February 13, 2013, the new Treaty was signed by the US Ambassador to Poland, Stephen Mull, and the Polish Deputy Finance Minister, Maciej Grabowski, in a ceremony held at the Polish Ministry of Finance in Warsaw. The signing signified the pinnacle of four years of intense work by the negotiating teams from both countries. Once ratified, the new Treaty will replace the existing 1974 bilateral Convention. Both countries are to notify one another once their respective ratification procedures are successfully completed and the Treaty will then enter into force as of the later (i.e. last) of the two notifications. As of February 2020, the Treaty has still not been ratified.

These significant moments bring us to the purpose of this article which is to analyse the proposed US-Poland Income Tax Treaty (the "Treaty") with particular attention being paid to its LOB clause. This is achieved through a recollection of the events which led to the signing in 1974 of the first Double Tax Convention[6] (the "1974 Convention") between both countries. Thereafter, this article concentrates on changes introduced in the existing Treaty articles and then moves on to discuss the newly introduced articles, i.e. those that do not exist under the provisions of the 1974 Convention which is currently in effect. This analysis will be done through the prism of other, recent Double Tax Conventions ("DTC") entered into by the US as well as agreed, and commonly seen, international practices in the field of bilateral tax agreements. The author's lens will also inspect an article that perhaps ought to have been included in the US-Poland Treaty but which is missing.

Although reminiscing a bit on the past, this article will mainly concentrate on analysing the text of the proposed Treaty and survey the current stance in anticipation of the Treaty coming into force. Considering that LoB clauses have, in the last 30

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5 Full text of the 1974 Income Tax Treaty available: 'UNITED STATES - POLAND INCOME TAX CONVENTION' (2019) <https://www.irs.gov/pub/irs-trty/poland.pdf> accessed 6 December 2019.

6 Dz. U. z 1976 r. Nr 31, poz. 178. 'Umowa Między Rządem Polskiej Rzeczypospolitej Ludowej A Rządem Stanów Zjednoczonych Ameryki O Uniknięciu Podwójnego Opodatkowania I Zapobieżeniu Uchylaniu Się Od Opodatkowania W Zakresie Podatków Od Dochodu, Podpisana W Waszyngtonie Dnia 8 Października 1974 R.' (*Prawo.sejm.gov.pl*, 2019) <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19760310178> accessed 6 December 2019.

years[7] gained importance, applicability and prominence, two sections are dedicated to their history, importance and usage as well as the actual investigation into provisions of the proposed US-Poland Treaty's own LoB clause. Some of the elements of the tests contained in the LoB provision will also be compared to other DTCs concluded or negotiated by the US around the same time.

Countries entering into DTCs normally do so with a threefold purpose: (i) to prevent so-called economic taxation, where the same income is taxable in the two countries; (ii) when cross-border trade and investment are concerned, they provide vital legal certainty; and (iii) protection of both signatories' business interests by the prevention of any form of discrimination, for example, excessive taxation abroad.[8] Also, it is useful to understand the rationale behind why countries enter into DTCs. The reasons are often seen on both macroeconomic and microeconomic levels. On a macroeconomic level, the purpose is to encourage cross-border investment and to get rid of discriminatory international trade practices. At the individual taxpayer level, such treaties lessen or remove the burden of double taxation[9] and provide for a higher degree of legal certainty and predictability when cross-border economic activities take place. DTCs are important as they affect and standardise the tax treatment of most items of income derived from cross-border transactions between the treaty-states.

In recent years, additional threats to the treaty provisions - and what follows treaty networks, were detected, one of which is the practice of "treaty shopping"[10] which happens when a third country (hereafter "TC"), i.e. a country not a party to a DTC manages to access the benefits available under DTC between the two other counties. Put simply, it is an *"access by the TC as long as lawful, i.e. not prohibited by treaty provisions or general international law"*.[11] Despite the legality of some of the TC's access to any given treaty benefits, various countries decided (with the US leading the pack) to introduce a number of anti-treaty-shopping rules in their DTCs, which were designed to completely prevent such access by TCs. With this purpose in mind, one

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7 The first LoB clause was included in the US-Germany (1989) DTC as per: Avi-Yonah, R.S., Panayi, C. HJI., *Rethinking Treaty-Shopping Lessons for the European Union,* U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-002, U of Michigan Public Law Working Paper No. 182, (January 2010), p.22.

8 (*HMRC.com*, 2014) <http://www.hmrc.gov.uk/treaties/dta.htm> accessed 8 August 2014.

9 Studies have found that mitigation of double taxation positively impacts cross-border trade and investments, in: Peter Egger and George Wamser, *"Multiple Faces of Preferential Market Access: Their Causes and Consequences"*, Economic Policy, Vol. 28, No. 73, January 2013, pp. 143-187.

10 Becker Helmut & Felix J. Wurm, Survey, *Treaty Shopping: An Emerging Tax Issue and Its Present Status in Various Countries,* 1, 2 (Becker Helmut & Felix J. Wurm, 1988) 1.

11 Tom O'Shea, *EU Tax Law and Double Tax Conventions,* (Avoir Fiscal Limited, London 2008), p.192.

such rule[12] is the so-called LoB Clause which limits access to the benefits of the treaty. Currently, according to the Ministry of Finance, the treaty network for Poland includes around 90 DTCs[13] - while the US has nearly 70[14] with both networks currently being up-dated and likely to expand in the future.[15]

The proposed Treaty contains a number of changes, some rather significant when compared with the provisions of the 1974 Convention. Some are more or less taxpayer favourable with a majority of these important issues highlighted in this article. Section 1 of this article provides some background for the reasons behind the Treaty up-date. Section 2 assesses the changes to the articles of the 1974 Convention, whereas Section 3 concentrates on the Treaty's new articles which are not contained in the 1974 Convention. LoB clauses, because of their significance and complicated nature, will be discussed in Sections 4 and 5. Section 4 will briefly discuss issues surrounding treaty-shopping and improper use of DTCs as well as the EU legal aspects and how the supranational nature of the EU law over the EU Member States affects their DTCs with non-EU countries. Then, Section 5 will discuss the provisions of the new Treaty Article 22 (LoB clause), describing its various tests.

Lastly, the Conclusion will cover a number of the main points highlighted in the proposed Treaty analysis, concentrate on the evaluation of the Treaty and provide an up-date on its current state and the possible timeframe when it will enter into force.

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12 Such as the "beneficial owner" (Art.10 Comm. at para 12); "equivalent beneficiaries" at paragraphs 6.21-6.24 and 6.34 of the Art. 1 Comm.); the limitation on residence approaches in its Commentary since 1977; the "look-through" approach (Art 1 Comm. 13); "channel approach" (Art. 1 Comm. 17); the "limitation on residence approach"; the "exclusion approach" (Article 1 Comm. 21) and "the subject-to-tax" approach (Article 1 Comm.15).

13 Currently 90 DTCs as per: 'Wykaz Umów O Unikaniu Podwójnego Opodatkowania - Lista Umów O Unikaniu Podwójnego Opodatkowania - Finanse' (*Podatki.gov.pl*, 2019) <https://www.podatki.gov.pl/podatkowa-wspolpraca-miedzynarodowa/wykaz-umow-o-unikaniu-podwojnego-opodatkowania/> accessed 6 December 2019.

14 List of DTCs available at 'United States Income Tax Treaties A to Z | Internal Revenue Service' (*Irs.gov*, 2019) <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> accessed 6 December 2019. Note: the USSR no longer exists but the US continues to apply the USSR treaty to a number of countries such as: Armenia, Belarus and Kyrgystan amongst other. These are the so-called CIS (Commonwealth of Independent States) countries, i.e. former USSR countries. The CIS membership includes the following twelve states: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

15 Such as the US with Norway and Romania as per: *New US-Poland treaty sent to the Senate,* PwC, (Tax Insights from International Tax Services published 3 June 2014), p.2 Available: (*Pwc.com,* 2019) <http://www.pwc.com/en_US/us/tax-services/publications/insights/assets/pwc-new-us-poland-treaty-sent-senate.pdf> accessed 6 December 2019.

Section 1: Exploring the reasons behind the treaty up-date

A. Background to the US-Poland income tax treaty

Looking at the events of 1995, when the US terminated a 1980 US-Malta DTC[16] due to lack of a LoB clause (and then subsequently reached an agreement on the matter), illustrates that the issue of LoB clauses was important to the US. Perhaps, it was Poland joining the EU in 2004 that slowly lead to this moment as the process of negotiation of the new Treaty began in 2005. One can be certain that there was evidence of the US–Hungary DTC being substantially abused by TC investors.[17] In 2009, the US Treasury Department indicated that *"[u]pdating the agreements with Hungary and Poland is a key part of the Treasury Department's effort to protect the U.S. tax treaty network from abuse."*[18] On July 24, 2009 the Treasury's International Tax Counsel, John Harrington, remarked during a Conference in Washington that the US *"goal was not to create an opportunity"*[19] in Poland, i.e. not leaving a door open to possible abuse. At the time, another round of negotiations had been scheduled for the week of September 1, 2009. There are five known to the author bilateral economic agreements between the US and Poland between 1976 and 2009.[20]

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16 Agreement between the United States of America and the Republic of Malta with Respect to Taxes on Income, March 21, 1980, US-Malta, *reprinted in* 2 Tax Treaties (CCH) at para 5803.

17 A Treasury Department report to Congress, *Earning Stripping, Transfer Pricing and U.S. Income Tax Treaties*, released in November 2007 (2007 Treasury Report). See also: Venuti, J., Perryman, Z. and Robinson, S., *Update: New Hungary and Poland Income Tax Treaties* (August 31, 2009 KPMG up-date), p.3 [online] available at: <http://us.kpmg.com/microsite/taxnewsflash/2009/Aug/Hungary_Poland_Treaty.pdf >accessed 29 July 2014.

18 Venuti, J., Perryman, Z. and Robinson, S., *Update: New Hungary and Poland Income Tax Treaties,* August 31, 2009 KPMG up-date, p.3 [online] available at: <http://us.kpmg.com/microsite/taxnewsflash/2009/Aug/Hungary_Poland_Treaty.pdf> accessed 29 July 2014.

19 *Tax Treaties: Harrington Offers Broad-Ranging Update On Treaty Developments*, Global Initiatives, Daily Tax Report, Bureau of National Affairs (July 24, 2009) in: Venuti, J., Perryman, Z. and Robinson, S., *Update: New Hungary and Poland Income Tax Treaties,* August 31, 2009 KPMG up-date, p.5 [online] available at: <http://us.kpmg.com/microsite/taxnewsflash/2009/Aug/Hungary_Poland_Treaty.pdf>accessed 29 July 2014.

20 Reported in Poland in: Dz. U. z 1976 r. Nr 31, poz 178; Dz. U. z 1994 r. Nr 97, poz. 468; Dz. U. z 2005 r. Nr 3, poz. 14; M.P. z 2007 r. Nr 25, poz. 271; Dz. U. z 2009 r. Nr 46, poz. 374 i 376.

B. A snapshot of the economic activity between United States and Poland at the time of 2013 Treaty signing

Interestingly, despite the prevalent influence of US and OECD MTCs there is always a room for negotiation when it comes to DTCs. The process of drafting a treaty is rather complex as it requires an in-depth knowledge of the economies and tax systems of each of the treaty-countries. This is also to ensure that the included LoB clauses target precisely the structures they were intended against. This is why a snapshot of the economic activities between US and Poland at the time of the new Treaty signing is an appropriate place to start. According to data available at the time from the International Monetary Fund's ("IMF") World Economic Outlook Database[21] (also referred to in the US Technical Explanation of the US-Poland Income Tax Treaty[22] ("TE")), Poland, with the eighth largest economy in the EU, counted as one of the "more significant" EU trading partners for the US.[23] As the TE recalls, relying on 2013 statistics,[24] Poland was the 10th largest EU country for US exports and 12th in terms of size as a source for the importation of goods and services into the US from the EU at the time.[25]

During the signing ceremony for the Treaty on February 13, 2013 in Warsaw, the US Ambassador to Poland, Stephen Mull, admitted that a lot has changed since the signing of the 1974 Convention and remarked on the strength of Poland's market

21 'Download Entire World Economic Outlook Database, April 2014' (*Imf.org*, 2019) <http://www.imf.org/external/pubs/ft/weo/2014/01/weodata/download.aspx> accessed 6 December 2019.

22 '*Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income',* (*Treasury.gov*, 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019.

23 *Ibid*, p.16.

24 U.S. Bureau of Economic Analysis and U.S. Census Bureau, U.S. Department of Commerce, *"International Trade in Goods and Services: December 2013"*, 6 February 2014 available at: <http://www.bea.gov.newsreleases/international/trade/2014/pdf/trad1213.pdf>accessed 25 May 2014 as quoted in: *'Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income'* (*Treasury.gov*, 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019, p.16.

25 *'Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income'* (*Treasury.gov*, 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019, p.16.

economy and existence of a government that was now democratically elected.[26] He continued by saying that *"[t]he United States and Poland are now close allies and commercial partners in a way that was unimaginable in 1974. With all of these changes, it was time to modernize the bilateral tax relationship between the United States and Poland."*[27] According to him, the new Treaty's most important objectives were that it aimed to *"enable an efficient flow of cross-border investment that will not be hampered by tax-related barriers. (...) This treaty, I believe, will make it easier and more attractive not only for American companies to do business in Poland, but for Polish companies to invest in the United States."*[28] Considering these stated goals, it makes one wonder: When will the Treaty come into force?

C. US – Poland Treaty ratification process

The domestic ratification procedures with regard to the Treaty were completed by Poland and notified to the US on August 6, 2013.[29] In Poland, the process of ratification is done by way of a Ratification Bill (*Ustawa Ratyfikacyjna)*. The Polish Sejm (lower house of the Polish Parliament) received the Ratification Bill (*Project Ustawy Ratifikujacej)*[30] proposal on April 30, 2013. Polish Sejm, after fulfilling its procedural requirements and agreeing on it by majority vote, passed the Ratification

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26 Remarks at the ceremony on February 13, 2013 by the US Ambassador in Poland Stephen Mull. The US Embassy website (2018) <http://poland.usembassy.gov/amb_tax.html> accessed 17 June 2014.

27 Remarks at the ceremony on February 13, 2013 by the US Ambassador in Poland Stephen Mull. The US Embassy website (2018) <http://poland.usembassy.gov/amb_tax.html> accessed 17 June 2014. Polish version of his words: "*Polska i USA podpisały konwencję o unikaniu podwójnego opodatkowania"* (Rzeczpospolita 2018) <http://prawo.rp.pl/artykul/980431.html> accessed 26 March 2018. *"Przede wszystkim Polska ma mocną gospodarkę rynkową i demokratycznie wybrane władze. Stany Zjednoczone i Polska są teraz sojusznikami i partnerami handlowymi, co w 1974 r. nie było do wyobrażenia. Dlatego nadszedł czas, żeby uaktualnić też nasze dwustronne relacje w zakresie podatków"*.

28 Remarks at the ceremony on February 13, 2013 by the US Ambassador in Poland Stephen Mull. The US Embassy website (2018) <http://poland.usembassy.gov/amb_tax.html> accessed 17 June 2014.

29 The full Polish ratification process' timeline of the US-Poland Treaty in Poland can be found in the public online records of the Polish Sejm at: "*Rządowy projekt ustawy o ratyfikacji Konwencji między Rzecząpospolitą Polską a Stanami Zjednoczonymi Ameryki w sprawie unikania podwójnego opodatkowania i zapobiegania uchylaniu się od opodatkowania w zakresie podatków od dochodu, podpisanej w Warszawie dnia 13 lutego 2013 r"*, 'Druk Nr 1352' (*Sejm.gov.pl*, 2019) <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=1352> accessed 6 December 2019.

30 "*Rządowy projekt ustawy o ratyfikacji Konwencji między Rzecząpospolitą Polską a Stanami Zjednoczonymi Ameryki w sprawie unikania podwójnego opodatkowania i zapobiegania uchylaniu się od opodatkowania w zakresie podatków od dochodu, podpisanej w Warszawie dnia 13 lutego 2013 r"*, 'Druk Nr 1352' (*Sejm.gov.pl*, 2019) <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=1352> accessed 6 December 2019.

Bill on July 12, 2013,[31] and after being forwarded to the President of RP it was signed by the President on August 6, 2013.[32]

In the US, the process of ratification is completed by the US President with prior approval of the US Senate, i.e. the hearing by the Senate Foreign Relations Committee followed by a consideration. Once the committee completes its work, the process moves on to the next stage which means approval by the full US Senate. Then, the ratification process reaches its final stage which is the signing by the US President. In the US, the Treaty was forwarded to the US Senate as part of its domestic ratification process on May 20, 2014. The Senate Foreign Relations Committee then scheduled a public hearing for June 19, 2014.[33] As of December, 2019 the Treaty is still sat on the "Treaties Pending in the Senate" list .[34] However, with the Senate ratifying four new tax treaties with Japan, Luxemburg, Spain and Switzerland on July 16 and 17, 2019, which were held up due to the Senate's concerns over the information disclosure provisions; there is now a chance for movement on any remaining treaties in the pipeline such as the Polish DTA.[35] Once ratified, the Treaty will replace the 1974 Convention.

Upon completion of the ratification process by the US, both countries are required to notify each other in writing as to when their domestic ratifications conditions/ procedures have been fulfilled. The Treaty will then enter into force on the day when the last of said notifications communicated via diplomatic channels is issued between both treaty-countries.[36] With the Treaty's procedural history in mind, we now inspect the provisions of the proposed Treaty.

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31 "*Rządowy projekt ustawy o ratyfikacji Konwencji między Rzecząpospolitą Polską a Stanami Zjednoczonymi Ameryki w sprawie unikania podwójnego opodatkowania i zapobiegania uchylaniu się od opodatkowania w zakresie podatków od dochodu, podpisanej w Warszawie dnia 13 lutego 2013 r"*, 'Druk Nr 1352' (*Sejm.gov.pl*, 2019) <http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=1352> accessed 6 December 2019.

32 Recorded in: Dziennik Ustaw, i.e. Dz.U. poz. 995 *'Ustawa Z Dnia 21 Czerwca 2013 R. O Ratyfikacji Konwencji Między Rzecząpospolitą Polską A Stanami Zjednoczonymi Ameryki W Sprawie Unikania Podwójnego Opodatkowania I Zapobiegania Uchylaniu Się Od Opodatkowania W Zakresie Podatków Od Dochodu, Podpisanej W Warszawie Dnia 13 Lutego 2013 R.'* (*Isap.sejm.gov.pl*, 2019) <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20130000995> accessed 9 December 2019.

33 'JCX-137-15' (*Jct.gov*, 2019) <https://www.jct.gov/publications.html?func=startdown&id=4848> accessed 9 December 2019.

34 "Treaties Pending In The Senate" (Updated as of July 17, 2019) (*State.gov*, 2019) < https://www.state.gov/treaties-pending-in-the-senate/> accessed 9 December 2019.

35 United States – *Tax Treaty Updates – New treaty protocols ratified by Senate,* <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-reform-alert-072319.pdf> accessed 9 December 2019.

36 Article 28(1) (Entry into Force).

Section 2: Changes to articles contained in the 1974 Convention

This section discusses the changes to Articles contained in the 1974 Convention which is currently in force. However, before immersing into particular articles it is important to establish, who are the Treaty's intended beneficiaries. Articles of the proposed Treaty were drafted with a desire *"to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income"*[37] and are applicable only to persons resident[38] in one of the Contracting States with exceptions noted in the Treaty.[39] For the purpose of clarity, the term "person" in the Treaty (and this article) *"includes an individual, an estate, a trust, a partnership, a company, and any other body of persons"*.[40]

The US requested that it be able to tax former residents for up to 10 years after they have changed their country of residence or have lost their citizenship.[41] This is an interesting provision as it differs from the usual model revolving around the rule of residence/domicile of the taxpayer. This is consistent with internal US law rules.[42] Perhaps an explanation can be found in the vast numbers of Polish citizens emigrating to the US in the last few decades[43] which was often driven by economic reasons.

There is also Article 1(6) intended to eliminate any potential problems that may result from a mismatch in the understanding of the treatment by each of the treaty-countries which could potentially lead to either a double taxation or double non-taxation of structures described in the provision.

Now, four more provisions are discussed in this section starting with "permanent establishment" ("PE") Article 5 of the proposed Treaty.

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37 Title page of the proposed US-Poland Treaty.

38 Article 4(1) (Resident).

39 Article 1 (General Scope). In some limited cases, the provisions can also be applicable to some treaty-state nationals such as per Article 24(1) (Non-Discrimination) and third-country residents as per Article 26 (Exchange of Information).

40 Article 3 (General Definitions).

41 Article 1(4) (General Scope) as per: Magdalena Kocieniewska, '*Nowa konwencja z USA jest juz w Dzienniku Ustaw'*, (*TaxWeb*, 16 September 2013) <https://www.blog.ey.pl/taxweb/nowa-konwencja-z-usa-jest-juz-w-dzienniku-ustaw/> accessed 9 December 2019.

42 Section 877 as per: 'Insights' (*KPMG*, 2014), p.18 <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/jcx68-june18-2014.pdf> accessed 8 August 2014.

43 Christian Dustmann, Tommasso Frattini, Anna Rosso, *Emigration from Poland and the wages for those who stay behind* (The Rockwool Foundation Research Unit, University Press of Southern Denmark, Odense 2012).

A. Article 5 – Permanent establishment

The scope of the definition of PE has been expanded for the purpose of consistency with the US MTC and is now comparable with the other DTCs concluded by the US in the past years.[44] Subsection (2)(a) of Article 5 includes a place of management which has a broader scope as it includes: a building site, construction, assembly or an installation project.

The definition of PE under Article 5 is significant not only for the sake of clarity and legal certainty but the concept is also linked to several Articles within the Treaty such as Article 7 (Business Profits), which requires the existence of a PE in the Contracting State so that the PE state can tax the business profits of the other Contracting State's resident. Under the 1974 Convention, the period of exemption from PE status when it comes to building and/or construction sites, and other such projects, is currently eighteen months. The proposed Treaty shortens this to twelve months, which follows the current trend of setting the time at twelve months, such as witnessed in the Article 5(3) of the US-Hungary DTC. The 1974 Convention provided for a specific exemption for *"scientific research activities"*,[45] where the Treaty leaves such findings to be a matter of facts and circumstances which inevitably serve to expand the scope of the PE definition. It is useful to bear in mind that the methods of attributing business profits to a PE were further developed by the OECD in 2010[46] and in accordance with US tax policy, and again in the 2014. The 2017 version of the Article 7 OECD MTC has remained the same, however, there was an update to the commentaries to account for the changes made by the BEPS project.

Furthermore, Article 7(5) ((Business Profits) links Articles 10(6) (Dividends), 11(6) (Interest), 13(4) (Royalties), 14(4) (Capital Gains) and 21(2) (Other Income) to state that *"any income or gain attributable to a permanent establishment during its existence is taxable in the Contracting State where such permanent establishment is situated even if the payments are deferred until such permanent establishment has ceased to exist."*[47] The reduced rates of tax at the source under Articles 11 (Interest) and 13 (Royalties) are not applicable if the said dividends, interest and/or royalties are

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44 For example; US DTA with Malta and Hungary.

45 Such as can be still found in US-Canada DTC.

46 In the version of the PE Article 7 published in OECT MTC in 2010 PE is viewed as a distinct, separate enterprise. See also: OECD, *Report on the Attribution of Profits to Permanent Establishments* (December 2006), (*Oecd.org*, 2018) <http://www.oecd.org/tax/transfer-pricing/37861293.pdf> accessed 6 December 2019. Also, there were further changes made to the Article 5 (Permanent establishment) in OECD MTC 2017 and its Commentary resulting from the *Report on Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status)* and follow-up work on Action 7.

47 Article 7, paragraph 5 (Business Profits) of the proposed US-Poland income tax treaty.

connected with the PE and the provisions of Article 7 (Business Profits) shall apply in such cases.[48] These are discussed in the following paragraphs.

B. Articles 10 (Dividends), 11 (Interest) and 13 (Royalties) – the new withholding tax rates

Dividends payments (Article 10)

Consistent with the 1974 Convention, Article 10(2) of the proposed Treaty provides for a 5%[49] withholding tax rate on dividend payments in cases where the beneficial owner of the dividends is a company directly holding 10% or more of the shares of the company that pays the dividends. However, in all other cases the withholding tax rate is generally set at 15% such as for dividends that are paid by a US Regulated Investment Company (RIC) or US Real Estate Investment Trust (REIT) as per Article 10(4). Generally, because a REIT needs to meet the hurdles of Article 10(4),[50]i.e. the definition of "diversified"[51] as provided in the Article. The same conditions are set for dividends under Article 10 of the US-Belgium DTC that came into force in 2008. Companies resident in Poland that are deemed to be similar to a REIT (by means of a mutual agreement between competent authorities of both Contracting States) find the provisions of paragraph 4 also applicable to their dividends.[52] Article 10 also provides that dividends paid to pension funds are exempt from withholding tax by means of Article 10(3) provided they are not acquired *"from carrying on of a trade or business by the pension fund or through an associated enterprise"*[53] which is identical to the provision in the US-Hungary DTC. Article 10(7)(Dividends) of the proposed Treaty also allows, by means of Article 12(1) (Branch Profits), for a tax rate of not more than 5%[54] on branch profits. This is unlike recently negotiated US treaties, such as ones

48 This provision appears in Article 10(6) (Dividends), 11(6) (Interest) and 13(4) (Royalties) of the proposed US-Poland income tax treaty.

49 Same as the proposed US-Poland income tax treaty the US-Hungary Treaty does not provide for a zero rate either.

50 subparagraph (a)(i) to (a)(iii)

51 Article 10(4)(b).

52 Article 10(4)(c) (Dividends) of the proposed US-Poland income tax treaty.

53 Article 10(3)(b) (Dividends). See: EY Global Tax Alert, *US Senate Committee holds hearing on proposed Poland treaty and Treasury releases technical explanation*, (*Ey.com*, 25 June 2014) <http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Senate-Committee-holds-hearing-on-proposed-Poland-treaty-and-Treasury-releases-technical-explanation -> accessed 22 March 2018.

54 As per paragraph 2(a) of Article 10 (Dividends) subject to specified conditions.

with Belgium, the Netherlands, Sweden or the UK[55] where the rate of withholding on dividend payments is 0%.

Interest (Article 11)

Despite the recent US practice of setting the rate of withholding tax on cross-border payments of interest in their DTCs at 0%, in some cases, subject to the LoB test,[56] the Treaty increases the rate on many types of interest payments to 5%. In the case of interest payments, a limit of 5% withholding tax was introduced in Article 11(2) on most cross-border payments as opposed to the source-State exemption under the existing treaty. Considering that the withholding tax on interest as well as on dividends and royalties constitutes an impediment to international trade, the EU has sought to eliminate the problem by means of its EU Directive 2003/49/EC[57] where it set the withholding tax rate on interest at 0%. In the light of the international efforts in that direction and the US MTC, as well those concluded not long ago by the US DTCS (with a 0% rate), it would be reasonable to expect the Treaty to follow this trend of a 0% rate or at least a 0% rate subject to the tests contained in the Article 22 LoB clause. However, notwithstanding the provisions of Article 11(2), interest payments are generally exempt from withholding tax if the beneficial owner is either: a Contracting State or certain government entities;[58] a pension fund, but only if the interest is not derived, directly or indirectly, from carrying on a business;[59] a bank;[60] insurance company;[61] or a finance company.[62] The term "beneficial owner" is not defined in the proposed Treaty; therefore the definition in the source state's internal law applies. However, the term "interest" is defined as *"income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits"*[63] and contains a list of examples but excludes, for the purposes of the proposed Treaty, the Article 10 (Dividends) income and late payment penalty charges. Interestingly, the list itself is not as detailed as the one in the US-Hungary DTC.[64]

55 Subject to meeting their respective conditions as specified under the provisions of each of the DTCs.

56 Such as in Article 11 (Interest) of US-Belgium DTC subject to LOB test of Article 21.

57 Council Directive 2003/49/EC of 3 June 2003, *On a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States*, O.J. L. 157, 26 June 2003, p. 49.

58 Article 11(3) subparagraphs (a) to (c) (Interest).

59 Article 11(3)(d) (Interest).

60 Article 11(3)(e)(i) (Interest).

61 Article 11(3)(e)(ii) (Interest).

62 Article 11(3)(e)(iii) (Interest).

63 Article 11(5) (Interest).

64 US-Hungary DTC signed on February 4, 2010.

Royalties (Article 13)

The term "royalties" is defined in the Treaty and, therefore, domestic laws. However, some of the elements comprising the very definition are not defined which means they revert back for further explanation under provisions of a Contracting State's domestic laws. For example, Article 13(3)(a) contains "secret formula or process" and one has to study its meaning in the context of the US Code's sections 351 and 367.[65]

Practitioners warn that although the rate on royalties has been reduced from 10%, as currently set under Article 13(2) (Royalties) of 1974 Convention, to a rate of 5%, in reality this could broaden the scope to tax royalties, such as the status of royalties payable for the use of computer software.[66] The concepts contained in the Article 13 (Royalties) of the 1974 Convention, as well as the same Article of the proposed Treaty, are to be understood as dictated by the domestic law where not expressly defined in provisions of the treaty itself. This means that in Poland, they are subject to Polish law of February 4, 1994[67] where computer software does not correlate to any of the categories as currently listed in the 1974 Convention, i.e. copyright of artistic, literary or scientific work.[68] Under the currently binding 1974 Convention, computer software is not mentioned which has led to the situation where royalties payable for the use of computer software avoid the source treaty-state taxation. Contrasting this situation to the new Treaty's Article 13, "royalties" is defined to include *"(p)ayments of any kind received as a consideration for the use, or the right to use, any copyright of literary, artistic or scientific or other work"*.[69] In this context, "other work" could potentially include such royalties as those payable on the use of computer software which would then bring them within the scope of source treaty-state taxation. Simply put, while Article 13 is limiting the tax rate, it is possibly widening the scope of items taxable under the "royalties" definition.

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65 Other relevant sections are: Rev. Rul. 55-17, 1955-1 C.B. 388; Rev. Rul. 64-56, 1964-1 C.B. 133; Rev. Proc. 69-19, 1969-2 C.B. 301.

66 Ewa Sobońska, KSP Legal & Tax Advice, *Nowa umowa o unikaniu podwojnego opodatkowania z USA*, (KSP Legal & Tax Advice, March 28, 2013). Available in Polish: (*eGospodarka.pl*, 2019) <http://www.podatki.egospodarka.pl/92703, Nowa-umowa-o-unikaniu-podwojnego-opodatkowania-z-USA,1,68,1.html> accessed 6 December 2019.

67 *Ustawa z dn. 4 lutego 1994r. o prawie autorskim i prawach pokrewnych,* Dz.U. 1994 nr 24 poz. 83. Available in Polish: 'Ustawa Z Dnia 4 Lutego 1994 R. O Prawie Autorskim I Prawach Pokrewnych.' (*Isap.sejm.gov.pl*, 2019) <http://isap.sejm.gov.pl/DetailsServlet?id= WDU19940240083> accessed 6 December 2019.

68 Article 13(3)(a) (Royalties) 1974 Convention.

69 Article 13(3)(b) (Royalties) of the Treaty.

C. Elimination of Double Taxation (Article 23)

Under the Treaty, the method for eliminating double taxation is changing.[70] So far, the method of taxation with progression was used in the case of a Polish tax resident whose income was also subject to US taxation and 'eased' by the 2008 *'ulga abolicyjna'* (Abolition Relief).[71]

Under Article 23(1) of the proposed Treaty, Polish residents receive an exemption for income taxed in the US. According to the Polish Ministry of Finance, such a method will have a positive impact on the situation of pensioners who have returned, or are planning to do so, to Poland from the US.[72] With "other income" as defined in Article 21, i.e., dividends, interest, royalties and capital gains,[73] a tax credit is available. In the case of the US, which is classified as a credit country, US taxpayers are entitled to a tax credit[74] for foreign income taxes that were paid in different country on foreign-source income.[75]

Also, as opposed to the 1974 Convention, Article 23(4) of the Treaty contains new rules applicable to US citizens who are resident in Poland for tax purposes.

D. Exchange of Information (Article 26)

The Article relating to the exchange of information has been expanded significantly in the Treaty. It provides for a level of exchange of information which is consistent with US tax treaty policy as well as international standards for tax information

70 Lukasz Zalewski, *Umowa miedzy Polska a USA o unikaniu podwojnego opodatkowania jest korzysta wylacznie dla fiskusow, (*Gazeta Prawna, 2013) Available at: (*Incorpore.net*, 2019) <http://www.incorpore.net/index.php?option=com_content&view=article&id=85:umowa-midzy-polsk-a-usa-o-unikaniu-podwojnego-opodatkowania-jest-korzystna-wycznie-dla-fiskusow&catid=4:publikacje&Itemid=13> accessed 6 December 2019.

71 Ulga Abolicyjna, Art. 27g ustawy z dnia 26 lipca 1991r. o podatku dochodowym od osob fizycznych – tekst jedn.: Dz.U. z 2012r. poz. 361 z pozn. zm. – ustawa z dnia 25 lipca 2008r. o szczególnych rozwiązaniach dla podatników uzyskujących niektóre przychody poza terytorium Rzeczypospolitej Polskiej Dz. U. Nr 143, poz. 894. The last Abolotion Relief was available for years 2002-2007 meaning that in 2014 all of the committments from those years have already lapsed. See: (*Doradcy.krdp.pl*, 2019) <http://www.doradcy.krdp.pl /publikacje.php/0/4/346> accessed 6 December 2019.

72 Ewa Sobońska, KSP Legal & Tax Advice, *Nowa umowa o unikaniu podwojnego opodatkowania z USA,* (KSP Legal & Tax Advice, March 28, 2013). Available in Polish: (*eGospodarka.pl*, 2019) <http://www.podatki.egospodarka.pl/92703, Nowa-umowa-o-unikaniu-podwojnego-opodatkowania-z-USA,1,68,1.html> accessed 6 December 2019.

73 As listed under Article 23(2) Elimination of Double Taxation).

74 IRC section 901.

75 With some discussed in Section 3 of this article.

exchange.[76] Although on July 15, 2014 the OECD Council approved changes to the OECD MTC (including Article 26 (Exchange of Information)) after the Treaty was signed, the new Treaty is mostly consistent with said changes as those relating to Article 26 were already approved by the OECD Council on July 17, 2012.[77] Article 26 of the proposed Treaty does not expressly state that "group requests" are allowed, however, both countries' competent authorities *"may develop an agreement upon the mode of application of this Article."*[78]

Paragraph 1 of the Article imposes a requirement on both treaty-countries to exchange information *"as is foreseeably relevant for carrying out the provisions of the proposed Treaty or the domestic laws of the United States or of Poland".*[79] According to the TE the "foreseeably relevant" phrase in Article 26(1) is to be construed to allow information which "may be relevant" to an IRS investigation/probing, under domestic legislation,[80] to be exchanged. The same standard was used in the Spanish Protocol signed in 2013 and ratified in 2019.

According to paragraph 2 of the Article, information received under the proposed Treaty is to be treated as secret like any other information obtained by the treaty states under their domestic laws. The provisions of Art 1(1) and Article 2 of the Treaty do not equate to a restriction on the exchange of information. In practice, this means that the US, for example, can request information about a TC national's bank account held in Poland should the IRS believe the funds in said accounts failed to be reported.[81]

Paragraph 4 of the Article imposes a requirement on Contracting State A to provide information requested by Contracting State B so that Contracting State A uses its information collecting measures. The provision then goes further and states that if a request for information is made of a treaty-state, then that state cannot decline to

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76 Such as provisions of Article 26 of the OECD MTC (2012) and its 2014 update in relation to exchange (on request) of a "foreseeably relevant" information despite the domestic tax interests or bank secrecy.

77 The latest version of OECD MTC was published in 2017. However, given the US-Poland Treaty was signed in 2013, this article concentrates on the OECD MTC 2010 version and any updates that were known to the parties of this Treaty at the time of its signing on February 13, 2013.

78 Article 26(7) (Exchange of Information).

79 Article 26(1) (Exchange of Information).

80 Under Section 7602 of the US Internal Revenue Code which allows for examination of any material that "may be relevant" which begun with 1964 decision by the U.S. Supreme Court in the case of *United States v. Powell* 379 U.S. 48 (1964) and then upheld in subsequent cases.

81 '*Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income'*, p.77. Available at: (*Treasury.gov*, 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019.

provide such information merely on the grounds that it has no domestic interest in such information. However, this is subject to the limitations imposed by paragraph 3 (being obliged to act against its laws and administrative practices[82] or supply information not normally obtainable under its laws[83] amongst others). The Article also notes that the lack of agreement between competent authorities aimed at providing "comparable levels of assistance"[84] to each of the treaty-country does not relieve either of them of the obligations imposed by the article on exchange of information. In addition, paragraph 5 expressly states that the Contracting States cannot rely on the provisions of paragraph 3 to decline the provision of the information purely on the grounds that it is held by *"a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person."*[85]

An interesting matter should be raised when contrasting the provisions of the Exchange of Information Article together with the definitions found under Article 3(1)(i) (General Definitions) where, under the latter, a territory of the "United States" includes the geographical scope of the United States of America, i.e. its states, including the District of Colombia, territorial sea, sea bed and its adjacent subsoil but it expressly excludes *"Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory"*.[86] However, the June 17 TE states that the US can serve an administrative summons under the powers of Code section 7651 which in fact extend to its territories and possessions as if they were a state. Simply put, this means that the US is able to obtain the information.[87] This seems to suggest, the *"information in the U.S. possessions or territories is subject to exchange of information pursuant to a proper request under the proposed treaty."*[88] It is worth noting, however, that Article 26 does not facilitate or permit so-called "fishing expeditions".

82 Article 26(3)(a).

83 Article 26(3)(b).

84 Article 26(7).

85 Article 26(5).

86 Art 3(1)(i) – definition of the term "United States".

87 '*Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income'*, p.76. Available at: (*Treasury.gov,* 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019.

88 *"Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income"*, pp.76-77. Available at: (*Treasury.gov,* 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019.

This section illustrated the most important changes to the articles of the 1974 Convention with five of them being discussed in more detail. Now we will move to provisions which are new.

Section 3: New provisions not contained in the 1974 Convention

This section assesses the new Articles that did not exist in the 1974 Convention. These provisions have regard for international tax treaty standards and cross-border trade between the two Contracting States.

A. Taxing branch profits and branch interest payments (Article 12)

When it comes to taxation of branch profits and branch interest payments, under the provisions of Article 12(1(b)(ii) (Branch Profits) of the proposed Treaty, the rate in both cases, is limited to 5%.[89] The imposition of tax on branch profits is generally allowed by the source state in which the income is attributable to the company's PE (read: branch). Taxing payments of branch interest is permitted where the source country is allowed to tax interest that is paid or deemed to be paid by the PE to its parent company located in the other treaty-state.

B. Capital Gains (Article 14)

The Capital Gains Article 14(1) allows the taxation of capital gains derived by treaty-state residents from the sale of real property[90] in the other Contracting State. However, two further paragraphs clarify the rules regulating taxation of capital gains by (i) a resident of the US as opposed to (ii) a resident of Poland, from alienation of their Polish and US located real estate, respectively. The first case is governed by the provisions of Article 14(2) which refers to the US domestic law, i.e. Foreign Investment in Real Property Tax Act ("FIRPTA"). The latter case is subject to the conditions of paragraph 3 of the Article which concerns a sale of shares deriving, directly or not, more than 50% of their value from their Poland-located real property[91] combined with conditions stated further in the Articles' sub-paragraph 3(b).[92] Also, two new provisions were included in the Article allowing taxation of capital gains only by the state of residence as derived *"from the alienation of ships or aircraft*

89 The rate of 5% is as stated in Article 10(2)(a) (Dividends) which Article 12(1)(b)(ii) (Branch Profits) refers to.

90 As specified in Article 6 (Income from Real Property).

91 Article 14(3)(a) (Capital Gains).

92 Article 14(3)(b) (Capital Gains).

operated in international traffic"[93] and *"containers (...) used for the transport of goods or merchandise in international traffic"*.[94]

C. Entertainers and Sportsmen (Article 17)

The Treaty contains a new Article 17 concerning the taxation of income by entertainers and sportsmen which may be taxed in the source state.[95] This is a rather important Article which deals with entertainers and athletes/sportsmen, taxpayers who often earn considerable incomes and who frequently employ the use of so-called "loan out" companies who provide the services for/of the artist or athlete. In Poland, this is done by so-called "spolka estradowa" which is a form of a partnership. The aim was to stop sportsmen and artists from using such creations designed with the purpose of avoiding paying taxes in the treaty-country that they are actually working in. This new solution will ensure the income they receive will be treated as if received by the individual and not by his or her loan-out company incorporated in the other treaty-country.[96]

D. Pensions, Social Security, Annuities, Alimony, and Child Support (Article 18)

Individuals will be taxed on their pension in the treaty-state in which they are a resident with an exception for state pensions which are to be taxed in the country from where the pension originates. Also, the Treaty deals with alimony payments which are subject to tax exemption both in Poland and the US. Interestingly, the 1974 Convention is disadvantageous for those returning to Poland with a US pension which is currently often double taxed, as fully taxable in Poland, where the taxpayer re-emigrating to Poland is still obliged to pay the NFZ[97] contribution.[98] So far,

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93 Article 14(5) (Capital Gains).

94 Article 14(6) (Capital Gains).

95 Unless their gross receipts derived by them does not exceed USD 20,000.

96 More information can be found in: Lukasz Zalewski, *Umowa miedzy Polska a USA o unikaniu podwojnego opodatkowania jest korzysta wylacznie dla fiskusow, (*Gazeta Prawna, 2013) Available at: (*Incorpore.net*, 2019) <http://www.incorpore.net/index.php?option=com_content&view=article&id=85:umowa-midzy-polsk-a-usa-o-unikaniu-podwojnego-opodatkowania-jest-korzystna-wycznie-dla-fiskusow&catid=4:publikacje&Itemid=13> accessed 6 December 2019.

97 NFZ stands for Narodowy Fundusz Zdrowia which translates to National Health Fund.

98 Jakub Malczewski, (2013) *Polonia przeciw nowej umowie podatkowej z USA, (Gazeta Prawna*, 2 February 2013). [online] available at (in Polish): Jakub Malczewski, 'Polonia Przeciw Nowej Umowie Podatkowej Z USA' (*podatki.gazetaprawna.pl*, 2019) <http://podatki.gazetaprawna.pl/artykuly/678016,polonia_przeciw_nowej_umowie_podatkowej_z_usa.html> accessed 6 December 2019.

individuals receiving such payments have been taxed in both treaty-countries but have the right to deduct from the Polish tax the amount of tax paid on the pension in the US. There though posed a significant practical problem in that the US generally has a high tax-free allowance which meant that many pensioners taxed in Poland on their US pensions did not pay US tax. Consequently, no deduction was obtainable for them in Poland. Because of this, they had to pay the full rate of Polish income tax on their US pensions. The changes suggested in the proposed Treaty are awaited longingly as they will introduce a significant simplification to the 1974 Convention rules, especially for pensioners wishing to return to Poland. Polish ZUS[99] and KRUS[100] pensions will be free from income tax in the US. This is unlikely to introduce any changes for taxpayers who are resident in the US and receiving any of the two Polish pensions. The reason is very simple, i.e. this type of income is often below the US pension thresholds for income tax purposes. To sum up, there will only be two exceptions from the general rule of taxpayers being taxed in their country of residence: (i) US social security pensions will only be taxed in the US and (ii) if the US decides not to tax a pension then Poland will not do so either.

Also, the Article deems all cross-border "alimony" payments[101] between residents of the treaty-states as exempt from tax in both Contracting States.

E. Other Income (Article 21)

The "Other Income" provisions of Article 21 provide for income not specifically dealt with under other articles of the Treaty and subjects that income to tax only in the residence country (in one of the Contracting States) of the recipient. However, the Article does not generally[102] apply to income connected with a PE in the other Contracting State. In such cases Article 7 (Business Profits)[103] applies. The absence of this Article meant that both treaty-countries could tax such income.

These new provisions, especially Article 18, will greatly simplify the lives of numerous affected taxpayers. However, one has to note that it comes as a surprise that the proposed Treaty lacks a provision for binding arbitration despite the fact that arbitration clauses appear in the US DTCs concluded with Malta, Spain and Japan.

99 Zaklad Ubezpieczen Spolecznych (Social Insurance Institution).

100 Kasa Rolniczego Ubezpieczenia Spolecznego (The Agricultural Social Insurance Fund).

101 As defined in Article 18(5).

102 with an exception of income from real property.

103 This article also applies to independent/free professionals as they are included in the definition of "business" in Article 3(1)(e) (General Definitions).

Section 4 – "Treaty shopping" and LoB Clauses

A. Introduction to "treaty shopping" and improper use of tax treaties

Tax treaties often provide advantages for individuals and corporate taxpayers in countries that are parties to that tax treaty, advantages which would not otherwise be available to individuals or corporations of non-treaty countries. In many cases though, those who are not entitled to treaty benefits nevertheless try to access them. This is especially true in situations where there is no favourable tax treaty in existence or no DTC at all. An attempt is often made by said individuals and corporations to reap otherwise unavailable under their domestic treaty network tax benefits, by re-routing the profits back to their non-treaty country. Companies tend to do this by means of entities set up with the sole purpose of serving as a pipeline for income from a DTC contracting state, in which it gets a preferential tax treatment, to a non-treaty one. Such entity is referred to as a so-called "conduit company" with its structure branded by some as *"the greatest threat to the integrity of a country's tax treaty network"*.[104] The pattern of funneling profits from treaty to a non-treaty country is often referred to as "treaty shopping", which term is believed to have originated in the US and relates to so-called "forum shopping", i.e. a civil litigation strategy in which the litigant searches for a more favorable jurisdiction in which to bring his action.[105] Simply put, *"a person 'shops' into an otherwise unavailable treaty though complicated structures; hence the term treaty-shopping."*[106]

B. The OECD MTC and the US Model approaches dealing with the problem of treaty shopping and the improper use of tax treaties.

Treaty Shopping – US Model

The mid-1980s saw a transition from the post-World War II focus on outbound to inbound investment in the international tax policy of the US.[107] The aim was to attract foreign capital but this meant that some shrewdly engineered tax structures started to be seen for what they were, i.e. causing the erosion of source-based taxation in the

104 J. Wheeler, *'Chapter II. Persons qualifying for treaty benefits'* in the *'United Nations Handbook on Selected Issues in Administration of Double Tax Treaties'*, (United Nations, New York, 2013), p.82. In pp. 81-86 she sets out the characteristic of the conduit structures.

105 Helmut Becker and Felix J. Wurm, *Treaty Shopping: An Emerging Tax Issue and its Present Status in Various Countries*, (Deventer: Kluwer Law and Taxation Publishers, London, 1988) 2 – as per study/survey of 19 countries conducted in 1988.

106 Reuven S. Avi-Yonah, Christiana HJI Panayi., *Rethinking Treaty-Shopping Lessons for the European Union,* U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-002, U of Michigan Public Law Working Paper No. 182, (January 2010), p.2.

107 Reuven S. Avi-Yonah, Christiana HJI Panayi., *Rethinking Treaty-Shopping Lessons for the European Union,* U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-002, U of Michigan Public Law Working Paper No. 182, (January 2010), p.20-21.

US. This led to a form of an anti-treaty shopping instrument, i.e. a so-called LoB clause being incorporated into the US Internal Revenue Code and subsequently into international tax treaties, with the US–Germany DTC[108] marking the beginning of a rather antagonistic attitude towards treaty shopping by the US. Perhaps this was partly dictated by the fact that the practice of treaty shopping was linked with some unwanted revenue loss for the US.[109]

In 1996, the Technical Explanation by the US Treasury Department to LoB Article 22 defined treaty shopping as *"the use, by residents of third states, of legal entities established in a Contracting State with a principal purpose to obtain the benefits of tax treaty between the United States and the other Contracting State."*[110] However, since then a newer version of the US MTC was developed by the US and adopted on November 15, 2006. Unfortunately for those seeking clarity, the 1996 TE treaty shopping definition was then deleted from the 2006 US Model. Instead, 2006 TE to 2006 US Model said that the LoB Article 22: *"contains anti-treaty-shopping [provisions] that are intended to prevent residents of third countries from benefiting from what is intended to be a reciprocal agreement between two countries."*[111] This is as far as the 2006 US Model explanation actually went which is unfortunate as it provided no workable definition.

On February 17, 2016 the US Treasury Department issued their newly revised U.S. Model Income Tax Convention ("2016 Model").[112]

108 Reuven S. Avi-Yonah, Christiana HJI Panayi., *Rethinking Treaty-Shopping Lessons for the European Union,* U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-002, U of Michigan Public Law Working Paper No. 182, (January 2010), p.21.

109 David H. Rosenbloom, D.H. and Langbein, S.I., *United States Tax Treaty Policy: An Overview*, 19 Colum J. (TRANSNAT'L Law 359, 1981) 84.

110 Technical Explanation to LOB clause, Art 22, p.63, US Model 1996.

111 (2006) US TE, p.63.

112 Treasury Announces Release of 2016 U.S. Model Income Tax Treaty, (*www.treasury.gov*, 2019) <https://www.treasury.gov/press-center/press-releases/Pages/jl0356.aspx> accessed 6 December, 2019.

Treaty Shopping – OECD Model

Between 1992 and 2012[113] the OECD MTC has been published in a loose-format to aid the multiple changes made to the model in that period[114] and its latest version was approved by the OECD Council on November 21, 2017 and then published.[115]

The OECD has over the past years identified, in its Base Erosion and Profit Shifting ("BEPS") Action 6 (Prevent Treaty Abuse) Action Plan, treaty abuse, and particularly treaty shopping, as one of the most important sources of concern for BEPS. The BEPS project saw three methods of addressing treaty shopping emerge, i.e. (i) a principal purpose test ("PPT") which is an equivalent to Article 29(9) of the 2017 OECD MTC combined with a simplified or a detailed version of the LOB rules as can be seen in paragraphs 1 to 7 of the 2017 OECD MTC; or (ii) PPT alone; or (iii) a detailed LOB rule version combined with a mechanism aimed to deal, but not already addressed in the tax treaties, conduit arrangements, e.g. judicial doctrines or domestic anti-abuse rules or PPT-like treaty rule.[116] However, despite the work conducted in this field by the OECD there was, at the time of the Treaty signing, no express definition of what "improper use" actually meant according to the OECD. The OECD MTC provided an example (which is also contained in its 2017 update) where *"a person (whether or not a resident of a Contracting State), acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly."*[117] Although not specifically named as such, this example seems to be illustrating the concept of "treaty shopping".[118] Despite the lack of a formal definition of "improper use", the OECD initially adopted some basic anti-treaty-shopping methods in the form of a "beneficial ownership" concept as well as imposition of some limits on the residence provisions. These can already be observed in the 1977 OECD MTC. However, the OECD Fiscal Affairs Committee eventually realized that such methods were not only way too general[119] but also that that the two measures were insufficient. Subsequently, the Committee's suggestions materialized in the form of Commentary to Article 1

113 'Model Tax Convention On Income And On Capital 2010 (Full Version) - Books - OECD library' (*Oecd-ilibrary.org,* 2019) <http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en> accessed 6 December 2019.

114 Since 1992 up-dates were published in 1994, 1995, 1997, 200, 2003, 2005, 2008 and 2010.

115 Approved by the Committee on Fiscal Affairs on September 28, 2017.

116 Action 6 Prevention of tax treaty abuse – (*Oecd.org, 2019)* <http://www.oecd.org/tax/beps/beps-actions/action6/> accessed 6 December 2019.

117 OECD MTC (2010-2012) Commentary on Article 1 in para 9; and OECD MTC (2017) Commentary on Article 1 in para 56.

118 Borg Scicluna, M., *An analysis of the Limitation on Benefits clause in the recent US-Malta double taxation agreement – Part 1'*, (International Tax Report, April 2012), p.3.

119 OECD, *Conduit Companies Report in: OECD, Committee on Fiscal Affairs of the OECD International Tax Avoidance and Evasion, Four Related Studies, Double Taxation Conventions and the Use of Conduit Companies,* (Issues in International Series, no. 1 (OECD) Paris, 1987), paragraph 13-15.

1992 OECD MTC. Eventually, following the 2002 OECD Report on Restricting the Entitlement to Treaty Benefits[120] they were incorporated into the 2003 Commentary. Although the OECD MTC lists a number of approaches[121] its 2012 Commentary went as far as mostly mirroring the anti-treaty-shopping instrument found in the US Model – namely, in all its splendor, the LoB clause.[122] This rather vague description by the OECD did not, at the time, actually specifically define the term "treaty shopping" nor did it refer to some other source where such definition can be found. Although this can be contrasted with the1996 US TE, which one has to remember was superseded by the 2006 US Model (where the references made to the concept of "treaty shopping" are somewhat equally elusive in the TE to the 2006 US Model) which does not even include the "improper use of tax treaties" phrase at all. One could speculate that the reason for the lack of a clear definition of "treaty shopping" then was to allow a degree of discretion to the tax authorities on an ad hoc basis to differentiate legitimate tax planning and improper treaty shopping – which compromises the *quid pro quo* of the treaty.[123] However, both the US Model and the OECD Commentary to the OECD MTC have, at the time of the Treaty signing, a common denominator in the form of a LoB Clause as an attempt to battle the troublesome intentions of conduit structures and treaty shopping in general. According to the OECD MTC the provisions of LoB clauses are *"aimed at preventing persons who are not resident of either Contracting States from accessing the benefits of a Convention through the use of an entity that would otherwise qualify as a resident of one of these States."*[124]

At this point, the most important take-home message is that the US has a strict policy of including LoB clauses in its tax treaties[125] and only those states with significant bargaining power may make a successful attempt at trying to soften its provisions. It is interesting then to mention that the United Nations Model Convention includes in its Article 1 a broad discussion of not only treaty shopping but also of possible ways on how to prevent it.[126] Also, one cannot overlook the challenges faced by the

120 See: OECD (2002) 7-31.

121 Such as the "beneficial owner" (Art.10 Comm. at para 12); "equivalent beneficiaries" at paragraphs 6.21-6.24 and 6.34 of the Art. 1 Comm.); the limitation on residence approaches in its Commentary since 1977; the "look-through" approach (Art 1 Comm. 13); "channel approach" (Art. 1 Comm. 17); the "limitation on residence approach"; the "exclusion approach" (Article 1 Comm. 21) and "the subject-to-tax" approach (Article 1 Comm.15).

122 OECD Commentary to Article 1, paragraph 20 in OECD MTC (2012).

123 Reuven S. Avi-Yonah, Christiana HJI Panayi., *Rethinking Treaty-Shopping Lessons for the European Union,* U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 10-002, U of Michigan Public Law Working Paper No. 182, (January 2010), p.5.

124 (OECD MTC (2010-2012), OECD Commentary on Article 1, paragraph 20.

125 Ned Shelton, *Interpretation and application of Tax Treaties*, (LexisNexis, 2004), 417.

126 More information about possible defences can be found in: Philip Baker, *Chapter X: Improper use of tax treaties, tax avoidance and tax evasion,* in: *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties by Developing Countries,* (United Nations, New York, 2013), p.383-401.

supranational system of the European Union where its legal requirements are seen to give rise to a concept of "equivalent beneficiary"[127] which is helpful.

OECD/G20 Base Erosion and Profit Shifting – 2015 Final Report: "BEPS Action 6"

The issue of preventing treaty shopping and improper use of tax treaties has been a topic of the OECD/G20 Base Erosion and Profit Shifting Project[128] which went as far as to include a draft of a possible preamble to a convention. In its Public Discussion Draft, the preamble specifically stated *"that tax treaties are not intended to be used to generate double non-taxation"*.[129] The proposal by the discussion draft was intended for revision by the OECD MTC so it would include the US' tax treaties anti-abuse provisions with a clause including the so-called "main purpose text".[130] At the time this sparked a controversy amongst stakeholders,[131] a call for refinement by practitioners[132] and an official of the U.S. Treasury Department claiming that the main purpose test will produce uncertainly.[133]

127 Garcia Prats, F.A., *'6.3. Analysis of proposed treaty clauses to deal with treaty abuse: limitation-of-benefits clauses'*, in: *'The 'abuse of tax law': prospects and analysis', Essays in International and European Tax Law. ed by G. Bizioli. Jovene editore.* (Napoli. 2010), p.91.

128 'Preventing The Granting Of Treaty Benefits In Inappropriate Circumstances, Action 6 - 2015 Final Report | OECD READ Edition' (*OECD iLibrary*, 2018) <https://www.keepeek.com//Digital-Asset-Management/oecd/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en#.WrjLw3mWxD8> accessed 25 March 2018.

129 *BEPS Action 6: Preventing the granting of the Treaty benefits in inappropriate circumstances*, in: *B. Clarification that tax treaties are not intended to be used to generate double non-taxation*, OECD Public Discussion Draft, 14 March 2014 – 9 April 2014, p.27.

130 Kristen A. Parillo**,** *U.S Views on Treaty LOB and Main Purpose Test Draw Skepticism,* 143 TAX. NOTES 426 (Apr. 28, 2014).

131 Amanda Athanasiou, 'Stakeholders Weigh In on OECD's Treaty Abuse Discussion Draft', Tax Analysts, 2014 WTD 731 (16 April 2014). Available at: Services.taxanalysts.com, (2014). Accessed 27 July 2014.

132 David D. Stewart and Kristen A. Parillo, *OECD's LOB Approach Needs Refinement, Practitioners Say,* 74 Tax Notes International 111 (Tax Analyst, 15 April 2014). Available at: Services.taxanalysts.com, (2014). Accessed 27 July 2014.

133 Amanda Athanasiou, 'Stakeholders Weigh In on OECD's Treaty Abuse Discussion Draft', Tax Analysts, 2014 WTD 731 (16 April 2014). Available at: Services.taxanalysts.com, (2014). Accessed 27 July 2014.

The Action 6[134] has since formulated a new Article for the Model Treaty, namely, Article 29: Entitlement to Benefits which is included in 2017 OECD MTC and contains the LOB rule, which is based on the provisions found in the US-India and US-Japan treaties.[135]

C. EU law concerns

Considering that Poland is a Member State of the EU its national legislation, and what follows, warrants the need to be compatible with EU law. One of the areas impacted by the supranational nature of the EU is the matrix of the international tax treaties as concluded by its Member States with other EU Member States or third countries. Further, on the DTC level, the LoB clauses between US and EU countries,[136] such as the one in the Treaty, are also subject to compliance with EU law. In the past, the European Court of Justice decided in a string of "open skies"[137] cases, the incompatibility with EU law of so-called "nationality clauses" included in some DTCs, i.e. such provisions causing a breach of the guaranteed by the EC Treaty fundamental freedoms.[138] LoB clauses are designed to deny treaty benefits to non-residents of one of the treaty-states unless a strong connection to at least one of the treaty-states can be proved.[139] This is why some academics argue that LoB clauses

134 'Preventing The Granting Of Treaty Benefits In Inappropriate Circumstances, Action 6 - 2015 Final Report | OECD READ Edition' (*OECD iLibrary*, 2018) <https://www.keepeek.com//Digital-Asset-Management/oecd/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en#.WrjLw3mWxD8> accessed 25 March 2018.

135 Anna Kazacos, *BEPS Action 6: The Principle Purpose Test Revisited – Part I -International Tax Report* (*Internationaltaxreport.com*, 2018) <https://www.internationaltaxreport.com/double-taxation/beps-action-6-the-principle-purpose-test-revisited--part-i--1.htm> accessed 26 March 2018.

136 Rolf Eicke, *Tax Planning with Holding Companies – Repatriation of US Profits from Europe*, (Kluwer Law International, 2009), p.136.

137 Case C-466/98, Commission v. United Kingdom; C-467/98, Commission v. Denmark; C-468/98, Commission v. Sweden; C-469/98, Commission v. Finland; C-471, Commission v. Belgium; C-472/98, Commission v. Luxemburg; C-475/98, Commission v. Austria; C-476/98, Commission v. Germany. (Open skies judgments) Judgments of the Full Court of 5 November 2002.

138 As per Article 3 of the Treaty on European Union and Articles 45 to 66 of the Treaty on Functioning of the European Union (TFEU).

139 Georg W. Kofler, *European Taxation Under an 'Open' Sky: LoB Clauses in Tax Treaties Between the U.S. and EU Member States*, (Tax Notes International 2004), Vol. 35, 45, 84 in: Rolf Eicke, *Tax Planning with Holding Companies – Repatriation of US Profits from Europe*, (Kluwer Law International, 2009), p.136.

are comparable to the "nationality clauses" as they also can pose a threat to the EC Treaty fundamental freedoms. [140]

Also is worth noting the recent EU case law[141] where the CJEU rejected the exemption from the withholding tax interest which was paid to entities that are established in another Member State. The CJEU argued that the entities were just mere conduit companies and not the beneficial owners of the interest[142] and noted that *"EU law cannot be relied upon for abusive and fraudulent ends."*[143] This is an area where both parties, i.e. EU Member States and the US might want to be mindful of when entering into DTCs.

Since LoB clauses are at the heart of this controversy, and a lot can be said about them in this regard, it will be useful to inspect the actual provisions of the LoB clause in the proposed Treaty before drawing any conclusions on whether or not it is incompatible with EU law. Section 5 below turns to this analysis.

Section 5 – The LoB Clause of Article 22

Nowadays, it is US Treasury policy[144] for LoB clauses to be included in all US DTCs. It comes as no surprise then that every newly signed Treaty possesses such a provision and that the proposed Treaty shares the same fate. To look at this from a purely US perspective, the purpose of the LoB clause in a treaty is to limit the ability of third-country investors to claim treaty benefits through a US treaty partner. Ever since the US included the LoB clause in its MTC of September 20, 1996, LoB clauses are increasingly used in DTCs to cap the benefits of treaty provisions of some clauses or the entirety of a tax treaty.[145]

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140 Pasquale Pistone, *The Impact of European Law on the Relations with Third Countries,* (Intertax 2006), Vol. 34, 234.

141 *N Luxembourg 1* (Case C-115/16), *X Denmark* (Case C-118/16), *C Danmark I* (Case C-119/16) and *Z Denmark* (Case C-299/16) *v Skatteministeriet* (26 February 2019).

142 *N Luxembourg 1, X Denmark, C Danmark I* and *Z Denmark v Skatteministeriet*, (*www.taxjounal.com*, 2019) available https://www.taxjournal.com/articles/n-luxembourg-1-x-denmark-c-danmark-i-and-z-denmark-v-skatteministeriet> accessed 6 December 2019.

143 *Ibid.*

144 *See: US Department of the Treasury, Technical Explanation of the United States Model Income Tax Convention, September 20, 1996, article 22 which states: "the United States holds strongly to the view that tax treaties should include provisions that specifically prevent misuse of treaties by residents of third countries."* For a history of LOB clauses in the US treaties see: David H. Rosenbloom, *Tax Treaty Abuse: Policies and Issues,* 15 Law & Pol'y Int'l Bus. 763, 779-810 (1983).

145 F.A.Garcia Prats, *'6.3. Analysis of proposed treaty clauses to deal with treaty abuse: limitation-of-benefits clauses',* in: *'The 'abuse of tax law': prospects and analysis', Essays in International and European Tax Law. ed by G.* Bizioli. Jovene editore. (Napoli. 2010), p.89.

Back in the early 2000s (prior to Poland joining the EU in 2004), Poland was one of but a few remaining countries with whom the US had a tax treaty lacking a LoB clause and accommodating international investment.[146] The US has concluded a number of DTCs over the past years[147] including one with Malta where the LoB article specifically states its function *"as anti-treaty-shopping provisions that are intended to prevent residents of third countries from benefiting from what is intended to be a reciprocal agreement between two countries."*[148] The first treaty to be concluded by the US with an EU country that contained an elaborate LoB clause was the US–Germany DTC brought into force on August 21, 1991.[149] Since then other treaties modelled their LoB provisions on the US-German LoB clause.[150] However, this LoB clause was modified in later DTCs, such as the US–France[151] and US–Spain[152] treaties due to concerns raised as to its possible incompatibility with EU law[153] as noted above.

A. The provisions of the LoB Clause in detail

The inclusion of the LoB clause in the proposed Treaty represents a major change as the LoB clause was non-existent in the 1974 Convention. Quite simply, the fact of being a resident of a treaty-country does not automatically guarantee the granting of benefits under the provisions of the new Treaty. Such benefits are conditional upon meeting further criteria such as those outlined in the benchmarks set forth in Article

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146 The other countries were: Hungary, Romania, Greece, Pakistan and the Philippines if not to count some of the former USSR Republics.

147 Such as: Japan – United States DTC Protocol signed on January 24, 2013 as well as Chile and Hungary.

148 US-Malta DTC TE, 8 August 2008 as per Borg Scicluna, M., *An analysis of the Limitation on Benefits clause in the recent US-Malta double taxation agreement – Part 1'*, (International Tax Report, April 2012), p.5.

149 Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, August 29, 1989, US - Federal Republic of Germany, S. Treaty Doc. No. 101-10 (1990) in depth analysis in: Dietmar Anders, *The Limitation on Benefit Clause of the U.S. – Germany Tax Treaty and its Compatibility with European Union Law,* 18 Nw. J. Int'L. & Bus. 165 (1997-1998), p.165-216.

150 For example the US – Netherlands Income Tax Convention – discussed in detail in: Joseph DeCarlo et al., *An Overview of the Limitation on Benefits Article of the New Netherlands – U.S. Income Tax Convention*, 22 Tax Mgmt. Int'l J. 271 (1993).

151 Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, August 31, 1994, Article 30.

152 Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention on Fiscal Evasion with Respect to Taxes on Income, February 22, 1990, Article 17.

153 Dietmar Anders, *The Limitation on Benefit Clause of the U.S. – Germany Tax Treaty and its Compatibility with European Union Law,* 18 Nw. J. Int'L. & Bus. 165 (1997-1998), p.167.

22 of the proposed Treaty and analyzed in further detail in this article. The LoB article contained in the pending Treaty shares some common characteristics with other treaties recently negotiated by the US with European/EU countries and overall follows their common DTCs' practices. In line with their recent treaties, the new LoB clauses provide for a variety of tests in order to qualify for benefits such as ones for publicly traded companies, derivative benefits, an active trade or business test, a headquarters company test as well as a triangular rule all of which are presented below in more detail.

There are five categories of a "qualified person" under provisions of Article 22(2) of the proposed Treaty.[154] Such "qualified person" has to be a resident of Contacting State and either (i) an individual, (ii) Contracting State or administrative body such as defined in sub-paragraph 2(b), (iii) company, (iv) person described in Article 4(2) (Resident) or (v) *"person other than an individual"*[155] all of which are subjected to further conditions and thresholds as per provisions of the Article 22 and the Treaty in general. Below are the tests to determine whether or not a "person" can qualify for the benefits.

- **Publicly traded test – Art 22(2)(c)(i)**

The first prong of the publicly traded test under Art 22(2)(c)(i) is met for a resident of a Contracting State to be a "qualified person" if a principal class of the company shares and *"any disproportionate class of shares"*[156] are traded on a regular basis on one or more recognized stock exchanges, and either the 'management and control' of the company is primarily located in the Contracting State in which the company is a resident, or said shares are mainly traded in the same Contracting State that the company is a resident of (or as per subparagraph (2)(c)(i) the EU or EFTA located[157] recognized stock exchange for Polish-resident-company, and NAFTA[158] recognized stock exchange for the US-resident-company).

The second prong of the test sets a minimum threshold of 50% of the shares' aggregate voting power and value (same for any disproportionate class of shares) and the direct or indirect ownership of the company must be held by five or less companies entitled to proposed Treaty's benefits. The companies need to meet the Article 22(2)(c)(i) requirements, i.e. the first prong "publicly traded" test. Also, *"in the case of indirect ownership, each intermediate owner is a resident of either Contracting State"*.[159]

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154 The 2017 OECD MTC currently lists seven categories defining who can be a "qualified person" under Article 29(2) (Entitlement to Benefits).

155 Article 22(2)(e) (Limitation on Benefits).

156 Article 22(2)(c)(i) (Limitation on Benefits).

157 EFTA is comprised of Switzerland, Norway, Liechtenstein and Iceland.

158 North American Free Trade Agreement.

159 Article 22(2)(c)(ii) (Limitation on Benefits).

Paragraph 8 of the article states that the "recognized stock exchanges" include the NASDAQ[160], the Warsaw Stock Exchange[161], the stock exchanges as listed in Art 22 (8)(a)(iii), i.e. of Amsterdam, Brussels Budapest, Frankfurt, London, Mexico City, Montreal, Paris, Toronto, Vienna and Zurich and other, not listed but agreed to by competent authorities, stock exchanges.[162] The requirement is to establish a sufficient connection with the residence country, i.e. Contracting State. Although not impossible, companies that set up their operations with the aim of treaty-shopping are unlikely to be using quoted companies due to their ownership structures. The tests for this address, amongst other factors discussed below, factors such as the share ownership percentage as well as specific stock exchanges as already detailed above in this article. Although the term "regularly traded" is not defined in the provisions of the proposed Treaty, the answer as to how it should be determined is contained in the General Definitions Article 3, i.e. *"the domestic law of the country from which benefits are sought is determinative."*[163] When it comes to the "primarily traded" definition in paragraph 8(d) of the Article, it is consistent with the definition in Treas. Reg. Section 1.884-5(d)(3).

With regard to the "management and control" test, Article 22(8)(e) of the proposed Treaty states that the conditions will be met where the day-to-day strategic, financial and operational decision-making responsibilities are conducted in the state of residence rather than any other state. The latter also applies to the day-to-day activities leading to preparation and making of those decisions conducted by the employees.

The latter part of the test also relates to the subsidiaries of publicly traded companies test presented below in more detail. As has previously been observed in the academic analysis of the LoB clause of the US-Malta DTC, the purpose of this clause is to ensure "substantial business activities" for the company overcoming the anti-conduit company hurdles which are lurking in the LoB provisions. [164]

160 Further: Art 22 (8)(a)(i)

161 Art 22 (8)(a)(ii)

162 Art 22 (8)(a)(iv)

163 '*Department of the Treasury Technical Explanation of the Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income'*, p.60. Available at: (*Treasury.gov*, 2019) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Technical-Explanation-Poland-6-19-2014.pdf> accessed 6 December 2019.

164 Borg Scicluna, M., *An analysis of the Limitation on Benefits clause in the recent US-Malta double taxation agreement – Part 1'*, (International Tax Report, April 2012), p.6-7.

- **Subsidiary of publicly traded company test – Art 22(2)(c)(ii)**

Subsidiaries of publicly traded companies can, under the provisions of the Treaty, qualify for Treaty benefits upon meeting the Art 22(2)(c)(ii) test. In these circumstances, a qualified person is one that has a direct or indirect ownership of a company's shares by five or fewer US or Polish publicly traded companies entitled to benefit from the provisions of the Treaty under the publicly traded test.[165] Said ownership must be either equal to or exceed the threshold set at 50% of the aggregate voting control and value of the shares and at equal to or exceeding the 50% of any disproportionate class of shares. If the ownership is indirect then each of the intermediate owners must be a resident of either the US or Poland. It is worth noting that an identical provision can be observed in article 22(2)(c)(ii) of the US Model.

- **Ownership-base erosion test – Art 22(2)(e)**

For the purpose of clarity, in this test the term "person" means *"a person other than an individual"*.[166] This is a two-fold test for legal entities comprised of two interdependent elements where the resident has to meet the requirements of both the ownership (and) base erosion trials in order to qualify. Firstly, at least 50% of shares or other beneficial interests in the company must be directly or indirectly (if the latter then each of the intermediate owners must be resident in treaty-state) owned by persons' resident in the treaty-state on at least half of the year's taxable days.[167] Secondly, the proportion of less than 50 percent of the tax year's gross income for the "person" is directly or indirectly paid or accrued to certain non-qualifying residents of either treaty-state in such form so as to be deductible in said person's country of residence.

This does not include arm's length payments as observed in a company's ordinary course of business such as payments for tangible property and services.[168]

- **Derivative benefits test – Art 22(3)**

In order to meet the derivative benefits test under Article 22(3), a person must meet the two-prong ownership-base erosion test as well as tax-rate test. The ownership portion of the test requires that more than 95 percent of the company is owned by

165 More information: '*United States and Poland sign new income tax treaty'*, (Ernst & Young International Tax Alert, February 19, 2013) <http://www.ey.com/Publication/vwLUAssets/US_and_Poland_sign_new_income_tax_treaty_Feb_192013/$FILE/2013US_CM3214_US_and_Poland_sign_new_income_tax_treaty.pdf> accessed 27 June 2014.

166 Article 22(2)(e).

167 Article 22(2)(e)(i).

168 Article 22(2)(e)(ii).

seven or more "equivalent beneficiaries". Both voting power and value are tested[169] in this case and the ownership can be both direct and indirect.

The base erosion element sets the hurdle at less than 50 percent of gross income received by the person for the taxable year. This is paid or accrued, directly or indirectly, and is deductible in the tested person's jurisdiction with a reservation that said person cannot be an "equivalent beneficiary". As in the case of the ownership-base erosion test discussed above, certain arm's length payments are not included.[170]

Paragraph 8(f) provides for a definition of an "equivalent beneficiary" as a person who must be a resident of an EU Member State or any other EFTA state[171] or a party to NAFTA (subject to certain limitations).

As an interesting point, the proposed LoB clause in the pending US-Poland Treaty is somewhat different from the now ratified Protocol to the US-Spain DTC. There, the corresponding derivative benefits provision contains much more restrictive language[172] which proves the earlier point about the differences between the LoB clauses the US enters into in its DTCs with various other countries, possibly varying based on the other country's bargaining power or targeting some recognised threats to a particular DTC. The highlighted above test is similar to the DTCs with European countries such as US-Belgium,[173] US-Sweden[174] and the US-UK[175] treaties.[176]

- **Active trade or business test – Art 22(4)**

In addition to the provisions found in the 2006 US MT, the proposed US-Poland Treaty contains: (i) an anti-inversion provision,[177] a headquarters company test[178] and

169 *"and at least 50% of any disproportionate class of shares".*

170 Article 22(3)(b) i.e. *"payments in the ordinary course of business for services or tangible property".*

171 where EFTA states include: EU plus Iceland, Liechtenstein, Norway and Switzerland.

172 See: US Tax Treaty Newsletter, (17 January 2013), *New protocol to US-Spain treaty signals possible changes in the US policy on limitation on benefits.* Slide 2: (2018) <https://www.pwc.com/us/en/tax-services-multinationals/newsletters/us-tax-treaty-developments/spanish-protocol-us-spain-treaty.html > accessed 19 February 2018.

173 Article 21(3).

174 Article 17(3).

175 Article 23(3).

176 (2014) <http://www.deloitte.com/assets/DcomUnitedStates/Local%20Assets/Documents/Tax/us_tax_United_States_Alert_021813.pdf> accessed 25 October 2014.

177 Article 22(2)(c)(i)(B).

178 Article 22(5).

a triangular provision[179] with the latter two described below. According to some practitioners, the active trade or business test does not provide a "substantially safe harbor", however, they note a chance that the memorandum of understanding or the yet to be exchanged diplomatic notes will perhaps contain one.[180] The academic body seems to share this opinion.[181]

- **Headquarters company test – Art 22(5)**

At variance with the US MT, the LoB provisions of paragraph 5, i.e., the so-called "headquarter test", is in accord with a handful of other, concluded or currently negotiated US DTCs, such as one with Chile, Hungary and the Netherlands, as well as Spain. In fact, this test is nearly identical to the US-Hungary Article 22(4) but for the requirement that a resident must satisfy the provision with regard to income for *"any other specified conditions for the obtaining of such benefits"*.[182]

Upon meeting this test, a company operating as a headquarter company for a multinational corporate group qualifies to access the Treaty benefits.

"Triangular provision" – paragraph 6

Not surprisingly, the US included the so-called "triangular provision" in the new LoB clause. It is not surprising because the same has been done in the DTCs with Malta,[183] Chile and Hungary.[184] Under these provisions, if before the introduction of paragraph 6 of the LoB article, a resident company was able to access the benefits for income derived from a PE not located in Poland or the US, i.e., a non-treaty-country, then now, it will be prevented from doing so. It is "triangular" because it involves three elements *"an enterprise of one contracting state, an enterprise of the other contracting state and the permanent establishment in a third state."*[185] The US Model itself does not contain a "triangular" provision.

179 Article 22(6).

180 (2014) <http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_United_States_Alert_021813.pdf> accessed 25 October 2014.

181 J. Clifton Fleming, *Searching for the Uncertain Rationale Underlying the US Treasury's Anti-Shopping Policy*, (April 2012). 40 Intertax, Issue 4, p.245-252, p.252-253, 2012. Available at SSRN: http://ssrn.com/abstract=2133616

182 Article 22(3).

183 Article 22(5).

184 (2018) <http://totallyexpat.com/news/us-signs-tax-treaties-with-hungary-chile/> accessed 24 February 2018.

185 Borg Scicluna, M., *An analysis of the Limitation on Benefits clause in the recent US-Malta double taxation agreement – Part 1'*, (International Tax Report, April 2012), p.9.

- **Competent authority determination – Art 22(7)**

Article 27(2) contains an important safety measure for those *bona fide* persons that nevertheless cannot pass the hurdles of the LoB clause, i.e., a chance for the competent authority to determine on a case-by-case basis whether treaty shopping is an issue[186] with respect to a particular taxpayer. Failing to fulfill the requirements of Article 22(2) for a qualified person and not being entitled to Article 22(3) benefits with regard to an "item of income", the other Contracting State can still grant the benefits of the Treaty if it can be determined that the sole purpose *"of the establishment, acquisition or maintenance of such person and the conduct of its operations"*[187] was not to take an advantage of Treaty benefits. Paragraph 7 imposes a requirement for a consultation by the competent authority of the State in which the resident's income arises with the other State before denying the benefits of the Treaty.

In this author's opinion, the tests presented above, however complicated they may sound, provide a substantial obstacle to TC tax planning schemes wishing to take advantages of the proposed Treaty's benefits which are by default intended for "persons" who are actually residents of the Contracting States. Although the tests are rather strict in the hurdles they set, an Article 22(7), i.e., "competent authority determination" can nevertheless allow for some *bona fide* "persons" to access Treaty benefits. Such situations will be decided on case-by-case basis. As to the possible issue of incompatibility of the Treaty's LoB clause with EU law (considering Poland is an EU Member State) this issue shall be addressed in the Conclusion below.

II. Conclusion

Unfortunately, the line between sophisticated tax planning and often equally sophisticated treaty shopping often seems to be blurred in practice. In order to cast some additional light on this, various anti-treaty-shopping methods were developed by the US in its US MT, the OECD in its MTC and a Commentary to it as well under the BEPS Project (in particular Action Point 6). As countries were entering into bilateral DTCs, the international matrix of such tax agreements grew enormously. Although the benefits of the concluded treaties were drafted with the intention of only benefitting the Contracting States, various TC tax planning vehicles appear to be trying to find ways of tapping into the benefits such a Treaty would offer to those residents in the Contracting States. Without reasonable LoB clauses, these illegally obtained advantages can easily turn into burdens for the contracting states. In that light, while it would be easy to be critical of LoB clauses, they do serve a valuable purpose to the contracting states.

186 Tom O'Shea, *EU Tax Law and Double Tax Conventions,* (Avoir Fiscal Limited, London 2008), p.193.

187 Article 22(7) (Limitation on Benefits).

Although LoB clauses are widely used in DTCs as a means of battling tax abuse, one has to note the instances in which they might be deemed to be incompatible with the supranational EU law provisions. In such instances, a LoB clause could be discriminatory where for example it creates an obstacle to any of the four fundamental EU freedoms. Such a risk is not, in the author's opinion, present in the case of the Article 22 LoB clause in the proposed Treaty. Although the LoB clause contained in the Proposed Treaty seems overly complex due to the vast number of tests and hurdles one has to overcome it do not seem to contain a "nationality clause" (as briefly discussed earlier in the article), nor does it pose an obstacle to such companies exercising their fundamental freedoms under the EC Treaty.[188] Although it is generally known that EU law cannot impose obligations on third countries such as the US,[189] it can, however, impose such obligations on its Member States such as Poland. The Member States must comply with the EU, *"[t]his means that Member States are under an obligation not to enter into a DTC which contains a LoB clause in breach of the national treatment principle unless some proportionate justification concerning a general interest can be shown."* [190] According to the 2010 OECD MTC, LoB clauses appeared to be an effective way of combating "stepping-stone" devices[191]. In this author's opinion, the above position was rather erroneous because superficial entities may still meet the requirements as there is no analysis of their essence. Since then, the paragraphs containing the reference to "stepping-stone" devices[192] no longer appear in the 2017 OECD MTC.

Despite the fact that the proposed Treaty seems to be compatible with the EU law, potentially affected taxpayers, both individuals as well as companies, should pay careful attention to the provisions of the proposed Treaty, in particular if they are already claiming benefits under the existing 1974 Convention. Particularly whether they qualify under the active trade or business LoB provisions and the derivative benefits and/or the headquarters company test. In some cases it may mean the need for taxpayers to consider different structures enabling them to stay within the orbit of Treaty benefits, i.e., a continuous qualification for benefits of the proposed Treaty, should it enter into force.[193] The proposed Treaty contains no transition rule which means that taxpayers entitled to 1974 Convention benefits may lose those benefits once the proposed Treaty comes into force. Should the Treaty include such a rule, put

188 For example: the companies of the Contracting States can be listed on their national stock exchanges.

189 Georg W. Kofler, *European Taxation Under an 'Open' Sky: LoB Clauses in Tax Treaties Between the U.S. and EU Member States*, (Tax Notes International 2004), Vol. 35, 45, 46.

190 Tom O'Shea, *EU Tax Law and Double Tax Conventions*, (Avoir Fiscal Limited, London 2008), p.201.

191 The Commentaries on the Articles of the 2010 OECD Model Convention with Respect to Taxes on Income and on Capital, the commentary on Art. 1, paragraph 18.

192 *Ibid*, paragraphs 16-18.

193 As suggested in: '*United States and Poland sign new income tax treaty'*, Ernst & Young (International Tax Alert, February 19, 2013).

simply, it would allow taxpayers who currently benefit from the 1974 Convention's provisions, to continue such benefits for an additional period of 12 months as observed in many DTCs. Fortunately, Article 28(4) (Entry into Force) of the proposed Treaty states that individuals who were entitled to benefits under the 1974 Convention at the time of the entry into force of the new one (i.e., teachers, students and trainees, and government functions under Articles: 17, 18 and 19, respectively) *"shall continue to be entitled to such benefits until such time as the individual would cease to be entitled to such benefits if the 1974 convention remained in force"*.[194] This is consistent with Polish Deputy Finance Minister Maciej Grabowski's view that the older version was "worn out" and demanded changes.[195] He commented that the proposed Treaty contains beneficial provisions for the development of economic relationships between Poland and the US and will serve well, amongst others, academics, students and repatriating to Poland residents.[196] In fact, Article 20 of the proposed Treaty exempts students and business trainees of one treaty-country visiting another treaty-country – a host country – from taxation of certain types of payments received by them. One should also remember the provisions of Treaty's Article 18 which will be warmly welcomed by those living in the US and wishing to retire in Poland. The reaction to the proposed Treaty in Poland can be described as moderate to positive with some voices of criticism from practitioners[197] accusing it of being almost entirely beneficial only to the treasury of both countries – rather than the taxpayers.[198] According to these practitioners, the 1974 Convention provides for a very favourable environment for various, gainful for the taxpayers structures and it was in the US' interest to push

194 Article 28(4) of the proposed Treaty.

195 Polish Finance Minister, Maciej Grabowski during signing of the proposed treaty in Warsaw, 2013. 'Poland And US Sign New Tax Treaty' (*Polskie Radio dla Zagranicy*, 2018) <http://www.thenews.pl/1/12/Artykul/127305,Poland-and-US-sign-new-tax-treaty> accessed 26 March 2018.

196 See also: 'Polska Podpisała Ze Stanami Zjednoczonymi Umowę O Unikaniu Podwójnego Opodatkowania - Prosta Strona Podatków' (*Podatnik.info*, 2018) <http://www.podatnik.info/publikacje/polska_podpisala_ze_stanami_zjednoczonymi_umowe_o_unikaniu_podwojnego_opodatkowania,moja_firma,optymalizacja_podatkowa,2001cd> accessed 17 March 2018.

197 For example, Dr Janusz. Fiszer, Partner at PwC in Poland in his interview for Gazeta Prawna said the LOB clause is *'broad and difficult to apply in practice'* in: Magdalena Majkowska MD Prawna, *Nowa Umowa Z USA Nie Dla Wszystkich Będzie Korzystna* (*podatki.gazetaprawna.pl*, 2018)<http://podatki.gazetaprawna.pl/artykuly/713954,nowa_umowa_z_usa_nie_dla_wszystkich_bedzie_korzystna.html> accessed 12 March 2018.

198 Lukasz Zalewski, *Umowa miedzy Polska a USA o unikaniu podwojnego opodatkowania jest korzysta wylacznie dla fiskusow, (*Gazeta Prawna, 2013) Available at: (*Incorpore.net*, 2019) <http://www.incorpore.net/index.php?option=com_content&view=article&id=85:umowa-midzy-polsk-a-usa-o-unikaniu-podwojnego-opodatkowania-jest-korzystna-wycznie-dla-fiskusow&catid=4:publikacje&Itemid=13> accessed 6 December 2019.

for a change to secure their interests although none of the treaty-countries seem to be in a hurry to conclude it.[199]

The differences in bargaining power as well as importance of the relationship with the US illustrate that when entering into a bilateral DTC with the US it can be easily seen who benefits most by the fruit such negotiations bear in practice. The results can be seen in how elaborate certain provisions are depending on the negotiations. They often produce outcomes that surprise academics and practitioners with their breakaway by the US from the general practices in international treaty negotiations such as in the case of a missing Arbitration clause as briefly highlighted in this article. At this stage, it is unknown when the proposed Treaty will come into force. In 2018, there were quite few treaties waiting in the pipeline as a result of ratification delay caused in the past by US Senator Rand Paul (R-Kentucky) who used the unanimous consent procedures route to block all such action on the Senate floor over concerns about the privacy of taxpayer information. However, after numerous years of DTC limbo, the US Senate has in 2019 ratified new protocols with Luxembourg, Spain, Japan and Switzerland. At this stage, the DTAs with Hungary, Chile and Poland are yet to be acted on by the Senate Foreign Relations Committee as the legislators want to ensure the DTAs will not override the application of the recently enacted § 59A of the Internal Revenue Code, "base erosion and anti-abuse tax" revamping the US international tax system.[200]

Once the Treaty finally does enter into force, the withheld at source taxes under Article 28(2)(a) of the proposed Treaty's provisions will have effect *"for amounts paid or credited on or after the first day of the second month next following the date on which the Convention enters into force"*.[201] Normally, this would mean January 1 of the year next following the treaty's entry into force. However, this will only be in respect of, which is rare, the "other taxes"[202] of the proposed Treaty which may, in case of taxes withheld at source, mean that the taxpayers may need to deal with two different regimes in one tax year.[203] The author strongly encourages all possibly affect taxpayers to familiarize themselves with the proposed Treaty's provisions. When it

199 Lukasz Zalewski, *Umowa miedzy Polska a USA o unikaniu podwojnego opodatkowania jest korzysta wylacznie dla fiskusow, (*Gazeta Prawna, 2013) Available at: (*Incorpore.net*, 2019) <http://www.incorpore.net/index.php?option=com_content&view=article&id=85:umowa-midzy-polsk-a-usa-o-unikaniu-podwojnego-opodatkowania-jest-korzystna-wycznie-dla-fiskusow&catid=4:publikacje&Itemid=13> accessed 6 December 2019.

200 *"IRS issues proposed regulations on key new international provision, the base erosion and anti-abuse tax"*, IRS-2018-250, December 13, 2018 (*irs.gov*, 2019) <https://www.irs.gov/newsroom/irs-issues-proposed-regulations-on-key-new-international-provision-the-base-erosion-and-anti-abuse-tax> accessed 6 December 2019.

201 Article 28(2)(a) (Entry into Force).

202 Article 28(2)(b) (Entry into Force).

203 In Poland the tax year runs parallel with the calendar year, i.e. beginning January 1 and ending December 31 in the US it is a bit more complex. More information available at: *www.irs.gov*.

comes to the LoB, the US and OECD should continue to work more closely to unify their efforts to ensure that the complicated provisions do not discourage foreign investors. Also, the US and EU ought to ensure that their LoB provisions are compliant with EU laws as this would save possible future problems for their Treaty partners. The recent updates to the OECD MTC (especially the 2017 addition of the new Article 29 (Entitlement to Benefits)), the BEPS Action 6 work and further expected reviews to the LOB rule following the release of the 2016 US Model Treaty[204] look encouraging in this regard.

Appendix I

US-Poland Income Tax Treaty timeline

⤷ February 13, 2013 – the US and Poland sign new Income Tax Treaty which is the replace the existing 1974 Convention.

⤷ June 21, 2013 – the DTA is approved by the Parliament of the Republic of Poland.

⤷ August 6, 2013 – Poland completes its domestic ratifications procedures/ process in respect of the signed proposed US-Poland income tax treaty.

⤷ May 20, 2014 - as part of the US domestic ratification procedures the Obama Administration transmitted the US-Poland Income Tax Treaty to the US Senate.[205]

⤷ June 17, 2014 – the JCT releases explanation of the proposed US-Poland Treaty.

⤷ June 19, 2014 – the Senate Foreign Relations Committee (hereafter 'the Committee') held a hearing presided over by Senator Robert Menendez – a Foreign Relations Committee Chairman.

⤷ a Technical Explanation ('TE') of the proposed DTA was released by the Treasury Department.

⤷ March 26, 2018 – Treaty sat on the Treaties Pending in the Senate (updated as of May 8, 2017) list as per U.S. Department of State website.[206]

⤷ The Committee is now to schedule a date to meet and send a report on the proposed treaty for Senate's consideration. An advice and consent to ratification by the Senate should follow if there is a majority, two-thirds vote. Once this stage is completed and the Senate had taken an action, the President, shall complete the US approval and ratification process as he must sign the ratification instrument to the proposed DTA.

204 OECD/G20, supra note 6, at 11.

205 *New US-Poland treaty sent to the Senate*, PwC, (Tax Insights from International Tax Services published 3 June 2014) Available: (*Pwc.com*, 2019) <http://www.pwc.com/en_US/us/tax-services/publications/insights/assets/pwc-new-us-poland-treaty-sent-senate.pdf> accessed 6 December 2019

206 "Treaties Pending In The Senate" (Updated as of July 17, 2019) (*State.gov*, 2019) < https://www.state.gov/treaties-pending-in-the-senate/> accessed 9 December 2019.

⤷ Upon completion of the ratification process by the US,[207] both countries are required to notify each other in writing as to when their domestic ratifications conditions/ procedures have been fulfilled. The proposed treaty will enter into force on the day when the last of said notifications communicated via diplomatic channels is issued between both treaty-countries.[208]

207 Poland completed its ratification process on August 6, 2013.

208 Article 28(1) 'Entry into Force'.