No. 25-1563

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PAUL BRUYEA,

Plaintiff-Appellee

v.

UNITED STATES,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS No. 24-1284; JUDGE MATTHEW H. SOLOMSON

BRIEF FOR APPELLANT UNITED STATES

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July 3, 2025

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STATEMENT OF RELATED CASES

This case has not previously been before this or any other appellate court, and counsel for the United States are aware of no other case that will directly affect or be directly affected by this Court's decision in this case.

This case, arising under the United States-Canada tax treaty, raises the same legal issue as that raised in *Christensen v. United States*, No. 24-1284, which arises under the United States-France tax treaty, *i.e.*, whether the respective treaty allows a U.S. citizen residing in the treaty partner's country to claim a foreign tax credit against the net investment income tax imposed in § 1411 of the Internal Revenue Code where the Code itself does not allow such a credit. On April 15, 2025, this Court issued an order in *Christensen* directing that *Christensen* and this case be treated as companion cases. We respectfully suggest that this Court review the *Christensen* opinion and briefing first, as the Court of Federal Claims in this case looked to *Christensen* in its opinion.

GLOSSARY

Acronym	Definition
CFC	U.S. Court of Federal Claims
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Treaty	Convention Between the United States of America and Canada with Respect to Taxes on Income and Capital, signed on September 26, 1980, as amended by protocols in 1983, 1984, 1995, 1997, and 2007

JURISDICTIONAL STATEMENT

In November 2016, Paul Bruyea filed a federal income tax refund claim for $263,523 for the 2015 tax year. (Appx49.) On May 25, 2023, more than six months later, Bruyea filed a timely refund suit in the U.S. Court of Federal Claims (CFC) seeking that refund.[1] (Appx44-119.) *See* I.R.C. (26 U.S.C.) § 6532(a)(1). The CFC had jurisdiction under 28 U.S.C. § 1491(a). Although the suit involves a treaty-based claim, and such claims are generally beyond the jurisdiction of the CFC under 28 U.S.C. § 1502, a provision of the Internal Revenue Code provides an exception for treaty-based tax refund claims. *See* I.R.C. § 7422(f)(1) (providing that a tax-refund suit may be brought against the United States "notwithstanding the provisions of section 1502 of such title 28 (relating to certain treaty cases)").

On December 5, 2024, on Bruyea's motion for partial summary judgment and the government's motion for summary judgment, the

[1] The original complaint was sealed. (Appx38.) Bruyea filed a motion to seal the complaint and a proposed redacted complaint with exhibits. (Appx38 (Docket entries 2, 3.).) The CFC granted the motion to seal the original complaint and to unseal the proposed redacted complaint and exhibits. (Appx38 (Docket entry 6, Docket entry of June 5, 2023).)

CFC issued an opinion holding that Bruyea was entitled to his 2015 refund claim. (Appx2-36.) On January 17, 2025, the court entered a stipulated judgment for Bruyea that reserved the government's right to appeal. (Appx1, Appx37, Appx1096-1097.) That judgment was a final order resolving all claims of all parties. On March 17, 2025, within 60 days after entry of the judgment, the United States filed a notice of appeal (Appx1098), which was timely under 28 U.S.C. § 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUE

Whether the CFC erred in ruling that Article XXIV of the income tax treaty between the United States and Canada allows a U.S. citizen residing in Canada to claim a foreign tax credit (for taxes paid to Canada) to offset the net investment income tax imposed by § 1411 of the Internal Revenue Code, even though the Code itself does not allow such a credit.

STATEMENT OF THE CASE

A. Legal background

1. The Internal Revenue Code

The United States taxes its citizens on their worldwide income. *See* I.R.C. §§ 1, 61. When a portion of that income is also taxed by another country (*e.g.*, because it was earned in that other country), the result is a phenomenon known as double taxation. The Internal Revenue Code has long contained provisions aimed at reducing double taxation of U.S. taxpayers. To that end, the Code generally allows a foreign tax credit against U.S. income taxes for tax paid to a foreign country. I.R.C. § 27 ("The amount of taxes imposed by foreign countries and possessions of the United States shall be allowed as a credit against the tax imposed by this chapter to the extent provided in section 901."). For example, suppose a U.S. citizen earns $100 in income from a foreign source, which the foreign country taxes at a rate of 10% and which the United States taxes at a rate of 12%. The Code would allow a $10 foreign tax credit for the tax paid to the foreign country against the U.S. tax liability of $12, resulting in U.S. tax due of $2.

But the foreign tax credit provided by the Code is subject to various limitations, some of which are relevant here. *See* I.R.C. §§ 27,

901–909. For one, only certain types of taxes paid to a foreign country qualify—namely, "income, war profits, and excess profits taxes" that are "paid or accrued during the taxable year" to the foreign country. I.R.C. § 901(b)(1); *see also* I.R.C. § 903.

Relatedly, and important here, the credit can only be applied against certain types of U.S. income taxes—*i.e.*, those imposed by Chapter 1 of the Code. *See* § 27 (authorizing a credit against "the tax imposed by this chapter"), § 901(a) ("The credit shall not be allowed against any tax treated as a tax not imposed by this chapter under section 26(b)."). This means that although the foreign tax credit is available against the regular income tax imposed by § 1, it cannot be taken against taxes imposed elsewhere in the Code, outside of Chapter 1, including the tax on net investment income imposed by § 1411 in Chapter 2A—the tax at issue in this case. *Toulouse v. Commissioner*, 157 T.C. 49, 55-56 (2021); *see also* 26 C.F.R. § 1.1411-1(e).

And last, the foreign tax credit is subject to a source-based limitation that may limit the amount of the credit, depending on where the income taxed by a foreign country was earned, whether in the United States (U.S.-source income) or abroad (foreign-source income).

See I.R.C. § 904(a); *see also* §§ 861–865 (providing rules for determining the source of income). Section 904(a) provides that the "total amount" of the credit "shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States . . . bears to his entire taxable income" for the year. This source-based limitation acts as a cap on the credit, allowing it to offset only up to the amount of the U.S. tax that would otherwise be due on the taxpayer's income from *foreign sources*, while precluding any credit against the U.S. tax due on income from *U.S. sources*, thereby preserving the United States' ability to tax fully the taxpayer's income from U.S. sources. *See Vento v. Commissioner*, 147 T.C. 198, 204–05 (2016) ("A taxpayer's overall section 904 limitation for a given year equals the portion of the taxpayer's precredit U.S. tax liability attributable to foreign source income. The limitation prevents taxpayers from using foreign tax credits to reduce their U.S. tax on U.S. source income."); H.R. Conf. Rep. No. 108-755, at 381 (2004) ("The foreign tax credit generally is limited to the U.S. tax liability on a taxpayer's foreign-source income, in order to ensure that the credit serves its purpose of mitigating double taxation of cross-border income

without offsetting the U.S. tax on U.S.-source income."). *See generally* Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke L.J. 1021, 1054–56 (1997) (discussing the history of the foreign tax credit limitation).

To illustrate § 904(a)'s source-based limitation, assume the same facts as in the example above in which a U.S. citizen earns $100 from a foreign source, except that the tax rate of the foreign country on the foreign-source income is 15% (instead of 10%) and, in addition to the $100 in foreign-source income, the U.S. citizen also has $100 in income from U.S. sources. Although the U.S. citizen must pay $15 in tax on the foreign income to the foreign country, his foreign tax credit is limited to $12. The foreign tax credit is derived from multiplying the total U.S. tax liability of $24 ($200 taxed at a U.S. rate of 12%) by 0.5 ($100 foreign income (the numerator) divided by $200 total taxable income (the denominator)), resulting in a $12 credit. Section 904(c) would permit the excess $3 of unused foreign tax to be carried back as a credit

in the prior year and then carried forward for the succeeding 10 years until absorbed.[2]

2. The United States' income tax treaty with Canada

The Internal Revenue Code provisions governing foreign tax credits were the same in all relevant respects in 1980, when the United States and Canada entered into a bilateral income tax treaty. *See* Convention Between the United States of America and Canada with Respect to Taxes on Income and Capital, T.I.A.S. No. 11,087 (signed Sept. 26, 1980) (the "Treaty").[3] Article XXIV of the Treaty describes

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[2] The application of § 904(a)'s limitation on foreign tax credits is somewhat more complicated than illustrated by this simplified example because § 904(d) requires that § 904(a)'s limitation formula be applied separately for different categories, or "baskets," of income (*e.g.*, passive income and general income) to prevent cross-crediting. "Cross-crediting refers to the practice of averaging high and low rates of foreign taxes together to bring the overall rate of foreign tax below the U.S. effective tax rate. This practice erodes the impact of the foreign tax credit limitation, which otherwise might deny a portion of the credit for the highly taxed income." Dirk Suringa, *The Foreign Tax Credit Limitation Under Section 904*, 6060 T.M., at A-2 (BNA 2016) (reproduced at Appx766-769). The example in the text assumes that the foreign source income and the U.S.-source income fall into the same basket.

[3] The original treaty entered into force in 1984 and was amended by protocols in 1983, 1984, 1995, 1997, and 2007. (Appx587-625 (original treaty); Appx625-671 (1983 through 1997 Protocols), Appx901-938 (2007 Protocol).) A copy of the treaty incorporating all changes

(continued…)

how each country will undertake to relieve double taxation of their citizens or residents having dealings with the other country. The United States, for its part, agreed generally to avoid double taxation by authorizing a foreign tax credit as provided for by U.S. law in the Internal Revenue Code. Specifically, Article XXIV(1) provides the following (Appx565 (emphasis added)):

> In the case of the United States, subject to the provisions of paragraphs 4, 5, and 6, double taxation shall be avoided as follows: *In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof)*, the United States shall allow to a citizen or resident of the United States . . . as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; . . .

Canada, in turn, likewise promised to avoid double taxation by allowing a deduction against Canadian tax for taxes paid to the United States, but with a similar caveat that such deduction is "subject to the provisions of the law of Canada regarding the deduction . . . of tax paid in a territory outside Canada . . . ." Article XXIV(2)(a). (Appx565.)

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through 2007 is reproduced at Appx536-586, and we cite to that version. Although the protocols revised various portions of Article XXIV, the relevant language in paragraphs (1), (4), and (6) is unchanged from the original treaty.

Paragraphs 4, 5, and 6 of Article XXIV go on to provide additional special rules that apply "where a United States citizen is a resident of Canada." (Appx566.) Because such a person's worldwide income is taxable by both countries (by the United States based on citizenship and by Canada based on residency), paragraphs 4 and 5 create an ordering rule for the tax credit or deduction that each country must allow to relieve double taxation for certain items of income: Canada must first allow the U.S. citizen a deduction against Canadian tax for taxes paid to the United States on certain U.S.-source income (Article XXIV(4)(a), 5(b)); then, when computing U.S. tax due on the U.S. citizen's remaining, worldwide income, the United States must allow a credit against his U.S. tax for any income tax paid to Canada (after Canada's application of the deduction for U.S. taxes) (Article XXIV(4)(b), 5(c)). (Appx566.)

Paragraph 6 further provides that the U.S. citizen's U.S.-source income referred to in paragraphs 4 and 5 is "deemed to arise in Canada to the extent necessary to avoid the double taxation of such income under paragraph 4(b) or paragraph 5(c)." Article XXIV(6). (Appx566.) This re-sourcing rule, which treats the U.S. citizen's U.S.-source income

as foreign-source income, was necessary to give effect to the credit referenced in paragraphs 4 and 5, which might otherwise be limited by the Internal Revenue Code's source-based limitation in § 904(a) (itself made applicable by paragraph 1).[4]

3. The § 1411 tax on net investment income

In 2010, Congress imposed a new tax on net investment income and codified it in a new Chapter 2A of the Internal Revenue Code. I.R.C. § 1411; Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1402(a)(1), 124 Stat 1029, 1061. Section 1411 in general imposes a 3.8% tax on the net investment income of individuals, trusts, and estates above a threshold amount.

[4] Paragraph 3 of Article XXIV provides a general source rule for purposes of applying Article XXIV in which profits, income, and certain gains of a resident of one Contracting State which may be taxed in the other Contracting state in accordance with the Treaty are deemed to arise in the other Contracting State, while those items which may not be taxed in the other Contracting State in accordance with the Treaty are deemed to arise in the first Contracting State. (Appx656-566.) The re-sourcing rule in Paragraph 6 applies to U.S. citizens who are also residents of Canada, such as Bruyea, "notwithstanding the provisions of paragraph 3." Article XXIV(6). (Appx566.)

B. Bruyea's original and amended federal income tax returns for 2015

Paul Bruyea was a U.S. citizen and a resident of Canada during 2015. He filed an original Form 1040, U.S. Individual Income Tax Return, for the 2015 year as a married taxpayer filing separately. (Appx44, Appx57 (Line 3).)

On his U.S. income return for that year, Bruyea reported taxable income of $7,052,273, a U.S. income tax of $1,398,683, and an alternative minimum tax of $10,183. (Appx58 (Lines 43-45).) Bruyea claimed a foreign tax credit of $1,398,571, which he applied against his "regular" income tax liability (*i.e.*, income taxes imposed by Chapter 1 of the Code). (Appx58 (Line 48), Appx68-69.)[5] Although he also reported a

[5] Bruyea computed the allowable foreign tax credits on two separate Forms 1116, one providing for a "passive category income" foreign tax credit of $1,398,571 (Appx69 (Line 22)), and the other providing for a "general category income" foreign tax credit of $0 (Appx71 (Line 22)). Under § 904 of the Code, Bruyea's passive-category foreign tax credit was limited to the total U.S. tax liability ($1,398,683) multiplied by a fraction, where the numerator of the fraction is taxable income from foreign sources ($3,557,663) and the denominator is total taxable income from both U.S. and foreign sources ($3,557,965). *See* Appx68 (Lines 17-18); *see also* I.R.C. § 904(a); *supra* pp. 4-7. The resulting fraction of .99992 multiplied by Bruyea's tax liability of $1,398,683 resulted in the claimed foreign tax credit of $1,398,571. (Appx58 (Lines 19-22).)

liability of $263,523 for the § 1411 tax on net investment income in Chapter 2A, he did not claim a foreign tax credit against that liability on his original return. (Appx58 (Line 62), Appx 84 (Line 17).) But he later filed an amended return seeking a refund of his entire § 1411 tax liability, claiming that Article XXIV(1) of the Treaty authorized a foreign tax credit to be applied against his § 1411 tax liability, even though the Internal Revenue Code did not authorize such credit. (Appx49 (Line22), Appx50 (Part III), Appx53; *see also* Appx45-46.)[6]

The IRS proposed disallowing Bruyea's refund claim on the ground that a "[f]oreign tax credit cannot be claimed to offset the Net Investment Income Tax (NIIT) calculated on the Taxpayers Canadian source investment income." (Appx472; *see generally* Appx467-468.) Bruyea protested the proposed disallowance to the IRS Independent Office of Appeals, arguing that the U.S.-Canada income tax treaty authorized him to claim a foreign tax credit against the § 1411 tax. (Appx489-530.) Bruyea then presented his claim to the U.S. and

[6] The net investment income tax of $263,523 represents 3.8% of $6,934,823, the sum of Bruyea's U.S.-source passive income and foreign-source passive income in 2015, less $125,000, a threshold amount based on his filing status. (Appx84 (Lines 12-17); *see also* Appx45.)

Canadian competent authorities under the mutual agreement procedure outlined in the Treaty (Article XXVI). (Appx379-410, Appx569-570.) In response to a subsequent status request from Bruyea, the Canadian competent authority sent him a letter stating that it agreed with his position but that "discussions with the US competent authority . . . are ongoing and our respective positions remain far apart." (Appx378.) Bruyea then filed this action in the CFC. (Appx44-119.) After Bruyea initiated this litigation, the U.S. competent authority terminated any ongoing consideration of his competent authority request under the Treaty because of the litigation, and the IRS formally disallowed his refund claim. (Appx532-533.) *See* Rev. Proc. 2015-40, § 6.05(1), 2015-35 I.R.B. 236, 250 ("The U.S. competent authority will not . . . continue to consider a taxpayer's competent authority request regarding . . . any competent authority issue and taxable period that are pending in a U.S. federal court and that were under IRS Appeals jurisdiction with respect to the same taxpayer before the commencement of the litigation.").

C. Proceedings in the CFC

In the CFC, Bruyea moved for partial summary judgment, and the government cross-moved for summary judgment, on the question whether the Treaty authorizes a foreign tax credit against the § 1411 tax. (Appx132-174, Appx802-830, Appx841-900, Appx 939-63.) The government's primary argument was that the Treaty, Article XXIV(1), expressly allows a credit only "in accordance with the provisions and subject to the limitations of the law of the United States," and because the Internal Revenue Code does not allow foreign tax credits against taxes imposed outside of Chapter 1—including the § 1411 tax at issue—neither does the Treaty. (Appx871-877.)[7]

[7] The government argued, alternatively, that the Internal Revenue Code's disallowance of a foreign tax credit in this circumstance would prevail over any contrary interpretation of the Treaty under the "last-in-time" rule. (Appx881-882.) *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Kappus v. Commissioner*, 337 F.3d 1053, 1057 (D.C. Cir. 2003) ("When a statute conflicts with a treaty, the later of the two enactments prevails over the earlier under the last-in-time rule."). The CFC disagreed, concluding there was no "direct[ ] conflict[ ]" (Appx15) between the Code and the Treaty, as required for the last-in-time rule to apply, because neither § 27 nor § 901(a) of the Code affirmatively prohibits a treaty from authorizing a credit against the § 1411 tax. (*See* Appx15-20.) On appeal, the government does not challenge the CFC's ruling on this specific point or raise this alternative argument based on the last-in-time rule.

The CFC denied the government's motion and granted Bruyea's motion for partial summary judgment in a published opinion reported at 174 Fed. Cl. 238 (2024). (Appx2-36.) Although the CFC recognized that the Internal Revenue Code did not authorize a foreign tax credit against the §1411 tax, it held that the Treaty nonetheless did authorize such a credit independent of the Internal Revenue Code. (Appx35-36.)

In reaching that conclusion, the CFC declined to give "a literal, expansive reading" to Article XXIV(1)'s language restricting the credit in accordance with U.S. law, language that the CFC referred to in its opinion as the "U.S. Law Limitation." (Appx12-13.) According to the CFC, the government took an "ad-hoc approach to the U.S. Law Limitation" by interpreting it to preclude a credit not authorized by the Code, while also "conced[ing] that there are Treaty provisions that the government must follow even though they are inconsistent with the [Code]." (Appx12-13.) The example given by the CFC was the government's agreement that "Paragraphs 3, 4, 5, and 6 of Article XXIV . . . make promises that are inconsistent with the Code and provide rights that would not otherwise be provided for under the Code." (Appx21 (cleaned up).) In the CFC's view, that "concession" created an

"insurmountable impediment" to the government's interpretation of the U.S. law limitation in the Treaty. (Appx21.)

The CFC also considered other text in the Treaty and concluded that the government's interpretation of the U.S. law limitation (1) did not account for the language of the parenthetical that follows it; (2) would "render Article XXIV entirely inoperative"; and (3) was inconsistent with the Treaty's definition of "United States tax," which the parties agree covers the § 1411 tax. (Appx26-27.)

Having thus rejected a literal reading of the U.S. Law Limitation, the CFC turned to "extrinsic evidence" to determine its meaning, including the Department of the Treasury's Technical Explanation of the Treaty, the Letter of Submittal from the President to the United States Senate for ratification of the Treaty, and the Joint Committee on Taxation's explanation of the Treaty. (Appx28-32; *see* Appx218-322 (Technical Explanation), Appx 588-592 (Letter of Submittal), Appx 672-687 (Joint Committee explanation).) The CFC believed those documents supported a narrow reading of the U.S. Law Limitation to mean only that "[t]he credit is *to be computed* in accordance with the provisions of and subject to the limitations of U.S. law." (Appx32

(emphasis in original).) According to the CFC, "the parties intended something very specific" with the U.S. Law Limitation—*i.e.*, that "particular I.R.C. provisions may be appropriately utilized to compute the *quantum* of the tax credit." (Appx29-30 (emphasis added); *see also* Appx36 ("The U.S. Law Limitation clause is focused on how a Treaty-based credit is *computed* but not its existence.") (emphasis added).) In other words, the CFC construed the Treaty's reference to the "provisions" and "limitations" of "the law of the United States" in Article XXIV(1) to refer *only* to those particular provisions of the Code dealing with the actual *computation* of the amount of the foreign tax credit, but *not* to refer to § 27 and § 901(a) of the Code that preclude altogether any credit against taxes imposed outside of Chapter 1. Thus, although the CFC held that the U.S. law limitation in paragraph 1 of Article XXIV also applied to any potential treaty-based credit in paragraph (4)(b), it concluded that the U.S. law limitation did not preclude a foreign tax credit being applied against the net investment income tax under either paragraph. (Appx23 n.19.)[8]

[8] In so concluding, the CFC in this case disagreed with part of the CFC's holding in *Christensen v. United States*, 168 Fed. Cl. 263 (2023).

(continued…)

Finally, the CFC also gave weight to Canada's current view, expressed in its competent authority's July 2023 letter to Bruyea indicating support for his position, as well as to principles of treaty construction that the CFC believed favored Bruyea. (Appx33; *see* Appx378.)

Following the CFC's ruling, the parties stipulated to a judgment granting Bruyea a refund of $263,462, plus interest, and reserving the government's right to appeal. (Appx1, Appx37, Appx1096-97.) The government filed a timely appeal on March 17, 2025. (Appx1098.) 28 U.S.C. § 2107(b). Because of the similarities between this case and the government's pending appeal in *Christensen*, which has now been fully briefed, this Court subsequently granted Bruyea's unopposed motion to treat this appeal and the *Christensen* appeal as companion cases to be

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Christensen addressed claims for foreign tax credits under two subparagraphs of the U.S.-France treaty: article 24(2)(a), which is analogous to paragraph (1) of the Treaty at issue here, and article 24(2)(b), which is similar in application to paragraph (4). *Christensen* held that article 24(2)(a) "does not provide a foreign tax credit against the net investment income tax for the French income tax paid" by the taxpayers there, but also held that article 24(2)(b) "can provide a foreign tax credit against the net investment income tax imposed by I.R.C. § 1411 for the French income taxes paid." 168 Fed. Cl. at 333. The government appealed the latter holding in *Christensen*.

heard by the same merits panel. *See* Statement of Related Cases, *supra*.

SUMMARY OF ARGUMENT

Article XXIV(1) of the Treaty provides that a U.S. citizen or resident may claim a foreign tax credit against the U.S. income tax "[i]n accordance with the provisions and subject to the limitations of the law of the United States." The CFC erred in holding that Article XXIV provides a foreign tax credit against the net investment income tax independent of the Code restrictions in §§ 27 and 901(a) that preclude a foreign tax credit against income taxes arising outside Chapter 1 of the Code, including the § 1411 tax located in Chapter 2A.

1. Both the text and context of Article XXIV(1) demonstrate that Article XXIV of the Treaty does not authorize a foreign tax credit against the net investment income tax in § 1411. The signatories expressly agreed that the United States would allow a foreign tax credit "[i]n accordance with the provisions and subject to the limitations of the law of the United States." The law of the United States permits a foreign tax credit to offset only income taxes imposed by Chapter 1 of the Code, which does not include the net investment income tax

imposed in Chapter 2A. Because the Code does not authorize a foreign tax credit against the § 1411 tax, neither does the Treaty, which expressly incorporates the Code's "provisions" and "limitations" governing foreign tax credits. The CFC's holding to the contrary is at odds with every other court to have examined identical language in other treaties.

The parenthetical following the U.S. law limitation—which provides that the credit available in the Treaty is subject to post-ratification amendments to the Code so long as the amendments do not change the "general principle hereof"—also supports the government's position. The phrase "general principle hereof" refers to the general principle of Article XXIV to relieve double taxation, a goal circumscribed from the start by the signatories' agreement that any Treaty credit would be subject to each country's domestic law. The U.S. law that applied when the Treaty was signed in 1980 restricted the foreign tax credit to offsetting Chapter 1 taxes, and it does the same now. Nothing in the 2010 enactment of the net investment income tax in § 1411 in Chapter 2A of the Code changed that longstanding

statutory scheme; therefore, § 1411's enactment did not change Article XXIV's "general principle" for relieving double taxation.

The CFC's narrow interpretation of the U.S. law limitation to incorporate only the Code's rules for computing foreign tax credits finds no support in the Treaty's text, whose plain meaning easily extends to the provisions of the Code that restrict foreign tax credits to Chapter 1 taxes.

2. The Technical Explanation of the Treaty prepared by the U.S. Treasury Department—the agency charged with the negotiation and enforcement of the Treaty—supports the Government's interpretation. It confirms that the Government's interpretation is in fact how the United States understood Article XXIV contemporaneously when the Treaty was executed, and Canada expressly endorsed Treasury's views at that time. The CFC misinterpreted a reference in the Technical Explanation to the computational provisions of the Code to mean that only Code provisions addressing computational issues apply to the Treaty credit. The CFC similarly misread a reference to paragraph 7 of Article XXIV to refute the government's position. Paragraph 7 treats certain sub-national taxes of each country (*i.e.*,

Canadian provincial taxes and U.S. state and county taxes) the same as national taxes of each country, even if the sub-national taxes are not creditable under the Code. But the fact that the signatories agreed to some modification of the Code's rules does not negate the general rule in Article XXIV(1) that the Code's provisions otherwise apply—including the requirements that a foreign tax credit may be applied only against incomes taxes in Chapter 1 of the Code. The CFC similarly misinterpreted other extrinsic evidence it relied on here.

3. Finally, the Government's interpretation is also consistent with the purpose of the Treaty to avoid double taxation. While the Treaty aims to relieve double taxation, its text demonstrates that it does not, and was never intended to, eliminate double taxation in all circumstances. In Article XXIV(1) and (2), the United States and Canada agreed to allow a tax credit or deduction to reduce double taxation, but each country also conditioned and restricted the promised tax benefit in accordance with its own domestic law. As the signatories would have understood, the inevitable result of such restrictions is double taxation in some instances. The CFC erred in disregarding the

Treaty's plain text in favor of a more liberal interpretation requiring the elimination of double taxation in this case.

The CFC's judgment was erroneous and should be reversed.

ARGUMENT

The U.S. foreign tax credit referenced in Article XXIV of the Treaty is subject to the Internal Revenue Code's limitations on foreign tax credits

Standard of review

This Court "review[s] de novo a grant and denial of summary judgment by the [Court of Federal Claims]." *GSS Holdings (Liberty) Inc. v. United States*, 81 F.4th 1378, 1381 (Fed. Cir. 2023) (citation omitted).

A. Article XXIV does not authorize a foreign tax credit against the net investment income tax

The CFC erred in holding that Article XXIV(1) authorizes a foreign tax credit against the net investment income tax imposed by I.R.C. § 1411. (Appx28-32, Appx35-36.) The Treaty's text, as well as the extrinsic evidence relevant to treaty interpretation, supports the government's position that the Treaty does not authorize a foreign tax credit to offset the § 1411 tax. Three other courts have interpreted identical language in other U.S. tax treaties as precluding a foreign tax

credit against the § 1411 tax; the CFC's contrary analysis in this case is flawed and reflects a misunderstanding of the Treaty's text and the other materials it relied on.

1. The plain text of the U.S. law limitation in Article XXIV(1) refutes the CFC's interpretation

The Treaty's plain text strongly supports the government's interpretation that a credit under the Treaty is allowed only if authorized by the Code. *See Air France v. Saks*, 470 U.S. 392, 396–97 (1985) (the interpretation of a treaty "must begin . . . with the text of the treaty and the context in which the written words are used"). In Article XXIV(1), the signatories expressly agreed that the United States would allow a foreign tax credit "in accordance with the provisions and subject to the limitations of the law of the United States . . . ." Under the law of the United States, a foreign tax credit is available only against taxes imposed by Chapter 1 of the Internal Revenue Code. I.R.C. §§ 27, 901(a). Section 27 allows foreign tax credits to offset taxes imposed under "this chapter" (*i.e.*, Chapter 1) to the extent provided in § 901, and § 901 allows certain foreign taxes to be credited against "the tax imposed by this chapter" (again, Chapter 1), "subject to the limitation of section 904." *See* I.R.C. §§ 27(a), 901(a) (2015) (the year at

issue). These provisions were identical when the Treaty was signed in 1980. *See* I.R.C. § 33 (1976) (later renumbered as § 27); I.R.C. § 901(a) (1976). Therefore, any foreign tax credit authorized by the Treaty must be "in accordance with" and "subject to" these same provisions and limitations of the Code. Because the § 1411 tax is not a Chapter 1 tax, the Code does not authorize a foreign tax credit against the § 1411 tax at issue. *Toulouse*, 157 T.C. at 60 ("The enactment of a 3.8% net investment income tax as part of chapter 2A is a clear expression of congressional intent that credits against section 1 not apply against the section 1411 tax.") Consequently, neither does the Treaty.

The CFC's contrary ruling is the first of its kind, with three other courts—including the Tax Court, a District Court, and the CFC in another case—interpreting identical language in other U.S. tax treaties as precluding a foreign tax credit against the § 1411 tax. *Toulouse*, 157 T.C. at 58–62) (denying a foreign tax credit under U.S. treaties with France and Italy); *Kim v. United States*, 664 F. Supp. 3d 1062, 1084 (C.D. Cal. 2023) (denying a foreign tax credit under the U.S. treaty with South Korea); *Christensen*, 168 Fed. Cl. at 326–29 (adopting the government's interpretation of identical language in the United States'

treaty with France, but holding that a separate provision in that treaty authorized a foreign tax credit), *appeal pending* No. 24-1284 (Fed. Cir.).

The CFC's reasons for rejecting this straightforward interpretation of the Treaty's text are unsound. The CFC agreed that the Code does not allow a foreign tax credit against the § 1411 tax (Appx12), but it rejected a "literal" reading of the Treaty's U.S. law limitation as untenable because it believed other provisions in Article XXIV—namely, paragraphs 3, 4, 5, and 6—"make promises that are inconsistent with the Code and provide rights that would not otherwise be provided for under the Code" (Appx21). Correctly understood, however, paragraphs 3, 4, 5, and 6 further support the government's interpretation that the Treaty authorizes a credit only in accordance with the provisions and subject to the limitations of the Code, as stated in paragraph 1.

In fact, paragraphs 3 and 6 are both re-sourcing provisions that have no purpose *unless* the credit allowed by the Treaty *is* subject to the Code's provisions. To explain, both paragraphs provide that certain U.S.-source income is to be treated as foreign-source income for purposes of Article XXIV. *See* Article XXIV(3) ("Profits, income or

gains . . . of a resident of a Contracting State which may be taxed in the other Contracting State . . . shall be deemed to arise in that other State."); Article XXIV(6) ("[U.S.-source income] referred to in paragraph 4 or 5 shall . . . be deemed to arise in Canada.") (Appx566). But the source of the income—whether U.S.-source or foreign-source—has no relevance under Article XXIV unless the credit it authorizes is subject to the Code's source-based limitation in § 904(a). As illustrated above, § 904(a) limits the foreign tax credit to the amount of U.S. tax on foreign-source income, with the effect of precluding the credit from offsetting U.S. tax on U.S.-source income. Therefore, the drafters included the re-sourcing provisions in paragraphs 3 and 6 to treat U.S.-source income as foreign-source income so that the credit authorized in Article XXIV would not be restricted by Code § 904(a)'s source-based limitation with respect to certain items of income addressed by the Treaty. The drafters' inclusion of these re-sourcing provisions confirms their understanding that the credit authorized by the Treaty is subject to the Code's provisions and limitations, including § 904(a). If Code § 904(a) did not apply, then the source of the income would not matter for purposes of Article XXIV, and there would have been no reason for

the drafters to include these re-sourcing provisions in the Treaty. In contrast, the CFC's interpretation of the text of Article XXIV renders the re-sourcing provision in paragraphs 3 and 6 superfluous, violating the rule that treaties should not be interpreted in a manner that makes terms meaningless. *Water Splash, Inc. v. Menon*, 581 U.S. 271, 277-278 (2017) (rejecting an interpretation of the Hague Service Convention that would render a provision superfluous).[9]

To be sure, the treatment of income arising in the United States as foreign-source income in paragraphs 3 and 6 is "inconsistent" (Appx21) with the Code's rules in §§ 861–865 for determining the source

[9] Tax practitioners and legal commentators share the view that re-sourcing provisions like these are included in many U.S. treaties because the foreign tax credits authorized by those treaties remain subject to the Code's source-based limitation in § 904(a). *See, e.g.*, Lori Hellkamp & Alden Dilanni-Morton, *Demystifying the Saving Clause and Re-Sourcing Rules in Treaties*, Tax Notes Federal, vol. 172, at 1105, 1107–09 (August 16, 2021) (reproduced at Appx770-776; *see* Appx770, Appx772-774); Karl Kellar and Patrick Browne Jr., *U.S. Income Tax Treaties—Benefits Provided by a Country to Its Own Residents and Citizens*, 6875-2nd T.M., at A-15 to A-16 (2019) (citing the U.S.-France Treaty, art. 24), (reproduced at Appx777-784; *see* Appx777-781); New York State Bar Association Tax Section, *Report on Treaty Re-Sourcing Rules*, Rep. No. 1313, at 2–3 & n.4, 13–14, 23-24 (November 24, 2014); *see also id.* at 14–20 (discussing the evolution of re-sourcing provisions in the U.S. model income tax conventions), *available at* https://perma.cc/86N3-8EUG.

of income. But the treaty parties were free to agree to adjustments to the Code's sourcing rules as they deemed appropriate. The CFC misunderstood that paragraph 1 sets forth the general rule for determining the availability of a credit under the Treaty by incorporating the provisions of U.S. law governing the allowance of a foreign tax credit. But the treaty parties could, and did, make certain adjustments in subsequent paragraphs that differ from, or are inconsistent with, what the Code would otherwise provide; and in such instances, the parties' agreed adjustments in the Treaty control. *See* I.R.C. § 7852(d). Contrary to the CFC's reasoning, however, the mere fact that the treaty parties agreed to some adjustments that differ from specific Code provisions in no way negates the general rule in paragraph 1 that the allowance of a credit is otherwise governed by the Code. Indeed, that seems to be precisely what the drafters intended to convey by including in paragraph 1 the phrase "subject to the provisions of paragraphs 4, 5, and 6," which precedes the text of the U.S. law limitation. The relevant point is that the treaty parties did not agree to any changes in Article XXIV that would alter the Code's restriction on foreign tax credits to Chapter 1 taxes; therefore, the Code's provisions,

expressly incorporated by paragraph 1, apply to preclude the credit against the § 1411 tax in Chapter 2A that is at issue here.

The existence of a special ordering rule in paragraphs 4 and 5 of Article XXIV for U.S. citizens resident in Canada likewise does not support the CFC's conclusion that Treaty provisions that differ from the Code demonstrate that the Code does not otherwise apply. Because such U.S. citizens are subject to taxation on their worldwide income by both countries, the signatories agreed to rules for determining the order in which credits or deductions for certain taxes paid to the other country are to be applied. *See supra* pp. 9-10. If they had not done so, both countries would be paradoxically required, by operation of Article XXIV(1) and (2), to provide a credit or deduction, subject to their domestic law, on the income taxes imposed by the other country on the same items of income. The fact that the signatories solved that unique problem by providing a special ordering rule in no way negates the general rule in Article XXIV(1) that the Code applies.

2. Other language in the Treaty supports the government's interpretation

The CFC's interpretation of, and reliance on, other text of the Treaty (Appx26-27) was also flawed. First, the parenthetical language

following the U.S. law limitation in paragraph 1 is consistent with the government's interpretation. Article XXIV(1) provides in relevant part: "In accordance with the provisions and subject to the limitations of the law of the United States (*as it may be amended from time to time without changing the general principle hereof*), the United States shall allow . . . a credit . . ." (emphasis added). (Appx565.) The parenthetical clarifies that the credit available under the Treaty is subject to the provisions and limitations of the Code *as amended* after ratification of the Treaty, so long as subsequent amendments do not change the "general principle hereof."

The phrase "general principle hereof" refers to the general principle of Article XXIV, the aim of which is to provide relief from double taxation. That overall goal, however, was circumscribed from the start by the signatories' mutual agreement that the credit allowed by the United States and the deduction allowed by Canada would be subject to the provisions and limitations of each country's own domestic law. *See* Article XXIV(1), (2) (Appx565.) Thus, the "general principle" of Article XXIV to relieve double taxation has always incorporated each country's domestic-law restrictions on tax benefits.

At the time the Treaty was signed in 1980, as now, U.S. law restricted the foreign tax credit to Chapter 1 taxes, I.R.C. § 33(a) (1976) (later renumbered as § 27), and even some Chapter 1 taxes did not qualify for the credit, I.R.C. § 901(a) (1976). These provisions were part of "the law of the United States" that Article XXIV(1) expressly incorporates as a condition on the credit authorized by the Treaty. The 2010 enactment of § 1411 in Chapter 2A did not change the Code's long-standing statutory scheme for relieving double taxation by means of a foreign tax credit against Chapter 1 income taxes—and only against Chapter 1 income taxes. Accordingly, the same statutory scheme for relieving double taxation that existed in 1980 when the Treaty was signed continues to apply after the enactment of the § 1411 tax in 2010. Therefore, Article XXIV's "general principle" for relieving double taxation did not change upon enactment of § 1411; indeed, it was not affected at all.

Second, the CFC's conclusion that the government's interpretation of the U.S. law limitation would "render Article XXIV entirely inoperative" (Appx26) is unsupported. (Appx26.) Even without more, each country's mutual agreement in paragraphs 1 and 2 to avoid double

taxation by allowing a credit or deduction in accordance with its own domestic law would not be meaningless, where the parties could have agreed to any number of terms to facilitate the alleviation of double taxation. But it is clear that the signatories here also agreed to certain adjustments that are different from the Code's provisions and which, therefore, have work to do. For example, the re-sourcing provisions in paragraphs 3 and 6, which treat certain U.S.-source income as foreign-source income, are a well-recognized and significant tax benefit afforded by many U.S. tax treaties to facilitate a foreign tax credit within the Code's existing framework that would not otherwise be available under the Code. *See, e.g.*, Hellkamp, *supra*, at 1107–08; New York State Bar Association Tax Section, *supra*, at 2–3 & n.4, 23–24. Similarly, paragraphs 4 and 5 provide an ordering rule for the credit or deduction that each country must allow where the taxpayer is both a U.S. citizen and a resident of Canada and thus subject to tax by both countries on his worldwide income; the absence of such an ordering rule would result in a paradoxical situation where each country would be required to provide a credit for the income taxes imposed by the other country on the same items of income. *See supra* pp. 9-10, 30. And, as another

example, paragraph 7 broadens the foreign taxes that are creditable under the Treaty beyond the national taxes described in Article II of the Treaty to include sub-national taxes (taxes "of general application" that are paid to a "political subdivision or local authority") that are "substantially similar" (Appx567) to the national taxes, even if the sub-national taxes would not qualify for the foreign tax credit under the Code. *See infra* pp. 39-41. As these examples demonstrate, the government's interpretation of the U.S. law limitation does not render Article XXIV or any of its paragraphs "inoperative." (Appx26.)

Third, the CFC placed undue significance on the government's acknowledgment that the § 1411 tax is a "covered" tax under Article II and is included within the Treaty's definition of "United States tax" in Article III. (Appx27.) Neither Article II nor Article III prescribe the United States' obligations to relieve double taxation, which is governed instead by Article XXIV. Therefore, if taxpayers are entitled to a credit under the Treaty, it must be because Article XXIV authorizes it. And while Article XXIV(1) provides that "the United States shall allow to a citizen or resident of the United States . . . as a credit against the *United States tax* on income the appropriate amount of income tax paid

or accrued to Canada," that credit must be "[i]n accordance with the provisions and subject to the limitations of the law of the United States," which precludes applying a foreign tax credit against the § 1411 tax. (Appx565 (emphasis added).)

3. The CFC's narrow interpretation of the U.S. law limitation has no support in the Treaty's text

In addition, the text of the U.S. law limitation is much broader than the alternative, narrow meaning given it by the CFC. According to the CFC, the U.S. law limitation affects only the computation of the credit, not its availability. (Appx36; *see also* Appx29-30, Appx32.) Such a narrow interpretation finds no support in the Treaty's text, which broadly provides that the credit must be "in accordance with the provisions and subject to the limitations of the law of the United States." Article XXIV(1). Although this text certainly incorporates the Code's rules for computing foreign tax credits (*e.g.*, I.R.C. §§ 901(c), 904, 905, 907, 908, and 911), its plain meaning is far more encompassing and easily includes the provisions of § 27 and § 901(a) that restrict foreign tax credits to Chapter 1 taxes. *Toulouse*, 157 T.C. at 60 (rejecting the same narrow interpretation adopted by the CFC here); *Kim*, 664 F. Supp. 3d at 1084 (same); *Christensen*, 168 Fed. Cl. at 326-27 (same).

The CFC's alternative, narrow interpretation of the U.S. law limitation cannot be squared with the Treaty's broad and plain text incorporating the provisions and limitations of the Code governing foreign tax credits.

B. Relevant extrinsic evidence supports the government's interpretation

1. Treasury's Technical Explanation of the Treaty supports the government's position

The relevant extrinsic evidence on which the CFC relied (Appx28–32) also favors the government's position. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 441 (2020) ("Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations.") (internal quotations and citation omitted). Generally, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); *accord Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (noting the "well-established canon of deference" that "the Executive Branch's

interpretation of a treaty is entitled to great weight") (internal quotation omitted); *Nat'l Westminster Bank, PLC v. United States*, 512 F.3d 1347, 1358 (Fed. Cir. 2008).

(a) Here, the Department of the Treasury was charged with the negotiation and enforcement of the Treaty on behalf of the United States. And in that role it prepared, in 1981, a Technical Explanation as "an official guide to the Convention" that "reflects policies behind particular Convention provisions, as well as understandings reached with respect to the interpretation and application of the Convention," and presented it to the Senate prior to the Treaty's ratification. (Appx693.) *See Tax Treaties, Hearing Before the S. Comm. on Foreign Relations*, 97th Cong., at 117-74 (1981), *reproduced in relevant part at* Appx693-700. Treasury updated the Technical Explanation in 1984 to reflect changes to the Treaty made by the 1983 and 1984 protocols. (Appx219-322.) As relevant here, the 1984 Technical Explanation is consistent with the original technical explanation with respect to Article XXIV, and the CFC relied on it in its opinion. *See* Appx28-31.

Regarding Article XXIV, the 1984 Technical Explanation confirms the government's interpretation, stating that "[t]he . . . credits allowed

by paragraph 1 are subject to the limitations of the Code as they may be amended from time to time without changing the general principle of paragraph 1." (Appx254.) As the official explanation by the agency charged with negotiating and enforcing the Treaty, Treasury's Technical Explanation is entitled to "great weight." *Sumitomo*, 457 U.S. at 184–85. This is especially true given the fact that both the 1981 and 1984 Technical Explanations were "reviewed" and "approved" by the Canadian government. Joint Comm. on Tax'n, *Explanation of Proposed Income Tax Treaty Between the United States and Canada*, JCS-48-81, at 29 n.1, 37 (1981) (regarding 1981 Technical Explanation), *see* Appx686; Joint Comm. on Tax'n, *Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Canada*, JCX-57-08, at 110 & n.112 (2008) (noting that Canada had taken the "unusual" step of "endorsing," *inter alia*, the 1984 Technical Explanation).

The CFC nevertheless emphasized the next sentence in the Technical Explanation as supporting its narrow view that the U.S. law limitation addresses only the *computation* of the amount of the credit (Appx30): "Thus, as is generally the case under U.S. income tax conventions, provisions such as Code section 901(c), 904, 905, 907, 908,

and 911 apply for purposes of computing the allowable credit under paragraph 1." (Appx254.) But this sentence merely provides examples—signified by the term "such as"—identifying some of the provisions that may "apply for purposes of computing" the credit; nowhere does it suggest these are the *only* Code provisions that apply to the credit authorized by the Treaty, as the CFC erroneously concluded.

(b) The CFC also erroneously believed the government's interpretation was "flatly refuted" by the Technical Explanation's discussion of the relationship between paragraphs 1 and 7 of Article XXIV, which the CFC said "alone is a complete refutation of the government's overall position." (Appx30-31.) But the CFC misconstrued the function of paragraph 7 and the Technical Explanation's reference to it. Recall first that Article XXIV(1) provides that "[i]n accordance with the provisions and subject to the limitations of the law of the United States . . . the United States shall allow a citizen or resident of the United States . . . as a credit against the United States tax on income the appropriate amount of *income tax paid or accrued* to Canada." (Appx198 (emphasis added).) Paragraph 7 of Article XXIV provides that "[f]or the purposes of this Article, any

reference to 'income tax paid or accrued' to a Contracting State" includes not only Canadian tax and United States tax (as described in Article II, *see* Appx536-537), but also "*taxes of general application which are paid or accrued to a political subdivision or local authority of that State*"—*e.g.*, Canadian provincial taxes and U.S. state and local taxes—so long as those sub-national taxes are imposed in a manner consistent with the Treaty and are substantially similar to the Canadian tax or United States tax. (Appx567 (emphasis added).) Thus, in paragraph 7, the signatory parties agreed to place certain national and sub-national taxes on the same footing for purposes of Article XXIV, even if the sub-national taxes would not be creditable as "income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country" under the Code. I.R.C. §§ 901(b)(1), 903.

Describing this modification to the Code's rules in paragraph 7, the Technical Explanation therefore correctly explains that "[p]aragraph 1 provides a credit for these specified taxes [*i.e.*, foreign taxes paid to a political subdivision or local authority] whether or not they qualify as creditable under Code section 901 or 903." (Appx254 (emphasis added.) Far from "flatly refut[ing]" (Appx30) the

government's interpretation, the Technical Explanation is entirely consistent with the government's view that paragraph 1 of Article XXIV provides the general rule for allowing a credit by incorporating the Code's provisions and limitations, with the signatories adopting certain modifications to the general rule as specified and agreed to in subsequent paragraphs of Article XXIV. Contrary to the CFC's view, the fact that the signatories agreed to some modifications that differ from the Code's provisions does not negate the general rule in paragraph 1 that the Code's provisions—all those unaffected by such modifications—continue to apply and govern the allowance of the credit. (Appx30-31.) And those provisions include the Code's requirement that a foreign tax credit can be applied only against income taxes imposed in Chapter 1 of the Code. I.R.C. §§ 27, 901.

Further, the CFC ignored that paragraph 7 relates to the "income tax paid or accrued" to Canada in Article XXIV(1)—that is, the foreign tax that is eligible to be credited pursuant to the Treaty—and not the United States income tax against which the foreign tax may be applied. The determination whether a foreign tax paid to Canada is creditable against United States tax is a separate question from which United

States taxes that credit may offset. The CFC repeatedly—and erroneously—conflates those two questions. (*See generally* Appx28-31.) For example, the CFC placed great weight on language in the Technical Explanation referring to a taxpayer claiming a credit under the Treaty "for Canadian taxes made creditable solely by paragraph 1," which the CFC described as "a QED in Mr. Bruyea's favor." (Appx31 (emphasis omitted); *see* Appx254.) The CFC's apparent conclusion that it is sufficient here to determine whether a tax is "creditable" under Article XXIV(1) reflects a fundamental misunderstanding on the CFC's part.

In addition, there is no dispute that the taxes at issue are "creditable" for purposes of Article XXIV(1); the only issue is whether the Treaty requires that Bruyea's foreign taxes paid to Canada in 2015 be credited against his net investment income tax despite the Code's prohibition on such an application of the credit. As we have demonstrated, the Treaty's plain text compels the conclusion that no such credit is authorized.

(c) The CFC also relied on the Technical Explanation as confirming that the § 1411 tax is a "covered" tax under Article II(3) and is included within the Treaty's definition of "United States tax" in

Article III(1)(d). (Appx29, Appx31; *see* Appx538.) The government does not dispute that point, but it is ultimately irrelevant because the availability of a credit is governed by the terms of Article XXIV, not by Articles II or III, neither of which grants a credit. Put another way, just because the § 1411 tax is a "covered" tax under Article II(3) of the Treaty does not mean that Article XXIV(1) authorizes a credit to offset that tax, as the CFC appeared to believe. (Appx29, Appx31.) Article XXIV(1) must be applied according to its terms, which require that any credit against United States tax in paragraph 1 be made "[i]n accordance with the provisions and subject to the limitations of" U.S. law, and the Code does not permit the foreign tax credit to offset income taxes outside Chapter 1 of the Code.

2. The CFC misconstrued the other extrinsic evidence it relied on

(a) The CFC misinterpreted the Joint Committee on Taxation's explanation of the Treaty in the same way that it misinterpreted the 1984 Technical Explanation. (Appx32; *see* Appx329-377.) Thus, the CFC concluded that any language in the Joint Committee explanation indicating different treatment of a foreign tax credit under the Treaty and under the Code supported its view that the credit in Article

XXIV(1) operates independent of the Code. (Appx32.) As explained above, in light of the U.S. law limitation in paragraph 1, discrete modifications to the Code's treatment of a Canadian tax for purposes of Article XXIV(1) do not indicate that other, unmodified "provisions and . . . limitations" of the Code do not apply. (Appx198; *see supra* pp. 28-30, 40-41.) The CFC similarly misinterpreted the Joint Committee's explanation as supporting a conclusion that the U.S. law limitation is limited to the computation of the amount of the credit, contrary to the Treaty's text. (Appx32; *see supra* p. 38-39.) The Joint Committee's post-ratification explanation "is entitled to little weight" in any event. *Fed. Nat. Mortg. Ass'n v. United States*, 379 F.3d 1303, 1309 (Fed. Cir. 2004) (giving little weight to the Joint Committee's post-enactment explanation of legislation in determining Congressional intent).

(b) The CFC also gave undue weight to a generalized statement in the Letter of Submittal from the President to the United States Senate stating that the Treaty "contains a rule . . . for eliminating double taxation of the United States citizens who are residents in Canada.'" (Appx31) (emphasis omitted) (quoting Letter of Submittal, *see* Appx326.). As we explain *infra* pp. 47-50, the complete "elimination" of

double taxation was never the goal of the Treaty. Rather, each signatory party incorporated their own domestic-law limitations to restrict the credit (in the case of the United States) or the deduction (in the case of Canada) authorized by the Treaty, *see* Article XXIV(1) and (2), with the inevitable result that some double taxation would occur in some instances.

(c) The CFC also erroneously credited Canada's current view of the issue, as expressed in the July 2023 letter sent from Canada's competent authority to Bruyea shortly before he commenced this litigation. (Appx33; *see* Appx378.) Canada's competent authority took the position, without further explanation, that Canada had the right to tax the gain Bruyea earned from the disposition of Canadian real estate while the United States "must provide relief in accordance with Article XXIV" of the Treaty. (Appx378.) That letter, however, recognized the disagreement between Canada's and the United States' competent authorities on the matter. (Appx378 ("[O]ur respective positions remain far apart.").) So whatever Canada's current views may be, they are not entitled to any greater weight than the United States' own current views and litigating position here. Nor does Canada's current view shed

any light on the signatories' contemporaneous understanding when they signed the Treaty in 1980. The Treaty's text is the best evidence of the parties' shared expectations. *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994).

Further, the CFC's decision to credit Canada's current position was based on a misreading of *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155 (1976), in which the Supreme Court stated that "[t]he opinions of our sister signatories, . . . are entitled to considerable weight." 525 U.S. at 176 (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985).) In *El Al Israel Airlines*, the Supreme Court interpreted the Warsaw Convention regarding claims arising from international air travel and the "opinions" of "sister signatories" referenced by the Supreme Court were opinions by foreign courts, not foreign executives. *Id.* at 175-76. The Treaty, on the other hand, is a bilateral document between the United States and Canada alone, and there is no relevant international consensus to be consulted on the legal question raised here. Therefore, to the extent Canada's current view tipped the scale at all in Bruyea's favor, the CFC erred on that front as well.

C. The Government's interpretation of Article XXIV is consistent with the Treaty's purpose of avoiding double taxation

Finally, the CFC erred in applying a "liberal interpretation" of the Treaty to achieve its purported purpose to "eliminate" double taxation, contrary to the Treaty's text. (Appx11, Appx33.) The Treaty has two purposes, *i.e.*, "the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital." (Appx546.) The complete elimination of double taxation was never the goal of the Treaty. Indeed, the Treaty expressly recognizes that the parties did not eliminate double taxation altogether. *See* Article XXVI (flush language) ("They [*i.e.*, the U.S. and Canada competent authorities] may also consult together for the elimination of double taxation in cases not provided for in the Convention."). (Appx536.) Indeed, the Treaty negotiators foresaw multiple circumstances where double taxation could arise notwithstanding the application of the provisions Article XXIV and left its resolution to the discretion of the competent authorities in mutual agreement procedures. Thus, Article XXVI provides that the competent authorities may agree to eliminate double taxation "with respect to a partnership" and "with respect to

income distributed by an estate or a trust," and to "provide relief from double taxation" relating to estate taxes. Art. XXVI(3)(e)-(g). (Appx570.)

In Article XXIV(1) and (2), each signatory nation agreed to allow a tax credit or deduction to reduce double taxation, but each country also restricted the promised tax benefit, which was to be allowed only in accordance with its own domestic law. As the signatories would have understood, the inevitable result of such restrictions is double taxation in some instances.

For example, Article XXIV(1) allows a foreign tax credit subject to the provisions and limitations of the Internal Revenue Code. Consequently, a U.S. citizen residing in the United States cannot claim a foreign tax credit in excess of § 904(a)'s source-based limitation and will, therefore, be subject to double taxation to the extent that taxes paid to Canada exceed the limit. *See supra* pp. 4-7. Similarly, Article XXIV(1) does not allow a U.S. citizen residing in the United States a foreign tax credit against the § 1411 tax imposed outside of Chapter 1, with the result that such individual's net investment income will be subject to simultaneous taxes imposed by both Canada and the United

States. *See Toulouse*, 157 T.C. at 60–61 (interpreting identical language in U.S.-France treaty). And under Article XXIV(2), Canada similarly restricts the deduction it allows under the Treaty for taxes paid to the United States, allowing such deduction only "subject to the provisions of the law of Canada" applicable thereto. Article XXIV(2)(a).

Thus, although the tax benefits promised under the Treaty were meant to relieve double taxation, they were never intended to provide absolute protection from double taxation. *See Toulouse*, 157 T.C. at 60 (interpreting U.S.-France treaty); *Kim*, 664 F. Supp. 3d at 1085 (interpreting U.S.-South Korea treaty). The CFC therefore erred by disregarding the Treaty's plain text in favor of a more liberal interpretation that would require the elimination of double taxation in this specific case. "[I]t is [the court's] duty to interpret the treaty according to its terms. These must be fairly construed, but [the court] cannot add or detract from them." *Xerox*, 41 F.3d at 652 (quotation and citation omitted).

Further, double taxation does not necessarily result from the disallowance of foreign tax credits against the tax imposed by § 1411. The Code's remedy for double taxation includes generous foreign-tax-

credit carryover and carryback rules that permit excess credits to be carried over and used to reduce regular U.S. income tax in eleven additional tax years. To the extent that foreign income tax on the investment income were to exceed the Chapter 1 income tax on the same income, the excess credits would be eligible under I.R.C. § 904(c) to be carried back one year and forward ten years to reduce Chapter 1 taxes on other income in the carryover years. *See supra* pp. 6-7. These generous foreign-tax-credit carryover rules provide further relief from any potential double taxation.

In sum, the text and context of Article XXIV demonstrate that the foreign tax credit it authorizes is subject to the provisions and limitations of U.S. law, which are expressly incorporated by paragraph 1, including the Internal Revenue Code's restriction on the credit against taxes imposed outside of Chapter 1. Accordingly, the credit cannot be applied against the tax on net investment income imposed by I.R.C. § 1411 in Chapter 2A. That interpretation is confirmed by the U.S. Treasury Department's contemporaneous Technical Explanation explaining the Treaty's terms, and it is consistent with the Treaty's

purposes. The CFC's holding that the U.S. law limitation in Article XXIV(1) refers only to provisions of the Code governing the computation of the amount of the foreign tax credit cannot withstand scrutiny.

CONCLUSION

The judgment of the Court of Federal Claims was erroneous and should be reversed, with instructions that Bruyea's complaint be dismissed.

Respectfully submitted,

/s/ Kathleen E. Lyon

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JULY 3, 2025

ADDENDUM

In the United States Court of Federal Claims

No. 23-766 T
Filed: January 17, 2025

PAUL BRUYEA,	*	
Plaintiff,	*	
	*	**JUDGMENT**
v.	*	
	*	
THE UNITED STATES,	*	
Defendant.	*	

Pursuant to the court's Order, filed January 17, 2025, and the parties' joint status report, filed January 16, 2025,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the following amount: For plaintiff's income-tax year ended December 31, 2015, an overpayment of income tax in the amount of $263,462.00, with statutory interest on such overpayment pursuant to section 6611 of the Internal Revenue Code.

Lisa L. Reyes
Clerk of Court

By: s/ Ashley Reams
Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Effective December 1, 2023, the appeals fee is $605.00.

In the United States Court of Federal Claims

No. 23-766T

(Filed: December 5, 2024)

PAUL BRUYEA,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Stuart E. Horwich, Horwich Law LLP, London, United Kingdom, and *Max Reed*, Polaris Tax Counsel, Vancouver, British Columbia, Canada, for Plaintiff.

Jason Bergmann, United States Department of Justice, Tax Division, Washington, D.C., for Defendant. With him on the briefs were *David I. Pincus*, Chief, Court of Federal Claims Section, *Mary M. Abate*, Assistant Chief, and *David A. Hubbert*, Deputy Assistant Attorney General.

OPINION AND ORDER

Plaintiff, Mr. Paul Bruyea, claims that he overpaid his 2015 taxes by approximately $263,523, and therefore is entitled to a tax refund of that amount from the United States. Mr. Bruyea asserts he is owed the claimed refund once a treaty-based foreign tax credit is properly applied against the Net Investment Income Tax ("NIIT") he paid to the United States. Although Mr. Bruyea acknowledges that the Internal Revenue Code does not by its terms provide for such a foreign tax credit, he argues that a tax treaty between the United States and Canada independently entitles him to the claimed credit and, thus, the refund. This case turns on the proper interpretation of that tax treaty and how it fits with the text and structure of the Internal Revenue Code.

The interpretative puzzle is complicated but ultimately Mr. Bruyea's approach makes more sense of the relevant legal data. This Court thus agrees with Mr. Bruyea that he is entitled to the foreign tax credit he claims.

I. FACTUAL AND PROCEDURAL BACKGROUND

"All American citizens are subject to U.S. taxes, regardless of where they live or earn their income. Citizens living and working abroad must therefore report their foreign-source income to the Internal Revenue Service." *Kappus v. Comm'r*, 337 F.3d 1053, 1055 (D.C. Cir. 2003) (citations omitted). Pursuant to United States law and bilateral tax treaties (where applicable), however, "[U.S.] [t]axes on such income . . . may often be offset . . . by credits for taxes paid to foreign governments[.]" *Id.*

On May 25, 2023, Mr. Bruyea initiated this case by filing a tax refund complaint against Defendant, the United States. ECF No. 1 ("Compl."). He seeks a refund of federal income tax paid "for the taxable year ended December 31, 2015." *Id.* ¶ 4. During that tax year, Mr. Bruyea was a resident of British Columbia, Canada. *Id.* ¶ 10. He paid nearly $2 million in taxes to Canada, and "claimed a foreign tax credit of $1,398,683 to offset the regular U.S. tax liability[.]" *Id.* At the time, Mr. Bruyea "did not claim a foreign tax credit to offset the NIIT." *Id.* ¶ 11.

On November 7, 2016, Mr. Bruyea "filed an amended tax return (Form 1040X) with the Internal Revenue Service . . . claiming a refund of $263,523 by virtue of a foreign tax credit that offsets the NIIT[.]" Compl. ¶ 12. In particular, Mr. Bruyea asserts he is entitled to a foreign tax credit "based on the provisions of Article XXIV" of the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital ("Canada Tax Treaty" or "Treaty"). Compl. ¶¶ 3, 12.[1] The IRS rejected the refund claim, concluding that "the Canada Tax Treaty did not provide an independent basis for a foreign tax credit to offset the NIIT and that such a foreign tax credit is not allowed under U.S. statutory foreign tax credit rules." *Id.* ¶ 13.

When Mr. Bruyea failed to convince the IRS, he "invoked the 'Simultaneous Appeal Procedure' pursuant to which he sought the opinions of the U.S. and Canadian competent authorities to resolve a situation in which double taxation is present (*i.e.*[,] Canadian income tax and U.S. NIIT on the same items of income and gain with no foreign tax credit offset available)." Compl. ¶ 15. The Canadian tax authority agrees with Mr. Bruyea. ECF No. 18-6 ("The position of the Canadian competent authority in this regard is that Canada, as the country of source, has the right to tax the gain, while the US,

[1] The Treaty — also referred to as a "convention" — was originally signed on September 26, 1980, and subsequently amended via various Protocols between 1983 and 2007. The parties agree that none of the amendments impact the original Treaty provisions that are at issue in this case.

as the country which has residual taxation rights, must provide relief in accordance with Article XXIV of the Convention."). Following the IRS's denial of his tax refund claim, Mr. Bruyea filed his complaint in this Court, asserting that "he is entitled to a refund of the NIIT that he paid in the amount of $263,523 for the 2015 tax year." Compl. ¶ 21.

On February 14, 2024, Mr. Bruyea moved for partial summary judgment, arguing that "he is entitled to a foreign tax credit for his 2015 tax year under the terms of [the Canada Tax Treaty]." ECF Nos. 18 at 1; 18-1 (collectively, "Pl. MSJ").[2] The government filed a cross-motion for summary judgment and response in opposition to plaintiff's motion. ECF No. 24 ("Def. MSJ").[3] Each party filed a reply brief. *See* ECF No. 22 ("Pl. Rep."); ECF No. 26 ("Def. Rep.").

On September 19, 2024, this Court held oral argument on the parties' motions. ECF No. 28 ("Tr.").

II. JURISDICTION

Neither party disputes this Court's jurisdiction to decide this case. Nevertheless, this Court has an independent responsibility to confirm its jurisdiction. *See* Rule 12(h)(3) of the Rules of the United States Court of Federal Claims ("RCFC"). This Court finds that it has jurisdiction pursuant to 28 U.S.C. § 1491(a) and 26 U.S.C. ("I.R.C.") § 7422.[4] *See Christensen v. United States*, 168 Fed. Cl. 263, 297 (2023) (concluding that 26 U.S.C. § 7422(f)(1) "expressly provides an exception to the jurisdictional bar on treaty-based claims" otherwise contained within 28 U.S.C. § 1502).[5]

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[2] Citations to specific page numbers within electronic filings are to the ECF-stamped page numbers in the header of the filed PDF.

[3] The government initially filed a cross-motion for summary judgment and response in opposition to plaintiff's motion on March 29, 2024. ECF No. 20. The government subsequently moved to file a corrected version of its motion and response, ECF No. 23. This opinion refers only to the government's corrected filing, ECF No. 24.

[4] Title 26 of the United States Code is the Internal Revenue Code, and is often abbreviated or cited as "I.R.C."

[5] "While 28 U.S.C. 1346(a)(1) mentions the Court of Federal Claims in the course of conferring jurisdiction on district courts, it is not the source of the Court of Federal Claims' jurisdiction over tax refund cases; rather, such jurisdiction is based on 28 U.S.C. § 1491, which pre-dated section 1346(a)(1)." *Topsnik v. United States*, 120 Fed. Cl. 282, 286 n.3 (2015) (citing *Ferguson v. United States*, 118 Fed. Cl. 762, 763 n.2 (2014)). In *Gaynor v. United States*, 150 Fed. Cl. 519, 530 (2020), the undersigned wrote that "I.R.C. § 7422(a) provides this Court with jurisdiction (pursuant to the Tucker Act) to decide claims seeking a refund of taxes or penalties the IRS collected." More

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. RCFC 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." *Id.* at 250. "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving reasonable inferences against the party whose motion is under consideration." *Silver State Land LLC v. United States*, 155 Fed. Cl. 209, 212 (2021) (quoting *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003)); *see also Lippmann v. United States*, 127 Fed. Cl. 238, 244 (2016) ("The [RCFC 56] standard also applies when the Court considers cross-motions for summary judgment.").

In this case, both parties seek summary judgment as to liability, which reduces to a legal question regarding the proper interpretation of the Canada Tax Treaty and the I.R.C. Def. MSJ at 50 (explaining that "the parties have reserved questions regarding the computation of a foreign tax credit until after the Court has resolved the parties' dispute regarding the availability of a foreign tax credit in any amount"). Given the absence of any disputed material fact regarding liability, this Court agrees with the parties that liability may be properly resolved as a matter of law on summary judgment.

IV. PRINCIPLES OF TREATY INTERPRETATION

Interpreting a treaty is similar to interpreting a statute or a contract. Thus, "[t]he interpretation of a treaty, like the interpretation of a statute, *begins* with its text." *Golan v. Saada*, 596 U.S. 666, 676 (2022) (emphasis added) (quoting *Abbott v. Abbott*, 560 U.S. 1, 10 (2010)). Courts are further directed to consider a treaty's "text *and structure*," just like we must for a statute or contract. *Water Splash, Inc. v. Menon*, 581 U.S. 271, 276 (2017)

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accurately, however, that statute is a limit on this Court's jurisdiction but is not the source of it. *See Barnes v. United States*, 2023 WL 4683550, at *1 (Fed. Cl. July 21, 2023) ("To invoke this Court's jurisdiction in a tax refund suit, a plaintiff must comply with 26 U.S.C. § 7422(a)[.]"); *but see Chicago Milwaukee Corp. v. United States*, 40 F.3d 373, 374 (Fed. Cir. 1994) (noting that plaintiff "brought suit under I.R.C. § 7422(a)" and that "Section 7422(a) waives the United States' sovereign immunity from refund suits, . . . provided the taxpayer has previously filed a qualifying administrative refund claim" (internal citation omitted)); *Grigsby v. United States*, 2018 WL 1417398, at *2 (Fed. Cl. Mar. 7, 2018) ("Pursuant to 26 U.S.C. § 7422(a), this Court has jurisdiction to entertain suits for tax refunds.").

(emphasis added) (discussing "[t]he text and structure of the Hague Service Convention"); *cf. Hunt Const. Grp., Inc. v. United States*, 281 F.3d 1369, 1372 (Fed. Cir. 2002) ("The contract must be considered as a whole and interpreted to effectuate its spirit and purpose, giving reasonable meaning to all parts."). In that regard, courts follow "the maxim that the construction of *any legal document*—like a statute, contract or patent—should try to give meaning to every term in that document; otherwise, a lawyer or court will have erred by reading the chosen words of the document into oblivion." *Advanced Commc'n Design, Inc. v. Premier Retail Networks, Inc.*, 46 F. App'x 964, 980–81 (Fed. Cir. 2002) (emphasis added).[6]

When it comes to a treaty, however, there is a notable difference from other legal instruments: courts are encouraged to consider a treaty's purpose, as well as extrinsic evidence of the intent of the parties to the treaty. In that regard, "[b]ecause a treaty ratified by the United States is 'an agreement among sovereign powers,'" the United States Supreme Court has "also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 441 (2020) (quoting *Medellin v. Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996))).[7] Particularly "when a treaty provision is ambiguous," courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Water Splash,* 581 U.S. at 280 (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988)). Thus, "[t]he practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989). The Supreme Court has also instructed that "[t]he 'opinions of our sister

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[6] *Cf. Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 68 (D.D.C.) ("plain-meaning analysis . . . end[s] the matter . . . in the interpretation of contracts, judgments, and statutes"), *judgment entered*, 987 F. Supp. 2d 82 (D.D.C. 2013), *and aff'd sub nom. Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015).

[7] *See also Arizona v. Navajo Nation*, 599 U.S. 555, 567 (2023) ("[C]ourts must stay in their proper constitutional lane and interpret the law (here, the treaty) *according to its text and history*[.]" (emphasis added)); *Golan*, 596 U.S. at 679 ("Courts must remain conscious of th[e treaty's] purpose, as well as the [treaty's] other objectives and requirements[.]"); *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.") (cited with approval in *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 634 (2022)).

signatories,' . . . are 'entitled to considerable weight.'" *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

There is yet another, meta-principle that applies to treaty interpretation. A tax treaty, in particular, "should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it' and . . . '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred[.]'" *Stuart*, 489 U.S. at 368 (quoting *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940) (citations omitted)).

Our appellate court, the United States Court of Appeals for the Federal Circuit, has synthesized the Supreme Court's treaty interpretation principles as follows:

> In construing a treaty, the terms thereof are given their ordinary meaning in the context of the treaty and are interpreted, in accordance with that meaning, in the way that best fulfills the purposes of the treaty. . . . The judicial obligation is to satisfy the intention of both of the signatory parties, in construing the terms of a treaty.
>
> Unless the treaty terms are unclear on their face, or unclear as applied to the situation that has arisen, it should rarely be necessary to rely on extrinsic evidence in order to construe a treaty, for it is rarely possible to reconstruct all of the considerations and compromises that led the signatories to the final document. However, extrinsic material is often helpful in understanding the treaty and its purposes, thus providing an enlightened framework for reviewing its terms. However, "the ultimate question remains what was intended when the language actually employed . . . was chosen, imperfect as that language may be." *Great–West Life Assurance Co. v. United States*, 678 F.2d 180, 188, 230 Ct. Cl. 477 (1982).

Xerox Corp. v. United States, 41 F.3d 647, 652–53 (Fed. Cir. 1994) (citations omitted). In short, a Court "must 'examine not only the language, but the entire context of agreement.'" *Nat'l Westminster Bank, PLC v. United States*, 512 F.3d 1347, 1353 (Fed. Cir.

2008) (quoting *Great–West Life*, 678 F.2d at 183).[8] In *Xerox Corp.*, the Federal Circuit specifically noted that it had "reviewed the [extrinsic] evidence[.]" 41 F.3d at 653.

Although the Supreme Court has often given "great weight" to the Executive Branch's interpretation of the treaty, *Sumitomo*, 457 U.S. at 184–85, more recently the Supreme Court has acknowledged that it has "never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty." *GE Energy*, 590 U.S. at 444. And, in any event, binding Federal Circuit authority instructs us that "an agency's position merits less deference 'where an agency and another country disagree on the meaning of a treaty[.]'" *Nat'l Westminster Bank*, 512 F.3d at 1358 (quoting *Iceland Steamship Co., Eimskip v. U.S. Dep't of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000)). Moreover, the Federal Circuit "has declined to defer to Treasury's contemporaneous interpretation where it conflict[s] with the contemporaneous intent of the Senate." *Id.* (citing *Xerox*, 41 F.3d at 653–57).

"A treaty, when ratified, supersedes prior domestic law to the contrary and is equivalent to an act of Congress." *Xerox Corp.*, 41 F.3d at 658 (citing *United States v. Lee Yen Tai*, 185 U.S. 213, 220–22 (1902)).[9] On the other hand, the "tacit abrogation of prior law will not be presumed and, unless it is impossible to do so, treaty and law must stand together in harmony." *Id.*

Summarizing those interpretive principles is far easier than applying them. The Court turns next to that task.

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[8] *See also Nat'l Westminster Bank*, 512 F.3d at 1353 ("When construing a treaty, '[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982))); *United Techs. Corp. v. United States*, 315 F.3d 1320, 1322 (Fed. Cir. 2003) ("The terms of a treaty are to be given their ordinary meaning in the context of the treaty, and are to be interpreted to best fulfill the purpose of the treaty." (citing *Xerox Corp.*, 41 F.3d at 652)).

[9] *See Bell v. Off. of Pers. Mgmt.*, 169 F.3d 1383, 1386 (Fed. Cir. 1999) ("[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." (quoting *Breard v. Greene*, 523 U.S. 371, 376 (1998))); *see also Akins v. United States*, 551 F.2d 1222, 1229 (C.C.P.A. 1977) ("As a rule of priority between equals, a later dated statute in direct conflict with a treaty supersedes the treaty.").

V. DISCUSSION

A. The Canada Tax Treaty

The primary locus of the parties' dispute within the Treaty is Article XXIV, notably entitled "***Elimination*** of Double Taxation." Canada Tax Treaty, ECF No. 18-2 at 24 (emphasis added). Paragraph 1 of Article XXIV provides, in relevant part:

> In the case of the United States, **[1]** subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: **[2]** In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time **[3]** without changing the general principle hereof), **[4]** the United States shall allow to a citizen or resident of the United States . . . as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada . . . .

Id. (For ease of reference, the Court has inserted bracketed numbers to mark operative phrases within Paragraph 1 of Article XXIV, above; hereafter, the words "Clause" or "Clauses" followed by bracketed number(s) refers to the marked phrases. Clause [2] is referred to as the "U.S. Law Limitation.")

Paragraph 4 of Article XXIV provides:

> Where a United States citizen is a resident of Canada, the following rules shall apply:
>
> (a) Canada shall allow a deduction from the Canadian tax in respect of income tax paid or accrued to the United States in respect of profits, income or gains which arise (within the meaning of paragraph 3) in the United States, except that such deduction need not exceed the amount of the tax that would be paid to the United States if the resident were not a United States citizen; and
>
> (b) for the purposes of computing the United States tax, *the United States shall allow as a credit against* ***United States tax***

> *the income tax paid or accrued to Canada* after the deduction referred to in subparagraph (a). The credit so allowed shall not reduce that portion of the United States tax that is deductible from Canadian tax in accordance with subparagraph (a).

Canada Tax Treaty at 25 (emphasis added).

The Treaty, in turn, defines "United States tax" as "the taxes referred to in *Article II* (Taxes Covered) . . . that are imposed on income by the United States." Canada Tax Treaty at 3 (Art. III ("General Definitions"), ¶ 1(d)). And Article II provides that the Treaty "shall apply to taxes on income . . . imposed on behalf of each Contracting State, *irrespective of the manner in which they are levied*." *Id.* at 2 (Art. II, ¶ 1) (emphasis added). Article II further provides that "the taxes existing on March 17, 1995 to which the Convention shall apply are . . . in the case of the United States, the Federal income taxes imposed by the Internal Revenue Code of 1986." *Id.* (Art. II, ¶ 2(b)). The parties also clearly anticipated future changes to their respective tax codes, with the Treaty specifying that "[t]he Convention shall apply also to . . . any taxes identical or *substantively similar* to those taxes to which the Convention applies under paragraph 2 [of Article II]." *Id.* at 3 (Art. II, ¶ 3(a)) (emphasis added).

B. The NIIT

Chapter 2A of the I.R.C. covers the "Unearned Income Medicare Contribution." It contains but a single provision: 26 U.S.C. § 1411 ("Imposition of tax"). That tax provision imposes an income tax on individuals as follows:

> **(1) Application to individuals.**--In the case of an individual, there is hereby imposed (in addition to any other tax imposed by this subtitle) for each taxable year a tax equal to 3.8 percent of the lesser of--
>
> **(A)** net investment income for such taxable year, or
>
> **(B)** the excess (if any) of-- **(i)** the modified adjusted gross income for such taxable year, over **(ii)** the threshold amount.

26 U.S.C. § 1411(a).

C. The Crux of the Interpretive Problem

According to Mr. Bruyea, the Treaty in Article XXIV, Paragraph 1 — and particularly Clause [4] of that paragraph — creates a Treaty-based tax credit applicable to the NIIT irrespective of whether the I.R.C. provides for, or permits, that credit. Three textual data points support his view. First, Article XXIV's purpose, as indicated by its title, is the "Elimination of Double Taxation." Canada Tax Treaty at 24; *see also* Pl. MSJ at 20.[10] Second, Clause [4] expressly provides that "the United States shall allow to a citizen . . . of the United States . . . as a credit against the *United States tax* on income the appropriate amount of income tax paid or accrued to Canada[.]" Canada Tax Treaty at 24 (emphasis added). The government does not dispute that the NIIT qualifies as a "United States tax" as defined in Article II and Article III of the Treaty. *See* Canada Tax Treaty at 2-3. Third, Mr. Bruyea points to Paragraph 4(b) of Article XXIV, which provides that "for the purposes of computing the United States tax, the United States shall allow as a credit against *United States tax* the income tax paid or accrued to Canada after the deduction referred to in subparagraph (a)." *Id.* at 25 (emphasis added).

In opposing Mr. Bruyea's reading, the government relies primarily on the U.S. Law Limitation (*i.e.*, Clause [2] of Article XXIV, ¶ 1). *See* Def. MSJ at 12, 25, 32. According to the government, any Treaty-based credit — whether based on Paragraphs 1 or 4 of Article XXIV — must be "[i]n accordance with the provisions . . . of the law of the United States[.]" Canada Tax Treaty at 24. Put differently, the government maintains that a Treaty-based credit simply cannot exist independently of the I.R.C.— the "law of the United States." *Id*. The government further points out, Def. MSJ at 35, that Clause [2] specifically anticipates that the law of the United States "may be amended from time to time," thus extending the reach of the U.S. Law Limitation to future I.R.C. provisions that conflict with the Treaty.

Applying the U.S. Law Limitation to the facts of this case, the government contends that the NIIT — or, more accurately, the NIIT's placement outside of I.R.C. Chapter 1 — precludes the Treaty-based tax credit Mr. Bruyea claims. In particular, the government points to I.R.C. § 27, which provides that "[t]he amount of taxes imposed by foreign countries . . . shall be allowed as a credit against the tax imposed *by this chapter* to the extent provided in section 901[.]" 26 U.S.C. § 27 (emphasis added). Section 27 is in Chapter 1 of the I.R.C.[11] The NIIT, 26 U.S.C. § 1411, resides by its lonesome in Chapter 2A.

[10] Clause [1] instructs that "double taxation shall be avoided." Canada Tax Treaty at 24.

[11] I.R.C. § 901 is also contained within Chapter 1 of the I.R.C., and references "the tax imposed by

Because the I.R.C. provides that a foreign tax credit is only available for taxes within Chapter 1, and because the NIIT is outside of Chapter 1, the government argues that Mr. Bruyea cannot claim a Treaty-based foreign tax credit against the NIIT.

There is yet more textual complexity. Because the Treaty guarantees that any future amendment to United States law will not "chang[e] the general principle hereof," Canada Tax Treaty at 24 (Clause [3]), the government arguably cannot rely on the mere (later) location of the NIIT, within I.R.C. Chapter 2A, to preclude a Treaty-based credit. *See* Pl. MSJ at 37-39. Mr. Bruyea further asserts the "general principle hereof" refers to the Treaty's goal of eliminating (or avoiding) double taxation. *Id*.

By now, the basic interpretive problem is readily apparent. On the one hand, the Canada Tax Treaty plainly provides for a foreign tax credit in Mr. Bruyea's favor. *See* Canada Tax Treaty at 24–25 (Article XXIV, ¶ 1, Clause [4]; Article XXIV, ¶ 4(b)). On the other hand, a literal reading of the U.S. Law Limitation arguably takes back what Article XXIV otherwise giveth (because the I.R.C., by its terms, certainly does *not* provide for the Treaty-based tax credit Mr. Bruyea claims).

If Mr. Bruyea's refund claim were based only on the I.R.C., even he concedes that he would surely be out of luck. That is, Mr. Bruyea agrees with the foundational axiom that the I.R.C. does not provide the foreign tax credit he seeks to apply against the NIIT. He argues, however, that the I.R.C. cannot — and does not — answer the critical interpretative question posed by his complaint: "As the NIIT falls outside [C]hapter 1 [of the I.R.C.], the parties agree that no credit is allowed under domestic law, but Plaintiff's view is that the NIIT is covered by the foreign tax credit rules of the Canada Treaty." Pl. MSJ at 18. In other words, according to Mr. Bruyea, the government's position simply begs the question whether the Treaty independently provides a tax credit against the NIIT *notwithstanding* that the I.R.C. does not provide for such a credit.

More significantly, the government's interpretation has a glaring consistency problem: ***the government takes an ad-hoc approach to the U.S. Law Limitation***. The government interprets the U.S. Law Limitation differently when applied to different paragraphs within Article XXIV. In fact, as the Court details below, the government concedes that there are Treaty provisions that the government must follow even though

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this chapter[.]" More specifically, § 901 is within Subpart A ("Foreign Tax Credit") of Part III ("Income From Sources Without the United States") of Subchapter N ("Tax Based on Income From Sources Within or Without the United States").

they are inconsistent with the I.R.C. That is a powerful concession in Mr. Bruyea's favor because if there are such Treaty provisions, how does the U.S. Law Limitation work? How can the government ask this Court to read the U.S. Law Limitation to apply to some paragraphs of Article XXIV but not others? On the other hand, Mr. Bruyea must contend with the meaning of the U.S. Law Limitation.

The Court grapples with these questions *infra*, but no matter how the interpretive problem is sliced, once a literal, expansive reading of the U.S. Law Limitation is off the table, resorting to extrinsic evidence is all but unavoidable. Accordingly, this Court first addresses the plain text of the various Treaty and I.R.C. provisions at issue, and then explores the extrinsic material — all through the lens of the treaty interpretation principles set forth in the binding Supreme Court and Federal Circuit decisions this Court summarized above. At the end of the day, the Court concludes that Mr. Bruyea has the better case.

D. The Canada Tax Treaty Provides the Tax Credit Mr. Bruyea Claims

Consistent with the case law, both parties extensively rely on extrinsic evidence,[12] suggesting that neither party can throw a knock-out interpretive punch here. And the Court agrees: neither the Treaty nor the I.R.C. supplies a truly definitive answer — via the text's plain meaning — to the central issues in this case. More specifically, the Canada Tax Treaty contains no language that *expressly* answers the twin questions of: (1) whether "the NIIT is covered by the foreign tax credit rules of the Canada Treaty[,]" as Mr. Bruyea asserts, Pl. MSJ at 18; or (2) whether the U.S. Law Limitation precludes such a Treaty-based credit, as the government argues, Def. MSJ at 32.

But that does not mean this Court may disregard the Treaty's plain language or that it is unhelpful. To the contrary, this Court begins with the Treaty's plain language and fleshes it out by first considering points of common ground. Once we have a clear view of what the parties agree upon, the points of disagreement are sharpened into focus. Only then does the Court consider the extrinsic evidence upon which the parties rely.

[12] *See, e.g.*, Pl. MSJ at 36 (citing the Canadian government's interpretation of the Treaty and the Technical Explanation to the Canada Treaty); Def. MSJ at 37 (citing to the United States Treasury Department's guidance on the NIIT).

Ultimately, this Court concludes that Mr. Bruyea's interpretive approach places less strain on the Treaty's text than the government's interpretation, and that his approach finds greater support within the extrinsic evidence.

1. The textual evidence favors Mr. Bruyea's interpretation of the Treaty

At the outset, the government concedes[13] that a treaty generally *may* provide a self-executing tax credit (*i.e.*, even where the I.R.C. contains no implementing provisions or even where it is inconsistent with a treaty-based tax credit). In that regard, the government agrees that, in a hypothetical case, "the treaty would have effect, *notwithstanding the Code*, unless the treaty was *later* amended by a code provision providing *directly to the contrary*[.]" Tr. 4:7–17 (emphasis added). This gets us quickly to the very heart of the textual dispute in this case because that is precisely what Mr. Bruyea contends Paragraphs 1 and 4 of Article XXIV accomplish here:

> **THE COURT:** … [M]y first question when we began is that it's possible for the treaty to have a self-executing credit, even if the Code didn't expressly provide for it.
>
> **[GOVERNMENT COUNSEL]:** Yes.
>
> **THE COURT:** I think that's kind of Plaintiff's [central] position[:] . . . the Treaty gives us the credit and nothing in the Code takes it away.
>
> **[GOVERNMENT COUNSEL]:** Well, I think the Code *takes it away* by putting the [NIIT] outside of Chapter 1 [of the I.R.C.].

Tr. 22:8–18 (emphasis added).

[13] *See ModernaTx, Inc. v. Arbutus Biopharma Corp.*, 18 F.4th 1352, 1361 (Fed. Cir. 2021) (quoting a concession by counsel at oral argument as evidence a plaintiff fell short of its burden); *Faiella v. Fed. Nat'l Mortg. Ass'n*, 928 F.3d 141, 146 (1st Cir. 2019) ("A party ordinarily is bound by his representations to a court and — having staked out his position in response to the district court's inquiry — the appellant cannot now repudiate that position." (citation omitted)); *United States v. Lloyd*, 10 F.3d 1197, 1209 (6th Cir. 1993) (concession made by defendant's attorney in district court was binding on appeal); *Adidas Sportschuhfabriken ADI Dassler KG v. Chen*, 1988 WL 1091940, at *7 (N.D. Cal. Feb. 2, 1988) (concluding that a court "is entitled to rely upon and enforce the representations of counsel" because "the Court system would soon fail to function were the Court not able to rely upon representations and stipulations of counsel acting on behalf of their clients.").

The government thus agrees that United States law need ***not*** expressly implement a Treaty-based tax credit for one to exist. Rather, a Treaty-based credit can be "self-executing." *Id.* And we see that the government further concedes, albeit implicitly, that the Treaty here *does* generally create a Treaty-based tax credit. Otherwise, there would be nothing for the Code to "take[] away." *Id.* Finally, according to the government, the Treaty-based tax credit claimed here — that is, *as applied to the NIIT* — is precluded not by any express I.R.C. text *per se*, but rather by the NIIT's placement outside of I.R.C. Chapter 1.

Because the NIIT's statutory terms are silent about not only foreign tax credits generally, but also about Mr. Bruyea's putative Treaty-based credit in particular, the critical question is this: may this Court infer that any Treaty-based tax credit against the NIIT is precluded based upon its placement outside of Chapter 1 of the I.R.C.?

To answer that question, we first must understand that the Treaty, as a matter of law, will give way to the I.R.C. in only two circumstances. The first is where a later-enacted statutory provision "directly" conflicts with the Treaty. Tr. 4:15–17. That "last-in-time rule" is a background, bedrock legal principle of treaty interpretation. The second circumstance is where the Treaty, by its terms, defers to the I.R.C. The government asserts both grounds in arguing that this Court should reject Mr. Bruyea's tax claim.[14] The Court addresses each issue, in turn.

a. The "last-in-time rule" does not apply here

A later-enacted statute controls over a *directly conflicting* treaty provision. *Bell*, 169 F.3d at 1386. This is known as the "last-in-time rule." *Kappus*, 337 F.3d at 1057 ("When a statute conflicts with a treaty, the later of the two enactments prevails over the earlier under the last-in-time rule." (discussing *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888)); *Whitney*, 124 U.S. at 195 ("The duty of the courts is to construe and give effect to the latest expression of the sovereign will."). Moreover, Congress has codified, in 26 U.S.C. § 7852(d)(1), the "last-in-time principle as applied to tax treaties and statutes." *Kappus*, 337 F.3d at 1057 (discussing 26 U.S.C. § 7852(d)(1)). Here, the parties do not dispute that

[14] Def. MSJ at 31 ("Because the tax imposed by § 1411 on net investment income is not a Chapter 1 tax, the text and structure of the Code make clear that foreign tax credits are not allowed against it.); *id.* at 32 ("Thus, to allow a credit against the NIIT would not be '[i]n accordance with the provisions . . . of the law of the United States,' and would contravene both the Code and the text of paragraph (1).").

the NIIT was enacted after the operative Treaty provisions on which Mr. Bruyea relies to support his claim. But the "last-in-time rule" only has significance if the NIIT indeed conflicts *directly* with the treaty. The government's mere talismanic invocation of the "last-in-time rule" does not mean it is applicable or that it resolves the salient question.

Now, Mr. Bruyea concedes that if Congress had enacted a later statute that *expressly* precluded any foreign tax credit — or any Treaty-based credit — from being applied to the NIIT, such a provision would control over the Treaty, and he would not have a viable claim here. Pl. MSJ at 24 ("Later enacted statutes can override a treaty if Congress intends to do so, but . . . Congress did not intend an override when enacting the NIIT."). In other words, such a hypothetical statute would control even if the Treaty lacked the U.S. Law Limitation (contained within Art. XXIV, ¶ 1, Clause [2]). That, of course, necessarily means that the U.S. Law Limitation is completely irrelevant to the "last-in-time rule," which, again, is a background rule that would apply even if the Treaty did not contain the U.S. Law Limitation. We can thus put the U.S. Law Limitation to the side for now and concentrate solely on whether the "last-in-time rule" applies here in some dispositive way.

The first major problem for the government's argument, according to Mr. Bruyea, is that "[b]ecause there has not been an explicit Congressional override, long-established case law requires that the NIIT and the Canada Treaty should be read harmoniously to give effect to both." Pl. MSJ at 25. Mr. Bruyea is correct. This Court must attempt to harmonize Treaty and statutory provisions: "Where a treaty and a statute 'relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either.'" *Kappus*, 337 F.3d at 1056 (quoting *Whitney*, 124 U.S. at 194, and citing *Xerox Corp.*, 41 F.3d at 658)).

In *Kappus*, the United States Court of Appeals for the District of Columbia Circuit declined to attempt to harmonize the Canada Tax Treaty with 26 U.S.C. § 59(a)(2), the statute at issue in that case. 337 F.3d at 1056. There, the D.C. Circuit acknowledged that "[t]he question of whether the Treaty and statute can be harmonized as the government suggests is an extremely close one." The court concluded, however, that "[i]t is not . . . a question that [the court] need resolve" because the plaintiffs *conceded* that the Treaty and statute were in "irreconcilable conflict" — indeed, the plaintiffs "contend[ed] that harmonization is not possible" — and the D.C. Circuit found that the statute was last in time. *Id.*

Mr. Bruyea does not concede the "irreconcilable conflict" point here and he is correct not to do so. Because neither the NIIT nor any other I.R.C. provision *expressly* precludes the application of the Treaty-based tax credit Mr. Bruyea claims, this Court further agrees with Mr. Bruyea that we can dispense with the "last-in-time rule" on that basis alone. Simply put, the fact that the I.R.C. provides for foreign tax credits only in Chapter 1 does not *expressly* preclude the Treaty's serving as an independent source for such a credit against the NIIT (*i.e.*, just because the NIIT is located elsewhere within the I.R.C.).

Again, if Congress, after the Treaty's ratification, had enacted a provision mandating that "the NIIT shall not be subject to any foreign tax credit," this case would be over (and decisively so, in favor of the government). But this Court cannot *infer* such a meaning or result — and read the I.R.C. as if such express language exists — merely because the NIIT was placed in a separate chapter of the IRC. *See, e.g.*, *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." (citing *Cook*, 288 U.S. at 120, amongst other cases)); *In re Rath*, 402 F.3d 1207, 1219 (Fed. Cir. 2005) (Bryson, J., concurring) (applying *Cook*).

In *Trans World Airlines*, the Supreme Court explained that "[l]egislative silence is not sufficient to abrogate a treaty." 466 U.S. at 252 (citing *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)). There, the Supreme Court concluded that "[n]either the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the [treaty]" at issue in that case. *Id.* To the contrary, explained the Court, the legislation at issue "was unrelated to the [treaty]." *Id.* The same is true in this case. The government has pointed to no express textual or extrinsic evidence — literally, nothing — even remotely suggesting that Congress's placement of the NIIT outside of Chapter 1 was intended to preclude a Treaty-based tax credit. *See* Def. MSJ at 23-24. Nor does any such evidence likely exist.[15]

[15] *See* Ausher M.B. Kofsky & Bryan P. Schmutz, *What a Long Strange Trip It's Been for the 3.8% Net Investment Income Tax*, 78 Md. L. Rev. Online 14, 31 (2019) ("In summary, the NIIT arose as a last-minute revenue replacement to offset the revenue loss from Congress's delayed implementation of the 40% excise tax on high-cost . . . health insurance plans.").

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court contrasted, in the context of a treaty, "an exception to arbitrability grounded in *express congressional language*" with "a judicially implied exception." 473 U.S. 614, 639 n.21 (1985) (emphasis added). The Court reasoned that it was "[d]oubtless" that "Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention" at issue in that case. *Id.* The Court declined, however, "to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not *expressly* directed the courts to do so." *Id.* (emphasis added). Here, as in *Mitsubishi*, there is no express direction for courts to disregard the Treaty-based tax credit Mr. Bruyea claims based on Congress's having placed the NIIT in its own chapter within the I.R.C. (*i.e.*, outside of Chapter 1).

In sum, there is nothing "expressly" (or even necessarily) inconsistent about the NIIT's placement and the Treaty-based credit Mr. Bruyea claims in this case. *Magone v. Heller*, 150 U.S. 70, 74 (1893) ("the adverb 'expressly,' in its primary meaning, denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to 'in an express manner' or 'in direct terms[.]'"); *Express*, *Black's Law Dictionary* (12th ed. 2024) (defining "Express" as "Clearly and unmistakably communicated; stated with directness and clarity.").[16] This Court rejects the government's argument that "the placement [of the NIIT] is itself an express inconsistency" with the Treaty. Tr. 21:18–19.

The government's argument, however, is even more ambitious, rejecting the need for any specificity in the later-enacted provision to overrule the Treaty. According to the government, the general rule that "a Congressional intention to modify a treaty by statute must be clearly expressed" does not apply to tax cases; rather, the government asserts, "a different standard applies under the [Internal Revenue] Code." Def. MSJ at 42 n.20. In particular, the government points to 26 U.S.C. § 7852(d)(1), which provides that "[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being treaty or law."[17] The government thus asserts that "treaties have no preferential status over *tax* statutes, and there need be no explicit statement of

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[16] An "express repeal" is a "[r]epeal by specific declaration in a new statute . . . ." *Repeal*, *Black's Law Dictionary* (12th ed. 2024).

[17] This provision was enacted as part of the Technical and Miscellaneous Revenue Act of 1998 ("TAMRA"), Pub. L. No. 100-647, 102 Stat. 3342.

Congressional intent that the Code will prevail in case of conflict with a treaty." Def. MSJ at 42 n.20 (citing S. Rep. No. 100-445 at 325-26 (1988)).

The government cannot get the mileage out of 26 U.S.C. § 7852(d)(1) it desires. As the D.C. Circuit recognized — citing the same Senate Report as the government here — "this provision was intended to codify the last-in-time principle as applied to tax treaties and statutes." *Kappus*, 337 F.3d at 1057. And, indeed, that is all the statute's plain language accomplishes. The government is wrong; tax statutes aren't different than other statutes vis-à-vis treaties.

To be clear, neither this Court nor Mr. Bruyea takes any issue with the "last-in-time" principle in general. The question is simply whether it applies here. The Court continues to answer that question in the negative. Because 26 U.S.C. § 7852(d)(1) does nothing more than codify the "last-in-time rule," as the D.C. Circuit recognized, the statute itself does nothing more than beg the question *whether there is, in fact, a necessary conflict* between the NIIT statute, on the one hand, and the Treaty, on the other. The government answers that question in the affirmative based on the NIIT's placement — and despite any textual evidence that its placement in Chapter 2A was intended to defeat the Treaty-based tax credit. Mr. Bruyea, in contrast, correctly points to the general rule that this Court should not manufacture a conflict between the statute and the Treaty by implication. That is precisely what this Court established *infra*, and 26 U.S.C. § 7852(d)(1) does not change this Court's analysis.

Kappus further demonstrates why the government is flat wrong. In that case, I.R.C. § 59(a)(2) — the tax statute at issue that conflicted with the Treaty — was subject to yet another TAMRA provision that specified that § 59(a)(2) was "intended to apply notwithstanding any inconsistent treaty obligations[.]" 337 F.3d at 1057 (discussing TAMRA, § 1012(aa)(2), codified at 26 U.S.C. § 861 note, and citing S. Rep. No. 100-45 at 319). According to the D.C. Circuit, "TAMRA thus made it crystal clear that Congress intended [§ 59(a)(2)] to supercede any preexisting treaty obligation with which it conflict[s]." *Id.* at 1058. Here, in contrast, the Treaty and the NIIT statute may be harmonized and, relatedly, there is no similar "crystal clear" congressional language like that in *Kappus*, indicating that the NIIT's placement was designed to "supercede" a Treaty-based tax credit.

Finally, if the government were correct that 26 U.S.C. § 7852(d)(1) somehow vitiates the Supreme Court's instruction that "a Congressional intention to modify a

treaty by statute must be clearly expressed[,]" Def. MSJ at 42 n.20, we would expect to see some clear authority to that effect. The government notably quotes no language from the Senate Report or *any* case law so holding. And that is because there is no support for the government's assertion. To the contrary, the D.C. Circuit in *Kappus* recognized — as does this Court — the continued vitality of the Supreme Court's general rule that "statutes and treaties should be harmonized if possible," even in tax cases. *Kappus*, 337 F.3d at 1059 n.7 (citing *Whitney*, 124 U.S. at 194, and the Federal Circuit's decision in *Xerox Corp.*, 41 F.3d at 658). Indeed, the D.C. Circuit instructed that "[t]he best way to harmonize § 59(a)(2) with [later-enacted] protocols [amending the Treaty] is to *assume the latter were not intended to repeal the former*." *Id.* (emphasis added). And that is precisely how this Court approaches the NIIT. Moreover, this Court again notes that, quite unlike the plaintiffs in *Kappus*, Mr. Bruyea does not concede a conflict between the Treaty and a statute. Nor, for that matter, does the government point to language — "crystal clear," *id.* at 1058, or otherwise — making a conflict between the Treaty and the NIIT "irreconcilable," *id.* at 1056, or making them "absolutely incompatible," *id.* at 1059.

To side with the government, this Court would have to disregard the Federal Circuit's instruction in *Xerox Corp.* that "unless it is impossible to do so, treaty and law must stand together in harmony." *Kappus*, 337 F.3d at 1059 n.6 (quoting *Xerox Corp.*, 41 F.3d at 658). This Court has done its best to implement that instruction and the result favors Mr. Bruyea.

b. The Treaty's U.S. Law Limitation does not preclude the application of a Treaty-based credit to the NIIT

But what about the second possibility: that the Treaty itself somehow precludes the application of a Treaty-based tax credit to the NIIT? The government argues that the Treaty's U.S. Law Limitation does precisely that. The fatal problem for the government is that the government simultaneously (and variously) contends that the U.S. Law Limitation means that the I.R.C. *always* trumps the Treaty and — try to wrap your head around this — that the Treaty *sometimes does* trump the I.R.C. The government cannot have it both ways. As demonstrated *infra*, the Court attempted during oral argument to pin the government down on the precise meaning and scope of the U.S. Law Limitation, but that proved to be "an effort to nail jello to a wall." *Alexander v. Mayhew*, 334 F.R.D. 626, 627 (N.D. Fla. 2020).

For starters, the government critically concedes that the U.S. Law Limitation does not *always* preclude a Treaty-based tax credit unless implemented in the I.R.C. Indeed,

the government agrees that the Treaty, ***in Article XXIV, contains several paragraphs that control over conflicting United States statutory provisions***. For example, the government readily agrees not only that Paragraph 3 of Article XXIV is inconsistent with the I.R.C., Tr. 13:5–17, but also that "Paragraphs 3, 4, 5, and 6 [of Article XXIV] ***do*** make promises that are inconsistent with the Code ***and provide rights that would not otherwise be provided for under the Code***[.]" Tr. 28:1–5 (emphasis added) (further agreeing that the "extrinsic materials that we refer to are quite specific about that"). In other words, computing taxes pursuant to Article XXIV, ¶¶ 3–6, would yield a different result than if the I.R.C. were followed instead.[18]

That critical concession creates an insurmountable impediment to the government's interpretive approach to the Treaty. That is because whatever the proper scope of the Treaty's U.S. Law Limitation, the government agrees that it cannot be read literally to mean that the I.R.C. always trumps the Treaty. And once we know that the Treaty contains *some* provisions that must be followed even though they conflict with United States law, the next, natural question is not rocket science: *why is the Treaty-based tax credit Mr. Bruyea claims pursuant to Paragraphs 1 and 4 of Article XXIV any different than what is permitted in Paragraphs 3-6*? The Court spent the bulk of oral argument trying to unravel the mystery of that question — *i.e.*, how the government can contend both that U.S. Law Limitation precludes Mr. Bruyea's claimed credit, but elsewhere permits Treaty provisions to trump the I.R.C. There is no gentle way to say this — the government had the Court going in circles:

> **THE COURT:** But doesn't this also – ["]the subject [to] the provisions and limitations of the law of the United States["] [language] apply to all the subsequent paragraphs? Isn't this . . . a general rule for . . . the double taxation compromise generally?
>
> **[GOVERNMENT COUNSEL]:** It does, yes. . . . [E]xcept where the other [Treaty] paragraphs specifically trump specific provisions of the Code.

[18] *See* Pl. MSJ at 20 ("Article XXIV(5) provides a United States foreign tax credit to a Canadian resident United States citizen on dividends, royalties, and interest arising in the United States. Under Code Sections 901 and 904(a), a foreign tax credit is only available with respect to foreign source income. Thus, the credit under Article XXIV(5) of the Canada Treaty represents a credit that is not available under the Code and is independently provided by the Canada Treaty.").

Tr. 28:17–29:1 (cleaned-up).

But there are no Treaty paragraphs that "specifically" — *i.e.*, explicitly, by their terms — "trump specific provisions of the Code." *Id.* No such language exists. As hard as the Court tried to pin down precisely how the government reads the U.S. Law Limitation consistently across Article XXIV, the Court could not get the government to articulate a consistent approach:

> **THE COURT:** If we're putting aside *Whitney vs. Robinson*, [and focus just on the Treaty language] "in accordance with the provisions and subject to the limitations of the [law of the] United States," the Code should trump all of these other [Treaty] provisions that you are saying are enforceable, and I'm trying analytically to figure out how do you know that some of these provisions in the Treaty trump the Code and in other cases the Code trumps the Treaty?
>
> **[GOVERNMENT COUNSEL]:** Because the Treaty in its text specifically provides for remedies that are different from the remedies that are in the Code.
>
> **THE COURT:** So? Maybe the[] [Treaty provisions] just lose in the face of the Code.
>
> **[GOVERNMENT COUNSEL]:** Well, the Government is not taking such a draconian position in this case, Your Honor.
>
> **THE COURT:** Right, but it's an unprincipled one if I can't come up with a rule, an interpretive rule that explains your position in both cases, and it doesn't sound like I've got one.
>
> **[GOVERNMENT COUNSEL]:** The interpretive rule is that as a general matter, for any foreign tax credit that's allowed under the Treat[y], [it] is subject to the provisions and limitations of the Code except to the extent that elsewhere in the treaty there are specific provisions of the Code that are altered by the Treaty partners agreeing to do so in a particular [case].

Tr. 29:3–30:3 (cleaned-up).

The government's explanation in a nutshell amounts to this: the Treaty governs unless it doesn't.[19]

At best, a generous characterization of the government's position is that while there is no hard-and-fast rule, the Court should consider the relative specificity of competing Treaty and statutory provisions. At worst, the government concedes that its interpretation would nullify other paragraphs within Article XXIV, but the government knows that result would be absurd and so its only recourse is to arbitrarily adjust its interpretation of the U.S. Law Limitation depending on the paragraph at issue. When the Court pressed the government on just these problems, the government hypothesized a specificity distinction:

> **THE COURT:** It seems like that . . . "in accordance language," works differently depending on what we're talking about. When we're talking about the other paragraphs with the . . . greater details on the three-bite [computation] rule, you agree

[19] Even if the U.S. Law Limitation must be read to apply to Paragraphs 3–6 of Article XXIV, and not just Paragraph 1 of that article, Mr. Bruyea still prevails. *See, e.g.*, Def. MSJ at 38 (arguing that the U.S. Law Limitation "applie[s] to the credits referenced in paragraph 4(b) [of Article XXIV] as well"); Tr. 40:5–9 (government arguing that "Paragraph 1 is, itself, subject to Paragraphs 4, 5, and 6, so there is an interlink between the two"). Indeed, the Court is inclined to agree with the government that Paragraph 1 of Article XXIV — including the U.S. Law Limitation — applies to any Treaty-based tax credit claim based on Paragraph 4. *See* Def. MSJ at 43. Thus, in contrast to *Christensen v. United States*, 168 Fed. Cl. 263, 330 (2023), the undersigned sees no reason to distinguish between the operative Treaty-based tax credit language in Paragraph 1 and that of Paragraph 4(b). Accordingly, the undersigned disagrees with *Christensen* that the U.S. Law Limitation applies in the former but not the latter. Instead, this Court concludes that the U.S. Law Limitation applies to both paragraphs, but they must be read together and are not expressly inconsistent with the I.R.C. What that means is that the U.S. Law Limitation does not preclude the Treaty-based foreign tax credit against the NIIT in either Paragraph 1 or 4(b). In that regard, *Christensen* itself concluded that there was "no evidence of congressional intent when placing I.R.C. § 1411 in Chapter 2A of the I.R.C.," 168 Fed. Cl. at 328, and that "nothing in the legislative history of the enactment of I.R.C. § 1411 indicates the congressional intent with respect to abrogating any foreign tax credit provided by" the nearly-identical tax treaty with France at issue in that case "when Congress enacted the [NIIT] in Chapter 2A[,]" *id.* at 331. Thus, in the undersigned's view, *Christensen* ultimately correctly rejected the government's request for "this court to *assume* from the words of [the NIIT] and its placement in Chapter 2A of the I.R.C. . . . that Congress intended to exclude the [NIIT] from all foreign tax credits." *Id.* at 331 (emphasis added). *Christensen* also is correct that I.R.C. § 6511(d)(3)(A) squarely supports the proposition "that a foreign tax credit may be allowed by the provisions of a treaty without also being provided by the terms of I.R.C. § 901." *Id.* at 332–33. In sum, the U.S. Law Limitation does not preclude Mr. Bruyea's claimed tax credit even if that clause applies to Paragraph 4(b) of Article XXIV.

> that the Treaty provisions -- what is it called, the sourcing rules?
>
> **[GOVERNMENT COUNSEL]**: Yes.
>
> **THE COURT:** That trumps the Code.
>
> **[GOVERNMENT COUNSEL]:** Yes.
>
> **THE COURT:** Because they are inconsistent. All I'm asking you, if they are inconsistent with the Code, why does the Treaty provisions win there, but if I interpret the Treaty provision in Paragraph 1 to be what the Plaintiff is saying, it does not trump? That's what I'm asking.
>
> **[GOVERNMENT COUNSEL]:** Because when the parties enacted Paragraph 1 of the Treaty, they were not expressly making a promise to alter the Code, whereas paragraphs 3, 4, 5, and 6 *contain express promises* to alter certain aspects of the Code.
>
> **THE COURT:** Where is that? Where is the express promise that they are altering the Code? Is it just in their specificity?
>
> **[GOVERNMENT COUNSEL]:** Yes.

Tr. 31:25–32:24 (cleaned-up) (emphasis added).

This Court rejects the government's specificity argument. As the Court discussed during oral argument, and holds now, there are no "express promises" — contrary to the government's assertion — that provide that the Treaty trumps the Code in Paragraphs 3, 4, 5, and 6 of Article XXIV, but not in Paragraph 1. To conclude otherwise, and to side with the government, would require conflating the words "express" and "inferred":

> **THE COURT:** Counsel, that is not what we mean when we say "express." "Express" means [something like] "notwithstanding any provision of the United States Code, we amend it as follows." You want me to infer [such language] from the specificity [of Article XXIV, ¶¶ 3-6], which then means we're just debating levels of specificity and what ought to govern when things aren't specific. It's a much different argument.

> **[GOVERNMENT COUNSEL]**: You are right that it does not say "notwithstanding the Code."
>
> **THE COURT:** Right. So it's not express. . . . Express means literal.
>
> **[GOVERNMENT COUNSEL]:** [The Treaty] creates rules that govern the application of foreign tax credits that are themselves inconsistent with the Code.
>
> **THE COURT:** Right. So why doesn't the Code win?
>
> **[GOVERNMENT COUNSEL]:** Because the parties . . . agreed to a provision . . . in the Treaty that differed from the Code . . . .
>
> **THE COURT:** So the Treaty wins, not the Code?
>
> **[GOVERNMENT COUNSEL]**: In that case, yes.
>
> **THE COURT:** Why?
>
> **[GOVERNMENT COUNSEL]**: Because that's what . . . the Treaty partners agreed to in the text of the Treaty[.]

Tr. 33:1–34:2 (cleaned-up).

In sum, the government's reading of the U.S. Law Limitation would simultaneously: (1) *preclude* Mr. Bruyea's claimed Treaty-based tax credit because it *putatively* conflicts with the I.R.C.'s foreign tax credit scheme in Chapter 1 of the I.R.C.; and (2) *permit* the computation of foreign tax credits in a manner that *definitely* conflicts with the I.R.C. This Court rejects the government's ad-hoc approach to the U.S. Law Limitation. Below, the Court further finds that other Treaty language supports Mr. Bruyea's claim in this case and addresses the meaning of the U.S. Law Limitation utilizing the relevant extrinsic evidence, per the treaty interpretation rules the Supreme Court and the Federal Circuit have instructed us to follow.

c. Other Treaty language supports Mr. Bruyea's claim

The government's interpretation fails to explain the proviso in Clauses [2] and [3] of Article XXIV, Paragraph 1, reserving to the United States the right to "amend[]" its laws "from time to time *without changing the general principle*" of the Treaty. Canda Tax Treaty at 24 (emphasis added). The government does not adequately explain what

"general principle" the Treaty is referencing, but it seems quite clear to the Court that the Treaty refers to the "general principle" of eliminating or avoiding double taxation.

The government opposes this view, but once again engages in circular, question-begging reasoning, asserting that "the general principle cannot be broader than the language it follows in [P]aragraph (1), which requires the United States to provide foreign-tax-credit relief in accordance with its own domestic law." Def. MSJ at 35. At oral argument, the government further asserted that "[t]he 'general principle' refers to the allowance of a credit under the Code[.]" Tr. 18:11–12. According to the government, this language is a "promise . . . that the United States will not repeal the foreign tax credit provisions from the Code. That's what it promises." Tr. 19:17–19. But this reading critically assumes that the Treaty promised something impossible and, therefore, meaningless: to eliminate the "last-in-time rule." Of course, the Treaty cannot preclude the government from later repealing foreign tax credit provisions within the I.R.C. Moreover, the government's hypothesis about the meaning of the "general principle" language further critically assumes that a Treaty-based tax credit is precluded unless domestic law provides for it. But the government already has conceded that: (1) nothing in our domestic law expressly precludes a Treaty-based tax credit *per se*; and (2) Article XXIV itself contains provisions that ***are*** inconsistent with domestic law.

The government makes no attempt to reconcile those concessions with its frankly incredible assertion that the U.S. Law Limitation means that the Treaty "does not necessarily provide U.S. taxpayers with rights beyond those already provided by the Code[.]" Def. MSJ at 36 (arguing that "Article XXIV(1) of the Treaty need not provide rights to taxpayers beyond those in the Code"). In using the word "necessarily" without further explanation, the government confirms this Court's suspicion that the government is engaged in an *ad hoc* interpretation of the U.S. Law Limitation; it means whatever the government wants it to, depending on the paragraph. And if the government is correct that the Treaty provides nothing "beyond . . . the Code," *id.*, the Treaty accomplishes… what, precisely? The government's approach — that Paragraph 1 of Article XXIV may well give nothing beyond the I.R.C. — may render Article XXIV entirely inoperative,[20]

[20] *See* Tr. 17:17–23 ("**THE COURT:** But if [Paragraph 1 of Article XXIV] were inconsistent with the Code, [the Treaty provision] would give nothing. . . . [I]t [would] really all come[] down to the Code. The Code either provides for a credit or it doesn't. **[GOVERNMENT COUNSEL]:** You are correct, Your Honor, that Paragraph 1 does not give anything beyond the Code…."). That is an inexplicable position, as a matter of basic textual interpretation principles, and one that is inconsistent, in any event, with the government's own concessions, as explained *supra*.

which is exactly what the government accuses Mr. Bruyea of doing to the U.S. Law Limitation.

Accordingly, this Court agrees with Mr. Bruyea: "If Defendant's position were accepted, it is hard to understand what Defendant contends is the purpose of Article XXIV(1). If this provision simply states that domestic law governs the allowance of a foreign tax credit, the article would have no independent purpose or effect in contravention of the fundamental rules of U.S. legal interpretation." Pl. MSJ at 38.

In any event, the Court does not read that "the general principle" language as "broader" than the U.S. Law Limitation, but rather as an interpretive rule to say this: *where the United States enacts a later tax code provision, the "general principle" of eliminating or avoiding double taxation should be effectuated* (*i.e.*, unless the "last-in-time rule" requires otherwise because there is a direct conflict). Indeed, if Congress wants to override treaty obligations where there is a possible inconsistency with a statute — as opposed to a direct conflict governed by the "last-in-time rule" — Congress knows how to do that. *See, e.g.*, 26 U.S.C. § 7874(f) ("Special rule for treaties.--Nothing in section 894 or 7852(d) or in any other provision of law shall be construed as permitting an exemption, by reason of any treaty obligation of the United States heretofore or hereafter entered into, from the provisions of this section."). The Court's approach avoids the government's *ipse dixit* and gives meaning to the "the general principle" phrase, which, in the Court's view, clearly refers to the principle of eliminating or avoiding double taxation — a principle that the government, contrary to the Treaty, entirely disregards.

Finally, the government admits that the Treaty's definition of "United States tax" includes the NIIT. Def. MSJ at 32 n. 13 ("Defendant does not disagree with plaintiff's position . . . that the NIIT is a 'covered tax' under Article II(3) of the Treaty."). Now, if anything is sufficiently specific from which the Court may draw a conclusion, *that* definition *is an express* provision that is at least as specific as Paragraphs 3-6 of Article XXIV and certainly far clearer than the inference the government wants this Court to draw from the placement of the NIIT outside of I.R.C. Chapter 1. Again, the Treaty also provides that it "shall apply also to . . . any taxes identical or *substantively similar* to those taxes to which the Convention applies under paragraph 2 [of Article II]." *Id.* at 3 (emphasis added) (Art. II, ¶ 3(a)). This language covers the NIIT and the government offers no response.

2. The extrinsic evidence supports Mr. Bruyea's interpretation of the Treaty

The government — contradicting its broad reading of the U.S. Law Limitation within Paragraph 1 — asserts that "[t]he fact that certain other provisions of the Treaty, such as Article XXIV(5), may in certain circumstances provide benefits to taxpayers that would not otherwise be allowed by the Code does not mean that the 'provisions' and 'limitations' language may be read out of [Article XXIV] paragraph (1)." Def. MSJ at 34.

There are three problems with that argument.

First, the Court notes that the government once again concedes that Article XXIV *does* contain provisions that are binding and provide benefits to taxpayers even though they conflict with the I.R.C.

Second, the government's assertion is a strawman. The government is correct that the U.S. Law Limitation must be given meaning, but we now know that it simply cannot be read as broadly as the government insists; at least not if the provision is going to have a consistent meaning throughout Article XXIV (given the government's own view of the Treaty provisions in Paragraph 3–6 of Article XXIV that the government agrees conflict with United States law).

Third, Mr. Bruyea's interpretation of the Treaty sits comfortably alongside the disputed U.S. Law Limitation language. To explain how, we must refer, as both parties do, to the extrinsic evidence. The extrinsic evidence not only generally supports Mr. Bruyea's claim to a Treaty-based tax credit but also provides a plausible answer regarding what the parties intended with the U.S. Law Limitation.

a. The Technical Explanation

The Technical Explanation of the Treaty "is an official guide to the Convention" published by the Treasury Department. *See* ECF No. 18-3 at 1 (Treasury Department Technical Explanation of the Convention Between the Government of the United States of America and Canada with Respect to Taxes on Income and on Capital Signed at Washington, D.C. on September 26, 1980, as Amended by the Protocol Signed at Ottawa on June 14, 1983 and the Protocol Signed at Washington on March 28, 1984). Both parties rely on it. Pl. MSJ at 36–37; Def. MSJ at 44–46. It answers three critical questions.

First, what taxes does the Treaty cover? The Technical Explanation of Article II indicates that the Treaty "shall apply . . . in the case of the United States, to the Federal income taxes imposed by the Internal Revenue Code." ECF No. 18-3 at 2. The Technical Explanation notes that the Treaty expressly excludes particular United States taxes, such as "the estate, gift, and generation-skipping transfer taxes, the Windfall Profits Tax, Federal unemployment taxes, social security taxes imposed under sections 1401, 3101, and 3111 of the Code, and the excise tax on insurance premiums imposed under Code section 4371." *Id.* More significantly — and consistent with the plain language of Article II, Paragraph 3 — the Technical Explanation makes clear that the Treaty may apply to future taxes no matter where they are located in the I.R.C.:

> Paragraph 3 provides that the Convention also applies to any taxes identical or *substantially similar to the taxes on income in existence on September 26, 1980* which are imposed *in addition to* or in place of *the taxes existing on that date*. Similarly, taxes on capital imposed *after that date* are to be covered.

Id. at 3 (emphasis added); *see also id.* at 4 (addressing Paragraph 1(d) of Article III). The Court once again notes that the government concedes that the NIIT is a "Federal income tax" and a "United States tax" as the Treaty defines those terms. Def. MSJ at 32 n. 13 ("Defendant does not disagree with plaintiff's position (at 11-12) that the NIIT is a 'covered tax' under Article II(3) of the Treaty.").

Second, does Paragraph 1 of Article XXIV contain a mere truism that gives United States citizens nothing, as the government at times has suggested? The Technical Explanation answers that question squarely in the negative: "Paragraph 1 provides the general *rules* that will apply under the Convention with respect to foreign tax credits for Canadian taxes paid or accrued." ECF No. 18-3 at 37 (emphasis added). The Technical Explanation clearly supports Mr. Bruyea's claim: "The United States undertakes to allow a citizen . . . of the United States . . . a credit against the Federal income taxes imposed by the Code for the appropriate amount of income tax paid or accrued to Canada." *Id.*

Third, how should we read the critical language in the U.S. Law Limitation? According to the Treasury Department, the parties intended something very specific:

> The direct and deemed-paid credits *allowed by paragraph 1* are subject to the limitations of the Code as they may be amended

> from time to time without changing the general principle of paragraph 1. Thus, as is generally the case under U.S. income tax conventions, provisions such as Code sections 901(c), 904, 905, 907, 908, and 911 apply *for purposes of computing* the allowable credit under paragraph 1. In addition, the United States is not required to maintain the overall limitation currently provided by U.S. law.

ECF No. 18-3 at 37 (emphasis added).

We learn several things from the Technical Explanation: (1) the Treaty, by its terms, covers the NIIT even though it was enacted later; (2) Paragraph 1 of Article XXIV itself contains "rules" and commits the United States to allowing its citizens credits "against the federal income taxes imposed by the [I.R.C.] for taxes paid to Canada"; (3) Paragraph 1 of Article XXIV contains no suggestion that it was intended to limit in any way the type of United States tax to which a foreign tax credit might apply; and (4) consistent with United States law, particular I.R.C. provisions may be appropriately utilized to compute the quantum of the tax credit.

Any remaining contention that a taxpayer is not entitled to any Treaty-based credit unless the I.R.C. provides for it is flatly refuted by the Technical Explanation in two different ways.

First, the Technical Explanation advises this:

> The term "income tax paid or accrued" is defined in paragraph 7 of Article XXIV to include certain specified taxes which are paid or accrued. The Convention only provides a credit for amounts paid or accrued. The determination of whether an amount is paid or accrued is made under the Code. ***Paragraph 1 provides a credit for these specified taxes whether or not they qualify as creditable under Code section 901 or 903***.

ECF No. 18-3 at 37 (emphasis added). Whatever is meant by "these specified taxes," it is perfectly clear the parties intended that Paragraph 1 ***of the Treaty*** "provides a credit"

even if those taxes do "not . . . qualify as creditable under [I.R.C.] 901 or 903." *Id.* This alone is a complete refutation of the government's overall position.

Second, the Technical Explanation refers to "[a] taxpayer who claims ***credit under the Convention*** for Canadian taxes ***made creditable solely by paragraph 1***." *Id.* (emphasis added). This, too, is a QED in Mr. Bruyea's favor. The government does not address any of this language in its briefs.

Finally, the Technical Explanation indicates that "[t]he rules of Paragraph 1" of Article XXIV must be construed in concert with the "rules in paragraphs 4 and 5." ECF No. 18-3 at 43 ("The rules of paragraph 1 are modified in certain respects by rules in paragraphs 4 and 5 for income derived by United States citizens who are residents of Canada."). That is the government's position, *see supra* note 19, and, again, the Court takes no issue with that straightforward proposition. But the point yields the government no advantage as there is no suggestion that there is any limitation — in Paragraphs 4 and 5 — regarding the type of "United States tax" to which a Paragraph 1, 4, or 5 credit may apply. In other words, so long as the NIIT qualifies as a "United States tax," which the government concedes is this case here, the Treaty provides for the claimed credit.

b. Other extrinsic evidence supports Mr. Bruyea's claim

The Letter of Submittal from the President to the United States Senate, seeking its "advice and consent to ratification," ECF No. 18-4 at 2, also supports Mr. Bruyea's case. The Transmittal Letter explains that the Treaty "contains a *rule* . . . for *eliminating double taxation* of United States citizens who are residents in Canada." *Id.* at 4 (emphasis added). The purpose of the Treaty — at least in the President's contemporaneous view — could not be clearer and we are instructed to take it into account. *Water Splash,* 581 U.S. at 281 (considering a report that the President included when transmitting a treaty to the United States Senate for consideration and explaining that "[t]he Court also gives 'great weight' to 'the Executive Branch's interpretation of a treaty'" (quoting *Abbott*, 560 U.S. at 15)). The Joint Committee on Taxation's explanation of the Treaty, ECF No. 18-5 ("JCT Explanation"), similarly explains that "[t]he *principal purposes* of the proposed income tax treaty between the United States and Canada is to reduce *or eliminate* double taxation of income earned by citizens and residents of either county from sources within the other country[.]" ECF No. 18-5 at 7 (emphasis added).

The JCT Explanation also clarifies that the Treaty provides for a foreign tax credit independent of the I.R.C., noting that "[t]he U.S. foreign tax credit *provided for by the treaty* is to be applied on a per-country basis: that is, Canadian taxes will only be permitted to offset U.S. tax imposed on Canadian income." *Id.* at 11 (emphasis added). Indeed, that "*contrasts* with the Code limitation which is computed on an overall, worldwide basis." *Id.* (emphasis added).

And here's another total refutation of the government's position from the JCT Explanation: "[T]he treaty's rules are used *only if the taxes are not creditable under the Code*." *Id.* (emphasis added). The JCT Explanation expressly acknowledges that the Treaty "will apply to substantially similar taxes *which either country may subsequently impose*." ECF No. 18-5 at 16 (emphasis added).

While the JCT Explanation *does* comment that "[t]he credit is provided . . . only to the extent permitted under domestic law[,]" that means that "[t]he credit is *to be computed* in accordance with the provisions of and subject to the limitations of U.S. law." ECF No. 18-5 at 40 (emphasis added). Note that this language contains the same phrase as the U.S. Law Limitation, upon which the government primarily relies, but is explained to reflect that it references computation, and not general allowability. This dovetails nicely, and is consistent, with the Technical Evaluation's referencing specific I.R.C. provisions that could be employed to compute the quantum of any Treaty-based credit (but that do not themselves nullify such a credit). Thus, in the same section, the JCT Explanation references the "use[] [of] the Treaty credit," *id.*, as well as a taxpayer's "claiming benefits under the treaty not available under the [I.R.C. ,]" *id.* at 40-41.

The JCT Explanation directly addresses Mr. Bruyea's claim and supports it: "The proposed treaty also contains special rules for U.S. citizens who are residents of Canada. . . . [T]he United States will allow the citizen a credit *against his U.S. tax for any tax paid to Canada* after Canda has allowed the credit for U.S. taxes." ECF No. 18-5 at 42 (emphasis added). Note the expansive language — "U.S. tax" without limitation — and the lack of any limitation based on the I.R.C.

Finally, the government relies on the Technical Explanation of the 2006 U.S. model treaty, Def. MSJ at 26 (discussing ECF No. 20-13), but that document also provides support for Mr. Bruyea. It notes that "the United States will allow a credit to its citizens and residents in accordance with the Article, *even if such credit were to provide a benefit not available under the [I.R.C.].*" ECF No. 20-13 at 6 (emphasis added).

3. Other interpretive principles support Mr. Bruyea's claim

As noted above, this Court must also account for Canada's view, as "[t]he 'opinions of our sister signatories,' . . . are 'entitled to considerable weight.'" *El Al Israel Airlines,* 525 U.S. at 176 (quoting *Air France*, 470 U.S. at 404). Here, Canada has indicated that Mr. Bruyea is entitled to the Treaty-based tax credit he seeks. ECF No. 18-6 ("The position of the Canadian competent authority in this regard is that Canada, as the country of source, has the right to tax the gain, while the US, as the country which has residual taxation rights, must provide relief in accordance with Article XXIV of the Convention.").

The Supreme Court further instructs that "'where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred[.]'" *Stuart*, 489 U.S. at 368 (quoting *Bacardi Corp.*, 311 U.S. at 163 (citations omitted)). The Court sees no reason to disregard that principle here and it clearly favors Mr. Bruyea, just as it did the plaintiff in *Christensen*. *See Christensen*, 168 Fed. Cl. at 333 (discussing *Stuart* and following the Supreme Court's instruction that a "liberal interpretation" of tax treaties is warranted).

4. Treasury's own regulatory explanations refute the government's policy-based objections

The government asserts that recognizing "a Treaty-based allowance of foreign tax credits against the NIIT would require the creation of a brand new, parallel, foreign-tax credit regime not contemplated by the Code[.]" Def. MSJ at 56. Thus, argues the government, "[t]he absence of any such methodology in the Code suggests strongly that Congress did not contemplate the application of foreign tax credits against the NIIT." *Id.* The government's objection, in essence, is that the precise methodology for calculating Mr. Bruyea's claimed credit is not clear in the I.R.C. and thus this Court should infer no such credit may be claimed.

For starters, the government already has agreed that this computational question may be decided after the entitlement issue the parties' motions for summary judgment presents for resolution. Indeed, the computation problem is a non-issue at this stage of the case because "[t]he parties have agreed at this stage to defer any computation issues pending the outcome of this motion for partial summary judgment." Pl. Rep. at 18 n.11; *see also* Def. MSJ at 50 (explaining that "the parties have reserved questions regarding the computation of a foreign tax credit until after the Court has resolved the parties' dispute regarding the availability of a foreign tax credit in any amount").

Moreover, the government's objection, by its own admission, is overblown. In the final regulation implementing the NIIT, the Treasury Department and IRS agreed that there is no *per se* obstacle to a treaty-based credit applying to the NIIT:

> The Treasury Department and the IRS also received comments asking whether United States income tax treaties may provide an independent basis to credit foreign income taxes against the section 1411 tax. The Treasury Department and the IRS do not believe that these regulations are an appropriate vehicle for guidance with respect to specific treaties. An analysis of each United States income tax treaty would be required to determine whether the United States would have an obligation under that treaty to provide a credit against the section 1411 tax for foreign income taxes paid to the other country.

Net Investment Income Tax, 78 Fed. Reg. 72394-01, 72396, 2013 WL 6222406 (Dec. 2, 2013). The clear and necessary implication is that a treaty-based credit *may* apply to the NIIT and, thus, that the NIIT's placement in Chapter 2A of the I.R.C. (*i.e.*, outside of Chapter 1) does not preclude a foreign tax credit.

The Court recognizes that the very same Federal Register commentary reads the U.S. Law Limitation as precluding "an independent basis for a credit against the section 1411 tax." *Id.* But particularly in the absence of any explanation of that assertion — persuasive or otherwise — that addresses the canons of treaty interpretation, the extrinsic evidence, and the other interpretive difficulties this Court analyzed above but which the government fails to answer, this Court declines to afford Treasury's view any deference. *See, e.g., Loper Bright Enterprises v. Raimondo*, -- U.S. --, 144 S. Ct. 2244, 2266 (2024) (concluding that "agencies have no special competence in resolving statutory ambiguities" and that "[t]he Framers . . . expected that courts would resolve them by exercising independent legal judgment"). And to be clear, there are no actual regulatory provisions Treasury or IRS promulgated that address the issues in this case.

VI. REDUX

Given the relative complexity of the parties' contentions and arguments, the Court provides this basic summary of its decision:

1. The United States and Canada entered a tax treaty: the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital.
2. Based upon that Treaty, Mr. Bruyea claims he is entitled to a foreign tax credit to be applied against the NIIT he paid to the United States.
3. The Treaty provides in Paragraph 1 of Article XXIV that "the United States *shall allow* to a citizen or resident of the United States . . . *as a credit against the United States tax on income* the appropriate amount of income tax paid or accrued to Canada . . . ."
4. The Treaty similarly provides in Paragraph 4 of Article XXIV that "for the purposes of computing the United States tax, *the United States shall allow as a credit against* ***United States tax*** *the income tax paid or accrued to Canada*."
5. The government agrees that, in general, a taxpayer may claim a treaty-based foreign tax credit — *i.e.*, the I.R.C. does *not* have to implement a treaty-based tax credit for one to exist.
6. The government nevertheless argues that the I.R.C. only provides for foreign tax credits against income taxes contained within Chapter 1 of the I.R.C. Because Congress placed the NIIT in Chapter 2A of the I.R.C., no foreign tax credit may be applied against the NIIT. This is for two reasons: (a) because the NIIT was enacted after the Treaty, the NIIT's terms and placement in Chapter 2A trump the Treaty pursuant to the "last-in-time rule"; and (b) pursuant to the Treaty's terms, any Treaty-based foreign tax credit must be "[i]n accordance with the provisions and subject to the limitations of the law of the United States." In that regard, Mr. Bruyea agrees that the I.R.C. does not provide for the foreign tax credit he seeks.
7. The government's "last-in-time" argument fails because the Court is required to harmonize the Treaty and the I.R.C. where possible, and here it is possible to do so; the NIIT contains no text specifically and expressly inconsistent with the Treaty-based foreign tax credit language upon which Mr. Bruyea relies.
8. More importantly, the government concedes that Article XXIV of the Treaty contains several paragraphs that are incompatible with the I.R.C. but that are *not* trumped by the I.R.C. Thus, the government does not read the phrase "[i]n accordance with the provisions and subject to the limitations of the law of the United States" (the U.S. Law Limitation clause) to mean that Treaty provisions must be consistent with the I.R.C. to be enforceable. That phrase must be read

consistently across Article XXIV, but the government does not do so. Instead, the government sometimes applies it (*i.e.*, to preclude Mr. Bruyea's claimed foreign tax credit) and sometimes does not (*i.e.*, the government implements the credit calculation rules contained within Paragraphs 3-6, even though they are inconsistent with the U.S. Law Limitation). As a result, the Court rejects the government's overly-broad reading of that provision.

9. The parties in the Treaty defined "United States tax" in a manner that covers the NIIT and further agreed that "[t]he Convention shall apply also to . . . any taxes identical or *substantively similar* to those taxes to which the Convention applies under paragraph 2 [of Article II]." These Treaty terms support Mr. Bruyea's claim.

10. One purpose of the Treaty is to eliminate or avoid double taxation and Mr. Bruyea's interpretation best effectuates that purpose of the parties to the Treaty.

11. Mr. Bruyea's interpretation also better accounts for the extrinsic evidence, which substantiates that the parties contemplated Treaty-based foreign tax credits even where inconsistent with the I.R.C.

12. The U.S. Law Limitation clause is focused on how a Treaty-based credit is computed but not its existence. Thus, the Treaty may provide for a tax credit even where the I.R.C. does not otherwise effectuate that credit.

VII. CONCLUSION

For the foregoing reasons, Mr. Bruyea is entitled to partial summary judgment on the issue of entitlement to a Treaty-based foreign tax credit for his 2015 tax year. *See* RCFC 56. On or before January 16, 2025, the parties shall file a joint status report regarding how this case should proceed.

IT IS SO ORDERED.

s/Matthew H. Solomson
Matthew H. Solomson
Judge

Internal Revenue Code of 1986 (26 U.S.C.)

§ 27 Taxes of foreign countries and possessions of the United States
(effective to March 22, 2018)

(a) The amount of taxes imposed by foreign countries and possessions of the United States shall be allowed as a credit against the tax imposed by this chapter to the extent provided in section 901.

* * *

§ 901 Taxes of foreign countries and of possessions of United States
(effective August 10, 2010 to December 21, 2017)

(a) Allowance of credit.--If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under sections 902 and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year. The credit shall not be allowed against any tax treated as a tax not imposed by this chapter under section 26(b).

(b) Amount allowed.--Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) Citizens and domestic corporations.--In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *

* * *

§ 904 Limitation on the credit
(effective December 19, 2014 to December 21, 2017)

(a) Limitation.--The total amount of the credit taken under section 901(a) shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

* * *

§ 1411 Imposition of tax

(a) In general.--Except as provided in subsection (e)--

(1) Application to individuals.--In the case of an individual, there is hereby imposed (in addition to any other tax imposed by this subtitle) for each taxable year a tax equal to 3.8 percent of the lesser of--

(A) net investment income for such taxable year, or

(B) the excess (if any) of--

(i) the modified adjusted gross income for such taxable year, over

(ii) the threshold amount.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Case Number: 25-1563

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