THE TERMINATION OF THE UNITED STATES-NETHERLANDS ANTILLES INCOME TAX CONVENTION: A FAILURE OF U.S. TAX POLICY

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1. INTRODUCTION

On June 29, 1987, the United States gave notice that the United States-Netherlands Antilles Income Tax Convention (the "Antilles Treaty" or the "Treaty") would be terminated on January 1, 1988. While the notice of termination was modified on July 10, 1987, the U.S. action nonetheless had serious implications for the Netherlands Antilles (the "Antilles" or the "Islands"), the Eurobond Market and the international investment community's perception of U.S. tax policy. In light of these effects, the termination of the Antilles Treaty is exposed as a tax policy failure for the United States.

The termination resulted from the desire of the United States to end treaty shopping and tax evasion in the Antilles. However, the ter-

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3. The United States excluded Article VIII of the Antilles Treaty, which pertains to interest payments, from the scope of the June 29th termination notice. Id.
4. The Antilles consists of two groups of islands which are part of the Kingdom of the Netherlands. The Windward Islands (Sint Eustatius, Sint Maarten, Saba) are located east of Puerto Rico, and the Leeward Islands (Aruba, Bonaire, Curacao) are located just northwest of Venezuela. The Antilles covers a land area approximately one-third the size of Rhode Island and has a population of approximately 245,000. The capital city and financial center is Willemstad on Curacao. Tax Evasion Through the Netherlands Antilles and Other Tax Haven Countries: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 98th Cong., 1st Sess. 794-96 (1983) [hereinafter 1983 Hearings]; Dilworth, Tax Reform Act of 1984—Netherlands Antilles—Effect of the Repeal of the Withholding Tax on Portfolio Interest Payments to Foreign Investors, 15 GA. J. INT'L & COMP. L. 111, 112 n.7 (1985). Recently, Aruba has obtained "status aparte" within the Kingdom of the Netherlands, and therefore, has relative independence from the rest of the Antilles. Van Kempen, supra note 2, at 455.
mination virtually ignored important policy considerations, such as the promotion of foreign investment in the United States and the U.S. interest in the economic and political stability of the Antilles. An analysis of the relationship between the United States and the Antilles demonstrates that the United States improperly weighed the pertinent factors before terminating the Antilles Treaty. A better balancing of the policy considerations would have supported a less drastic alternative for dealing with abuses of the Antilles Treaty.

This comment examines the decision to terminate the Antilles Treaty and suggests areas in which the United States did not properly consider the potential effects of the termination. Section 2 of this comment provides a description of the Antilles' status as a tax haven. Section 3 outlines the provisions of the Antilles Treaty and the subsequent emergence of Antillean finance subsidiaries. Section 4 demonstrates how the Antilles was used for tax evasion and treaty shopping, and it suggests that an effective exchange of information program is the best way to deal with tax evasion. Section 5 analyzes the effects of the Treaty's termination on the Eurobond Market, the Antilles and the United States. Section 6 discusses the alternatives to the outright termination of the Treaty and advocates that the adoption of some alternative would have been preferable. Finally, Section 7 states the conclusion that the termination of the Antilles Treaty constitutes a failure of U.S. tax policy.

2. The Antilles as a Tax Haven

All tax havens share certain common features: (1) low or zero tax rates; (2) minimal currency exchange regulations and restrictions; (3) commercial and banking confidentiality laws; (4) a record of political stability and government policy favoring foreign investment; and (5) efficient travel and telephone systems in conjunction with good business facilities. Tax havens can be characterized as pure havens, liberal


7. Tax havens are countries in which foreigners can gain relief from the burdens of their domestic tax system. U.S. ownership and direct investment in tax havens grew five fold between 1968 and 1978. Growing Use of Tax Havens Is Serious Problem, Says IRS, 151 J. Acct. 22 (March 1981). "Tax havens have their origins buried deep in the past. They vie in age with the world's oldest profession; and the pendulum of their respectability has swung through almost as wide an arc." C. DOGGART, TAX HAVENS AND THEIR USES 1 (1979).


9. A pure haven has no direct taxes on income, profits, capital gains or inheritances, but it may have customs duties and property taxes. Vanatu and Nauru are
havens, or a combination of the forms.

The Antilles' status as a tax haven was assured by its commercial secrecy laws, its sanctioning of anonymous "bearer share" corporations, its minimal tax rates for financial institutions, and the Treaty's provisions which eliminated or reduced the U.S. tax on U.S. source income. In order to benefit from tax haven opportunities, the Antillean Government actively recruited well-trained personnel to manage tax haven activities and spent over $100 million on improvements to Willemstad's telephone and telex facilities. As a result of these efforts and its relationship with the United States, the Antillean Government has generated a large percentage of its revenue in recent years from the taxes and fees paid by financial entities resident in the Antilles.

The existence of tax havens is inevitable, and one can predict which countries will become tax havens by analyzing their tax treaties. The problem with tax havens arises when the treaties are grossly abused such that the abuses outweigh the benefits. While most observers agree that the revenue lost due to tax havens cannot be estimated accurately, indirect evidence indicates that the United States' losses are not as great as the Internal Revenue Service ("IRS") believes.

Examples of pure havens. Id. at 454-56.

10. A liberal haven has some direct taxes but provides favorable treatment for international investment activities. Hong Kong, Panama and Ireland are examples of liberal havens. Id. at 456-58.

11. A treaty haven has a treaty or usually a network of treaties which provide nonresidents with favorable tax treatment. Id. at 459.

12. The Antilles has no specific commercial secrecy statute. However, Articles 285 and 286 of the Netherlands Antilles Criminal Code make the divulgence of confidential financial information punishable by imprisonment for up to six months or payment of a 600 guilder fine. 1983 Hearings, supra note 4, at 518.

13. Id. at 569. "U.S. source income" is income received by foreigners from a U.S. corporation or entity (e.g. interest, dividends, royalties, annuity payments). See id. at 282-86.


15. 1983 Hearings, supra note 4, at 571. In 1982 for example, one-third of the Antilles' federal budget, about $100 million, was paid by such sources. Id.

16. In a 1981 Report on tax havens, the Internal Revenue Service ("IRS") recommended the termination of treaties that are frequently abused and that provide only small benefits for the United States. The Report identified such candidates for termination as treaties made with lightly populated countries which were once colonies of European countries. Cathcart, International Developments: Use of Tax Havens by United States Taxpayers, 5 REV. TAX'N INDIVIDUALS 383, 386-87 (1981).

17. While the IRS asserts that it cannot predict the revenue lost due to tax haven abuse, it believes the amount to be in "the many billions of dollars." 1983 Hearings, supra note 4, at 589; but cf. Irish, supra note 8, at 480 (stating that U.S. revenue loss each year due to all tax havens is probably on the order of $1 billion). In 1982, a Congressional staff estimated that the annual tax loss on dividends and interest paid to unqualified recipients at foreign addresses is approximately $800 million. Improper Use of Foreign Addresses To Evade U.S. Taxes: Hearings Before the Subcomm. on
The Antilles and Switzerland share a reputation for maintaining tax treaties with the United States that are frequently abused. In fact, available statistics demonstrate that both countries are major recipients of U.S. source income. The reason the United States terminated the Antilles treaty, while tolerating the treaty with Switzerland, may stem from a Treasury Department determination that Switzerland, unlike the Antilles, has attempted to combat tax evasion.

3. BACKGROUND OF THE ANTILLES TREATY

The United States and the Kingdom of the Netherlands executed an income tax treaty in 1948 that allowed for the extension of the treaty to overseas parts of either country upon request. In 1955, upon the request of the Antillean Government, a protocol extended the treaty to the Antilles. The treaty with respect to the Antilles was amended by a protocol in 1963 and modified by a convention in 1965.

3.1. Major Provisions of the Antilles Treaty

Under the Antilles Treaty, interest from a U.S. corporation paid to a resident of the Antilles was exempt from U.S. tax unless 50% or
more of the U.S. corporation was owned by an Antillean parent corporation. Dividends from a U.S. corporation paid to a resident of the Antilles were taxed in the United States at a 15% rate ordinarily, and at a 5% rate if 95% or more of the U.S. corporation was owned by an Antillean parent corporation. Income from real property and interest from a secured mortgage were taxed only in the country where the property was located. The exchange of information provisions were very sketchy and provided for the exchange of "necessary" information for the prevention of fraud and for the administration of the Treaty. These provisions produced a favorable climate in the Antilles for the emergence of finance subsidiaries to take advantage of the Treaty with the United States.

3.2. Antillean Finance Subsidiaries

Prior to 1984, the Internal Revenue Code imposed a 30% withholding tax on income derived by nonresidents and foreign corporations from interest paid by U.S. borrowers. Over 200 U.S. corporations established "paper corporations" in the Antilles to escape the withholding tax on portfolio indebtedness interest. These finance subsidiaries would borrow money from foreign investors and then in turn loan the borrowed funds to the U.S. parent corporation. The interest paid by the U.S. parent to the Antillean subsidiary was exempt from the withholding tax under Article VIII of the Antilles Treaty. Interest paid by the subsidiary to the foreign investors was exempt from tax in the Antilles under domestic law and from tax in the United States under Article XII of the Antilles Treaty.

The use of Antillean finance subsidiaries grew dramatically in the late 1970s and early 1980s. From 1978 to 1982 for example, the

25. Id. art. VIII, para. 1.
26. Id. art. VII, para. 1.
27. Id. art. V.
28. Id. arts. XXI, XXIII. As a result of this ambiguous language, virtually no information was exchanged between the IRS and the Antillean Government. 1983 Hearings, supra note 4, at 569.
29. See Dilworth, supra note 4, at 112.
32. Dilworth, supra note 4, at 112.
33. See supra note 25 and accompanying text.
34. Antilles Treaty, supra note 1, art. XII; Irish, supra note 8, at 460.
amount of borrowing by U.S. corporations from Antillean subsidiaries rose from $1 billion to $16 billion.\textsuperscript{35} Finance subsidiaries provided the further advantage of a reduced corporate tax rate in the Antilles. The ordinary corporate tax rate in the Antilles is 27-35%, but the profits tax on interest paid to finance subsidiaries is only 2.4-3%.\textsuperscript{36} Even at those low rates, the Antillean Government has recently derived between $50 million and $100 million in annual tax revenues from finance subsidiaries.\textsuperscript{37}

The Eurobond Market\textsuperscript{38} was the main vehicle for the investments of Antillean finance subsidiaries. Because debt instruments can generally be sold in international capital markets only if the issuer can make interest payments to foreign investors free from a withholding tax,\textsuperscript{39} the Antilles Treaty provided U.S. corporations with the perfect opportunity to raise capital in the Eurobond Market by issuing debt through an Antillean subsidiary and then borrowing that money from the subsidiary.\textsuperscript{40} U.S. corporations have used Antillean subsidiaries to issue many

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\item 36. Dilworth, supra note 4, at 116 n.40; Renegotiated Netherlands-Netherlands Antilles Treaty Will Increase the Tax Costs of the Two-Tier (Netherlands Antilles-Netherlands) Holding Company Structure, 13 TAX MGMT. INT'L J. 236 (1984). By comparison, Swiss holding and domiciliary companies pay an overall tax rate of 14%, which is considerably less than the standard corporate rate in Switzerland. Blackshaw, supra note 16, at 77.
\item 37. See Lashbrooke, Uncertainty in the Eurobond Market, 6 LOY. L.A. INT'L & COMP. L.J. 331, 349-50 (1983); see supra note 15 and accompanying text. Historically, offshore finance operations have contributed about 41% of the Antillean Government's annual budget. HOUSE COMM. ON ENERGY AND COMMERCE, 100TH CONG., 1ST SESS., REPORT OF THE DELEGATION TO SOUTH AMERICA 27 (Comm. Print 1987) [hereinafter SOUTH AMERICAN DELEGATION REPORT] (statement of Prime Minister Domenico Martina).
\item 38. The Eurobond Market is made up of long-term loan transactions in which unsecured corporate notes are issued to international investors. The typical Eurobond is a bearer instrument generally in a $1000 denomination. The bearer bond form protects the anonymity of the investor and provides for easy transfer. Under the Securities Act of 1933, U.S. corporations cannot directly issue Eurobonds without registration with the Securities and Exchange Commission. U.S. corporations can avoid SEC registration and, prior to 1984, the 30% withholding tax for bonds that come to rest abroad by issuing Eurobonds through Antillean finance subsidiaries. In this manner, U.S. corporations could generate capital in response to their needs without registration delays and tax obstacles. In order to facilitate the sale, a parent corporation generally guarantees the subsidiary's Eurobonds, and the Eurobonds are usually convertible into equity shares of the parent. The risk of the Eurobond Market derives from potentially wide fluctuations in Eurocurrency, which can cause an erratic market and an international credit crunch. Lashbrooke, supra note 37, at 335-36; Irish, supra note 8, at 467-68.
\item 39. Duncan & Pergam, Euromarket Participants Evaluate Treaty Revocation, 6 INT'L FIN. L. REV. 12, 12-13 (Aug. 1987). Without the guarantee of freedom from a withholding tax, a bond issue would not be a profitable investment since many withholding tax-free issues are available on international capital markets. See id.
\item 40. See supra text accompanying notes 32-34.
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billions of dollars in Eurobonds since the early 1960s.\textsuperscript{41} In 1980, the Eurobond Market constituted a little less than one-half of the world's capital markets,\textsuperscript{42} but by 1982, it constituted over 60\% of the world's capital markets.\textsuperscript{43} In recent years, U.S. corporations issued approximately equal amounts of debt in both the Eurobond and the domestic markets.\textsuperscript{44}

The U.S. Congress dealt a harsh blow to Antillean finance subsidiaries in 1984 when it repealed the withholding tax on portfolio indebtedness interest paid to foreigners.\textsuperscript{45} The repeal applied to two types of debt: (1) certain unregistered bearer obligations (e.g. Eurobonds); and (2) obligations which could verifiably be proven not to be owned by U.S. persons.\textsuperscript{46} The repeal removed the major incentive for using Antillean finance subsidiaries to issue Eurobonds and effectively granted U.S. corporations direct access to international capital markets.\textsuperscript{47}

Harold Henriquez, the Antilles' former tax commissioner, warned that the repeal of the withholding tax seriously threatened the economic and political stability of the Antilles and that it could even cause the

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  \item 1983 Hearings, supra note 4, at 201. Prior to 1974, the growth of the Eurobond Market was spurred by the Treasury Department's program to prevent the devaluation of the dollar by stopping capital outflows from the United States. The Treasury Department encouraged U.S. corporations to borrow abroad and to close the domestic capital market to foreign borrowers. For this reason, the IRS officially recognized the use of offshore finance subsidiaries to avoid the withholding tax on portfolio indebtedness. See, e.g., Rev. Rul. 73-110, 1973-1 C.B. 454. In 1974, the Treasury Department's program to support the dollar ended, and the IRS revoked its approval of offshore finance subsidiary transactions. See, e.g., Rev. Rul. 74-464, 1974-2 C.B. 47. Despite its disapproval, the IRS has not challenged finance subsidiary arrangements. After a slight decline, the Eurobond Market recovered in 1977 and has been growing ever since. Irish, supra note 8, at 468.
  \item See Dilworth, supra note 4, at 118.
  \item Id. In 1980, $81.1 billion was invested in the world's capital markets ($42.6 billion in the Domestic Public Bond Market and $38.5 billion in the Eurobond/Foreign Currency Bond Markets). In 1982, $110.7 billion was invested in the world's capital markets ($37.5 billion in the Domestic Public Bond Market and $73.2 billion in the Eurobond/Foreign Currency Bond Markets). 1983 Hearings, supra note 4, at 595.
  \item Lashbrooke, supra note 37, at 351.
  \item Dilworth, supra note 4, at 116. Steven Lainoff, former International Tax Counsel for the Treasury Department, stated that the repeal of the withholding tax, "'removed the need to keep the Antilles around' by promoting direct access to this market [of foreign capital]." Johnson, supra note 5, at 129.
\end{itemize}
overthrow of the Antillean Government by "leftist" groups.\textsuperscript{48} Along similar lines, some commentators have said that the repeal was inconsistent with the Caribbean Basin Initiative's purpose to stabilize the Caribbean and to thwart political change in the region.\textsuperscript{49} In an attempt to dampen the effect of the repeal on the Antilles, Congress barred U.S. corporations from redeeming Eurobonds issued before July 19, 1984.\textsuperscript{50}

Most of the Antillean finance subsidiaries remained intact following the withholding tax repeal despite their new found lack of utility.\textsuperscript{51}

The Antilles' economy depends heavily on the operations of the finance subsidiaries.\textsuperscript{52} U.S. corporations can still use the finance subsidiaries as established mechanisms for quickly raising capital despite the repeal of the withholding tax. The Antillean finance subsidiaries are at the heart of both the Antilles Treaty and the effects of its termination.\textsuperscript{53} The existence of these institutions is the direct result of the legitimate use of the Antilles Treaty by U.S. corporations and foreign investors.\textsuperscript{54} In an attempt to end the problems that the Antilles Treaty posed for U.S. tax policy, the Treaty's termination also attacked the legitimate interests of the Antillean finance subsidiaries and their foreign investors.

4. Abuses of the Antilles Treaty

The Antilles Treaty caused two major problems for the United States. First, U.S. persons could use the Antilles Treaty and the Islands' domestic laws to evade taxes. Second, third-country residents could use the Antilles Treaty for "treaty shopping."

4.1. Criminal Tax Evasion through the Antilles

U.S. citizens and residents could evade taxes by establishing investment companies or financial accounts in the Antilles and channeling funds from U.S. sources through them.\textsuperscript{55} The funds would ultimately be reinvested in U.S. real estate, securities or insurance, and the conjunction of the Antilles Treaty and the Antillean commercial secrecy

\textsuperscript{48} Fialka, supra note 31, at 1, col. 6.
\textsuperscript{49} See, e.g., Dilworth, supra note 4, at 123.
\textsuperscript{50} Duncan & Pergam, supra note 39, at 12. The withholding tax repeal was effective on July 18, 1984. Dilworth, supra note 4, at 116.
\textsuperscript{51} Duncan & Pergam, supra note 39, at 12. It should be noted that Antillean subsidiaries could still be used to issue debt when U.S. corporations need immediate capital without the delay of the SEC registration process. See supra note 38.
\textsuperscript{52} See SOUTH AMERICAN DELEGATION REPORT, supra note 37, at 27.
\textsuperscript{53} See infra text accompanying notes 131-35.
\textsuperscript{54} See supra text accompanying notes 32-34.
\textsuperscript{55} 1983 Hearings, supra note 4, at 570.
laws would protect the beneficial owner’s anonymity and shield the income from IRS scrutiny. Thus, tax evasion was easily accomplished due to the anonymity surrounding Antillean companies. Over 25,000 corporations have been registered in the Antilles, but there is no indication of the number actually conducting business. Indirect evidence suggests that many of these investment companies are owned by U.S. persons.

Once an investment company was established in the Antilles, it could be used in various ways to evade taxes. The most common method of tax evasion was “skimming profits” and sending cash receipts to the Antillean company without reporting them as income. The owner could make a simple payment to the Antillean company and take an illegitimate deduction for a business expense. The taxpayer

56. See supra note 12.
57. 1983 Hearings, supra note 4, at 570. For example, during the early 1980s, the Industrial Concern & Investment Co. N.V. of Willemstad bought and then sold 3,000 acres of land in South Florida. The company made a $13 million profit from these transactions, but the owners of the company were unknown. As a result, the IRS has not determined whether any tax was ever paid on the income. Similar cases have occurred in Georgia, Texas, Colorado, California and throughout Florida. Id. at 570, 703-25.
58. The process for establishing an investment company in the Antilles is very simple. An investor contacts a lawyer who will in turn contact a trust company in the Antilles. In most cases, the investor's name is not disclosed to the trust company. The Antillean trust company prepares the incorporation documents, obtains the Antillean Minister of Justice’s approval of the articles of association, and arranges for the deed of incorporation to be executed before a notary. The name of the beneficial owner need not appear in the incorporation documents. Antillean law requires that the new company have two founders, a managing director, and a minimum of $6,000 in capital. The Antillean trust company usually supplies the founders and the managing director. Finally, the managing director must register the new company with the Chamber of Commerce in Willemstad. After incorporation, the new company often maintains a relationship with the trust company which may provide a mailing address, organize shareholder and board of directors meetings, prepare tax returns and keep accounting records for the new company. In 1983, the costs of incorporation were less than $1,000 ($600 notary fee, $60 Chamber of Commerce registration fee, $210 for publication of the articles of association, $75 stamp duty for the Minister of Justice’s “decree of no objection,” the cost of translating the deed of incorporation into Dutch, and a $17 annual registration fee). Id. at 56-57.
59. Id. at 57-58.
60. Id. at 570; see supra note 46 (defining “U.S. persons”).
61. In the United States, tax evasion is a crime punishable by up to five years imprisonment or a $100,000 fine. I.R.C. § 7201 (1982).
62. Businesses and taxpayers with large cash flows are the primary ones who skim profits. Such persons can skim profits by making a service contract with their offshore companies and claiming that the payments are for services rendered. In reality, the U.S. person performs the service and fraudulently takes a deduction for the payment to the offshore company. Workman, The Use of Offshore Tax Havens For the Purpose of Criminally Evading Income Taxes, 73 J. CRIM. L. & CRIMINOLOGY 675, 682-83 (1982).
63. If the taxpayer is audited, she can support the expense with a cancelled
could also establish a foreign trust that would nominally own the Antillean company and pay the taxpayer as the trust's beneficiary. The individual alternatively could "launder" the funds by having the Antillean company reinvest them in the United States without any detectable connection to himself. The effectiveness of these methods depended on the IRS' inability to obtain legally admissible evidence documenting the connection between the taxpayers and the offshore funds.

In order to curb tax evasion, the United States needs meaningful programs for the exchange of information with other countries. The language in the Antilles Treaty's exchange of information provision is broad and ambiguous. In light of this ambiguity, the Antilles exchanged virtually no financial information with the IRS. The combination of the Treaty's ambiguous provision, the lack of cooperation from the Antillean Government and the Antillean commercial secrecy laws made tax evasion through the Antilles a major problem for the United States. However, termination of the Antilles Treaty does not directly address this concern. Tax evasion was caused principally by the secrecy laws and the anonymity of Antillean companies and only to a small extent by the Antilles Treaty itself. To truly reduce tax evasion through the Antilles, the United States must implement a successful mutual assistance agreement with the Islands regardless of the

check or a receipt from the Antillean company. The IRS cannot find out if the taxpayer is related to the Antillean company due to the anonymity obstacle discussed in supra note 58. Id. at 681-82.

64. It is almost impossible for the IRS to discover the existence of a foreign trust. Id. at 683.

65. Funds can be "laundered" in many ways. The taxpayer could have the offshore company invest in U.S. securities through a blind trust. Alternatively, the taxpayer could sell appreciated securities to the trust for an annuity with a carryover basis, and when the trust sells the securities, the taxpayer would not realize an immediate taxable gain. The taxpayer could also choose to invest in U.S. real estate through the offshore company as described in supra note 57. These examples are only a few of the simpler "laundering" schemes. Id. at 684-85.

66. See id. at 686.

67. "Adroit tax planners with knowledge of bank secrecy laws can structure transactions that enforcement agencies could never document. The problem for the enforcement agencies is, thus, informational. The agencies must obtain evidence to connect taxpayers with offshore funds in [a] legally admissible form." Id.

68. See supra text accompanying note 28.

69. "Exchange of information provisions in the existing tax treaties with tax havens are simply inadequate because they do not override local bank or commercial secrecy laws." Belotsky, supra note 6, at 81.

70. 1983 Hearings, supra note 4, at 569.

71. See supra note 12.

72. See Lashbrooke, supra note 37, at 350.

73. See generally 1983 Hearings, supra note 4, at 569-70 (explaining that tax evasion through the Antilles was facilitated by the Antillean laws and the lack of information provided to the IRS).
Treaty's existence.\textsuperscript{74}

The U.S. experience with Switzerland shows that tax evasion can be addressed by a mutual assistance scheme between treaty partners. The exchange of information provision in the Swiss Treaty is similar to the provision in the Antilles Treaty.\textsuperscript{75} Under both treaties, the countries agreed to exchange information "for the prevention of fraud."\textsuperscript{76} The Swiss Federal Supreme Court has held that Switzerland fulfills its treaty obligation by merely providing the IRS with informational reports without including documentary evidence.\textsuperscript{77} This interpretation was problematic for the IRS because informational reports absent documentation are inadmissible as evidence in U.S. courts.\textsuperscript{78}

In 1977, the United States and Switzerland enacted the Treaty for Mutual Assistance in Criminal Matters ("Mutual Assistance Treaty"),\textsuperscript{79} which required the exchange of information in cases where the offense under investigation was a crime in both countries.\textsuperscript{80} However, Swiss law distinguishes between tax evasion, which is not a crime, and tax fraud, which is a crime.\textsuperscript{81} As a result, the Mutual Assistance Treaty generally has been construed to require the disclosure of information only in organized crime cases.\textsuperscript{82} Further progress occurred in 1982 when the United States and Switzerland signed a Memorandum of Understanding ("Memorandum").\textsuperscript{83} The Memorandum states that under certain circumstances insider trading could be the predicate crime for the compulsory disclosure of information under the Mutual Assistance Treaty.\textsuperscript{84} The Memorandum also integrated the Private Agreement Among Members of the Swiss Banker’s Association, which allowed for the disclosure of some information even absent a criminal

\textsuperscript{74} See generally Belotsky, supra note 6, at 81 (stating that mutual assistance agreements are potentially the best way to curb tax evasion).

\textsuperscript{75} Swiss Treaty, supra note 19, art. XVI.

\textsuperscript{76} Id.; Antilles Treaty, supra note 1, art. XXI.

\textsuperscript{77} Mullhaupt, Seeking Swiss Assistance in Enforcing United States Tax Laws, 4 INT’L TAX & BUS. LAW. 144, 146 (1986).

\textsuperscript{78} Workman, supra note 62, at 703.


\textsuperscript{80} Id. art. 4, para. 2.

\textsuperscript{81} Crinion, Information Gathering on Tax Evasion in Tax Haven Countries, 20 INT’L LAW. 1209, 1239-40 (1986). Under Swiss law, tax fraud involves only the intentional falsification of documents, whereas tax evasion covers "willful failure to make a return, willful misstatements on a return, or other deliberate efforts to obstruct proper tax . . . collection." Workman, supra note 62, at 703.

\textsuperscript{82} Mullhaupt, supra note 77, at 149.

\textsuperscript{83} Memorandum of Understanding, Aug. 31, 1982, United States-Switzerland, 22 I.L.M. 1.

\textsuperscript{84} Id. art. II, para. 3(a)-(b); Crinion, supra note 81, at 1242.
violation of Swiss law.  

The Swiss example demonstrates that the United States must act in concert with tax havens to stop tax evasion. Because of the commercial secrecy laws and the anonymity surrounding Antillean companies, tax evasion through the Antilles will not disappear with the termination of the Antilles Treaty. Since U.S. persons can use the Antilles for tax evasion with or without the Treaty's existence, its termination does not solve the IRS' lack of information concerning offshore activities. In fact, the Treaty's termination may exacerbate the problem by antagonizing the Antillean Government and making it even less cooperative in the future.

4.2. Treaty Shopping through the Antilles

Unlike tax evasion, treaty shopping in the Antilles was caused directly by the terms of the Antilles Treaty. Treaty shopping occurs when a third-country individual uses a treaty country as an investment conduit to obtain benefits that he was not intended to receive under the treaty. Treaty shoppers ordinarily come from countries that tax on a territorial basis (i.e. no tax is imposed on foreign source income). By investing in U.S. stocks, bonds or real estate through an Antillean investment company, a treaty shopper could take advantage of the Antilles Treaty to avoid U.S. taxation without the burden of any taxation.

85. See supra note 84.
86. See supra text accompanying notes 72-73.
87. See supra notes 62-65 and accompanying text.
88. See supra text accompanying notes 66-67.
89. While the United States has drafted effective exchange of information provisions, it is very difficult to convince a tax haven to agree to the terms. For example, the Caribbean Basin Initiative agreement provides for: [T]he exchange of such information . . . as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares. I.R.C. § 274(h)(6)(C)(i) (Supp. III 1985).
90. A third-country resident could invest through an Antillean company and use the Antilles Treaty to avoid U.S. tax on interest, dividends, real estate capital gains and royalties. 1983 Hearings, supra note 4, at 570.
91. Johnson, supra note 5, at 129; Irish, supra note 8, at 471; see Belotsky, supra note 6, at 70 ("Successful treaty shopping generally consists of three elements: (1) a reduction of source country taxation; (2) a low or zero effective rate of tax in the payee country; and (3) a low or zero rate of tax on payments from the payee treaty country to the taxpayer.").
92. 1983 Hearings, supra note 4, at 570. Two-thirds of the Latin American countries tax on a territorial basis. Id.
93. See supra text accompanying notes 58-59.
in his country of residence.\textsuperscript{94} Of all the U.S. tax treaties, the Antilles Treaty was the most widely employed for treaty shopping.\textsuperscript{95} The problem with treaty shopping is that it discourages countries without tax treaties from entering into treaties with the United States.\textsuperscript{96} These countries have little incentive to negotiate with the United States. Their residents can receive unintended benefits under existing U.S. treaties, and they need not make any concessions to the United States in return. Treaty shopping also creates a disincentive for countries such as the Antilles to renegotiate outdated tax treaties with the United States, because their residents benefit from the commerce generated by treaty shopping activities.\textsuperscript{97} As a result, treaty shopping weakens the U.S. treaty program and hurts the Treasury Department's ability to maintain the competitive position of the United States in international investment markets.\textsuperscript{98}

Treaty shopping can be prevented by various methods:\textsuperscript{99} (1) a treaty provision excluding holding companies and their shareholders from treaty benefits;\textsuperscript{100} (2) direct source country taxation;\textsuperscript{101} (3) a secondary withholding tax;\textsuperscript{102} and (4) the termination of the abused treaty.\textsuperscript{103} In an attempt to impede treaty shopping in the Antilles, the

\textsuperscript{94} 1983 Hearings, supra note 4, at 570; see Irish, supra note 8, at 471.


\textsuperscript{96} Baker Explains U.S. Position, supra note 95, at 92.

\textsuperscript{97} Id.

\textsuperscript{98} "Treaty shopping undermines our ability to negotiate or renegotiate treaties to assist the international competitive position of United States businesses." Id.


\textsuperscript{100} Id. A limitation of benefits provision which excludes holding companies (e.g. Antillean investment companies) and their shareholders from treaty benefits, is the most common method of curtailing treaty shopping. Belotsky, supra note 6, at 83. The United States-Luxembourg Treaty includes such an anti-holding company provision. Income Tax Convention, Dec. 18, 1962, United States-Luxembourg, art. XV, 15 U.S.T. 2355, T.I.A.S. No. 5726. In 1980, the Antilles received over 800% more U.S. source income than Luxembourg, a noted tax haven itself. Comment, supra note 99, at 639.

\textsuperscript{101} Comment, supra note 99, at 650. A taxpayer's country of residence usually has the primary right to tax his income.

\textsuperscript{102} Id. For example, the United States could impose a withholding tax on the interest paid by an Antillean investment company to a foreign investor in addition to a primary withholding tax on the interest paid by the U.S. corporation to the Antillean investment company.

\textsuperscript{103} Id. "It is the policy of [the Reagan] administration not to enter into new treaties which permit . . . benefits to residents of third countries and, as appropriate, to
Treasury Department negotiated new treaties with the Antilles and Aruba\(^{104}\) ("New Treaties") which were signed in August 1986.\(^{105}\)

The New Treaties included an anti-treaty shopping provision that restricted third-country persons from receiving treaty benefits except for two discrete types of income.\(^{106}\) First, payments from international mutual funds established in the Antilles or the United States were entitled to treaty benefits regardless of the investor’s residence.\(^{107}\) Second, qualified foreign real estate companies could either receive a waiver of the secondary withholding tax on dividends or elect to be treated as a domestic corporation thereby obtaining nondiscriminatory treatment with respect to the interest they received.\(^{108}\) In addition, the New Treaties addressed other items that were intended to enhance the Antilles’ status as an international financial center while reducing its stature as a tax haven.\(^{109}\)

The ratification of the New Treaties hit an obstacle when Congress passed the Tax Reform Act of 1986.\(^{110}\) The Antilles and the United States had agreed to reopen negotiations if Congress subsequently passed legislation that would materially affect the balance of benefits under the New Treaties.\(^{111}\) The Tax Reform Act may have substantially reduced the benefits for Antillean real estate companies, because it instituted a 30% branch profits tax on foreign entities that conduct business in the United States but do not reinvest their earnings

renegotiate, or, if necessary, to terminate existing treaties to accomplish this objective.”  

104. See supra note 4 (discussing Aruba’s independent status).


106. New Treaties, supra note 105, art. 16.

107. Id. art. 16, para. 5.

108. Id. art. 16, para. 6.

109. The New Treaties provided a twelve month grandfather clause for benefits received under the Antilles Treaty and a permanent grandfather clause for Eurobonds issued before the repeal of the withholding tax on July 18, 1984. Id. art. 28, paras. 5 & 6. The New Treaties also provided benefits for Antillean insurance and reinsurance companies. Id. art. 18. Finally, the New Treaties contained an elaborate exchange of information provision to address tax evasion. Id. art. 26.


In light of this new tax, the Antilles and the United States reopened negotiations on the New Treaties, and the Treasury Department began to consider the option of terminating the Antilles Treaty altogether. In light of this new tax, the Antilles and the United States reopened negotiations on the New Treaties, and the Treasury Department began to consider the option of terminating the Antilles Treaty altogether.

5. TERMINATION OF THE ANTILLES TREATY

On May 28, 1987, Treasury Secretary James Baker notified Antillean Prime Minister Domenico Martina that the United States would proceed to terminate the Antilles Treaty and suspend negotiations on the New Treaties. The Treasury Department also rejected the Antilles' final three proposals that the Islands thought would make the New Treaties worthwhile for both parties. On June 29, the Antilles was told that the Antilles Treaty would be terminated on January 1, 1988.

The Treasury Department announced the introduction of legisla-


113. See Netherlands Antilles Treaty Negotiations Stalled; Congress Gets into the Act, 35 TAX NOTES 1167 (1987) [hereinafter Netherlands Antilles Treaty Negotiations Stalled].

114. Netherlands Antilles Says U.S. Treaty Proposals Are Unacceptable, 35 TAX NOTES 1112 (1987). At roughly the same time as Secretary Baker's notification, two international tax lawyers wrote that, "[t]he treaty as a whole could not be terminated unilaterally as a practical matter . . . ." Forry & Karlin, supra note 111, at 797.

115. Netherlands Antilles Treaty Negotiations Stalled, supra note 113, at 1167. The Antilles' first proposal would have allowed Antillean corporations to issue debt free of U.S. tax. Id. The second proposal involved increasing the benefits for Antillean real estate companies by treating the interest in Antillean partnerships as non-U.S. assets and therefore exempt from U.S. estates tax. Id. The Antilles' final proposal would have permitted a corporation to qualify for treaty benefits if its owners qualified personally (i.e. if they were residents of either country). Id. The United States rejected these proposals because it felt that its prior concessions to the Antilles were sufficient to make the New Treaties viable. See id.

116. International Tax Developments, supra note 2, at 455. One international tax lawyer commented that, "[f]rom a tax policy point of view, termination made immin-ent [sic] sense. . . . Why have a treaty with the world?" Johnson, supra note 5, at 129. On the other hand, Richard M. Hammer, the Chairman of the Committee on Taxation of the U.S. Council on International Business, wrote a letter to Secretary Baker stating that the U.S. actions showed "an obvious disdain for its treaty obligations and that termination of the Antilles tax treaty was an example of Treasury 'taking its ball and going home,' because the Antilles didn't want to play the game Treasury's way." Id.
tion on July 2, 1987 that would maintain the withholding tax exemption for foreign investors holding Eurobonds issued before July 18, 1984, the effective date of the withholding tax repeal. On July 10, the Treasury Department retreated further and notified the Antilles that the Treaty's exemption for interest paid to Antillean residents would not be terminated with the rest of the Antilles Treaty. The awkward nature of the termination process may be attributable to the potentially profound effects that the Treaty's demise holds for the Eurobond Market, the Antilles and the United States.

5.1. Effects of the Termination on the Eurobond Market

After the original termination announcement on June 29, the international bond market dropped drastically, especially the prices of bonds issued before mid-1984. The decline was caused by the existence of bond redemption clauses, which generally allow for the redemption of an issue if the "tax regime in place at the time of issuance changes." The problem was that Eurobonds were selling at substantial premiums due to the higher interest rates at which they had originally been issued; and therefore, corporations could redeem the bonds at par value while refinancing their debt at the lower prevailing interest rates. If many corporations took advantage of this opportunity during the summer of 1987, millions and possibly billions of dollars would have been eliminated from the holdings of investors in the United States and abroad.
The June 29th termination caused a few corporations to announce their intentions to redeem pre-July 1984 Eurobond issues, and one even made a second formal announcement. In response to this situation, the Treasury Department made the July 2nd legislative proposal and subsequently the July 10th modification of the Treaty's termination. The modification restored the tax regime that was in place when the Eurobonds in question were issued, thereby restoring the maturity expectation in approximately $32 billion of Eurobonds.

The unfortunate effect on the international capital market sprung from the manner of termination and not from the fact of termination itself. The abrogation of the entire Antilles Treaty on June 29, 1987 exhibited either a tremendous callousness or an extraordinary naiveté on the part of the Treasury Department concerning the predictable repercussions in the Eurobond Market. In taking the position that U.S. tax policy takes precedence over the concerns of the international capital market, the Treasury Department ignored the reality that corporate finance occurs on the international level today and that the benefits available under tax treaties directly affect the way investors choose to invest their money. "In all of this . . . no one bothers to think about

350 bond issues, with a total value of $32 billion, were affected by the termination of the Antilles Treaty. However, it should be noted that this figure represents only a minority of the total Eurobond Market. Johnson, supra note 5, at 128; see supra note 43 and accompanying text.

124. Are Issuers Ready For Standard Tax Redemption Clauses?, 6 INT’L FIN. L. REV. 6 (1987) (also stating that issuers are required to make three formal announcements before bonds can be redeemed) [hereinafter Are Issuers Ready].

125. See supra notes 117-19 and accompanying text.

126. Duncan & Pergam, supra note 39, at 12. The termination of the Antilles Treaty caused many in the international financial community to call for the introduction of new bond redemption clauses that could not be invoked because of the caprice of some government. Id. The International Primary Market Association’s Legal and Documentation Committee drafted a model redemption clause and general guidelines for future redemption clauses in order to prevent the type of mass refinancing that the Eurobond Market almost witnessed in the summer of 1987. Are Issuers Ready, supra note 124, at 6.

127. Fin. Times, supra note 120, at 33, col. 8.

128. Policy makers must realize that corporate finance is international finance and that international finance should not be frustrated by the regulatory scheme of any state, particularly if that scheme is not subscribed to by other participating states. The United States is a part of the international financial community and must be a responsible member of that community.

the needs of markets... for foreign investors or America's interest in attracting foreign capital.\textsuperscript{129}

While the modification of the termination on July 10, 1987 prevented an explosion of bond redemption, it nonetheless raised the question of exactly where U.S. tax policy stands on the issue of the stability of the international capital market. The ability of U.S. corporations to raise capital internationally is intimately related to the credibility and the consistency of U.S. tax policy abroad. As one editorial bluntly stated, "the fecklessness of the abrogation [of the Antilles Treaty] stands as a warning to any future investor in the U.S."\textsuperscript{130}

5.2. Effects of the Termination on the Antilles

The revocation of the Treaty is likely to have a substantial impact on the Antilles' economy. The Islands have three basic industries: tourism,\textsuperscript{131} oil refining,\textsuperscript{132} and international finance. Since the withholding tax repeal in 1984,\textsuperscript{133} business activity in the Antilles has dropped 40% and unemployment has been as high as 28%.\textsuperscript{134} In April 1987, Prime Minister Martina predicted that revenue produced by offshore finance operations in the Antilles would decrease more than 15% over the following three years.\textsuperscript{135} However, that figure appears very conservative after the end of the Antilles Treaty.

The termination may also affect the political climate in the Islands. Some observers see the Antilles as a target for Cuban aggression and a Marxist takeover.\textsuperscript{136} In recognition of the Antilles' strategic significance, the Treasury Department worked closely with the State Department during the negotiations on the New Treaties.\textsuperscript{137} Senator Thomas A. Daschle (D-S. Dak.) warned Secretary Baker in the spring of 1987 that if the United States did not provide economic benefits to

\textsuperscript{129} L.A. Daily J., \textit{supra} note 120, at 4, col. 2.
\textsuperscript{130} Id.
\textsuperscript{131} The recession of 1982-83 hit the Antilles' tourist industry very hard. Venezuela was the major source of tourists. The Venezuelan bolivar was devalued from $0.45 to $0.10 during the recession, and the Antilles experienced a corresponding drop in Venezuelan tourism. \textit{SOUTH AMERICAN DELEGATION REPORT}, \textit{supra} note 37, at 26.
\textsuperscript{132} Shell, the largest company which refined oil in the Antilles, closed its refinery on Curacao in 1986 after 70 years of operation. Id.
\textsuperscript{133} See \textit{supra} notes 45-51 and accompanying text.
\textsuperscript{134} \textit{SOUTH AMERICAN DELEGATION REPORT}, \textit{supra} note 37, at 26. The largest drydock in the Western Hemisphere is located on Curacao, but after the departure of Shell and the recession, drydock operations dropped 40% and employee wages dropped 20%. Id.
\textsuperscript{135} Id. at 27.
\textsuperscript{136} Dilworth, \textit{supra} note 4, at 118.
\textsuperscript{137} \textit{Baker Explains U.S. Position}, \textit{supra} note 95, at 92.
the Antilles through the New Treaties then it may be forced to supply military aid in the future. The threat of a Marxist government sitting in Willemstad may have been exaggerated. The Antillean economy is overwhelmingly capitalistic due to the Treaty with the United States, and the Islands are strong political allies of the Western democracies. However, the United States does have an interest in the Antilles' political stability, and that stability was placed in at least some jeopardy by the termination of the Antilles Treaty.

The Caribbean Basin Initiative ("CBI") may be the logical solution to the problems of the Antilles' economic woes and potential political instability. When Congress passed the CBI in 1983, the Antilles hoped that it would help their economy by opening U.S. markets, but the CBI has actually provided few benefits for the Islands. A country with a large service based economy such as the Antilles receives little help under the terms of the CBI. In addition, the Antilles' only major product, refined oil, is expressly excluded from the ambit of the CBI. Therefore, the economic and political fallout from the termination of the Antilles Treaty cannot be addressed adequately by the CBI in its current state. Without such an instrument to help the Antilles,

139. [I]n many cases, the ties [between tax havens and Western industrialized countries] stem principally from the haven status of the tax havens, radical measures by the industrialized countries to eliminate or minimize the use of tax havens may have a corrosive effect on these ties and may lead to destabilization of the very governments which are staunch allies of the industrialized countries.[sic] As a consequence, the interests of the industrialized countries clearly cannot be defined exclusively in economic terms. There is a significant political dimension that requires careful consideration.

Irish, *supra* note 8, at 486.
140. The purpose of the Caribbean Basin Initiative is to stimulate investment and trade between the United States and the countries of the Caribbean, Central America and South America. The theory behind the CBI is that a strong economy provides a strong barrier against political change. Dilworth, *supra* note 4, at 114.
142. *Id.* In order to really benefit from the CBI, a country must have some tangible products to trade with the United States. The Antilles has virtually no agriculture; only 5% of the total land area is arable, and the only agricultural products of note are pigs and goats. *1983 Hearings*, *supra* note 4, at 794. (Phosphate is the only natural resource in any abundance on the Antilles.).
143. Prime Minister Martina told a delegation of Congressmen in April 1987 that the Antilles' economy would be helped greatly if the CBI considered oil and refined products. *South American Delegation Report*, *supra* note 37, at 27. In the past, the Antilles refined approximately one million barrels of oil each day almost exclusively for U.S. consumption; but by the Spring of 1987, the rate was down to 200,000 barrels each day. *Id.*
the termination will have a profound economic effect on the Islands, and it could potentially have an equally dramatic political effect.

5.3. Effects of the Termination on the United States

The effects of the Treaty’s abrogation on the U.S. Government are uncertain. U.S. tax revenues from Antillean investments in the United States will increase, but the magnitude of the increase cannot accurately be estimated. The termination should have no significant effect on the IRS’ ability to combat tax evasion in the Antilles because that problem is caused by the Antilles’ domestic laws. The end of treaty shopping through the Antilles will help the Treasury Department negotiate new tax treaties and potentially bolster the competitive position of U.S. corporations in the future. However, the termination alternatively may create a chilling effect on the ability of U.S. corporations to raise capital in international markets. If the international investment community perceives U.S. tax policy to be inconsistent, the termination of the Antilles Treaty may actually hurt the international competitive position of U.S. corporations. While the termination’s effects on the United States should be significant, they will not be nearly as dramatic as the effects on the Antilles.

6. Alternatives to the Termination of the Antilles Treaty

In 1981, the IRS outlined the considerations which shape the U.S. tax policy on income tax treaties:

(1) Maintaining the competitive position of the United States investing abroad or exporting;
(2) Maintaining tax equity as between investments in the United States and investments abroad;

144. See supra notes 19-20 and accompanying text.
145. See supra notes 73, 86-88 and accompanying text.
146. See supra note 103 and accompanying text.
147. See supra notes 96-98 and accompanying text.
148. "If this scenario comes to pass, companies then would be forced to go to the domestic market to raise needed funds, a market which is already saturated by the Federal government . . . ." Johnson, supra note 5, at 128.
149. See generally supra text accompanying notes 121-23 (explaining that investors’ expectations depend on the maintenance of a consistent tax regime).
150. See supra notes 128-30 and accompanying text. "This is exactly opposite of what ought to be the thrust of American policy. An administration with the values of President Reagan’s should be out trying to break down the barriers to capital. It should be easing the access of U.S. corporations and citizens to foreign capital.” L.A. Daily J., supra note 120, at 4. col. 2; but cf. supra note 98 and accompanying text.
The need to provide fair rules for taxing foreign investments;
Administrative efficiency;
Foreign policy considerations;
Promotion of investment in the U.S.\textsuperscript{151}

From this standpoint, the termination of the Antilles Treaty appears to be both a triumph and a failure of tax policy. The triumph consists of two elements. First, the termination takes a small step towards frustrating criminal tax evasion by eliminating the generous benefits provided under the Treaty.\textsuperscript{152} Second, the termination permanently solves the problem of treaty shopping through the Antilles.\textsuperscript{153}

The termination's failure is not as apparent, but in many ways it is more significant. Some argue that the policy of preventing tax evasion and treaty shopping should be paramount.\textsuperscript{154} However, that position is too parochial to carry the day in a world of international economic and political networking. Like many areas, tax policy naturally develops into a balance.\textsuperscript{155} In the case of the Antilles Treaty, one side of the balance contains the Treaty's abuses, which were only exacerbated by the uncooperative and often greedy nature of the Antilles Government.\textsuperscript{156} The other side holds the economic-political stability of the Antilles, the confidence of the international investment community, and in some ways, the integrity of U.S. tax policy itself.\textsuperscript{157} The failure emerges from the fact that the Treaty's termination overwhelmingly struck the balance in favor of discrete U.S. interests instead of broader international concerns.

The failure of tax policy is further illuminated if one considers the alternatives that were available. The United States could have done nothing. Such inaction would have perpetuated the old abuses of tax evasion and treaty shopping in the Antilles.\textsuperscript{158} The tax losses from those activities still could not have been measured.\textsuperscript{159} The inaction also would have buttressed and perhaps even augmented the international investment community's confidence in the stability of the U.S. tax sys-

\textsuperscript{151} Belotsky, \textit{supra} note 6, at 97.
\textsuperscript{152} See \textit{supra} text accompanying notes 69-73; \textit{but cf. supra} text accompanying note 89.
\textsuperscript{153} See \textit{supra} text accompanying note 90.
\textsuperscript{154} See Fin. \textit{Times, supra} note 120, at 33, col. 8; \textit{Baker Explains U.S. Position, supra} note 95, at 92.
\textsuperscript{155} See Belotsky, \textit{supra} note 6, at 97.
\textsuperscript{156} See \textit{supra} text accompanying notes 67-70 & 90.
\textsuperscript{157} See \textit{supra} notes 128-39 and accompanying text.
\textsuperscript{158} See \textit{supra} text accompanying notes 72 & 90.
\textsuperscript{159} See \textit{supra} note 19 and accompanying text.
tem. This confidence would have been beneficial to U.S. corporations that need access to foreign capital. The resulting foreign investments may have provided U.S. corporations with many billions of dollars each year. In addition, inaction would have helped to maintain the economic and political structure of the Antilles.

The United States could have terminated the Antilles Treaty after finishing negotiations and ratification of the New Treaties. This alternative would have substantially decreased tax evasion and treaty shopping, but neither would have been totally eliminated. In enacting the New Treaties, the United States would have told the international investment community that U.S. tax policy was consistent, fluid and responsive to international concerns. This alternative also would have provided the Antilles with the opportunity to maintain its stature as a financial center through real estate, mutual fund and insurance activities.

The United States could have terminated the Antilles Treaty and somehow made the Caribbean Basin Initiative a viable opportunity for the Antilles. Such action would have indicated that the United States was concerned about the future of its allies, regardless of their size. This alternative would have benefited both the United States and the Antilles, which thereby could maintain its identity as a successful capitalist democracy.

On balance, any of these alternatives would have been preferable to the outright termination of the Antilles Treaty. In conjunction with an effective exchange of information program, these alternatives would have sufficiently satisfied the Treasury Department's concerns while simultaneously serving the broader international interests. Even without an exchange of information program, each of them would have responded in some degree to the interests of the United States, the Antilles and the international investment community.

160. See supra notes 148-50 and accompanying text.
161. See supra text accompanying notes 41-44.
162. See supra text accompanying notes 131-39.
163. See supra notes 105-06 & 109 and accompanying text.
164. See supra notes 107-09 and accompanying text.
165. See supra notes 141-43 and accompanying text.
166. See supra note 140.
167. See supra note 74 and accompanying text. Exchanged information can detect treaty shopping activities in addition to tax evasion. See generally Comment, supra note 99, at 629-30 (stating that treaty shopping can be combated by IRS information gathering).
7. Conclusion

Under the Antilles Treaty, the Antilles' relationship with the United States was often strained. The Treaty allowed the Antilles to become the major international locus for treaty shopping. Tax evasion through the Antilles was another significant problem for the United States. While the Antillean commercial secrecy laws and the anonymity of Antillean companies directly caused tax evasion opportunities, the Treaty's ambiguous exchange of information provision did not help the United States to minimize the problem. In response to these abuses, the New Treaties were signed with the hope of strengthening the relationship between the two countries. However, the New Treaties were sidetracked by the Tax Reform Act of 1986, and the United States was forced to find another solution for the problems of the Antilles Treaty.

Unfortunately, when the situation became difficult, the United States chose simple abrogation seemingly without recognition of the actual interests involved in the decision. The effects of that decision on the Antilles, the Eurobond Market and the international investment community expose the termination as a failure of U.S. tax policy. The failure itself is not that the United States acted to end the abuses of the Antilles Treaty, but that the United States proceeded in a myopic manner in order to achieve its goal.