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Estate, Gift, and Generation-Skipping Transfer Tax Treaties

William H. Newton III

ESTATE, GIFT, AND GENERATION-SKIPPING TRANSFER TAX TREATIES

by

*William H. Newton, III**

CONTENTS

THE United States is a party to thirteen estate tax, four gift tax, and two generation-skipping transfer tax treaties.[1] These treaties are in turn divided into two separate categories: pre-OECD and OECD-

* J.D., Southern Methodist University. Of Counsel to Blank, Rome, Comisky & McCauley, Miami and West Palm Beach, Florida; Washington, D.C.; and Philadelphia, Pennsylvania; Adjunct Professor of Law, University of Miami; Author of INTERNATIONAL ESTATE PLANNING (Shepard's/McGraw Hill 1981). This Article will replace the existing portion of Chapter 5 of Mr. Newton's book on estate, gift, and generation-skipping transfer tax treaties.

1. *See* Appendix, which sets forth the contracting states, effective dates, and official citations of the various treaties. In this discussion of transfer tax treaties, citation is made only by reference to the foreign contracting state and treaty article number. The Appendix should be used to obtain the official citation.

The estate, gift, and generation-skipping transfer taxes serve to complement one another. All are in the nature of transfer taxes. It is for this reason that all three types of treaties are referred to in this analysis as transfer tax treaties.

Ratification of these treaties has proceeded at a much slower rate than ratification of in-

type treaties.[2] Though approaches in the two categories differ,[3] each type of treaty nevertheless presents a number of advantages not otherwise available. The extent to which these advantages may be claimed depends on the standing requirements of each treaty and the situs of assets.

The standing requirements raise two issues: (1) what specific taxes, foreign or domestic, are covered by the treaty, and (2) what classifications of taxpayers are entitled to claim the advantages of the treaty. Resolution of these issues depends on the provisions of each particular treaty. The second key factor in applying estate tax treaties is the situs of assets. This factor is important because it restricts jurisdiction to tax in the situs country and provides consistent situs treatment of assets for the treaty tax credit. The overall result is to reduce the impact of double taxation.

I. ADVANTAGES OF TRANSFER TAX TREATIES

Transfer tax treaties ordinarily provide three distinct advantages. The first is a restriction of the situs country's jurisdiction to tax. This restriction is accomplished by treating certain classifications of assets, which under internal law are deemed situated in that country, as having a foreign situs. Thus, these assets escape taxation in the situs country. The second advantage is the provision for additional deductions and exemptions that would not otherwise be available. The final advantage is the treaty tax credit. This last advantage implements underlying treaty policy by affording spe-

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come tax treaties. The United States is presently a party to 34 income tax treaties. The reason for the slower rate is not completely clear. In the case of estate taxation the United States Supreme Court as early as 1933 emphasized that primary relief from double taxation of decedents' estates rested on international conventions. Burnet v. Brooks, 288 U.S. 378, 399-400 (1933). In *Brooks* the Court stressed the need for "mutual concessions or reciprocal restrictions . . . voluntarily made or accepted by Powers freely negotiating on the basis of recognized principles of jurisdiction." *Id.* (footnote omitted). Perhaps the primary reason for the slower pace of ratification of transfer tax treaties is that while influential business and industrial interests are more properly concerned with double taxation of income, "decedents have no lobby!" Carroll, *Double Taxation Conventions Concluded by the United States Since 1939*, in V STUDIES IN INTERNATIONAL TAX LAW 25, 77 (Int'l Fiscal Ass'n ed. 1947).

2. The Organization for Economic Cooperation and Development (OECD) has published a model tax treaty. Only the more recent treaties, such as those with France, the Netherlands, the United Kingdom, the proposed Austrian and German treaties, and the Treasury Model Treaty, are patterned after the OECD model. The French and United Kingdom treaties are unified; they expressly cover estate, gift, and generation-skipping transfer taxes. The proposed Austrian, German, and United States Treasury Model treaties follow the same approach. The Netherlands estate tax treaty may implicitly cover generation-skipping transfer taxes. *See* Netherlands, art. 2(2) (United States taxes covered are those on "estates and inheritances imposed . . . on the occasion of death . . . in the form of . . . transfer duties").

Of the pre-OECD treaties, only the Japanese treaty is unified to cover both estate and gift taxes. There are separate estate and gift tax treaties with Australia only because of a provision in the Australian Constitution requiring that a particular tax law deal only with one subject of taxation. *See* SEN. COMM. ON FOREIGN RELATIONS, REPORT ON THE ESTATE TAX CONVENTION WITH AUSTRALIA, *reprinted in* I TAX TREATIES (P-H) ¶ 15,541 (1980). In this analysis the reference to the Australian treaty is inclusive of both estate and gift tax treaties unless otherwise indicated.

3. *See infra* notes 53-76, 196-234 and accompanying text.

cific relief from double taxation.[4] Where both countries, due to overlapping jurisdiction, subject the same property to taxation, the credit provision specifies which country has the prior right of taxation and which must grant the treaty credit.[5]

II. TAXES AFFECTED

Each treaty expressly covers the federal estate, gift, or generation-skipping transfer taxes, or some combination thereof.[6] Existing treaties do not restrict the right of states or municipalities of the United States to levy these or analogous transfer taxes.[7] Foreign taxes governed by transfer tax treaties tend to be national taxes that, taken cumulatively, roughly correspond to the United States federal taxes at issue. These taxes may be national death, estate,[8] inheritance,[9] gift,[10] or other transfer taxes.[11] There are two exceptions to the national nature of taxes covered by the treaties.

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4. Every tax treaty is based on the policy of avoiding double taxation. *See generally* King, *Fiscal Cooperation in Tax Treaties*, 26 TAXES 889 (1948); Titlow, *International Double Taxation and the United States*, 46 TAXES 135 (1968). Double taxation occurs when two countries tax the same income or assets. As a practical matter, taxpayers tend not to invest in countries where there is double taxation. The effect is to create artificial barriers to the free flow of commerce between nations. These barriers discourage international good will and cooperation. In contrast, tax treaties promote these objectives by harmonizing tax principles, and by minimizing or eliminating double taxation.

Australia abolished its commonwealth estate and gift duties effective July 1, 1979. *See generally*, Pedrick, *Oh, to Die Down Under! Abolition of Death and Gift Duties in Australia*, 35 TAX LAW. 113 (1981). Thus, the prospect of the United States and Australia taxing the same transfer is now eliminated. Despite this fact, the Australian estate and gift tax treaties should continue to remain effective until officially terminated. This is also true of the Canadian estate tax treaty. Canada abolished its estate tax effective January 1, 1972, and replaced it with an income tax on deemed dispositions. *Cf.* Rev. Rul. 82-82, 1982-1 C.B. 127 (income tax on deemed dispositions not creditable tax for Canadian estate tax treaty). *See also infra* notes 15-18 and accompanying text (discussion of Canadian treaty). The proposed Canadian income tax treaty, if and when it becomes effective, expressly provides for subsequent termination of the estate tax treaty. Proposed Canadian Income Tax Treaty, art. XXX, para. 8.

5. Availability of the treaty credit has particular importance for gift and generation-skipping transfer taxes. This is because, in contrast with income and estate taxes, there is no credit under the United States Internal Revenue Code for either tax. *See* I.R.C. §§ 901-906 (1976 & Supp. V 1981) (credit for foreign income taxes); *id.* § 2014 (1976) (credit for foreign death taxes); *see also infra* notes 195-233 and accompanying text (discussion of treaty tax credit). In view of the absence of a credit for foreign gift or generation-skipping transfer taxes, the slow pace of treaty ratification is especially puzzling.

6. See *supra* note 2.

7. *See, e.g.*, Op Tex. Att'y Gen. No. M-92 (1967) (Canadian estate tax treaty providing that debts are situated at debtor's residence has no application for purposes of Texas inheritance tax). A nondiscrimination provision covering state and local taxes is included in the proposed Austrian treaty and in the Treasury's model treaty. Proposed Austrian Treaty, art. 2, para. 3, art. 10, para. 3; Treasury Model Treaty, art. 2, para. 3, art. 10, para. 4.

8. *See* Ireland, arts. I(1)(b), II(1)(d) (estate duty); Italy, arts. I(1)(b), II(1)(c) (estate tax); Union of South Africa, arts. I(1)(b), II(1)(d) (estate duty). The estate duty and estate tax covered under the Australian and Canadian treaties have been abolished. *See supra* note 4; *cf.* Australia, art. I(1)(b) (commonwealth estate duty); Canada art. I(b) (dominion estate tax).

9. *See* France, art. 2(1)(b) (duty levied on succession); Greece, arts. I(1)(b), II(1)(c) (tax on inheritances); Italy, arts. I(1)(b), II(1)(c) (inheritance tax); Japan, art. I(1)(b) (inheritance tax); Netherlands, art. 2(1)(b) (succession duty); Norway, art. I(1)(b) (tax on inheritances); *see also* Proposed Austrian Treaty, art. 2, para. 1(b) (inheritance tax); Proposed

The Finnish treaty applies to Finnish taxes at both national and local levels.[12] The Swiss treaty covers estate and inheritance taxes imposed at the local level by Swiss cantons.[13]

Transfer tax treaties typically extend automatically to death taxes subsequently adopted that are in addition to or in place of existing taxes. For automatic application, the subsequent taxes must be substantially similar to, or of a substantially similar character as, those taxes expressly covered by treaty.[14] Whether this requirement is satisfied requires analysis and comparison of the subsequent taxes with those expressly covered. This comparison process is illustrated by Revenue Ruling 82-82.[15] At issue was the Canadian treaty, which expressly covered the Canadian estate tax.[16] That tax had been repealed effective January 1, 1972, and replaced with an

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Belgian Treaty, art. I(1)(b) (succession duty); Proposed German Treaty, art. 2, para. 1(b) (inheritance tax).

Inheritance taxes differ from estate taxes in that an estate tax is one imposed on a property interest ceasing by reason of death; the executor is liable. In contrast, an inheritance tax is imposed on the interest to which a person succeeds at death; the heir or beneficiary-transferee is liable. Though liability rests with the transferee, the jurisdictional nexus for imposition may rest both on the transferor's and the transferee's personal status. This is the case in both Austria and Germany. *See* Note, *German Inheritance and Income Taxation of U.S. Estates*, 24 TAX L. REV. 127 (1968); *see also infra* note 28.

10. *See* France, art. 2(1)(b) (duty on gifts); Japan, art. I(1)(b) (gift tax); *see also* Proposed Austrian Treaty, art. 2, para. 1(b) (gift tax); Proposed German Treaty, art. 2, para. 1(b) (gift tax). The gift duty under the Australian treaty has been abolished. *See supra* note 4; *cf.* Australia, art. I(1)(b) (commonwealth gift duty).

11. *See* Netherlands, art. 2(1)(b) (transfer duty at death); United Kingdom, art. 2(1)(b) (capital transfer tax).

12. The national tax is the Finnish inheritance tax. Finland, arts. I(1)(b), II(1)(c). The local taxes are the communal tax on inheritances, bequests, or devises, and the "poors percentage." *Id.* "The communal tax . . . is deemed to be an income tax, based on income received by the beneficiary." DEP'T OF STATE, REPORT ON ESTATE TAX CONVENTION BETWEEN UNITED STATES AND FINLAND, *reprinted in* I TAX TREATIES (P-H) ¶ 37,601, at 37,572 (1980). The "poors percentage" is an estate tax imposed by the communes for the benefit of the poor. *Id.*

13. Switzerland, art. I(1)(b) (estate and inheritance taxes imposed by cantons and any political subdivision thereof). The Swiss national government does not impose death duties (estate or inheritance taxes). Most local Swiss cantons and several municipalities impose their own death duties. *See* DEP'T OF STATE, REPORT ON ESTATE TAX CONVENTION BETWEEN UNITED STATES AND SWITZERLAND, *reprinted in* II TAX TREATIES (P-H) ¶ 82,601, at 82,572 (1980) (nature of Swiss death duties).

14. Australia, art. I(2) (substantially similar character); Canada, art. I, para. 2 (substantially similar character); Finland, art. I(2) (substantially similar character); France, art. 2(2) (substantially similar); Ireland, art. I(2) (substantially similar character); Italy, art. I(2) (substantially similar character); Japan, art. I(2) (character substantially similar); Norway, art. I(2) (substantially similar character); Switzerland, art. I(2) (substantially similar character); Union of South Africa, art. I(2) (substantially similar character); United Kingdom, art. 2(2) (identical or substantially similar). Analogous language is contained in the proposed Austrian, Belgian, and German treaties. Proposed Austrian Treaty, art. 2, para. 2 (identical or substantially similar); Proposed Belgian Treaty, art. I(2) (substantially similar character); Proposed German Treaty, art. 2, para. 2 (any similar). Though the Netherlands treaty contains no express requirement of similarity, the technical explanation indicates it is implicit. *See* Netherlands, art. 2(2); TREAS. DEP'T, TECHNICAL EXPLANATION OF PROPOSED U.S.-NETHERLANDS ESTATE TAX CONVENTION, *reprinted in* II TAX TREATIES (P-H) ¶ 66, 621, at 66,631 (1980).

15. Rev. Rul. 82-82, 1982-1 C.B. 127.

16. Canada, art. I, para. 1(b).

income tax on deemed dispositions of property at death. The ruling analyzed and compared the subsequently enacted tax with the expressly covered tax:

> The common element in estate, inheritance, legacy, and succession taxes is that they are all taxes imposed on the value of the property transferred from a decedent to an heir. . . . The Canadian tax under consideration is not a transfer tax. Rather, it recognizes gain or loss with respect to a decedent's property. If the property has neither appreciated nor depreciated during the decedent's ownership, no tax would be assessed for the deemed disposition.[17]

Because the two taxes were not of a substantially similar character, the Canadian estate tax treaty was inapplicable to the new tax.[18]

A number of treaties require the respective contracting states to notify each other of substantial or appreciable changes in their laws affecting the transfer taxes at issue.[19] Consultation is required for the purpose of adopting and extending the treaty to cover such changes.[20] Otherwise, the changes may not be incorporated or given effect.[21]

III. TAXPAYERS COVERED

The extent to which transfer tax treaty advantages may be claimed also depends on the taxpayer's personal status. Restriction of situs jurisdiction by treating assets as having a foreign rather than a domestic situs is based on one of three distinct approaches. First, a number of treaties protect only those taxpayers domiciled in one of the contracting states at the time of transfer.[22] Citizens of contracting states domiciled in noncontracting states are unable to claim the benefits of the treaty.

> *Example*: Spiro Agnopolous, a citizen of Greece, dies in 1983 domiciled in Cyprus (a noncontracting state). Spiro owns property that under the Internal Revenue Code is treated as having a United States situs. The situs article of the Greek treaty applies only to persons

17. Rev. Rul. 82-82, 1982-1 C.B. 127.

18. The decedent in Rev. Rul. 82-82, 1982-1 C.B. 127, was a United States citizen and domiciliary at the time of death in 1981. The decedent owned real property in Canada subject to the tax on deemed dispositions. The issue was whether the Canadian tax was creditable against the United States estate tax imposed on worldwide assets. Because of the absence of similarity between the previously repealed and the new Canadian tax, the treaty tax credit was unavailable. In addition, the Internal Revenue Code credit of § 2014 was unavailable since the new tax was not an estate, inheritance, legacy, or succession tax. *See supra* note 4.

19. France, art. 2(3); Greece, art. I(2); Netherlands, art. 2(3). The United Kingdom and proposed Austrian treaties require notification of changes without regard to whether they are substantial or appreciable. United Kingdom, art. 2(2); Proposed Austrian Treaty, art. 2, para. 3.

20. Greece, art. I(2).

21. *Cf.* Rev. Rul. 81-303, 1981-2 C.B. 255 (enactment of § 2010 (1976 & Supp. V 1981) unified credit was appreciable change not incorporated into Greek treaty); *see also infra* notes 163-70 and accompanying text (questioning validity of ruling on other grounds).

22. *See* Greece, art. IV(2); Ireland, art. III(2); Union of South Africa, art. III(2); *see also* Proposed Austrian Treaty, art. 1, para. 1, art. 4, para. 1. Foreign jurisdictions may use a jurisdictional nexus analogous to domicile. *See, e.g.*, Union of South Africa, art. III(2) (ordinarily resident); *see also infra* notes 53-74 (citizenship and domicile).

domiciled in the territory of the contracting states.[23] Thus, the article is inapplicable and the situs of Spiro's estate is determined under the Internal Revenue Code.

In contrast, citizens of nontreaty states domiciled in treaty states will benefit from restricted situs jurisdiction.[24]

The second approach to restriction of situs jurisdiction is keyed to either citizenship or domicile in the United States, but only to domicile in the other contracting state.[25] Most treaties applying this approach focus on the personal status of the transferor.[26]

Example: Bill Smith, a citizen of the United States, is domiciled in Peru. He makes a gift of property that under internal French law has its situs in France. Because Mr. Smith is a United States citizen he can claim the advantage of restricted situs jurisdiction under the French treaty.[27]

The Finnish and Japanese treaties are unique in their application of this approach. Finland and Japan impose transfer taxes based on the transferee's status in addition to or rather than the transferor's status. This distinction is reflected in the Finnish and Japanese treaties.[28]

Example: K, a citizen and domiciliary of Korea, makes a gift of property to *J*, a domiciliary of Japan. The property passing to *J* is deemed under the Internal Revenue Code to have a United States situs. The Japanese treaty situs rules extend to donees domiciled in Japan. Thus, the treaty rather than the Internal Revenue Code may be selected to determine situs.[29]

The final approach to restricting situs is to protect taxpayers who are citizens of or domiciled in either of the contracting states when the taxable transfer occurs.[30]

Example: Jan Willem, a citizen of the Netherlands, dies domiciled in Spain. He owned property that is treated as having a United States

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23. Greece, art. IV(2).

24. In line with the preceding example, a citizen of Cyprus domiciled in Greece can claim restricted situs jurisdiction under the Greek treaty. *Id.*

25. *See* Australia, art. III(1); Canada, art. II; Finland, art. III(2); France, arts. 1(1), 4; Japan, art. III(1); *see also* Proposed Belgian Treaty, art. III; Proposed German Treaty, art. 1, & art. 4, para. 1. This is the same approach typically applied by the United Kingdom treaty. United Kingdom, art. 1. Yet, that treaty contains a unique provision applicable to taxpayers who are neither citizens or domiciliaries of the United States nor domiciliaries of the United Kingdom, but who are subject to situs taxation by each. *Id.* art. 5(6). In this event the competent authorities are to determine a single situs by mutual agreement. *Id.*

26. The generation-skipping transfer tax is not based on an actual but rather a deemed transfer of property. *See* I.R.C. § 2612 (1976); *see also* W. NEWTON, INTERNATIONAL ESTATE PLANNING § 7.14 (1981). The term "transferor" for this analysis is inclusive of both an actual and deemed transferor unless otherwise specified.

27. France, arts. 1(1), 4.

28. The Finnish treaty restricts situs jurisdiction based on both the transferee's and the transferor's status. Finland, art. III(2). The Japanese treaty focuses only on the transferee's status. Japan, art. III(1). Though both Austria and Germany impose tax based on the transferee's and the transferor's status, the proposed Austrian and Germany treaties restrict situs jurisdiction based only on the transferor's status. *See* Proposed Austrian Treaty, art. 1, para. 1; Proposed German Treaty, art. 1.

29. *See* W. NEWTON, *supra* note 26, § 5.03 (Code—Treaty Relationship).

30. *See* Italy, art. III(1); Netherlands, art. 1; Norway, art. III(2).

situs under the Internal Revenue Code. Because Mr. Willem was a citizen of the Netherlands, the Netherlands treaty applies even though he was domiciled in Spain (a noncontracting state) at death.[31]

Under some treaties the advantages of deductions and exemptions extend to citizens and domiciliaries of the United States, but only to domiciliaries of the other treaty jurisdiction.[32]

Example: Pierre Boisvert is a domiciliary of France. He dies leaving real property situated in the United States, owned directly in his own name. The realty passes to Mr. Boisvert's spouse. Because Mr. Boisvert was a domiciliary of France, he is entitled to the marital deduction under the French treaty.[33]

Most treaties, however, grant deductions and exemptions to taxpayers who are citizens or domiciliaries of either contracting state.[34] The effect is to afford this advantage to citizens of a contracting state domiciled in a nontreaty jurisdiction.

Example: John Jones, a citizen of Australia domiciled in Spain (a noncontracting state), makes a gift of property having a United States situs. Since Mr. Jones is not domiciled in Australia, the Internal Revenue Code situs rules apply. However, because the advantage of additional deductions and exemptions is extended to citizens as well as domiciliaries of Australia,[35] Mr. Jones is entitled to this benefit in computing the United States situs gift tax.

The treaty tax credit typically extends to both citizens and domiciliaries of the United States.[36] Some treaties extend this tax credit advantage only to domiciliaries of the other treaty jurisdiction,[37] but most extend it to citizens as well.[38] Under treaties limiting the advantages of restricted situs jurisdiction and treaty deductions and exemptions to domiciliaries, tax

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31. Netherlands, art. 1.

32. *See* Canada, art. IV; Finland, art. IV; France, art. 1(1); Japan, art. IV; *see also* Proposed Belgian Treaty, art. IV; Proposed German Treaty, art. 1 & art. 4, para. 1. The proposed Austrian treaty extends this advantage only to taxpayers domiciled in one of the contracting states. Proposed Austrian Treaty, art. 1, para. 1, & art. 8. The Irish and Union of South African treaties merely incorporate deductions and exemptions provided by internal law. Ireland, art. IV(1); Union of South Africa, art. IV(1).

33. France, art. 11(2); *see also infra* notes 179-82 and accompanying text (marital deduction under French treaty).

34. *See* Australia, art. IV(2); Greece, art. V; Italy, art. IV; Netherlands, art. 1; Norway, art. IV; Switzerland, art. III; United Kingdom, art. 8; *see also* Estate of Burghardt v. Commissioner, 80 T.C. 705, 706 (1983) (citizen of Germany domiciled in Italy entitled to proportionate share of I.R.C. § 2010 unified credit).

35. Australia, art. IV(2).

36. A narrow exception arises only under the pre-OECD treaties with Greece, Ireland, and the Union of South Africa. The exception extends the secondary credit of those treaties to United States domiciliaries, but not citizens. *See infra* note 214. The primary credit extends to both United States citizens and domiciliaries under all pre-OECD treaties. *See infra* note 206.

37. *See* Finland, art. V; France, arts. 1(1), 12; Union of South Africa, art. V; *see also* Proposed Austrian Treaty, art. 1, para. 1, & art. 9; Proposed Belgian Treaty, art. V; Proposed German Treaty, arts. 1, 4, 11.

38. *See* Australia, art. V; Canada, art. V; Greece, art. VI(a); Ireland, art. V; Italy, art. V; Japan, art. V; Netherlands, arts. 1, 11; Norway, art. V; Switzerland, art. IV; United Kingdom, arts. 1, 9.

treatment of nondomiciliary citizens will be determined by internal law. The benefit of the treaty tax credit, however, remains available to nondomiciliary citizens under most treaties.

> *Example: U*, a citizen of the United States, dies in 1982 domiciled in Brazil (a noncontracting state). *U* owns property that has a Greek situs under the internal situs rules of Greece. The advantage of restricted situs jurisdiction is available only to domiciliaries of the United States and as a result is not applicable to modify internal Greek law.[39] The estate tax treaty credit, however, extends to United States citizens and domiciliaries.[40] As a result the Greek tax based on situs is credited against the United States tax based on citizenship.[41]

IV. THE SAVINGS CLAUSE

The savings clause preserves the right of the United States to tax its citizens and domiciliaries as if the treaty had not been entered into. The effect is that a United States citizen who becomes domiciled in another treaty country is unable to claim the advantage of restricted situs taxation.[42] The clause is expressly set forth in a number of treaties,[43] but in most is merely implied.

The Tax Court construed one such implied savings clause in *Estate of Vriniotis v. Commissioner*.[44] The decedent was a citizen of both the United States and Greece[45] and was domiciled in Greece at death. He owned real property in Greece and bank accounts in New York.[46] The estate argued that the Greek treaty exempted it from United States estate tax. The Tax Court disagreed:

> Except for providing credits . . . for taxes imposed by Greece on a decedent's movable assets, the treaty does not affect the application of the Federal estate tax to the estate of a decedent who dies a citizen of the United States. In other words, the U.S. estate tax applies to the entire estate of a U.S. citizen regardless of where he is domiciled or regardless of where his property is situated, and the treaty does not change those basic rules.[47]

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39. Greece, art. IV(2).

40. *Id.* art. VI(1) (primary credit).

41. *See infra* notes 109, 207-08 and accompanying text.

42. This is also true if both contracting states conclude under internal law that the alien transferor was a domiciliary. The deadlock-breaking rules of the French, Netherlands, United Kingdom, and the Proposed Austrian and Germany treaties may, however, preclude the United States from treating an alien as a domiciliary even after a finding of domicile within the United States. *See infra* notes 30-55 and accompanying text.

43. *See* France, art. 8; Netherlands, art. 9; United Kingdom, art. 5(1)(b); *see also* Proposed Austrian Treaty, art. 9, para. 1; Proposed German Treaty, art. 11, para. 1(a); Treasury Model Treaty, art. 1, para. 3.

44. 79 T.C. 298 (1982).

45. The decedent, as a child of Greek parents, was a Greek citizen at birth. On immigration to the United States he became a naturalized United States citizen. He did not renounce his United States citizenship, nor did the record reflect renunciation of Greek citizenship. At death the court assumed the decedent "had dual citizenship." *Id.* at 305.

46. The decedent also owned a one-third interest in the estate of his brother.

47. 79 T.C. at 308 (footnote omitted). This conclusion is also supported by committee reports analyzing certain treaties not expressly reflecting a savings clause. *See* SEN. COMM.

A United States citizen who expatriates for tax avoidance purposes is expressly subject to the Internal Revenue Code's ten-year expatriation provisions[48] only under the proposed Austrian and German treaties.[49] Revenue Ruling 79-152 concludes that the expatriation provisions have implicit application at least if the treaty at issue specifically reflects a savings clause.[50] *Di Portanova v. United States*[51] extends further, holding that the ten-year expatriation rules may apply even though the treaty at issue contains no express savings clause.[52]

V. CITIZENSHIP AND DOMICILE

The availability of standing to claim treaty advantages is based on the taxpayer's personal status.[53] That status, depending on the treaty, may be dependent on citizenship, domicile, or a personal status analogous to domicile. Transfer tax treaties do not define citizenship. Rather, determination of who is a citizen is made according to the internal law of the country imposing the tax.[54] In addition to the United States, a number of foreign treaty and nontreaty jurisdictions impose transfer taxes based on citizen-

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ON FOREIGN RELATIONS, REPORT ON CERTAIN ESTATE TAX CONVENTIONS, *reprinted in* I TAX TREATIES (P-H) ¶ 41,617 (1980) (Irish, South African, Norwegian, Greek, and Canadian treaties).

48. I.R.C. § 2107 (1976) (estate tax expatriation provision); *id.* § 2501 (1976 & Supp. V 1981) (gift tax expatriation provision).

49. *See* Proposed Austrian Treaty, art. 9, para. 1; Proposed German Treaty, art. 11, para. 1(a); *see also* Treasury Model Treaty, art. 1, para. 3.

50. Rev. Rul. 79-152, 1979-1 C.B. 237. The rationale of the ruling is that the savings clause expressly reserved to the United States the right to tax its citizens as though the treaty had not come into effect. The ruling treats Internal Revenue Code expatriation provisions as a "manifestation of United States taxation on the basis of citizenship." *Id.* 1979-1 C.B. at 238; *see also* I.R.C. §§ 877, 2107, 2501(a)(3) (1976 & Supp. V 1981).

The ruling is contrary to the Treasury Department's technical explanation of the Netherlands treaty. There, in discussing the savings clause the Treasury stated: "[D]ecedents described in section 2107 of the Internal Revenue Code of 1954 (relating to decedents who are United States expatriates and who relinquish United States citizenship for the principal purpose of avoiding taxes) are *not United States citizens for this purpose*." TREAS. DEP'T, *supra* note 14, at 66,631 (Article 1. Estates Covered) (emphasis added); *see also* Netherlands, art. 1.

51. 690 F.2d 169 (Ct. Cl. 1982).

52. The treaty at issue was the Italian income tax treaty. The absence of both 10-year expatriation provisions and an express savings clause was not addressed. Instead, the court stated "[t]he tax treaty does not prevent the application of section 877 [the income tax expatriation provision] to the plaintiff." *Id.* at 177. The court further concluded that the United States—Italian Treaty of Friendship, Commerce, and Navigation did not bar application of the expatriation provision, nor was the provision unconstitutional. *Id.* at 178; *see also* W. NEWTON, *supra* note 26, § 5.08 n.1.

53. *See supra* notes 22-41 and accompanying text.

54. Each treaty generally provides either that citizenship is determined under internal law or that terms not otherwise defined, such as citizenship, have the meaning applied under internal law. *See* Australia, art. II(2), (3); Finland, arts. II(2), III; France, art. 3(2); Greece, art. II(2); Ireland, art. II(2); Italy, art. II(2); Japan, art. II(2); Netherlands, art. 3(2); Norway, art. II(2); Switzerland, art. II(2); Union of South Africa, art. II(2); United Kingdom, art. 3(2); *see also* Proposed Austrian Treaty, art. 3, para. 2; Proposed Belgian Treaty, art. II(2), (3); Proposed German Treaty, art. 3, para. 2; Treasury Model Treaty, art. 3, para. 2. The Canadian treaty contains only a provision that domicile is determined under internal law. Canada, art. III, para. 3. The regulations under the previously expired Canadian treaty refer to both domicile and citizenship. Canada, Reg. § 570.103(b).

ship.[55] Thus, double taxation based on citizenship may occur.

Example: *N* dies in 1980, leaving substantial assets located in various countries around the world. Norway and the United States tax citizens on worldwide assets.[56] In determining whether *N* was a citizen of either Norway or the United States, each country applies internal law.[57] If both the United States and Norway determine *N* was a citizen, each will tax worldwide assets. However, the Norwegian treaty provides an estate tax credit that reduces the double tax impact.[58]

Standing may also be based on domicile or a personal status analogous thereto. The analogous status may more closely approach the concept of residence than domicile.[59] This may be expressly reflected in the treaty at issue[60] or may become apparent only after examination of underlying internal law.[61] Even among common law jurisdictions, the definition of

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55. Greece and Norway both exercise jurisdiction to tax based on citizenship. *See, e.g.*, SEN. COMM. ON FOREIGN RELATIONS, *supra* note 47, at 41,584, 41,585. *But see* Estate of Vriniotis v. Commissioner, 79 T.C. 298, 309 (1982) (no evidence Greek national was subject to Greek inheritance tax on bank deposits or interest in brother's estate). Nontreaty jurisdictions taxing on basis of citizenship include Israel, Spain, and Turkey. *See* W. GOODMAN, INTERNATIONAL DOUBLE TAXATION OF ESTATES AND INHERITANCE 112 (1978).

56. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 47.

57. Norway, art. II(2).

58. *Id.* art. V. Estates of United States citizens or domiciliaries may claim the Internal Revenue Code rather than treaty estate tax credit. I.R.C. § 2014 (1976). In the case of a nontreaty jurisdiction taxing on the basis of citizenship, only the Code credit is available. *See also infra* notes 200-04 and accompanying text (general discussion).

59. Civil law jurisdictions in particular tend to adopt this technique.

60. *See* Finland, art. III (resident in Finland); Union of South Africa, art. III(1) (ordinarily resident in Union of South Africa). "The term 'ordinarily resident' under South African law means, as distinguished from 'domiciled,' habitually resident or resident in the ordinary course of a person's life." SEN. COMM. ON FOREIGN RELATIONS, *supra* note 47, at 41,584; *see also* Proposed Austrian Treaty, art. 4, para. 1(b) (resident [Wohnsitz oder gewohnlicher Aufenthalt] in Austria); Proposed Belgian Treaty, art. II(2) (inhabitant of Belgium); Proposed German Treaty, art. 4, para. 1(b) (domicile [Wohnsitz] or habitual abode [gewohnlicher Aufenthalt] in Germany or otherwise deemed subject to German tax). German law defines domicile [Wohnsitz]: "as the place where an individual maintains a residence under conditions that it will be used. The definition has two criteria: the existence of a residence and its use on a more than temporary basis." TREAS. DEP'T, TECHNICAL EXPLANATION OF THE U.S.—GERMAN ESTATE AND GIFT TAX TREATY, *reprinted in* I TAX TREATIES (P-H) ¶ 39,621, at 39,616 (1980). Also according to German law, an habitual abode [gewohnlicher Aufenthalt]: "is 'a place where one spends time in circumstances which indicate more than a temporary presence'. In particular, where a stay in Germany exceeds six months, an habitual abode is considered to exist." *Id.* German citizens with neither domicile nor habitual abode in Germany are deemed otherwise subject to German tax under German law if they have had a domicile or habitual abode in Germany in the past five years. *Id.* If their residence outside Germany is in a tax haven, liability continues for ten years rather than five. W. GOODMAN, *supra* note 55, at 154.

61. The French, Japanese, and Netherlands transfer tax treaties each reflect domicile as the jurisdictional nexus applied by the foreign jurisdiction. *See* France, art. 4(1); Japan, art. III(1); Netherlands, art. 4(1). None of these jurisdictions applies the common law meaning of that term. A person is considered domiciled in France if he has his main or principal establishment there. *See* W. GOODMAN, *supra* note 55, at 132 (distinctions between English and French domicile concepts). In Japan the principal place a persons lives, the base and center of the life of a person, is his domicile. *Id.* at 135. It has been said that: "the one distinguishing difference between Japanese and Anglo-American concepts of domicile is the fact *that no critical importance seems to be attached in Japan to the intention of the person to remain indefinitely* . . . ." G. WAY, PLANNING THE ESTATES OF AMERICANS RESIDING IN JAPAN, CURRENT LEGAL ASPECTS OF INTERNATIONAL ESTATE PLANNING 372, 381 (1981).

domicile often varies.[62] In any event, existence of the relevant nexus to impose tax is initially determined under the internal law of the jurisdiction imposing tax.[63] If only one of the contracting states finds the relevant nexus, the other is bound by that determination.[64] This means the other contracting state may not disregard the treaty and apply its own internal law by claiming that the relevant status existed only with respect to some third country.

In addition to the United States, all foreign jurisdictions with which the United States has transfer tax treaties exercise jurisdiction to tax based either on domicile or an analogous personal status.[65] Thus, the potential for double taxation occurs more frequently than in the case where jurisdic-

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The Netherlands also considers a person a domiciliary: (1) if he had an habitual abode there despite the absence of an intent to remain permanently, and (2) in the case of citizens of the Netherlands, for 10 years after relinquishing the habitual abode. *See* TREAS. DEP'T, *supra* note 14, at 66,632; *see also* Netherlands Protocol, art. V (Netherlands will not assert 10-year rule of presumptive domicile for decedents with intent to remain permanently in United States). The net effect is that each of these foreign countries is somewhat quicker in finding the requisite nexus than the United States.

62. The United States and the United Kingdom differ in the criteria applied for gauging relinquishment of domicile of choice. *See In re* Jones' Estate, 192 Iowa 78, 182 N.W. 227 (1921). *See generally* W. NEWTON, *supra* note 26, § 3.49. The United Kingdom treaty expands the distinctions even further. It deems an individual domiciled in the United Kingdom if so domiciled in accordance with its law or if treated as so domiciled for purposes of the United Kingdom capital transfer tax. *See* United Kingdom, arts. 2(1)(b), 4(1)(b). An individual not considered domiciled in the United Kingdom under general law is nevertheless treated as so domiciled for the capital transfer tax if he: (1) was domiciled in the United Kingdom on or after December 10, 1974, and within three years immediately preceding the taxable event; or (2) was resident in the United Kingdom on or after December 10, 1974, in at least 17 of the 20 income tax years of assessment ending with the income tax year in which the taxable event occurs; or (3) has, since December 10, 1974, become and remained domiciled in the Channel Islands or the Isle of Man and, immediately before becoming domiciled there, was domiciled in the United Kingdom. For condition (2), "resident" is defined as for income tax purposes except that the availability of a dwelling-house in the United Kingdom is disregarded. An individual is a United Kingdom resident for income tax purposes for the entire year if he has been present in the United Kingdom for a single day in that year, provided he also has a dwelling-house in the United Kingdom. Thus, the dwelling-house limitation means that an individual whose principal home is not in the United Kingdom, but who comes to the United Kingdom on occasional visits and maintains a flat or house there, will not be subject to capital transfer tax under this provision. *See* TREAS. DEP'T, TECHNICAL EXPLANATION OF THE UNITED KINGDOM TREATY, *reprinted in* II TAX TREATIES (P-H) ¶ 89,547 (1980).

63. Each treaty provides either that domicile is determined under internal law or that terms not otherwise defined such as domicile have the meaning applied under internal law. *See* Australia, art. II(2), (3); Canada, art. III, para. 3; Finland, arts. II(2), III; France, art. 3(2); Greece, art. II(2); Ireland, arts. II(2), III(1); Italy, art. II(2); Japan, arts. II(2), III(1); Netherlands, art. 3(2); Norway, arts. II(2), III(1); Switzerland, art. II(2), (3); Union of South Africa, arts. II(2), III(1); United Kingdom, art. 3(2); *see also* Proposed Austrian Treaty, art. 3, para. 2; Proposed Belgian Treaty, art. II(2), (3); Proposed German Treaty, art. 3, para. 2; Treasury Model Treaty, art. 3, para. 2.

64. *See* Australia, art. II(3); Canada, art. III, para. 3; Finland, art. III; France, art. 4(1); Ireland, art. III(1); Japan, art. III(1); Netherlands, art. 4(1); Norway, art. III(1); Switzerland, art. II(3); Union of South Africa, art. III(1); United Kingdom, art. 4(1); *see also* Proposed Austrian Treaty, art. 4, para. 1; Proposed Belgian Treaty, art. II(2); Proposed German Treaty, art. 4, para. 1; Treasury Model Treaty, art. 4, para. 1.

65. Prior to 1973, Italy imposed a death tax only on the basis of situs. W. GOODMAN, *supra* note 55, at 70. A number of South American jurisdictions also follow this approach. *Id.* The effect is to encourage investment abroad by those having the requisite degree of

tion to tax is based on citizenship. If two sovereign jurisdictions each find the relevant nexus to impose tax under internal law, no rule exists for breaking the deadlock except under the more recent OECD-type treaties. In pre-OECD treaties relief from double taxation is provided by the treaty tax credit.[66]

The OECD-type treaties contain specific rules designed to break any deadlock. These rules are directed toward determining what is denominated as the "fiscal domicile."[67] To illustrate, in the case of the Netherlands estate tax treaty, if under internal law both the Netherlands and the United States find the relevant nexus[68] and a deadlock occurs, the decedent is treated as having a fiscal domicile only in the country of citizenship if three requirements are satisfied.[69] These are that the decedent: (1) was domiciled in the country of which he was not a citizen for less than a total of seven years during the ten-year period ending with his death; (2) was in that country for a business, professional, educational, training, touristic, or other similar purpose;[70] and (3) had no clear intention of remaining indefinitely in that country.[71]

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personal attachment in the local jurisdiction. In 1973 Italy amended its death tax, which is now imposed based on personal status as well.

66. Existence of the credit is of particular importance in the case of gift and generation-skipping transfer taxes. This is because, in contrast with estate taxation, there is no foreign gift or generation-skipping tax credit under the Internal Revenue Code to relieve the impact of double taxation. *See* I.R.C. § 2014 (1976); *see also infra* notes 197-200 and accompanying text (possibility of double taxation under Code).

67. *See* France, art. 4; Netherlands, art. 4; United Kingdom, art. 4; *see also* Proposed Austrian Treaty, art. 4; Proposed German Treaty, art. 4; Treasury Model Treaty, art. 4. The concept of fiscal domicile accommodates conflicting internal determinations of domicile or its analogous nexus. Yet it also resolves that conflict through ultimate determination of a single domicile—the fiscal domicile.

The rules determining fiscal domicile do not affect the right of the United States to tax its citizens on worldwide transfers. This results from the savings clause. *See supra* notes 42-43 and accompanying text. The United States may, however, be precluded from taxing transfers by alien domiciliaries who have also been found domiciliaries of one of these foreign treaty jurisdictions.

68. Though the Netherlands estate tax treaty reflects domicile as the jurisdictional key, the Netherlands does not apply the common law meaning of that term. Netherlands, art. 4(1); *see supra* note 61.

69. The requirements for breaking the deadlock may vary depending on the transfer tax treaty at issue.

70. This requirement may also be satisfied if the decedent was in the other contracting state as the spouse or a dependent member of the family of a person who was in that other contracting state for such purpose. Netherlands, art. 4(2)(b).

71. The third requirement is presumed satisfied in the absence of clear and convincing evidence to the contrary. *See* TREAS. DEP'T, *supra* note 14, at 66,632. The requirements of the French treaty, where both jurisdictions have found the individual a domiciliary but he is a citizen of only one, are:

> Under the first test, such a person will be considered domiciled [sic] in the country of which he is a citizen if he was domiciled in the other country for less than 5 years during the 7-year period which ends with the year of his death or the year the gift was made, and he was in that country because of an assignment of employment or because he was the spouse or dependent of a person who was in that country for such a purpose. Under the second test, the person will be considered a domiciliary of the country of which he is a citizen if he was domiciled in the other country for less than 7 years during the 10-year period which ends with the year of his death or the year the gift was

Example: *U*, a United States citizen, dies while living in the Netherlands. *U* had lived there for business purposes for two years prior to his death. Previously, *U* had lived at all times in the United States. Both the Netherlands and the United States, applying internal law, determine that *U* was a domiciliary. The estate tax treaty, however, limits *U* to a single domicile. Since *U* was a United States citizen who lived in the Netherlands for business purposes for only two years during the ten-year period preceding his death and there is no evidence of his intent to remain in the Netherlands indefinitely, *U*'s domicile is limited to the United States.

If these three requirements cannot be satisfied or if they are inapplicable,[72] additional tests come into play to resolve the double domicile issue. These tests in order of priority are: (1) The decedent is treated as domiciled in the state in which the decedent's permanent establishment was maintained for five years immediately preceding death.[73] (2) Otherwise, domicile is in the country with which the decedent's personal relations were the closest. (3) Otherwise, domicile is in the country of which the decedent was a citizen. (4) If the decedent was a citizen of both states or neither, the competent authorities resolve the double domicile issue by mutual agreement.[74]

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made, and he was in that country because of a renewal of an assignment of employment or because he was the spouse or dependent of a person who was in that country for such a purpose.

A second rule, which is similar to the first in that it applies to persons who are domiciliaries of both countries and citizens of only one of the countries, applies if domicile cannot be resolved under the first rule. Under the second rule such a person will be considered a domiciliary of the country of which he is a citizen if he had a clear intention to retain his domicile in that country and he was domiciled in the other country for less than 5 years during the 7-year period which ends with the year of death or the year the gift was made.

SEN. COMM. ON FOREIGN RELATIONS, REPORT ON THE TAX CONVENTION BETWEEN THE UNITED STATES AND THE FRENCH REPUBLIC, S. EXEC. REP. NO. 96-3, 96th Cong., 1st Sess., *reprinted in* 1 TAX TREATIES (P-H) ¶ 38,553, 38,548 (1980). The effect of these deadlock-breaking rules is to keep citizens of one contracting state temporarily present in the other state from being subject to taxation on worldwide assets by that other state. *See* TREAS. DEP'T, *supra* note 14, at 66,632-33. These rules are especially important where the foreign jurisdiction is relatively quick to exercise taxing authority even with respect to aliens temporarily residing there.

72. The requirements would be inapplicable if the decedent were a citizen of both contracting states at date of death. Netherlands, art. 4(3)(d).

73. In applying this test a decedent cannot have more than one permanent home. Netherlands Protocol, art. III.

74. Analogous tests under the French treaty are:

[T]he individual will be considered domiciled in the country (1) in which he maintained his permanent home, (2) in which his personal relations were the closest (center of vital interests), (3) in which he had a habitual abode, or (4) in his country of citizenship. In cases were [sic] an individual's domicile cannot be determined under these rules, the competent authorities of the countries are to settle the question by mutual agreement.

SEN. COMM. ON FOREIGN RELATIONS, *supra* note 71, at 38,548. These same tests are also reflected in the United Kingdom treaty. United Kingdom, art. 4(4).

VI. SITUS RULES

The situs rules of transfer tax treaties serve two important functions. First, they restrict situs jurisdiction, that is, jurisdiction to tax on the basis of situs.[75] Situs jurisdiction is restricted by treating certain classifications of assets, which under internal law are deemed situated in a particular jurisdiction, as having a foreign situs. Thus, that jurisdiction is precluded from exercising its situs tax. The second important function of the situs rules is to provide consistent situs treatment. For this purpose, the situs rules are tied directly into the treaty tax credit,[76] providing consistent situs treatment for the credit computation. More importantly, consistent situs treatment diminishes the impact of double taxation.

Situs rules in pre-OECD and OECD-type treaties differ. Pre-OECD treaties contain a comprehensive set of situs rules for identifying the location of specific categories of assets. The more recent OECD-type treaties depart from these comprehensive rules, and instead authorize situs taxation only for a few narrowly-defined types of property. Rather than situs, the principal focus is on the transferor's domicile. Property not covered by the narrowly-drawn situs rules is subject to taxation by the domiciliary jurisdiction and cannot be taxed on the basis of situs.

A. Pre-OECD Treaties

Pre-OECD treaties break property down into three broad classifications: (1) real property; (2) tangible personal property; and (3) specific categories of intangible personal property. Classifications of property not otherwise enumerated are covered by a catchall clause. The law of the country imposing tax on the basis of situs ordinarily controls in determining property classification.[77] An exception arises under several treaties that contain narrow provisions specifically designating the jurisdiction whose law is to govern certain limited property classifications.[78]

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75. Only the Swiss treaty contains no rules for computing the situs tax. In Switzerland no situs death tax is imposed on movable or personal property, only on real property. It was for this reason that Swiss taxing authorities requested omission of rules relating to the situs tax. *See* DEP'T OF STATE, *supra* note 13, at 82,572.

76. The Swiss treaty provides situs rules only for purposes of the treaty tax credit and then only where double domicile or citizenship is at issue. Switzerland, art. IV(1). Because of their more limited utility, the Swiss situs rules will be addressed only in the footnotes of this analysis.

77. Terms not otherwise defined have the meaning prescribed under the internal law of the jurisdiction whose taxes are at issue. *See* Australia, art. II(2); Canada, art. III, para. 3; Finland, art. II(2); Greece, art. II(2); Ireland, art. II(2); Italy, art. II(2); Japan, art. II(2); Norway, art. II(2); Switzerland, art. II(2); Union of South Africa, art. II(2); *see also* Proposed Belgian Treaty, art. II(3)(2).

78. *See* Finland, art. III(1)(a); Greece, art. IV(2)(a); Norway, art. III(2)(a); *see also* Proposed Belgian Treaty, art. III(a); SEN. COMM. ON FOREIGN RELATIONS, REPORT ON ESTATE TAX CONVENTION WITH CANADA, *reprinted in* 1 TAX TREATIES (P-H) ¶ 22,567, at 22,549-52 (1980).

1. Real Property.

Real property is deemed situated where the land is located. Among pre-OECD treaties, only those with Italy and Norway apply the term "real property,"[79] while others refer to "immovable property."[80] The two terms are not synonymous. Immovable property includes chattels ordinarily characterized as personalty.[81]

To the extent a treaty prescribes a definition of the term at issue, that definition will control. For example, a number of treaties employing the term "immovable property" exclude from its scope interests by way of security such as mortgages.[82] The Japanese treaty contains a special provision that places mining or quarrying rights or mining leases at the place of the mining or quarrying.[83] The Greek treaty is expressly inapplicable to immovable property situated in either contracting state.[84]

If the treaty does not define a term, the appropriate definition will typically be that of the jurisdiction whose taxes are at issue[85] or, as is the case under several treaties, the jurisdiction where the land involved is located.[86] Because the United States has no internal law defining immovable property it would seem that that term should be construed to mean real property.[87] Adoption of a broader scope would expand the definition beyond even that provided under internal United States law.[88]

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79. *See* Italy, art. III(1)(a); Norway, art. III(2)(a). The proposed Belgian treaty adopts the same approach. *See* Proposed Belgian Treaty, art. III(a).

80. *See* Australia, art. III(1)(a); Canada, art. II(a); Finland, art. III(2)(a); Ireland, art. III(2)(a); Japan, art. III(1)(a); Union of South Africa, art. III(2)(a).

81. Duncan v. Lawson, 41 Ch. D. 394 (1889); *see also* W. NEWTON, *supra* note 26, at §§ 2.06-.08 (classification of property).

82. *See* Australia, art. III(1)(a); Canada, art. II(a); Union of South Africa, art. III(2)(a). Regulations under the expired Canadian and United Kingdom treaties include leases, regardless of duration, within the scope of immovable property. *See* Canada, Reg. § 570.104(c)(1); United Kingdom, Reg. § 507.204(d)(1).

83. Japan, art. III(1)(i).

84. Greece, art. IV(2)(a). Characterization of the property as immovable is keyed to the place where the land involved is located. *Id.*; *see also* Estate of Vriniotis v. Commissioner, 79 T.C. 298, 307 n.8 (1982) (historical background of treatment of immovable property under Greek treaty).

The situs rules of the Swiss treaty applied in computation of the treaty tax credit do not expressly cover real or immovable property. Switzerland, art. IV(1). Presumably, the competent authorities could agree to extend coverage. *Id.* art. IV(1)(d).

85. *See supra* note 77.

86. *See supra* note 78.

87. This is the position taken in explanations of both the French and Netherlands OECD-type treaties. *See* SEN. COMM. ON FOREIGN RELATIONS, *supra* note 71, at 38,548; TREAS. DEP'T, *supra* note 14, at 66,634. The United Kingdom treaty contains an express definition that approximates the civil law concept of immovable property. *See* United Kingdom, art. 6; *see also infra* note 143 (United Kingdom treaty definition of immovable property).

88. Treas. Reg. §§ 20.2104-1(a)(1) (1982), 25.2511-3(b)(1) (1973). The result would make little practical difference under internal law since the property distinguishing immovable and real property—chattels real—would be classified as tangible personal property and typically subject to taxation. *See* I.R.C. § 2103 (1976); Treas. Reg. § 25.2511-3(b)(1) (1973). *But see* I.R.C. § 2105(c) (1976) (exception for works of art on loan for exhibition in United States).

2. Tangible Personal Property.

Tangible personal property, except for ships and aircraft, is treated as situated where physically located. This treatment also extends to most currency.[89] Under pre-OECD treaties property temporarily in transit is considered situated at the place of destination.[90] The Greek treaty is an exception in that it contains no provision expressly covering property temporarily in transit.[91] Ships and aircraft are accorded more favorable treatment under pre-OECD treaties than under the Internal Revenue Code. The treaties fix situs at the place of registration or documentation.[92] In contrast, the Internal Revenue Code treats ships and aircraft as situated at the place of physical location.[93]

Example: N, a citizen and domiciliary of Norway, dies owning ships physically located in the United States but registered in Norway. By virtue of the Norwegian estate tax treaty, the ships are deemed situated in Norway, and as a result are not subject to United States estate tax.[94] In the absence of the treaty, the situs would be the physical location within the United States and the United States estate tax would apply.

3. Intangible Personal Property.

Each estate tax treaty contains situs rules governing categories of intangible personal property. The appropriate rule varies with the category. Categories include corporate stock, debt obligations, bank deposits, life insurance, and choses in action not represented by certificates. Corporate stock, under most pre-OECD treaties, is treated as situated in the country where the corporation was created or organized.[95] This is the same rule

89. Australia, art. III(1)(b); Canada, art. II(b); Finland, art. III(2)(b); Greece, art. IV(2)(b); Ireland, art. III(2)(b); Italy, art. III(1)(b); Japan, art. III(1)(b); Norway, art. III(2)(b); Union of South Africa, art. III(2)(b); *see also* Switzerland, art. IV(1)(c); Proposed Belgian Treaty, art. III(b).

90. Australia, art. III(1)(b); Canada, art. II(b); Finland, art. III(2)(b); Ireland, art. III(2)(b); Italy, art. III(1)(b); Japan, art. III(1)(b); Norway, art. III(2)(b); Union of South Africa, art. III(2)(b); *see also* Proposed Belgian Treaty, art. III(b).

91. Greece, art. IV. In the absence of an express provision the catchall clause may place situs at the decedent's domicile. *Id.* art. IV(2)(j); *see infra* notes 127-29 and accompanying text. The Swiss tax credit situs rules contain neither a provision governing property in transit nor a catchall clause. Switzerland, art. IV. In the absence of coverage the internal law of the jurisdiction whose taxes are at issue controls. *Id.* art. II(2).

92. Australia, art. III(1)(h); Canada, art. II(i); Finland, art. III(2)(e); Greece, art. IV(2)(b); Ireland, art. III(2)(f); Italy, art. III(1)(e); Japan, art. III(1)(e); Norway, art. III(2)(f); Union of South Africa, art. III(2)(f); *see also* Proposed Belgian Treaty, art. III(f). The Swiss tax credit situs rules contain no provision expressly covering ships or aircraft. Switzerland, art. IV(1). Thus, the more general situs rule covering movable property places situs at the physical location. *Id.* art. IV(1)(c).

93. This is the result for United States transfer taxes—estate, gift, and generation-skipping transfers. *See* I.R.C. §§ 2103, 2614(b)(2) (1976); Treas. Reg. §§ 20.2104-1(a)(2) (1982), 25.2511-3(b)(1) (1973); *see also* I.R.C. § 2105(c); Treas. Reg. § 20.2105-1(e) (1982) (special treatment for works of art on loan for exhibition in United States).

94. Norway, art. III(2)(f).

95. Canada, art. II(f); Finland, art. III(2)(d); Greece, art. IV(2)(f); Ireland, art. III(2)(b); Italy, art. III(1)(d); Japan, art. III(1)(d); Norway, art. III(2)(e); Union of South Africa, art.

contained in the Internal Revenue Code.[96] The Australian treaty is an exception in that it does not specifically address corporate stock situs. Thus, situs is governed by the catchall clause of that treaty.[97] The effect of the catchall clause is to leave determination of situs to the internal law of the country imposing the tax or allowing the credit.[98]

The situs of corporate bonds varies significantly. Several treaties place the situs of bonds in the jurisdiction of incorporation of the corporate obligor.[99] This treatment is less favorable than the Internal Revenue Code's estate tax rule, which treats bonds of a domestic corporation as having a foreign situs if the corporation derives less than twenty percent of its gross income from United States sources during the preceding three-year period.[100] Other treaties place situs at the decedent's domicile.[101]

Example: K, a citizen and domiciliary of Greece, dies owning bonds of a United States corporation. Under the Internal Revenue Code the bonds are treated as having a United States situs. If the Greek estate tax treaty is applied, however, situs of the bonds is placed at the decedent's place of domicile in Greece.[102]

Most pre-OECD treaties place the situs of promissory notes at the obligor's place of residence.[103] The Irish and South African treaties place situs at physical location.[104] The Norwegian treaty leaves the issue to internal law.[105]

Under three treaties, bank deposits are situated at the decedent's domicile.[106] This may lead to more favorable tax treatment than is provided by

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III(2)(d); *see also* Switzerland, art. IV(1)(a); Proposed Belgian Treaty, art. III(e). In United States v. Sinclair, 30 A.F.T.R.2d (P-H) ¶ 147,701 (D. Del. 1972), the stock of U.S. Steel, a domestic corporation, was deemed to have a United States situs under the Canadian treaty.

96. I.R.C. § 2104(a) (1976).

97. Australia, art. III(2).

98. Australia, in treaty negotiations, would not abandon its own internal situs rule. That rule regards shares as situated in Australia if the transfer of title may be accomplished on a stock transfer register located in Australia. *See* SEN. COMM. ON FOREIGN RELATIONS, REPORT ON DOUBLE TAXATION CONVENTION WITH BELGIUM AND AUSTRALIA, S. REP. NO. 2, 83d Cong., 1st Sess. 6 (1953).

99. Canada, art. II(f); Finland, art. III(2)(c); Italy, art. III(1)(c); Japan, art. III(1)(c); *see also* Switzerland, art. IV(1)(b); Proposed Belgian Treaty, art. III(c).

100. I.R.C. § 2104(c) (1976). This exception is implicitly included in the Norwegian treaty, since that treaty provides that the internal law of the country taxing on the basis of situs is controlling. Norway, art. III(2)(d).

101. Greece, art. IV(2)(1); Ireland, art. III(2)(c); Union of South Africa, art. III(2)(c). The Australian treaty places situs at the decedent's domicile if the bonds relate to a business establishment at domicile; otherwise, situs is at the debtor's residence. Australia, art. III(1)(c).

102. Greece, art. IV(2)(1).

103. *See, e.g.*, Canada, art. II(c); Finland, art. III(2)(c); Greece, art. IV(2)(g); Italy, art. III(1)(c); *see also* Switzerland, art. IV(1)(b); Proposed Belgian Treaty, art. III(d). This same result is reached under the catchall clause of the Japanese treaty. Japan, art. III(1)(c). The Australian treaty adopts the same approach used in the case of corporate bonds. Australia, art. III(1)(c).

104. Ireland, art. III(2)(b); Union of South Africa, art. III(2)(b).

105. Norway, art. III(2)(d).

106. Greece, art. IV(2)(j); Ireland, art. III(2)(c); Union of South Africa, art. III(2)(c); *see also* Estate of Vriniotis v. Commissioner, 79 T.C. 298 (1982) (analyzing article IV(2)(j) of Greek treaty).

the Internal Revenue Code.

Example: *T*, a citizen and domiciliary of Ireland, dies owning substantial bank deposits in the United States. The deposits are effectively connected with a United States trade or business that *T* conducted in the United States. Under the Internal Revenue Code the deposits are treated as having a United States situs.[107] The Irish treaty preempts the Internal Revenue Code rules, and treats the deposits as situated at *T*'s domicile in Ireland so that they are not taxed by the United States.[108]

Other treaties expand the scope of situs jurisdiction beyond that provided in the Internal Revenue Code by specifying that deposits are deemed situated where the bank is incorporated[109] or located.[110]

Example: *N*, a citizen and domiciliary of Norway, dies owning substantial bank deposits in the United States, none of which are effectively connected to a United States trade or business. Under the Norwegian treaty, since the bank where the deposits were made was organized in the United States, the deposits have United States situs.[111] Under the Internal Revenue Code, however, the deposits have a foreign situs and are not taxed. *N*'s estate elects Internal Revenue Code taxation.

The situs of life insurance proceeds under the Canadian, Irish, and South African treaties is placed at the decedent's domicile.[112] Life insurance proceeds receive the same treatment under the Internal Revenue Code's estate tax situs rule.[113] The Canadian treaty adopts the same approach for annuities and pensions that are not covered by the Internal Revenue Code exception.[114] Other treaties place the situs of life insurance proceeds at the insurer's place of residence or incorporation.[115] The Australian treaty, which also covers annuities, places situs where the proceeds are payable.[116] If there is no designated place of payment, situs is located at the debtor's residence or place of incorporation.[117]

Choses in action not represented by certificates include causes of action surviving for the benefit of the transferor's estate.[118] Estate tax treaties with Australia, Canada, Ireland, and South Africa place situs where the

107. I.R.C. § 2105(b) (1976).

108. The result is unfavorable if both Ireland and the United States determine that *T* was a domiciliary. The estate would then rely on the tax credit to avoid double taxation.

109. Finland, art. III(2)(c); Italy, art. III(1)(c); Norway, art. III(2)(c).

110. Australia, art. III(1)(c); Canada, art. II(d); Japan, art. III(1)(c).

111. Norway, art. (2)(c).

112. Canada, art. II(g); Ireland, art. III(2)(e); Union of South Africa, art. III(2)(e).

113. I.R.C. § 2105(a) (1976).

114. Canada, art. II(g). No other treaty expressly covers annuities or pensions. For these treaties the catchall clause will control. *See infra* notes 128-30 and accompanying text. In the absence of treaty, annuity and pension contracts enforceable against a United States person are United States situs property for estate taxation. I.R.C. § 2105(a) (1976).

115. Finland, art. III(2)(c); Japan, art. III(1)(c); Norway, art. III(2)(c); *see also* Switzerland, art. IV(1)(b).

116. Australia, art. III(1)(f).

117. *Id.*

118. Causes of action ex delicto are causes of action in tort. Only the Canadian treaty includes causes of action other than in tort. Canada, art. II(m).

cause of action arose.[119] This contrasts with the Internal Revenue Code estate tax rule, which treats a cause of action as having a United States situs if it is enforceable against a resident of the United States, a domestic corporation, or a governmental unit.[120]

Example: *S*, a citizen and resident of the United States, commits a tort in Ireland that creates a cause of action in favor of *I*. *I*, a domiciliary of Ireland, subsequently dies. The cause of action continues in favor of *I*'s estate. The situs of this cause of action under the Internal Revenue Code is in the United States, and would result in inclusion in the gross estate.[121] The Irish estate tax treaty modifies the Internal Revenue Code and treats the cause of action as situated in Ireland where it arose.[122]

Additional categories of intangible personal property covered by treaties are: (1) good will; (2) patents, trademarks, copyrights, and licenses; and (3) judgment debts. Good will is deemed situated at the place where the trade or business is carried on.[123] Patents and trademarks are situated at the place of registration or use,[124] while copyrights and licenses are located at the place where the rights are exercisable.[125] Estate tax treaties with Australia, Canada, Ireland, and South Africa provide that judgment debts have as their situs the place where the judgment is recorded or obtained.[126]

4. Catchall Clauses.

Property not otherwise specifically classified under pre-OECD situs rules is governed by a catchall clause. The catchall clauses of treaties with Greece, Italy, and Norway all place situs at the decedent's domicile.[127] The remainder of the treaties provide for situs to be determined by the law of the country attempting to tax on that basis.[128]

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119. Australia, art. III(1)(1); Canada, art. II(m); Ireland, art. III(2)(j); Union of South Africa, art. III(2)(j). The remaining estate tax treaties contain no specific provision for causes of action. Under these treaties the catchall clause will govern situs. This is also true of the Australian gift tax treaty which contains no provision for causes of action.

120. Treas. Reg. § 20.2104-1(a)(4) (1982).

121. *Id.*

122. Ireland, art. II(2)(j).

123. Australia, art. III(1)(i); Finland, art. III(2)(f); Greece, art. IV(2)(c); Ireland, art. III(2)(g); Italy, art. III(1)(f); Japan, art. III(1)(f); Norway, art. III(2)(g); Union of South Africa, art. III(2)(g). The Canadian treaty uses the term "carried on." Canada, art. II(j); *see also* Proposed Belgian Treaty, art. III(g).

124. Australia, art. III(1)(j); Canada, art. II(k); Finland, art. III(2)(g); Greece, art. IV(2)(d); Ireland, art. III(2)(h); Italy, art. III(1)(g); Japan, art. III(1)(g); Norway, art. III(2)(h); Union of South Africa, art. III(2)(h); *see also* Proposed Belgian Treaty, art. III(h).

125. Australia, art. III(1)(k); Canada, art. II(1); Finland, art. III(2)(h); Greece, art. IV(2)(e); Ireland, art. III(2)(i); Italy, art. III(1)(h); Japan, art. III(1)(h); Norway, art. III(2)(i); Union of South Africa, art. III(2)(i); *see also* Proposed Belgian Treaty, art. III(i).

126. Australia, art. III(l)(m); Canada, art. II(n); Ireland, art. III(2)(k); Union of South Africa, art. III(2)(k). The Australia gift tax treaty contains no provision for judgment debts. Thus, the catchall clause controls.

127. Greece, art. IV(2)(i); Italy, art. III(1)(i); Norway, art. III(2)(j); *see also* Proposed Belgian Treaty, art. III(k).

128. Australia, art. III(2); Canada, art. II; Finland, art. III(2)(i); Ireland, art. III(2); Japan, art. III(1)(k); Union of South Africa, art. III(2).

Example: *S*, a citizen and domiciliary of the United States, dies owning an interest in a partnership that conducted certain business activity in Japan. The Japanese treaty provides no specific situs rules for partnership interests. Under the catchall clause, the law of the country taxing on the basis of situs will control.[129] Japan, in determining situs for purposes of its situs tax, will apply its own internal law.

B. OECD-Type Treaties

The French, Netherlands, and United Kingdom treaties resolve the issue of situs by departing from the complex and comprehensive situs rules of earlier treaties. These treaties authorize situs taxation only for a few narrowly defined types of property. Jurisdiction to tax property not covered by these narrowly drawn rules is tied to domicile and such property cannot be taxed based on situs.[130] Thus, upon resolution of the threshold issue of domicile, the determination of the primary right of taxation for all of the transferor's assets, except those assets expressly subject to the narrow situs rules, is automatically made.[131]

The French treaty contains three classifications of property that may be taxed on the basis of situs: (1) "Immovable (real) property";[132] (2) "business property of a permanent establishment and assets pertaining to a fixed base used for the performance of professional services";[133] and (3) "tangible movable property."[134] All remaining property not covered by these situs rules may be subject to taxation by the jurisdiction of domicile but cannot be taxed based on situs.[135] In contrast, the Netherlands and United Kingdom treaties contain analogues for only the first two classifications.[136]

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129. Japan, art. III(1)(k).

130. The jurisdiction of domicile can tax even that property taxed on the basis of situs, but must allow a credit, or other appropriate reduction, for the situs tax. *See infra* notes 219-33 (analyzing credit for OECD-type treaties).

131. Analogous rules for determining situs are contained in the proposed Austrian, German, and United States Treasury Model treaties. *See* Proposed Austrian Treaty, arts. 5-7; Proposed German Treaty, arts. 5-9; Treasury Model Treaty, arts. 5-7.

132. France, art. 5.

133. *Id.* art. 6.

134. *Id.* art. 7. Currency is excluded from the scope of tangible movable property. *Id.* art. 7(1). Tangible movable property in transit has its situs at the place of destination. *Id.* Otherwise, under the French treaty there are three exceptions to the general rule that tangible movable property may be taxed at its situs. First, property of a permanent establishment and assets pertaining to a fixed base used for performance of professional services is situated where the permanent establishment or fixed base is located. *See infra* notes 145-47 and accompanying text. Second, property owned by a domiciliary of the jurisdiction of citizenship (under the special 5-of-7 or 7-of-10 year rules of article 4(3)) held for normal personal use of the domiciliary or his family can essentially be taxed only by the jurisdiction of citizenship. France, art. 7(2). Third, ships and aircraft operated in international traffic may be taxed where registered; otherwise they may be taxed by the jurisdiction whose harbors they most frequently use. *Id.* art. 7(3).

135. *Id.* art. 8. The United States can continue to tax worldwide transfers based on citizenship, but must allow a credit for any French tax based on either situs or domicile. *Id.* arts. 8, 12.

136. *See* Netherlands, arts. 6-7; United Kingdom, arts. 6-7; *see also* Proposed Austrian Treaty, arts. 5-6; Treasury Model Treaty, arts. 5-6. The proposed German treaty contains specific situs rules covering ships and aircraft, and interests in partnerships. *See* Proposed

Under these treaties, tangible personal property not otherwise falling within the scope of the two enumerated classifications escapes situs taxation.[137] Intangible personal property that does not fall within the scope of the situs classifications[138] escapes situs taxation under all three treaties.

Example: Van Kleffens, a citizen and domiciliary of the Netherlands, dies owning stock of a United States corporation and jewelry physically located in a safe deposit box in the United States. Neither type of property falls into an enumerated situs classification under the Netherlands treaty. Under the Internal Revenue Code, both the jewelry and stock are treated as United States situs property and included in Mr. Kleffen's gross estate.[139] The treaty can be applied to preempt the Internal Revenue Code and authorize taxation by the Netherlands (the jurisdiction of domicile).[140] Thus, the United States can tax neither the jewelry or the stock based on situs, and neither is included in Mr. Kleffen's gross estate.

The first classification of property that may be subject to situs taxation under the French, Netherlands, or United Kingdom treaties is immovable (real) property or its definitional analogue.[141] To the extent each treaty

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German Treaty, arts. 7-8. Ships and aircraft operated in international traffic and movable property pertaining to such ships and aircraft may be taxed at domicile but not situs. *Id.* art. 7. The situs rule covering interests in partnerships treats the partnership as a pass-through or look-through entity with respect to property otherwise covered by article 5 (immovable property) or article 6 (business property of a permanent establishment and assets pertaining to a fixed base used for performance of independent personal services). *Id.* art. 8. If the estate of a decedent domiciled in the United States contained an interest in a partnership that owned immovable property in both the United States and Germany, then Germany could tax only that part of the interest that corresponds to the immovable property in Germany. *Cf.* Treasury Model Treaty, art. 7(2) (related provision pertaining to partnerships and trusts).

137. The definition of immovable property (real property) under the United Kingdom treaty is broad enough to embody property ordinarily treated as tangible, personal property. *See* United Kingdom, art. 6(2) (property accessory to immovable property, livestock, and equipment used in agriculture and forestry), *see also* Proposed Austrian Treaty, art. 5, para. 2; Proposed German Treaty, art. 5, para. 2; Treasury Model Treaty, art. 5, para. 2. Business property of a permanent establishment or assets pertaining to a fixed base may also include tangible movable property. *See* France, art. 6; Netherlands, art. 7; United Kingdom, art. 7; *see also* Proposed Austrian Treaty, art. 6; Proposed German Treaty, art. 6; Treasury Model Treaty, art. 6.

Situs taxation is avoided by virtue of the express provision dealing with property not otherwise expressly covered under the situs rules. *See* France, art. 7; Netherlands, art. 8; United Kingdom, art. 5; *see also* Proposed Austrian Treaty, art. 7; Proposed German Treaty, art. 9; Treasury Model Treaty, art. 7. Property in transit, not otherwise covered, falls within the protection of this provision.

138. Intangible personal property may form part of the business property of a permanent establishment or assets pertaining to a fixed base. *See supra* note 137. Examples include securities, patents, and trademarks. *See* TREAS. DEP'T, TECHNICAL EXPLANATION OF THE U.S. MODEL ESTATE AND GIFT TAX TREATY, *reprinted in* I TAX TREATIES (P-H) ¶ 1021, at 1073 (1980).

139. I.R.C. §§ 2103, 2104(a) (1976).

140. Netherlands, art. 8.

141. *See* France, art. 5 (immovable (real) property); Netherlands, art. 6 (immovable property); United Kingdom, art. 6 (immovable property); *see also* Proposed Austrian Treaty, art. 5 (real property); Proposed German Treaty, art. 5 (immovable property); Treasury Model Treaty, art. 5 (real property).

contains a definition of this classification, that definition will control.[142] For example, each treaty expressly provides that debts secured by mortgages are included.[143] Otherwise, the scope of the classification is determined in accordance with the internal law of the situs jurisdiction.[144]

The second classification covered by all OECD-type treaties is business property of a permanent establishment and assets pertaining to a fixed base used for the performance of professional services.[145] The Netherlands estate tax treaty illustrates the approach to this classification. The article governing this category provides that assets forming part of the business property of a permanent establishment or a fixed base[146] may be taxed in the jurisdiction where that permanent establishment or fixed base is situated.[147] The definition of a permanent establishment is patterned after that found in income tax treaties. Thus, a permanent establishment will not exist unless there is a United States trade or business as well as satisfaction of either the fixed place of business or agency tests.[148] The Netherlands treaty includes specific examples of a fixed place of business.[149] Six specific activities may be conducted through a fixed place of business without giving rise to a permanent establishment.[150] Included

142. *See supra* notes 75-88 and accompanying text (discussion of applicable situs rules).

143. *See* France, art. 5(2); Netherlands, art. 6(2); United Kingdom, art. 6(2). The United Kingdom treaty further provides:

> The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated, provided always that debts secured by mortgage or otherwise shall not be regarded as immovable property. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats, and aircraft shall not be regarded as immovable property.

United Kingdom, art. 6(2). The proposed Austrian, German, and Model Treasury treaties contain language analogous to that quoted from the United Kingdom treaty. *See* Proposed Austrian treaty, art. 5, para. 2; Proposed German Treaty, art. 5, para. 2; Treasury Model Treaty, art. 5, para. 2. No such language is included in either the French or Netherlands Treaties. *See* France, art. 5; Netherlands, art. 6.

144. *See* France, art. 5(2); Netherlands, art. 6(2); United Kingdom, art. 6(2); *see also* Proposed Austrian Treaty, art. 5, para. 2; Proposed German Treaty, art. 5, para. 2; Treasury Model Treaty, art. 5, para. 2. The Netherlands and Model Treasury treaties look to the law of situs even if the situs is not a contracting state. *See* Netherlands, art. 6(2); Treasury Model Treaty, art. 5, para. 2. To the extent not expressly modified by treaty, explanations under the French and Netherlands treaties construe the classification as being synonymous with the definition of real property. *See supra* note 87 and accompanying text. In fact the Netherlands treaty expressly precludes taxation of this classification beyond that provided by internal law. Netherlands, art. 6(4).

145. *See* France, art. 6; Netherlands, art. 7; United Kingdom, art. 7; *see also* Proposed Austrian Treaty, art. 6; Proposed German Treaty, art. 6; Treasury Model Treaty, art. 6.

146. *See* Rev. Rul. 75-131, 1975-1 C.B. 389 ("fixed base" is virtually identical to "permanent establishment"); *see also* TREAS. DEP'T, *supra* note 62, at 89,557 (Appendix B) (concept of a fixed base is analogous to that of permanent establishment).

147. Netherlands, art. 7(1), (8).

148. *See* W. NEWTON, *supra* note 26, at §§ 5.11-.12.

149. Netherlands, art. 7(3).

150. *Id.* art. 7(4). Cumulative conduct of one or more of the activities is allowable. *Id.*

among the allowable activities is investment or trading in stocks, securities, or commodities for the decedent's own account. The decedent is treated as having a permanent establishment based on the agency test only if engaged in business through an agent who had and regularly exercised authority to conclude contracts in the decedent's name.[151] Only two allowable activities are excluded from the scope of this test. They are: (1) the authority to purchase goods or merchandise for the decedent; and (2) the authority to invest or trade in stocks, securities, or commodities for the decedent's own account.[152] Activities conducted by the decedent through an independent agent will not give rise to a permanent establishment.[153]

The practical impact of subjecting the permanent establishment or fixed base of a nondomiciliary to taxation in the United States may be minimized to a great extent. Rather than conducting business activities in the form of a sole proprietorship or partnership, the nondomiciliary may simply form a corporation. The decedent's stock in the corporation will, under the Netherlands treaty for example, be deemed situated in the decedent's domicile, and as a result is not taxed.[154]

Example: *N*, a citizen and domiciliary of the Netherlands, sells tulips in the United States through dependent agents who had and regularly exercised the authority to conclude contracts in *N*'s name. This activity is sufficient to give rise to a permanent establishment in the United States under the Netherlands treaty, the assets of which establishment would be included in *N*'s estate. If, however, *N* incorporates this business activity, the stock reflecting the underlying assets is not included in the gross estate. Since the stock is treated as situated at *N*'s domicile in the Netherlands, the result is the same whether the corporation is domestic or foreign.[155]

VII. DEDUCTIONS AND EXEMPTIONS

Transfer tax treaties tend to expand the scope of deductions and exemptions beyond what would otherwise be allowable under the Internal Revenue Code.[156] The treaties accomplish this by carving out a series of express exceptions to internal law. The expansion is much more evident in

151. Netherlands, art. 7(5).

152. *Id.*

153. *Id.* art. 7(6).

154. Netherlands, arts. 7(2), 8; *see also* TREAS. DEP'T, *supra* note 138, at 1074 (under article 7 of model treaty, United States surrenders right to tax shares of domestic corporate stock). If the requirements of I.R.C. § 1014(b)(1) (1976) are satisfied, the stock will also attain a step-up in basis. *See* W. NEWTON, *supra* note 26, at § 4.65. The effect of this step-up in basis would be of particular benefit if the domestic corporation was a United States real property holding corporation under I.R.C. § 897 (Supp. V 1981). In this event an I.R.C. § 337 (1976 & Supp. V 1981) liquidation could be effected without regard to the I.R.C. § 897(i) (Supp. V 1981) election.

155. The stock of a domestic corporation has a United States situs under the Internal Revenue Code for federal estate tax. I.R.C. § 2104(a) (1976). The stock of a foreign corporation does not. Treas. Reg. § 20.2105-1(f) (1982).

156. This advantage under a number of treaties extends to citizens and domiciliaries of the United States, but only to domiciliaries of the other treaty jurisdiction. *See supra* notes

OECD-type than in pre-OECD treaties.[157] The Canadian pre-OECD treaty authorizes a foreign charitable deduction.[158] In contrast, direct charitable transfers to foreign organizations by nondomiciliaries are not deductible from federal estate tax under the Internal Revenue Code.[159] In addition, the Canadian treaty contains a threshold limitation exempting smaller estates from taxation for administrative convenience.[160] This limitation exempts from United States situs taxation taxable estates of Canadian nondomiciliaries not exceeding $15,000. If the taxable estate exceeds $15,000, the tax is the lesser of: (1) the amount by which such estate exceeds $15,000, or (2) the tax computed after allowance of a specific exemption of $2,000.[161]

The Greek pre-OECD treaty provides further expansion. It grants citizens and domiciliaries of the respective contracting states:

> [E]very abatement, exemption, deduction, or credit (except the marital deduction provided by the United States Revenue Act of 1948) . . . in an amount not less than the proportion thereof which the value of the property, situated . . . in such State and subject to the tax of such State, bears to the value of the property which would have been subject to the tax of such State if the decedent had been domiciled in its territory . . . .[162]

A number of pre-OECD treaties authorize only an analogue of the exemption referred to in the Greek treaty.[163] Otherwise these treaties provide no express benefit in terms of deductions or exemptions.[164]

3-5, 32, and accompanying text. Most treaties extend this advantage to taxpayers who are citizens or domiciliaries of either contracting state. *See supra* note 32.

157. The foreign contracting state may expand reciprocal benefits accorded United States citizens or domiciliaries to a more significant degree. *See, e.g.*, Finland, art. IV(2); Proposed Belgian Treaty, art. IV(2).

158. Canada, art. III, para. 2. No proration is required for this deduction. *Id.*

159. I.R.C. § 2106(a)(2) (1976).

160. Canada, art. IV, para. 1(b). The exemption applies only to property taxed on the basis of situs. *Id.*

161. The reference to a specific exemption of $2,000 corresponds to the estate tax exemption allowed under the Internal Revenue Code prior to the Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1541. *See* Rev. Rul. 81-303, 1981-2 C.B. 255.

162. Greece, art. V(a). The treaty expressly excludes "the marital deduction provided by the United States Revenue Act of 1948." *Id.* The present marital deduction available to United States citizens and domiciliaries is provided by the Internal Revenue Code of 1954, rather than the Revenue Act of 1948. I.R.C. § 2056 (1976 & Supp. V 1981). Because the marital deduction provided by the 1954 Code is not expressly excluded, it can be argued that it is allowable under the general language of the Greek treaty authorizing "every . . . deduction" provided by United States internal law. Greece, art. V(a).

163. Australia, art. IV(2)(a); Finland, art. IV(1)(a), (2)(a); Italy, art. IV(a); Japan, art. V(2); Norway, art. IV(a); Switzerland, art. III.

164. A number of treaties provide no benefits, but simply incorporate deductions, exemptions, and credits otherwise available to nondomiciliaries under the Internal Revenue Code. Ireland, art. IV(1); Union of South Africa, art. IV(1). Other treaties support the truism that deductions will be permitted to the extent authorized by internal law. *See* Australia, art. IV(1); Canada, art. III, para. 1; Ireland, art. IV(1); Union of South Africa, art. IV(1). Of these, only the Canadian treaty in incorporating local law expressly refers to debts. Canada, art. III, para. 1. Another standard provision is that a jurisdiction in determining its rate of tax shall take no account of property situated outside its territory. *See* Australia, art. IV(2)(b); Canada, art. IV, para. 1(a); Greece, art. V(b); Ireland, art. IV(2); Italy, art. IV(b);

To the extent the express benefit of a prorated exemption is provided, Revenue Ruling 01-303[165] construed the provision in a manner that rendered it virtually meaningless. The ruling concluded that reference to an exemption[166] incorporated no portion of the unified credit provided by section 2010 of the Internal Revenue Code.[167] The Tax Court rejected this result in *Estate of Burghardt v. Commissioner*.[168] The court held that the term "specific exemption" included in the Italian treaty[169] incorporated a portion of the unified credit.[170]

The expansion of deductions and exemptions is much more evident in OECD-type treaties. The French treaty provides expansion by way of a

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Japan, art. IV(b); Norway art. IV(b); Union of South Africa, art. IV(2); *see also* Estate of Vriniotis v. Commissioner, 79 T.C. 298, 310 (1982) (Greece, art. V(b), extends only to nondomiciliary aliens of United States).

165. Rev. Rul. 81-303, 1981-2 C.B. 255.

166. The ruling uses the term "specific exemption" rather than "exemption" as stated in the Greek treaty. *See* Greece, art. V(a).

167. United States citizen and domiciliary decedents are entitled to a phased-in unified credit of $192,800 for 1987 and later years. I.R.C. § 2010 (1976 & Supp. V 1981). This is equivalent to an exemption from the taxable estate of $600,000. *Id.* § 2001(c) (Supp. V 1981). In contrast, a nondomiciliary's taxable estate is allowed a credit of only $3,600, which corresponds to an exemption of $60,000. *Id.* § 2101(d) (1976).

The ruling reached its conclusion with respect to the Australian, Finnish, Greek, Italian, Japanese, Norwegian, and Swiss estate tax conventions. *Cf.* Ltr. Rul. 8137015 (same conclusion, but only for Italian estate tax convention). The conclusion does not expressly apply to the former gift tax exemption covered under the Australian and Japanese treaties. The ruling relied on three distinct grounds. First, the treaty reference to a specific exemption was keyed to the $60,000 estate tax exemption as it existed prior to repeal by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520. The prior exemption and unified credit were said to operate in a different manner. Second, the unified credit replaced exemptions for both estate and gift taxes and the Swiss treaty at issue covered only estate taxes. Third, the unfavorable tax impact falling on estates of nondomiciliaries relative to those of United States citizens and domiciliaries was thought to have diminished.

Of these three grounds, the second would apply to the Australia gift tax treaty, but would be inapplicable to the unified Japanese estate and gift tax treaty. The third ground is questionable since nondomiciliaries continue not to be allowed a marital deduction, and their estate tax credit by 1987 will be only one-tenth (1/10) that of United States citizens and domiciliaries. Furthermore, an issue not addressed by the ruling is whether the prior estate and gift tax exemptions provided by the Internal Revenue Code have continued treaty viability. Resolution depends on whether treaty language is frozen to the prior point in time or is dynamic in that subsequent Code amendments are automatically incorporated. For example, at the time of adoption of the Australian gift tax treaty and Japanese unified treaty, which also covers the gift tax, the United States extended to its citizens and domiciliaries a gift tax exemption of $30,000. With the unification of the estate and gift taxes under the Tax Reform Act of 1976, no exemption for United States citizens and domiciliaries is presently available. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520-33. Since both treaties appear to incorporate the law of the situs country in effect at the time the gift is made rather than when the treaties were ratified, it seems this benefit may have been eliminated as to nondomiciliary aliens of the United States. Australia, art. IV(2)(a); Japan, art. IV(a); *see also* DEP'T OF STATE, REPORT ON THE GIFT TAX CONVENTION WITH AUSTRALIA, *reprinted in* I TAX TREATIES (P-H) ¶ 15,731, at 15,752 (1980) (emphasizing that "present" exemption provided by United States law is $30,000); DEP'T OF STATE, REPORT ON THE ESTATE TAX CONVENTION BETWEEN THE UNITED STATES AND GREECE, *reprinted in* I TAX TREATIES (P-H) ¶ 41,601, at 41,572 (1980) (suggesting this result).

168. 80 T.C. 705 (1983).

169. *See* Italy, art. IV(a).

170. The effect was to allow a proportionate share of the I.R.C. § 2010 unified credit to a German citizen residing in Italy. 80 T.C. at 706.

deduction for debts,[171] a deduction for charitable transfers,[172] and a marital deduction.[173] Debts under the Internal Revenue Code are deductible in full only if the indebtedness is nonrecourse;[174] otherwise proration is required.[175] The French treaty provides expansion where the debts pertain to a permanent establishment, fixed base, or ships and aircraft operated in international traffic.[176] These debts are deductible in full without regard to any proration required under internal law.[177] The French treaty also authorizes a deduction for foreign charitable transfers provided three conditions are satisfied,[178] and a marital deduction, which is implemented through two distinct approaches that vary depending on whether the French or United States tax is at issue. In the case of the French tax, property acquired for consideration by United States citizens or domiciliaries during marriage is automatically deemed community property.[179] Thus, French tax is imposed on only one-half the value of the property. If the United States tax is at issue, a French domiciliary may claim the marital deduction in effect on November 24, 1978, when the treaty was adopted.[180] The rate of tax is the higher one applicable to United States

171. France, art. 9.

172. *Id.* art. 10.

173. *Id.* art. 11.

174. Estate of Harcourt Johnstone v. Commissioner, 19 T.C. 44 (1952).

175. I.R.C. § 2106(a)(1) (1976); Treas. Reg. § 20.2106-2 (1976).

176. France, art. 9(2)(b).

177. *Id.* Otherwise, the French treaty incorporates internal law. *Id.* art. 9(1). The Netherlands treaty contains no provision relating to debts. The United Kingdom and Treasury Model treaties merely incorporate local law without providing expansion. United Kingdom, art. 8(1); Treasury Model Treaty, art. 8, para. 1.

The proposed Austrian treaty allows full deduction of all debts irrespective of the jurisdictional basis for imposition of taxation. *See* Proposed Austrian Treaty, art. 8. The proposed German treaty provides for deductions in full for all property subject to situs taxation. *See* proposed German Treaty, art. 10, para. 1. The Treasury Department's Technical Explanation states that the reference to debts in article 10 of the German treaty covers all expenses and indebtedness, including administrative. *See* TREAS. DEP'T, *supra* note 60, at 39,620. Thus, if article 10 is claimed, the prorata amount of administrative expenses normally claimed will be unavailable. *Id.*

178. France, art. 10. The conditions are that the entity receiving the transfer must: (1) have tax exempt status in the jurisdiction in which it is organized; (2) be organized exclusively for religious, charitable, scientific, literary, or educational purposes; and (3) receive a substantial part of its support from contributions from the public or from government funds. *Id.* art. 10(2). Transfers to a governmental entity of the contracting states are deductible only if specifically limited to a religious, charitable, scientific, literary, or educational purpose. *Id.* art. 10(3).

The Netherlands, United Kingdom, and proposed Austrian treaties do not cover charitable transfers. The proposed German and Treasury Model treaties do. Proposed German Treaty, art. 10, para. 2; Treasury Model Treaty, art. 8, para. 3. In contrast with the French treaty, the proposed German treaty authorizes charitable transfers to governmental entities of the contracting states even for exclusively public purposes. *Compare* Proposed German Treaty, art. 10, para. 2; *with* France, art. 10(3).

179. France, art. 11(1). Community property treatment applies unless the spouses expressly elect otherwise. *Id.*

180. France, art. 11(2). At that time the marital deduction was limited to the greater of $250,000 or one-half (½) of the adjusted gross estate. Due to the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, the deduction is now unlimited in amount. *See* I.R.C. § 2056 (1976 & Supp. V 1981).

citizens or domiciliaries.[181] If the tax is less without the marital deduction and with the lower nondomiciliary rates, the lesser tax is the amount due.[182]

The Netherlands and United Kingdom OECD-type treaties also contain a marital deduction.[183] The United Kingdom treaty provides a reciprocal marital deduction to citizens and domiciliaries of the respective contracting states.[184] Unlike the French treaty, the deduction extended to citizens and domiciliaries of the United Kingdom for purposes of the United Kingdom tax is not by its terms tied to any specific point in time,[185] nor does it contain any specific percentage limitation.[186] This raises the viable contention that the unlimited marital deduction now reflected in section 2056 of the Internal Revenue Code[187] is incorporated directly into the treaty.[188]

The deduction provided by the Netherlands treaty is actually in the nature of an exemption.[189] In addition, the Netherlands marital deduction applies only for the purpose of the Netherlands situs tax. In order to claim this benefit, separate (noncommunity) property must pass to the surviving spouse from a decedent who was a United States citizen or domiciliary. The property is included in the estate and subjected to the Netherlands transfer duty only to the extent its value exceeds fifty percent of the value of all property included in the Dutch estate.[190]

In addition to the marital deduction, the Netherlands treaty provides a further benefit.[191] As in the case of the pre-OECD Canadian treaty, it

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181. France, art. 11(2). *Compare* I.R.C. § 2001(c) (Supp. V 1981) (rates for United States citizens and domiciliaries); *with* I.R.C. § 2101(d) (1976) (rates for nondomiciliaries).

182. France, art. 11(2).

183. *See* Netherlands, art. 10(1); United Kingdom, art. 8(2)-(4).

184. United Kingdom, art. 8(2)-(4).

185. *Compare* United Kingdom, art. 8(2); *with* France, art. 8(2).

186. *See, e.g.*, Netherlands, art. 10(1) (percentage limitation of 50%).

187. I.R.C. § 2056 (1976 & Supp. V 1981).

188. This conclusion seems warranted by the express language of United Kingdom, art. 8(3). *But see* TREAS. DEP'T, *supra* note 62, at 89,549 (analyzing limitations imposed prior to unlimited marital deduction).

The proposed Austrian treaty provides no marital deduction, a treaty marital deduction being considered unnecessary because of Austria's low tax rate on transfers to a surviving spouse. *See* SEN. COMM. ON FOREIGN RELATIONS, REPORT ACCOMPANYING U.S.—AUSTRIAN ESTATE AND GIFT TAX TREATY, S. EXEC. REP. NO. 97-60, 97th Cong., 2d Sess., *reprinted in* I TAX TREATIES (P-H) ¶ 16,617, at 16,584 (1980). A limited marital deduction is reflected in both the proposed German and Treasury Model Treaties. *See* Proposed German Treaty, art. 10, para. 4; Treasury Model Treaty, art. 8, para. 4.

189. Netherlands, art. 10(1).

190. The marital exemption is unavailable during any period when the United States tax on nondomiciliary estates is substantially less favorable in relation to estates of citizens and domiciliaries than when the treaty was signed on July 15, 1969. Netherlands, art. 11(3). With adoption of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, this may well be the case. The effect was to reduce the rate of taxation, increase the unified credit, and provide an unlimited marital deduction but only for United States citizens and domiciliaries.

191. Otherwise, there is virtually no further expansion of deductions and exemptions provided by OECD-type treaties. The proposed German treaty does not provide an exemption for certain pensions, annuities, and other amounts. Proposed German Treaty, art. 10, para. 3. The Treasury Model treaty contains a clause merely incorporating the Internal

contains a threshold limitation for administrative convenience.[192] This limitation specifies that the situs tax will not be imposed if the value of the estate after all deductions does not exceed $30,000. Where the value does exceed $30,000, the tax will not exceed the lesser of (1) fifty percent of the value in excess of $30,000, or (2) the amount of tax determined under the treaty.[193] The threshold limitation when coupled with the marital deduction can be quite beneficial.

> *Example:* "*D*, a United States citizen and domiciliary, own[s] Dutch immovable property (his only Dutch property) valued under Dutch law at $200,000 and subject to a $150,000 mortgage. *D* devise[s] the property, which [is] not community property, to *W*, his wife. Under Dutch law, the mortgage is entirely deductible from the Dutch property in determining the taxable estate. Accordingly, the net Dutch estate is $50,000. Under Article 10(1), a marital exemption of 50 per cent of that amount, or $25,000, is allowable. The $30,000 exemption eliminates the remaining $25,000 of the estate so there is no taxable estate for purposes of the Dutch transfer duty."[194]

VIII. TREATY TAX CREDIT

The treaty tax credit is the principal method used in transfer tax treaties for minimizing the extent of double taxation.[195] It determines which country has the primary right of taxation and which must grant the credit.[196] The credit has particular importance where the taxes at issue are the gift and generation-skipping transfer taxes, because there is no corresponding

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Revenue Code unified credit for nondomiciliaries under I.R.C. § 2102(c)(1) (1976). Treasury Model Treaty, art. 8, para. 5.

Interestingly, the Soviet Union income tax treaty exempts gains of Soviet residents, derived from United States sources, from the sale or other disposition of property received as a result of inheritance or gift. Union of Soviet Socialist Republics Income Tax Treaty, art. III, para. 1(c). Ltr. Rul. 8216073 construes this provision as exempting gain derived from sale of a United States real property interest at least through the end of 1984. *See* I.R.C. § 897 (Supp. V 1981); *see also* Ltr. Rul. 8121084 (distribution of assets for estate planning does not qualify for reduced income tax treaty dividend withholding rate).

192. Netherlands, art. 10(2). No other existing or proposed OECD-type treaty contains this benefit.

193. Netherlands, art. 10(2).

194. TREAS. DEP'T, *supra* note 14, at 66,637.

195. The credit does not apply in every instance to eliminate totally the impact of double taxation. To the extent it does not, a further method of minimizing the level of double taxation is provided through the mutual agreement procedure expressly reflected in every transfer tax treaty except that with Ireland. *See* Australia, art. VII; Canada, art. XI, Finland, art. X; France, art. 14; Italy, art. VIII; Japan, art. VII; Netherlands, art. 13; Norway, art. XI; Switzerland, art. VI; Union of South Africa, art. XI; United Kingdom, art. 11; *see also* Proposed Belgian Treaty, art. VII; Proposed German Treaty, art. 13. Yet, there are limits even on this procedure. It is not triggered unless the taxpayer demonstrates double taxation not in accordance with or contrary to the terms of the convention. *See, e.g.*, Rev. Rul. 56-251, 1956-1 C.B. 846 (procedure not activated; double taxation not contrary to terms of prior French treaty).

196. A threshold issue is whether the tax is one which is creditable. *See* Rev. Rul. 82-82, 1982-1 C.B. 127 (tax on deemed dispositions not creditable under Canadian treaty); *see also supra* notes 15-18. A further issue is what taxpayers are entitled to claim treaty benefits. *See supra* notes 36-40.

Internal Revenue Code credit for these taxes.[197] In the case of United States citizens and domiciliaries abroad, the absence of such credits may trigger double taxation if both the United States and the foreign jurisdiction tax the same transfer.[198]

Example: Alexander Jefferson is a citizen and domiciliary of the United States. He makes a gift of property situated in Spain (a noncontracting state). If the property is subject to both Spanish and United States gift taxes, the United States will allow no credit for the gift tax imposed by Spain. Were the gift subject to a tax treaty, the treaty tax credit would have been available.[199]

In contrast to the gift and generation-skipping transfer taxes, the Internal Revenue Code does provide a corresponding credit for foreign death taxes.[200] Estates of United States citizens or domiciliaries are entitled to claim either the Internal Revenue Code or treaty credit,[201] whichever is more beneficial.[202] Although elements of Internal Revenue Code and treaty credits typically cannot be combined, a narrow exception exists where taxes are imposed both by a foreign jurisdiction and by its political subdivisions.[203] The exemption allows the combining of Internal Revenue Code and treaty credits with respect to taxes imposed by the political subdivision provided there is no double credit benefit.[204]

The approach adopted by pre-OECD and OECD-type treaties in extending the credit differs. Pre-OECD treaties are more complex, and ordinarily provide both a primary and a secondary credit.[205] Both credits are directly connected to the treaty situs rules. The result is greater consistency in application of the rules with a consequent reduction in the inci-

197. *See* W. NEWTON, *supra* note 26, § 3.56 (double taxation of gifts), § 7.20 (credits).

198. The foreign jurisdiction may allow an internal credit or other reduction for the United States tax.

199. *See* Rev. Rul. 66-119, 1966-1 C.B. 359 (credit for United States citizen under Australian gift tax treaty).

200. I.R.C. § 2014 (1976).

201. Both Code and treaty credits also exist for income taxation. *See* I.R.C. §§ 901-906 (1976 & Supp. V 1981).

202. Treas. Reg. § 20.2014-4(a)(1) (1982); *see also* Japan, art. V(3) (emphasizing only one credit, not both, must be selected). This does not mean the greater of the Code or treaty credits is always the more beneficial. *See, e.g.*, Treas. Reg. § 20.2014-4(a)(2) (1982) (selection of Code versus treaty credit may impact on I.R.C. § 2013 (Supp. V 1981) tax on prior transfers). If a number of different foreign jurisdictions tax the same transfer, either a Code or treaty credit may be claimed for each specific jurisdiction. Treas. Reg. § 20.2014-1(a)(2) (1976). In any event the Code credit is narrower than the treaty credit in that it connects directly with the Code situs rules. I.R.C. §§ 2103-2105 (1976). These rules may be inconsistent with those of the foreign jurisdiction imposing a situs tax on United States citizens or domiciliaries, leading to a greater propensity for double taxation.

203. Treas. Reg. § 20.2014-4(b)(3) (1982); *cf.* Rev. Rul. 72-6, 1972-1 C.B. 306 (death taxes paid to Canadian province of Ontario allowed a credit under § 2014).

204. This approach was adopted because taxes of political subdivisions of certain foreign jurisdictions, though creditable under the Code, were not covered by treaty. It was believed paradoxical that the presence of a treaty could result in loss of a benefit otherwise allowable under internal law. *See* SEN. COMM. ON FOREIGN RELATIONS, *supra* note 78, at 22,557 (Article V); *see also* Treas. Reg. § 20.2014-4(b)(3)(ii) (1982) (taxes of political subdivision must not otherwise be creditable under § 2014).

205. Exceptions are the Italian and Swiss treaties, which contain no secondary credit. *See* Italy, art. V; Switzerland, art. IV.

dence of double taxation. The primary credit is ordinarily allowable where one or both contracting states impose a tax based on personal status.[206] The taxing jurisdiction must grant a credit for the tax imposed by the other jurisdiction on property that has its situs within the other jurisdiction.[207] The amount of the credit cannot exceed that portion of the tax imposed by the crediting country attributable to the property.[208]

Example: *S*, a citizen of the United States, dies leaving property, some of which is situated in the United States and some of which is situated in Ireland. Pursuant to the Irish treaty, Ireland and the United States make independent determinations of domicile.[209] Each finds *S* was domiciled in its territory. Since both countries tax worldwide assets based on domicile,[210] *S*'s total assets of $600,000 will be taxed by both Ireland and the United States. Of this total, assets of $400,000 are located in the United States and $200,000 are in Ireland. Ireland will allow a credit for the United States tax paid with respect to the $400,000 in assets situated in the United States. Conversely, the United States will allow a credit for the Irish tax paid with respect to the $200,000 in assets situated in Ireland.[211]

Example: *U*, a citizen and domiciliary of the United States, makes a gift of property having a Japanese situs to *X*, who is also a domiciliary of the United States. The United States taxes the gift because of *U*'s United States citizenship and domicile. Japan taxes the gift because the situs of the property is in Japan. Under the Japanese treaty, the United States is required to credit the amount of the Japanese tax against the United States gift tax.[212] The credit is limited by the amount of the United States tax attributable to the property.[213] In the

206. *See* Australia, art. V(1); Canada, art. V, para. 1; Finland, art. V(1)-(2). Greece, art. VI(1); Ireland, art. V(1); Italy, art. V(1); Japan, art. V(1); Norway, art. V(1); Union of South Africa, art. V(1)-(3)(a). The Swiss and proposed Belgian treaties require both jurisdictions to tax based on personal status. *See* Switzerland, art. IV(1); Proposed Belgian Treaty, art. V(1).

207. The primary credit is inapplicable if the property has its situs in neither of the contracting states. *See, e.g.*, Rev. Rul. 56-251, 1956-1 C.B. 846 (property under prior French treaty had situs in neither United States nor France). The credit is also unavailable if the property is deemed situated in both contracting states or is otherwise subject to the secondary credit. *See* Australia, art. V(1); Canada, art. V, para. 1; Finland, art. V(1)-(2); Greece, art. VI(1); Ireland, Art. V(1); Italy, art. V(1); Japan, art. V(1); Norway, art. V(1); Switzerland, art. IV(1); Union of South Africa, art. V(1)-(3)(a); *see also* Proposed Belgian Treaty, art. V(1).

208. *See* Australia, art. V(1); Canada, art. V, para. 1; Finland, art. V(1)-(2); Greece, art. VI(1); Ireland, art. V(1); Italy, art. V(1); Japan, art. V(1); Norway, art. V(1); Switzerland, art. IV(1); Union of South Africa, art. V(1)-(3)(a); *see also* Proposed Belgian Treaty, art. V(1).

209. Ireland, art. III(1), expressly authorizes each contracting state to determine whether the decedent was domiciled in its territory at death.

210. *See* SEN. COMM. ON FOREIGN RELATIONS, *supra* note 47, at 41,582 (Ireland taxes worldwide transfers of domiciliaries for its estate duty).

211. Ireland, art. V(1).

212. Japan, art. V(1).

213. *Id.* The Japanese unified treaty, covering both estate and gift taxes, allows a credit for estate tax only against estate tax and a credit for gift tax only against gift tax. *Id.* art. V(4). This means no credit for estate tax of one jurisdiction may be taken against the gift tax of the other. Conversely, no credit for gift tax may be taken against estate tax.

absence of the treaty, *U* would be taxed under the Internal Revenue Code and would receive no offsetting credit for the Japanese situs tax.

Pre-OECD treaties also typically provide a secondary credit. The secondary credit is ordinarily available where both contracting states tax on the basis of personal status[214] with respect to property deemed to be situated within both contracting states or outside both.[215] The secondary credit is limited to the lesser of (1) the amount of the crediting country's tax attributable to the property, or (2) the amount of the other contracting country's tax attributable to the property, multiplied by the relation the crediting country's tax bears to the sum of both countries' taxes. This limitation is demonstrated by the following equation:

$$\text{Secondary Credit} = \text{Lesser of crediting country's or other country's tax attributable to the property} \times \frac{\text{Crediting country's tax so attributable}}{\text{Crediting country's tax so attributable} + \text{Other country's tax so attributable}}$$

Example: *D* dies leaving a gross estate of $500,000. Of this amount, $50,000 of assets are situated in Denmark (a nontreaty country). Pursuant to the Norwegian treaty, both Norway and the United States determine that *D* was domiciled in their territory at death.[216] Since both countries tax worldwide assets based on domicile,[217] *D*'s total assets, including the $50,000 of assets in Denmark, are subjected to tax by both. Furthermore, since the Danish assets are located outside both treaty countries, the secondary credit applies.[218] If the United States tax (before the credit computation) attributable to the $50,000 in Danish assets is $5,000, and the Norwegian tax (before the credit) attributable to that same Danish property is $6,000, the secondary credit allowed by the United States is:

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214. To claim the secondary credit, both jurisdictions must tax based on the designated personal status. In all treaties but those with Greece, Ireland, and the Union of South Africa, this includes both citizenship and domicile (or its analogous personal status). *See* Australia, art. V(2); Canada, art. V, para. 2; Finland, art. V(3); Japan, art. V(2); *see also* Proposed Belgian Treaty, art. V(2). The Greek, Irish, and South African treaties authorize the credit based only on domicile and not on citizenship. *See* Greece, art. VI(2); Ireland, art. V(2); Union of South Africa, art. V(3)(b). This means a United States citizen domiciled in either of these three jurisdictions, but not found domiciled in the United States, is unable to claim the secondary credit. *See, e.g.*, Rev. Rul. 56-251, 1956-1 C.B. 846 (United States citizen domiciled only in France unable to claim credit under prior French treaty).

215. *See* Australia, art. V(2); Canada, art. V, para. 2; Finland, art. V(3); Ireland, art. V(2); Norway, art. V(2); Union of South Africa, art. V(3)(a). The Japanese treaty expands the secondary credit to cover property deemed by: (i) one country to be situated in either country and by the other to be situated outside both countries, and (ii) each country to be situated in the other country. Japan, art. V(2). The Greek treaty contracts the credit to cover only property situated outside both. Greece, art. VI(2).

216. Norway, art. III(1)-(2).

217. *See* SEN. COMM. ON FOREIGN RELATIONS, *supra* note 47, at 41,584 (Norway taxes worldwide transfers of domiciliaries for its tax on inheritances).

218. Norway, art. V(2).

$$\$5{,}000 \times \frac{\$5{,}000}{\$11{,}000} = \$2{,}272.73$$

and the credit allowable by Norway is:

$$\$5{,}000 \times \frac{\$6{,}000}{\$11{,}000} = \$2{,}727.27$$

The primary and secondary credits are computed only after allowance has been made for credits otherwise allowed under the internal law of the treaty partners.[219] The primary and secondary credits cannot exceed the amount of the crediting country's tax attributable to the property.

The credit provisions of OECD-type treaties are simpler and more straightforward. They permit each transfer to be subject to primary taxation in only one of the two treaty jurisdictions. Though both may tax, one of the two must allow a credit against its tax for that paid to the other. The jurisdiction whose taxes are to be credited has the right of primary taxation. The right of primary taxation extends first to the jurisdiction taxing on the basis of situs.[220] This means that the jurisdiction taxing on the basis of personal status must credit the situs tax imposed by the other contracting state.[221] In the case of the United States, it must credit the situs tax of the other jurisdiction against its own tax based on citizenship or domicile.

Simplification under OECD-type treaties also results from rules designed to breach any deadlock based on findings of double domicile.[222] The effect is to determine the ultimate *fiscal domicile*.[223]

Example: *N* has business and family ties with both the Netherlands and the United States and owns real property located in each. *N* dies in 1983. Though *N* was a citizen of neither, both the Netherlands and the United States determine under internal law that *N* at death was a domiciliary.[224] Prior to death *N* had made his permanent home in the United States for more than five years. Thus, under the treaty *N*'s fiscal domicile at death was the United States.[225] The United States may tax *N*'s worldwide assets including the realty situated in the Netherlands. The Netherlands has primary taxing jurisdiction, however, over the realty based on situs.[226] The United States must credit

219. *See* Australia, art. V(3); Canada, art. V, para. 3; Finland, art. V(3); Greece, art. VI(3); Ireland, art. V(4); Italy, art. V(2); Japan, art. V(3); Norway, art. V(3); Switzerland, art. IV(2); Union of South Africa, art. V(4); Proposed Belgian Treaty, art. V(3); *see also* Rev. Rul. 73-240, 1973-1 C.B. 399 (death rebates received from Canadian province of Alberta considered reduction under Canadian treaty).

220. *See supra* notes 130-55 and accompanying text.

221. *See* France, art. 12(2)(b)(i); Netherlands, art. 11(1); United Kingdom, art. 9(1)(a), (2)(a); *see also* Proposed Austrian Treaty, art. 9, para. 2(a); Proposed German Treaty, art. 11, paras. 2(a), 3(a); Treasury Model Treaty, art. 9, paras. 1(a), 2(a). An exemption rather than a credit is provided for the Austrian and French taxes. *See* Proposed Austrian Treaty, art. 9, para. 5; France, art. 12(2)(a). Both countries in computing the rate of tax may take into account the exempted property. *Id.*

222. *See supra* notes 67-74 and accompanying text.

223. *See supra* note 67 and accompanying text.

224. Netherlands, art. 4(1).

225. *Id.* art. 4(3)(a).

226. *Id.* art. 6.

the Netherlands situs tax against its own based on domicile.[227] The deadlock-breaking rules do not preclude the United States from taxing worldwide transfers by its citizens, including those having their fiscal domicile in the other contracting state.[228] Where this occurs, the French and United Kingdom treaties extend the right of primary taxation to the country of fiscal domicile.[229] The United States, then, is required to credit the tax based on fiscal domicile against its own based on citizenship.

Example: Gary Brown is a United States citizen whose fiscal domicile is in France. He makes a gift of property. The gift is taxed by France based on domicile and by the United States based on citizenship. The United States allows a credit for the French gift tax.[230]

The Netherlands treaty is more complex. Where one jurisdiction taxes on the basis of citizenship and the other on the basis of domicile, additional provisions come into play. The Netherlands treaty specifies:[231] (1) If a citizen of one country was domiciled in the other for seven or more years, the country of citizenship will allow a credit for the tax imposed by the other country. (2) If the decedent was a citizen of both countries and a domiciliary of only one country, the country of which the decedent was not a domiciliary will grant a credit for the tax of the country of domicile. (3) In all other cases, primarily where a citizen of one country was domiciled in the other for less than seven years but with the intent to remain there indefinitely, the treaty provides for a proportionate splitting of the credit. In no event may the credit under OECD-type treaties exceed that part of the tax imposed by the crediting country attributable to the property.[232]

Example: N, a domiciliary of the Netherlands, dies owning property situated in the United States. The United States, exercising its right of primary taxation, imposes an estate tax of $15,000 based on situs. The Netherlands, exercising residual taxation rights based on fiscal domicile, imposes a succession duty of $13,000 attributable to the same property. The credit for the United States situs tax against the Netherlands succession duty is limited to $13,000.[233]

IX. ADMINISTRATIVE PROCEDURE

The period of time within which a claim for credit or refund must be made varies among the treaties. Pre-OECD treaties ordinarily require that

227. *Id.* art. 11(1).

228. This results from the savings clause. *See supra* notes 42-52, 67 and accompanying text.

229. *See* France, art. 12(3); United Kingdom, art. 9(1)(b), (2)(b); *see also* Proposed Austrian Treaty, art. 9, para. 2(b); Proposed German Treaty, art. 11, para. 2(b); Treasury Model Treaty, art. 9, paras. 1(b), (2)(b).

230. France, art. 12(3). Because the Internal Revenue Code has no credit for foreign gift tax, in the absence of the treaty double taxation would result.

231. Netherlands, art. 11(2).

232. *See* France, art. 12(2)(b)(ii); Netherlands, art. 11(3); United Kingdom, art. 9(4); *see also* Proposed Austrian Treaty, art. 9, para. 4; Proposed German treaty, art. 11, para. 6; Treasury Model Treaty; art. 9, para. 6.

233. Netherlands, art. 11(3).

the claim be filed within six years from the date of transfer.[234] A few treaties require the claim to be filed five years from either the date of transfer,[235] the time the return is required to be filed,[236] or the due date of the tax.[237] OECD-type treaties provide greater flexibility. For example, under the French treaty any claim for credit or refund must be made before expiration of the latest of: (1) the time for making the claim under the internal law of the contracting state to which the claim is made, or (2) five years from the date of transfer, or (3) one year after final determination (administrative or judicial) and payment of tax from which the credit is claimed, provided this occurs within ten years from the date of transfer.[238]

The treaty tax credit is not allowed until taxes owing to the other contracting state have been paid.[239] Refunds typically do not include payment of interest on the amount refunded,[240] although exceptions to this rule may be found in the Japanese and United Kingdom treaties. Both those treaties allow payment of interest to the extent authorized by internal law.[241]

X. PREVENTION OF FISCAL EVASION

Each transfer tax treaty contains a provision expressly authorizing the exchange of information between contracting states to prevent fiscal eva-

234. *See* Australia (estate tax treaty), art. V(5), Australia (gift tax treaty), art. V(4); Finland, art. VI(1); Ireland, art. VI(1); Norway, art. VI(1); Union of South Africa, art. VI(1); *see also* Proposed Belgian Treaty, art. V(4). The Canadian treaty requires the claim be filed within the later of six years from transfer, or the time otherwise provided by the internal law of the jurisdiction to which the claim is made. Canada, art. VI, para. 1. This period under United States law is the later of: (1) four years from filing the estate tax return, (2) expiration of any extension of time for paying the estate tax, or (3) 60 days after a final decision of the Tax Court. I.R.C. § 2014(e) (1976).

235. Switzerland, art. V(1).

236. Greece, art. VII(1).

237. Japan, art. V(5).

238. France, art. 13(1). Identical provisions are contained in the Netherlands treaty. Netherlands, art. 12(1). The United Kingdom treaty requires filing within six years from transfer or, where later, one year from the last date on which tax for which the credit is given is due. United Kingdom, art. 9(5); *see also* Proposed Austrian Treaty, art. 9, para. 6 (10 years); Proposed German Treaty, art. 11, para. 7 (10 years); Treasury Model Treaty, art. 9, para. 7.

239. *See* Australia (estate tax treaty), art. V(7), Australia (gift tax treaty), art. V(6); France, art. 12(4); Japan, art. V(6); Netherlands, art. 11(6); United Kingdom, art. 9(4); *see also* Proposed Belgian Treaty, art. V(5). Estate of Vriniotis v. Commissioner, 79 T.C. 298 (1982), reached this conclusion despite absence of express provision to this effect in the Greek treaty.

240. *See* Australia (estate tax treaty), art. V(6); Australia (gift tax treaty), art. V(5); Canada, art. VI, para. 2; Finland, art. VI(2); France, art. 13(2); Greece, art. VII(2); Italy, art. V(3); Netherlands, art. 12(2); Norway, art. VI(2); Switzerland, art. V(2); Union of South Africa, art. VI(2); *see also* Proposed Austrian Treaty, art. 9, para. 6; Proposed Belgian Treaty, art. V(4); Proposed German Treaty, art. 11, para. 7; Treasury Model Treaty, art. 9, para. 7. The Irish treaty provides payment without interest except to the extent interest was originally paid on the refunded amount. Ireland, art. VI(2).

241. The Japanese treaty reaches this result expressly. Japan, art. V(5). The United Kingdom does so implicitly by not specifically precluding payment of interest. United Kingdom, art. 9; *see also* Brown & Williamson, Ltd. v. United States, 688 F.2d 747 (Ct. Cl. 1982) (absence of treaty provision for nonpayment incorporates local law). Interest runs from the date of overpayment under United States law. I.R.C. § 6611(b) (1976).

sion.[242] Typically, information is disclosed to foreign contracting states only on direct request by its competent authority. In fact, the United States and the foreign jurisdiction may conduct simultaneous examinations of taxpayers from their respective jurisdictions. There is, however, an important exception to the general rule that information is furnished to a foreign contracting government only upon specific request. The exception occurs in the case of spontaneous disclosure, which is a spontaneous transfer of information to a treaty partner in the absence of a specific request.[243] The matter disclosed is information discovered by the Internal Revenue Service during a tax examination that suggests noncompliance with the tax laws of a treaty partner.

Transfer tax treaties do not ordinarily contain provisions authorizing assistance by one country in collection of the tax of another country. This is due largely to reasons of public policy.[244] There are exceptions, however, and these exceptions are broadest, and the assistance in collection greatest, under the French, Norwegian, and Union of South Africa treaties.[245]

XI. CONCLUSION

The importance of understanding the terms and provisions of transfer tax treaties cannot be overemphasized. The present trend towards lowering artificial barriers between nations will promote international good will and cooperation. An integral part of this process is the harmonization of tax principles between nations. An acceleration in the rate of adoption of transfer tax treaties should thus be anticipated. The result should trigger a reduction of the incidence of taxation and closer administrative coordination between the contracting states.

242. *See* Australia, art. VI; Canada, arts. VII-IX; Finland, arts. VII, IX; France, art. 15; Greece, art. XI(2); Ireland, art. VII(2); Italy, art. VI; Japan, art. VI(1); Netherlands, art. 14; Norway, arts. VII, VIII, X; Switzerland, art. VII(2); Union of South Africa, arts. VII, IX, X; United Kingdom, art. 12; *see also* Proposed Austrian Treaty, art. 12; Proposed Belgian Treaty, art. VI; Proposed German Treaty, art. 14; Treasury Model Treaty, art. 12.

243. *See, e.g.*, Proposed Austrian Treaty, art. 12, para. 1.

244. These reasons include the following: (a) collection of taxes is viewed as an extraterritorial intrusion; (b) lack of reciprocal enforcement; (c) foreign inquiry into policy behind tax; (d) adverse effect on foreign relations; (e) tax impositions are deemed penal sanctions that may not be enforced in foreign courts; (f) local courts do not have the background or expertise to be burdened with foreign tax claims. *See* Johnson, Nirenstein, & Wells, *Reciprocal Enforcement of Tax Claims Through Tax Treaties*, 33 TAX LAW. 469, 470 (1980).

245. *See* France, art. 16; Norway, art. IX; Union of South Africa, art. VII. More narrow collection provisions are contained in the Finnish and Italian treaties. *See* Finland, art. VIII; Italy, art. VII.

APPENDIX

UNITED STATES ESTATE, GIFT, AND GENERATION-SKIPPING TRANSFER TAX TREATIES

Contracting State	Date Effective	International Citation	Treasury Citation
	ESTATE TAX TREATIES		
Australia	7 Jan. 1954	TIAS No. 2903	1957-1 C.B. 633
Canada	14 June 1941	TIAS No. 989	1945 C.B. 381
Amendment	21 Nov. 1951	TIAS No. 2348	1954-2 C.B. 633 1957-2 C.B. 992
Canada (Second Treaty)	1 Jan. 1959	TIAS No. 4995	
Finland	18 Dec. 1952	TIAS No. 2595	1957-1 C.B. 641
France	1 Oct. 1980	TIAS No. 9812	
Greece	30 Dec. 1953	TIAS No. 2901	1957-1 C.B. 645
Protocol	30 Dec. 1953	TIAS No. 2901	1957-1 C.B. 645
Protocol	27 Oct. 1967		1968-1 C.B. 631
Ireland	20 Dec. 1951	TIAS No. 2355	1957-1 C.B. 650
Italy	26 Oct. 1956	TIAS No. 3678	1956-2 C.B. 1089
Japan	1 Apr. 1955	TIAS No. 3175	1955-1 C.B. 654
Netherlands	3 Feb. 1971	TIAS No. 7061	
Norway	11 Dec. 1951	TIAS No. 2358	1957-1 C.B. 653
Switzerland	17 Sept. 1952	TIAS No. 2533	1957-1 C.B. 657
Union of S. Africa	15 July 1952	TIAS No. 2509	1957-1 C.B. 659
Protocol	1 July 1944	TIAS No. 2509	
United Kingdom	11 Nov. 1979	TIAS No. 9580	1980-1 C.B. 369
	GIFT TAX TREATIES		
Australia	14 Dec. 1953	TIAS No. 2879	1957-1 C.B. 637
France	1 Oct. 1980	TIAS No. 9812	
Japan	1 April 1955	TIAS No. 3175	1955-1 C.B. 654
United Kingdom	11 Nov. 1979	TIAS No. 9580	1980-1 C.B. 369
	GENERATION-SKIPPING TRANSFER TAX TREATIES		
France	1 Oct. 1980	TIAS No. 9812	
United Kingdom	11 Nov. 1979	TIAS No. 9580	1980-1 C.B. 369
Netherlands	3 Feb. 1971	TIAS No. 7061	

Notes

1. Proposed Treaties exist with Austria, Belgium, and Germany. *See* Treaty Doc. No. 97-26 (Proposed Austrian Treaty); Treaty Doc. No. 97-1 (Proposed German Treaty); S. EXEC. DOC. No. G, 83d Cong., 2d Sess. (1954) (Proposed Belgian Treaty); *see also* Treasury Model Treaty, *reprinted in* I TAX TREATIES (P-H) ¶ 1020 (1980). The proposed treaties with Austria and Germany cover estate, gift, and generation-skipping transfer taxes. They were signed on June 21, 1982, and December 3, 1980, respectively. The proposed treaty with Belgium covers only estate tax. Although signed on May 27, 1954, the required exchange of

instruments of ratification has never taken place. Treaties with Denmark and Sweden are now being negotiated.

2. Australia abolished its estate and gift duties effective July 1, 1979. Canada abolished its estate tax effective January 1, 1972.

3. Only the French, Netherlands, United Kingdom, and the proposed Austrian and German treaties are based on the OECD Model Estate Tax Treaty. There is no OECD model gift or generation-skipping tranfer tax treaty.

4. The Japanese treaty is unified in that it expressly covers estate and gift taxes. The French, United Kingdom, and the proposed Austrian and German treaties are unified in that they expressly cover estate, gift, and generation-skipping transfer taxes. The Netherlands estate tax treaty may also cover the generation-skipping transfer tax by implication.