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MIGRANTS WITH RETIREMENT PLANS: THE CHALLENGE OF HARMONIZING TAX RULES

by

Cynthia Blum*

ABSTRACT

Many countries seek to encourage retirement savings for their residents by offering tax preferences for privately-operated “qualified retirement plans.” These tax preferences generally take the form of delaying taxation of contributions made to the plan and of the earnings thereon until funds are withdrawn by the participant during retirement. In a few cases, countries instead tax contributions immediately but forgo further tax. Because these rules encompass the tax treatment to be accorded throughout an individual’s lifetime, the individual is able to plan for retirement with some assurance of the eventual tax consequences. However, in recent years, it has become increasingly likely that an individual who has accumulated qualified retirement savings in one country will later migrate and retire in another country and, as a result, face unexpected tax consequences.

This Article examines (1) the tax rules commonly applied by the country of emigration in order to maintain its ability to tax a departing participant in a qualified plan, and (2) the tax rules commonly applied by the country of immigration when its new resident has accumulated savings in another country’s qualified plan. The Article then analyzes how the interaction of the two countries’ rules may lead to inappropriate tax consequences and administrative burdens. In addition, it considers the various ways that bilateral treaties and model tax treaties seek to ameliorate these concerns.

The Article concludes that the provisions regarding pensions in the U.S. Model Treaty achieve a reasonable degree of coordination of the two countries’ tax rules, but also could be improved in a variety of ways. The Article also explores further coordination methods in light of the improbability that bilateral treaties with the improved rules will become universal. The Article recommends adoption of a multilateral agreement for

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information-sharing and for taxation of qualified retirement plans and the establishment of an International Retirement Plan (“IRP”) to facilitate the operation of the multilateral agreement. The IRP would have the limited administrative role of accepting deposits from qualified individual retirement accounts established in participating countries; collecting withholding tax pursuant to the tax rules (including treaties) of the participating countries; and promoting the flow of information between the participating countries.

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I. INTRODUCTION

Many countries provide a tax preference for privately-operated “qualified retirement plans” with the goal of encouraging retirement savings. In most cases, these plans allow deferral of income tax on contributions and earnings thereon until funds are withdrawn in retirement, with the eventual rate of tax determined based on the retiree’s ability to pay at the time of withdrawal.

With increased global mobility comes an increased likelihood that workers who have accumulated qualified retirement savings while working in one country may later retire in another country.¹ This Article will discuss the challenges faced by the work country² and the retirement country in determining the appropriate method of taxation and in coordinating rules with other countries. Issues to be explored include (1) whether deferral of tax should continue in one or both of the two countries, (2) how the new residence country will obtain information about the foreign retirement account, (3) how tax revenues should be shared, (4) how double international taxation or non-taxation should be avoided, and (5) the role of treaties³ or other arrangements, such as an international retirement plan, to resolve these issues.

This Article makes the simplifying assumption that the country where a qualified plan is created is also the country where the services are performed and the worker is resident while working. Additional issues arise in cases where this assumption does not hold. In addition, except where specifically noted, this Article assumes that an individual who is resident in a country other than the United States (while working or during retirement) is not at that same time a U.S. citizen.

II. CONSIDERATIONS IN TAXING CROSS-BORDER PENSIONS

1. See Robert Holzmann & Johannes Koettl, *Portability of Pension, Health, and Other Social Benefits: Facts, Concepts, Issues* (SP Discussion Paper No. 1110, May 2011), http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/06/21/000333038_20110621005640/Rendered/PDF/627250NWP00111000PUBLIC00BOX361489B.pdf, at 2 [hereinafter Holzmann & Koettl, *Portability*] (“[A]n increasing share of the population is spending some time of his or her life outside the own country’[s] borders—mostly working but increasingly also retiring.”).

2. I recognize that the country where a plan is created is not necessarily the country where services are performed or where the worker is resident. For simplicity, I am assuming that all these activities occur in one country (the “work country”).

3. For a discussion of the diminishing role of treaties, see Bob Michel, *IFA Turns 75! Proceedings of the IFA 75th Anniversary Jubilee Conference*, 67 BULL. FOR INT’L TAX’N, no. 7 (2013): 383–90 (Richard Vann suggested that “formal bilateral tax treaties would play a diminishing role in the future and that other devices outside the framework of hard law would carry the development of new international and domestic tax rules.”). Vann has noted that “tax treaties also failed to deal with certain important issues . . . [for example] foreign exchange movements, tax-exempt entities, exploitation of domestic law differences, covert discrimination and the reconciliation of domestic tax systems with regard to pensions and pension plans.” *Id.* at 387. Vann also noted “the rise of the BRICS . . . [which] increasingly challenge international norms propagated by the OECD.” *Id.*

Most individuals will spend some of the last years of their lives in retirement (whether by choice or due to age-related disability). Nevertheless, individuals may fail to accumulate enough savings to maintain their accustomed standard of living throughout retirement. This failure results in hardship and insecurity for the individual even if government provides a modest welfare payment to residents facing extreme poverty.

To promote the well-being of their residents and to avoid the need for welfare assistance to the elderly poor, most countries establish for their residents a government-mandated program, such as Social Security in the United States, that ensures at least a minimum income for elderly retirees (based on contributions or taxes paid during an individual's working life). In addition, governments seek to encourage retirement savings by offering tax preferences for qualified employer-sponsored retirement plans (funded by employer and/or employee contributions) and for qualified individual retirement savings accounts, funded by the individuals themselves; these plans are subject to government regulation of the amount of contributions, types of investments, and amount and timing of withdrawals so as to limit the revenue loss to the government and ensure that the funds are available to pay living expenses in retirement. In the United States and elsewhere, there has been an increased use of defined contribution plans in preference to defined benefit plans.⁴

In most countries, the tax preference for qualified retirement plans takes the form of deferral of income tax on contributions to, and earnings in, the plan until withdrawal of funds, with the eventual rate of tax (and personal allowances) determined based on the retiree's financial circumstances at the time of withdrawal.⁵ This is described in the literature as "EET" (an

4. See Pablo Antolin, Colin Pugh, & Fionna Stewart, *Forms of Benefit Payment at Retirement* (OECD Working Papers on Insurance and Private Pensions No. 26, Sept. 2008), at 2, <http://www.oecd.org/finance/private-pensions/41408028.pdf>. There is a "growing importance of occupational defined contribution (DC) pension plans and personal retirement savings." *Id.* They consider it "undeniable that there is a major shift to defined contribution plans throughout most of the world." *Id.* at 35. Cf. EDWARD A. ZELINSKY, *THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA* 102 (2007) ("[S]o far at least, no major trading partner of the United States has embraced individual accounts with the relish of the United States.").

5. See Kwang-Yeol Yoo & Alain de Serres, *Tax Treatment of Private Pension Savings in OECD Countries* (OECD Economic Studies No. 39, 2004/2), at 76, <http://www.oecd.org/eco/growth/35663569.pdf> [hereinafter Yoo & Serres, *Tax Treatment*] ("As regards the practice of taxation of private pension plans, a vast majority of countries apply a variant of the EET regime."); see also *id.* at Table 1 (22 countries use EET, with 10 of these allowing partial exemption on withdrawal; of the 8 others, 3 are shown as ETT, 2 as TET, and one each as TEE, TTE, and TTT). See Rhys Cormick & John A. McLaren, *The Current Retirement System in Australia Needs to Be More Attuned to a Mobile International Workforce: A Case for Reform*,

abbreviation for “Exempt Exempt Taxed”), which refers to the treatment of the participant at three points in time: (1) at the time that contributions are made to the plan, (2) the time when earnings accrue in the plan, and (3) the time when distributions are made to the participant. This treatment of retirement savings is consistent with the model of a cash-flow consumption tax. More recently, the United States and a few other countries have sanctioned qualified retirement plans taxed under the pre-paid consumption tax paradigm (*i.e.*, taxation of contributions to the plan, but complete exemption of earnings and withdrawals).⁶ This treatment is referred to as “TEE” (an abbreviation for “Taxed Exempt Exempt”), which signifies that (1) taxation occurs when contributions are made to the plan, but the participant is (2) exempt when earnings accrue in the plan and (3) exempt at the time that distributions are made from the plan.⁷

If the individual utilizing a qualified retirement account is to plan adequately for, and feel secure about, his (often distant) retirement, he will want assurance that his expectations for the tax treatment of the plan (deferral for an EET plan and exemption for a TEE plan) will be fulfilled throughout his life. Governments that allow qualified plans under the EET

20 AUSTL. TAX FORUM 493, 501–02 (2014) [hereinafter Cormick & McLaren, *Retirement System in Australia*]. They describe the tax treatment of pensions in Australia as “tE” and in New Zealand as “tTE.” *Id.* at 501–02. The lower case “t” signifies that in Australia, contributions and accruing earnings are taxed but at a lower rate than the taxpayer’s marginal tax rate on other income. *Id.* at 501.

6. See Edward Whitehouse, *The Tax Treatment of Funded Pensions* (Social Protection Discussion Paper No. 9910, World Bank, April 1999) at 4, 35–36, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/08/31/000011823_20050831160440/Rendered/PDF/333890ENGLISH0PRPNoteTaxation.pdf [hereinafter Whitehouse, *Tax Treatment*]. See generally Daniel I. Halperin & Alvin C. Warren, Jr., *Understanding Income Tax Deferral*, 67 TAX. L. REV. 317, 325 (2014) (providing an example of the “familiar conclusion that traditional and Roth IRAs produce equivalent results if tax rates do not change”).

7. In the United States, plans with the TEE paradigm take the form of Roth IRAs or Roth accounts in a 401(k) plan. For recent criticism of Roth IRAs, see Calvin H. Johnson, *Repeal Roth Retirement Plans to Increase National Savings*, 128 TAX NOTES 773 (Aug. 16, 2010). Yoo & Serres depict Hungary as following TEE with respect to individual (as compared to employer) contributions. Yoo & Serres, *Tax Treatment*, *supra* note 5, at 80. More recently, Canada and the United Kingdom provide an option to residents to form Roth-like plans. For a description of Canadian Tax-Free Savings Accounts, see Canadian Revenue Agency, Tax-Free Savings Account (TFSA), Guide for Individuals, <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/tfsa-celi/menu-eng.html>. For a description of the U.K. ISA (revised to be NISA), see www.hmrc.gov.uk/taxon/savings.htm.

model also form expectations that future taxes will be collected when the individual receives distributions in retirement.⁸

If an individual has accumulated retirement savings in a qualified plan in his residence country, but later emigrates to a new residence, these expectations of the individual and his original residence country (now the source country) may be harder to fulfill. Fulfilling the individual's expectations may be seen as an issue of fairness (due to the individual's reliance) or because the worker should be treated equally to others working in the same country as a matter of efficiency.⁹

A source country is limited in the methods it can realistically use to impose its tax upon its former resident with a qualified EET plan; it may utilize an exit tax or a withholding tax.¹⁰ Thus, compared to the individual's expectations, the source country's tax may be accelerated or excessive by not being tailored to the individual's circumstances in retirement. This result may make the source country unattractive to talented individuals who wish to work there but not retire there.¹¹ And the source country's claim to tax may be lessened by the fact that it need not provide government services (or a safety net) to the emigrant after departure.

In addition, the new country of residence (if it obtains knowledge of the foreign retirement plan) may seek to share in the tax revenue resulting

8. See Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1561 (2009) [hereinafter Mason, *Global Labor*] (“[M]any states subsidize their residents’ contributions to savings and pension plans with the expectation of taxing the distributions from those plans. If the resident moves abroad before receiving distributions from the savings plan, however, tax treaties generally grant the new residence state exclusive entitlement to tax the distributions.”) (footnotes omitted). Mason cites this as an example of how “[s]eparation in time between the conferral of the tax incentive and the accrual of the positive externality may increase the likelihood that the externality will accrue outside the residence state.” *Id.*

9. This relates to the norms of labor export neutrality and labor residence neutrality. See *id.* at 1545. Mason proposes “four benchmarks for analyzing government policies that affect global labor mobility” by way of distorting choices. *Id.* These are: “labor export neutrality” relating to “taxpayers’ choices about whether to work at home or abroad,” “labor import neutrality” regarding “taxpayers’ choice about whether to engage in labor or leisure,” “labor ownership neutrality” regarding “whether particular jobs are filled by resident or nonresident taxpayers,” and “labor residence neutrality” regarding “taxpayers’ choice about where to reside.” *Id.* She assumes that “absent a specific policy objective to encourage or discourage international labor mobility, tax laws should not distort decisions regarding cross-border migration” so as to “allow workers to move to where their labor could be used most productively, thereby increasing global productivity.” *Id.* at 1566.

10. Or it may apply “extended tax liability” over recent emigrants. See *infra* note 83.

11. This would violate the norm of labor export neutrality. See *supra* note 9.

from earnings in the retirement plan and may not respect the deferral treatment of a foreign EET plan or the exemption of a foreign TEE plan. The new residence may have a legitimate claim to tax because it will be providing various public benefits (transportation infrastructure, police protection, hospital systems, etc.) to the new resident (and perhaps welfare benefits in the event retirement savings fall short). The result for the individual may be double international taxation, as well as complicated administrative burdens with respect to two countries. On the other hand, the new residence may seek to attract individuals with significant assets¹² by providing tax concessions for foreign source retirement income or because it is more generally a tax haven. This may offer the individual an opportunity to reduce or eliminate his expected tax with respect to a qualified EET plan.

Because of the divergence of income tax rates and personal allowances among countries, even if tax rules are well coordinated, a shift from residence in one country to another may result in a decrease or increase in tax rates, as well as a change in the level of government services provided. These factors may influence emigration and migration decisions to a greater extent than the tax rules specifically governing cross-border retirement.¹³

Part III describes how the United States applies its tax rules to a qualified retirement plan in the case of a change of residence, in cases where no treaty is implicated. First, the section considers the United States as the “work country” and then discusses the United States as the “retirement

12. Many countries offer foreigners retirement visas, but not the United States. For a listing of countries offering a retirement visa, see http://wikitravel.org/en/Retiring_abroad. See also David Dixon, Julie Murray, & Julia Gelatt, *America's Emigrants: U.S. Retirement Migration to Panama and Mexico*, Migration Policy Institute, Sept. 1, 2006, <http://www.migrationpolicy.org/article/americas-emigrants-us-retirement-migration-mexico-and-panama> (discussing policies of Mexico and Panama). In 2011, U.S. green cards were granted to about 53,000 older immigrants. See Jeanne Batalova, *Senior Immigrants in the U.S.*, Migration Policy Institute, May 30, 2012, <http://www.migrationpolicy.org/article/senior-immigrants-united-states>. She notes that recently “the older-age immigrant population has been rebounding,” in part as a result of an increase in naturalization of younger immigrants, who then sponsor a parent. *Id.* The immigration reform bill passed by the Senate in 2013, included a new Retiree Visa in section 4504. S. 744, 113th Cong. (as passed by the Senate, June 27, 2013).

13. Cf. Reuven S. Avi-Yonah, *And Yet It Moves: Taxation and Labor Mobility in the Twenty-First Century*, 67 TAX L. REV. 169, 181 (2014) [hereinafter Avi-Yonah, *Labor Mobility*] (“We should go back to Charles Tiebout’s famous conclusion . . . that if people are mobile, jurisdictions should set tax rates to reflect the taste of their residents, and those residents that do not like the resulting choice (which is established by democratic elections) should be free to move to other jurisdictions whose choices they like better.”) *But cf.* Mason, *Global Labor*, *supra* note 8, at 1564 (arguing that there are “several reasons, however, to question whether Tieboutian sorting works on an international scale”).

country.” Part IV discusses how the U.S. rules as the work country (and variants used elsewhere) intersect with rules used by the United States as the retirement country (or variants used elsewhere) to identify potential coordination issues. In part V, existing treaty rules for resolving these coordination issues and potential improvements in treaties are explored. Part VI concludes with a discussion of how greater coordination might be achieved in the absence of a bilateral treaty between the work country and the retirement country.

III. CURRENT U.S. TAX TREATMENT

A. *United States as Country of Work*

Under U.S. law, U.S. citizens and resident aliens are taxed by the United States on worldwide income under the section 1 progressive rate schedule and with personal exemptions and the option of claiming a standard deduction.¹⁴ (The standard deduction is increased for individuals aged 65 or older.)¹⁵ A foreign national who works in the United States over an extended period will generally be classified as a resident alien, due to satisfying the “substantial presence” test or in any event if he has status as a “legal permanent resident.”¹⁶

A resident alien may participate in an employer-sponsored retirement plan or create an individual retirement account, subject to the same rules and limitations that apply to a U.S. citizen. Thus, subject to these limitations, he may exclude employer contributions on his behalf to a qualified employer-sponsored plan; he may make pre-tax contributions to a 401(k) plan (or make after-tax contributions to a Roth 401(k) program) and may make pre-tax contributions to a traditional Individual Retirement Account (“IRA”) or after-tax contributions to a Roth IRA. Upon terminating employment, his balance in an employer-sponsored defined contribution plan may be rolled over tax-free into an IRA. Distributions (other than from Roth accounts) are taxable as ordinary income, with reduction for after-tax investment in the

14. See I.R.C. § 1. By contrast, nonresident aliens are taxed by the United States solely with respect to U.S. source income or income classified as effectively connected with a U.S. trade or business; the tax on U.S. source income that is not effectively connected with a U.S. trade or business is imposed at a flat rate of 30 percent, and is collected by withholding.

15. See I.R.C. § 63(f). In addition, section 22 provides a credit for the elderly and disabled, which is phased out when adjusted gross income exceeds certain low levels. See I.R.C. § 22(d). See generally I.R.S., Publication 554, *Tax Guide for Seniors* (2014), at 20, 26, <http://www.irs.gov/pub/irs-pdf/p554.pdf>.

16. See I.R.C. § 7701(b).

contract, if any.¹⁷ A qualified distribution from a Roth plan is exempt from tax.¹⁸

If a foreign national who has participated in a qualified U.S. retirement plan abandons U.S. residence, he will be taxed by the United States thereafter as a nonresident alien.¹⁹ Unless the taxpayer is a covered expatriate (described below), this will not affect the deferral of tax until the time of distribution or the exemption for distributions from a Roth plan. However, two changes in treatment will occur. First, no tax is imposed on any foreign-source element of a distribution (*i.e.*, amounts contributed by the employer or employee with respect to services performed abroad). And, most importantly, any other portion of the distribution would be viewed as U.S. source and would be subject to withholding by the payor at a flat rate of 30 percent (apart from the effect of a treaty), without allowance of any personal exemption or standard deduction.²⁰ (This assumes that the payor correctly identifies the distributee as a nonresident alien; however, current regulations allow payors to presume that an individual with a U.S. social security number is a U.S. person if retirement payments are made to an address in the United States or treaty country).²¹

The nonresident alien would be allowed to file a nonresident U.S. tax return on which he would report the amount attributable to employer contributions or pre-tax employee contributions with respect to services in the United States as personal service income that is “effectively connected with the conduct of a U.S. trade or business.” This income would be taxed under the graduated U.S. rate schedule and with allowance of a personal exemption. If the tax so computed is less than the 30 percent withheld tax on

17. I.R.C. § 402(a) (qualified employee’s trust); § 408(d) (individual retirement account); § 72 (investment in the contract).

18. I.R.C. § 402A(d) (Roth contributions to 401(k) plan); § 408A(d) (Roth IRA).

19. See discussion in Cynthia Blum & Paula N. Singer, *A Proposal for Taking the Complexities Out of Taxing U.S. Retirement Distributions to Foreign Nationals*, 11 FLA. TAX REV. 775, 788–90 (2011) [hereinafter Blum & Singer, *Proposal*]; Russell E. Hall, *International Pension Planning*, 320 TAX MGMT. PORT. 3d (BNA) § III.B.1 (last accessed Jan. 9, 2015) [hereinafter Hall, *International Pension*].

20. See Blum & Singer, *Proposal*, *supra* note 19, at 789–90, 796–99.

21. See *id.* at 798–99, 804–05. Although a nonresident alien should file a Form W-8BEN before receiving a payment from a qualified U.S. retirement plan, he may not do so. If the payor has the individual’s U.S. Social Security Number (“SSN”) and the payment is made to an address in the United States or a treaty country, then he may presume that the individual is a U.S. person and withhold tax in accordance with that status (*i.e.*, wage withholding on periodic distributions or at a flat 10 percent or 20 percent rate on other distributions). *Id.* at 798–99. The new temporary regulations coordinating withholding rules with FATCA has not yet changed this. See *infra* note 104.

such amounts, he would be entitled to a refund.²² In the case of a U.S. citizen who works in the U.S. and participates in a qualified U.S. retirement plan, but then retires in another country, the change of residence (without loss of citizenship) will not affect U.S. taxation of the distributions from the plan (apart from a treaty).²³

A special treatment will apply, however, to the departure of a long-term permanent resident²⁴ or a U.S. citizen abandoning citizenship if he has a sufficiently large amount of assets or of income tax liability in recent years or if he fails to certify his U.S. tax compliance for the previous five years.²⁵ A covered expatriate with an interest in an employer-sponsored qualified plan has a choice between (1) making an irrevocable waiver of any right to claim a treaty reduction with respect to the 30 percent withholding to be collected from a future distribution or (2) constructively receiving the present value of the accrued retirement benefit immediately before the expatriation date. Regardless of any waiver, he is considered to receive an immediate distribution of the full amount of any qualified individual account.²⁶

22. See *id.* at 788–90; Hall, *International Pension*, *supra* note 19, at § III.B.1.e. There is some uncertainty as to whether distributions attributable to contributions for services performed in the United States should be characterized as “effectively connected income” in the case where the services were performed while the taxpayer was a resident alien (rather than a nonresident alien). Blum & Singer, *supra* note 19, at 803. See Jeffrey M. Colon, *Double-Dipping: The Cross-Border Taxation of Stock Options*, 35 RUTGERS L. J. 171, 220–24 (2003) [hereinafter Colon, *Double-Dipping*]. For determination of foreign source amounts, see *infra* note 79.

23. A U.S. citizen who moves his residence abroad is nevertheless taxed under section 1 on worldwide income. Section 911 does not apply to U.S. source income or to pension distributions. See I.R.C. § 911(a), (b)(1). Under a treaty saving clause, a treaty exemption from source country taxation of pensions would not apply to a U.S. citizen, despite being a resident in a country having a U.S. treaty. See, e.g., United States Model Income Tax Convention of November 15, 2006, art. 1.4, 1.5(a), art. 17.1(a) (U.S. Dep’t of the Treasury 2006), <http://www.irs.gov/pub/irs-trty/model006.pdf> [hereinafter U.S. Model Treaty]. However, the treaty may allow a foreign tax credit with respect to U.S. source income. See U.S. Model Treaty, art. 1.5, art. 23.4.

24. See ABA Tax Section, *Options for Tax Reform in the Inbound International Tax Provisions of the Internal Revenue Code*, 67 TAX LAW. 331, 350 (2014) [hereinafter ABA Tax Section, *Options*] (arguing that “long-term residence” should require presence for 17 of 20 years and that the \$2 million net worth requirement be indexed for inflation). The Tax Section also argues for applying the “exclusion amount” in section 877A(a)(3)(A) to deferred compensation covered by section 877A(d). *Id.* at 354.

25. I.R.C. § 877A(d)(1)–(3), (e); Blum & Singer, *Proposal*, *supra* note 19, at 786–87.

26. See Blum & Singer, *Proposal*, *supra* note 19, at 794–96. If a taxpayer constructively receives the present value of the accrued benefit in the case of ineligible deferred compensation, the Code provides that “appropriate adjustments

It is not clear if incurring the exit tax in itself results in complete disentanglement of the departing taxpayer from U.S. taxation of a U.S. qualified retirement plan. Perhaps, it only creates basis for his interest in the amount subjected to the exit tax. It may be advisable for an individual subject to such an exit tax to rollover his interest into a Roth IRA so as to avoid future U.S. tax.²⁷

B. United States as Country of Retirement

If a retiree (who is not a U.S. citizen) moves to the United States after accumulating funds in a foreign retirement plan, his tax treatment in the United States will depend on the nature of the non-U.S. plan.²⁸

If it is an *employees' trust*, the individual would generally not be subject to U.S. tax prior to receiving distributions from the plan.²⁹ However,

shall be made to subsequent distributions.” I.R.C. § 877A(d)(2)(C). A similar rule applies with respect to the deemed distribution of an individual retirement account. I.R.C. § 877A(e)(1)(C).

27. An actual withdrawal of the assets, if permitted by the plan, without a rollover, may result in imposition of the 10 percent U.S. penalty if the taxpayer has not attained the age of 59 and 1/2 (or 55 in the case of separation from service). I.R.C. § 72(t)(1), (2)(A).

28. See discussions in Abraham Leitner, *Selected US Tax Developments: Canada-US Treaty Election for Non-Resident Alien Beneficiaries of Canadian Pension Plans*, 60 CAN. TAX J. 1017 (2012) [hereinafter Leitner, *Treaty Election*]; Lawrence J. Chastang & Steve Yeager, *Foreign Pensions and Florida Practitioners Oops. . .*, FLORIDA CPA TODAY, May/June 2013, at 22 [hereinafter Chastang & Yeager, *Florida Practitioners*]; Lawrence J. Chastang & Steve Yeager, *Foreign Pensions/Retirement Plans and the U.S. Taxpayer*, FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, 32ND ANNUAL INTERNATIONAL TAX CONFERENCE, VOL. II, Jan. 23–24, 2014, at 14.32-33 [hereinafter Chastang & Yeager, *Foreign Pensions*]; Veena K. Murthy, *Selected Cross-Border Equity and Deferred Compensation Issues With Funded Foreign Plans*, 42 COMP. PLAN. J. 67 (Apr. 4, 2014) [hereinafter Murthy, *Cross-Border*]. Murthy notes that “[n]on-U.S. trust arrangements governed by [section] 402(b) include Australian and New Zealand superannuation plans, arrangements within Dutch Stichtings, Hong Kong provident funds (as well as provident funds in other jurisdictions such as Singapore, India, Israel, etc.), Irish Employee Benefit Trusts (EBTs), arrangements within Swiss “foundations,” and United Kingdom EBTs.” *Id.*

29. A foreign plan would be unlikely to meet the various requirements of a qualified plan under section 401(a) (even apart from the fact that it is not organized in the United States). Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.5. In general, an employees' trust, which is not qualified under section 401(a) “is treated as an ordinary non-grantor trust” but “distributions to the employees . . . are taxable under section 72(b).” Leitner, *Treaty Election*, *supra* note 28, at 1019; I.R.C. § 402(b)(2), (3). If the trust would qualify under section 401(a) apart from its organization outside the United States, it is treated as an exempt trust for purposes of

vested accrued benefits would be currently included in taxable income of the individual if the plan does not have broad participation and the individual is a “highly compensated employee.”³⁰ (For the first year of residence, this might include the full value of previously accrued benefits.³¹) In either case, the employee would be considered to have no basis or investment in the contract for purposes of applying section 72, in respect of contributions made, or earnings accrued, prior to obtaining U.S. residence, except for amounts previously taxed by the work country.³² Therefore, if the work country applied the EET paradigm to the retirement plan and did not impose an exit tax, the investment in the contract would be zero.³³

Tax imposed by the country of work before the individual became a resident alien or U.S. citizen (*e.g.*, an exit tax) would not be eligible for a foreign tax credit against U.S. tax.³⁴ Foreign tax imposed after the change of

section 402(a), (b), and (c). *See* I.R.C. § 402(d); Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.10–14.11. For discussion of the potential applicability of section 409A, even when a foreign trust is covered by section 402(b), see Murthy, *Cross-Border*, *supra* note 28, at 78 (section 409A may apply if “a plan awards a right to compensation that will be transferred to a § 402(b) trust in the future, if that right is substantially vested when transferred to the trust”).

30. I.R.C. § 402(b)(4). *See* Leitner, *Treaty Election*, *supra* note 28, at 1019, 1024. The participation requirements are contained in sections 401(a)(26) and 410(b). The term “highly compensated employee” is defined in section 414(q). *See* I.R.C. § 402(b)(4)(C). For discussion of these requirements in this context, see Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.13–15; Murthy, *Cross-Border*, *supra* note 28 (arguing for changes in the rules).

31. *See* Leitner, *Treaty Elections*, *supra* note 28, at 1024; *but cf.* Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.20 (“Since the taxpayer will effectively be marking to market by operation of IRC § 402(b)(4)(A), any taxable income associated with distributions will generally be nominal (or non-existent) except in cases where pre-tax contributions were made to the plan while the taxpayer was a nonresident alien of the U.S.”).

32. *See* I.R.C. § 72(w)(1)–(3) (overriding § 72(f)). *See* Leitner, *Treaty Election*, *supra* note 28, at 1021 (background of provisions); S. REP. NO. 108-266, at 127–28 (May 14, 2004) (explaining that providing basis for such employer contributions “is inconsistent with the taxation of benefits paid to individuals who both accrue and receive distributions of benefits from such arrangements as U.S. residents (*i.e.*, basis generally includes only previously-taxed amounts).”) The Report further noted that “the Committee is aware that some taxpayers take the position that there is basis in the earnings on such contributions, even though such amounts have not been subject to tax . . . [and] believes it is appropriate to provide more equitable treatment with respect to the distributions of both contributions and earnings from such arrangements.” *Id.* at 128.

33. *See* Leitner, *Treaty Elections*, *supra* note 28, at 1021.

34. *See* Colon, *Double Dipping*, *supra* note 22, at 211–13 (explaining that foreign tax paid prior to becoming a U.S. resident cannot be carried over to the

residence, for example, on subsequent distributions from the plan, would be eligible for the credit. However, the credit is limited to the U.S. tax rate multiplied by the foreign source income for the year³⁵ as determined under U.S. timing principles; and unused credits may be carried back only one taxable year or carried forward to subsequent years.³⁶

By contrast, some types of foreign retirement plans, such as a Canadian registered retirement plan (“RRSP”), are not considered to be an employees’ trust for U.S. tax purposes because they were not set up by an employer.³⁷ In that case, the foreign plan would be classified by the United States as a *grantor trust*, and current income of the trust would be taxed to the grantor.³⁸ But distributions from the plan would apparently not be taxed as the distributee would already be considered the owner of the assets.³⁹

residence period because of “the interaction of the foreign tax credit rules for nonresidents and the foreign tax credit carryover rules”).

35. In addition, the United States applies the limitation separately to general category income and passive category income. I.R.C. § 904(d)(1). *See* Murthy, *Cross-Border*, *supra* note 28, at 9 (suggesting that distributions from a section 402(b) trust, including amounts attributable to earnings in the trust, should be classified as wages, despite the contrary rule applied to earnings of a U.S. tax qualified plan, which are treated as investment income sourced by reference to the situs of the trust).

36. *See* I.R.C § 904(a), (c).

37. An employees’ trust has to be set up by an employer or by a self-employed individual with respect to a specific trade or business treated as the employer. Leitner, *Treaty Election*, *supra* note 28, at 1022 (citing I.R.C. §§ 402, 401(a), (c)). For treatment of foreign plans involving a “combination of employer contributions and elective employee deferrals,” see Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.08–14.09 (discussing Reg. § 1.402(b)-1(b)(6)); Murthy, *Cross Border*, *supra* note 28, at 10–11.

38. The grantor trust rules of sections 671–79 would apply. Leitner, *Treaty Election*, *supra* note 28, at 1022; Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.6. *See* OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION, art. 18, ¶ 29 (2010), <http://www.oecd.org/berlin/publikationen/43324465.pdf> [hereinafter OECD, COMMENTARIES].

39. *See* Leitner, *Treaty Elections*, *supra* note 28, at 1022. Section 72(w) would not apply in the absence of an employer-employee relationship. Leitner, *supra*, at 1023. Without section 72(w), the basis for the assets should be considered to include the contributions and earnings that accrued prior to the individual becoming a U.S. resident. Under a common law rule, basis for an incoming resident includes amounts that would have been taxed under U.S. tax rules if the individual had been a U.S. resident; contributions to a grantor trust would have been nondeductible and earnings would have been currently taxed under section 671. For discussion of this theory, see Colon, *Double Dipping*, *supra* note 22, at 207 (“For property brought into U.S. tax jurisdiction, its U.S. tax attributes, such as basis, are generally determined by treating the property as if it had been subject to U.S. tax jurisdiction ab initio.”) Professor Colon cites *Gutwirth v. Commissioner*, 40 T.C. 666

Another possibility is that the foreign plan is organized as a corporation, which could be treated as a controlled foreign corporation (“CFC”) or a passive foreign investment company (“PFIC”), with resulting current income inclusion.⁴⁰

If the taxpayer has been a U.S. citizen while residing and working abroad and participating in a foreign plan, he would generally (in the absence of a relevant treaty provision), be currently taxable by the United States on employer contributions to the plan and would be denied deductions for his own contributions to the plan.⁴¹ In addition, if the plan is an employees’ trust lacking broad participation and he is a highly compensated employee, he would be taxed on accruals of earnings (if vested) in the plan;⁴² similarly, if

(1963); *Heckett v. Commissioner*, 8 T.C. 841 (1947), *acq.* 1947–2 C.B. 5160; Rev. Rul. 56–514, 1956–2 C.B. 499; G.C.M. 34,572 (August 3, 1971); C.C.A. 2003–03–021 (January 17, 2003). *Id.* at nn. 140–41. This is consistent with the IRS view of “investment in the contract” in the case of an RRSP where the individual elects deferral under the U.S.-Canada treaty. *See Leitner, supra*, at 1023 (citing Rev. Proc. 89–45, 1989–2 C.B. 596, which was superseded by Rev. Proc. 2002–23, 2002-1 C.B. 744, which did not address this issue).

40. *See* Letter of Richard E. Piluso, President, NYSSCPA (New York State Society of Certified Public Accountants), to M. Grace Fleeman, Senior Technical Reviewer, I.R.S. (May 3, 2012) (<http://www.mysscpa.org/commentletter/rrsp.pdf>) [hereinafter Piluso Letter]. The letter argues that:

U.S. persons with investments in retirement plans in jurisdictions not covered by any U.S. tax treaty or retirement plans in locations with treaties that do not address the tax treatment of retirement plans, are often left in a difficult situation. To the extent that the retirement savings plan is a trust, they may be required to recognize the income currently (as in the case of a grantor trust) or, to the extent that the retirement savings plan is a corporation, it could be a controlled foreign corporation resulting in current income inclusion or a passive foreign investment company resulting in either current income recognition or a harsh interest charge at the time of distribution of the income.

The letter recommends consideration of providing a deferral mechanism (similar to that in the Canadian treaty) to additional treaties or “[l]egislation to provide for the deferral of tax on compulsory employer contributions to foreign retirement plans and income in legitimate foreign retirement savings plans that were compulsorily established by a U.S. person while they were living or working outside the U.S.” *See also* Letter of Martha Henderson, to Mark J. Mazur, Assistant Secretary (Tax Policy), Treas. Dep’t (June 24, 2014) (2014 TAX NOTES TODAY 131–19) (U.S. citizen with Australian superannuation fund argues that current U.S. taxation of annual income of the fund is “unfair”).

41. *See* I.R.C. § 402(b)(1) (nonqualified employees’ trust); § 402(b)(4) (top heavy if highly compensated employee); § 61 (grantor trust); Chastang & Yeager, *Foreign Pensions, supra* note 28, at 14.11–14.21.

42. *See* I.R.C. § 402(b)(4).

the plan is of the type that the United States classifies as a grantor trust, earnings accruing in the trust would be currently taxable as his own income.

A U.S. citizen or resident alien who is a beneficiary of a foreign pension plan may be subject to an array of filing requirements with respect to the plan. If the plan is classified as an employees' trust, then I.R.S. Form 8938 (Statement of Foreign Financial Assets)⁴³ is required; if the plan is classified as a grantor trust, a variety of other forms, such as I.R.S. Form 3520 (Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts), may be required.⁴⁴ Although these filing requirements (and associated penalties) may enhance the ability of the United States to identify foreign retirement plans of its residents,⁴⁵ they are unlikely to provide complete assurance that all such plans will be identified. This information gap is not closed by automatic information-sharing under the

43. See I.R.S., Form 8938, Statement of Foreign Financial Assets (Dec. 2014), <http://www.irs.gov/pub/irs-pdf/f8938.pdf>; Chastang & Yeager, *Florida Practitioners*, *supra* note 28, at 22. The filing of Form 8938 is mandated by section 6038D with respect to "a specified foreign financial asset" if the aggregate value of such assets exceeds \$50,000. See Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.32–14.33; see also Narendra Acharya, *Reporting Obligations Imposed by FATCA on Foreign Retirement Plans and U.S. Participants in Such Plans*, 43 TAX MGT. INT'L J. 540, 543 (Sept. 12, 2014) [hereinafter Acharya, *Reporting Obligations*].

44. See I.R.S., Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts (2014), <http://www.irs.gov/pub/irs-pdf/f3520.pdf>; I.R.S., Form 3520A, Annual Information Return of Foreign Trust with a U.S. Owner (2014), <http://www.irs.gov/pub/irs-pdf/f3520a.pdf>; FinCEN, Form 114, <http://www.fincen.gov/forms/files/FBARE-FileAuth114aRecordSP.pdf>; I.R.S., Form 8621 Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund (2014), <http://www.irs.gov/pub/irs-pdf/f8621.pdf>. For FBAR filing with respect to foreign retirement plans, see Chastang & Yeager, *Foreign Pensions*, at 14.33–14.35. Under section 6048(a), Form 3520 is required for a foreign grantor trust subject to sections 671–79. See Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.29–14.31. The foreign trustee is required to file Form 3520-A. *Id.* If the foreign grantor trust owns stock in a foreign mutual fund classified as a PFIC, then Form 8621 may be required. See Chastang & Yeager, *Foreign Pensions*, at 14.31. For further discussion of these filing requirements, see Chastang & Yeager, *Florida Practitioners*, *supra* note 28, at 22. For Canadian RRSP's or RRIF's, I.R.S., Form 8891, U.S. Information Return for Beneficiaries of Certain Canadian Retirement Plans, had been required in lieu of Form 3520 or Form 3520-A. Chastang & Yeager, *Foreign Pensions*, at 14.32. However, the IRS has recently ruled that neither Form 8891 nor Form 3520 or Form 3520A is required for a Canadian retirement plan. Rev. Proc. 2014-55, 2014-44 I.R.B. 753, § 5.

45. This required filing may have contributed to greater awareness among U.S. tax practitioners regarding foreign retirement plans owned by their clients. See Chastang & Yeager, *Foreign Pensions*, *supra* note 28, at 14.2–14.3.

Foreign Account Tax Compliance Act (FATCA) and its progeny,⁴⁶ because the regulations under FATCA, the Model Intergovernmental Agreement, and the common reporting agreement recently proposed by the Organisation for Economic Co-operation and Development (OECD) all contain exemptions from reporting for certain retirement plans that are tax-preferred in their own country and are required to report to tax authorities in their own country.⁴⁷

IV. INTERSECTION OF WORK COUNTRY TAX AND RESIDENCE COUNTRY TAX IN ABSENCE OF TREATY

If an individual works and participates in a retirement plan in one country but then retires in a second country, an individual will likely face tax consequences that differ from those that would have occurred if he had

46. See Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 141–61 (2014). Kirsch discusses FATCA and related developments and the “impact they have had on global information sharing and tax enforcement norms.” *Id.* at 157. He concludes that they “have significantly strengthened the willingness of other countries to expand information sharing to combat cross-border tax evasion.” *Id.* at 157–58. See Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 TAX NOTES 1245 (March 17, 2014).

47. See David W. Powell, *Non-US Pension Fund Exemptions under the Final FATCA Regulations*, Groom Law Group Benefits Brief, March 5, 2013, http://www.groom.com/media/publication/1225_Non_US_Pension_Fund_Exemptions_Under_Final_FATCA_Regulations.pdf [hereinafter Powell, *Non-US Pension*]; Reg. § 1.1471-5(b)(2)(i)(A) (exemption from “financial account” definition for certain retirement accounts that are tax-favored and for which annual information reporting to the relevant tax authorities is required); Reg. § 1.1471-6(f) (treatment of certain retirement plans as “exempt beneficial owners” and division of them into the categories of treaty-qualified retirement funds, broad participation retirement funds, and narrow participation funds). Powell notes that “plans listed in Annex II to [an] IGA will be treated as exempt from FATCA without regard to whether the account or fund satisfies the exemptions of the final regulations.” Powell, *Non-US Pension*. See also Florence Olsen, *Foreign Retirement Plans Seen Scrutinized in U.S. Effort: Taxes*, BLOOMBERG (August 28, 2013), <http://www.bloomberg.com/news/2013-08-28/foreign-retirement-plans-seen-scrutinized-in-u-s-effort-taxes.html>; Acharya, *Reporting Obligations*, *supra* note 43. In 2014, the OECD published its new standard for automatic information exchange. See OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en#page1. For retirement fund exemption therein, see *id.* at 43–44 (Section VIII Defined Terms, B.1 Non-Reporting Financial Institution) and 55–56 (C(17) Excluded Account).

simply remained in the first country, even if the two countries have similar tax rates and personal allowances in a domestic context.⁴⁸

A. *Method of Tax in Work Country*

Although the first country (the “work country”) remains likely to tax him (unless he has invested in a TEE plan, such as a Roth IRA), the method of taxation may well change. Because of the individual’s departure, the work country is limited in the realistic methods by which it can tax; it can either impose an exit tax on the accrued benefits in the retirement plan at the time of departure (as the United States does in some cases for a covered expatriate), or it can withhold tax, at a flat rate, on distributions from the plan as they are made (such as the 30 percent U.S. withholding tax). Neither method of taxation meets with the expectations of an individual who contributed to a retirement plan of the EET paradigm and thus was planning to be taxed only at the time of withdrawals from the plan in retirement and, then, under a graduated rate schedule with personal allowances reflecting his situation at that time. (One further alternative used in some countries is “extended tax liability” (*i.e.*, continuation of residence tax for a certain number of years after departure). Somewhat similarly, if the United States is the work country and the individual is a U.S. citizen when retired abroad, the United States will continue to apply its regular graduated rate tax to future distributions.)⁴⁹

An exit tax, such as the U.S. tax on the balance of an individual retirement account of a covered expatriate,⁵⁰ results in acceleration of the

48. For an analysis of these issues from the perspective of German tax law, see Rosemarie Portner, *Cross-Border Pension Issues—What are the Tax Implications? A German perspective*, 39 TAX PLAN. INT’L REV. 4 (BNA) (Nov. 30, 2012) [hereinafter Portner, *Cross-Border Pension Issues*]; see also Rosemarie Portner, *Cross-Border Pension Issues*, NYU INTERNATIONAL TAX PROGRAM (Mar. 23, 2012), <http://www.deloitte-tax-news.de/arbeitnehmerentsendung-personal/thema-des-monats/files/cross-border-pension-issues-portner-23032012.pdf>. For analysis of these issues from an Australian perspective, in respect of migration involving Australia and the U.K., Hong Kong, or New Zealand, see Cormick & McLaren, *Retirement System in Australia*, *supra* note 5.

49. See discussion at *infra* note 82 (Finland and Germany); *supra* note 23 (U.S. citizen).

50. For a description of exit taxes imposed by Canada, Finland, Germany, the Netherlands, Switzerland, the UK, and US, see Vikram Chand, *Exit Charges for Migrating Individuals and Companies: Comparative and Tax Treaty Analysis*, 67 BULL. INT’L TAX’N, no. 4, 2013 [hereinafter Chand, *Exit Charges*]. Denmark, Belgium, and the Netherlands have enacted exit taxes applicable specifically to recapture some of the tax benefits of pensions. See Luc de Broe, *General Report, in THE TAX TREATMENT OF TRANSFER OF RESIDENCE BY INDIVIDUALS*, CAHIERS DE DROIT FISCAL INTERNATIONAL, vol. LXXXVIIb, at 19, 53 (2002) [hereinafter de

expected tax, availability of only one year's personal allowances, and a potential for a high marginal rate due to bunching of income. A withholding tax at a flat rate does not allow consideration of the amount of the taxpayer's overall income under a graduated rate schedule and does not provide for personal allowances. Although the work country might, as the United States does, allow the individual to seek a refund of a portion of the withheld tax by filing a nonresident personal tax return reflecting "effectively connected income," with a graduated rate schedule, this would involve considerable administrative complications if distributions occur over several years. On the other hand, such a return may yield an artificially low tax rate due to the omission of the individual's income from other countries.⁵¹

If the country of retirement fails to impose tax on income from the foreign pension plan (either because of an exemption or because it is not aware of the plan's existence),⁵² then the exit tax or the withholding tax

Broe, *General Report*]. The Danish tax "only applies to excessive pension premiums paid some years before emigration" and does not apply to departure to a country in which the Danish treaty allows source-based taxation of pensions. *Id.* Belgium imposes an exit tax on the value of pension rights as of the "day immediately preceding the transfer of residence." *Id.* at 54. However, the rule is not applied "in situations involving article 18 OECD model if the immigration country effectively imposes tax on the pension." *Id.* In the Netherlands, the tax applies to the value of pension rights on departure, but the tax can be deferred, if security is provided; the tax is then only collected if within ten years there is a lump sum payout or a transfer to a nonresident insurer. *Id.* at 53–54. This treatment addresses for example the case of a "Dutch resident moving to Belgium to take advantage of Belgium's favorable tax regime for lump-sum payments in lieu of pensions." *Id.* at 53. Canada imposes an exit tax, *see* Chand, *Exit Charges*, at ¶2.1.2, but it does not apply to pensions or retirement accounts. *See infra* note 111. The Netherlands exit tax applies only to substantial shareholdings. Chand, *Exit Charges, supra*, at § 2.1.4.

51. Canada allows the individual to file a Canadian return. *See infra* note 111.

52. Some countries do not tax pensions from foreign sources. One is apparently South Korea. De Broe, *General Report, supra* note 50, at 59, n.50. In the case of an immigrant to Australia, no tax is imposed on amounts previously accumulated in a foreign pension plan and this is also true in the Netherlands "if the immigrant has been subject to a foreign tax on the accumulations that is comparable to the Dutch tax or if he did not enjoy a deduction for the contributions." *Id.* at 59. De Broe further explains that in Australia "if lump sum payments are made within six months after arrival a full exemption is available." *Id.* For discussion of Israeli rules, *see* Andrew Halkyard, *Tax Incentives to Encourage Migration of Skilled Labour: Another Tax Expenditure or a Failure of Tax Residence?* 11 *EJOURNAL OF TAX RES.* 23, 25 (2013) [hereinafter Halkyard, *Tax Incentives*]. Halkyard explains that for new immigrants and certain returning residents there is a 10-year exemption for "foreign source income, including income from professional work, salary and capital gains" and that "[n]ew immigrants are exempted from tax on offshore pension income without time limit." *Id.*

imposed by the work country (or, in the case of the United States as the work country, the graduated rate tax imposed with respect to a U.S. citizen) would be the final tax imposed on the individual with respect to the retirement plan.

On the other hand, if the country of retirement also taxes income from the retirement plan after the individual establishes residence (most likely under a progressive rate schedule based on worldwide income and with personal allowances), there is a possibility of double international taxation, unless the work country's tax is allowed as a credit in the new residence country. However, discrepancies in the timing of income reporting between the two countries may create an obstacle to allowance of a foreign credit.

B. *Foreign Tax Credit in Retirement Country*

If the foreign tax credit rules of the new residence are similar to the rules under the U.S. Internal Revenue Code, no credit would be allowed for foreign tax paid before the individual became a resident and the amount of foreign tax credited would be limited to the tax rate of the new residence multiplied by the foreign source income for the year, as determined under the residence country's timing principles; and unused credits would be allowed to be carried back only one taxable year or carried forward to subsequent years.

In that case, no foreign tax credit would be allowed by the new residence for the exit tax because it was paid before the individual assumed his new residence.⁵³ Thus, if any further tax is imposed by the new residence on income from the retirement plan, this would represent an additional tax.

In addition, the new residence may view the accrual of earnings in the retirement plan as the taxable event for its tax purposes rather than the making of a distribution, at which time the work country would withhold its tax (or, if the United States is the work country, would apply a graduated rate tax to a U.S. citizen). In that case, it may not be possible to claim a foreign tax credit in the retirement country for tax imposed by the work country in the year a distribution is made (for lack of foreign source income in that year), and a carryback may not be allowed to the earlier year of accrual

53. See ABA Tax Section, *Options*, *supra* note 24, at 351 (discussion of foreign tax credit timing issues for a covered expatriate who incurs exit tax with respect to deferred compensation earned abroad); de Broe, *General Report*, *supra* note 50, at 62 (reporting that none of the 26 countries surveyed allow a foreign tax credit for a tax paid when previously accumulated pension rights have been taxed on departure from the old residence). The rationale is either that the "recapture is not a taxable event according to the taxation principles of the immigration country" or that "a foreign tax credit is only granted if the foreign and the domestic tax are payable in the same year of assessment." *Id.* at 62.

(when the new residence considers the foreign source income to arise).⁵⁴ (Similarly, a U.S. citizen, working and residing in a foreign country and contributing to a foreign retirement plan, who later retires in the United States, may incur U.S. tax on contributions during the working years, but a foreign withholding tax several years later when distributions are made.) On the other hand, when these timing differences occur, it may be possible to use source country withholding tax on distributions from the plan as a credit against tax paid in the new residence on other foreign source income in current or subsequent years.⁵⁵

C. TEE Retirement Plan

If the retirement plan was taxed under the TEE paradigm in the work country, as for example, in the case of a Roth IRA or Roth 401(k) account, the individual would view his tax as “prepaid” and would not be expecting to owe any further tax on earnings accruing in the plan or on amounts distributed from the plan. But if the new residence does not recognize the foreign plan as a qualified TEE plan, then it may impose its own tax either at the time earnings accrue or when distributions are made. Since the work country tax would have been incurred before the individual became a resident, and perhaps in the distant past, the new residence would be very unlikely to allow foreign tax credit for work country tax.

On the other hand, the new residence may limit itself to taxing earnings accruing after the individual becomes a resident (as the United States does for a foreign plan viewed as a grantor trust) or may at least refrain from taxing the amounts already subject to work country tax at the time of contributions (as the U.S. would do if applying section 72(w)).

V. COORDINATION UNDER TREATIES

54. For discussion of timing issues preventing claiming of a foreign tax credit in connection with stock options, see Colon, *Double-Dipping*, *supra* note 22, at 209. A U.S. citizen who works and resides in a foreign country and contributes to a foreign plan may be subject to U.S. tax when contributions are made; when he later retires in the United States, he would not be able to credit against this U.S. tax the foreign tax imposed several years later on the plan distributions.

55. See ROBERT KEATS, *A CANADIAN’S BEST TAX HAVEN: THE U.S.* 109 (Self-Counsel Press 2012) [hereinafter KEATS, TAX HAVEN] (“[R]ecovering foreign tax credits from the IRS created through the withholding [of Canadian] tax on withdrawal of the funds [in a RRSP] from Canada may often result in achieving zero net tax.”). He explains that “[t]he recovery of foreign tax credits requires a custom-designed investment portfolio or other foreign income generator strategies to generate the types of income that will utilize foreign tax credits efficiently.” *Id.*

A. *Existing U.S. Treaties*

Most existing U.S. treaties achieve coordination for the taxation of retirement plans after a change in residence by denying the source country (the work country) the right to tax when payments are made.⁵⁶ There are, however, some important exceptions,⁵⁷ which allow source taxation, but in

56. See Blum & Singer, *Proposal*, *supra* note 19, at 790–91. This is also the rule in the OECD Model Tax Convention and the U.S. Model Treaty. See OECD Model Tax Convention on Income and on Capital art. 18 (2010), http://www.keepeek.com/Digital-Asset-Management/oced/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en#page1 [hereinafter OECD Model Treaty] (“[P]ensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.”); U.S. Model Treaty, *supra* note 23, art. 17.1(a) (“[P]ensions and other similar remuneration beneficially owned by a resident of a Contracting State shall be taxable only in that State.”).

57. A few countries, including France and Denmark, provide for *exclusive* source-based taxation. See Protocol Amending the Convention between The Government of the United States of America and the Government of The French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, art. III, Dec. 8, 2004, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-France-12-8-2004.pdf> [hereinafter U.S.-France Protocol]; Convention Between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 18.1(a), Aug. 19, 1999, <http://www.irs.gov/pub/irs-trty/denmark2.pdf> [hereinafter U.S.-Denmark Treaty]. The savings clause in the French treaty does not apply to this provision, so that a U.S. citizen receiving distributions from a French pension plan is taxable only by France. U.S.-France Protocol, *supra*, art. VI.2; see Hall, *International Pension*, *supra* note 19, at n.730. Under the treaty with the United Kingdom, the source country has the exclusive right to tax a “lump sum payment.” Convention between The Government of the United States of America and the Government of The United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, art. 17.2, July 24, 2001, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/uktreaty.pdf> [hereinafter U.S.-U.K. Treaty]. Under the treaty with Italy, a lump sum payment received after a change of residence from the place of employment is taxable only in the source country. Convention Between the Government of the United State of America and the Government of the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud or Fiscal Evasion, art. 18.3, Aug. 25, 1999, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/italy.pdf> [hereinafter U.S.-Italy Treaty]. The treaty with the Philippines provides for taxation in the country where services were performed. The Convention Between the Government of the United States of America and the Government of the Republic of

some cases limit the rate of tax to 15 percent.⁵⁸ (A U.S. citizen who participates in a U.S. retirement plan and then moves abroad, without loss of

the Philippines with Respect to Taxes on Income, art. 18.1, Oct. 1, 1976, <http://www.irs.gov/pub/irs-trty/philip.pdf> [hereinafter U.S.-Philippines Treaty].

58. A 15 percent limit in a treaty may apply, in all, or, in only some, circumstances. The treaty with Indonesia allows taxation at the source at a rate of no more than 15 percent. The Convention Between the Government of the United States of America and the Government of the Republic of Indonesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 21.1, July 11, 1988, <http://www.irs.gov/pub/irs-trty/indo.pdf> [hereinafter U.S.-Indonesia Treaty]. The treaty with Canada limits source taxation of periodic payments to 15 percent, but imposes no limit with respect to lump sum payments. A Convention Between the United States and Canada with Respect to Taxes on Income and on Capital, art XVIII.2(a), Sept. 26, 1980, <http://www.irs.gov/pub/irs-trty/canada.pdf> [hereinafter U.S.-Canada Treaty]. Under the South African treaty, U.S. taxation at source is limited to 15 percent (except where a distribution is subject to an early withdrawal penalty); but South Africa may tax at source if the individual was employed there for over 10 years. *See* Convention between the United States of America and the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, art. 18.1(a), (b), Feb. 17, 1997, <http://www.irs.gov/pub/irs-trty/safrica.pdf>; R. Mark Williamson, *U.S. Income Tax Treaties—Provisions Relating Only to Individuals*, 943-1st TAX MGMT. PORT. (BNA) § III.G.3. (last accessed Jan. 9, 2015), at n.150 [hereinafter Williamson, *U.S. Income Tax Treaties*]. Under the pending treaty with Chile, the source country may tax at a rate limited to 15 percent. Convention Between the Government of the United States of America and the Government of the Republic of Chile for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Income and Capital, with Protocol, art. 18.1(a), Feb. 4, 2010 (pending), <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc8/pdf/CDOC-112tdoc8.pdf> [hereinafter Pending U.S.-Chile Treaty]. However, as in most U.S. treaties, article 18.3 provides for exclusive source-based taxation of payments under the social security system, and the privatized accounts under the Chile social security system are included in that provision. *See id.* at 36, ¶19 of Protocol. Some countries allow source-based taxation without a 15 percent limit. The treaty with Jamaica allows source taxation if “the past employment was performed in the other Contracting State while such person was a resident of that other State.” Convention Between the Government of the United States of America and the Government of Jamaica for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art 19.1(a), May 21, 1980, <http://www.irs.gov/pub/irs-trty/jamaica.pdf>. Under the treaty with the Netherlands, the source country may tax a lump sum payment if the recipient had been a resident within the previous five years. The Convention Between the United States of America and the Kingdom of the Netherlands For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art.19.2, Dec. 18, 1992, <http://www.irs.gov/pub/irs-trty/nether.pdf> [hereinafter U.S.-Netherlands Treaty]; *see* Williamson, *U.S. Income Tax Treaties*, *supra*, n.151. The current Polish treaty does not have a limitation on taxation of pensions. Convention

U.S. citizenship, cannot use a treaty provision barring or limiting tax by the source country to avoid U.S. tax because of the savings clause. However, treaty provisions may enable the U.S. citizen to claim a credit against U.S. tax for the tax imposed by the new residence with respect to U.S. source income from the retirement plan).⁵⁹

In order for an emigrating retiree to claim the benefit of a treaty limiting U.S. source-based taxation, the treaty resident needs to file Form W-8BEN with the payor (to avoid or reduce the withholding). This in turn triggers filing of a Form 1042-S by the payor to the IRS, resulting in an

Between the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Oct. 8, 1974, <http://www.irs.gov/pub/irs-trty/poland.pdf> [hereinafter U.S.-Poland Treaty]. However, the new, pending U.S. treaty with Poland provides for exclusive residence taxation. Convention Between the United States of America and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, art. 18.1, Feb. 13, 2013 (pending), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Poland-2-13-2013.pdf> [hereinafter Pending U.S.-Poland Treaty]. For a review of provisions in U.S. treaties, see Williamson, *U.S. Income Tax Treaties*, *supra*, at § III.G.

59. A U.S. citizen who moves his residence abroad is nevertheless taxed under section 1 on worldwide income. Section 911 does not apply to pension distributions or U.S. source income. Under a treaty savings clause, the exemption from source country taxation of a pension would not apply to a U.S. citizen. *See, e.g.*, U.S. Model Treaty, *supra* note 23, art.1.4, 1.5(a). But under various U.S. treaties, the tax imposed by the new residence may be claimed as a foreign tax credit against U.S. tax. *See, e.g.*, U.S. Model Treaty, *supra* note 23, art. 23.2 and 23.4 (credit to be allowed by United State for foreign tax paid in the country of retirement as if the income were from foreign sources); Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 22.3, Nov. 27, 2006, <http://www.irs.gov/pub/irs-trty/belgiumtt06.pdf> [hereinafter U.S.-Belgium Treaty]; The Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, art. 22.3, Apr. 30, 1984, <http://www.irs.gov/pub/irs-trty/china.pdf>; Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, art. 23.3, Oct. 2, 1996, <http://www.irs.gov/pub/irs-trty/swiss.pdf>; IRS Program Manager Technical Assistance Memorandum, PMTA 2010-002, Feb. 2, 2010, http://irs.gov/pub/lanoa/pmta_2010-02.pdf (explaining application of art. 23.3 of the U.S. treaty with Switzerland). Absent the treaty, the United States would not allow a foreign tax credit for tax paid to the country of retirement because the income is from U.S. sources; foreign taxes could be claimed as an itemized deduction. Hall, *International Pension*, *supra* note 19, at § 1.B.1.a, n.132.

automatic sharing of this information with the retirement country.⁶⁰ Under this approach, coordination is achieved by assigning the right to tax solely to the retirement country, which in effect steps into the shoes of the work country by imposing a progressive tax on worldwide income. However, under many U.S. treaties, social security payments are taxed exclusively in the source country so that worldwide income in the residence country may exclude this potentially significant item.

For the most part, treaties forbidding (or limiting) source-based taxation of retirement income do not regulate the tax treatment of the retirement plan in the retirement country; as a result, the individual's expected treatment in the work country (in terms of timing of tax, determination of investment in the contract, and exemption for TEE plans) may not be followed by the retirement country. In fact, it is not clear if current U.S. treaties actually require the retirement country to impose any tax as a condition of the source country exemption. Moreover, it is not clear whether the imposition of an exit tax by the work country would be barred in any existing U.S. treaty in that an exit tax is imposed before the individual becomes a resident of the treaty country.⁶¹

B. U.S. Model Treaty

Some U.S. treaties, and the U.S. Model Treaty, go further toward making the tax in the retirement country more consistent with the tax that would have been imposed in the work country absent the change of residence. A number of recent treaties, such as the treaty with the United Kingdom, provide that “the amount . . . that would be exempt from taxation” in the source country “if the beneficial owner were a resident thereof shall be exempt from taxation” in the residence state.⁶² This provision not only bars

60. See Blum & Singer, *Proposal*, *supra* note 19, at 798–99; I.R.S., Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals) (Rev. Feb. 2014); I.R.S., Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding (2015). However, in some cases, the treaty resident does not file the form; in that case, if the payor has the payee's U.S. SSN and payment is made to an address in a treaty country, the payor may rely on a presumption that the individual is a U.S. person. See *supra* note 21 and *infra* note 104.

61. For discussion of whether “introduction of a domestic immediate exit tax regime after the conclusion of a tax treaty amounts to a treaty override,” see Chand, *Exit Charges*, *supra* note 50, at § 4.33.

62. See U.S.-U.K. Treaty, *supra* note 57, art. 17.1(b); U.S.-Belgium Treaty, *supra* note 59, art. 17.1(b); U.S.-Canada Treaty, *supra* note 58, art. 18.1; Convention Between the United States of America and the Republic of Estonia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 18.1, Jan. 15, 1998, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Estonia-1-15-1998.pdf>; Convention

taxation by the residence country of amounts previously taxed by the source country, but also ensures that if the qualified plan in the source country was based on the TEE paradigm, the new residence country would not be able to impose tax, even with respect to accruals after residence was established.⁶³

Some treaties also prevent the residence country from taxing prior to the receipt of distributions from the retirement plan. For example, the U.S.-Canada treaty provides Canadians assuming U.S. residence an election to defer U.S. taxation of income arising from investments held in an RRSP until distributions are received.⁶⁴ A number of recent treaties (following the U.S.

Between the United States of America and the Republic of Latvia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Jan. 15, 1998, art. 18.1, <http://www.irs.gov/pub/irs-trty/latvia.pdf>; Convention Between the Government of the United States of America and the Republic of Lithuania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Jan. 15, 1998, art. 18.1, <http://www.irs.gov/pub/irs-trty/lith.pdf>; Convention Between the Government of the United States of America and the Government of Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Aug. 8, 2008, art. 17.1(b), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/usmalta%20agreement.pdf>; *see also* Convention Between the Government of the United States of America and the Government of the Republic of Hungary for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 17.1(b), Feb. 4, 2010 (pending), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Hungary-2-4-2010.pdf> [hereinafter Pending U.S.-Hungary Treaty]; Pending U.S.-Chile Treaty, *supra* note 58, art. 18.1(b); Pending U.S.-Poland Treaty, *supra* note 58, art. 18.2.

63. *See* U.S. Dep't of the Treasury, Technical Explanation Accompanying the United States Model Income Tax Convention, Nov. 15, 2006, at 54–55, <http://www.irs.gov/pub/irs-trty/temod006.pdf> [hereinafter Technical Explanation]. *See* Reuven S. Avi-Yonah & Martin B. Tittle, *The New United States Model Income Tax Convention*, 61 BULL. INT'L TAX. 224, 230 (2007) (noting that this provision was “suggested by Para. 23 of the OECD Commentary on Art. 18, which mandates a reciprocal exemption when a pension that would be exempt in the source state is paid to a resident of the other contracting state”). The commentary on the OECD Model Treaty explains that this type of provision addressed the concern that the residence country would tax pensions “which were designed not to be taxed and the amount of which may . . . result in undue financial hardship for the recipient of the pension.” OECD, Commentary, *supra* note 38, art. 18, ¶ 22.

64. Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, art. 13.2, Sept. 21, 2007, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-Canada-9-21-2007.pdf> [hereinafter U.S.-Canada Protocol]; Leitner, *Treaty Election*, *supra* note 28, at 1023. This type of provision is also suggested in the OECD's commentary on its model treaty. OECD, Commentary, *supra* note 38, art. 18, ¶ 29. If the election is made, investment in the

Model Treaty)⁶⁵ provide for deferral of taxation until a distribution is made (without the need for an election).⁶⁶

The U.S. Model Treaty prevents taxation by the source country⁶⁷ and adopts both of these refinements to make sure that the residence country follows the timing rules of the source country and does not tax amounts already taxed or amounts not intended to be taxed. (Similarly, when a U.S. citizen is working and residing in a foreign country and contributing to a

contract would apparently be allowed for amounts contributed or earnings accrued thereon (but not unrealized asset appreciation), prior to the establishment of U.S. residence. Leitner, *supra*, at 1023 (citing Rev. Proc. 89-4, 1989-2 C. B. 596). Although Leitner notes that this revenue procedure was superseded by Rev. Proc. 2002-23, 2002-1 C.B. 744, he notes that the 2002 procedure does not address the issue of investment in the contract. *Id.*

65. U.S. Model Treaty, *supra* note 23, art. 18.1.

66. See U.S.-Belgium Treaty, *supra* note 59, art. 17.6; Convention Between the Government of the United States of America and the Government of the Republic of Bulgaria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 17.5, Feb. 23, 2007, http://www.amcham.bg/Files/The_Agreement.pdf; Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, art. 18A.1, Aug. 29, 1989, <http://www.irs.gov/pub/irs-trty/germany.pdf>; Convention Between the Government of the United States of America and the Government of Iceland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 17.4, Oct. 23, 2007, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Iceland-10-23-2007.pdf>; U.S.-Malta Treaty, *supra* note 62, art. 18; Protocol Amending the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 5(a), March 8, 2004, [http://www.treasury.gov/resource-center/tax-policy/treaties/](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-Netherlands-3-8-2004.pdf)

[Documents/Treaty-Protocol-Netherlands-3-8-2004.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-Netherlands-3-8-2004.pdf) (adding paragraph 7 to Article 19); U.S.-U.K. Treaty, *supra* note 57, art. 18.1; Pending U.S.-Chile Treaty, *supra* note 58, art. 18.4; Pending U.S.-Hungary Treaty, *supra* note 62, art. 17.3; Pending U.S.-Poland Treaty, *supra* note 58, art. 18.4; Protocol Amending the Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Art. X, Jan. 1, 2014 (pending), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-Spain-1-14-2013.pdf> [hereinafter Pending U.S.-Spain Protocol] (adding paragraph 5 to Article 20).

67. U.S. Model Treaty, *supra* note 23, art. 17.1(a). However, if the source country is the United States, the United States may tax U.S. retirement income of a U.S. citizen who retires in a treaty country, but must allow a foreign tax credit for the treaty country's tax as if the income were from foreign sources. *Id.* at arts. 23.2, 23.4. If the foreign tax occurs earlier than the taxable event for U.S. tax purposes, the foreign tax could be carried forward to be credited against U.S. tax in a later year.

foreign EET plan, the United States may, in effect, follow the deferral in the foreign plan (up to U.S. limits) which has the effect of coordinating the timing of eventual taxation in the two countries.)⁶⁸

C. *Evaluation of treaties*

1. *Elimination or Limitation of Tax at Source*

Countries that allow EET treatment of amounts contributed to qualified retirement plans often view this deferral of tax as a tax expenditure designed to encourage their residents to save for retirement. But if an individual emigrates before retirement and can claim the benefit of elimination of source-based tax by treaty, the intended deferral in effect becomes a complete exemption from tax in the work country. Some countries, especially those with strong retirement systems,⁶⁹ view this result as unfair,⁷⁰ as do some developing countries.⁷¹ Moreover, the rate of tax in the residence country may be much more or less than in the source country.⁷²

68. U.S. Model Treaty, *supra* note 23, art. 17.1(b) (“[T]he amount of any such pension or remuneration arising in a Contracting State that, when received, would be exempt from taxation in that State if the beneficial owner were a resident thereof shall be exempt from taxation in the Contracting state of which the beneficial owner is a resident.”); U.S. Model Treaty, *supra* note 23, art. 18.1 (“Where an individual who is a resident of one of the States is a member or beneficiary of, or participant in, a pension fund that is a resident of the other State, income earned by the pension fund may be taxed as income of that individual only when, and, subject to the provisions of paragraph 1 of Article 17 . . . to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund in that other State).”); U.S. Model Treaty, *supra* note 23, art. 18.4 (allowing to a U.S. citizen a current U.S. deduction (or exclusion) for contributions to a retirement plan in a treaty country in which he works and is resident up to the lesser of the limits in that country or the limits applicable to a generally corresponding plan in the United States). See Hall, *International Pensions*, *supra* note 19, at § V.B.2.b. A provision similar to U.S. Model Treaty, art. 18.4, is contained in U.S. treaties with Canada and the U.K. See U.S.-Canada Protocol, *supra* note 64, art. XIII.3; U.S.-U.K. Treaty, *supra* note 57, art. 18.5.

69. The Melbourne Mercer Global Pension Index, which rates 18 countries with respect to the adequacy, sustainability, and integrity of their retirement income systems, gives an A grade to Denmark, a B+ to Netherlands and Australia, B to Sweden, Switzerland, UK and Canada, C+ to Germany and Ireland, and C to the United States, Poland, South Africa, Brazil, Austria, and France. Australian Centre for Financial Studies, Melbourne Mercer Global Pension Index, Oct. 2014, at 7, http://www.globalpensionindex.com/wp/uploads/RRF18505_MMGPI_Report_MINISTERSLETTER_WEB.pdf. A D grade is awarded to China, South Korea, Indonesia, Japan, Italy, Mexico, and India. *Id.*

70. See OECD, Commentary, *supra* note 38, art. 18, ¶¶ 12–21 (Some states consider that “because a deduction for pension contributions is a deferral of tax on

the part of the employment income that is saved towards retirement, they should be able to recover the tax so deferred where the individual has ceased to be a resident before the payment of all or part of the pension benefits. This view is particularly prevalent where the benefits are paid through a lump-sum amount or over a short-period of time as this increases risks of double non-taxation.”). It notes that if the other country does not tax the retirement benefits, “the mismatch in the approaches adopted by the two States will result in a situation where no tax will be ever be payable on the relevant income.” *Id.* at ¶ 14. See also Jill C. Pagan, *United Kingdom: Momentum for Change In Approach to Taxation Gathers Pace*, 11 TAX NOTES INT’L. 802, 805 (Sept. 18, 1995). Pagan argues that countries, such as the U.K. and Netherlands, “that allow generous deductions to pension reserves, are high-tax, developed nations with strong welfare systems” and that this tax break is “justified only in relation to keeping down future welfare costs and substituting a stream of taxable income when employment has ceased.” *Id.* She argues that “high-earning ‘mobiles’ will draw their pensions as (technical) residents of havens where the sun shines and the taxes are low; [while] the mid- to lower-income sector and the poor needing welfare [will] stay behind in high-tax countries.” *Id.* at 805–06. See Cynthia Blum, *U.S. Income Taxation of Cross-Border Pensions*, 3 FLA. TAX REV. 259, 307 (1996) [hereinafter Blum, *Cross-Border Pensions*].

71. The 2011 U.N. Model Treaty provides two alternative provisions of Article 18. Under Alternative A, pensions are taxable solely in the residence country. Under Alternative B, pensions may be taxed in the residence country but also may be taxed in the source country (meaning the country in which the payor is a resident or has a permanent establishment). Under both alternatives, social security benefits are taxable only in the source country. United Nations, Model Taxation Convention Between Developed and Developing Countries (2011), art. 18, <http://www.slideshare.net/undesa/un-model-2011update> [hereinafter U.N. Model Treaty]. Under Alternative B, “the provisions of Article 23 A or 23 B will determine whether the State of residence shall exempt such income or shall allow, as a deduction from its own tax on such income, the tax paid in the State of source.” *Id.*, Commentary on art. 18, General Considerations, at 269–70. The commentary to Article 18 B notes:

Since pensions are in substance a form of deferred compensation for services performed in the State of source, they should be taxed at source as normal employment income would be. When tax relief is granted for pension contributions, the tax on part of the employment income is deferred until retirement and the tax so deferred should be recovered even if the individual has ceased to be a resident before all part of the pension benefits is paid. Pension flows between some developed and developing countries may not be reciprocal and in some cases represent a relatively substantial net outflow for the developing country.

Id., Commentary on the Paragraphs of Article 18B, at 275–76.

72. See OECD, Commentary, *supra* note 38, art. 18, ¶ 18 (“[A]n individual who has emigrated to another State with different tax rates will either be advantaged or disadvantaged by receiving an after-tax pension that will be different from that envisaged under the pension scheme.”).

Nevertheless, most treaties around the world provide for exclusive residence taxation of pensions as a means to avoid double taxation.⁷³ In fact, there are significant advantages to eliminating taxation at source in the context of a treaty where taxation by the residence country can be assured⁷⁴ and molded into an appropriate replacement for source taxation.

First, source taxation results in complications if there is more than one country that views itself as the source country. The source country might be “[where] the fund is established” or “where the relevant work has been performed” or “where deductions have been claimed.”⁷⁵ Whereas some view this controversy as resolved in favor of the place where the fund is established,⁷⁶ the OECD Model Treaty commentary views that approach as “difficult to justify” because “many individuals now spend significant parts of their careers outside” that state.⁷⁷ And the commentary argues that looking

73. See Int’l Bureau of Fiscal Doc., *The UN Model in Practice 1997-2013* (Oct. 2013), http://www.un.org/esa/ffd/wp-content/uploads/2014/11/9STM_FinalPublishedVersionIBFD.pdf (review of 1,811 of the 2,036 tax treaties concluded worldwide from 1997 to 2013, including 762 treaties between two non-OECD countries, 825 between one OECD country and another non-OECD country, and 224 between two OECD countries). The research found that 479 of these treaties (or 26 percent) attribute some sort of right to tax pensions in the source country. The percentage was 25 percent for treaties between non-OECD countries, 27 percent for treaties between a OECD and non-OECD country, and 30 percent for treaties between OECD countries. The combined percentage for a treaty with at least one non-OECD country is 26 percent, which is a significant reduction from the percentage of 37 percent found in 1997 research. See Shee Boon Law, *Pensions and Social Security Payments in Recent Tax Treaties*, 65 BULL. INT’L TAX’N 123 (Mar. 2011) (reviewing 73 tax treaties that entered into force in 2010). Law notes that 63 percent follow the OECD Model Treaty. *Id.* at 124. He asserts that none follow U.N. Model Treaty, Art. 18, Alt. B, ¶¶ 1 and 2, which in effect “link the treatment of pensions with the treatment of employment income.” *Id.* at 125. However, he finds that three provide for limited source state taxation, six provide for unlimited source taxation, and two provide for exclusive source taxation of pensions from nongovernmental employment. *Id.*

74. See OECD, Commentary, *supra* note 38, art. 18, ¶ 21 (noting that “[e]xclusive residence taxation may . . . may give rise to concerns about the non-reporting of foreign pension income” and suggesting the need for “[e]xchange of information coupled with adequate taxpayer compliance systems”).

75. U.N. Model Treaty, *supra* note 71, at 276.

76. As noted by the U.N. Commentary, “taxation in the State where those services were performed or in which relief was granted would raise uncertainty and administrative difficulties for both taxpayers and tax authorities because it would create the possibility of different parts of the same pension being taxable in different States of source.” *Id.* The commentary concludes: “It is generally agreed, therefore, that taxation of pension at source should be construed to mean taxation at the place in which the pension payments originate.” *Id.*

77. OECD, Commentary, *supra* note 38, art. 18, ¶ 19.1.

to “where the work has been performed or deductions claimed . . . would raise administrative difficulties for both taxpayers and tax authorities . . . since it would create the possibility of different parts of the same pension having different States of source.”⁷⁸ (Under current U.S. rules, a pension payment needs to be divided into a contribution element, based on the place (or places) of services,⁷⁹ and an accretion element, based on the location of the plan; this division is particularly difficult to apply in the case of a defined benefit plan.)⁸⁰

Second, as noted, the source country is limited in its methods of taxation. Neither an exit tax, nor a flat-rate withholding tax on distributions can take into account the individual’s economic circumstances while receiving distributions to the same extent as a tax by the residence country.⁸¹ Although an individual could be allowed (or required for a limited period)⁸² to file a more complete tax return in the source country and seek a refund from excessive withholding, this requires the individual to remain conversant in the tax laws of the source country throughout retirement and file complete returns in two countries⁸³ each year.⁸⁴ Third, if source country tax is allowed

78. *Id.*

79. See Rev. Proc. 2004-37, 2004-1 C.B. 1099 (application to U.S. defined benefit plan, where services provided both inside and outside United States); Rev. Rul. 84-144, 1984-2 C.B. 129 (taxable income from foreign sources for purposes of section 904 includes only amount attributable to employer contributions made to a qualified U.S. pension plan (subsequently rolled over into an IRA) on wages earned abroad).

80. See discussion at Blum, *Cross-Border Pensions*, *supra* note 70, at 308–12. For discussion of federal legislation adopted by the United States in 1996 to bar states from taxing pension payments made to a nonresident, see *id.* at 310–11.

81. See OECD, Commentary, *supra* note 38, art. 18, ¶ 17:

[T]he State of residence is in a better position to provide for adequate taxation . . . as it is easier for that State to take into account the worldwide income, and therefore the overall ability to pay tax, of the recipient so as to apply appropriate rates and personal allowances [S]ource taxation of pensions may well result in excessive taxation where the source State imposes a final withholding tax on the gross amount paid.

Id. at ¶ 17. It further notes: “If little or no tax is levied in the residence State (*e.g.*, because of available allowances), the pensioner may not be able to claim a credit in the residence State for the tax paid.” *Id.*

82. Finland imposes extended tax liability with respect to departing residents for three years. Chand, *Exit Charges*, *supra* note 50, at § 2.3.2. Germany imposes extended tax liability on German-sourced income for 10 years if the individual still has substantial economic ties with Germany and becomes a resident of a low-tax country. *Id.* at § 2.3.3.

83. See OECD, Commentary, *supra* note 38, art. 18, ¶ 17 (noting that “some States have allowed the pension payments made to non-resident recipients to be taxed at the marginal rate that would be applicable if that recipient were taxed on

as well as residence tax, there is need for allowance of a foreign tax credit in the residence country,⁸⁵ which also adds to complications.

Finally, particularly in the case of periodic distributions over an extended period of retirement in the new residence, that country may be providing significant benefits to the retiree (such as police protection, fire and ambulance service, and public transportation and other infrastructure) that justifies taxation (although perhaps not for the amount of untaxed income already accrued by the time of arrival).

As just described, the limitation on source country taxation rests more on administrative considerations and concern for the expectations of the retiree than on a decision that the source country does not deserve the revenue from taxing a tax-favored pension. This is shown by comparing the treatment of TEE pensions. Under the U.S. Model Treaty, in a case where an individual is allowed to contribute to a qualified retirement account of the TEE regime, the treaty provides that no tax shall be imposed by the residence country.⁸⁶ Thus, the only revenue to be derived is allotted to the country in which the TEE plan arose, and the individual's expectations regarding the tax treatment of the qualified plan are fulfilled.

2. *Improvements to U.S. Model Treaty*

worldwide income (that system, however, involves administrative difficulties as it requires a determination of the worldwide income of the non-resident only for the purpose of determining the applicable rate of tax)"). Moreover, the OECD commentary notes that "exclusive taxation by the State of residence means that pensioners only need to comply with the tax rules of their State of residence as regards payments covered by Article 18." *Id.* at ¶ 20.

84. The commentary to the U.N. Model Treaty suggests that absence of personal allowances by the source country may result in its tax being excessive. It suggests, as a possible treaty provision, that the source country grant to the taxpayer "any personal allowances, reliefs and reductions for taxation purposes granted to its own residents in the proportion which the pensions and other similar remunerations bear to world income" of the taxpayer. U.N. Model Treaty, *supra* note 71, at 276.

85. The commentary to the U.N. Model suggests that the method provided for in Article 23 be used, which might be a foreign tax credit or an exemption in the residence. *Id.* at 269. An exemption would in effect treat the source country's right to tax as exclusive.

86. U.S. Model Treaty, *supra* note 23, art. 17.1(b). *See also* OECD, Commentary, *supra* note 38, art. 18, ¶¶ 22–23 (discussing the situation in which residence-based taxation "may result in the taxation by that State of pensions which were designed not to be taxed and the amount of which may well have been determined having regard to that exemption" and the possibility of "undue financial hardship" for the recipient of the pension). It notes that "some States include in their tax treaties provisions to preserve the exempt treatment of pensions." *Id.* at ¶ 23. *See also* U.N. Model Treaty, *supra* note 71, at 274 (incorporating that OECD discussion).

A few improvements to the U.S. Model Treaty can be suggested, which would result in tax consequences more in line with the expectations of the individual contributing to a qualified plan and then changing residence.

First, the U.S. Model Treaty does not appear to block imposition of an exit tax immediately before departure from the country of work. Since the exit tax, such as the tax under section 877A on an IRA of a covered expatriate, applies when the individual is still resident in the work country, it is arguable that it does not represent an override of existing treaties. However, an exit tax, as noted above,⁸⁷ is inconsistent with an individual's expectation as to taxation of a traditional retirement plan if he had stayed in the United States (both in terms of acceleration of tax and bunching). Moreover, the U.S. Model Treaty apparently allows the new residence to tax earnings accrued in the retirement plan after imposition of an exit tax.⁸⁸ But it is more appropriate for the residence country to refrain from taxing these earnings.

An exit tax imposed on the balance of an EET retirement account is equivalent to the tax that would be imposed by the United States when a traditional IRA is converted to a Roth IRA. A conversion to a Roth IRA results in an exemption from U.S. tax for all future earnings accrued in the account, which is recognized as equivalent to the benefit of deferral of a traditional IRA (at least with a flat tax rate).⁸⁹ The U.S. Model Treaty requires the residence country to continue the exemption for earnings in a Roth IRA after the change of residence so that the individual does not lose the expected benefit of prepaid consumption tax treatment. Since an exit tax is essentially a forced conversion to a Roth IRA, the Model Treaty should require the residence country (and the work country) to treat it the same way as a Roth IRA. Otherwise, the individual is not reaping the expected benefit of consumption tax treatment for his retirement account.

Second, the U.S. Model Treaty should provide some assurance that the limit on taxation on the part of the first country will not result in double nontaxation. Thus, for example, under the U.S.-Israel Treaty, the United States refrains from taxing an emigrant to Israel⁹⁰ (who is not a U.S. citizen),

87. See text accompanying *supra* notes 50–51.

88. Since the United States would presumably provide basis to the extent of the amount subject to the exit tax, then under the U.S. Model Treaty this basis should also be provided in the new residence.

89. See Whitehouse, *Tax Treatment*, *supra* note 6, at 4 (equivalence of the EET and TEE paradigm with a flat tax rate).

90. The treaty with Israel simply provides that “pensions and other similar remuneration paid to an individual shall be taxable only in the Contracting State of which he is a resident.” Convention Between the Government of the United States of American and the Government of the State of Israel with Respect to Taxes on Income, art. 20.1, Nov. 20, 1975, <http://www.irs.gov/pub/irs-trty/israel.pdf>. For

but Israel has adopted rules exempting foreign source pension income for new immigrants.⁹¹ Moreover, there is no requirement in the U.S. Model Treaty that a new residence impose a tax on the full amount that would be taxed in the country of origin. The new residence might provide basis equal to the amount in the account at the time of entry; there is no requirement that treaty partners adopt the U.S. approach of section 72(w) denying basis for a foreign plan following the EET paradigm (nor does the United States follow this approach for a foreign individual retirement account). If taxation by the source country is to be replaced by tax in the new residence, then taxation of the same amount (after personal allowances) should be required. An alternative way to avoid double nontaxation is for the source country to impose withholding tax in the event of a lump sum withdrawal within a certain number of years of the individual's departure.⁹²

Third, the U.S. Model Treaty accepts that in the case of an EET retirement plan, the source country should refrain from taxing. Therefore, it seems a relatively small step to allow a retirement plan created in the first country (and allowed to be rolled over to another such plan in the first country) to also be rolled over to a roughly similar EET retirement plan in the second country. This has the potential to provide more flexibility for investments in the plan, relief from complex reporting requirements for ownership of foreign financial assets,⁹³ and simplicity in accounting for

discussion of the controversy under the Israel-UK treaty, see Brian Cleave CB QC, *The Weiser Case: UK Pension Income Not Subject to Tax in Israel under the Israel-United Kingdom Income Tax Treaty (1962)*, 67 BULL. INT'L TAX'N 6 (2013). For discussion of tax concessions used to attract talented individuals, see Halkyard, *Tax Incentives*, *supra* note 52.

91. South Korea apparently does not tax foreign source pension income. See Chang Hee Lee, *Republic of Korea Report*, in THE TAX TREATMENT OF TRANSFER OF RESIDENCE BY INDIVIDUALS, CAHIERS DE DROIT FISCAL INTERNATIONAL, vol. LXXXVIIIb, at 387 (2002) ("Arguably, foreign-source private pensions and payments under a life insurance contract received by an immigrant are not taxable, because the taxable category of 'pension income' only lists Korean source pensions and payments. No other taxable category will apply to foreign source pensions and payments.").

92. Under the U.S. treaty with the Netherlands, a lump sum payment may be taxed by the source country if the recipient had been a resident within the previous five years. See U.S.-Netherlands Treaty, *supra* note 58, at art. 19.2. The U.S. treaties with the U.K. and Italy provide for exclusive source country taxation of lump sum withdrawals. See U.S.-U.K. Treaty, *supra* note 57, at art. 17.2; U.S.-Italy Treaty, *supra* note 57, at art. 18.3. The treaty with Canada does not limit source country taxation of a lump sum payment. See U.S.-Canada Treaty, *supra* note 58, at art. XVIII.2(a).

93. See *supra* note 44. But if a U.S. citizen worker with a U.S. retirement plan retires in a foreign country, a rollover to a foreign plan would result in the need to report the foreign plan to the United States.

distributions from the plan.⁹⁴ The OECD commentary to Article 18 contains an optional provision calling for a transfer from a domestic fund to a foreign fund to be treated in the same manner as a transfer between domestic funds.⁹⁵ But use of this provision does not appear to be common.⁹⁶ The IRS has rejected taxpayer arguments⁹⁷ that certain U.S. treaties may allow tax-free

94. For an extensive discussion of reasons for a Canadian emigrant to the United States to make “complete or staged withdrawal” from a RRSP, see ROBERT KEATS, *THE BORDER GUIDE: A GUIDE TO LIVING, WORKING AND INVESTING ACROSS THE BORDER* 209 (Self-Counsel Press, 8th ed. 2007). Failure to do so, he argues, leads to many potential problems: (1) possible future changes in Canadian withholding tax or in rules for withdrawals from a RRSP; (2) potential for a Canadian “deemed disposition” tax at death, which may not be creditable against U.S. estate tax; (3) exposure to unfavorable currency fluctuations; (4) increased complexity for investing in U.S. funds; (5) higher brokerage fees and management fees in Canada; (6) state law requirements that a broker obtain a brokerage license in the place of residence; (7) future capital gains facing double tax; (8) complications of tax and investment management; (9) a need for U.S. advisors who understand RRSPs; (10) a need for U.S. information filings for foreign plans held by U.S. resident; and (11) the possibility that Canada may view the continued holding of an RRSP as residential tie to Canada. *Id.* at 209–14.

95. See OECD, Commentary, *supra* note 38, art. 18, ¶¶ 66–68, cited in Luc de Broe & Robert Neyt, *Tax Treatment of Cross-Border Pensions under the OECD Model and EU Law*, 63 BULL. INT’L TAX’N 86 (Mar. 2009), at 89 [hereinafter de Broe & Neyt, *EU Law*] (summarizing the proceedings of a 2008 IFA Congress seminar on cross-border pensions). The OECD Commentary notes that such a transfer may create a problem in that the country in which “the individual resides may consider that the payment arising upon the transfer is a taxable benefit.” OECD, Commentary, *supra* note 38, art. 18, ¶ 68. Moreover, if a treaty “gives source taxing rights on pension payments,” the source country “may want to apply that taxing right to any benefit derived under the scheme.” *Id.*

96. de Broe & Neyt, *EU Law*, *supra* note 95, at 89. This may be because a country that retains “source taxing rights on pensions [under a treaty] . . . will obviously not agree to include a rollover clause on the transfer of pension rights in their tax treaties.” *Id.* Also, “the state to which the pension rights are transferred” may object if the first pension scheme “does not correspond to a scheme recognized in the host state,” so that “pension rights that do not qualify for tax relief in the host state could accrue tax free for years, thus creating shop-floor inequality.” *Id.*; see also Peter Schoneville, Koen Van Duyse, & David W. Powell, *Friction at the Border—Recent Cross Border Developments*, INT’L PENSION AND EMPLOYEE BENEFITS LAWYERS ASS’N, 34 (May 24, 2009), http://www.groom.com/media/publication/486_IPEBLA%20Cross%20Border%20Presentation%20for%20052709.pdf.

97. See ADVISORY COMM. ON TAX-EXEMPT AND GOV’T ENTITIES, I.R.S., INT’L PENSION ISSUES IN A GLOBAL ECONOMY: A SURVEY AND ASSESSMENT OF IRS’ ROLE IN BREAKING DOWN THE BARRIERS 49 (2009), www.irs.gov/pub/irs-tege/tege_act_rpt8.pdf (“Acknowledging that there would be a tax cost, rollovers to U.S. qualified plans or IRAs should be permitted from approved ‘broad-based

rollover between retirement plans of the two treaty partners.⁹⁸ Adoption of this rollover rule would be an improvement to the U.S. Model Treaty.

VI. OTHER METHODS OF COORDINATION

A. *Bilateral Income Tax Treaties are not a Complete Answer*

Many of the treaties entered into by the United States do not completely follow the U.S. Model Treaty.⁹⁹ Approximately ten current U.S. treaties provide for taxation by the source country, in at least some circumstances.¹⁰⁰ Only seven current treaties require the residence country to exempt amounts that would be exempt in the source country (due to basis recovery or a TEE paradigm).¹⁰¹ And only seven current treaties require the

foreign retirement plans' meeting the Code section 409A definition. This result would provide more flexibility for cross-border mobile employees. The European Union has already approved this concept." (footnote omitted)).

98. See Letter of David W. Powell, Principal, Groom Law Group Chartered, to John Harrington et al., Dep't of Treasury 10–11 (July 13, 2009), http://www.groom.com/media/publication/502_model%20treaty%20comments%20071009.pdf (citing P.L.R. 98–33–020 (May 19, 1998) and Rev. Proc. 2008-40, 2008-29 I.R.B. 151). *Id.* at n.13. See also C.C.A. 2012–31–010 (Apr. 24, 2012) (transfer from U.S. plan to U.K. plan was not made to an “eligible retirement plan” described in section 402(c)(8)(B) and therefore treated as distribution, rather than a tax-free rollover; assumption made that section 402(d) was not applicable to the U.K. plan); P.L.R. 2011-0096 (Dec. 30, 2011), <http://www.irs.gov/pub/irs-wd/11-0096.pdf> (noting that although the U.S.-Malta treaty prevents current U.S. taxation of a U.S. resident on a transfer from one Malta pension fund to another, and a provision of the U.S.-U.K. treaty prevents U.S. taxation on a transfer from one U.K. pension fund to another, the treaties do not protect a U.S. resident from U.S. taxation on a transfer of funds from a U.K. fund to a Malta fund).

99. The United States has 68 income tax treaties that are currently in effect. See Jason R. Connery, Seth Green, & Kimberly Tan Majure, *Current Status of U.S. Tax Treaties and International Tax Agreements*, 43 TAX MGM'T INT'L J. 633, 706–07 (2014) [hereinafter Connery, Green, & Majure, *Current Status*]. This includes nine countries with which the U.S.-U.S.S.R. Treaty, signed June 20, 1973, is in effect. These are Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan. *Id.* at 707, n.6.

100. See *supra* notes 57–58. These are France, Denmark, the Philippines, Indonesia, Poland, South Africa, the U.K., Italy, Jamaica, Canada, and the Netherlands. *Id.* Source taxation is also allowed under the pending treaty with Chile. See *supra* note 58. But the pending treaty with Poland would no longer allow source taxation. See *supra* note 58.

101. See *supra* note 62. These are the UK, Belgium, Canada, Estonia, Latvia, Lithuania, and Malta. *Id.* Three pending treaties (Hungary, Chile, and Poland) include this provision. *Id.* In addition, the current treaty with Slovenia prevents taxation of amounts already taxed in the source country. Convention

residence country to defer taxation of retirement income of an individual retiree until the time of distribution.¹⁰² None explicitly deal with the new exit tax imposed by the United States. Nor do the treaties require the new residence to impose a tax as a condition for a tax exemption or rate reduction in the source country. Finally, the withholding regulations allow U.S. payors of retirement income to presume that an individual who has a U.S. social security number and an address in a treaty country is a U.S. person and to impose backup withholding as it would for a U.S. person not filing a Form W-4P; in that case, the United States would collect some tax without providing information to the residence country,¹⁰³ which is granted exclusive right of taxation under the treaty.¹⁰⁴

Moreover, in light of the arduous and time-consuming procedures for modifying treaties,¹⁰⁵ bringing all these treaties up to the standards of the U.S. Model Treaty would be a very significant undertaking that could be expected to span many years, even assuming that other countries would find that policy acceptable. Moreover, many developing countries, which may send workers to the United States,¹⁰⁶ but to which the workers may return on

Between the United States of America and the Republic of Slovenia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, art. 18.1, June 21, 1999, <http://www.irs.gov/pub/irs-trty/slovenia.pdf>.

102. See *supra* note 66. These are Belgium, Bulgaria, Germany, Iceland, Malta, the Netherlands, and the U.K. This provision is included in three pending treaties (Hungary, Chile and Poland) and in a pending protocol with Spain. *Id.*

103. For discussion of U.S. reluctance to share information about foreigners with their countries of residence, see Lee A. Sheppard, *News Analysis: Will U.S. Hypocrisy on Information Sharing Continue?*, 69 TAX NOTES INT'L 320 (Jan. 28, 2013). Cf. Avi-Yonah, *Labor Mobility*, *supra* note 13, at 175 (noting that “the United States has finally decided to make its own banks collect information on interest paid to nonresidents”).

104. See Reg. § 1.1441-1(b)(3)(iii)(C), discussed in Blum & Singer, *Proposal*, *supra* note 19, at 798–99, 804–05. While new temporary withholding regulations providing for coordination with FATCA revise a number of related provisions, this particular provision is reserved. See T.D. 9658, 2014-13 I.R.B. 748 (adopting Reg. § 1.1441-1T(b)(3)(iii), with (B) and (C) reserved). The proposed regulations are the same. REG-134361-12, I.R.B. 2014-13, Mar. 24, 2014. See *supra* notes 21 & 60.

105. For example, treaties signed with Chile and Hungary in February, 2010, have not yet been ratified by the Senate, although they were approved by the Senate Foreign Relations Committee on April 1, 2014. See Casey Wooten, *Foreign Relations Panel OKs Accords Fostering Communication on Tax Issues*, INT'L TAX MONITOR (BNA), Apr. 2, 2014.

106. The ten largest immigrant groups in the U.S. in 2012 were from Mexico, Korea, India, Guatemala, El Salvador, the Dominican Republic, Cuba, China, Vietnam, and the Philippines. Migration Policy Institute, *Largest U.S.*

retirement, do not have treaties with the United States and may not in the future.¹⁰⁷ For example, the United States has only four treaties with countries in Africa¹⁰⁸ and one treaty (as well as one pending treaty) with a country in South America.¹⁰⁹ Thus, it is important to consider whether there are means of achieving better coordination without the use of treaties.

B. Possible Incentives for Coordination in Absence of Comprehensive Income Tax Treaty

In the absence of a comprehensive income tax treaty, the work country may have no reason to refrain from imposing its withholding tax or an exit tax on an individual who departs to another country with a qualified retirement plan of the EET paradigm. By imposing tax, it preserves for itself the expected future tax revenue from the EET plan; and it avoids the possibility of double nontaxation in the event that the new residence does not impose a tax. However, the work country cannot at the same time be assured that the new residence will not impose its own tax in a duplicative manner so that the departing individual faces double international taxation. This possibility makes the work country a less attractive destination for global talent.

The residence country, on the other hand, may lack information regarding the existence of the retirement plan, so that it cannot accurately measure the worldwide income of its resident. Even if it would want to exempt any foreign retirement income from tax, it may want to obtain information about such income for purposes of determining personal allowances or tax rates under its income tax or in determining means-tested benefits to be accorded to its residents. If the residence country does obtain information about the existence of the plan and wishes to tax income from

Immigrant Groups Over Time, 1960–Present, <http://www.migrationpolicy.org/programs/data-hub/charts/largest-immigrant-groups-over-time>. Many of these countries are no longer classified as “developing.”

107. See Avi-Yonah, *Labor Mobility*, *supra* note 13, at 181, n.73, for an argument that withholding tax on inbound portfolio capital is not:

needed to induce countries to enter into tax treaties with the United States, because most countries that want such treaties (that is, developed countries and large developing ones) already have them and the others (smaller developing countries) are unlikely to want them because they are uninterested in reducing U.S. taxation on their mobile capital (which from their perspective represents undesirable capital flight).

Id.

108. These are Egypt, Morocco, South Africa, and Tunisia. See Connery, Green, & Majure, *Current Status*, *supra* note 100, at 706–07.

109. The United States has a treaty with Venezuela and a pending treaty with Chile. *Id.* at 707–08.

the plan, it may lack sufficient information about the work country's treatment of the plan that would enable it to better coordinate its tax treatment with the tax treatment in the work country.

Therefore, even if a particular country is primarily a work country or primarily a retirement country, it may have an interest in greater information sharing and greater coordination of taxation.

C. Possible Multilateral Agreement

Perhaps these interests could be promoted by means of a multilateral agreement for information-sharing and taxation of retirement plans and their beneficiaries. (The Multilateral Agreement for Administrative Assistance in Tax Matters¹¹⁰ is a precedent for a multilateral agreement relating to taxation.) Under this proposed agreement, each signatory country would be required to obtain information regarding the residence of beneficiaries under its local qualified retirement plans and the timing and amount of source-based taxation and to share it automatically with other signatories; moreover, each signatory would agree to refrain from imposition of an exit tax with respect to local qualified retirement plans of residents departing to become residents of another signatory country. Each signatory, in taxing retirement payments to its residents from another signatory country's qualified plan, would be required to follow the EET or TEE paradigm established in that other country and to follow the source country's lead in determining investment in the contract (as under section 72(w)). In the case of a qualified plan organized in a signatory country, the residence country would be obligated to avoid double taxation by means of a foreign tax credit or exemption for the foreign source income; carrying out this obligation would be facilitated by the information exchange and coordination of the amount and timing of taxation by the two countries.

110. See OECD, THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS, AMENDED BY THE 2010 PROTOCOL (2011), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en

#page3. For a discussion of the advantages of this multilateral agreement over bilateral agreements for tax information exchange and assistance, see Reuven S. Avi-Yonah & Gil Savir, *IGAs vs. MAATM: Has Tax Bilateralism Outlived Its Usefulness?* (U. Mich. Law & Econ., Working Paper No. 14-002, 2014), <http://ssrn.com/abstract+2392702>. See Cormick & McLaren, *Retirement System in Australia*, *supra* note 5, at 514 (noting that “[m]ultilateral treaties [regarding retirement funds] will allow greater synergy and uniformity in comparison with multiple bilateral conventions” and that “[s]uch multilateral treaties may however be difficult to negotiate due to the competing policies of multiple states”).

The sharing of information by the work country with the retirement country seems consistent with the spirit of recent improvements in information-sharing related to FATCA, even though FATCA regulations currently exempt reporting with regard to qualified foreign retirement plans. Forgoing imposition of an exit tax on a departing resident's qualified EET pension plan should not be viewed as a serious concession by the work country as long as it remains in a position to collect the tax that it had expected to collect if the resident had not departed. Since the trustee of the plan is located in that country and is responsible under its laws for withholding, there would appear to be little risk that the tax of the "old residence" could be avoided after the change of residence. Thus, for example, although Canada does impose an exit tax on certain assets of departing residents, the tax does not apply to qualified Canadian retirement arrangements. Instead, Canada imposes a withholding tax of 25 percent (or 15 percent under its treaty with the United States) when withdrawals are made from the Canadian retirement plan.¹¹¹

The residence country may consider this agreement to be too disadvantageous. The agreement would, in effect, reduce the allowed amount of residence taxation because of the increased availability of a foreign tax credit and the exemption from residence tax for foreign TEE qualified plans. On the other hand, the residence country would, at last, have a method of obtaining information about foreign plans and retirement income of its residents, which it may not otherwise have. This information could assist the residence country in taxing this retirement income and could also influence the tax rates applied by it to other income of retirees or the availability of government benefits to retirees. In addition, a residence country could avoid the possibility of the foreign withholding tax on foreign source retirement income being used to offset its tax on other unrelated low-tax foreign source income by providing a separate limitation for the foreign retirement income.

If the work country allows qualified plans established under the EET paradigm to be freely converted to the TEE paradigm at the price of an

111. It also allows an election for the recipient to file a tax return in Canada. See Canada Revenue Agency, *Emigrants and Income Tax 2013*, at 6, <http://www.cra-arc.gc.ca/E/pub/tg/t4056/t4056-13e.pdf> (exception to departure tax for pensions and similar rights, including registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs), and tax-free savings accounts (TFSA)); Canada Revenue Agency, *Nonresidents and Income Tax 2013* at 6, <http://www.cra-arc.gc.ca/E/pub/tg/t4058/t4058-13e.pdf> (25 percent withholding tax applies to pension or registered retirement plan payments to a nonresident); Canada Revenue Agency, *Emigrants and Income Tax*, *supra*, at 10–11 (explaining that retirement plan payments are subject to withholding of nonresidence tax as a final obligation, but the taxpayer may elect under section 217 of the Income Tax Act to report these payments on a Canadian return showing Canadian sourced income of this sort, and that, as a result, all or part of the withholding tax may be refunded).

immediate tax, the individual would be in a position to thwart any imposition of tax by the residence country. But presumably, the departing resident would only do so if the immediate tax on conversion was less burdensome than the tax treatment to be conferred by the two countries with respect to an EET plan; and this would seem relatively unlikely. Another possibility would be for the residence country to be allowed, under the agreement, to disregard conversions to the TEE paradigm made within a few years of departing from the work country. Finally, the residence country may agree to honor a plan's TEE paradigm only if the payout was under a lifetime annuity or phased withdrawal regime that would insure that the resident is in a position to fund his retirement.

D. A New International Retirement Plan Regime

A multinational agreement on retirement plans, such as is described above, could also authorize establishment of a new institution, an international retirement plan (IRP),¹¹² that would hold retirement assets originating in participating countries.¹¹³ (The IRP could either be organized under a particular country's law or as a new type of global entity.)

112. See Cormick & McLaren, *Retirement System in Australia*, *supra* note 5, at 513 (discussing the possible use of IRPs “for expatriates who work in a number of jurisdictions over the course of their working life” and noting that “[a]ppportioning a state[’s] right to tax an IPP may also present a number of difficulties”). They regard it as “an optimum solution for globally mobile employees and states where they live and work” if adopted “in combination with greater uniformity in the models of retirement fund tax treatment.” *Id.* at 514. For discussion of a “global pension scheme that could be operated centrally for internationally assigned employees to participate during their secondment,” see Portner, *Cross-Border Pension Issues*, *supra* note 48, at § V. See also Holzmann & Koettl, *Portability*, *supra* note 1, at 30 (suggesting the option of “[i]ncreasing the scope for multi-national (service) providers in the area of supplementary pensions Such multi-employer entities could be created at regional or even international level, be subject to centralized supervision and create an innovative tax arrangement with the participating countries. Thinking outside the box is required . . .”).

113. See Tom Starner, *The Global Nomads Retirement Puzzle*, Aug. 16, 2012, <http://www.hreonline.com/HRE/view/story.jhtml?id=533350084> (describing conversation with J.P. Provost, senior partner in international consulting business at Mercer). According to Provost, “employers can run into problems when it is no longer possible, for a variety of reasons, to maintain assignees in the home-country plan.” *Id.* Provost explains that “an increasingly popular solution is to establish an international retirement plan, providing a single solution across assignments and the potential for a common design.” *Id.* However, “Mercer’s survey results showed that only 12 percent of companies have established international retirement plans” and “[o]ffshore plans may not address all concerns, such as taxation or facilitating

The least radical approach would be for the IRP to serve merely an administrative role. In one possible scenario, the IRP would not accept new retirement contributions from an individual or his employer, but would simply serve as a repository, or custodian, for assets held in qualified personal retirement plans (such as a U.S. IRA) organized under the laws of participating countries. (These personal retirement accounts could hold assets rolled over from qualified employer plans of the same country.) If an individual had qualified personal retirement plans from more than one participating country, the IRP would hold the assets in separate subaccounts; each subaccount would retain its identity as a qualified account of a particular country and would be subject to the tax rules of that country (including its bilateral or multinational treaties). In other words, the IRP would be transparent for tax purposes. (In the case of a U.S. IRA, this would require a change in the requirement that the IRA be “maintained as a U.S. trust at all times.”¹¹⁴)

The role of the IRP would be solely to minimize the administrative difficulties for the plan beneficiaries, the source countries, and the residence countries. The trustee would compile information regarding tax-paid amounts, or investment in the contract, in the source country. It would be responsible for withholding of source country taxation from all distributions made to a beneficiary, in the absence of proof of an exemption agreed to with the residence country. An individual beneficiary of the plan would be required to annually file proof of his current residence (including the previous year’s tax return) with the trustee of the IRP. This would take the place of information reports, such as a Report of Foreign Bank and Financial Accounts (FBAR) or Form 8938, otherwise required to be filed by an individual with his country of residence.

The international trustee would develop the expertise to file all necessary information reports and to determine the proper amount of withholding with respect to amounts originating in various source countries; it would also report information, including foreign taxes withheld, to the current residence that would allow the residence country to more easily determine the proper treatment of distributions under its own internal laws. The individual beneficiary would be free of complex reporting requirements for foreign pensions in his residence country, and would easily obtain the information needed for tax filing in the residence country.

Even if the IRP were limited to this type of administrative role, difficult legal issues would arise. For example, from the U.S. standpoint, if the IRP were to be organized under the laws of another country, choice of

exclusion from host-country pension arrangements, depending on the jurisdictions concerned.” *Id.*

114. See Reg. § 1.408-2(b); I.R.C. § 408(a) (“trust created or organized in the United States”).

law issues would need to be resolved, such as whether U.S. securities,¹¹⁵ banking, or insurance laws would continue to apply to a U.S. subaccount.¹¹⁶ Somewhat similar issues arise for the cross-border occupational retirement plans (IORPS) operating within the European Union (EU) or for a potential EU-wide personal pension plan;¹¹⁷ but in that context, coordination can be achieved by EU-wide rules.¹¹⁸

115. For a discussion of SEC rules applicable to U.S. retirement plans, see Robert J. Toth, Jr., *Securities Rules for Retirement Plans*, PRACTICAL COMPLIANCE & RISK MANAGEMENT FOR THE SECURITIES INDUSTRY 33 (Mar.–Apr. 2011), http://businessofbenefits.wp.lexblogs.com/wp-content/uploads/sites/83/2009/12/Toth_PCRM_02-111.pdf.

116. Presumably, the Employee Retirement Income Security Act of 1974 (ERISA) rules would not apply since the IRP would not be an employee pension benefit plan. See Employment Retirement Income Security Act of 1974, Pub. L. No. 93–406, § 3(2)(A), 88 Stat. 829, 833 (1974) [hereinafter ERISA] (employee pension benefit plan must be a plan “established or maintained by an employer or an employee organization”).

117. See EUR. INS. OCCUPATION PENSIONS AUTH., TOWARDS AN EU-SINGLE MARKET FOR PERSONAL PENSIONS: AN EIOPA PRELIMINARY REPORT TO COM, EIOPA-BoS-14/029, at 28–32 (2014), http://ec.europa.eu/internal_market/pensions/docs/eiopa/eiopa-preliminary-report_en.pdf [hereinafter EIOPA Report] (discussing tax and other obstacles).

118. See Directive 2003/41/EC of the European Parliament and the Council of June 3, 2003, discussed in Hans van Meerten & Bastiaan Starink, *Cross-Border Obstacles and Solutions for Pan-European Pensions*, 20 EC TAX REV. 30, 30–35 (2011) [hereinafter van Meerten & Starink, *Cross-Border Obstacles*]. This 2003 directive has led to the establishment of new cross-border occupational pension institutions (or IORPs), such as the Dutch Premium Pension Institution or the Irish Organization for Financing Pensions. These institutions can offer centralized administration of a multinational employer’s various defined contribution plans, each designed to satisfy the rules of a particular country in the EU. Each defined contribution plan continues to be governed by the rules of its host country; but the rules of the domicile of the IORP govern its supervision. van Meerten & Starink, *Cross-Border Obstacles*, *supra*, at 32. A new EU proposed directive on pensions seeks to remove some of the “prudential barriers” to cross-border activity of IORPs, as well as to address issues regarding risk management, good governance, and clear disclosure. See European Commission Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (Mar. 27, 2014), 2014/0091 (COD), http://ec.europa.eu/internal_market/pensions/docs/directive/140327_proposal_en.pdf. See also discussion in David W. Powell, European Commission Issues Long Awaited Revised Pension Directive, Groom Law Group Benefits Brief, Apr. 1, 2014, http://www.groom.com/media/publication/1401_European_Commission_Issues_Long_Awaited_Revised_Pension_Directive.pdf. For a detailed study of disparities in pension rules of various EU countries and how they can be overcome with a cross-border IORP, see HEWITT, FEASIBILITY STUDY FOR CREATING AN EU PENSION FUND

It would be a much more ambitious and complex undertaking to create an IRP to serve as a stand-alone, universally-qualified retirement plan that could accept contributions from employers and individual employees from participating countries. Participating countries would have to resolve numerous basic issues: (1) whether an IRP could be formed under the laws of any of the participating countries or would be a new type of global entity governed by the multilateral agreement; (2) what rules would govern fiduciary standards¹¹⁹ and securities and banking issues; and whether this would depend, for example, on where the entity was formed or where its headquarters were located; (3) what rules would govern the amount of allowable contributions, issues of nondiscrimination, funding, and vesting, and the timing of permissible or required withdrawal of funds by the beneficiary; (4) whether the country where services are performed (or, if different, the residence country of the worker) would allow deductions for contributions to the plan, and if so, up to what amount;¹²⁰ alternatively, whether the TEE paradigm would be applicable; (5) whether the IRP would itself be tax-exempt in all participating countries, with respect to current earnings; and (6) what countries would be allowed to tax distributions from the plan (and whether bilateral treaties would have any application).¹²¹

FOR RESEARCHERS (June 15, 2010), http://ec.europa.eu/euraxess/pdf/research_policies/Ec_final_report_18_June_2010.pdf.

119. ERISA does not permit a fiduciary to maintain the “indicia of ownership” of plan assets outside the jurisdiction of U.S. district courts, except as permitted by regulation. See ERISA, *supra* note 116, § 404(b), discussed in David W. Powell & Richard Matta, *US Department of Labor issues guidance on certain aspects of global investment pooling: another step towards global pensions?*, http://www.groom.com/media/publication/411_International%20Pension%20Lawyer.pdf. In 2008, the Department of Labor issued an advisory opinion to Northern Trust, regarding its “Multinational Cross-Border Pooling Products,” allowing the various pension plans of a multinational employer to pool investments in a single entity. U.S. Dep’t of Labor, Advisory Opinion, 2008-04A, <http://www.dol.gov/ebsa/regs/aos/ao2008-04a.html> [hereinafter DOL Advisory Opinion]. See discussion in Powell & Matta, *supra*. The Advisory Opinion notes that Congress’s stated objective in ERISA section 404(b) was to “preclude frustration of adequate fiduciary supervision and remedies for breach of trust.” DOL Advisory Opinion, *supra*, at 6, n.7.

120. Because the participating countries may vary in the extent to which they rely on the various pillars of retirement protection (*e.g.*, social security, occupational plan, or personal pension), it may not be possible to agree on a uniform deduction limit for any particular pillar. See van Meerten & Starink, *Cross-Border Obstacles*, *supra* note 118, at 38–39 (discussing a “multi-pillar pension model with a compensating layer”).

121. In the United States, the plan would need to be compliant with the rules of section 409A.

Even within the EU, a Pan-European retirement plan that is tax qualified in all member states has not yet emerged.¹²² One important obstacle is that, under the principle of fiscal autonomy in the EU, tax rules for pension plans are not harmonized (although there is some coordination through bilateral treaties and the rule against tax discrimination).¹²³ If a Pan-European retirement plan were to operate successfully, perhaps it could serve as a model for a plan of wider applicability.

VII. CONCLUSION

This Article has described current rules (with emphasis on U.S. statutory provisions and treaties) for dealing with a change of residence by an individual who has accumulated savings in a qualified retirement plan. This Article concludes that a treaty resembling the U.S. Model Treaty offers a reasonable method of coordination between two countries and can for the most part result in fulfillment of the expectation of the retiree; but the Article offers some suggestions for improvement of the U.S. Model Treaty. Because in many cases, the work country and residence country do not have (and likely will not have) a bilateral treaty resembling the U.S. Model Treaty, other means are needed to prevent double international taxation and to insure that both countries have access to information about the plan. This Article proposes a multilateral agreement for information-sharing and taxation of qualified retirement plans as one possible solution. It also suggests that the vehicle of an International Retirement Plan may be useful for reducing the administrative burden on the two countries and on the individual, without jeopardizing the collection of tax by either country or the individual's expectation as to the tax treatment of his retirement assets.

122. Although there have been proposals for a so-called "28th Regime" pension plan that would be tax-qualified in all EU countries, this has not yet come to pass. See Igor Guardiancich, *Pan-European Pension Funds: Current Situation and Future Prospects*, 64 INT'L SOC. SECURITY REV. 15 (2011); van Meerten & Starink, *Cross-Border Obstacles*, *supra* note 118, at 38; EIOPA Report, *supra* note 117, at 32, referring to the latter article. EIOPA further notes that "COM together with the OECD is conducting research on tax incentives for pensions." *Id.* at 32.

123. See van Meerten & Starink, *Cross-Border Obstacles*, *supra* note 118, at 38; EIOPA Report, *supra* note 117, at 28–32 (discussing tax obstacles). The report states that "[c]urrently there is no specific EU legislation on the taxation of pensions. This area is covered by national laws and bilateral treaties. Therefore pensions are taxed very differently across the EU." *Id.* at 28.