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CHOICE AND CHANGE OF TRUST SITUS

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INTRODUCTION

Choice of trust situs is a factor of singular importance in international tax planning. Initially, the tax planner must choose between a domestic or foreign trust situs.[1] A domestically sited trust is taxed as a United States citizen; a foreign trust is taxed as a nonresident. Where a foreign situs is desired, additional factors come into play. These include the nature of the foreign legal system and the underlying tax burden resulting from placing situs in the foreign jurisdiction.

Factors which lead to placing the situs within a particular jurisdiction are typically dynamic and vary with time. For both tax and non-tax reasons, it may become necessary to change situs from the initial to a new jurisdiction. There are several methods for changing situs. The optimal method should minimize both the discontinuity in situs transition and the corresponding tax impact. This paper will discuss the various means by which a trust situs may be changed and the factors relevant in deciding which means to use.

INITIAL CHOICE OF TRUST SITUS: DOMESTIC OR FOREIGN

A trust may have either a domestic or foreign situs for United States income taxation purposes. The distinction is important. A domestic trust is taxed on worldwide income, while a foreign trust is ordinarily taxed only on income effectively connected with a United States trade, business, or source with fixed-determinable income.[2] Unlike foreign trusts,[3] domestic trusts can be classified as a United States person.[4] This classification is the operational key to the IRC section 679 grantor trust rule,[5] the IRC section 1491 excise tax,[6] and other

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1. For United States income tax purposes, a domestic trust has a United States situs while a foreign trust has a non-United States situs. *See* I.R.C. § 641(b) (1976). *See also* Treas. Reg. § 1.871-2(a) (1957) (the term "nonresident alien individual" includes a nonresident fiduciary).

2. Rev. Rul. 73-254, 1973-1 C.B. 613. I.R.C. § 871(a)(2). Noneffectively connected, United States source capital gain may also be taxed if the 183-day physical presence test is satisfied. *Id.* § 871(a)(2). The rate applied is either the 30% rate for fixed-determinable income or a lower treaty rate. *Id.*

3. I.R.C. § 7701(a)(30), (31) (1976).

4. *Id.*

5. *Id.* § 679.

6. *Id.* § 1491.

Code provisions.[7] In contrast with domestic trusts, income paid to foreign trusts may be subject to withholding.[8]

Classification of a trust as domestic or foreign depends on the underlying facts and circumstances.[9] The legislative history of the 1976 Reform Act states:

> The Internal Revenue Code does not specify what characteristics must exist before a trust is treated as being comparable to a nonresident alien individual. However, Internal Revenue Service rulings and court cases indicate that this status depends on various factors, such as the residence of the trustee, the location of the trust assets, the country under whose laws the trust is created, the nationality of the grantor, and nationality of the beneficiaries. If an examination of these factors indicates that a trust has sufficient foreign contracts, it is deemed comparable to a nonresident alien individual and thus is a foreign trust.[10]

Other factors relevant to the classification of a trust include place of administration[11] and residence of the grantor or beneficiaries.[12]

Of these factors the trustee's residence is the most critical in determining whether the trust is domestic or foreign.[13] For example, in *Maximov v. United*

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7. *See, e.g., id.* § 367 (foreign corporate transfers); *see also id.* §§ 951-964 (controlled foreign corporations). In contrast with § 679, § 1491 is also activated if the transfer is to a foreign corporation, foreign estate, or foreign partnership.

8. Treas. Reg. § 1.1441-3(f), T.D. 6908, 1967-1 C.B. 222, 229. Furthermore, the trust must be domestic for trust earnings from a pension or profit sharing plan to be exempt. I.R.C. § 401(a) (1976); Treas. Reg. § 1.401-1(a)(3) (1956).

9. I.R.C. § 7701(a)(31) (1976) states that the term foreign trust means "[a] trust . . . the income of which, from sources without the United States which is not effectively connected with the conduct of a trade of business within the United States, is not includible in gross income under subtitle A." I.R.C. § 1493, repealed in 1967, contained a similar provision applicable to transfers to avoid tax. I.R.C. § 7701(a)(31) (1976) does not define a foreign trust, it discusses the tax consequences once a foreign trust is held to exist.

10. H.R. REP. No. 658, 94th Cong., 2d Sess. 206, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2897, 3101 (footnote omitted); S. REP. No. 938, 94th Cong., 2d Sess. 215, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3439, 3645.

11. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271, 279 (1971).

12. *Id.*

13. *See, e.g.*, R. HENDRICKSON & N. SILVERMAN, CHANGING THE SITUS OF A TRUST 12-38 (1982); Kanter, *The Foreign Trust—A "One World Concept of Tax Planning"*, 1970 S. CAL. TAX INST. 467 (suggesting that the residence of the trustee is determinative of situs); Note, *Foreign Accumulation Trusts and the Tax Reform Act of 1976*, 10 VAND. J. TRANSNAT'L L. 123 (1977) (emphasizing residence of the trustee). *See also* S. REP. No. 1616, 86th Cong., 2d Sess. 60 (1960) (defining a foreign trust, in an unsuccessful bill to discourage their use, as a "trust . . . in a foreign country with a nonresident alien as trustee").

I.T. 1885, II-2 C.B. 164 (1923) provided that the place of creation was controlling by stating that:

> The status of the fiduciary as a citizen or an alien, a resident or a nonresident, has nothing to do with the status of the trust . . . . The status of such a trust depends upon where it was created. If it owes its existence to the laws of a foreign country or of a political subdivision thereof, it is regarded as a nonresident alien entity.
>
> The trust estate now under discussion is obviously a nonresident alien entity because it owes its existence to the laws of a foreign jurisdiction . . . .

States[14] the trust was administered in the United States by a United States trustee. The United States Supreme Court found the trust domestically sited[15] even though the grantor and all beneficiaries were United Kingdom residents.[16]

The trustee's residence is interrelated with two other factors, the location of trust assets and place of administration. These two factors may be controlling if the trustee's residence is not confined to a single jurisdiction or if a trust has two or more trustees who reside in different jurisdictions. Thus to insure the creation of a foreign-situs trust no trustee should be a United States resident.[17] This principle is illustrated by the Second Circuit's decision in *B.W. Jones Trust v. Commissioner*.[18] In that case, the trust was created under English law by an English grantor for English beneficiaries.[19] Three of the trustees were English, and one was a United States citizen and resident.[20] Approximately 90 percent of trust assets were located and administered in the United States. The remainder was located and administered in England. The court held the trust had a domestic situs.[21]

Id. This result was modified by Rev. Rul. 60-181, 1960-1 C.B. 257. *But see* Lazarus v. Commissioner, 58 T.C. 854 (1972) (treating trusts organized in foreign jurisdictions as having a foreign situs without addressing other criteria); Bixby v. Commissioner, 58 T.C. 757 (1972).

14. 373 U.S. 49 (1963).

15. *Id.* at 53.

16. The court below indicated that the trust assets were located in the United States when it pointed out that the capital gains at issue were realized in the United States. United States v. Maximov, 299 F.2d 565, 566-67 (2d Cir. 1962).

17. For example, in Rev. Rul. 70-242, 1970-1 C.B. 89, a trust was created in Canada by a Canadian organization as grantor. Only United States residents were beneficiaries and all trusts were located in the United States. Some of the trustees were American citizens and residents and others were Canadian. Most administrative functions were performed in the United States, although bookkeeping was conducted in Canada. The ruling concluded that the situs of the trust was the United States.

18. 132 F.2d 914 (4th Cir. 1943), *aff'g*, 46 B.T.A. 531 (1942).

19. Though the grantor created five trusts, they all reflected identical characteristics and functioned as a single trust entity. *Id.* at 915.

20. The United States trustee usually followed the advice of one of the English trustees. *Cf.* Rev. Rul. 55-200, 1955-1 C.B. 633 (foreign trust arose where United States bank acted as agent in the United States for Canadian trustee).

21. In reaching this conclusion the court stressed:

> A problem somewhat similar to the one before us has been considered in determining the "situs" of trusts for purposes of taxation. Bogert in his treatise "Trusts and Trustees", vol. 2, ch. 15, sec. 262, p. 842, states: "Where there are two or more trustees residing in different states, the courts are in fairly general agreement, where a different rule is not established by statute, that the property will be taxable in the state of residence of the trustee who has actual custody or control of it. . . ."

Jones Trust v. Commissioner, 46 B.T.A. 531, 536 (1942), *aff'd*, 132 F.2d 914 (4th Cir. 1943). The outcome may have been different in the absence of the single United States resident trustee. *See* R. HENDRICKSON & N. SILVERMAN, CHANGING THE SITUS OF A TRUST 12-38 (1982). *See also* Treas. Reg. § 1.643(a)-6(b), ex. (1) (1956) (foreign trust existed where trust had foreign trustee though portion of trust corpus invested in United States assets). The effect of the decision under prior law was to subject United States source capital gain to taxation.

CHOOSING THE PROPER FOREIGN TRUST SITUS

Selecting the optimum foreign situs requires careful consideration of the foreign legal system and the underlying tax impact which results from placing situs in that jurisdiction.[22] That impact is dependent on the tax burden imposed by the situs and the availability of income tax treaty benefits. To claim treaty benefits not otherwise available, trust situs may be divided from the jurisdiction of creation.

Foreign Situs: The Legal System and Tax Impact

Civil law jurisdictions, such as France,[23] Germany,[24] Venezuela,[25] and the Netherlands Antilles[26] generally neither authorize nor expressly prohibit creation of trusts.[27] Attempts to create a trust in these jurisdictions may result in invalidity.[28] Certain civil law jurisdictions have modified internal law to accommodate the trust.[29] Choosing such a jurisdiction, however, can lead to unexpected results and should be avoided. In *Estate of Oei T. Swan*,[30] foreign

22. In addition to distinctions in tax consequences, a foreign trust may afford a greater degree of confidentiality.

23. *In re* Tabbagh's Estate, 167 Misc. 156, 3 N.Y.S.2d 542 (Sur. Ct. 1938). *See also* Comments and Notes, *Trust and Estate Planning in France after "Epoux Courtors" and "Dome B"*, 16 INT'L LAW. 70 (1982).

24. *In re* Hirschmann's Estate, 124 N.Y.S.2d 801 (Sur. Ct. 1953).

25. Buckley v. Commissioner, 22 T.C. 1312 (1954), *aff'd per curiam*, 231 F.2d 204 (2d Cir. 1956).

26. *See also infra* notes 50-63 and accompanying text.

27. *See, e.g., In re* Hirschmann's Estate, 124 N.Y.S.2d 801 (Sur. Ct. 1953) (trust essentially a common law concept); *In re* Estate of Cook, 204 Misc. 704, 123 N.Y.S.2d 568 (Sur. Ct. 1953), *aff'd*, 283 A.D. 1047, 131 N.Y.S.2d 882 (App. Div. 1954). *See also* F. WEISER, TRUSTS ON THE CONTINENT OF EUROPE 60 (1936) ("there exists [in civil law jurisdictions] . . . no statutory proviso, case law, doctrine, practice, tendency, habit of thought or general desire favoring or even consistent with . . . the Anglo Saxon trust"); Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126 (1927) (comparing trust to "those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness sold by peddlers on the Paris boulevards"); Nussbaum, *Sociological and Comparative Aspects of the Trust*, 38 COLUM. L. REV. 408 (1938). *See generally* W. NEWTON, INTERNATIONAL ESTATE PLANNING §§ 2.25-.28 (1981).

28. *See, e.g., In re* Estate of Strauss, 75 Misc. 2d 454, 347 N.Y.S.2d 840 (Sur. Ct. 1973) (trust invalid as to realty situated in Germany). *See also In re* Renard, 108 Misc. 2d 31, 437 N.Y.S.2d 860 (Sur. Ct. 1981) (domiciliary of civil law jurisdiction can establish common law trust to avoid forced heir restrictions at domicile).

Civil law jurisdictions may authorize trust equivalents. *See, e.g.*, Estate of Zietz, 34 T.C. 351 (1960) (analyzing German civil law substitute). Civil law jurisdictions have recognized the common law trust in international debt financing. *See* Rich, *International Debt Obligations of Enterprises in Civil Law Countries; The Problem of Bondholder Representation*, 21 VA. J. INT'L L. 269 (1981). International organizations such as the International Monetary Fund utilize the trust though their members consist of civil law jurisdictions. *See Trust Funds in International Law: the Contribution of the International Monetary Fund to a Code of Principles*, 72 AM. J. OF INT'L L. 856 (1978).

29. *See generally* J. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING 689, 787 (1982). Political subdivisions based on civil law which now accommodate the trust should also be avoided. *See, e.g.*, Civil Code of Lower Canada, arts. 981 a-n (Cliff 1939) (Quebec); Civil Code of Puerto Rico §§ 834-874 (1930 ed.).

30. 24 T.C. 829 (1955), *rev'd and rem'd on other grounds*, 247 F.2d 144 (2d Cir. 1957).

Stiftungs (trusts) were organized in both Liechtenstein and Switzerland, each a civil law jurisdiction. The Stiftungs were treated as revocable entities for estate taxation, but as separate corporate-like juridical entities for income tax purposes.[31]

In contrast to civil law jurisdictions, common law jurisdictions expressly authorize trusts. Suitable common law jurisdictions for trust creation should be those with little or no taxation,[32] such as the Bahamas, Barbados,[33] Bermuda, the British Virgin Islands, the Grand Cayman Islands, and Hong Kong.[34] The selected jurisdiction should also have favorable laws concerning trust validity, administration, and restraints on alienation.[35] Because violation of the rules against perpetuities or accumulations[36] can result in invalidation of the trust, the underlying foreign law governing these issues must be fully developed and subject to clear resolution.[37] Thus, the tax planner must analyze conflict of laws principles to ascertain the controlling law.

31. The precise classification of the entities as trusts or corporations was not determined for the purpose of estate taxation. *See* Swan v. Commissioner, 247 F.2d 144, 147 (2d Cir. 1957), *rev'g*, 24 T.C. 829 (1955). Instead, they were simply characterized as revocable under I.R.C. § 2038 (1976). *Id.* In contrast, in Aramo-Stiftung v. Commissioner, 172 F.2d 896 (2d Cir. 1949), a Stiftung was treated as a separate juridical entity for income taxation.

There may be other pitfalls where a civil law jurisdiction apparently authorizes use of a trust. For example, Treas. Reg. § 301.7701-4(a) (1960), defining a trust as an arrangement subject to "the ordinary rules applied in chancery or probate courts," could be construed as limiting the trust to common law judicial forums.

Furthermore, the basic civil law relationships is based on contractual rather than fiduciary principles. Civil law commentators often refer to *le contrat du trust. See, e.g., Trust — Institution juridique anglo-saxonne. — Jurisprudence francaise*, 38 J. DU DROIT INTERNAT'L PRIRE 134 (1911).

32. Many common law jurisdictions are unsuitable because they are high tax jurisdictions. These include Australia, Canada, New Zealand, and the United Kingdom. *But see* Comment, *Foreign Situs Trusts; The Option of Utilizing a High Taxation Jurisdiction*, 52 TEX. L. REV. 949 (1974) (benefits from creating a foreign trust in high tax jurisdiction).

33. *See* Zagaris, *Barbados Develops as a Low Tax Jurisdiction*, 15 INT'L LAW. 673, 680 (1981). Barbados was covered by the former United Kingdom treaty prior to its termination by the United States. *See Table of Territories to which the convention of the 16th April, 1945, is to be Extended*, II TAX TREATIES (P-H) ¶ 89,156.

34. Hong Kong is a low rather than a no tax haven. Its rate of taxation on personal income is 15%. *See* M. LANGER, PRACTICAL INTERNATIONAL TAX PLANNING 2 (2d ed. 1979) (classifying jurisdiction imposing maximum 20% rate as a low tax haven).

35. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268-277 (1971).

36. The rule against perpetuities is a rule against remoteness of vesting. At common law it provided that property ownership must vest in a beneficiary not later than 21 years (plus periods of gestation) after lives in being. *See generally* L. SIMES, FUTURE INTERESTS 289-328 (2d ed. 1966). The rule against accumulations restricts the period during which income can be accumulated within a trust. At common law its period coincided with that of the rule against perpetuities. *Id.* Both rules have been statutorily modified. The period of each may vary not only within the same jurisdiction, but from one jurisdiction to another.

37. Bermuda applies the common law rule against perpetuities but does not restrict accumulations. Grand Cayman allows avoidance of the rule against perpetuities for up to 100 years in the case of exempted trusts. In Hong Kong the rule against perpetuities requires vesting of property within a period of 80 years from creation of the trust or 21 years after lives in being on creation of the trust. The Hong Kong rule against income accumulation is limited to one of six noncumulative periods. J. SCHOENBLUM, *supra* note 29, at 786 (discusses Hong Kong's Perpetuities and Accumulations Ordinance).

The Effect of Income Tax Treaties on Trusts

Income tax treaties provide important tax advantages not otherwise available under the internal law of the contracting foreign jurisdictions.[38] A trust must meet the treaty's standing requirement before these advantages are available. Many recent treaties expressly grant standing to trusts[39] provided the trust is taxed as a resident of the treaty jurisdiction.[40] If the trust is not taxed, standing is based on the status of the grantor or beneficiaries.[41] Other treaties

38. *See* Appendix (official citations for each United States income tax treaty). In this discussion of United States income tax treaties, citation is made only by reference to the foreign contracting state. Treaty advantages include restriction of jurisdiction to tax in the country of source and relief from double taxation.

39. For example, the United Kingdom treaty defines "persons" entitled to protection as including "an individual, a corporation, a partnership, an estate, a trust and any other body of persons." United Kingdom, art. 3(1)(c).

40. The United Kingdom treaty states:

> (1) For the purposes of this convention:
> (a) the term "resident of the United Kingdom" means:
> (i) any person, . . . resident in the United Kingdom for the purposes of United Kingdom tax; but in the case of a partnership, estate, or *trust*, only to the extent that the income derived by such partnership, estate, or *trust* is subject to United Kingdom tax as the income of a resident, either *in its hands or in the hands of its* partners or *beneficiaries*; . . .
> (b) the term "resident of the United States" means:
> (i) any person, . . . resident in the United States for the purposes of United States tax; but in the case of a partnership, estate, or *trust*, only to the extent that the income derived by such partnership, estate or *trust* is subject to United States tax as the income of a resident, either in its hands or in *the hands of its partners or beneficiaries*; . . .

Convention for the Avoidance of Double Taxation, Dec. 31, 1975, United States-United Kingdom, art. IV, para. 1, ___ U.S.T. ___, T.I.A.S. No. 9682 (emphasis added). *See also* Rev. Proc. 81-58, 1981-2 C.B. 678 (analyzing this provision of the United Kingdom treaty). Analogous qualifications are contained in other existing treaties. *See, e.g.*, Convention for the Avoidance of Double Taxation, Feb. 12, 1979, United States—Hungary, art. IV, para. 1, 30 U.S.T. 6357, T.I.A.S. No. 9560; Convention for the Avoidance of Double Taxation, May 7, 1975, United States—Iceland, art. 3, para. 1, 26 U.S.T. 2004, T.I.A.S. No. 8151; Convention for the Avoidance of Double Taxation, Dec. 4, 1973, United States—Romania, art. III, para. 1, 27 U.S.T. 165, T.I.A.S. No. 8228; Convention for the Avoidance of Double Taxation, Dec. 3, 1971, United States—Norway, art. III, para. 1, 23 U.S.T. 2832, T.I.A.S. No. 7474; Convention for the Avoidance of Double Taxation, July 9, 1970, United States—Belgium, art. IV, para. 1, 23 U.S.T. 2687, T.I.A.S. No. 7463. *See also* Convention for the Avoidance of Double Taxation, June 4, 1976, United States—Korea, art. III, para. 1, 30 U.S.T. 5253, T.I.A.S. No. 9506 (expressly qualifying standing as to fiduciary). The draft of the United States model income tax treaty dated June 16, 1981, and many proposed treaties adopt this approach. *See* Draft of United States Model Treaty, art. 4, para. 1; Argentina, art. 4, para. 1; Bangladesh, art. 4, para. 1; Cyprus, art. 3(1); Egypt, art. 3(1); Malta, art. 4(1); Philippines, art. 3(1).

41. *But see Treasury Department Technical Explanation of U.S.—Jamaica Income Tax Treaty*, I TAX TREATIES (P-H) ¶ 55,136 (trust which constitutes tax exempt charitable organization or pension fund continues to be entitled to standing).

The Treasury's amended technical explanation of the United Kingdom treaty provides "the treatment of income received by a trust or estate will be determined by the residence and taxation of the person subject to tax on such income, which may be the grantor, the beneficiaries or the trust or estate itself, as the case may be." *See Amended Treasury Department Technical Explanation of U.S.—U.K. Income Tax Treaty*, II TAX TREATIES (P-H)

implicitly accord standing to *residents* of each contracting state. Many treaties leave the definition of this term to the law of the jurisdiction whose taxes are at issue.[42] Other treaties define resident in terms which do not expressly include the term trust.[43] Application of income tax treaty standing requirements varies depending on whether taxation of the grantor, the trust, or the beneficiaries is at issue.

In the case of a grantor trust, the grantor's status alone is the key. The grantor must have standing independently to claim treaty benefits. This principle is illustrated by Revenue Ruling 80-15.[44] There an Italian corporation created a domestic trust. The trust was a grantor trust because the corporation reserved the power to revoke, modify, or amend. The trust was created for the purpose of filing suit against a domestic corporation to recover patent royalties. The Italian treaty exempts royalties from United States taxation. This exemption was available because the grantor was entitled to standing.[45]

In nongrantor trusts, standing is based on the status of the trust, the beneficiaries, or both. Where trust income is distributed currently, standing is tied entirely to the beneficiaries' status.[46]

¶ 89,064. Technical explanations of other treaties contain identical language. *See Treasury Department Technical Explanation of U.S.—Iceland Income Tax Treaty*, I TAX TREATIES (P-H) ¶ 46,137.

The technical explanations of a number of treaties refer only to the trust or beneficiaries, not the grantor. *See Treasury Department Technical Explanation of U.S.—Hungary Income Tax Treaty*, I TAX TREATIES (P-H) ¶ 45,130. Other explanations cover only the trust and neither the beneficiaries nor the grantor. *See Treasury Department Technical Explanation of U.S.—Jamaica Income Tax Treaty*, I. TAX *Treaties* (P-H) ¶ 55,136.

42. *See, e.g.*, Convention for the Avoidance of Double Taxation, Dec. 30, 1965, United States—Netherlands, arts. II(2), VII, VIII, IX, X, XIV, XVI, XVIII, XIX, 17 U.S.T. 896, T.I.A.S. No. 6051.

43. The definition may be keyed to the term "person" with that term defined as including "an individual . . . and any other body of persons." *See* France, arts. 2(1)(c), 3; Japan, arts. 2(1)(d), 3; New Zealand, art. II (e), (j). Other treaties expressly provide that "person" includes not only an individual but also a fiduciary. *See also* Finland, art. 3, para. 1 & 2; Korea, art. 3(1). A further approach is to omit the intermediate definition of person and tie the term "resident" directly to the terms "individual" or "any other body of persons." *See, e.g.*, U.S.S.R., art. II, para. 3 & 4.

44. Rev. Rul. 80-15, 1980-1 C.B. 365.

45. The ruling raises two additional issues: (1) whether the domestic trust constituted a permanent establishment, and (2) whether the amount received was indeed a royalty. If the trust constituted a permanent establishment of the Italian corporation, the exemption was unavailable. *See* Convention for the Avoidance of Double Taxation, Mar. 30, 1955, United States—Italy, art. VII, 7 U.S.T. 2999, T.I.A.S. No. 3679. Because the trust neither had nor exercised general agency authority in the United States on behalf of the corporation, it did not constitute a permanent establishment. *Id.*, art. II (1)(c). As to the second issue, because the amount ultimately received was in lieu of the amount required under the patent agreement, the recovery was a royalty payment under the treaty. *See also* United States—Italian Income Tax Treaty, Reg. § 512.7 (standing accorded beneficiaries of domestic trusts whose tax liability is at issue and who are residents of Italy).

46. *See Amended Treasury Department Technical Explanation of U.S.—U.K. Income Tax Treaty*, II TAX TREATIES (P-H) ¶ 89,064. Regulations under a number of older treaties expressly provide that a beneficiary can claim standing independently of the trust. *See, e.g.*,

If the trust income is accumulated, both the beneficiaries and the trust must satisfy standing requirements.[47] Beneficiaries otherwise entitled to protection lose treaty benefits if income is accumulated unless the trust also can claim protection. For example, in *Maximov v. United States*[48] the grantor and beneficiaries were citizens and residents of the United Kingdom and the trust was domestic. The trust realized United States source capital gain which was accumulated rather than distributed currently. A former United States-United Kingdom income tax treaty exempted capital gain realized by a resident of the United Kingdom from United States taxation. Even though the beneficiaries were entitled to this treaty benefit, the trust was not a resident of the United Kingdom and could not claim the exemption. If the income had been distributed currently, the beneficiaries' status would have been the only consideration and the exemption would have been available.[49]

Dividing Trust Situs from Jurisdiction of Creation

To attain the treaty benefits of a civil law country, the jurisdiction of trust situs may be divided from the jurisdiction of creation. Because the trust is not indigenous to a civil law jurisdiction,[50] it is ordinarily not feasible to claim treaty benefits through creating a trust in such a jurisdiction.[51] For income taxation purposes, however, trust situs may be established in a separate jurisdiction apart from the jurisdiction of creation. The jurisdiction of creation does not control situs.[52] Instead, situs is based on the underlying facts and circumstances.[53] Thus a proper focusing on the facts and circumstances can lead to establishing situs in a civil law jurisdiction separate and apart from the jurisdiction of creation.[54]

United States—Italian Income Tax Treaty, Reg. § 512.7. Though these regulations do not expressly distinguish between current and accumulation distributions, it is implicit that they cover only the former. Maximov v. United States, 373 U.S. 49 (1963).

Distributions to trust beneficiaries are expressly covered by the Canadian treaty. It states:

> A resident of one of the contracting States who is a beneficiary of an estate or trust of the other contracting State shall be exempt from tax by such other State with respect to that portion of any amount paid, credited, or required to be distributed by such estate or trust to such beneficiary out of income from sources without such other State.

See Convention for the Avoidance of Double Taxation, Oct. 25, 1966, United States—Canada, art. XIII E, 18 U.S.T. 3186, T.I.A.S. No. 6415. In the case of a beneficiary of a domestic trust residing in Canada, this provision would appear to preclude taxation of the beneficiary on effectively connected foreign source income. *See* I.R.C. § 864(c)(4), (5) (1976).

47. The distributable net income of a foreign trust includes income from United States sources which are otherwise exempt by treaty. *See* I.R.C. § 1.643(a)-6(b), ex. (1)(b) (1980).

48. 373 U.S. 49 (1963).

49. The exemption would also have been available if the trust were a grantor trust.

50. *See supra* notes 23-31 and accompanying text.

51. *But see supra* note 28 (civil law trust equivalent).

52. *See* Rev. Rul. 60-181, 1960-1 C.B. 257.

53. The most important of these is the trustee's residence. *See supra* notes 13-16 and accompanying text.

54. Liechtenstein (a nontreaty jurisdiction) and Switzerland (a treaty jurisdiction) are based on civil law. Each provides the means of establishing trust situs in their respective

This approach is subject to two restrictions.[55] The first is based on the conflict of laws principle concerning the validity of the trust.[56] This principle requires the law which governs trust validity to bear a sufficient nexus[57] to the trust. A sufficient nexus can exist at the outset of the trust even though the jurisdiction of creation and trust situs are separately established.[58] Otherwise, situs can be changed to the desired jurisdiction only after creation.[59]

The second restriction involves whether the treaty at issue expressly or implicitly accords standing to trusts.[60] Treaties expressly granting standing to trusts do so only to the extent the trust is taxed as a resident of the treaty jurisdiction.[61] In a civil law jurisdiction, trusts are typically not taxed as a resident of that jurisdiction.

In contrast, treaties which implicitly grant standing may not require taxation by the treaty jurisdiction to permit claims of treaty benefits.[62] Instead, such jurisdictions determine trust situs through their internal laws. If that law deems the trust situs in the treaty jurisdiction, treaty benefits should be avail-

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jurisdiction in creation of a trust in a common law jurisdiction. *See Personen und Gesellschaftsrecht* art. 931 (PGR — Personal Status and Company Law Act-Liechenstein); *Code des Obligations* art. 401 (Switzerland).

55. Additional restrictions may be imposed by the situs jurisdiction. In Liechtenstein, trusts ordinarily must be publically registered. Failure to register can result in a fine, the amount of which depends on whether nonregistration was willful.

56. Invalidity may result in failure of the trust. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 411-429 (1971). Other conflict of laws issues may arise including administration and restraints on alienation.

57. *Id.* §§ 269, 270 (jurisdiction governing trust validity must bear substantial relation to trust).

58. The Restatement (Second) keys existence of a substantial relation to the trust's status as testamentary or inter vivos. In the case of a testamentary trust:

> [A jurisdiction] has a substantial relation to a trust when it is the state in which the trust is to be administered; or that of the place of business or domicile of the trustee at the time of the testator's death, or that of the domicile of the testator at that time, or that of the domicile of the beneficiaries. There may be other contacts or groupings of contacts which will likewise suffice.

Id. § 269 comment f. For an inter vivos trust, a jurisdiction has a substantial relation when it is that:

> [W]hich the settlor designated as that in which the trust is to be administered, or that of the place of business or domicile of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicile of the settlor, at that time, or that of the domicile of the beneficiaries. There may be other contacts or groupings of contacts which will likewise suffice.

Id. § 270 comment b. For both testamentary and inter vios trusts, the nature of these contacts is such that the jurisdiction of creation and trust situs may be separately established at the outset. Thus, the common law jurisdiction (the jurisdiction of creation) can control trust validity and the civil law jurisdiction determine situs.

59. *See infra* notes 64-143 and accompanying text.

60. *See supra* notes 40-43 and accompanying text.

61. *Id.*

62. This includes treaties with Austria, Canada, Denmark, Germany, Italy, the Netherlands, the Netherlands Antilles, and Switzerland. *See supra* note 42.

able despite the absence of taxation by the treaty jurisdiction.[63] For example, the Netherlands Antilles is a civil law jurisdiction which does not recognize trusts, but does have a favorable income tax treaty with the United States.

CHANGE OF TRUST SITUS

The situs of an existing trust may be changed from one jurisdiction to another for both tax and non-tax reasons.[64] Tax reasons for shifting situs include moving the trust from one foreign jurisdiction to another to take advantage of the latter's tax haven status or to claim the benefit of an income tax treaty. Shifting from a foreign to a domestic situs may avoid the impact of section 668 interest charge,[65] section 679 grantor trust rule,[66] or income tax withholding requirements on foreign trusts.[67] For nonresidents, changing situs from domestic to foreign may avoid state and city taxes[68] or preclude federal taxation of noneffectively connected foreign income.[69]

Non-tax reasons for changing situs include avoiding local exchange con-

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63. *See supra* notes 44-49.

64. The broad policy bases for effecting a situs change irrespective of the reasons have been succinctly captured:

> Thus, in a time when people easily move their houses, their assets, and themselves from state to state and country to country, it should follow that their trusts should be able to follow them. Their trusts should not have to remain behind, stuck in the same out situs, to suffer whatever adverse consequences may threaten them there. To carry the argument a step further, why should a trust not be able to move its situs elsewhere even when its grantor and beneficiaries do not move, whenever good reasons for such a move are not exclusively economic?

See R. HENDRICKSON & N. SILVERMAN, CHANGING THE SITUS OF A TRUST V (1982).

65. The extent the interest charge can be avoided is directly related to the procedure chosen for changing situs. *See infra* notes 72-129 and accompanying text. A change in the character of trust assets can avoid the impact of § 668 without a situs shift. An example is interest from tax-exempt bonds. *See* I.R.C. § 103 (West Supp. 1983). In the case of an accumulation distribution, this interest retains its character even in the hands of a United States citizen or resident beneficiaries. *Id.* § 667(a).

66. Avoidance of the § 679 grantor trust rule is also related to the procedure chosen for shifting situs. *See infra* notes 72-129 and accompanying text. Tax-exempt interest avoids the impact of § 679 without a situs change. This interest is not taxed to the grantor under § 679.

67. Treas. Reg. §1.1441-3(f) T.D. 6908, 1967-1 C.B. 222, 229; Rev. Rul. 65-311, 1965-2 C.B. 322. An additional tax reason for changing from a foreign to domestic situs is the taxation entirely to the trust, rather than ultimately to the beneficiaries, of accumulated capital gain allocated to corpus and income accumulated by the trust before the beneficiary attains the age of 21. I.R.C. §§ 643(a)(3), 665(b) (1976). The effect is to allow rate shifting from that paid by a higher income beneficiary to a lower trust rate. Distinctions also exist between foreign and domestic trusts in computation of the foreign tax credit and in pension or profit sharing plans. I.R.C. §§ 665, 667(e), 901, 904 (West Supp. 1983).

68. These same taxes may be avoided by retaining a domestic situs (in the United States) but merely shifting situs location from one state to another. For United States citizens and residents, this course is usually more appropriate since a shift from domestic to foreign may trigger §§ 668, 679, or 1491.

69. In contrast with nonresidents, United States citizens or residents are taxed on worldwide income. I.R.C. § 1(a) (Supp. V 1981); I.R.C. § 11(a) (Supp. II 1978); I.R.C. § 61(a) (Supp. IV 1980).

trols, forced heirship or probate. A situs change may additionally prevent recharacterization of property interests upon change of domicile or may protect property from confiscation by a politically unstable jurisdiction. A situs shift may also facilitate trust administration and reduce administration expenses if the trustee or primary beneficiary has recently changed residence.[70]

The tax impact of changing jurisdictional situs is directly related to the procedure chosen for effecting the change. Three basic procedures[71] are available for changing situs and the tax impact under each is geared to the nature of the situs change and whether a *distribution* or *transfer*[72] is deemed to have

70. A shift in the primary beneficiary's residence does not also require a shift in the existing trustee's residence to effect a change of situs. Instead, situs may be changed through appointment of a new trustee in the new jurisdiction with a corresponding shift in beneficial rights in trust assets to him from the old jurisdiction.

71. This analysis of procedure relates principally to trusts other than those classified as revocable. The situs of a revocable trust may be shifted pursuant to the grantor's reserved power to amend. *Cf.* Estate of Denzer, 29 T.C. 237 (1957) (relinquishment of powers to amend and make testamentary disposition did not amount to termination of old trust or creation of new one). Alternatively, the trust could merely be revoked and a new one established in the desired jurisdiction. *Cf.* Becklenberg's Estate v. Commissioner, 273 F.2d 297 (7th Cir. 1959) (initial trust revoked and assets transferred to new trust for purchase of annuity). The finding of revocability in Buhl v. Kavanagh, 118 F.2d 315 (6th Cir. 1941), may have been an important distinguishing feature in gauging viability of the second procedure. *See infra* notes 94-121 and accompanying text.

72. A distribution or transfer for this analysis is one given effect for federal tax purposes. It may result from disposition of either bare legal title or equitable title to trust assets. It may but need not involve an actual transfer of assets. However, absence of a transfer in fact may be an ineffective means to deal with the reasons for changing situs in the first instance.

The distribution on transfer must in any event be one so complete as to put the property legally beyond recall. This is illustrated by Lynchburg Trust & Savings Bank v. Commissioner, 68 F.2d 356 (4th Cir.), *cert. denied,* 292 U.S. 640 (1934). The decedent placed the residue of his estate in trust. Income arising therefrom was divided into three parts. One-half went to his child and one-quarter went to each of his two grandchildren. His child's income was distributed currently while most of the grandchildrens' income was accumulated. *Id.* at 357. The Service contended the decedent had created only one trust and the accumulated income was taxed in its entirety to that trust. *Id.* at 358. The court rejected this contention. It concluded the decedent had created three separate trusts. The first covered only the residue. The second and third covered income accumulated for each of the grandchildren. This income was treated as paid or credited by the first to the second and third trusts so as to vest absolute property rights in the ultimate beneficiaries subject only to postponement of possession. Tax liability was split between the second and third trusts. *Id.* at 361. *See also* Duke v. Commissioner, 38 B.T.A. 1264 (1938) (trust income not currently taxed to ultimate beneficiaries in absence of immediate right of receipt). *But see* I.R.C. § 667(c) (1976) (benefits of multiple trusts restricted).

A different result was reached in Urquhart v. Commissioner, 125 F.2d 701 (9th Cir. 1942). The decedent placed shares of stock in trust. A second trustee was named for the rest, residue, and remainder of the trust estate. The first trust received stock dividends which were allocated to the second trustee. A significant portion of the income was accumulated. *Id.* at 703. Accumulation was to continue until the designated beneficiary reached 30, but if the beneficiary died before then accumulated income was to be paid to a separate beneficiary. *Id.* at 702. The taxpayers argued two separate trusts were created, one for the stock and one for accumulated income. *Id.* at 703. The court concluded there was only one trust. It reasoned that because the designated beneficiary had not reached 30, he had no vested interest in the accumulated income. Thus, no *distribution* occurred to any second trust and no deduction was allowed for the first. *Id.* at 704.

occurred. The first procedure involves modifying those factors which led to establishing situs in the initial jurisdiction. This includes appointing a trustee in the new jurisdiction with a corresponding situs shift from the initial jurisdiction. The second procedure is to terminate the trust in the initial jurisdiction and concurrently establish a trust in the new jurisdiction with identical terms and assets. Under the third procedure situs is changed by decanting the trust. The initial trust makes either a total or partial transfer of trust assets to a separate, distinct trust created in the new jurisdiction.

Situs Factor Retracing or Modification

The procedure which best minimizes the discontinuity in a situs transition is one that retraces or modifies those factors leading to the initial establishment of situs. This is so regardless of whether the nature of the situs change is from a foreign to domestic jurisdiction, a domestic to foreign, or from one foreign jurisdiction to another. The trust does not terminate upon situs transition but continues to exist with its situs repositioned. No separate, distinct trust is created; instead, the trust before situs change retains its identity and is synonymous with that after the shift. The control of trust assets shifts from the trustee in the initial jurisdiction to the trustee in the new jurisdicion.

Under this procedure the situs change is given effect where the new trustee is a resident of the new jurisdiction and substantially all of the trust assets are maintained there. Arguably, corporate rather than individual trustees are preferred under this procedure. Mere presence of an individual trustee in a jurisdiction outside the existing situs may lead the Service to argue that an inadvertent change in situs has occurred. Because an individual may have more than one residence,[73] this argument can be made even if the trustee has not abandoned his residence at the situs. Furthermore, with a foreign trust, the trustee's presence in the United States for 183 days or more will result in the taxation of capital gain.[74] These undesirable effects may be minimized by selecting a corporation organized in the situs jurisdiction as trustee.[75]

Despite this preference for corporate trustees, if the trustee is an individual, it is theoretically possible to shift trust situs without changing trustees. The existing trustee may simply abandon his present residence and acquire a new one in the targeted jurisdiction. Yet this approach is problematic. The Service may argue that the new residence was never acquired or that the existing residence was never abandoned. In either event, the effect would be a continuation of the existing trust situs.

The tax impact of using this first procedure to change a trust's situs from foreign to domestic was partly addressed in two private letter rulings.[76] Each

73. *See* Treas. Reg. § 1.871-2(b) (1957) (residency of individual trustee keyed to immigration status and length of stay in United States).

74. I.R.C. § 871(a)(2) (1976).

75. Unless the foreign corporate trustee avoids engaging in a United States trade or business, it may be classified as a United States resident. *See* Treas. Reg. § 301.7701-5 (1960). This could trigger an inadvertent change in situs.

76. *See* Ltr. Rul. 7917037 (Jan. 24, 1979); Ltr. Rul. 7917063 (Jan. 25, 1979). The focus was on the change from a foreign to domestic trustee. *Id.* Stern v. Commissioner, 77 T.C.

ruling concluded that the situs change was not a "transfer" of property constituting a gift for gift tax purposes. The letters reasoned that the grantor had parted with dominion and control over trust property on the transfer to the trust in the initial jurisdiction. No additions to trust corpus were made after the situs change.

Two additional rationales are implicit in the rulings. First, only bare legal title passed from the initial to the new trustee. The gift tax applies only to transfer of a beneficial interest, not to a transfer of bare legal title to a trustee.[77] Second, because the trust retained its identity with the situs shift, the transfer was complete at the creation of the initial trust. In effect, no separate, distinct transfer occurred.[78]

The letter rulings failed to address the impact of issues resulting from domestication of a foreign trust such as the section 668 interest charge[79] and the section 679 grantor trust rule.[80] The section 668 interest charge is triggered upon an accumulation distribution to the beneficiary of a foreign trust.[81] The Service should not treat the situs change as a taxable distribution or transfer of property because the trust retains its identity under this first procedure. After the situs shift, however, accumulation distributions may occur. In that event, it is unclear whether the controlling date is that of subsequent distribution or prior accumulation. If the subsequent distribution date controls, section 668 is literally inapplicable because the trust is no longer foreign but domestic.

The throwback rules could change this result if the controlling date was prior accumulation. These rules carry accumulation distributions back to the earliest "preceding taxable year" for which the trust had undistributed net

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614 (1981), is analogous. There the shift was from the Bahamas to the Cayman Islands. The court stated:

> The Hylton trust *changed its situs* to the Cayman Islands as of March 28, 1972, in accordance with petitioner's earlier demand. This change was effected by the resignation of Wobaco Trust (Bahamas) as trustee and the appointment by petitioner of Wobaco Trust (Cayman) *as the successor trustee*. Despite the change of trustees, the records of the Hylton trust continued to be maintained by Wobaco Trust (Bahamas) until sometime in February 1973.

Id. at 623 (emphasis added).

77. Treas. Reg. § 25.2511-1(g)(1) (1958).

78. The rulings do not state whether a change in location of trust assets occurred. The trust administered real property in the United States prior to domestication. *See* Ltr. Rul. 7917037 (Jan. 24, 1979); Ltr. Rul. 7917063 (Jan. 25, 1979).

79. The taxpayers initially requested rulings that § 668 was inapplicable. The requests were withdrawn.

80. Other issues not addressed were § 644, estate taxation, and the generation-skipping transfer tax. Section 644 imposes a special two-year tax on the trust, geared to the grantor's tax rate. I.R.C. § 644(a)(2) (Supp. II 1978). This tax is normally inapplicable based on the second implicit rationale of the letter rulings that there is no transfer treated as occurring due to retention of trust identity. An exception arises if the grantor is treated as making an indirect transfer to the foreign trust. Estate taxation and the generation-skipping transfer tax can also be avoided based on this same rationale.

81. I.R.C. §§ 667(a)-(b), 668 (Supp. III 1979).

income.[82] Whether the definition of preceding taxable year relates to the time of trust creation or accumulation is not entirely clear.[83] Nevertheless, if at either time the trust was foreign, section 668 would be triggered.[84]

Section 679 grantor trust rule extends to direct and indirect transfers of property.[85] The following three elements must exist for this rule to apply: the grantor must be a United States person;[86] the direct or indirect transfer of property must be made by the grantor to a foreign trust;[87] and the trust must have a United States beneficiary.[88]

A foreign trust subject to section 679 may be able to remove the taint by changing situs. Though section 679 could theoretically be construed as requiring continued coverage despite domestication, this construction contravenes the policy bases underlying the section.[89] The proper construction is that section 679 applies only as long as a trust retains its foreign situs.[90] The situs change may be from domestic to foreign or from one foreign jurisdiction to another, rather than foreign to domestic. In either event under the first procedure no new trust is brought into existence after the shift. Based on the implicit rationale of the private letter rulings,[91] a disposition or transfer of property should not be treated as occurring. Completion of the situs shift to a foreign jurisdiction, however, may activate section 679[92] or section 668.[93]

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82. I.R.C. § 666(a) (1976).

83. *See id.* § 665(e) (referring to creation in case of foreign trust created by United States person).

84. The importance of whether the preceding taxable year is tied to creation or accumulation comes into play after domestication. If it is creation, § 668 would continue to have theoretical application to income accumulated even after domestication.

85. I.R.C. § 679(a)(1) (Supp. IV 1980).

86. *Id.*

87. *Id.*

88. *Id.* If a trust satisfying the first two elements later acquires a United States beneficiary, § 679 is automatically triggered for the year of acquisition. *Id.* § 679(c).

89. *See* S. REP. No. 938, 94th Cong., 2d Sess. 219-20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3439, 3649-50 discussing application of I.R.C. § 679 to foreign trusts).

90. Analogous issues are raised if a United States resident grantor subsequently becomes a nonresident.

91. *See* Ltr. Rul. 7917037 (Jan. 24, 1979); Ltr. Rul. 7917063 (Jan. 25, 1979).

92. The legislative history provides that a domestic to foreign situs shift is an indirect transfer for purposes of § 679. *See* S. REP. No. 938, 94th Cong., 2d Sess. 219-20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3439, 3649-50. Factors which must exist before the transfer is treated as indirectly made by the grantor is uncertain. A power vested in the grantor to change trustees would obviously suffice. An advance understanding or preconceived plan of action would likewise be fatal. *See* Zimmerman, *Using Foreign Trusts in the Post-1976 Period: What Possibilities Remain?*, 47 J. TAX'N 12, 15 (1977).

93. In a domestic to foreign situs shift, if the controlling date is subsequent distribution, § 668 could theoretically apply to all accumulated income even that accumulated prior to the shift. In contrast, if the controlling date were prior accumulation rather than subsequent distribution application of § 668 would depend on whether the definition of preceding taxable year for the throwback rules is keyed to trust creation or accumulation. If trust creation controls, § 668 could be rendered entirely inapplicable even as to income accumulated after situs transition.

Termination

The second procedure for changing trust situs is through termination. Under this procedure, the initial trust is liquidated,[94] and trust assets including current and accumulated income are distributed to the beneficiaries.[95] The beneficiaries concurrently create and fund a separate, distinct trust in the new jurisdiction with terms identical to those of the initial trust.

This procedure differs from the first in that two transfers of property occur and a new, distinct trust is created. The first transfer occurs with a shift in trust assets from the initial trust to the beneficiaries. The second shift moves the assets from the beneficiaries to the new trust. Consequently, trust termination raises the potential for significant discontinuity resulting in substantial tax liability. The extent of discontinuity depends on whether the situs change is characterized as a termination of the trust in fact or as a mere change of trust substance.

If deemed a termination in fact both transfers are given full force and effect. The new trust is treated and recognized as a separate entity. The initial transfer subjects the beneficiaries to taxation on both current and accumulated income.[96] If the trust making the transfer is foreign, the section 668 interest charge applies to the tax on accumulation distributions.[97] The beneficiaries should be able to claim unused loss carryovers and excess deductions on the termination of the initial trust.[98] Beneficiaries would be unable to claim a distribution deduction for payments personally made after trust termination.[99]

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94. Issues may arise as to when the initial trust terminates. This does not occur automatically upon happening of the event by which duration of the trust is measured. Treas. Reg. § 1.641(b)-3(b) (1960). Instead, a reasonable time is permitted after the event for the trustee to perform duties necessary to complete administration. *Id. See, e.g.*, Studebaker v. Commissioner, 2 B.T.A. 1020 (1925) (further duties are required of the trustees when there is no termination); Green v. United States, 6 A.F.T.R.2d 5647 (N.D. Tex. 1960) (trust terminated with death of the son and therefore no further duties remained). *See also* Rev. Rul. 55-287, 1955-1 C.B. 130 (trust continues for federal taxation during period trustee is allowed by law of jurisdiction in which trust administered to distribute assets). A trust generally terminates only when the trustee has finally accounted and title to trust property has vested in those persons beneficially entitled to it. Swoboda v. United States, 258 F.2d 848 (3d Cir. 1958). *But see* Treas. Reg. § 1.641(b)-3(b) (1960) (termination cannot be unduly postponed based on mere technicality such as whether trustee has rendered final accounting).

95. Distribution must vest title to trust property in those persons beneficially entitled thereto. Swoboda v. United States, 258 F.2d 848 (3rd Cir. 1958). This is done by expressly spelling out in the trust instrument that on termination title vests automatically. *See* A. SCOTT, SCOTT ON TRUSTS 2738 (3d ed. 1967).

96. *See* I.R.C. §§ 652, 662, 665-668 (Supp. V 1981).

97. I.R.C. § 667, 668 (1976).

98. *Id.* § 642(h); Treas. Reg. § 1.642(h)-1 & -2 (1978). Neither loss carryovers nor excess deductions may be claimed if termination has not occurred in fact. *See, e.g.*, Studebaker v. Commissioner, 2 B.T.A. 1020 (1925); Weston v. Commissioner, 24 T.C.M. 1439 (1965) (losses unavailable to beneficiaries when there is no termination).

99. I.R.C. §§ 651, 661 (West Supp. 1983). The decedent in Green v. United States, 6 A.F.T.R.2d 5647 (1976) (N.D. Tex. 1960), established a testamentary trust with a life estate in his invalid son. In addition, small payments from the trust were to be made to family servants. The son died. *Id.* at 5648-49. The court concluded that when this occurred the

The second transfer is made by the beneficiaries to the new trust. This could result in the beneficiaries being categorized as trust grantors and thus liable for gift tax.[100] Furthermore, the beneficiaries might be forced to include the trust assets in their own gross estates for estate tax purposes. This could occur when a third person creates a life estate in trust corpus for the beneficiaries.[101] The beneficiaries may be viewed as receiving the property outright free from the life estate, on the initial transfer. Each beneficiary is then treated as having retained a life estate upon the second transfer to the new trust.[102] Section 2036 mandates including the transferred assets in the beneficiaries' gross estate. Additionally, any grandfather status for the generation-skipping transfer tax of a trust in existence on June 11, 1976 will be lost.[103]

Completing both transfers to create the new trust may activate provisions previously inapplicable to the initial trust. A shift from domestic to foreign or from one foreign jurisdiction to another may trigger either the section 679 grantor trust rule[104] or the section 1491 excise tax,[105] or may reactivate the section 644 special two year tax.[106] A domestic to foreign shift will invoke the section 668 interest charge.[107]

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essential purpose of the trust ceased and the trust terminated. The recipient of the trust corpus was denied a deduction for payments subsequently made to the servants. *Id.* at 5649.

100. The basis of the property to the trust is ordinarily that in the beneficiaries' hands. I.R.C. § 1015(a) (1976). The basis is taken as fair market value only if the beneficiaries' basis at the time of the gift is greater than fair market value. *Id.*

101. *See, e.g.*, Rev. Rul. 66-68, 1966-1 C.B. 216.

102. *But see* Estate of Denzer v. Commissioner, 29 T.C. 237 (1957) (rejecting this argument). Should inclusion be required, the included amount must be reduced by the value of the beneficiaries' income interests. The situs rules may also limit inclusion in case of nondomiciliary beneficiaries. *See* I.R.C. §§ 2101-2108 (West Supp. 1983). A step-up in basis would not result unless the beneficiary (as grantor retained trust income for life coupled with a power to revoke. I.R.C. § 1014(b)(2) (1976). *See, e.g.*, Trust of Spero v. Commissioner, 30 T.C. 845 (1958); Rev. Rul. 57-543, 1957-2 C.B. 518.

103. The rules affecting generation skipping transfers generally apply to transfers after June 11, 1976. Proposed Treas. Reg. § 26.2601-1(c), 26 C.F.R. § 2601-1(c) (1980). In the case of nondomiciliaries, a change of trust situs coupled with a physical relocation of trust assets could trigger the situs rules for estate, gift, or generation-skipping transfer taxation.

104. I.R.C. § 679 (West Supp. 1983). In the case of a shift from one foreign jurisdiction to another, § 679 could be triggered in at least two respects even though previously inapplicable. First, if the beneficiaries are United States persons, the Service may seek to characterize the beneficiaries of the initial trust as grantors of the new trust. Second, if the grantor of the initial trust has changed status and become a United States person prior to the situs shift, he may be treated as making an indirect transfer to the new trust. In the case of a domestic to foreign shift the domestic trust could also be treated as grantor of the foreign trust. In this event the Service could hypothetically assert that the initial grantor, the initial trust, and the beneficiaries should all be characterized as grantors of the new trust. It is doubtful the Service would prevail. The positions are theoretically inconsistent and no allocation would typically be feasible since each would be treated as having transferred the same assets to the new trust.

105. I.R.C. § 1491 (Supp. II 1978). The impact of § 1491 on the situs shift is analogous to that of § 679. *See supra* note 104.

106. I.R.C. § 644 (Supp. V 1981).

107. I.R.C. § 668 (1976). In a shift from one foreign jurisdiction to another, the charge will have previously been applicable to the initial foreign trust. The charge applies to the partial tax imposed on accumulation distributions from the initial foreign trust. *Id.*

An alternative is to argue that the second procedure for situs change is not a termination in fact, but merely a change of the trust's substance. The tax impact of the change in substance is analogous to that of situs factor retracing or modification.[108] The initial trust is deemed to retain its identity and two transfers in theory do not occur.

This approach, however, is tenuous and rests primarily on two cases, *Buhl v. Kavanaugh*[109] and *MacManus v. Commissioner*.[110] In *Buhl* the grantor created a revocable trust[111] naming his daughter as beneficiary. The corpus and all accrued income was distributed to the beneficiary with the express condition that it be used to create a new trust. The Service argued that the beneficiary was a grantor of the new trust,[112] and subject to income taxation under the grantor trust rules.[113] The court characterized the transaction as merely reshaping the original trust.[114] Thus the original grantor rather than the beneficiary was subject to income taxation under the grantor trust rules.

The grantor in *MacManus* initially created six revocable trusts. The following year the trusts were made irrevocable, although the grantor reserved the power to designate beneficiaries.[115] Two beneficiaries subsequently died and the assets of their trusts were distributed. The grantor became dissatisfied with the trustee and sought to replace him. Pursuant to the provision for changing beneficiaries, the grantor's son was designated sole beneficiary of all four remaining trusts. The grantor's stated purpose was to "facilitate a termination"[116] of the trusts in order to change trustees. The son subsequently executed a declaration of trust stating he, as trustee, would hold trust corpus and income for the remaining four beneficiaries.[117]

108. *See supra* notes 73-93 and accompanying text.

109. 118 F.2d 315 (6th Cir. 1941).

110. 131 F.2d 670 (6th Cir. 1942), *rev'g*, 44 B.T.A. 508 (1941).

111. The original trust instrument was ambiguous. One provision gave the grantor the power to terminate the trust outright. A separate provision authorized termination only on certain conditions. 118 F.2d at 318. Analysis of the underlying facts and circumstances led the court to conclude the grantor "possessed complete dominion and control of the trust. . . ." *Id.* at 321. Furthermore, the Service had treated income from the trust as taxable to the grantor. *Id.*

112. The form used in creating the new trust did treat the beneficiary as grantor. Yet, looking to substance, the court believed the original grantor to be grantor in fact. *Id.* at 321.

113. *Id.* at 320. The beneficiary would also have been subject to the throwback rules had they been in effect. Alternatively, the Service could have ignored the beneficiary and treated the distribution as having been made to the original grantor. Thus, the grantor would have been subject to taxation on termination and to gift tax on creation of the new trust.

114. *Id.* at 321.

115. The grantor expressely reserved:

> [T]o himself the power from time to time, and as often as he may think proper, to designate as beneficiaries, along with or in the place of the said [e.g.] John R. MacManus, any person bearing any of the following relationships to said John, that is to say, spouse, child, brother, sister, or spouse, or child of a brother or sister;. . . .

See MacManus Trust v. Commissioner, 44 B.T.A. 508, 508-509 (1941), *rev'd*, 131 F.2d 670 (6th Cir. 1942).

116. 131 F.2d 671-72 n.2.

117. Based entirely on form, property rights to all trust assets literally were transferred

The *MacManus* court ignored form. It concluded that the four original trusts had not merged into one. Instead, each retained its separate trust identity[118] with a mere change of trustees.[119]

Buhl and *MacManus*, however, are only tenuous support for a situs shift based on a substance-over-form interpretation of the second procedure. Neither case concerned a situs change; each trust was apparently reconstituted in the same jurisdiction where created. Accordingly, the grantors' motivations were inapposite from those reasons which trigger a situs shift.[120] In contrast with *MacManus*, the initial trust in *Buhl* was revocable. The grantor possessed theoretical control over the trust, its corpus, and accumulated income. The *Buhl* court's willingness to ignore form might be partly attributable to the grantor's power of revocation. There was no need to adopt the formality of routing corpus and accumulated income through the beneficiary.[121] The situs change procedures discussed herein concern nonrevocable trusts. Thus, the dubious characterization of the trust termination procedure and corresponding tax effect make it an unsatisfactory means of situs change.

Decanting

In the third procedure for changing situs, decanting, the initial trust makes a total or partial transfer of trust assets to a separate, distinct trust in the new jurisdiction. In a total transfer, all property rights including those to current and accumulated income are vested in the new trust. The initial trust then terminates.[122] In a partial transfer, some portion of property rights are retained by the initial trust. Both the initial and the new trusts continue to exist.[123]

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to the son as beneficiary. *Id.* at 671. The son then placed those same rights in trust with himself as trustee. *Id.*

118. *Buhl* was cited for the proposition that the original trust had been reshaped or remolded. *Id.* at 673.

119. The original grantor and not his son continued to be treated as the grantor of the remolded trusts in all respects. *Id.* at 673-74. This result is consistent with the conclusion reached in subsequent litigation involving the original grantor's estate. *See* MacManus Estate v. Commissioner, 172 F.2d 697 (6th Cir. 1949), *aff'g*, 8 T.C. 330 (1947). The court held that the grantor continued to retain the power to designate beneficiaries even after the change of trustees. *Id.* at 700. This retained power triggered inclusion of the value of trust assets in the grantor's gross estate. *Id.* at 700-01.

120. The grantor's purpose in *Buhl* was to change the substantive terms of the original trust instrument. 118 F.2d at 319. The lack of identity between the terms of the initial and new trusts is a positive feature. It indicates a degree of discontinuity not triggering an adverse tax impact. In *MacManus* the grantor's motivation was simply dissatisfaction with the existing trustee. MacManus v. Commissioner, 131 F.2d 670, 671 (6th Cir. 1942), *rev'g*, 44 B.T.A. 508 (1941).

121. *See supra* note 71.

122. If the transfer is total, the only transfer that is treated as occurring is that from the initial to the new trust. Without assets, the initial trust cannot continue as a viable entity but may continue in practice as a mere shell. *See* A. SCOTT, SCOTT ON TRUSTS § 74 (3d ed. 1967).

123. In a partial transfer, one transfer is treated as occurring initially but a subsequent transfer is necessary to dispose of any retained property rights. *Cf.* Lynchburg Trust & Sav. Bank v. Commissioner, 68 F.2d 356 (4th Cir.), *cert. denied*, 292 U.S. 640 (1934) (two new trusts resulted from partial decanting of initial trust). *But see* Urquhart v. Commissioner,

This procedure differs from the first two. In the first, no new trust is created and no transfer is treated as occurring. In the second, two transfers of property occur and a new trust is created. The third procedure involves only one transfer, from the initial to the new trust.

Even only one transfer raises a potential for substantial discontinuity with resultant tax liability. The new trust is taxed on current income and, to the extent authorized by the throwback rules, on accumulated income.[124] Distributions from a foreign trust trigger the section 668 interest charge to the partial tax on accumulation distributions.[125]

In addition, section 679 may be activated when, for example, a foreign trust not previously subject to section 679 decants to a domestic one. A property transfer to a United States beneficiary is required under section 679.[126] The new domestic trust may be treated as a beneficiary for the purpose of applying section 679 to undistributed net income.[127] Furthermore, grandfathered benefits for avoiding both section 679 and the generation-skipping transfer tax may be lost by completing the transfer.[128]

Despite these tax liabilities, the third procedure has some positive features. If the initial trust totally decants, then terminates, the new trust should be able to claim unused loss carryovers and excess deductions of the initial trust.[129] In addition, because the transfer is from one trust to another, the section 644 two-year period for trust distributions should not be reactivated.[130]

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125 F.2d 701 (9th Cir. 1942) (no new trust brought into existence since no transfer as occuring). *See also supra* note 72 (analyzing both cases).

124. The new trust theoretically can be taxed as a beneficiary. Treas. Reg. § 1.643(c)-1 (1956). Yet as a new trust it will have no preceding taxable years to which an accumulation distribution can be allocated. I.R.C. § 667(a) (1967). Though beneficiaries of the new trust could have such years, they should not be treated as constructively receiving the distribution unless vested rights are acquired in the distribution. *Compare* Lynchburg Trust & Sav. Bank v. Commissioner, 68 F.2d 356 (4th Cir.), *cert. denied*, 292 U.S. 640 (1934) *with* Urquhart v. Commissioner, 125 F.2d 701 (9th Cir. 1942).

Subsequent distribution of income accumulated by the initial trust to beneficiaries of the new trust triggers a number of potential results. The results vary depending on whether distribution is immediate or delayed. *See, e.g.*, Treas. Reg. § 1.665(b)-1A(b)(1) (1972). First, if distribution is immediate, the new trust arguably has no preceding taxable years and the throwback rules are inapplicable. I.R.C. § 665(e) (1976). Second, the new trust may be ignored and the accumulation distribution treated as made directly to the ultimate beneficiaries. Treas. Reg. § 1.665(b)-1A(b)(1) (1972). Third, the preceding taxable years of the initial trust are tacked on to those of the new trust. *Id.*

125. I.R.C. §§ 667(a)(3), 668 (1976).

126. I.R.C. § 679(b).

127. *Id.*

128. Section 679 applies to transfers to existing foreign trusts after May 21, 1974, and to all new trusts created after that date. For the generation-skipping transfer tax, the grandfathered status of those trusts in existence on June 11, 1976, will be lost. Proposed Treas. Reg. § 26.2601-1(c), 26 C.F.R. § 2601-1(c) (1980).

129. I.R.C. § 642(h) (1976); Treas. Reg. § 1.642(h)-1, -2 (1978). Loss carryovers and excess deductions can be claimed by those "beneficiaries succeeding to the property of the . . . trust." I.R.C. § 642(h) (1976). For this purpose, a beneficiary can include a trust or an individual. Treas. Reg. § 1.642(h)-3(c) (1956).

130. I.R.C. § 644 (Supp. V 1981). In a transfer from one trust to another, the two year

Drafting Provisions for Changing Situs

The key provisions for changing situs must be expressly spelled out in the trust instrument. These provisions may be broken down into three principal components: authorization for the situs change, allowable investments, and the procedure employed in effecting the change. Each component must be drafted with great care.

The provision authorizing the situs shift is the "force majeure" clause.[131] Its wording must clearly reflect the key activating feature which triggers the situs shift. This force majeure could be a specific event, a series of events, a third party's exercising independent discretion, or a combination of factors.

Perhaps the best approach to drafting a situs change provision is to couple a series of specific events with the exercise of independent discretion. Relying only on a separate event or a series of events is risky. The events, if too narrowly drafted, may trigger the situs shift too late to avoid an unperceived yet very real threat. If the provision is too broadly drafted, the change may occur prematurely and unnecessarily. Combining a series of specific events with the exercise of independent discretion permits providing for the unexpected without granting unlimited discretion. The drafter tempers the third party's discretion by mandating a situs shift when certain narrowly defined events occur.[132] These enumerated events are not inclusive, but merely reflect other events which through the exercise of discretion may also precipitate a situs shift.[133]

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period runs from the date of the initial transfer in trust. I.R.C. § 644(a)(1)(A) (Supp. II 1978).

131. The term force majeure is defined as a superior or irresistible force. BLACK'S LAW DICTIONARY 774 (rev. 4th ed. 1968). The clause is ordinarily given effect. *See* UNIF. PROB. CODE § 7-305 (1969) ("[t]rust provisions relating to the place of administration and to changes in the place of administration or of trustee [shall] control. . . ."). An exception arises where authorization is controlled by statute. *See, e.g.*, CAL. PROB. CODE § 1139.1 (West 1981).

Despite presence of force majeure clause, if the situs shift is contested negative results may follow. *Cf. In re* Hudson, 29 A.D.2d 145, 286 N.Y.S.2d 327 (App. Div. 1968), *aff'd*, 23 N.Y.2d 834, 245 N.E.2d 405, 297 N.Y.S.2d 736 (1969) (authorization did not justify the conclusion that a trustee from a different rather than same jurisdiction should be appointed); Kemp v. Patterson, 6 N.Y.2d 40, 159 N.E.2d 661, 188 N.Y.S.2d 161 (1959) (refusal to terminate despite taxation of trust income at a rate in excess of 90%). A potential solution is for all interested parties, the trustee and all beneficiaries (actual and potential) to agree not to contest the situs issue.

132. The following is an example of a force majeure clause:

> A change in the situs of this trust shall occur automatically upon the happening of any of the following:
> (1) existence of war or revolution in or invasion of the situs juridiction;
> (2) action by the situs jurisdiction which
> (a) confiscates or expropriates trusts corpus,
> (b) liquidates or dissolves the trust,
> (c) substitutes new trust beneficiaries, or
> (d) restricts, suspends, or abrogates this trust instrument, in whole or part.
> Full and independent authority at any time during existence of this trust to make any further situs changes shall vest in the sole discretion of _____.

133. *See id.*

The capacity of the person with whom discretion rests is important. This may be the trustee, executor (for a testamentary trust), or an independent third party.[134] Independent third parties are often best suited since their economic interests are generally detached and not interwoven with retaining situs in a particular jurisdiction. Nevertheless, the party with whom discretion ultimately rests should not be one subject to governmental authority in the situs jurisdiction. Otherwise, the party may be intimidated by the threat of official sanction for the exercise of discretion.[135]

The trust instrument must also spell out the impact of the situs shift on allowable investments. The law of the new jurisdiction must authorize all trust investments irrespective of the procedure employed to change situs. Furthermore, the trust should be expressly authorized to hold investments to the full extent allowed by the law of the new jurisdiction.[136] One approach to delineating investment powers is to provide broad, flexible powers qualified by a

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134. An independent third party holding this power must be truly independent and not a mere agent of the grantor. Otherwise, includability in the gross estate may result. *See* Rev. Rul. 79-353, 1979-2 C.B. 325, *modified by*, Rev. Rul. 81-51, 1981-1 C.B. 458.

135. Omission of a force majeure clause lessens the prospect but does not preclude a change of situs. A number of approaches are available. The first is to obtain entry of an order authorizing the shift in the new jurisdiction. *See* R. HENDRICKSON & N. SILVERMAN, *supra* note 3, at 4-11. A second approach is to transfer situs only after obtaining the express consent of all interested parties. This avoids need for court intervention. This approach is sometimes combined with a force majeure clause.

A third approach in the absence of a force majeure clause is pursuant to court order entered in the initial situs jurisdiction. It is this approach which principally has been the subject of litigation. Several factors have been emphasized, such as the grantor's implied intent. In New York, cases authorizing a situs shift have expressly relied on this factor. *See In re* Benedito, 83 Misc. 2d 740, 370 N.Y.S.2d 478 (Sur. 1975); *In re* Weinberger, 21 A.D.2d 780, 250 N.Y.S.2d 887 (App. Div. 1964); *In re* Smart, 15 Misc. 2d 906, 181 N.Y.S.2d 647 (Sup. Ct. 1958); *In re* Matthiessen, 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. 1949). Cases denying a situs change have done likewise. *See In re* Hudson, 29 A.D.2d 145, 286 N.Y.S.2d 327 (App. Div. 1968), *aff'd*, 24 N.Y.2d 834, 297 N.Y.S.2d 736, 245 N.E.2d 405 (1966); *In re* Flexner, 7 Misc. 2d 621, 166 N.Y.S.2d 469 (Sup. Ct. 1957); *In re* Firth, 205 Misc. 101, 127 N.Y.S.2d 407 (Sur. 1953). *See also* Finch v. Reese, 28 Conn. 509, 268 A.2d 409 (1970) (Connecticut looks both to grantor's implied intent and the benefit to trust administration).

Another factor emphasized by the courts is the benefit to trust administration. *See* Martin v. Haycock, 22 N.J. 1, 123 A.2d 223 (1956) (approving a change of situs from New Jersey to Ireland). Finally, the bona fide residence of the beneficiaries has also been considered important. In *In re* Weston's Settlements [1968], 1 All E.R. 720 Ch. D, the court refused to authorize a change in situs from England to Jersey. The beneficiaries had no real ties with Jersey and it was not established that they intended to continue to live there. The court concluded that the principal purpose of the change was tax avoidance. *Id.* at 725. This is in contrast with *In re* Whitehead's Will Trusts [1971], 2 All E.R. 1334 Ch. D. There the party seeking the change established a hotel business in Jersey and had lived there with his family for over ten years. *Id.* at 1335. Because of bona fide residence, the English court permitted the situs change though tax avoidance was unquestionably a motive for the change. *Id.* at 1339. *See also In re* Windeatt's Will Trusts [1969], 2 All E.R. 324 Ch. D (English situs changed to Jersey); *In re* Seale's Marriage Settlement [1961], 3 All E.R. 136 Ch. D (English situs changed to Canada); *In re* Liddiard [1880], 14 Ch. D 310 (English situs changed to Australia).

136. *Cf.* A. SCOTT, *supra* note 95, at 2763 (distributee can properly receive any property which is proper trust investment).

general prohibition of investments not authorized by the situs jurisdiction. Investments held prior to the situs shift that are not allowed under the law of the new situs must be liquidated expeditiously. If the shift is to be made by trust termination or decanting, the trust instrument should clearly direct the trustee to distribute the property in kind.[137] Absent such a provision, the property may have to be sold and the proceeds distributed.[138]

The trust instrument should also expressly set out the procedure for effecting the situs change. Because situs factor retracing or modification provides the greatest degree of tax certainty, it will normally be used. To implement this procedure, the trust instrument should spell out that legal title to trust property passes automatically to the new trustee.[139] Thus the need for actual transfer of legal title by the initial trustee is avoided.[140] Because the initial trustee must transfer possession of trust property,[141] it is important that the trust instrument details the procedure for determining the new trustee. The initial trustee runs the risk of liability if trust property is turned over to the wrong person.[142] Though the risk can be avoided by obtaining a decree from a court of competent jurisdiction, this cumbersome procedure tends to undermine the very reasons for shifting situs in the first instance.[143]

CONCLUSION

A tax planner has the option of creating either a foreign or domestic situs for his client's trust. The key to making a choice is a thorough understanding of the section 679 grantor trust rule, the excise tax and the applicable laws of any proposed foreign jurisdictions. Careful planning is particularly important when dealing with civil law jurisdictions because the civil law generally grants no explicit authority for trust creation. Common law jurisdictions explicitly provide for trusts. Laws concerning trust validity, administration and restraints on alienation should be examined before choosing a particular common law situs.

If the standing requirements are met, income tax treaties can be the most effective means of providing a suitable foreign trust situs. However, conflict of laws problems can arise when dealing with a treaty. Provided the standing and choice of law problems are resolved, a foreign jurisdiction with a favorable income tax treaty may be more favorable to an individual client than any domestic trust situs.

137. *Id.* at 2751.

138. *Id.*

139. *Id.* at 2738.

140. The trustee may be required to execute appropriate documentation to clear record title. *Id.* at 2739. In the absence of express provision, title does not vest automatically. *Id.* An exception arises in the case of realty. The Statute of Uses effects transfer automatically without need for conveyance by the trustee. *See* Swoboda v. United States, 258 F.2d 848, 850 (3d Cir. 1958). Legal title to personalty continues to remain with the trustee until transferred. A. SCOTT, *supra* note 95, at 2738.

141. The trustee is entitled to be compensated fully for administering the trust before transferring possession. A. SCOTT, *supra* note 95, at 2742.

142. Personal liability may also result if the delay in transferring possession is unreasonable. *Id.* at 2741.

143. These include protecting against confiscation in the event of political instability.

Appendix
UNITED STATES TAX TREATY TABLES
United States Income Tax Treaties[1]

Contracting State	Date Effective	Treaty Classification	International Citation	Treasury Citation	Treasury Decisions
Australia	1 Jan. 1953	pre-OECD	4 U.S.T. 789, T.I.A.S. No. 2880	1958-2 C.B. 1029	6108, 1954-2 C.B. 614
Austria	1 Jan. 1957	pre-OECD	8 U.S.T. 1699, T.I.A.S. No. 3923	1957-2 C.B. 985	6322, 1958-2 C.B. 1038
Belgium[2]	1 Jan. 1953	pre-OECD	4 U.S.T. 1647, T.I.A.S. No. 2833	1954-2 C.B. 626	6056, 1954-1 C.B. 132; 6160, 1956-1 C.B. 815
Amendment	1 Jan. 1959		10 U.S.T. 1358, T.I.A.S. No. 4280	1960-1 C.B. 740 & 753	6438, 1960-1 C.B. 739; 6469, 1960-1 C.B. 752
Belgium	1 Jan. 1971	OECD	23 U.S.T. 2687, T.I.A.S. No. 7463	1973-1 C.B. 619	None issued
Canada	1 Jan. 1941	pre-OECD	56 Stat. 1399, 6 Bevans 244, T.S. No. 983	1943 C.B. 526	5206, 1943 C.B. 526
Amendment	1 Jan. 1951		2 U.S.T. 2235, T.I.A.S. No. 2347	1955-1 C.B. 624	6047, 1953-2 C.B. 59
Amendment	1 Jan. 1957		8 U.S.T. 1619, T.I.A.S. No. 3916	1957-2 C.B. 1014	
Amendment	20 Dec. 1967		18 U.S.T. 3186, T.I.A.S. No. 6415	1968-1 C.B. 628	
Denmark	1 Jan. 1948	pre-OECD	62 Stat. (2) 1730, 7 Bevans 131, T.I.A.S. No. 1854	1950-1 C.B. 77	5692, 1959-1 C.B. 104; 5777, 1950-1 C.B. 76
Egypt	1 Jan. 1982	OECD			
Finland	28 Feb. 1971	OECD	22 U.S.T. 40, T.I.A.S. No. 7042	1971-1 C.B. 513	None issued

1. Existing treaties reflected in this Table with Australia, Austria, Belgium, Finland, Germany, Ireland, Italy, Netherlands Antilles, Pakistan, Sweden, Switzerland, Trinidad and Tobago, and the USSR are being renegotiated. Treaties with China, Costa Rica, Nigeria, Sri Lanka, and Tunisia are being negotiated but nothing has yet been signed.

2. Extends only to the following former Belgian colonies: Ziare, Rwanda, and Burundi.

Appendix (Continued)

Contracting State	Date Effective	Treaty Classification	International Citation	Treasury Citation	Treasury Decisions
France	1 Jan. 1967	OECD	19 U.S.T. 5280, T.I.A.S. No. 6518	1968-2 C.B. 691	6986, 1969-1 C.B. 365
Protocol	1 Jan. 1970		23 U.S.T. 20, T.I.A.S. No. 7270	1972-1 C.B. 438	
Protocol	1 Jan. 1979		30 U.S.T. 5109, T.I.A.S. No. 9500	1979-2 C.B. 411	
Germany	1 Jan. 1954	pre-OECD	5 U.S.T. 2768, T.I.A.S. No. 3133	1955-1 C.B. 635	6122, 1955-1 C.B. 641
Protocol	Various	OECD	16 U.S.T. 1875, T.I.A.S. No. 5920	1966-1 C.B. 360	
Greece	1 Jan. 1953	pre-OECD	5 U.S.T. 47, T.I.A.S. No. 2902	1958-2 C.B. 1054	6109, 1954-2 C.B. 638
Protocol	1 Jan. 1953		5 U.S.T. 47, T.I.A.S. 2902	1958-2 C.B. 1059	
Hungary	1 Jan. 1980	OECD	30 U.S.T. 6357, T.I.A.S. 9560	1980-1 C.B. 333	None issued
Iceland	1 Jan. 1976	OECD	26 U.S.T. 2004, T.I.A.S. No. 8151	1976-1 C.B. 442	None issued
Ireland	1 Jan. 1951	pre-OECD	2 U.S.T. 2303, T.I.A.S. No. 2356	1958-2 C.B. 1060	5897, 1952-1 C.B. 89
Italy	1 Jan. 1956	pre-OECD	7 U.S.T. 2999, T.I.A.S. No. 3679	1956-2 C.B. 1096	6215, 1956-2 C.B. 1105
Jamaica	1 Jan. 1982	OECD			
Japan	1 Jan. 1973	OECD	23 U.S.T. 967, T.I.A.S. No. 7365	1973-1 C.B. 630	None issued
Korea	1 Jan. 1980	OECD	30 U.S.T. 5253, T.I.A.S. No. 9506	1979-2 C.B. 435	None issued
Luxembourg	1 Jan. 1964	OECD	15 U.S.T. 2355, T.I.A.S. No. 5726	1965-1 C.B. 615	
Malta	1 Jan. 1982	OECD			

Appendix (Continued)

Contracting State	Date Effective	Treaty Classification	International Citation	Treasury Citation	Treasury Decisions
Morocco	1 Jan. 1981	OECD			
Netherlands	1 Jan. 1947	pre-OECD	62 Stat. (2) 1757, 10 Bevans 225, T.I.A.S. No. 1855	1950-1 C.B. 93	5690, 1949-1 C.B. 92; 5778, 1950-1 C.B. 92
Amendment	10 Nov. 1955		6 U.S.T. 3696, T.I.A.S. 3366	1956-2 C.B. 1116	6153, 1955-2 C.B. 777
Amendment	1 Jan. 1967	OECD	17 U.S.T. 896, T.I.A.S. No. 6051	1967-2 C.B. 572	
Netherlands Antilles	1 Jan. 1955	pre-OECD	6 U.S.T. 3703, T.I.A.S. No. 3367	1956-2 C.B. 1116	6153, 1955-2 C.B. 777
Protocol	Various		15 U.S.T. 1900, T.I.A.S. No. 5665	1965-1 C.B. 624	
New Zealand	1 Jan. 1951	pre-OECD	2 U.S.T. 2398, T.I.A.S. No. 2360	1958-2 C.B. 1071	5957, 1953-1 C.B. 238
Norway	1 Jan. 1971	OECD	23 U.S.T. 2832, T.I.A.S. No. 7474	1973-1 C.B. 669	None issued
Amendment	Dec. 1981				
Pakistan	1 Jan. 1959	pre-OECD	10 U.S.T. 984, T.I.A.S. No. 4232	1960-2 C.B. 646	6431, 1960-1 C.B. 755
Philippines	1 Jan. 1983	OECD			
Poland	1 Jan. 1974	OECD	28 U.S.T. 891, T.I.A.S. No. 8486	1977-1 C.B. 416	None issued
Romania	1 Jan. 1974	OECD	27 U.S.T. 165, T.I.A.S. No. 8228	1976-2 C.B. 492	None issued
South Africa	1 July 1946	pre-OECD	3 U.S.T. 3821, T.I.A.S. No. 2510	1954-2 C.B. 651	None issued
Protocol	1 July 1948		3 U.S.T. 3821, T.I.A.S. No. 2510	1954-2 C.B. 655	

Appendix (Continued)

Contracting State	Date Effective	Treaty Classification	International Citation	Treasury Citation	Treasury Decisions
Sweden	1 Jan. 1940	pre-OECD	54 Stat. 1759, 11 Bevans 809, T.I.A.S. No. 958	1940-2 C.B. 43	4975, 1940-2 C.B. 43
Amendment	Various	OECD	15 U.S.T. 1824, T.I.A.S. No. 5656	1965-1 C.B. 626	
Switzerland	1 Jan. 1951	pre-OECD	3 U.S.T. 3972, T.I.A.S. No. 2316	1955-2 C.B. 815	5867, 1951-2 C.B. 75; 6159, 1955-2 C.B. 814
Trinidad and Tobago	1 Jan. 1970	OECD	22 U.S.T. 164, T.I.A.S. No. 7047	1971-2 C.B. 479	None issued
USSR[3]	1 Jan. 1976		27 U.S.T. 1, T.I.A.S. No. 8225	1976-2 C.B. 463	None issued
United Kingdom	1 Jan. 1975	OECD	__ U.S.T. ___, T.I.A.S. No. 9682	1980-1 C.B. 394	None issued
United Kingdom[4]	1 Jan. 1945	pre-OECD	60 Stat. 1377, 12 Bevans 671, T.I.A.S. No. 1546	1947-1 C.B. 209	5532, 1946-2 C.B. 73; 5569, 1947-2 C.B. 100
Amendment	19 Jan. 1955		6 U.S.T. 37, T.I.A.S. No. 3165	1957-1 C.B. 665	
Amendment	1 Jan. 1956		9 U.S.T. 1329, T.I.A.S. No. 4124	1958-2 C.B. 1078	
Amendment	1 Jan. 1959		9 U.S.T. 1459, T.I.A.S. No. 4141	1960-2 C.B. 653	6437, 1960-1 C.B. 767
Amendment	1 Jan. 1966		17 U.S.T. 1254, T.I.A.S. No. 6089	1966-2 C.B. 582	6898, 1966-2 C.B. 567
Argentina	Not yet effective — Signed 7 May 1981				
Bangladesh	Not yet effective — Signed 6 Oct. 1980				
Brazil	Not yet effective — Signed 13 Mar. 1967				

3. Though the effective date of the treaty with the USSR is subsequent to the OECD Model treaty, the treaty with that country is not based on the OECD model due to its unique taxing system.

4. Extends to former United Kingdom colonies such as Barbados, Gambia, Sierra Leone, and Zambia.

Appendix (Continued)

Contracting State	Date Effective	Treaty Classification	International Citation	Treasury Citation	Treasury Decisions
British Virgin Islands[5]	Not yet effective — Signed 20 Feb. 1981				
Cyprus	Not yet effective — Signed 26 Mar. 1980				
Honduras	Treaty Terminated 31 Dec. 1966				
Israel	Not yet effective — Treaty originally signed 20 Nov. 1975; Protocol signed 20 May 1980				
Netherlands Antilles[6]	Not yet effective — Negotiations held 9 June 1980				
Thailand	Not yet effective — Signed 1 Mar. 1965				

5. The extension of the 1945 United Kingdom treaty to the British Virgin Islands was terminated on June 30, 1982. The termination is effective January 1, 1983.

6. The Netherlands Antilles are presently covered by an extension of the 1947 income tax treaty with the Netherlands. That coverage will continue until either the proposed treaty becomes effective or the extension is terminated.