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An Alternate Approach to Situs Determination for Partnership Interests

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I. Introduction

Imagine that in 2021 a wealthy domiciliary of country Q dies leaving a large and varied estate. Neither the decedent nor his estate has any ties to the U.S. except for an ownership interest in a partnership organized under New York state law. The partnership assets include a consulting firm with operations and offices in the U.S. and abroad. There is no estate tax treaty between the U.S. and country Q. This article seeks to answer two questions:

1) On what authorities would a U.S. court rely in determining whether the partnership interest (PI)[1] of this hypothetical decedent, as a non-resident non-citizen (NRNC) of the U.S., is U.S. situs?
2) In applying these authorities to the facts, what portion of the decedent's PI, if any, would a U.S. court deem to be U.S. situs, and thus subject to U.S. estate tax?

There are four theoretical bases, generally speaking, for determining situs of PIs: 1) domicile of decedent at death, 2) partnership's place of organization, 3) location of business activities, and 4) physical location of its underlying assets.[2] For illustration purposes, applying each of these situs theories to our hypothetical decedent yields the following situs determinations: 1) Country Q situs – where the decedent was domiciled at death; 2) U.S. situs – partnership organized under New York state law; 3) Split situs – partnership has operations in U.S. and abroad; and 4) Split situs – partnership has business assets physically present in the U.S. and abroad.

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1 Unless indicated otherwise, any reference in this article to partnership interests or PIs is intended to mean the partnership interests of a non-resident non-citizen decedent.

2 *See* Michael Heimos, *Non-Citizens – Estate, Gift and Generation-Skipping Transfer Tax, Detailed Analysis*, 837-4th Ests., Gifts & Trs. Portfolios (BL) at IV.D (2021).

Which situs theory applies has significant impact for our hypothetical decedent and for the Internal Revenue Service (the Service). Under the first theory, the value of the partnership is excluded from the decedent's gross estate entirely; under the second it is included entirely. For the theories that yield a split situs result, the inevitable question of proportionality arises, that is, does any U.S. presence, no matter how small, render the entire value of the decedent's interest in the partnership includable in his gross estate, or is the extent of inclusion proportional to the presence? And the stakes are high: NRNC estates, like those of U.S. residents, are subject to an effective estate tax rate of 40%, but whereas the 2021 exemption for U.S. residents stands at $11,700,000, adjusted for inflation, the exemption for NRNCs is a mere $60,000.[3]

In answering the two questions posed above, this article begins with a survey of the statutory, regulatory and judicial authorities that influence PI situs determination. The discussion then moves to an analysis of the 1933 Supreme Court case of *Burnet v. Brooks*[4] for two reasons: first, to ground the discussion in the principles that initially authorized the federal government to impose an estate tax on NRNC property; second, to establish an analytical framework for determining the scope of U.S. situs rules that can be applied to PIs. In applying this framework to PIs, the focus shifts to international law, specifically to bilateral estate tax treaties, and then more specifically, to those bilateral estate tax treaties to which the U.S. is party. It will categorize the treatment of PIs under the various treaty regimes and use the hypothetical decedent described above as a test case in order to identify situs rule norms at international law.

In conclusion, the article argues that a U.S. court tasked with determining the PI situs would be limited, per *Brooks*, by the situs norms at international law, of which there are two: first, a partnership's underlying assets are U.S. situs to the extent that those assets are part of a "permanent establishment" physically located in the U.S., and then only to the extent of the decedent's interest in the partnership; second, PI situs is the domicile country of the NRNC decedent. Although these two situs rules conflict, together they establish the outer boundaries of what *Brooks* would deem a viable situs rule. Therefore, until Congress addresses the issue of PI situs directly, *Brooks* mandates that a court faced with facts similar to those of the hypothetical decedent above limit its holding to one of the two situs rules enumerated above.

3 *See* Rev. Proc. 2020-45, 2020-46 I.R.B. 1016; *see* I.R.C. § 2102(b)(1). All citations are to the Internal Revenue Code of 1986, as amended, unless otherwise stated.

4 288 U.S. 378 (1933).

II. Partnership Interest Situs: Status of the Law

Congress must express its intention to tax in clear and unambiguous language.[5] Despite the fundamental role situs determination plays in calculating one's tax liability, Congress and the Service have neglected to provide clear PI situs rules in the relevant statutes and regulations. As for agency guidance, the Service has visited this topic on a single occasion, in the form of Rev. Rul. 55-701 of 1955;[6] however this ruling is widely regarded as fundamentally flawed and unreliable. Lastly, federal case law provides no holdings that directly address PI situs determination, and the common law maxim of *mobilia sequuntur persoman*, which functions as a backstop situs rule in the event of statutory and regulatory silence, has received such unfavorable treatment in federal case law that reliance upon the maxim alone would be ill-advised. It is this dearth of legal authority that necessitates an alternate approach to PI situs rules, but before discussing the alternative, an in-depth analysis of these authorities must proceed.

A. Statutes and Regulations

Section 2101 of the Internal Revenue Code ("Code") imposes estate tax on the gross estate of every NRNC the world-over. Section 2103 narrows the NRNC gross estate to property "situated in the United States" at the time of death. The sister statutes of sections 2104 and 2105 then define the scope of "in the United States" for different types of property and property interests. The statutes provide clear situs rules for certain property types, such as corporate stock, but they are silent on PIs.

In 1958 the Service promulgated Treas. Regs. section 20.2104-1(a)(4) and section 20.2105-1(e) to refine the scope of "situated in the United States," and ever since commentators have debated whether PIs fall within its provisions.[7] Treas. Reg. section 20.2104-1(a)(4) states that an NRNC's gross estate includes: "intangible personal property the written evidence of which is not treated as being the property itself, if it is issued by or enforceable against a resident of the United States or a domestic corporation or governmental unit."[8]

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5 Eidman v. Martinez, 184 U.S. 578, 583 (1902).

6 Rev. Rul. 55-701, 1955-2 C.B. 836.

7 Treas. Reg. §§ 20.2104-1(a)(4), 20.2105-1(e). The two provisions mirror one another: the former states that intangibles are within the U.S. if listed therein, the latter states that intangibles are outside the U.S. if not listed therein. Each states that it is subject to the other, and each lists the exact same property interests. For simplicity, this article will only refer to Treas. Reg. § 20.2104-(a)(4) henceforth.

8 Treas. Reg. § 20.2104-1(a)(4).

The analysis begins with whether PIs are "intangible personal property" because if not, Treas. Reg. section 20.2104-1(a)(4) is irrelevant. Commentators largely agree,[9] despite the Service's reluctance to provide guidance on the issue,[10] that PIs are intangibles. The authorities for this proposition are scattered but consistent.[11] Thus if the Code incorporates PIs into an NRNC's gross estate, it must do so by way of Treas. Reg. section 20.2104-1(a)(4). The analysis shifts to determining whether PIs qualify as "issued by or enforceable against" a 1) "resident of the United States" 2) "a domestic corporation" or 3) "governmental unit."[12] If none of the three applies, then the only conclusion is that the Code and its regulations contain no PI situs rule.

Partnerships are not governmental units, and by definition they cannot be corporations.[13] Therefore if Treas. Reg. section 20.2104-1(a)(4) includes PIs, it must be because a partnership is a "resident of the United States." Prior to 2006, the strongest argument for the assertion that the term "resident" included partnerships relied on the now-repealed language of Treas. Reg. section 301.7701-5 that defined "resident partnerships."[14] This position had its critics, with some asserting that because the resident partnership provision of then Treas. Reg. section 301.7701-5 applied an engaged in trade or business test to determine residency, incorporating that definition, and thereby that test, into Treas. Reg. section 20.2104-1(a)(4) would be an arbitrary and capricious extension of that test into an area of law that had previously only adjudged situs based on place of organization (regarding corporate stock)

9 Richard A. Cassell et al., Special Reports, *U.S. Estate Planning for Nonresident Aliens Who Own Partnership Interests*, 2003 TAX NOTES INT'L. 563, 572.

10 The IRS will not rule as to whether partnership interests are intangibles under I.R.C. § 2501(a)(2), regarding NRNC transfers of intangibles for gift tax purposes. *See* Rev. Proc. 2018-7, 2018-1 I.R.B. 271, 273 § 4.01(29)-(30). It is widely assumed that this extends to estate tax considerations as well, as the estate tax and gift tax provisions are to be read in *pari materia*. *See, e.g.*, Merrill v. Fahs, 324 U.S. 308, 311 (1945).

11 *See* Blodgett v. Silberman, 277 U.S. 1 (1928); *see also* PLR 7737063 (June 17, 1977) (stating that intangibles refer to "corporate stock, bonds, notes, bank deposits, patents, partnership interest, goodwill, etc."); *see also* Rev. Rul. 55-701, 1955-2 C.B. 836 (referring to *Blodgett* in its attempt to resolve situs of partnerships).

12 Treas. Reg. § 20.2104-1(a)(4).

13 I.R.C. § 7701(a)(2).

14 M. Annette Glod, *United States Estate and Gift Taxation of Nonresident Aliens: Troublesome Situs Issues*, 51 TAX LAW. 109, 116-17 (1997); Patrick W. Martin, *Why Section 2104 Must Address When Partnership Interests Owned by Foreign Investors Are (and Are Not) Subject to United States Estate Tax*, PROCOPIO 1, 7 (May 2004), https://www.procopio.com/uploads/model/Block/4555/pdf/113/why-section-2104-must-address-when-partnership-interests-owned-by-foreign-investors-are-and-are-not-subject-to-united-states-estate-tax-918.pdf.

and physical presence (regarding real and tangible property).[15] However since the amendment to Treas. Reg. section 301.7701-5 in 2006, the concept of residency as applied to partnerships is virtually non-existent in the Code.[16] In fact, the basis given for the amendment was that the concept of residency as applied to partnerships had "become obsolete" in the Code.[17] Thus the argument that "resident" under Treas. Reg. section 20.2104-1(a)(4) includes partnerships no longer holds water.

The Code's definition of "resident" is equally unhelpful, as, by its own terms, it does not apply to subtitle B (Estate and Gift Taxes).[18] Therefore the definition of "resident" as regards Treas. Reg. section 20.2104-1(a)(4) must come from within subtitle B itself. That definition is found in Treas. Reg. section 20.0-1(b)(1), which provides that residence is determined by domicile. Domicile determination is heavily fact dependent and hinges upon the actor's intent. As partnerships and other organizations cannot intend, the only conclusion available is that "resident" as used in Treas. Reg. section 20.2104-1(a)(4) cannot include partnerships. In light of the foregoing, it is clear that the Code and its regulations are silent on the situs determinations of PIs, and guidance must come from elsewhere.[19]

B. Agency Rulings

The only time the Service addressed the issue of PI situs was in Rev. Rul. 55-701 of 1955.[20] A wide variety of commentators concur that Rev. Rul. 55-701 is no longer good law, if it ever was, because of its potentially narrow scope and its misplaced reliance on unsupportive or unpersuasive case law.[21] Nonetheless, the ruling represents the Service's current position on the matter and deserves consideration.

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15 Robert F. Hudson, Jr., *The Tax Effects of Choice of Entities for Foreign Investment in U.S. Real Estate and U.S. Businesses*, 4 Bus. Entities, Mar.-Apr. 2003, at 16, 23.

16 Howard J. Barnet Jr., Special Report, *Estate Tax Situs of Partnership Interests*, 2014 Tax Notes 1093, 1096 n.27.

17 T.D. 9153, 2004-2 C.B. 517.

18 I.R.C. § 7701(b)(1) ("In General — For purposes of this title (other than subtitle B).").

19 This conclusion is widely supported among commentators. *See* Martin, *supra* note 14, at 2-3; Cassell et al., *supra* note 9, at 570-71; Dina Kapur Sanna, *Calling for Clarity on NRAs' Partnership Situs*, Tr. & Est., Nov. 2009, at 36, 37; Barnet Jr., *supra* note 16, at 1096; *see also* Heimos, *supra* note 2, at 3 ("The reason for this debate is simple: Advisors and commentators have really been given no choice, as Congress is silent on the issue, the rules in the regulations are incomplete or poorly written (and perhaps, as some commentators have surmised, are invalid), and the guidance from the IRS is flawed.").

20 Rev. Rul. 55-701, 1955-2 C.B. 836.

21 *See* Stafford Smiley, *Dispositions of U.S. Partnership Interests by Nonresident Aliens*, 8 J. P'ship Tax'n 133, 144 (1991); Glod, *supra* note 14, at 121; Barnet Jr., *supra* note 16, at 1096.

In Rev. Rul. 55-701, the Service was tasked with applying the situs rules of a now-obsolete U.S.-U.K. estate tax convention to determine the situs of PIs belonging to a U.K. domiciliary decedent. The provisions of that now-obsolete tax convention required that when its situs rules failed to mention the particular type of property at issue, the situs rules of the non-domiciliary State would serve as the tiebreaker.[22] Since the decedent was a domiciliary of the U.K., and since the situs rules of the treaty did not mention PIs, the treaty required that the Service apply U.S. law to determine situs. The Service, finding no U.S. authority on point, relied on a 1907 U.K. court decision in which an English subject died owning shares in a sheepherding partnership based in Australia.[23] Why the Service chose to rely on a wholly foreign court case, and why the Service chose this particular case over other foreign cases, is unclear.[24] Questionable authoritative basis aside, the Service concluded that the situs of PIs is where the business is carried on.

Some commentators advance the additional argument that the scope of Rev. Rul. 55-701 is confined to interpreting the obsolete U.S.-U.K. treaty and should not be regarded as the Service's position on PI situs in general.[25] The closing line of the ruling seems to qualify its scope, stating, "In view of the foregoing, it is held that *in the application of the United States-United Kingdom Estate Tax Convention* the situs of a partnership interest is where the business is carried on."[26] Regardless of the ruling's scope, its fundamental flaw is its arbitrary reliance on a single foreign case. In light of the fact that the Service has not revisited the issue of PI situs, we turn now to federal case law.

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22 Convention Respecting Double Taxation and Taxes on Estates of Deceased Persons, U.S.-U.K., Apr. 16, 1945, T.I.A.S. 1547. This treaty was terminated October 19, 1978. *See infra* note 68.

23 Comm'r of Stamp Duties v. Salting [1907] AC 449 (PC) (appeal taken from NSW).

24 The Service's reliance on a single foreign case has been a source of bemusement for commentators. *See* Hudson Jr., *supra* note 15, at 30 n.34 ("[C]iting no U.S. authorities but rather a U.K. case!"); Heimos, *supra* note 2, at 4 ("So in formulating its (apparently final) position on the subject, the IRS relied solely upon an interpretation of the New South Wales death duty as it applied to a partnership of Australian sheep farmers. That this ruling can be criticized as having a weak foundation is obvious. There was no reliance on any American authority for the final position.").

25 *See* Cassell et al., *supra* note 9, at 573 ("[T]his ruling was based on an interpretation of a former estate and gift tax treaty, rather than providing guidance as to the domestic estate tax rules.").

26 Rev. Rul. 55-701, 1955-2 C.B. 836 (emphasis added).

C. Federal Case Law

Unfortunately, the guidance federal case law provides is similarly scant. It is well documented that *Blodgett v. Silberman*,[27] to which Rev. Rul. 55-701 erroneously cites, is not on point for determining PI situs.[28] While acknowledging that *Blodgett* is not on point, some commentators have attempted to mill this case for a different type of grain, specifically as support for the proposition that the common law doctrine of *mobilia sequuntur personam* should control PI situs determination.[29] That doctrine holds that in lieu of a statute to the contrary, it is the domicile of the decedent that determines situs of personal property, including intangibles.[30] The statutes are undoubtedly silent on PI situs, and therefore, the argument goes, until that silence is filled, *mobilia sequuntur personam* controls. The Achilles heel of this argument is the checkered past of the doctrine itself. The Supreme Court has frequently dismissed the doctrine as "a fiction at most,"[31] and according to one commentator, no U.S. court has ever applied it in situs determination.[32] So although its mechanical logic may be tempting, the argument in favor of *mobilia sequuntur personam* is only as sound as the courts' past treatment of the doctrine itself, and that treatment is far from favorable.

The other case that orbits close to PI situs determination is *Sanchez v. Bowers*, but it too is wide of the mark.[33] In *Sanchez*, Judge Learned Hand determined as a threshold issue that the underlying assets of the NRNC-owned *sociedad de gananciales* (a Cuban juridical entity akin to a partnership) were subject to the physical presence test that existed in the regulations at that time, on the basis that the NRNC decedent's death had caused the *sociedad de gananciales*, by its terms, to liquidate and cease to be an entity.[34] The estate in question therefore did not contain any partnership interests, only a chose-in-action of the property that was formerly held in partnership. In other words, *Sanchez* does not apply to situs determination of partnership interests, it applies only to situs determination of a chose-in-action; as long as partnerships persist

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27 277 U.S. 1 (1928).

28 Glod, *supra* note 14, at 112. "The Service [in Rev. Rul. 55-701] also cited *Blodgett v. Silberman* in support of its conclusion. However, *Blodgett* provides no support for the Service's ruling. In *Blodgett*, the Supreme Court ruled only that Connecticut's succession tax law was constitutional." *Id.* at 121 (footnote omitted).

29 Hudson, Jr., *supra* note 15, at 24; Heimos, *supra* note 2, at 4.

30 Estate of Vandenhoeck v. Comm'r, 4 T.C. 125, 135 (1944).

31 Burnet v. Brooks, 288 U.S. 378, 391 (1933); *see also* Eidman v. Martinez, 184 U.S. 578, 581 (1902) ("The ancient maxim of the law, *mobilia sequuntur personam*, was the outgrowth of conditions which have largely ceased to exist . . . .").

32 Glod, *supra* note 14, at 113.

33 70 F.2d 715 (2d Cir. 1934).

34 *Id.* at 717.

as an entity after the death of one of its partners, *Sanchez* is not on point.

In sum, the state of the law for PI situs determination looks bleak: the statutes and regulations are silent, agency guidance is virtually nonexistent, and federal case law provides no authoritative holding. Commentators have focused primarily, if not exclusively, on the narrow topic of PI situs determination in hopes of finding a holding or regulatory language targeted to this specific type of property. As the foregoing shows, this line of analysis yields no conclusive outcome. This calls for an alternate approach.

III. *Brooks*

Instead of mining the same regulations and cases for hints of guidance on PI situs rules, the search for helpful authorities should be broadened to include analogous cases that resolve the situs rules of property other than PIs, with the aim of identifying the analytical framework and applying it to PIs. This broadened search should be grounded in the legal principles and foundational jurisprudence that authorized the imposition of an estate tax on NRNC property in the first place. Conveniently, there is a 1933 Supreme Court case that accomplishes all of this: *Brooks*.[35]

A. Historical Background and Opinion

From its outset in 1916, the modern estate tax regime included a tax on nonresident[36] decedent property and contained the now-familiar language of "situated in the United States" to define the scope of nonresident gross estates.[37] In 1918 the Service issued regulations refining the scope of "situated in the United States." The Revenue Act of 1924 and its accompanying situs regulations mirrored the 1916 Act and the 1918 regulations save for a few minor adjustments.[38] It was in this context that the Supreme Court heard *Brooks* to decide two questions: (i) the

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35 *Brooks*, 288 U.S. 378.

36 The additional qualifier of "not a citizen of the United States" did not supplement "nonresident" in the situs statutes until 1934. *Compare* Revenue Act of 1928, ch. 852, § 401, 45 Stat. 791, 862 (deductions for "nonresident decedents"), *with* 26 U.S.C. §§ 460-64 (1934). Therefore, in the context of the *Brooks* decision, this article refers to the owner of the partnership interest at issue as "nonresident" and not as NRNC.

37 Revenue Act of 1916, ch. 463, § 203(b), 39 Stat. 756, 778. This statute is the forerunner of modern day I.R.C. § 2104.

38 The regulations under the 1924 Act provided the following: "Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States." T.D. 3683 *in* 137 Treasury Dep't, Internal Revenue Acts of the

situs of nonresident property when the type of property at issue was not addressed in the governing statute or regulations of 1924, and (ii) whether the federal government has the power to impose an estate tax on the property of nonresidents.

The facts of *Brooks* are as follows: the decedent was a British subject who died in 1924 as a resident of Cuba, and who was at no point engaged in business in the U.S. The decedent's estate contained various securities and debt instruments, including stock in foreign corporations, and the physical certificates evidencing that stock were located in New York. The 1924 regulations provided physical location situs rules for some types of nonresident property, but not for others. For instance, the 1924 regulations deemed bonds as "situated in the United States" when the physical certificates representing those intangibles were physically located in the U.S.[39] The regulations however were silent as to whether foreign corporation stock certificates physically within U.S. territory rendered that stock "situated in the United States." Thus, the first issue confronting the *Brooks* Court was one of scope: whether "situated in the United States" could be stretched to include a type of property unmentioned in the regulations. It is worth noting here the parallels in *Brooks* to modern-day PIs, as PIs occupy the same regulatory grey area in relation to modern-day Treas. Reg. section 20.2104-1(a)(4) as the foreign stock certificates occupied vis-à-vis the 1924 regulations.

The *Brooks* Court held that the scope of "situated in the United States" extended to foreign stock certificates physically located in the U.S., and thus the value of the foreign stock was included in the decedent's gross estate. In his opinion for the Court, Chief Justice Hughes reasoned that determining the scope of the statutory and regulatory situs rules was a matter of discerning legislative intent,[40] and that this intent could be discerned from two sources: (i) the situs rules as they existed at common law prior to the statute's enactment, and (ii) the legislative history of the statutes and regulations.

First, under the belief that Congress enacted the statute with common law situs doctrines in mind,[41] the Court stated that a situs rule based on the physical location of certificates was "well established" and

United States, 1909-1950: Legislative Histories, Laws, and Administrative Documents § 303, art. 50 (Bernard D. Reams, ed. 1979).

39 *Id.*

40 Burnet v. Brooks, 288 U.S. 378, 388 (1933).

41 *Id*. at 389 ("[S]o far as the intention of Congress is concerned, we think that the principles thus impliedly invoked by the statute were the principles theretofore declared and then held.").

therefore in keeping with common law situs rules.[42] Second, the Court examined the legislative history and concluded that by reenacting the statute in 1924, Congress evinced a tacit approval of the regulatory situs rule, in place since 1918, which deemed certificates of foreign bonds as U.S. situs when physically located in the U.S.[43] The Court could find no reason why Congress would reject a situs rule based on the physical location of foreign stock certificates where it had approved, albeit tacitly, such a rule for foreign bond certificates.[44] The Court thus concluded that by not expressly applying the physical location situs rule to foreign stock certificates, the "express terms of these regulations did not go far enough" and "so far as they did go, they failed to express the legislative intent."[45] Hence the Court extended the physical location situs rule to include foreign stock certificates to align with what it deemed to be Congress's intent.

Having determined the scope of "situated in the United States," the second issue facing the *Brooks* Court was whether the federal government had the power to lay an estate tax on nonresident decedent property in the first place. This marked the first time that the Supreme Court considered the constitutional limits of Congress's power to lay such a tax. The Court rejected the argument that the Fifth Amendment limitation on the States' taxing jurisdiction over nonresidents (i.e., residents of different states within the U.S.) placed a similar limitation on the federal taxation power over nonresident foreigners.[46] Finding no constitutional constraints, the Court held that the government's power to tax nonresident property was a function of its national sovereignty in international relations. Chief Justice Hughes stated that the nonresident's property constituted "property within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principle of international law."[47] In the final few lines of his opinion, the Chief Justice explained that, "We determine national power in relation to other

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42 *Id*. It is also worth noting that the Court brushed aside the contention that *mobilia sequuntur personam* applied here, stating "[t]he Congress did not enact a maxim." *Id.*

43 See note 38, *supra*, for language of the 1924 regulations.

44 *Brooks*, 288 U.S. at 393 ("In the view which identifies the property interest with its physical representative, no sufficient reason appears for holding that bonds were intended to be included, and not certificates of stock, if these were physically in the United States at the time of death.").

45 *Id.*

46 *Id.* at 403.

47 *Id*. at 396.

countries and their subjects by *applying the principles of jurisdiction recognized in international relations*."[48]

Importantly, the Court then proceeded to measure the scope of its situs rule against the corresponding situs rule at international law, stating, "This view of the scope of the sovereign power in the matter of the taxation of securities physically within the territorial limits of the sovereign is sustained by high authority and is a postulate of legislative action in other countries."[49] The Court examined a U.K. domestic case in order to identify the U.K. situs rule for physically present security certificates, and also took into account a British lawmaker's summary of the situs rule as it existed at international law.[50] For insight into the Italian position, the Court recommended a Commerce Department pamphlet on Italian "Tax on Successions" and for the French position it cited to a 1928 treatise titled "French Fiscal Legislation."[51] In all the Court considered the situs laws of the U.K., Italy, and France to ascertain the prevailing situs principles at international law.

Based on the findings of its survey of international sources, the Court was content that the U.S. situs rule violated no principle of international law. Thus, the Court ruled that the provisions of the 1916 Revenue Act, as amended by the 1924 Act, authorizing the tax of nonresident decedent property "situated in the United States" was decidedly within the federal government's taxing power.[52]

B. Application to Partnership Interests

As state previously, the parallels between the foreign stock certificates of *Brooks* and modern-day PIs are apparent. And as there are no statutes, regulations, agency guidance, or federal cases directly on point for determining PI situs rules, *Brooks* is arguably the best authority for predicting how a U.S. court would determine the scope of "situated in the United States" under section 2104 and its regulations in relation to PIs.

The *Brooks* Court chose to structure its opinion as sequential analyses of two separate issues: (i) determining the scope of the specific statutory situs rule, and then (ii) resolving whether the government had the power to lay the tax. But these two issues are both essentially about scope, as the government has the power to lay the tax only if the situs rule is within the scope of "principles of jurisdiction recognized in inter-

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48 *Id*. at 406 (emphasis added).
49 *Id.* at 396.
50 *Id*. at 396-97.
51 *Id.* at 398 n.6.
52 *Id.* at 406.

national relations."[53] Therefore *Brooks* could be characterized as containing an implicit second step for determining the scope of situs rules under section 2104 that accounts for the prevailing situs rules at international law.[54] Accordingly, the Court's analytical approach can be recast as a two-step scope test: the first analyzes congressional intent to discern the scope of the specific situs rule; the second analyzes situs principles at international law to ensure the situs rule does not violate those principles.

1. *Step One: Congressional Intent*

As discussed above, step one of *Brooks* determines the scope of "situated in the United States" by discerning congressional intent by (i) surveying the predominant situs doctrines at common law, and (ii) reviewing the statute's legislative history. For the *Brooks* Court in 1933, this line of analysis required that it review the legislative history of the eight years between 1916 and 1924, as well as the common law situs doctrines as they existed around 1916. If a court today were to attempt this same line of analysis, it would be required to review over a century of shifting legislative history and common law situs doctrines.[55] On top of this, and as various esteemed commentators have shown, Congress and the Service have been reluctant to provide any insight into which situs rule they prefer when it comes to PIs. This reality means that a court would have paltry little from which to discern congressional intent. Nonetheless, on the few occasions that Congress or the Service has engaged with the situs rules of PIs, U.S. treaty law has played an important role which should not be ignored when assessing congressional intent.

First, when Congress initially promulgated section 2104 in its modern form in 1954, the House and Senate committee reports expressly stated that the new situs rule it contained was chosen because it "conforms to the tax conventions the United States has entered into with many countries."[56] Thus, although not PI-specific, there is precedent for Congress to enact domestic legislation to sync with, or at least in consideration of, the situs rules of U.S. treaty law. Second, although Congress

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[53] *Id.* ("We determine national power in relation to other countries and their subjects by applying the principles of jurisdiction recognized in international relations. Applying those principles we cannot doubt that the Congress had the power to enact the statute, *as we have construed and applied it* to the property in question." (emphasis added)).

[54] *See* I.R.C. § 2104.

[55] A clear instance of a situs doctrine falling out of favor in the past century was when Congress enacted I.R.C. § 2104 to remove the physical location test for certificates of foreign stock, directly reversing the *Brooks* Court decision. *See* H.R. Rep. No. 83-1337, at 92 (1954); S. Rep. No. 83-1622, at 125-26 (1954).

[56] H.R. Rep. No. 83-1337; S. Rep. No. 83-1622.

has remained silent on PI situs determination since 1916, in that time it has ratified and amended more than a dozen bilateral estate tax treaties, several of which create express PI situs rules,[57] and the PI situs rules of these treaties provide a rare glimpse into Congress's thinking on the subject.

In summary, while applying step one reveals nothing concrete about which situs rule Congress would apply to PIs, it shows, at the very least, that Congress has considered U.S. treaty law when defining the scope of "situated in the United States" regarding NRNC decedent property in general and PIs specifically. Therefore, a court attempting to discern Congress's intent, per *Brooks*, could benefit from understanding the PI situs rules in U.S. treaty law.

2. *Step Two: Norms at International Law*

Step two of *Brooks* shifts the analytical focus to the international sphere. In *Brooks* the Court surveyed the situs rules of the U.K., Italy and France to confirm that the situs rule it identified in step one was in keeping with the "principles of jurisdiction recognized in international relations."[58] By contrast, in applying the *Brooks* framework to PIs, the step one analysis produces no concrete situs rule for the reasons discussed above. Hence step two of the analysis is of added importance for ascertaining a situs rule for PIs.

It bears mentioning here that consulting international law to interpret U.S. legislation can be controversial but doing so in this particular context makes sense. First, compared to the 1933 context in which *Brooks* was decided, situs principles at international law have grown substantially more robust. Given the importance *Brooks* attached to international law in determining the scope of the federal taxing power, it is hard to believe that the *Brooks* Court would have ignored the situs provisions of international tax treaties to which the U.S. is party had they existed at the time,[59] especially considering the fact that the *Brooks* Court mentioned the tax convention negotiations that were ongoing between the U.S. and other countries.[60] Second, consulting U.S. treaty law for clarification on an innately international topic is distinguishable from

57 In total, the U.S. has ratified bilateral estate tax treaties with 16 nations, 14 of which are still active. For a timeline and table of bilateral estate tax treaties to which the U.S. is party, see *infra* Appendices A and B.

58 *Brooks*, 288 U.S. at 405-06.

59 No bilateral estate tax treaty existed at the time *Brooks* was decided. The first bilateral estate tax treaty to which the U.S. was party was the now repealed 1945 U.S.-U.K. Estate Tax Convention. *See supra* note 22.

60 *Brooks,* 288 U.S. at 399-400.

controversial cases such as *Roper v. Simmons*, wherein international norms informed the interpretation of a purely domestic issue.[61]

Before moving into the treaty analysis section, a review of the discussion up to this point may be of use. The statutes, regulations, agency guidance and case law are virtually silent on PI situs. *Brooks* explained the jurisprudential underpinning for imposing an estate tax on nonresidents, and presented what was effectively a two-step analytical framework for defining the scope of "situated in the United States" for types of property unmentioned in the statutes or regulations (i.e., modern-day section 2104 and Treas. Reg. section 20.2104-1(a)(4)). In applying this two-step test to PIs, the step one analysis, having become unworkable due to the statutory and regulatory silence towards PIs over the past century, yielded no clear situs rule. On the other hand, step two of the *Brooks* framework – situs principles at international law – offers an opportunity to explore a field of law that could provide specific guidance on PI situs rules.

IV. Situs Rules at International Law

In applying step two of *Brooks*, the discussion below begins with a general survey of bilateral estate tax treaties to identify trends and establish context. The focus shifts to bilateral estate tax treaties to which the U.S. is party, considering first those treaties that contain express PI situs rules and secondly those that do not. The takeaway from this survey is that there are two accepted international norms to which the U.S. adheres regarding PI situs: 1) the U.S. may tax the underlying assets of an NRNC-owned partnership but only to the extent that those assets are part of a "permanent establishment" physically located in the U.S., and only to the extent of the NRNC's interest in the partnership, and 2) the NRNC's domicile State has sole taxing authority over PIs. Although these two norms are not co-extensive and thus do not provide a singular situs rule for step two of *Brooks*, they serve to identify the outer limits of U.S. taxing jurisdiction over PIs at international law.

A. Bilateral Estate Tax Treaties

The vast majority of estate tax[62] treaties fall into one of two categories: situs-based treaties or domicile-based treaties (hereinafter "Situs Treaties" and "Domicile Treaties"). Situs Treaties appeared in the first

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[61] 543 U.S. 551, 575 (2005). In *Roper*, the Court in a 5-4 decision held that changing societal standards rendered the execution of minors "cruel and unusual punishment" as prohibited by the Eighth Amendment. As evidence of the evolving standards, the Court pointed to "overwhelming" international opinion against the execution of minors.

[62] For convenience, inheritance tax, gift tax, succession tax, stamp duties, and any other type of tax that applies to gratuitous transfers or transfers occurring by reason of

wave of estate tax treaty formation in the late 1940s and 1950s, and Domicile Treaties appeared in the second wave in the late 1960s through the 1980s. Domicile Treaties closely adhere to the Organization for Economic Cooperation and Development (OECD) Estate, Inheritance and Gift Model Convention and its Commentary (hereinafter "OECD Model Estate Tax Treaty"), which was first published in 1966 and revised in 1982.[63]

Situs Treaties seek to avoid double taxation on the basis of both States claiming property situs, or one State claiming right to tax based on situs and the other claiming right to tax based on some personal affiliation (e.g., domicile, residence, citizenship, etc.). The primary focus for Domicile Treaties, on the other hand, is to prevent a type of double taxation that occurs by virtue of each State claiming some personal affiliation with the decedent. Each Domicile Treaty has a "fiscal domicile" provision which serves as a tiebreaker when a decedent has multiple personal affiliations with the two States. Domicile Treaties then proceed to identify specific categories of property that the non-fiscal domicile State may tax on the basis of that property being located in its territory (i.e., on the basis of situs). These specific situs property categories are limited to "immovable property"[64] and property that comprises a "permanent establishment."[65] Some Domicile Treaties also provide that assets pertaining to a fixed base used for performance of a "professional service" or "independent personal service" may be taxed by the situs State as well.[66] The State claiming the right to tax based on situs of immovable property, permanent establishment property, or professional/independent personal service property has jurisdictional primacy to tax. Any property that does not qualify as situs property or is not mentioned by the situs rules is taxed by the fiscal domicile State.[67] Thus,

death are referred to as estate tax. Bilateral treaties that deal with income tax in addition to estate tax are not within the scope of this article.

63 OECD, Model Double Taxation Convention on Estates and Inheritances and on Gifts (1983).

64 *Id.* at 57-58.

65 *Id.* at 59.

66 *Id.* at 62.

67 *See, e.g.*, Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates of Deceased Persons and on Gifts, U.S.-U.K., art. 5(1)(a), Oct. 19, 1978, T.I.A.S. No. 9580 [hereinafter U.S.-U.K. Treaty] ("Subject to the provisions of Articles 6 (Immovable Property (Real Property)) and 7 (Business Property of a Permanent Establishment and Assets Pertaining to a Fixed Base Used for the Performance of Independent Personal Services) and the following paragraphs of this Article, if the decedent or transferor was domiciled in one of the Contracting States at the time of the death or transfer, property shall not be taxable in the other State."). For full citations to bilateral estate tax treaties to which the U.S. is party, see *infra* Appendix B.

an NRNC estate seeking relief under a Domicile Treaty must first identify the fiscal domicile of the decedent, and then identify which property located in the non-fiscal domicile State qualifies as "immovable," "permanent establishment" or "professional/independent personal service" property.

The Domicile Treaty framework has become the norm at international law for bilateral estate tax treaties. Among the countries that impose an estate tax[68] the vast majority of bilateral estate tax treaties in force today are between OECD member countries.[69] Moreover, nearly every bilateral estate tax treaty enacted after the 1966 OECD Model Estate Tax Treaty was published has been a Domicile Treaty modeled after the OECD Model Estate Tax Treaty.[70] France's approach to bilateral estate tax treaty formation makes it the only country that could be said to challenge the Domicile Treaty norm, but even France adheres to the norm roughly as often as it eschews it. France is party to roughly two dozen bilateral income tax treaties which incorporate estate tax provisions.[71] However France is also party to a number of estate tax-only treaties, including with the U.S., each of which adheres to the Domicile Treaty framework.[72]

Other than partial divergence by France, the norm at international law is well established: if two States intend to enter into a bilateral estate tax treaty, they will almost invariably employ the Domicile Treaty framework in doing so.[73] As such, bilateral estate tax treaties which employ the Domicile Treaty framework represent the area of law best suited to produce a situs rule norm for partnership interests.[74]

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68 As of 2015, 43 countries impose an estate tax, of which 19 are OECD member countries. *See* Alan Cole, *Estate and Inheritance Taxes around the World*, 458 TAX FOUND. (Mar. 17, 2015), https://taxfoundation.org/estate-and-inheritance-taxes-around-world/ [https://perma.cc/X2FT-UQLT].

69 *See infra* Appendix C; EY, WORLDWIDE ESTATE AND INHERITANCE TAX GUIDE 448 (2020) (ebook).

70 *See infra* Appendix C.

71 EY, *supra* note 69, at 132.

72 *Id.*

73 Model Double Tax'n Convention between Developed and Developing Countries, U.N. Doc. SER.E/213, at v, vii (2017).

74 Burnet v. Brooks, 288 U.S. 378, 398 n.6 (1933). The domestic law of countries that impose an estate tax is another potential source for identifying international situs norms. In fact, the *Brooks* Court surveyed the domestic laws of the U.K., Italy and France. The primary difficulty inherent in identifying situs norms for partnerships interests in the domestic laws of other countries is the fact that these countries' laws rarely contain the juridical equivalent of a partnership. Although foreign entities that parallel U.S. partnerships in terms of registration requirements, liability, etc., certainly exist, exploring the situs rules associated with those entities is beyond the scope of this article.

B. Partnership Interest Situs Rules in Bilateral Estate Tax Treaties

The U.S. is currently party to 14 bilateral estate tax treaties,[75] though if one includes the U.S.-Canada Income Tax Treaty, which folds in estate tax considerations, the count is 15.[76] Non-treaty countries clearly outnumber the 14 treaty countries; however a highly disproportionate amount of NRNCs filing estate tax returns with the Service are domiciled in these 14 countries. In fact, a majority of 706-NA forms – the form which NRNCs must file for U.S. estate tax purposes – comes from treaty countries.[77] Thus, as far as the U.S. is concerned, more NRNC estates evaluate their tax burden based on the provisions of the 14 bilateral treaties than do solely based on I.R.C. sections 2101-2108.[78]

The 14 bilateral estate tax treaties to which the U.S. is party are far from uniform and span many decades,[79] but there are also clear and consistent patterns across these treaties which reinforce international law norms. Most importantly, in recent decades the U.S. has comported with the established international norm of employing Domicile Treaties: since 1966, each of the six bilateral estate tax treaties the U.S. has signed and ratified was a Domicile Treaty. As such the situs provisions of these six treaties represent the clearest example of U.S. acceptance of international situs norms in the estate tax context.

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75 *See infra* Appendix B.

76 The U.S.-Canada Estate Tax Treaty was terminated in 1961 after Canada replaced its estate tax in favor of an income tax on gains at death. The U.S.-Canada Income Tax Treaty now governs the interaction between this Canadian tax and the U.S. transfer taxes. Because the U.S.-Canada tax agreement is an outlier, it is disregarded for the purposes of this article. Convention with Respect to Taxes on Income and on Capital, Ca.-U.S., art. II, Sept. 26, 1980, 1469 UNTS 189.

77 Between 2009 and 2014 (the most recent years in which the data is available), estates from treaty countries filed 3,181 706-NA forms. In that same timeframe estates from non-treaty countries filed only 1,012. *See SOI Tax Stats - Nonresident Alien Estate Tax Returns with Non-Treaty Status*, IRS, https://www.irs.gov/statistics/soi-tax-stats-nonresident-alien-estate-tax-returns-with-non-treaty-status (last updated Dec. 3, 2020) [https://perma.cc/PZ8T-UP88]; *see SOI Tax Stats - Nonresident Alien Estate Tax Returns with Treaty Status*, IRS, https://www.irs.gov/statistics/soi-tax-stats-nonresident-alien-estate-tax-returns-with-treaty-status (last updated Jan. 6, 2021) [https://perma.cc/9ZHT-KF4C].

78 A taxpayer is never required to use an estate tax treaty, and a taxpayer may only use a treaty's situs rules instead of those in the Code when there is some benefit to doing so. *See* Glod, *supra* note 14, at 109 n.2. Thus, not every NRNC domiciled in a treaty country seeks relief under the applicable U.S. bilateral treaty, but the estate will nonetheless evaluate its tax burden under an available treaty to determine if a benefit accrues.

79 The longest standing of these treaties was signed in 1949, and the most recent update to an active treaty occurred in 2004. *See infra* Appendix A.

Of the six Domicile Treaties to which the U.S. is party, three expressly address PI situs: France, Netherlands, and Germany.[80] These three treaties have important differences, but as their PI-specific provisions share an overarching conceptual framework, it is appropriate to consider them first as a group. As Domicile Treaties, they set out the criteria for establishing fiscal domicile.[81] The treaties then define, with slight variations, "immovable property" and "permanent establishment" – the latter of which is characterized as "a fixed place of business" through which business is carried on, which is then further defined with a list of examples of what is and is not a "permanent establishment."[82] Like all Domicile Treaties, the treaties assign primary taxing jurisdiction over the property that comprises the "permanent establishment" "immovable property" or "professional/independent personal service" to the State in which property is physically located, i.e., the situs State, and any property not qualifying as such is subject to tax by the fiscal domicile State.[83]

The France, Germany and Netherlands treaties stipulate, in varying ways, that assets of a permanent establishment are taxable by the situs State to the extent of the decedent's interest in the partnership. In other words, the treaties set out a situs rule of "engaged in trade or business" mixed with permanent establishment considerations, which is a function of physical asset location. The situs State is permitted to look through the partnership interest to the underlying assets, but only regarding assets that qualify as part of a permanent establishment – what is otherwise known as an "aggregate approach." Thus, the general rule under these Domicile Treaties is that the U.S. may tax PIs to the extent of

80 As mentioned previously, the U.S.-Australia Treaty – a Situs Treaty – directly addresses PIs as well, but it is an outlier and not representative of the norm at international law. The rule itself is vague and no longer applies in practice as Australia repealed its estate tax in 1979. *See* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on the Estates of Deceased Persons, Austl.-U.S., art. 3(1)(g), May 14, 1953, T.I.A.S. 2903; Jeffrey A. Schoenblum, *U.S. Estate and Gift Tax Treaties*, 851-2nd T.M. (2003).

81 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates and Inheritances, Neth.-U.S., art. 4, July 15, 1969, T.I.A.S. No. 7061 [hereinafter U.S.-Netherlands Treaty]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances and Gifts, Fr.-U.S., art. 4, Nov. 24, 1978, T.I.A.S. No. 9812 [hereinafter U.S.-France Treaty]; Convention for Double Taxation with Respect to Taxes on Estates, Inheritances, and Gifts, Ger.-U.S., art. 4, Dec. 3, 1980, T.I.A.S. 11082 [hereinafter U.S.-Germany Treaty].

82 U.S.-Germany Treaty, *supra* note 81, art. 5(2), 6(2)(a); U.S.-France Treaty, *supra* note 81, art. 5(2), 6(2); U.S.-Netherlands Treaty, *supra* note 81, art. 6(2), 7(2).

83 U.S.-France Treaty, *supra* note 81, art. 8; U.S.-Germany Treaty, *supra* note 81, art. 9; U.S.-Netherlands Treaty, *supra* note 81, art. 8.

assets forming part of a permanent establishment located in the U.S., and only to the extent of the decedent's interest in the partnership.

Having established the general framework of these three treaties, the next step is to engage with the PI-specific provisions of each treaty and understand the points of divergence. Article 6 of the U.S.-France Treaty (as amended by the 2004 Protocol) states in relevant part:

> *Article 6 Business property of a permanent establishment and assets pertaining to a fixed base used for the performance of professional services*
>
> 1. [A]ssets . . . used in or held for use in the conduct of the business of a permanent establishment may be taxed by a Contracting State if the permanent establishment is situated therein.
>
> 2. For purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of *an enterprise* is wholly or partly carried on. If an individual is a member of a partnership or other similar pass-through entity which is engaged in *industrial or commercial activity* through a fixed place of business, he shall be deemed to have been so engaged to the extent of his interest *therein*.[84]

As for the antecedent question of what qualifies as an "enterprise," the U.S.-France Treaty defines "enterprise" as an "industrial or commercial" undertaking or activity.[85] If we apply this definition to Article 6, permanent establishment must mean "a fixed place of business through which the business of an industrial or commercial activity is wholly or partly carried on." If an activity is neither industrial nor commercial in nature, then it is not a permanent establishment, and thus the assets of that activity do not qualify for Article 6 look-through, aggregate treatment. As PIs are not mentioned elsewhere under the U.S.-France Treaty situs rules, PIs in non-commercial, non-industrial activities qualify as an unmentioned type of property taxable solely by the fiscal domicile State.[86] Additionally, the U.S.-France Treaty, unlike the Germany and Netherlands treaties, categorizes a fixed place of business that engages solely in investment activities as not permanent establishment property, further narrowing the types of partnerships that would be subject to a look-through, aggregate approach.[87]

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[84] U.S.-France Treaty, *supra* note 81, art. 6(1)-(2) (emphasis added).
[85] *Id.* art. 3(1)(d).
[86] *Id.* art. 8.
[87] *Id.* art. 6(4)(f).

If the activity is industrial or commercial, then the partner is taxed "to the extent of his interest *therein*" by the State in which the assets of the activity are located.[88] There is some debate over the grammatical object to which the adverb "therein" refers, as it could refer to the partnership, or it could refer to the activity. One commentator, without citing any sources, contends that "therein" must refer to the activity.[89] The better interpretation is that "therein" refers to the partner's interest in the partnership, not in the activity. It is hard to see how a partner's interest could include certain partnership activities and exclude others. And it is only reasonable that the assets attributable to the partner be limited to the extent of the partner's interest in the partnership. Therefore, "his interest therein" must refer to the partner's interest in the partnership.

The PI provision of the U.S.-Netherlands Treaty closely mirrors that of the U.S.-France Treaty. It states in relevant part:

> *Article 7 Business property of a permanent establishment and assets pertaining to a fixed base used for the performance of professional services*
> 1. Assets . . . forming part of the business property of a permanent establishment may be taxed by a State if the permanent establishment is situated in that State.
> 2. For purposes of this Convention, the term "permanent establishment" means a fixed place of business through which a decedent was engaged in trade or business. A decedent shall be deemed to have been engaged in trade or business through a fixed place of business whether he is so engaged as a sole proprietor or through a partnership or other unincorporated association, but in the case of a partnership or association, only to the extent of his interest therein . . . .[90]

The U.S.-Netherlands Treaty uses the same phrasing as the U.S.-France Treaty regarding "his interest therein" and thus the above analysis is equally applicable to this treaty. Unlike the U.S.-France Treaty however, the U.S.-Netherlands Treaty contains no "enterprise" requirement when defining "permanent establishment" and therefore PIs of non-commercial, non-industrial business undertakings could qualify for situs State taxation under the U.S.-Netherlands Treaty where they would not so qualify under the U.S.-France Treaty.[91]

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88 *Id.* art. 6(2).

89 Cassell et al., *supra* note 9, at 574 ("'therein' appears to refer to the activity rather than the partnership.").

90 U.S.-Netherlands Treaty, *supra* note 81, art. 7.

91 *Id.* Among the Domicile Treaties to which the U.S. is party, Germany, France, and the U.K. define "enterprise" as an "industrial or commercial" undertaking or activ-

The PI provision of the U.S.-Germany Treaty is structured somewhat differently, but its scope and effect are similar to those of the U.S.-Netherlands Treaty. In relevant part, it states:

> *Article 8: Partnership Interests*
>
> An interest in a partnership which forms part of the estate of or of a gift made by a person domiciled in a contracting State, which partnership owns property described in Article 5 or 6, may be taxed by the State in which such property is situated, but only to the extent that the value of such interest is attributable to such property.[92]

Article 8 imposes a look-through, aggregate approach to property mentioned in Articles 5 and 6. In Article 6, the U.S.-Germany Treaty, like the U.S.-France Treaty, narrows permanent establishment to commercial or industrial business undertakings.[93] However the unique feature of the U.S.-Germany Treaty is that Articles 5 and 6 concern not only assets comprising a permanent establishment, but also "assets . . . pertaining to a fixed base . . . used for the performance of independent personal services." By contrast, the look-through rule prescribed by the France and Netherlands treaties apply solely to permanent establishment assets. The term "independent personal services" is not defined anywhere in the treaty, but its inclusion certainly broadens the scope of the U.S.-Germany Treaty's look-through rule beyond partnerships engaging in commercial or industrial activities.

In sum, the PI provisions of the Germany, Netherlands and France treaties all impose a similar rule, but the scope of that rule varies from treaty to treaty. All three treaties impose a look-through, aggregate approach to a partnership's underlying assets when those assets are part of a permanent establishment. And those assets are taxable by the situs State to the extent of the decedent's interest in the partnership. By limiting permanent establishment to commercial and industrial activities, the U.S.-France Treaty applies a look-through, aggregate approach only to permanent establishment assets of partnerships of a commercial or industrial nature, and it specifically excepts investment activities from qualifying as part of a permanent establishment. The U.S.-Netherlands Treaty provides a broader look-through, aggregate approach whereby permanent establishment assets of a partnership engaging in business activities of any nature are subject to the look-through, aggregate rule.

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ity; the Austria and Denmark treaties use the term but do not define it; and the Netherlands treaty does not use the term at all. U.S.-Germany Treaty, *supra* note 81, art. 3(c)(d); U.S.-France Treaty, *supra* note 81, art. 3(d); U.S.-U.K. Treaty, *supra* note 67, art. 3(c); U.S.-Netherlands Treaty, *supra* note 81, art. 5.

92 U.S.-Germany Treaty, *supra* note 81, art. 8.

93 *Id.* art. 6(2).

Lastly, the look-through, aggregate approach under the U.S.-Germany Treaty applies to permanent establishment assets of a partnership engaging in commercial or industrial business activities as well as to assets used in the performance of independent personal services from a fixed base.

For illustrative purposes, consider the partnership of the hypothetical NRNC decedent from country Q described in the Introduction, which held a consultancy that had operations in the U.S. and abroad. Assuming the consultancy owned by the partnership had assets that otherwise qualify as part of permanent establishment located in the U.S., whether and to what extent the U.S. has taxing jurisdiction would vary from treaty to treaty. Under the U.S.-France Treaty, the look-through, aggregate approach does not apply because the consultancy cannot be said to be commercial or industrial in nature, and thus the property that passes under the treaty is a partnership interest, not its underlying assets. As the U.S.-France Treaty's situs rules do not otherwise mention partnership interests, the interests are taxable only by the fiscal domicile State, i.e., France.[94] Under the U.S.-Netherlands Treaty, the U.S. may tax the underlying permanent establishment assets of the consultancy, as there is no commercial or industrial requirement under that treaty. As for the U.S.-Germany Treaty, whether the U.S. could tax the partnership's underlying assets depends upon whether a consultancy qualifies as a "fixed based" for providing "independent personal services." If it does so qualify, then the assets are taxable by the U.S.; if not, then Germany, in its capacity as the fiscal domicile State, has sole taxing jurisdiction over the PIs.[95]

Ascertaining the situs rule norms at international law in satisfaction of *Brooks* step two requires identifying general trends across bilateral treaties. These general trends can only be identified by applying principles of treaty interpretation to the text of individual treaties. Unfortunately treaty interpretation can be notoriously inconsistent.[96] This is partly because keeping decades-old treaty texts up to date with ever-changing business models and methods necessitates administrative bodies, such as the U.S. Treasury and the OECD, to issue treaty interpretation guidance.[97] While a comprehensive review of treaty interpretation

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94 U.S.-France Treaty, *supra* note 81, art. 8.

95 It should be noted that the above analysis applies only when the NRNC is a domiciliary of the treaty State. There are situations in which a decedent is a domiciliary of neither the U.S. nor the treaty State, but has operations and business assets in each. Taxing jurisdiction in such situations is governed by treaty provisions separate than those discussed here.

96 *See* Schoenblum*, supra* note 80.

97 Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 TEX L. REV. 1063, 1067-68 (2009).

principles is beyond the scope of this article, there are a handful of interpretive tools specific to bilateral tax treaties that a court applying *Brooks* step two should consult, and thus deserve mention here.

In the domestic sphere, the U.S. Treasury issues administrative interpretive guidance for bilateral estate tax treaties in three forms: i) Technical Explanations that accompany each treaty, ii) the U.S. Model Estate and Gift Tax Treaty (hereinafter "U.S. Model Estate Tax Treaty"),[98] and iii) the Technical Explanation of the U.S. Model Estate Tax Treaty.[99] U.S. courts and the Service have shown a willingness to rely upon these materials or their income tax equivalent.[100] Internationally, the OECD provides two interpretive tools that U.S. courts and the Service have relied upon in the past: i) the OECD Model Estate Tax Treaty, and ii) the Commentary to the OECD Model Estate Tax Treaty.[101]

Moreover, administrative-type guidance occasionally identifies other resources which were consulted or copied writ-large when drafting the treaty text, which arguably expands the interpretive toolkit to encompass those sources as well. The technical explanations of several estate tax treaties expressly state that some of the terms used in the estate tax treaties are derived from or substantially similar to the definitions of corresponding U.S. income tax treaties.[102] The OECD Model Estate Tax Treaty provides guidance on the origin of some terms. For instance, it provides that the definition of "permanent establishment" was taken verbatim from the 1977 OECD Income Tax Model Convention, and that the Commentary to the Income Tax Model Convention is equally applicable in the estate tax context.[103] Although useful and copious, guidance

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98 *U.S. Model Est. and Gift Tax Treaty (1980)*, Tax Treaties (CCH) ¶ 214 (2010).

99 *Treas. Dep't Technical Explanation, U.S. Model Estate and Gift Tax Treaty*, Tax Treaties (CCH) ¶ 217 (2010).

100 *See, e.g.*, PLR 9806012 (Feb. 6, 1998) (relying upon the Technical Explanation of the U.S. Model Income Tax Treaty); Rev. Rul. 86-145, 1986-2 C.B. 297 (relying upon a Treasury Department Technical Explanation of the U.S.-U.K. Income Tax Treaty for determining the meaning of "tax year concerned").

101 *See, e.g.*, United States v. A.L. Burbank & Co., 525 F.2d 9, 15-17 (2d Cir. 1975) (relying upon OECD Model Estate Tax Treaty).

102 *See, e.g.*, COMM. ON FOREIGN RELATIONS, ESTATE AND GIFT TAX TREATY WITH THE FRENCH REP., S. REP. NO. 96-3, app. B, at 42 (1979) ("The definition is substantially similar to the definition of 'permanent establishment' in Article 4 of the Income Tax Convention between the United States and the French Republic signed on July 28, 1967."); *Tax Conventions with Belgium, Finland, Trinidad and Tobago, and The Netherlands: Hearings Before the Comm. on Foreign Rel.,* 91st Cong. 112-13 (1970) ("The article defines the term 'permanent establishment.' The definition is an updated adaptation of the definition found in the Income Tax Convention between the United States and the Netherlands.").

103 OECD Model Estate Tax Treaty, art. 6 cmt. § 5 ("The definition of permanent establishment in paragraphs 2 to 5 is taken *verbatim* from paragraphs 1, 2, 3 and 4 of

from income tax materials should be applied with caution to the estate tax context as small variations and contextual considerations can lead to the legal equivalent of false cognates.

C. Bilateral Treaties where Partnership Interests not Expressly Mentioned

The three Domicile Treaties to which the U.S. is party that do not expressly address PIs are the U.K., Denmark and Austria treaties. The PI situs rule of these three treaties differs from the one identified in the previous section. Lacking any PI-specific provision, PIs under the U.K., Denmark and Austria treaties qualify as "property not expressly mentioned." As discussed previously, Domicile Treaties afford sole taxing authority of "property not expressly mentioned" to the fiscal domicile State. Thus, as regards the PIs of the hypothetical decedent, the U.S. would have no jurisdiction to impose an estate tax, as he is not a domiciliary of the U.S.

Consideration should also be given to the treatment of PIs under the U.S. Model Estate and Gift Tax Treaty as it treats PIs in much the same manner as the U.K., Denmark and Austria treaties. Largely based on the OECD Model Estate Tax Treaty, the U.S. Model Estate Tax Treaty follows the Domicile Treaty framework and contains a "property not expressly mentioned" article typical of the bilateral estate tax treaties to which the U.S. is party.[104] Also like the U.K., Denmark and Austria treaties, the U.S. Model Estate Tax Treaty contains no PI-specific provision. An illustrative example in the Technical Explanation of the U.S. Model Estate Tax Treaty sheds light on the treatment of PIs under treaties with no PI-specific rule. In explaining Article 7 (Property Not Expressly Mentioned) of the U.S. Model Estate Tax Treaty, the Technical Explanation provides the following example:

> Suppose, for example, that a domiciliary of the other Contracting State transferred an interest in a partnership owning U.S. real property. If the other Contracting State considered it a transfer of real property and the United States considered it a transfer of a partnership interest, the transfer would be determined, under paragraph 2, to be a *transfer of a partnership in-*

Article 5 of the 1977 Income Tax Model, so that only a brief explanation need be given here. Although more restricted in scope, these paragraphs apply in the same way to taxes on estates, inheritances and on gifts as they do to taxes on income. Consequently, the Commentary on the above-mentioned Article 5 applies equally to them, notwithstanding that it has not been reproduced here in its entirety.").

104 *U.S. Model Estate and Gift Tax Treaty*, Tax Treaties (CCH) ¶ 214.07 (2010).

> *terest. Consequently, the other State would have the sole taxing right under Article 7* (Property Not Expressly Mentioned).[105]

The example chosen by the Treasury in the Technical Explanation clearly shows that when property is deemed to be a partnership interest (in this case, under the tiebreaker rule of Article 7(2)), and the applicable treaty contains no PI-specific rule, then the fiscal domicile State has sole taxing authority over the PI by way of the treaty's "property not expressly mentioned" article. This supports the conclusion above that, under the U.K., Denmark and Austria treaties, the U.S. would have no taxing authority over the hypothetical decedent's PI as his fiscal domicile would not be in the U.S.

The Technical Explanation's example sidesteps an antecedent issue regarding PI situs determination that deserves discussion: whether U.S. domestic law would in fact categorize the transfer of a partnership interest as a transfer of personal property or as a transfer of underlying assets for estate tax purposes. To be clear, this issue is separate from that of categorizing entities organized under foreign law. So far, this article has exclusively considered the situation where an NRNC owns interests in a partnership organized under the laws of a U.S. state, and thus the juridical character of the entity is known (i.e., it is a state law partnership). By contrast, when an NRNC-owned partnership is organized under a foreign law, a host of unresolved questions regarding the correct corresponding U.S. juridical categorization of the entity (or non-entity) arises which is beyond the scope of this article. However, even putting the foreign entity issue aside, the federal government's treatment of transfers of interests in partnerships and similar pass-throughs organized under U.S. law is not entirely settled.

The most relevant case is the 2009 Tax Court case of *Pierre v. Commissioner*, in which the court held in a 10-6 decision that a gift of an interest in a single-member LLC constituted a gift of personal property, not a gift of its underlying assets, despite the fact that the income tax check-the-box entity categorization rules of section 7701 treated the single-member LLC as a disregarded entity.[106] *Pierre* addressed a gift tax transfer, and some doubt still remains as to whether its holding applies to estate tax transfers of interests in entities that are classified as disregarded entities under the check-the-box rules.

The more likely outcome is that *Pierre* will be extended to estate tax transfers. The *Pierre* court consistently refers to the "Federal estate and gift tax statutes" as a singular consideration throughout its opinion

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105 *Treas. Dep't Technical Explanation, U.S. Model Estate and Gift Tax Treaty*, *supra* note 99, ¶ 217 (emphasis added).

106 133 T.C. 24, 26-27, 51 (2009).

and in its holding,[107] and it expressly states that the "Federal estate tax is interpreted in *pari materia* with the Federal gift tax."[108] Thus, the likely outcome is that *Pierre* will be extended to estate tax transfers, and therefore, as the example in the Technical Explanation assumes, the transfer of a partnership interest would be treated as a transfer of personal property not expressly mentioned in the treaty's situs rules taxable solely by the fiscal domicile State.[109]

V. Conclusion

Brooks step two mandates that in determining the scope of a situs rule regarding NRNC property unmentioned in section 2104 or its regulations, a situs rule that adheres to, or at least does not violate, the corresponding situs norms at international law is a valid exercise of the U.S. taxing authority in its capacity as a sovereign power in international relations. Domicile Treaties are the norm at international law for bilateral estate tax treaties, and from the six Domicile Treaties to which the U.S. is party, two situs rules for PIs emerge: First, the U.S. may tax the underlying assets of an NRNC-owned partnership but only to the extent that those assets are part of a "permanent establishment" physically located in the U.S., and only to the extent of the NRNC's interest in the partnership. The definition of permanent establishment can vary from treaty to treaty, and some treaties apply the look-through, aggregate approach to partnership assets that do not necessarily comprise part of a permanent establishment; however permanent establishment assets of a commercial or industrial undertaking are invariably subject to the rule. Second, the NRNC's domicile State has sole taxing authority over PIs held by the NRNC at death regardless of whether the underlying assets comprise what could be deemed a permanent establishment in the U.S.

Although the two situs rules that emerge from applying *Brooks* do not provide a singular situs rule for PIs, taken together they establish, at the very least, which situs rules are not viable. To wit, step two of *Brooks* rejects a situs rule based on the partnership's place of organization. It likewise rejects a situs rule that would include partnership assets located outside the U.S. in the NRNC's gross estate by virtue of some partnership assets being located in the U.S. or by virtue of some partnership business being carried on in the U.S.

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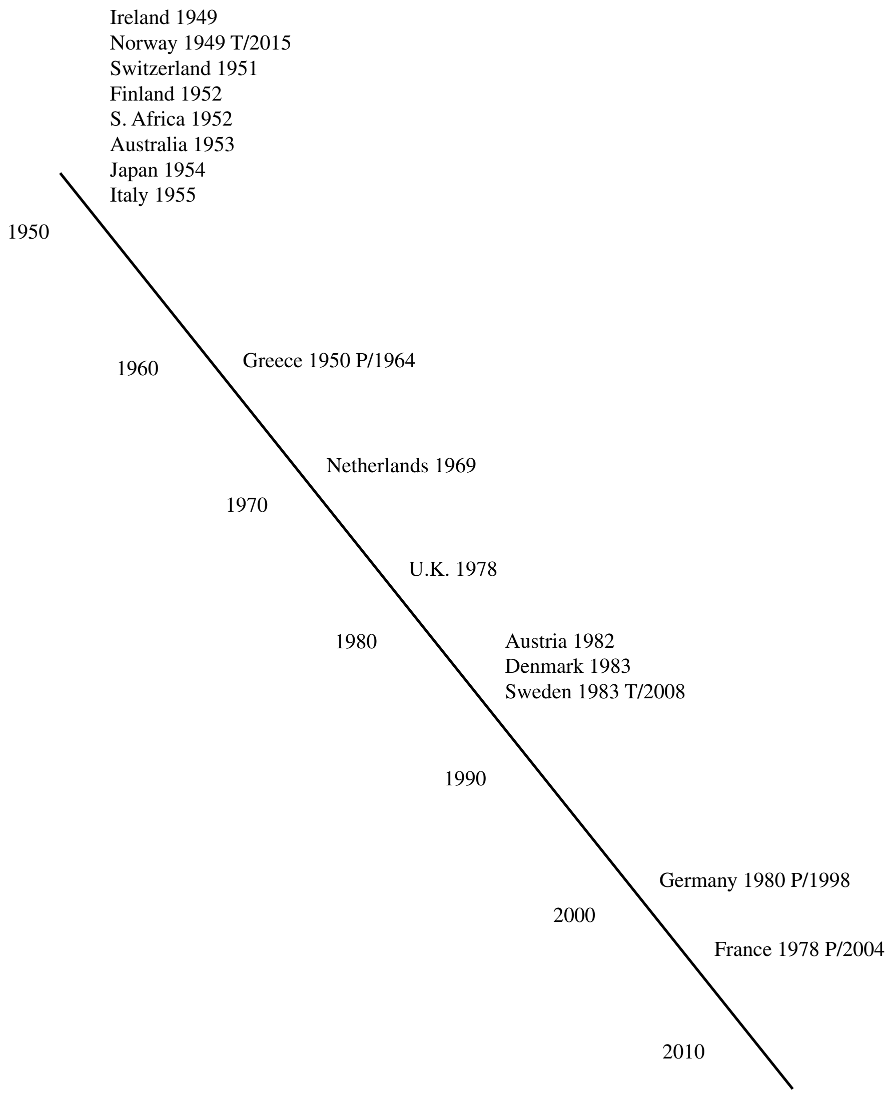
107 *Id.* at 28-29.

108 *Id.* at 36 n.9.

109 *But see* Barnet Jr., *supra* note 16, at 1098, 1100 (arguing that extending *Pierre* to estate tax transfers would be unwarranted primarily because *Pierre* addressed fair market valuation of gifts, which is a matter of fact, whereas situs determination is a matter of law).

The exact extent to which the look-through, aggregate rule applies is unresolved, partly due to the discrepancies between provisions in specific bilateral treaties, and partly due to persisting uncertainties in treaty interpretation generally. Furthermore, the antecedent issue of whether the holding in *Pierre* will be extended to partnership interests transferred by reason of death is likewise unresolved. Until these two outstanding issues are settled, or until Congress or the Service deigns to address PI situs determination directly, it is impossible to say what portion of the hypothetical decedent's PI will be included in his U.S. gross estate. In the meantime, administrators of estates similarly situated to that of the hypothetical decedent must endure the disquiet of an uncertain tax liability, as they have done for decades. Hopefully the alternate approach to PI situs determination advanced by this article succeeded in reducing, if only marginally, the extent of that uncertainty.

Appendix A: Timeline of Bilateral Estate Tax Treaties to Which U.S. Is Party



P/ = Protocol
T/ = Terminated

APPENDIX B: BILATERAL ESTATE TAX TREATIES TO WHICH U.S. IS PARTY

Bilateral Treaty Citations
Australia (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on the Estates of Deceased Persons, U.S.-Austl., May 14, 1953, T.I.A.S. 2903. NOTE: Australia no longer imposes and estate or gift tax at the federal level as of June 30, 1979.
Austria (Domicile Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, Gifts and Generation-Skipping Transfers, U.S.-Austria, June 21, 1982, T.I.A.S. 10570. NOTE: Austria no longer imposes an inheritance tax or gift tax as of Aug. 1, 2008.
Denmark (Domicile Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, Gifts and Certain Other Transfers, U.S.-Den., Apr. 27, 1983, T.I.A.S. 11089.
Finland (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates and Inheritances, U.S.-Fin., Mar. 3, 1952, T.I.A.S. 2595.
France (Domicile Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, and Gifts, U.S.-Fr., Nov. 24, 1978, T.I.A.S. 9812 (as modified by protocol signed Dec. 8, 2004).
Germany (Domicile Treaty) Convention for Double Taxation with Respect to Taxes on Estates, Inheritances, and Gifts, U.S.-Ger., Dec. 3, 1980, T.I.A.S. 11082 (as modified by protocol signed Dec. 14, 1998).
Greece (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Movable Property Estates of Deceased Persons, U.S.-Greece, Feb. 20, 1950, T.I.A.S. 2901 (as modified by protocol signed July 18, 1953, supplementary protocol signed Dec. 30, 1953, and protocol signed Feb. 12, 1964, T.I.A.S. 6375).
Ireland (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates of Deceased Persons, U.S.-Ir., Sept. 13, 1949, T.I.A.S. 2355.

Italy (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates and Inheritances, U.S.-It., Mar. 30, 1955, T.I.A.S. 3678.
Japan (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, U.S.-Japan, Inheritances and Gifts, Apr. 16, 1954, T.I.A.S. 3175.
Netherlands (Domicile Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates and Inheritances, U.S.-Neth., July 15, 1969, T.I.A.S. 7061.
Norway (terminated) (Situs Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates and Inheritances, U.S.-Nor., June 13, 1949, T.I.A.S. 2358 (terminated, effective Jan. 1, 2015). NOTE: The treaty was terminated, effective Jan. 1, 2015, due to Norway's 2014 repeal of its inheritance tax.
South Africa (Situs Treaty) Convention with Respect to Taxes on the Estates of Deceased Persons, U.S.-S. Afr., Apr. 10, 1947 (as supplemented by Protocol signed July 14, 1950), T.I.A.S. 2509.
Sweden (terminated) (Domicile Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritance, and Gifts, U.S.-Swed., June 13, 1983, T.I.A.S. 10826 (terminated, effective Jan. 1, 2008). NOTE: The treaty was terminated, effective, Jan. 1, 2008, due to Sweden's 2004 repeal of its inheritance and gift taxes.
Switzerland (Modified Situs Treaty) Convention for the Avoidance of Double Taxation with Respect to Taxes on Estates and Inheritances, U.S.-Switz., July 9, 1951, T.I.A.S. 2533. NOTE: The U.S.-Switz. Treaty is a modified Situs Treaty insofar as there is no express assignment of situs for taxation purposes.
United Kingdom (Domicile Treaty) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates of Deceased Persons and on Gifts, U.S.-U.K., Oct. 19, 1978, T.I.A.S. 9580. Convention Respecting Double Taxation and Taxes on Estates of Deceased Persons, U.S.-U.K., Apr. 16, 1945, T.I.A.S. 1547 (terminated, Oct. 19, 1978).

Appendix C: Post-1966 Bilateral Estate Tax Treaties Among Countries with Five or More*

		Year	OECD Model Domicile Treaty	Permanent Establishment Mentioned
Austria (repealed inheritance tax Aug. 2008)				
1	France	1993	Y	Y
2	Hungary	1975	Y	Y
3	Liechtenstein	1955		
4	Netherlands	2001	Y	Y
5	Sweden	1962		
6	Switzerland	1974	Y	Y
7	U.S.	1982	Y	Y
Denmark				
1	Finland	1989	Y	Y
2	Iceland	1989	Y	Y
3	Germany	1995	Y	Y
4	Italy	1966	Y	Y
5	Sweden	1989	Y	Y
6	Switzerland	1974	Y	No
7	U.S.	1983	Y	Y
Finland				
1	France	1958		
2	Netherlands	1954		
3	US	1952		
4	Denmark	1989	Y	Y
5	Iceland	1989	Y	Y
6	Sweden	1989	Y	Y
7	Switzerland	1956		
France				
1	Austria	1993	Y	Y
2	Belgium	1959		
3	Finland	1958		
4	Germany	2006	Y	Y
5	Italy	1990	Y	Y
6	Monaco	1950		
7	Portugal	1994	No	No
8	Spain	1963		
9	Sweden	1994	Y	Y
10	U.K.	1963		
11	U.S.	1978	Y	Y
Germany				
1	Denmark	1995	Y	Y
2	France	2006	Y	Y
3	Greece	1910		
4	Switzerland	1978	Y	Y
5	U.S.	1980	Y	Y
Italy				
1	Denmark	1966	Y	Y
2	France	1990	Y	Y
3	Greece	1964		
4	Israel	1968	No	No
5	Sweden	1956		
6	U.K.	1966		
7	U.S.	1955		

		Year	OECD Model Domicile Treaty	Permanent Establishment Mentioned
Netherlands				
1	Austria	2001	Y	Y
2	Curaçao	2013	Y	Y
3	Finland	1954		
4	Israel	1974	Y	Y
5	Sweden	1952		
6	Switzerland	1951		
7	U.K.	1979	Y	Y
8	U.S.	1969	Y	Y
Sweden (repealed inheritance tax Jan. 2008)				
1	Austria	1962		
2	Belgium	1956		
3	Denmark	1989	Y	Y
4	Finland	1989	Y	Y
5	France	1994	Y	Y
6	Hungary	1936		
7	Iceland	1989	Y	Y
8	Israel	1962		
9	Italy	1956		
10	Netherlands	1952		
11	Norway	1989	Y	Y
12	South Africa	1961		
13	Spain	1963		
14	Switzerland	1979	Y	Y
15	U.K.	1980	Y	Y
16	U.S.*	1983	Y	Y
Switzerland				
1	Austria	1974	Y	Y
2	Denmark	1974	Y	No
3	Finland	1956		
4	Germany	1978	Y	Y
5	Netherlands	1951		
6	Sweden	1979	Y	Y
7	U.K.	1993	Y	Y
8	U.S.	1951		
U.K.				
1	France	1963		
2	India	1956		
3	Ireland	1977	Y	No
4	Italy	1966		
5	Netherlands	1979	Y	Y
6	Pakistan	1957		
7	South Africa	1978	Y	Y
8	Sweden	1980	Y	Y
9	Switzerland	1993	Y	Y
10	U.S.	1978	Y	Y

*Terminated