Washington Law Review

Volume 90 | Number 1

3-1-2015

Home-Country Effects of Corporate Inversions

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HOME-COUNTRY EFFECTS OF CORPORATE INVERSIONS

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Abstract: This Article develops a framework for the study of the unique effects of corporate inversions (meaning, a change in corporate residence for tax purposes) in the jurisdictions from which corporations invert ("home jurisdictions"). Currently, empirical literature on corporate inversions overstates its policy implications. It is frequently argued that in response to an uncompetitive tax environment, corporations may relocate their headquarters for tax purposes, which, in turn, may result in the loss of positive economic attributes in the home jurisdiction (such as capital expenditures, research and development activity, and high-quality jobs). The association of tax-residence relocation with the dislocation of meaningful economic attributes, however, is not empirically supported and is theoretically tenuous. The Article uses case studies to fill this gap. Based on observed factors, the Article develops grounded propositions that may describe the meaningful effects of inversions in home jurisdictions. The case studies suggest that whether tax-relocation is associated with the dislocation of meaningful economic attributes is a highly contextualized question. It seems, however, that inversions are more likely to be associated with dislocation of meaningful attributes when *non*-tax factors support the decision to invert. This suggests that policymakers should be able to draft tax-residence rules that exert non-tax costs on corporate locational decisions in order to prevent tax-motivated inversions.

* Assistant Professor of Law, University of Florida Levin College of Law. For helpful comments and critique, I thank Reuven Avi-Yonah, Yariv Brauner, Neil Buchanan, Karen Burke, Cliff Fleming, Tom Lin, Adam Rosenzweig, Stephen Shay, Reed Shuldiner, Willard Taylor, Bret Wells, and participants at the University of Pennsylvania Tax Law and Policy Workshop, the National Tax Association's 107th Annual Conference on Taxation; the American Tax Policy Institute's conference on Taxation and Migration; the 2014 International Business Law Scholars Roundtable at Brooklyn Law School; the University of Florida Levin College of Law Faculty Workshop; and the 2014 Annual Meeting of the Southeastern Association of Law Schools. Gus Gari provided outstanding research assistance. Any errors and omissions are my own.

INTRODUCTION

Much of the international tax reform discourse in the United States is grounded in two truths:[1] First, multinational corporations' (MNCs) locational decisions are sensitive to home-country tax burdens.[2] High

1. See Part I, *infra*, for a description of U.S. tax policy discourse in this context.

2. Michael P. Devereux, *The Impact of Taxation on the Location of Capital, Firms and Profit: A Survey of Empirical Evidence* 41 (Oxford Univ. Centre for Bus. Tax'n Working Paper No. 0702, 2007) ("It is clear from this accumulated evidence that taxation does play a role in affecting the

taxes in an MNC's home jurisdiction may induce the MNC to relocate its tax-residence to a low-tax jurisdiction.[3] Second, having an MNC headquartered within a jurisdiction has positive effects on the local economy in the form of increased capital expenditures, research and development (R&D) activities, and high-quality jobs.[4]

The combination of these two truths has led to a policy argument that U.S. tax-law should not target corporate headquarters' locations. Taxing an MNC based on the location of its headquarters raises a concern that "management . . . would flee to other countries,"[5] resulting in the loss of both the corporate tax base as well as the positive externalities associated with having the headquarters located within the United States.[6] This Article suggests, however, that this policy argument is overstated for two reasons.

First, there is no reason to assume that the place of tax-residence is also the place of the economic attributes that policymakers care about. For example, under the Internal Revenue Code (IRC) corporate tax-residence is determined based on the place of incorporation (POI). There is little reason to expect that the place of incorporation and the place of a corporation's meaningful attributes converge around a single location. Unfortunately, much of the empirical research in this area implicitly assumes such convergence. It is well established, however, that the meaningful functions of the modern MNCs are decentralized.[7] Different substantive attributes of a corporation may be located in different jurisdictions, which are not necessarily the jurisdiction of the MNC's tax

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choices made by multinational companies.").

3. *See, e.g.*, Tomi Laamanen, Tatu Simula & Sami Torstila, *Cross-Border Relocations of Headquarters in Europe*, 43 J. INT'L BUS. STUDS. 187 (2012) (finding that high home country taxes increase the likelihood of corporate headquarters relocation); Johannes Voget, *Relocation of Headquarters and International Taxation*, 95 J. PUB. ECON. 1067 (2011) (finding that additional home country tax due upon repatriation of foreign earnings has a positive effect on the probability of corporate migration).

4. Kimberly A. Clausing, *Should Tax Policy Target Multinational Firm Headquarters?*, 63 NAT'L TAX J. 741, 744 (2010). For a summary of such possible positive effects see *id.* at 744–47.

5. *Tax Reform Options: International Issues: Hearing Before the S. Comm. on Fin.*, 112th Cong. 15 (2011) [hereinafter *Tax Reform Options*] (statement of James T. Hines Jr., Collegiate Professor of Law, University of Michigan Law School); *id.* at 9 (statement of Scott Naatjes, Vice President and General Tax Counsel, Cargill Inc.) (stating that taxing corporations based on their place of management would "put at risk highly mobile headquarters job and all economic benefits they create to our Nation").

6. *See id.* at 47–48 (statement of James T. Hines Jr., Collegiate Professor of Law, University of Michigan Law School) (stating that taxing corporations based on the place of management "discourages firms from locating management activities in a country that uses such standard, which is not sensible if management activities are thought to be desirable").

7. *See* discussion in Part II.B.1 *infra*.

residence. Tax residence can be changed with no need to dislocate any meaningful structures in the jurisdiction from which an MNC inverts. Conversely, economic attributes of an MNC can be shifted across borders with no corresponding change to the tax-residence. A change of an MNC's tax-residence ("inversion") and a dislocation of economic attributes in the jurisdiction from which the MNC inverts are two distinct phenomena.

Second, even if corporate tax-residence is based on the location of meaningful economic attributes (for example, by determining tax-residence based on the place of management or assets), there is no reason to assume that MNCs will dislocate such attributes en masse in order to change their tax-residence. Literature in organizational studies suggests that meaningful corporate functions are likely to be located in jurisdictions that offer substantive non-tax advantages, such as developed financial markets, skilled labor force, infrastructure and other agglomeration benefits.[8] The dislocation of real attributes is costly and may result in the loss of agglomeration benefits. This Article suggests that when the dislocation of real economic attributes is necessary in order to "lose" tax-residence, tax savings may not justify the cost of such dislocation. Stated differently, current literature fails to balance the tax benefit expected from an inversion, with the non-tax cost associated with arbitraging one tax regime for another.[9]

A possible reason for the lack of coherence in policy implications of inversions literature is that it lacks testable theoretical constructs. Public finance economists have long studied the effects of taxation on locational decisions.[10] However, there is no theoretical framework that explains what *substantive* dislocations may specifically be associated with inversion transactions. This Article aims to fill such gaps through case study research. The aim is to develop theoretical propositions based on observed dislocations in inversion transactions. Several case studies of large-scale inversions are examined in order to articulate—in policy-

8. *See* Julian Birkinshaw et al., *Why Do Some Multinational Corporations Relocate Their Headquarters Overseas?*, 27 STRATEGIC MGMT. J. 681, 682 (2006) ("There are well established theories of agglomeration in the literature, and it is now accepted that proximity to specialized labor, complementary suppliers and customers, and access to knowledge spillovers are all important benefits to the firm.").

9. *See* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 231 (2010) (explaining that regulatory arbitrage makes sense "[s]o long as the regulatory savings outweighs the increase in transactional costs"). For a discussion of tax-arbitrage opportunities specifically in the context of entities' residence and classification rules, see Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV. 79, 94–98 (2002).

10. For a detailed summary of this voluminous literature see Devereux, *supra* note 2.

relevant terms—the possible *meaningful* economic effects of an inversion in the jurisdiction from which a corporation inverts.

This Article finds that inversions driven exclusively by tax considerations are less likely to be associated with dislocation of real economic attributes, compared with inversions supported by non-tax reasons. These findings are consistent with literature in organizational studies.[11] This Article therefore suggests that policymakers should be able to prevent inversions that lack economic substance by imposing stricter locational rules on corporate taxation. This can be achieved, for example, by determining corporate tax-residence based on substantive factors (such as the place of management) rather than formal ones (such as the place of incorporation). The Article thus situates itself within the vast literature on "frictions." Broadly speaking, frictions literature postulates that abusive tax planning can be mitigated by attaching non-tax costs to the planning scheme.[12] This added non-tax cost is referred to as a "friction" that may discourage the tax-planning.[13] In the context of this Article, such non-tax frictions would result from the requirement to dislocate real activities away from the home jurisdiction in order to invert. Business considerations thus would serve to deter tax-motivated inversions.

The policy discussion on the implications of inversions gained urgency recently with the advent of a wave of corporate expatriations from the United States to other jurisdictions.[14] Over the past five years, multiple U.S.-based MNCs have changed their tax-residence,[15] moving out of the U.S. to jurisdictions such as the UK, Ireland and Switzerland.[16] One possible way to deal with the problem is to enforce

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11. Julian Birkinshaw et al., *supra* note 8.

12. *See, e.g.*, Leigh Osofsky, *Who Is Naughty and Who Is Nice? Frictions, Screening, and Tax Law Design*, 61 BUFF. L. REV. 1057, 1059–75 (2013) (summarizing tax-frictions literature); Adam H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 579–80 (2007) (describing how reduced frictions associated with entity classification rules may induce tax planning); David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312, 1323–38 (2001) (offering a framework for the design of successful frictions).

13. *See* MYRON S. SCHOLES ET AL., TAXES AND BUSINESS STRATEGY 9 (Alana Bradley et al. eds., 3d ed. 2004) (defining "frictions" as "transaction costs incurred in the marketplace that make implementation of certain tax planning strategies costly").

14. *See* DONALD J. MARPLES & JANE G. GRAVELLE, CONG. RESEARCH SERV., CORPORATE EXPATRIATIONS, INVERSIONS, AND MERGERS: TAX ISSUES 5–7 (2014) (describing the recent inversions phenomenon).

15. For a summary of recent inversion transactions see Martin A. Sullivan, *Lessons from the Last War on Inversions*, 142 TAX NOTES 861, 866 (2014).

16. MARPLES & GRAVELLE, *supra* note 14, at 5 (noting that "these types of inversions generally target countries such as Ireland, Switzerland, and, more recently, the UK").

stricter locational tax rules. Specifically, the POI tax-residence test enables a U.S. MNC to invert without any significant dislocation in the U.S., simply by changing its place of incorporation. It has therefore been suggested to tax corporations based on substantive factors, such as the place of management or the place of assets, sales and employees.[17] Others have resisted such proposals, arguing that taxing U.S. MNCs based on the locations of substantive attributes creates an incentive to dislocate such attributes out of the United States in order to "lose" tax-residence (rather than to simply incorporate some place else while maintaining the meaningful attributes in the U.S.).[18] The solution, this group of scholars argues, is to make the U.S. corporate tax system more "competitive" so as to eliminate the tax incentives to invert.[19] The case studies explored in this Article suggest that the dislocation of meaningful attributes in the context of inversion transactions is a highly context-dependent issue, and that the fear of substantive dislocations is not always warranted.

This Article is structured as follows: Part I briefly outlines some of the current policy considerations and legislative proposals aimed at dealing with the problem of corporate inversions. Part II surveys current literature on MNCs' tax-residence locational decisions and explains the limitations of such literature for tax policy-making. It also develops a framework for understanding inversions in the context of tax-friction literature. Part III explains why a case-study approach may overcome some of the limitations of empirical research. It then executes a case-study analysis of five events in which MNCs relocated their residences for tax purposes. Part IV analyzes the case studies surveyed and identifies observation-based patterns that warrant further research. This Part also observes that frictions (or rather, lack thereof) seem to play an important role in the decision to invert, and discusses some of the policy implications of this finding. The Article concludes with a summary of its limitations and caveats and a call for a more nuanced empirical approach in the study of the meaningful effects of corporate inversions.

I. BACKGROUND: CORPORATE INVERSIONS AND THE TAX RESIDENCE DEBATE

The purpose of this Part is to briefly describe the phenomenon of corporate inversions and explain why inversions are a focal point of tax

17. *See infra* notes 57–60 and accompanying discussion.

18. *See infra* notes 39–43 and accompanying discussion.

19. *Id.*

policy-making. Part I.A briefly describes the history of inversions of U.S. MNCs, and discusses one major congressional response to it. Part I.B outlines current political discourse in the wake of current wave of inversions.

A. *The Two Waves of Corporate Inversions*

During the late 1990s through the early 2000s the United States experienced a wave of transactions by which U.S.-based multinational corporate groups restructured themselves as multinational groups controlled by parents incorporated in tax havens.[20] The change of place of incorporation was the only effect of such restructurings. No shift of economic activity from the U.S. to the new jurisdiction followed.[21] This period of inversions is sometimes described as the "first wave" of corporate inversions.[22]

These transactions, known as "naked inversions,"[23] were completely tax-driven. They were made easily possible because, for tax purposes, the United States determines the residence of corporations based on POI.[24] Thus, reincorporation as a foreign corporation makes an MNC "foreign" for federal income tax purposes. Such transactions were perceived as abusive (and even an "unpatriotic tax dodge").[25] Congress responded with the enactment of Section 7874 of the Internal Revenue Code in 2004.[26]

Section 7874 prevents naked inversions by treating an inverted corporation as "domestic" for tax purposes (notwithstanding its foreign incorporation) if it is eighty percent owned by shareholders of the former

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20. MARPLES & GRAVELLE, *supra* note 14, at 54 (stating the corporations inverted primarily to "Bermuda and the Cayman Islands were the location of many of the newly created parent corporations—jurisdictions that have no corporate income tax but that also do have highly developed legal, institutional, and communications infrastructures").

21. *Id*. (stating that "[t]hese corporate inversions apparently involved few, if any, shifts in actual economic activity").

22. Zachary R. Mider, *Medtronic Is Biggest Yet to Renounce U.S. Tax Citizenship*, BLOOMBERG (Jun. 16, 2014, 1:01 PM), http://www.bloomberg.com/news/2014-06-16/medtronic-is-biggest-firm-yet-to-renounce-u-s-tax-status.html (describing the late 1990s to the early 2000s period as "the first wave of corporate inversions").

23. MARPLES & GRAVELLE, *supra* note 14, at 3 (stating that an "inversion [that] does not require any change in the effective control of the corporation, . . . is referred to as a 'naked inversion'").

24. I.R.C. § 7701(a)(4) (2012).

25. Hale E. Sheppard, *Flight or Fight of U.S.-Based Multinational Business: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend*, 23 NW. J. INT'L L. & BUS. 551, 557–58 (2003) (describing how corporate inversions were perceived by media and policy makers in the early 2000s).

26. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418.

domestic parent.[27] If the inverted corporation is sixty percent owned by shareholders of the former parent, then the corporation is unfavorably taxed in the U.S. for a period of ten years on gains from dispositions of certain assets.[28] Such tax may or may not affect the decision to invert, depending on the particular status of the inverting corporation. For example, if less than eighty percent but more than sixty percent of the inverted corporation shareholders were shareholders of the old corporation, there is no disincentive in inverting as long as the disposition of the inverting corporation's assets is not expected to generate gains. In such a case no corporate tax liability is expected as a result of the inversion.

In order to allow inversions that are not driven by tax avoidance (but rather by real business considerations), an exception has been added to the anti-inversion rules of Section 7874. The exception applies if the inverted corporation has "substantial business activity" in the jurisdiction to which it inverted.[29] Section 7874 largely succeeded at shutting down naked inversions.[30]

Evidently, Section 7874 leaves two avenues open for an inversion transaction. First, an inverting U.S. corporation may merge with a smaller foreign-incorporated corporation, creating a foreign-incorporated entity which is less than eighty percent owned by owners of the former corporation, thus avoiding the eighty percent ownership threshold. Alternatively, a U.S.-based MNC can merge with, or purchase, a smaller foreign corporation with some activity in the foreign jurisdiction—making the foreign corporation the parent—thus qualifying for the "substantial business activity" exception. Under current regulatory guidance, the "substantial business activity" exception is met if at least twenty-five percent of the employees, assets, and sales of the combined entity are located in the new jurisdiction.[31]

U.S.-based MNCs have identified these opportunities to avoid U.S. tax jurisdiction. Over the past several years multiple U.S. MNCs have purchased or merged with smaller foreign corporations—incorporated in

27. I.R.C. § 7874(b) (2012).

28. I.R.C. § 7874 (defining an "expatriated entity", among others, as an inverting corporation in which at least sixty percent of the stock (by vote or value) are held by former shareholders. Expatiated entities are subject to U.S. tax on "inversion gain" for a period of ten years after the inversion. Expatriated entities are denied from using certain credits in order to reduce their inversion gain).

29. I.R.C. § 7874(a)(2)(B)(iii).

30. MARPLES & GRAVELLE, *supra* note 14, at 6 ("The 2004 Act largely eliminated the generic naked inversions.").

31. Treas. Reg. § 1.7874-3T (2014).

places like the UK, Ireland or Switzerland—in order to change their tax-residence.[32] Some of the most conspicuous examples include Perrigo, the U.S. drugmaker, which acquired Irish biotech corporation Elan in an $8.6 billion deal;[33] Medtronic, the U.S. medical devices maker, which merged with the Irish-based Covidien (which itself inverted in 2008) in a $42.9 billion deal;[34] and the failed attempt by Pfizer, the giant U.S. pharmaceuticals corporation, to acquire the UK-based pharmaceuticals company AstraZeneca in a $118 billion (!) hostile takeover.[35] This renewed corporate expatriation activity has been dubbed the "second wave" of corporate expatriations.[36] The continued trend of inversions eventually prompted the Department of Treasury to respond, issuing guidance aimed at denying some of the tax benefits associated with inversions.[37] Whether this guidance will succeed at stopping inversions remains to be seen.[38]

B. Current Policy Discussion on Corporate Inversions

Many have suggested that in order to deal with the problem of inversions the United States should adopt a more "competitive" tax system. Most prominently it has been suggested the U.S. should abandon its system of worldwide taxation. Under the U.S. worldwide tax system, corporate taxes are imposed on worldwide income of domestic corporations (though foreign-sourced business income is only taxed when repatriated).[39] This is unlike most other industrialized

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32. MARPLES & GRAVELLE, *supra* note 14.

33. Jonathan D. Rockoff, *Perrigo to Buy Elan, Gain Lower Tax Rate*, WALL ST. J., July 29, 2013, at B3, *available at* http://online.wsj.com/news/articles/SB10001424127887324354704578634652886726058.

34. Catherine Boyle, *Medtronic $43B Covidien Deal-and Irish Tax Move*, CNBC (Jun. 16, 2014, 8:25 AM) http://www.cnbc.com/id/101760661.

35. Ben Hirschler & Bill Berkort, *Pfizer Walks Away from $118 Bln AstraZeneca Takeover Fight*, REUTERS (MAY 26, 2014, 11:53 AM), http://www.reuters.com/article/2014/05/26/us-astrazeneca-pfizer-idUSBREA3R0H520140526.

36. MARPLES & GRAVELLE, *supra* note 14, at 1–2.

37. I.R.S. Notice 2014-52.

38. *See, e.g.*, Reuven S. Avi-Yonah, *A World Turned Upside Down: Reflections on the 'New Wave' Inversions and Notice 2014-52*, 145 TAX NOTES 95 (2014) (arguing that the notice is a helpful first step, but unlikely to turn the tide on inversions).

39. Most recently, the House Committee on Ways and Means released draft legislation for a comprehensive tax reform that includes the adoption of a "participation exemption" system, which is a widely adopted variant of territoriality. *See* STAFF OF H. COMM. ON WAYS & MEANS, 113TH CONG., DISCUSSION DRAFT OF TAX REFORM ACT OF 2014, §§ 4001–4212, *available at* http://waysandmeans.house.gov/uploadedfiles/statutory_text_tax_reform_act_of_2014_discussion_draft__022614.pdf. For a summary of the policy debate about the adoption of territorial system in the United States and competitiveness arguments in this regard, see Omri Marian, *Meaningless*

jurisdictions, which have in place some form of a "territorial" system, by which only profits from within the jurisdiction are taxed while profits from foreign sources are exempt.[40] Because U.S. MNCs are taxed on repatriated profits while foreign competitors are not, it is argued that the U.S. tax system is "uncompetitive."[41] This problem is exacerbated by the fact that the United States has one of the highest corporate tax rates in the world.[42] Adopting a territorial system and reducing the U.S. corporate tax rates, the argument goes, would put the U.S. at par with its trading partners, thus eliminating the incentive to invert.[43]

The competitiveness argument is tenuous, however.[44] Notwithstanding the fact that the U.S. indeed has one of the highest nominal corporate tax rates in the world (currently thirty-five percent), it is unclear whether U.S. MNCs actually face higher effective tax burden compared with their foreign counterparts.[45] Moreover, as many commentators have noted, myriad loopholes in current U.S. tax law make the U.S. tax system functionally similar to a territorial one.[46] Therefore, the benefit of territoriality cannot account for the full spectrum of inversion incentives.

Rather, it has been convincingly argued that there are other major incentives for inversions.[47] One major reason to invert is the ability to access untaxed foreign cash.[48] Generally, under U.S. law, income of

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Comparisons: Corporate Tax Reform Discourse in the United States, 32 VA. TAX. REV. 133, 163–67 (2012).

40. *See* PHILIP DITTMER, TAX FOUND., SPECIAL REPORT NO. 202: A GLOBAL PERSPECTIVE ON TERRITORIAL TAXATION 3 (2012), *available at* http://taxfoundation.org/sites/taxfoundation.org/files/docs/sr202_0.pdf (concluding that "[o]verwhelmingly, developed economies are turning to the territorial approach").

41. *See* Marian, *supra* note 39, at 150.

42. For a summary of the policy debate about corporate tax rates in United States and competitiveness arguments in this regard, see *id.*

43. *See* MARPLES & GRAVELLE, *supra* note 14, at 12.

44. For a full-blown rebuttal of the argument according to which inversions are driven by competitiveness concerns, see Edward D. Kleinbard, *Competitiveness Has Nothing to Do with It*, 144 TAX NOTES 1055 (2014).

45. Marian, *supra* note 39, at 158 (describing studies that contest the argument according to which U.S. tax rates are uncompetitive).

46. *See, e.g.*, J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Worse Than Exemption*, 59 EMORY L.J. 79 (2009) (describing the U.S. international tax system and suggesting that foreign-source income of U.S. MNCs is even more generously treated than foreign-source income under territorial taxation principles); Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 715–27 (2011) (explaining how the U.S. tax system is an "ersatz variant on territorial systems").

47. Kleinbard, *Competitiveness Has Nothing to Do with It*, *supra* note 44, at 1065–67 (explaining the reasons for the current wave of inversions).

48. *Id.* at 1065–66 (explaining how inversions facilitate "hopscotch payments," which allow

foreign subsidiaries of domestic corporations is not taxed in the United States until repatriated (generally in the form of dividends or other payments from foreign subsidiaries).[49] U.S. MNCs thus focus their tax-planning efforts on booking income with subsidiaries in low-tax jurisdictions, where the income remains untaxed.[50] For example, the infamous "Double Irish Dutch Sandwich" planning technique is aimed at shifting income associated with patented goods from the jurisdiction where the good are designed, manufactured or sold, to tax havens.[51] Generically explained, this is achieved by having subsidiaries in tax-havens own the valuable patents of the affiliated group, and have the affiliates in the developed (high-taxed) jurisdictions pay royalties to the tax haven entities. The royalties are deductible and therefore strip the tax-bases in the high-tax jurisdictions where factories and clients are located, and the income is accumulated in the tax-haven jurisdiction, where nothing is located other than pocket-book entities.[52]

The problem for U.S. MNCs arises when they wish to access these pools of untaxed cash.[53] If they simply repatriate the cash to the U.S. parent, the repatriated amounts will be taxed. If, however, by the magic of inversion, the U.S. parent becomes a "foreign" parent, the rules of repatriation taxes no longer apply. The tax-haven entities can then make direct payments to the foreign parent, in a foreign-to-foreign exchange that skips U.S. taxing jurisdiction (these payments are thus appropriately termed "hopscotch" payments), and can be used for stock buybacks or dividends. If this inversion-related planning is successful, then the earnings of the tax-haven subsidiaries are never taxed.[54] Recent Treasury guidance is aimed in particular at this type of inversion benefits.[55]

The second benefit of inversions stems from the fact that under U.S. tax law, "foreign" MNCs are better positioned to reduce the tax bill on

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inverted firms to access previously untaxed cash held in foreign subsidiaries).

49. Of course, U.S. MNCs could theoretically avoid tax on repatriation by having foreign subsidiaries invest directly in U.S., or buying U.S. debt. However, the IRC prevents such planning by treating such amounts as deemed repatriated, and hence subject to tax. *See* I.R.C. § 956 (2012).

50. Kleinbard, *Competitiveness Has Nothing to Do with It*, *supra* note 44, at 1056 (stating that "U.S.-domiciled multinational firms have become adroit at moving income that as an economic matter is earned in high-tax foreign countries to very low-taxed ones").

51. *See* Kleinbard, *Stateless Income*, *supra* note 46, at 706–13 (describing the Double Irish Dutch Sandwich).

52. *Id*.

53. It is estimated the U.S. MNCs currently hold, in the aggregate, two trillion dollars in offshore earnings. *See* Kleinbard, *Competitiveness Has Nothing to Do with It*, *supra* note 44, at 1057.

54. *See id*. at 1065–66 (discussing "hopscotch" transactions).

55. *See* IRS Notice 2014-52.

their *U.S. source* income when compared with "domestic" MNCs.[56] This is so because a foreign parent is able to extract gains from U.S. operations in the form of payments that are deductible in calculating U.S. income (for example, interest paid by a domestic subsidiary to its foreign parent). This means that the adoption of a territorial system is of little help, since under such a system the U.S. will continue to tax income earned in the United States. Thus, the incentive to invert remains.

For this reason, some have suggested dealing with inversions by making it harder for inverting corporations to avoid taxation on income that is substantively generated in the United States.[57] Others have suggested reforming the way by which the United States determines MNCs' residence for tax purposes.[58] Specifically, many proposals suggest applying a "Real Seat" test that considers substantive factors in determining residence, instead of the formal POI test currently adopted.[59] MNCs can easily change their POI, but it might prove more difficult to change the location of substantive attributes. The most common proposal has been to implement a residence test based on the central management and control (CMC),[60] which is adopted by multiple

56. *See* Mihir A. Desai & James R. Hines, *Expectations and Expatriations: Tracing the Cause and Consequences of Corporate Inversions*, 55 NAT'L TAX J. 409, 438 (2002) (suggesting, among other things, that "managers and shareholders allowed for the possibility of reductions in domestic tax obligations in their consideration of the expatriation"); Bret Wells, *What Corporate Inversions Teach About International Tax Reform*, 127 TAX NOTES 1345, 1367 (2010) (Studying several case studies of corporate inversions in order to unravel the motives for inversions, and concluding at 1367 that "[t]he corporate inversion phenomenon provides clear and noncontroversial evidence that foreign-owned firms are tax preferred whether they are competing against U.S.-owned multinational corporations in the U.S. domestic economy or in foreign markets").

57. For a summary of such proposals, see Bret Wells, *Corporate Inversions and Whack-a-Mole Tax Policy*, 143 TAX NOTES 1429, 1433–34 (2014).

58. *See, e.g.*, S. 1346, 112th Cong. § 103 (2011). Under the Act, a publicly traded corporation managed "directly or indirectly, primarily within the United States . . . shall be treated as a domestic corporation." *Id.* Additional bills suggest likewise. *See, e.g.*, S. 268, 113th Cong. § 103 (2013); S. 2075, 112th Cong. § 103 (2012); H.R. 62, 112th Cong. § 2 (2011).

59. *See* Omri Marian, *Jurisdiction to Tax Corporations*, 54 B.C. L. REV. 1613, 1619–20 (2012) (discussing the Real Seat test).

60. For such proposals see, for example, *Tax Reform Options*, *supra* note 5, at 34–36 (statement of Reuven S. Avi-Yonah, Professor, University of Michigan Law School); STAFF OF THE JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 178–81 (Comm. Print 2005) (proposing the adoption of a CMC test); Kleinbard, *Stateless Income*, *supra* note 46, at 160 (suggesting to adopt a "mind and management" residence test). At least one commentator suggested adopting a residence test that is based on the location of the MNC's largest customer base. *See* George K. Yin, Letter to the Editor, *Stopping Corporate Inversions Sensibly and Legally*, 144 TAX NOTES 1087 (2014).

industrialized jurisdictions.[61] Such proposals have been met with criticism grounded in the argument that under a Real Seat system of tax-residence determination, corporations would not be able to invert solely by changing their POI and would be induced to move real activities out of the U.S. in order to "lose" their U.S. tax-residence.[62] The next part discusses the empirical literature supporting such criticism and identifies its shortcomings.

II. TAXATION AND THE LOCATION OF CORPORATE HEADQUARTERS

This Part explains the empirical literature that purports to support the argument according to which inversions may be associated with the dislocation of meaningful attributes in the home jurisdiction. This argument stands in the basis of the resistance to the adoption of a Real Seat test for corporate tax-residence. Part II.A briefly summarizes current empirical literature on corporate tax-residence decisions. Drawing on research in organizational studies, Part II.B explains how inversion literature overstates its policy implication.

A. Empirical Literature on Corporate Inversions and Its Claimed Policy Implications

There are several benefits in having a corporate headquarters located within a jurisdiction.[63] For example, the national pride associated with having a well-known corporation headquartered within a jurisdiction may produce certain political benefits.[64] In addition, a firm's headquarters may bring with it job creation and capital expenditure, resulting in positive economic effects in the jurisdiction in which the headquarters operate.[65] Headquarters are also likely "to generate learning and innovation, since research, development, and entrepreneurial activities"[66] happen within corporate headquarters. Moreover, some studies find that in multinational groups, headquarters

61. *See* Marian, *supra* note 59, at 1625–26 (discussing the widespread adoption of the CMC and similar residence tests in industrialized jurisdictions).

62. *See, e.g.*, sources cited in *supra* notes 5–7.

63. Clausing, *supra* note 4, at 744–47 (describing the benefits of having MNC headquarters located within a jurisdiction).

64. *Id.* at 744.

65. *Id.*

66. *Id.*

locations are more profitable than other locations,[67] suggesting that "multinational headquarters will generate larger profits, higher wages and labor rents, and greater tax payments."[68] It is therefore obvious that incentives and disincentives for MNC headquarters locational decisions are policy-relevant.

Several empirical studies have examined how taxes affect the decisions of MNCs to locate their headquarters in one jurisdiction or another. One recent paper by Johannes Voget questions "to what extent . . . observed relocations [of MNCs' headquarters] exhibit a tax avoidance motive."[69] Comparing a large sample of MNCs that have inverted with MNCs that did not, Voget finds that home country tax on profits repatriated from foreign jurisdictions increases the likelihood that MNCs will relocate their headquarters.[70] Voget concludes with a policy implication according to which "countries have an incentive to present themselves as attractive locations for headquarters if hosting headquarters has certain positive externalities like an increased demand for skilled labor, a larger tax base, or even a better representation of the country's interest in the decision making of the multinational firm."[71] Therefore, according to Voget, countries should not tax repatriated profits.

In another paper, Huizinga and Voget study the impact of taxes on MNC structure following international mergers and acquisitions (M&As).[72] They test cross-border M&As involving two countries, constructing two hypothetical tax rates for a post-merger structure, depending on whether the post-merger parent firm is located in one jurisdiction or the other. They find that taxes have a significant impact on the decision of where to locate the parent, and that "[c]ountries that impose high levels of international double taxation are less likely to attract the parent companies of newly created multinational firms."[73] They suggest that such a result has important policy implications since "the international organization of the firm implies cross-border

67. Matthias Dischinger, Bodo Knoll & Nadine Riedel, *There Is No Place Like Home: The Profitability Gap Between Headquarters and their Foreign Subsidiaries*, 23 J. ECON. & MGMT. STRATEGY 369, 370 (2014) (finding empirical evidence that an over proportional part of multinational group profits accrues with the corporate headquarters).

68. Clausing, *supra* note 4, at 745.

69. Voget, *supra* note 3, at 1067.

70. *Id.* at 1079.

71. *Id.* at 1079.

72. Harry P. Huizinga & Johannes Voget, *International Taxation and the Direction and Volume of Cross-Border M&A*, 64 J. FIN. 1217 (2009).

73. *Id.* at 1244.

relationships of ownership and control that are bound to affect the internal operation of the firm and the dealings of the firm with the affected national economies, for instance, in the form of employment."[74] A similar study by Barrios et al., finds that MNCs' decisions regarding where to locate new subsidiaries are influenced by MNCs' home-country taxes.[75]

Laaman, Simula, and Torstila analyze a data set of fifty-two cross-border headquarters relocations in Europe.[76] They suggest that inquiry into the factors that drive headquarters relocations has important policy implications, since corporate headquarters create various "kinds of spillover effects to the national economy they are part of."[77] They find that corporate taxation plays an important role in locational decisions of multinationals. Specifically, they find that high taxes in a home jurisdiction serve as a "push factor" incentivizing corporations to relocate their headquarters into jurisdictions with lower taxes (i.e., low taxes serve as a "pull factor[]").[78]

It therefore seems that tax policymakers have good reasons to worry about MNCs' decisions on the locations of their headquarters. According to the studies discussed, inversion may result not only in the loss of the tax base, but also in the loss of important attributes associated with having an MNC headquarters located within a jurisdiction.

B. How Empirical Studies on Corporate Inversion Overstate Their Policy Implications

1. Identifying Meaningful Headquarters Relocations

The studies discussed above strongly support the assertion that MNCs are incentivized to change their tax-residences in response to high taxes in their countries of residence (or in response to low taxes in other jurisdictions). However, suggesting that headquarters relocation *for tax purposes* is also associated with the loss of meaningful attributes in the jurisdiction from which MNCs invert (as these studies argue), requires a significant logical leap. As further discussed below,[79] empirical

74. *Id.*

75. Salvador Barrios et al., *International Taxation and Multinational Firm Location Decisions*, 96 J. PUB. ECON. 946, 956 (2012).

76. Laamanen, Simula, & Torstila, *supra* note 3, at 188.

77. *Id*. at 189.

78. *Id*. at 204–05.

79. *See* discussion in Part II.B.2 *infra*.

literature on inversion views headquarters locational decisions as a binary variable (i.e., the headquarters is located either in one jurisdiction or the other). However, the headquarters of a modern MNC can hardly be viewed as a binary variable.

It is well established that the corporate functions of the modern MNC are not always centralized in a single identifiable location.[80] Therefore, it is problematic to assume that meaningful functions—the functions that create positive economic effects that policymakers might care about—are located in the same place as the tax-residence of an MNC (whether before or after an inversion).

For example, organizational researchers distinguish between various levels of corporate functions. Such functions include "*obligatory functions* (general management, treasury and tax, financial reporting),"[81] "*discretionary activities* (value adding and control functions related to HR, audit, corporate planning, IT),"[82] and "*operational functions* (marketing, distribution and production)."[83] Each such function may generate different attributes, and might be located in a different jurisdiction. Therefore, it is not necessarily the case that the most important attributes are in the jurisdiction of tax-residence, or that such attributes may be affected by a change to tax-residence.

In addition, decentralization can be observed within each functional level. For example, "the location of the headquarters themselves has become increasingly scattered in recent years."[84] Mihir Deasi suggests that an MNC "home" is triple-faceted, divided among "managerial," "financial," and "legal" homes.[85] The "managerial home" is where "the managerial talent and key decision-makers" are located.[86] The managerial home itself could, for example, be dispersed among several jurisdictions, with various management functions performed in different places. A firm's "financial home" is the "place where its shares are listed,"[87] which in turn dictates the rights and obligations of investors and managers in publicly traded entities. A MNC's "legal home" is the

80. For a summary of research on the decentralization of corporate functions, see David Collis, David Young, & Michael Goold, *The Size and Composition of Corporate Headquarters in Multinational Companies: Empirical Evidence*, 18 J. INT'L MGMT. 260, 262–63 (2012).

81. *Id*. at 264 (emphasis added).

82. *Id*. (emphasis added).

83. *Id*. (emphasis added).

84. Clausing, *supra* note 4, at 743.

85. Mihir A. Desai, *The Decentring of the Global Firm*, 32 WORLD ECON. 1271, 1277 (2009).

86. *Id*.

87. *Id.* at 1278.

residence of the corporation for legal purposes.[88] The legal home itself can be divided. For example, residences for tax purposes and for corporate-law purposes may be separately determined, creating tension between different jurisdictional rules.[89] Each such "managerial", "financial" or "legal" home may be located in a different place, and each such home may generate different types of positive attributes in the jurisdiction in which it is located. There is no reason to expect that when the "tax home" is changed (i.e., inversion) other "homes" will follow.

To summarize, MNCs' operations, and specifically MNCs headquarters' functions are not "black boxes" with a single identifiable location. They must be viewed as complex organizational structures. When this is the case, it is rather a complex task to define a "relocation" of corporate headquarters. Organizational researchers have tackled the issue, however.

For example, Birkinshaw et al. sought to explain MNCs' decisions to relocate corporate headquarters and corporate business units overseas.[90] They clearly distinguish among three elements that define corporate headquarters: The first two are "a top management group that typically has an official location at which it meets . . . [and] a series of HQ functions . . . (treasury, investor relations, corporate communications etc.), each one of which has an identifiable physical location."[91] The third is "the legal domicile" of the MNC.[92] Birkinshaw et al. recognize that headquarters may be incorporated in one jurisdiction for tax purposes but meaningfully operate in another.[93] They also note that various *substantive* management functions may be located in different jurisdictions.[94] They therefore conclude that it is "possible to conceptualize the HQ's location on some sort of continuum, from entirely based in the home country through to entirely relocated overseas."[95] The *degree* of HQ relocation is therefore the dependent variable in their analysis.

Birkinshaw et al. then study the spectrum of headquarters relocations

88. *Id.* at 1280–81.

89. For a discussion on the interaction between residence for corporate law purposes and residence for tax purposes, see Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229 (2008).

90. Birkinshaw et al., *supra* note 8.

91. *Id.* at 684.

92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

based on case studies of forty MNCs, using multiple interviews and questioners.[96] Such a method allows them to disaggregate management functions and identify the geographical locations of each. They find that business units (meaning operational functions) tend to relocate in response to demand of local markets and in order to take advantage of local agglomeration effects.[97] Corporate headquarters tend to meaningfully relocate in response to the demand of shareholders and financial markets. They acknowledge that corporate tax may play a role in relocation decisions, but unfortunately they do not directly study it.[98]

Similarly, Barner-Rasmussen, Piekkari, and Bjorkman use case studies to identify which factors explain the relocation of specific management functions.[99] Like Birkinshaw et al., they view headquarters relocation on a spectrum, rather than as a binary variable. They differentiate between "full, partial or virtual" relocation of headquarters.[100] They define each as follows:

> *Full* relocation means that the entire top management group and all HQ functions are moved. *Partial* HQ relocation signifies that only selected members of the top management group and functions are transferred. *Virtual* relocation refers to situations in which HQ management responsibilities are handled through frequent travel and modern IT support systems.[101]

They find that multiple factors may drive meaningful relocations, and that such drivers may be highly contextualized.[102]

Unfortunately, as explained below,[103] public-finance researchers who have studied MNCs' tax-residence decisions have viewed relocations of headquarters as a binary variable. This limits the policy implications of their studies.

2. Revisiting the Policy Implications of Inversions Literature

The Article now turns to question the policy implications of empirical research on inversions against the backdrop of organizational literature

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96. *Id*. at 689.

97. *Id*. at 697.

98. *Id*. at 690.

99. Wilhelm Barner-Rasmussen, Rebecca Piekkarim, & Ingmar Björkman, *Mobility of Headquarters in Multinational Corporations*, 1 EUR. J. INT'L MGMT. 260 (2007).

100. *Id*. at 263.

101. *Id*. (emphasis in original) (citations omitted).

102. Birkinshaw et al., *supra* note 8, at 697 (discussing factors that may drive different types of dislocations in various contexts).

103. *See infra* Part II.B.2.

discussed above. Inversions researchers suggest that jurisdictions should present MNCs with a competitive tax environment for headquarters locations, and that noncompetitive jurisdictions risk losing important economic attributes. This policy implication is not, however, supported by these researchers' empirical findings.

For example, in Voget's study, relocation occurs "when a headquarter firm sells its assets to a foreign company or alternatively when the firm's shareholders sell their shares to a foreign company in exchange for shares or for cash."[104] This means that Voget's empirical findings only explain how tax may affect the nominal change of ownership of stock or assets. Voget's study offers no insight into the effects of taxes on locational decisions of meaningful headquarters functions. Using Desai's terminology, Voget studies the effect of taxes on legal or tax relocations.[105] Such relocations interest policymakers due to the associated loss of the corporate tax base. However, legal dislocations do not necessarily entail the dislocation of economically significant attributes (contrary to what Voget suggests).

The Huizinga and Voget study on post-merger structure assumes that "[f]or tax purposes, the newly created multinational is resident in the acquiring or parent country."[106] However, such locational decision means little in terms of where the relevant management attributes are. Tax residence and the residence of managerial talent are two different attributes. For example, when the U.S.-based Eaton Corporation inverted in 2012 by merging with the Irish corporation Cooper Industries, the post-merger parent company ("New Eaton") was indeed located in Ireland (a low-tax jurisdiction),[107] in line with Huizinga and Voget's prediction. However, in its offering documents, Eaton stated that "The New Eaton senior management team after the acquisition and the merger will be the same as the current senior management team of Eaton."[108] In other words, the merged corporation, notwithstanding the fact that it is incorporated in Ireland, seems to be substantively managed from the

104. Voget, *supra* note 3, at 1069.

105. *Supra* notes 85–88 and accompanying text.

106. Huizinga & Voget, *supra* note 72, at 1226.

107. For 2012, Ireland's corporate tax rate was 12.5%. *See OECD Tax Database*, OECD, http://www.oecd.org/tax/tax-policy/tax-database.htm#C_CorporateCaptial [hereinafter: *OECD Tax Database*].

108. Eaton Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) 100 (Sept. 14, 2012). In addition, according to Eaton's 2013 annual report (namely, at the end of the first full fiscal year following the transaction), all eleven board members were U.S. nationals. *See* EATON CORP., ANNUAL REPORT 22 (2013).

U.S.[109] This is inconsistent with Huizinga and Voget's policy argument according to which high taxes may affect dislocation of meaningful management attributes. To be sure, it is *possible* that this is indeed the case, but Huizinga and Voget's study provides no empirical support for such argument. Because of their definition of dependent variables, all their study does is to explain the effect of taxes on *nominal structuring* decisions.

Laaman, Simula, and Torstila's definition of relocation is similarly problematic.[110] Interestingly, they note the fact that the headquarters relocation is a matter of degree, citing Barner-Rasmussen, Piekkari, and Bjorkman.[111] Nonetheless, they explicitly choose to study virtual relocations, ignoring that such relocations may not be associated with relocation of meaningful attributes. They define headquarters relocation "as the *legal transfer* of a firm's corporate or regional HQ from one country to another."[112] They explicitly "do not require that even the top management team itself would have to move to the new HQ location."[113] It is therefore surprising that given their methodological choice of virtual relocation as their dependent variable, they suggest that such relocations may have meaningful economic effects.[114]

To summarize, in formulating policy implications, current inversion literature assumes that MNCs' tax-residence overlaps with the place of all the meaningful management attributes that create positive effects in the local economy. Organizational studies do not support this assumption and the empirical inversions research does not test it. The most sanguine reading of empirical literature on inversions would only support the conclusion that in response to high taxes, MNCs may engage in tax planning (such as a scheme to change tax-residence). From a policy-making point of view, that is not an interesting argument.

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109. Conceivably, the entire management team could have moved to Ireland. However, this would be material information the disclosure of which is required under securities laws. In the absence of such disclosure, the assumption is that no corporate officers moved to Ireland in connection with the inversion.

110. Laamanen, Simula, & Torstila, *supra* note 3.

111. *Id.* at 189.

112. *Id.* (emphasis added).

113. *Id.*

114. Interestingly, Laaman, Simula, and Torstila observe that actual move of managers "would seem to be the case in most relocations." *Id.* They do not provide support for such an assertion. The case studies explored herein suggest to the contrary, namely that managers rarely move for tax reasons alone. Rather, following tax-driven inversions managements perform minimal functions (such as board meetings) in the new jurisdictions, in order to assure that the new tax-residence is respected. However, in most cases they continue to reside and operate their daily business in the old jurisdiction. See discussion on *Virtual Relocations from a CMC Jurisdiction, infra* Part IV.B.3.

Rational taxpayers will always attempt to reduce their tax burdens by using available tax-planning schemes.

Obviously, it is still *possible* that tax-residence planning is associated with distorted capital allocations, causing meaningful effects. There is no question that taxation influences decisions about where to locate capital.[115] However, inversion studies do not show that to be the case in the context of MNC relocations. In fact, some studies imply to the contrary. A 2010 study by Kimberly Clausing did not find a strong relationship between the registered location of *Fortune 500* firms and meaningful R&D activities that are usually associated with headquarters locations.[116] Similarly, a study by Bandik, Gorg, and Karpaty did not find a decline in the level of R&D activity in Sweden following acquisition of Swedish corporations by foreign-owned MNCs.[117]

3. Inversions Literature Excludes Many Meaningful Relocations

There is an additional shortcoming stemming from the fact that legal (or virtual) relocation is the dependent variable in empirical inversion studies. By defining relocation based on tax-residence, inversion studies exclude from their sample many *meaningful* relocations that are not accompanied by a change of tax-residence.

For example, in 2004, Nokia—the Finnish communications giant—established a corporate office in New York by *substantively* moving the corporate CFO office and other key corporate management functions from Espoo, Finland to New York.[118] At the time of the announcement of the relocation, Nokia expected the New York headquarters to employ approximately 100 to 150 people.[119] This move was not accompanied by the change of the tax-residence. Nokia's parent entity is tax-resident in Finland to this day. Since inversion studies define relocation based on the change of tax residence, all corporate headquarters moves that are not associated with a change in tax residence, such as Nokia's, are excluded from their samples. The result is that such studies overstate the effects of taxation on virtual headquarters moves, and do not necessarily address the effects of taxation on meaningful headquarters moves.

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115. *See* Devereux, *supra* note 2.

116. Clausing, *supra* note 4, at 756–60.

117. Roger Bandick, Holger Gorg & Patrik Karpaty, *Foreign Acquisitions, Domestic Multinationals, and R&D*, 116 SCANDINAVIAN J. ECON. 1091 (2014).

118. Press Release, Nokia to Establish a New Corporate Office in the New York Metropolitan Area (Dec. 17, 2003), *available at* http://company.nokia.com/en/news/press-releases/2003/12/17/nokia-to-establish-a-new-corporate-office-in-the-new-york-metropolitan-area.

119. *Id.*

4. Inversions and Frictions

To this point, the Article has demonstrated the shortcomings of inversions literature. Current research does not support the argument that taxing MNCs based on the location of their headquarters may cause meaningful loss of economic attributes. Moreover, literature on tax frictions possibly points to a different outcome.

Frictions are generically defined as "transaction costs incurred in the marketplace that make implementation of certain tax planning strategies costly."[120] Frictions present a powerful tool for tax-writers. A successful tax-law design in this context will create significant unavoidable non-tax costs on unwanted tax planning,[121] without deterring desired behavior.[122]

When an MNC's Chief Executive Officer considers an inversion, she must weigh the expected tax benefit associated with restructuring as a foreign corporation, against the possible *non-tax* cost of such restructuring. For example, if all that is required in order to "lose" tax residence is to reincorporate in a foreign jurisdiction, there is little non-tax cost to consider.[123] Reincorporation itself is almost costless, and unlikely to require any substantive changes to business operations. In such a case, there is no significant friction deterring the inversion, and opportunistic tax-planning is expected.

On the other hand, if, in order to lose the tax residence, it is necessary to relocate management, assets, and other operations overseas, the non-tax cost of inverting becomes significant. The cost stems not only from the significant expenses associated with having to move people and assets overseas, but also from the possible loss of the benefits of operating in the old jurisdiction. For example, there might be a good *business* reason for management to be geographically close to the MNC's most significant customer base. Thus, moving management to a new jurisdiction entails certain entrepreneurial risks that may not justify the tax savings. In such a context, the MNC's preferences regarding its

120. MYRON S. SCHOLES ET AL., *supra* note 13, at 9.

121. Schizer, *supra* note 12, at 1325 ("In sum, end runs are unlikely if, in changing the transaction to avoid the reform, the taxpayer or an irreplaceable counterparty would suffer a dramatic and unavoidable decline in utility, and this cost would exceed the tax benefit at issue.").

122. *See* Osofsky, *supra* note 12, at 1072–73.

123. There might be a cost associated with having to operate under a corporate-law regime (that of the new jurisdiction) that is not as developed as the one of the old jurisdiction. However, it should be rather easy to find a jurisdiction with comparable corporate laws, or to contract around undesired laws. In such a case, there is no significant non-tax friction that serves as a deterrent for inversion. For a discussion of corporate charter competition as a possible source of friction, see Kane & Rock, *supra* note 89.

business operations serve as a friction that may deter the inversion.[124] If, however, a new customer base develops overseas, it may make sense to move management regardless of tax, and thus tax-law does not prevent the restructuring.

Friction literature thus points to an outcome that is possibly contrary to the one claimed by empirical inversions literature. Namely, frictions suggest that having corporate tax residence attached to substantive attributes may prevent inversions, rather than cause the dislocation of the substantive attributes. Identifying the types of attributes that are less susceptible to dislocation may provide policymakers with a toolbox to address the inversions problem.

III. A CASE STUDY APPROACH TO HOME COUNTRY EFFECTS OF CORPORATE INVERSIONS

One of the main shortcomings of current inversion literature is the lack of a cohesive theoretical connection between the empirical findings (which this Article does not dispute) and their proposed policy implications. Particularly, current literature ignores the need to balance the tax benefit of an inversion against the costs associated with relocation of real corporate attributes. This Article attempts to fill this theoretical gap by developing a framework for the description of meaningful home-country effects that may be associated with corporate inversions. Part III.A explains how case study research may address the shortcomings in current literature, introduces the case studies selected and explains the method of analysis. Part III.B summarizes the findings.

A. Method and Case Selection

In order to deduce testable constructs that describe the meaningful effects of inversions, it is not enough to look at nominal loss of tax residence as current literature has done. There is a need for an explorative task, aimed at unearthing meaningful changes that policymakers may care about. For such a task, case study research is particularly well-suited.[125] Such strategy "focuses on understanding the dynamics present within single settings,"[126] which in the case of this

124. *See* Schizer, *supra* note 12, at 1326–27 (describing business preferences as a powerful friction).

125. Kathleen M. Eisenhardt, *Building Theories from Case Study Research*, 14 ACAD. MGMT. REV. 532 (1989).

126. *Id.* at 534.

Article is an inversion transaction. The idea is to identify observable "themes, concepts, and possibly even relationships between variables,"[127] and use such observations to offer constructs to guide future research. Future research may negate or support such constructs.

This Article studies the substantive home country effects of five inversions of large MNCs.[128] The case studies represent inversions that may reasonably be perceived to cause negative consequences in the home jurisdictions. Each case study examines an inverted company that is well-known in its home jurisdiction, and is a significant player in the company's relevant industry segment. In such cases, the loss of such company can reasonably be perceived to result in significant consequences. The case studies selected are aimed, however, at generating a sample of inversions that vary in their legal, jurisdictional and commercial characteristics. This is in order to try to articulate, in policy-relevant terms, the meaningful relocations that commonly take place in the specific context of inversions. The following characteristics are considered: the jurisdictions involved (both home and target jurisdiction); the tax system in each jurisdiction (territorial systems versus worldwide systems); tax-residence determination in each jurisdiction (CMC versus POI); and industry segment of the inverted MNC.

The Article only explores inversions from one industrialized nation to another.[129] The assumption is that inversions involving pure tax havens are unlikely to entail dislocation of real economic attributes, since tax havens are not positioned to support such attributes.[130] Indeed, it has been shown that tax havens are not expected to divert real economic activity from non-haven jurisdictions.[131] The characteristics of the transactions studied are summarized in Table 1.

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127. *Id.* at 541.

128. It is generally accepted that a minimum of four case studies and a maximum of ten is the desired range of grounded-theory research. *See* Eisenhardt, *supra* note 125, at 545.

129. Relocations within jurisdictions or to small tax-havens are not explored.

130. Tax Havens are usually small countries, in population and area. *See* Dhammika Armapala & James R. Hines Jr., *Which Countries Become Tax Havens?*, 93 J. PUB. ECON. 1058 (2009). As such, tax havens probably lack infrastructure to support physical investment attributes of scale.

131. Mihir Desai, C. Fritz Foley & James R. Hines, Jr., *Do Tax Havens Divert Economic Activity*, 90 ECON. LETTERS 219, 221 (2006) (concluding that "tax havens do not appear to divert activity from non-havens").

Table 1 – Characteristics of Corporate Inversion Case Studies

Inverting corporation	Year completed (fiscal)	Home jurisdiction	Target jurisdiction	Home jurisdiction tax characteristics (tax system; residence determination)	Target jurisdiction tax characteristics (tax system; residence determination)	Industry of inverting corporation
Shire Pharmaceuticals	2008	UK	Ireland	Worldwide; CMC	Worldwide; CMC	Pharmaceuticals
Wolseley PLC	2011	UK	Switzerland	Territorial; CMC	Territorial; POEM[132]	Building materials
Nobel Biocare	2002	Sweden	Switzerland	Worldwide; POI	Territorial; POEM	Dental implants
News Corporation	2004	Australia	USA	Worldwide; CMC	Worldwide; POI	Media
Tim Hortons	2009	USA	Canada	Worldwide; POI	Mixed; CMC	Food chain

Changes in the home country are explored at two points in time: immediately after the inversion (meaning, at the end of the fiscal year in which the inversion took effect) and a year after the inversion (meaning the end of the first full fiscal after the year of inversion). The assumption is that by the end of the full year after the inversion, changes that are directly attributable to the inversion have already taken effect. Of course, it is possible that changes attributable to the inversion can be observed in the long term, but the Article refrains from such inquiry. For long post-inversion periods it should prove difficult to isolate the effects of inversions from other factors, such as external economic effects or a change in business strategy.

This Article uses numerous data sources to identify changes in the home jurisdiction. Company filings and press releases are used in order

132. PEOM stands for the Place of Effective Management. In most cases, POEM is the same as CMC. *See* HM Revenue & Customs, INTM 120210—Company Residence: Guidance Originally Published in the International Tax Handbook, § ITH348 (2010), *available at* http://www.hmrc.gov.uk/manuals/intmanual/intm120210.htm#IDA1ORZF (explaining the apparent differences between CMC and POEM and concluding that "it is not that easy to divorce effective management from central management and control and in the vast majority of cases they will be located in the same place"). The Organisation for Economic Co-operation and Development ("OECD") defines POEM as "the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made." *See* OECD COMM. ON FISCAL AFFAIRS, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL, C-(4)8 (2010), *available at* http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-oncapital-2010_9789264175181-en.

to articulate the drivers to, as well as the structure of, each inversion transaction. Annual reports are used as qualitative sources describing MNCs' substantive operations both before and after the inversions. This Article also draws from investigative reporting by reputable news outlets that looked into the nature of MNCs' operations both before and after an inversion.

This Article also explores some quantitative data from companies' public filings. Specifically, to the extent available, the Article investigates financial segment reporting. MNCs are required to separately report financial data for "material" geographic segments.[133] Often the home jurisdiction from which an MNC inverts is its historical home, which is usually a material market for the MNC operations. The home jurisdiction is therefore reported as a separate segment. Changes in that segment occurring after the inversion may provide useful insights.

Unfortunately, the breadth of information contained in segment reporting varies depending on the jurisdiction in which the MNCs' securities are listed for trade, as well as on each MNC's accounting practices. However, all include, at a minimum, the book value of long-lived assets (i.e., assets that provide the company with benefits extending beyond the current fiscal year) and gross revenues in each material segment. Some MNCs also report capital expenditures and the number of employees in the geographical segment note. Even if not reported in the segment note, most MNCs' annual reports contain a breakdown of the number of employees in each geographical segment.

Multiple data sources are used to study possible changes of management composition following an inversion. Annual reports are used to study management composition before and after the inversion and to understand the reasons for any observed change in composition. Nationality of board members is taken from the ICC Directors database as well as other sources (such as annual reports of other firms in which management members hold positions, and sometimes LinkedIn profiles of management members).

Finally, all historical corporate tax rates are taken from the OECD Tax Database.[134]

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133. 17 C.F.R § 229.101(d) (2014). For a discussion of the relationship between segments reporting and tax planning, see Herita T. Akamah, Ole-Kristian Hope & Wayne B. Thomas, *Tax Haven and Disclosure Aggregation* 2 (Rotman Sch of Mgmt. Working Paper No. 2419573, 2014) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419573 (the authors find that MNCs that are aggressive in their tax planning tend to aggregate segments, meaning, providing lower-quality disclosure).

134. *OECD Tax Database*, *supra* note 107.

The findings are narratively discussed immediately below. Some stylized facts are presented in tables following the discussion of each case study.

B. Results: Inversion Case Studies

1. Shire Pharmaceuticals' 2008 Move from UK to Ireland

Shire PLC ("Shire") is a large MNC specializing in the development, manufacturing, and sale of pharmaceuticals. It is a dual-listed company, with securities traded on both the London Stock Exchange (LSE) and NASDAQ.

Shire was founded in 1986 in the UK ("Old Shire") and was headquartered in Basingstoke, UK, for both tax and business purposes until April 2008, when it announced its intention to change its tax-residence to Ireland.[135] Under the inversion plan, a new holding company, Shire Limited ("New Shire"), was registered in the Isle of Jersey, a tax haven.[136] New Shire "operational headquarters" as well as tax-residence were to be located in Ireland.[137] Shareholders of Old Shire received shares of New Shire on a one-for-one basis, and New Shire became the publicly traded entity.[138] The inversion was completed in late May 2008.[139]

Prior to announcing the inversion plan, Old Shire had significant presence in both the U.S. and the UK but very limited presence in Ireland. Shire's board of executives was composed of four U.S. nationals (including the Chairman, as well as the Chief Executive Officer), five British nationals (including the Chief Financial Officer), and one French national. Shire did not have a significant Irish investor base. Of its three largest shareholders, none were Irish.[140]

Shire's operations in Ireland were also insignificant compared to other geographical regions. For example, as of December 31, 2007,

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135. Press Release, Shire PLC, Shire to Introduce a New UK Listed Holding Company (Apr. 15, 2008), *available at* http://www.shire.com/shireplc/uploads/press/NEWUKLISTEDHOLDINGCOMPANY15Apr2008.pdf [hereinafter Shire's Press Release].

136. *See* JANE G. GRAVELLE, CONG. RESEARCH SERV., 7-5700, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 4 (2013) (listing the Isle of Jersey as a tax haven).

137. *See* Shire's Press Release, *supra* note 135.

138. *Id*.

139. Shire PLC, Annual Report (Form 10-K) 38 (Feb. 27, 2009) [hereinafter Shire 2008 10-K] (noting the inversion was completed on May 23, 2008).

140. PROSPECTUS, SHIRE LTD., INTRODUCTION OF UP TO 700,000,000 ORDINARY SHARES OF 5 PENCE EACH TO THE OFFICIAL LIST 11 (Apr. 16, 2008) [hereinafter SHIRE'S PROSPECTUS].

Shire employed 3346 personnel, of whom seventy-four percent were based in the United States and thirteen percent were based in the UK.[141] Shire had only fifty-five employees in Ireland (about 1.6% of its global workforce), primarily in sales and marketing operations.[142] The Irish employees were based in a 16,000 square foot office complex in Dublin, which accounted for about one percent of the total area of Shire's principal properties worldwide.[143] For comparison, Shire's UK principal properties covered an area of 67,000 square feet, and Shire's principal properties in the U.S. covered an area of 1,005,000 square feet, or about ninety percent of Shire's reported principal properties. The U.S. properties included all of Shire's principal manufacturing, research and technology centers.

According to Shire's geographical segment reporting,[144] most of its long-lived assets were located in the North America ($294.8 million of a total of $368.6 million, or about eighty percent). Seventy-four percent of its gross revenues were also produced in the U.S. ($1798.2 million of a total of $2436.3 million). The UK was the second largest segment, where nineteen percent of the long-lived assets were located and seven percent of the revenues were generated.

Prior to the inversion, Ireland was not reported as a separate geographical segment, supporting the conclusion that it was not significant for Shire's operations in general. Indeed, as of December 31, 2007, Shire had only $1 million of long-lived assets in Ireland (less than one percent of Shire's worldwide long-lived assets), and it generated less than one percent of its worldwide revenues in Ireland.

To summarize, Ireland had no significant role in Shire's global operations prior to the inversion, and therefore agglomeration effects cannot have possibly played a significant role in Shire's decision to move to Ireland. Rather, the move was completely tax driven. In its press release announcing the inversion, Shire stated that given the group's international operations "Shire has concluded that its business and its shareholders would be better served by having an international holding company with a group structure that is *designed to help protect*

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141. SHIRE PLC, ANNUAL REPORT 32 (2007) [hereinafter SHIRE 2007 ANNUAL REPORT].

142. Salamander Davoudi & Andrew Jack, *Shire Deals Blow to UK as It Moves Tax Domicile to Ireland*, FIN. TIMES (Apr. 16, 2008, 3:00 AM), http://www.ft.com/intl/cms/s/0/051e289c-0b4c-11dd-8ccf-0000779fd2ac.html.

143. All of the data about Shire's 2007 principal properties is taken from Shire's Prospectus, *supra* note 140, at 298.

144. For Shire's geographical segment reporting data, see SHIRE PLC, ANNUAL REPORT 115–17 (2008) [hereinafter SHIRE 2008 ANNUAL REPORT].

the group's taxation position, and better facilitate the group's financial management."[145]

Shire's effective tax rate for 2007 was rather low, at 11.9%.[146] However, Shire's effective tax rates for 2006 and 2005 were quite substantial, at 26.8% and 27.5%, respectively.[147] Shire did not disclose the expected effect of the inversion on the group's effective tax rate. However, the incentive to adopt Irish tax residence in lieu of the UK one was rather obvious: At the time, the UK tax system was a worldwide system, meaning that a resident UK MNC was subject to tax in the UK on its worldwide income.[148] The UK corporate income tax was substantial, at thirty percent.[149] This created an incentive for UK MNCs to "lose" their UK tax residence (in which case they would only be taxed in the UK on income derived from sources within the UK) and establish residence in a lower-tax jurisdiction. While Ireland was also a worldwide tax jurisdiction, Ireland's corporate tax rate at the time was 12.5%.[150]

Under UK law, tax-residence of corporations is determined based on two alternative tests: the POI, or the CMC.[151] The satisfaction of either would result in UK tax-residency. This means that in order to "lose" its UK tax-residence Shire had to take a two-step approach. First, it had to reincorporate some place other than the UK. This is rather easy to achieve, and indeed, Shire had changed its place of incorporation to the Isle of Jersey, a tax haven.[152]

Second, Shire had to change its place of central management and control. Changing the place of central management and control may seem more challenging. Under UK law, the place of central management is, broadly speaking, the place where the highest level of control of the business of the company is directed.[153] Presumably then, managers

145. Shire's Press Release, *supra* note 135 (emphasis added).

146. In fact, the rate in 2007 was negative 4.0%. The 11.9% figure excludes the impact of a one-time charge made in respect of a specific investment. *See* Shire PLC, Annual Report (Form 10-K) 53 (Feb. 25, 2007) [hereinafter Shire 2007 10-K].

147. *Id*. at 60.

148. The UK changed its system from worldwide to territorial in July of 2009. *See infra* note 185 and accompanying discussion.

149. Historical Corporate Tax Rates are taken from the *OECD Tax Database*, *supra* note 107.

150. *Id.*

151. HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 435 (3d ed. 2010).

152. *See supra* notes 136–37 and accompanying text.

153. Christiana HJI Panayi, *United Kingdom*, *in* RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 817, 826–27 (Guglielmo Maisto ed., 2009).

would actually have to move someplace else, dislocating real management attributes, in order for Shire to "lose" its UK status. This is the type of behavioral incentive that opponents of the Real Seat tests are worried about. Indeed, when discussing the planned inversion, Shire's CEO explicitly differentiated Shire's planned inversion from naked inversions that were common practice in the U.S. in the early 2000s. He explained: "[t]he era of paper transactions and occasional board meetings in order to have intellectual property in the Caymans, Bermuda and the Bahamas has ended, with a shift to substance over form."[154] This strongly implies that a real, economically significant move would have had to take place in order to shift Shire's tax-residence.

However, in stark contrast to such a story, Shire took great care to assure its various stakeholders that no substantive changes were expected to take place as a result of the inversion. Shire assured its shareholders that "[t]he new holding company . . . will have the same Board and management team as [Old] Shire and there will be no substantive changes to corporate governance and investor protection measures."[155] Shire also stated that the inversion "will not result in any changes in the day to day conduct of Shire's business."[156]

Indeed, Shire's board composition hardly changed following the inversion. While some personnel changes have occurred, the national composition of board members remained largely the same. Following the inversion, Shire's board included four Americans (including the Chairman), five British nationals (including the CEO as well as the CFO), and one French national, just as before the inversion. The following year (2009), two American and one British board members left, and one American has been appointed. In other words, British residents maintained majority in Shire's board.

While Shire had to have its central management and control in Ireland in order to have gained residence there, not a single board member moved to Ireland, nor was any Irish board member appointed. An investigation by the Guardian newspaper into Shire's post-inversion operations suggested that as of February 2009, Shire had approximately seventy employees in its Dublin office (about two percent of its global workforce), none of whom were involved in the "central management" of Shire.[157] For comparison, Shire's UK headquarters employed a staff

154. Davoudi & Jack, *supra* note 142.

155. Shire's Press Release, *supra* note 135.

156. *Id*.

157. Tax Gap Reporting Team, *Tracking Down the Addresses of the Irish Headquarters*, THE GUARDIAN, Feb. 10, 2009, at 13.

of 300 at the time.[158] It therefore seems that at the strategic corporate level, the relocation has been completely virtual.

Given that both the UK and Ireland determine the place of residence based on the central management and control test, this seems odd. How is it that no significant dislocation of corporate-level functions can be observed in the UK following Shire's inversion? The answer seems to be that Shire felt comfortable that its place of central management and control would be based in the place of board meetings.[159] The place of board meetings is viewed as having an important (even if not determinative) role in concluding where the place of central management is.[160] Indeed, Shire instituted a $9271 budget to support executives' travels for board meetings in Ireland.[161] Of the five board meetings that took place in the year following the inversion, three took place in Ireland, and two in the U.S. It appears that three board meetings were enough to substantiate tax-residence in Ireland.[162]

An examination of Shire's geographical segment reporting and annual reports tells a similar story.[163] In the years following the inversion, the bulk of Shire's work force remained in North America, with about seventy-two and seventy-three percent of the work force employed there in 2008 and 2009 respectively (compared to seventy-three percent before the inversion). The UK workforce also maintained its size. Prior to the inversion, Shire employed 458 employees in the UK (thirteen percent of the global work force). It employed 452 and 465 employees in the UK in 2008 and 2009 respectively (twelve percent of the global workforce for both 2008 and 2009).

Following the inversion, Shire's only principal property in Ireland remained the same 16,000 square feet office complex in Dublin.[164] Shire's occupation of properties in the UK did not suffer a loss, and even

158. *Id*.

159. *See* SHIRE 2008 ANNUAL REPORT, *supra* note 141, at 45 ("In this regard the Board noted that as Shire is tax resident in Ireland it is obligated to hold all its Board meetings outside the UK, and as such there will always be an element of travel time before it can hold an urgent *ad hoc*.").

160. Panayi, *supra* note 153, at 830.

161. SHIRE 2008 ANNUAL REPORT, *supra* note 144, at 59 ("In addition, to recognize the travel required for Directors to attend meetings in Ireland or the US, a $9,271 travel allowance was instituted for travel exceeding four hours.").

162. *Id*.

163. For Shire's geographical segment reporting see, *supra* note 144.

164. All of the data about Shire's principal properties is taken from the following sources: For 2007, Shire 2007 10-K, *supra* note 146, at 3510-K; for 2008, SHIRE 2008 10-K, *supra* note 139, at 36; for 2009, Shire PLC, Annual Report (Form 10-K) 35 (Feb. 26, 2009) [hereinafter Shire 2009 10-K].

increased following the inversion. The area covered by Shire-reported principal properties in the UK in 2008 increased to 88,500 square feet, and increased in 2009 to 148,000 square feet. Most of Shire's occupied properties remained in the U.S. (1,039,000 square feet in 2009). All of Shire's main research and manufacturing facilities remained in the U.S. until the end of 2009, as was the case prior to the inversion.

North America also remained the location of most of Shire's long-lived assets (eighty-seven percent, representing an increase of about seven percent for both 2008 and 2009) and gross revenues (seventy-six percent and seventy-one percent in 2008 and 2009 respectively). The UK remained the second most significant geographical segment with eleven percent and twelve percent of the long-lived assets in 2008 and 2009 respectively and five percent of the revenues in both years. In nominal terms, in the year of the inversion the U.K. assets decreased by $7.2 million, but in the following year UK assets increased to a level higher than before the inversion. In terms of their proportional part of Shire's global assets, the UK has seen a decrease from seventeen to eleven percent in both 2008 and 2009. Ireland remained marginal with less than one percent of both long-lived assets and gross revenues.

It is therefore clear that, from the UK's perspective, the only result of Shire's inversion to Ireland was the loss of the UK tax-base. There were no overall noteworthy changes, positive or negative, to Shire's economic activities in the UK. One report summarized that Shire was able to move to Ireland (for tax purposes) with "[n]o change to strategy. No change to dividend policy. No staff relocation or job losses."[165]

Some of the geographical data of Shire's global activities before and after the inversion are summarized in Table 2. UK, the home country from which Shire inverted, is highlighted.

165. Andrew Hill, *Shire's Shift in Tax Residency Is a Warning to the UK*, FIN. TIMES (Apr. 15, 2008, 8:07 PM), http://www.ft.com/intl/cms/s/0/035ff9f2-0b1c-11dd-8ccf-0000779fd2ac.html.

Table 2 – Summary of Shire's activity by geographical segment before and after the inversion

	2007	2008 (Inversion announced and completed)	2009
Board Members' Nationality			
American	4	4	3
British	5[166]	5	4
French	1	1	1
Total	10	10	8
Employees[167]			
UK	458 (13%)	452 (12%)	465 (12%)
North America	2,533 (74%)	2,714 (72%)	2,829 (73%)
Rest of the world	445(13%)	603(16%)	581(15%)
Total	3,436 (100%)	3,769 (100%)	3,875 (100%)
Ireland[168]	55[169] (2%)	not reported	70[170] (2%)
Properties (sq. ft.) [171]			
UK	67,000 (6%); Basingstoke, UK, Global HQ	88,500 (8%); Basingstoke, UK, UK HQ	148,000 (9%); Basingstoke, UK, UK HQ
US	1,005,000 (90%); Offices, manufacturing, research and distribution facilities	1,039,000 (91%); Offices, manufacturing, research and distribution facilities	1,357,000 (86%); Offices, manufacturing, research and distribution facilities
Ireland	16,000 (1%); office space	16,000 (1%); Dublin, Ireland—Global HQ	16,000 (1%); Dublin, Ireland—Global HQ
Canada	34,000 (3%); office space	Not reported	35,000 (2%); office space

166. One non-executive director who lived in London in the relevant period is counted as British, though she possibly holds U.S. citizenship.

167. These figures are taken from Shire's respective annual reports for 2007, 2008, and 2009.

168. The number of Irish employees is taken from the Tax Gap Reporting Team, *supra* note 157. While Ireland was reported as a separate segment in Shire's annual reports, Irish employees were not reported separately. It is therefore possible that such employees are included in the UK figures.

169. *Supra* note 142.

170. This figure was current as of February 2009. *See* Tax Gap Reporting Team, *supra* note 157.

171. The data for Shire's occupied properties is taken from the following sources: Shire 2007 10-K, *supra* note 146, at 3510-K; Shire 2008 10-K, *supra* note 139, at 3610-K; Shire 2009 10-K, *supra* note 164, at 3610-K.

Germany	Not reported	Not reported	16,500 (1%); office space
Brazil	Not reported	Not reported	14,000 (1%); office space
Total	1,122,000 (100%)	1,143,500 (100%)	1,585,500 (100%)
Long Lived Assets ($ million)			
Ireland	1.4 (<1%)	1.0 (<1%)	0.7 (<1%)
UK	68.8 (19%)	61.6 (11%)	79.5 (12%)
North America	294.8 (80%)	468.6 (87%)	593.5 (87%)
Rest of the World	3.6 (1%)	6.6 (1%)	6.9 (1%)
Total	368.6 (100%)	537.8 (100%)	680.6 (100%)
Gross Revenues ($ million)			
Ireland	16.2 (1%)	17.8 (1%)	19.5 (1%)
UK	177 (7%)	160 (5%)	163.9 (5%)
North America	1798.2 (74%)	2299.6 (76%)	2141.3 (71%)
Rest of the World	444.9 (18%)	544.8 (18%)	683 (23%)
Total	2436.3 (100%)	3022.2 (100%)	3007.7 (100%)

2. Wolseley PLC's 2010 Move from the UK to Switzerland

Wolseley PLC ("Wolseley") is the world's largest distributor of heating and plumbing products to professional contractors and a leading supplier of building materials to the professional market.[172] Its shares are traded on the LSE. Wolseley was founded in 1887 in Australia,[173] and moved to England in 1889.[174]

On September 27, 2010, Old Wolseley announced its intention to "create a new Group holding company which will be UK listed, incorporated in Jersey and will have tax residence in Switzerland ('New Wolseley')."[175] Under the plan, New Wolseley issued ordinary shares to

172. *Our Story*, WOLSELEY PLC, http://www.wolseley.com/index.asp?pageid=177 (last visited Jan. 15, 2015).

173. *History*, WOLSELEY PLC, http://www.wolseley.com/index.asp?pageid=24&year=1880 (last visited Jan 15, 2015).

174. *Id.*

175. *Wolseley to Introduce a New UK Listed Holding Company*, WOLSELEY PLC,

holders of Old Wolseley shares on a one-for-one basis in exchange for the cancellation of their Old Wolseley shares.[176] The result was that Old Wolseley became a subsidiary of New Wolseley, a Swiss corporation for tax purposes. The plan took effect in late 2010.[177] Since Wolseley's fiscal year ends on July 31, the inversion took effect in the 2011 tax year.

Wolseley's strategic affiliation with Switzerland was not obvious prior to the inversion, though Wolseley did have some operations there. Wolseley's executive board consisted of nine British nationals (including the Chairman, the CEO and the CFO), one American, and one French. Wolseley also did not have a significant investor base in Switzerland. On its annual report for 2010, Wolseley reported six shareholders who have held substantial interests, none of which were Swiss (though the second largest shareholder, with holdings of about 5.17% of Wolseley share capital, was a hedge fund with offices in, among other places, Zurich).[178]

Prior to announcing the inversion plan, U.S. employees accounted for thirty-five percent of Old Wolseley's global workforce (17,108 employees out of a total number of 48,226, employed in 1241 branches out of a total of 4118). UK accounted for twenty-two percent (10,544 employees in 1486 branches), France eighteen percent (8831 employees), and the Nordic countries for thirteen percent (6468 employees). The Central European segment (which included Switzerland) had 2591 employees, accounting for about five percent of the global workforce.[179]

Segment reporting also demonstrates Wolseley's non-strategic affiliation to Switzerland. Rather, the U.S. was Wolseley's largest geographical segment. The U.S. accounted for thirty-three percent of Wolseley's long lived assets[180] (£2304 million of a total of £7058 million), the UK accounted for seventeen percent, and the Nordic jurisdictions accounted for twenty-five percent. Other significant geographical segments in terms of assets were France, Canada, and

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http://www.wolseley.com/index.asp?pageid=69&newsid=14 (last visited Jan. 15, 2015).

176. *Id.*

177. Press Release, Wolseley PLC, Results of Court and Scheme General Meeting 2 November 2010 (Nov. 2, 2010).

178. WOLSELEY PLC, ANNUAL REPORT 54 (2010) [hereinafter WOLSELEY 2010 ANNUAL REPORT).

179. For Wolseley's employee figures, see *id.* at 89.

180. For Wolseley's geographical segment information, see WOLSELEY PLC, ANNUAL REPORT 95–98 (2011) [hereinafter WOLSELEY 2011 ANNUAL REPORT].

Central Europe (which includes Switzerland), with thirteen, six, and five percent, respectively, of the group's total long-lived assets. In terms of revenues, the U.S., the UK, and the Nordic region accounted for thirty-nine percent, nineteen percent, and fifteen percent of the group's gross revenues, respectively. France, Canada, and Central Europe accounted for fifteen percent, six percent, and six percent. Within the small Central European segment, Switzerland was Wolseley's most profitable area.[181] However, in comparison to global operations, Switzerland seems marginal.

As in the case of Shire, it seems that agglomeration benefits played little role in the inversion plan. In explaining the inversion, Wolseley reasoned that the inversion is "expected to enable the Group to achieve a competitive effective corporate tax rate"[182] of "up to 28 per cent in the first full financial year"[183] following the inversion. A post-inversion twenty-eight percent effective tax rate seems rather significant. However, it represented an improvement compared to Old Wolseley's effective tax rate, which was thirty-four percent for 2010.[184] The main difference from Shire's inversion—which makes the inquiry into Wolseley's inversion worthwhile—is that significant tax reforms took place in the UK by the time of Wolseley's inversion.

In July of 2009 (before the inversion plan had been announced), the UK effectuated a reform of its tax system, exempting most foreign source income from UK taxation.[185] By doing so, the UK functionally adopted a territorial system of taxation. This is of major significance, as territoriality is frequently advocated as a remedy to the problem of corporate inversions, with many commentators pointing to the UK as an example.[186] The UK reform itself has been pitched as a necessary

181. WOLSELEY 2010 ANNUAL REPORT, *supra* note 178, at 24.

182. Press Release, Wolseley PLC, Wolseley to Introduce a New UK Listed Holding Company (Sept. 27, 2010).

183. PROSPECTUS, WOLSELEY PLC, INTRODUCTION OF UP TO 284,415,344 NEW WOLSELEY SHARES OF 10 PENCE EACH TO THE OFFICIAL LIST 6 (2010) [hereinafter WOLSELEY'S PROSPECTUS].

184. WOLSELEY 2010 ANNUAL REPORT, *supra* note 178, at 27.

185. *See* MICHAEL P. DEVEREUX & SIMON LORETZ, CORPORATION TAX IN THE UNITED KINGDOM 11 (2011), *available at* http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/corporation-tax-in-the-uk-feb-2011.pdf.

186. *See, e.g.*, Amanda Athanasiou & David D. Stewart, *News Analysis: Cheers and Jeers for U.K. Corporate Tax Climate Post-Pfizer*, TAX NOTES TODAY (June 10, 2014); Michelle Hanlon, *The Lose-Lose Tax Policy Driving Away U.S. Business*, WALL ST. J., June 12, 2014, at A15 ("The U.K. may be a good example: In 2010, after realizing that too many companies were leaving for the greener tax pastures of Ireland, the government's economic and finance ministry wrote in a report that it wanted to 'send out the signal loud and clear, Britain is open for business.' The country made

response to the problem of inversions by UK corporations.[187] Apparently, however, a territorial system was not enough of an incentive to keep Wolseley from inverting. A few other UK corporations completed inversions from the UK after the UK adopted a territorial system. Some examples include INEOS Group LTD. (moved from the UK to Switzerland in 2010)[188] and Brit Insurance N.V. (moved from the UK to the Netherlands in late 2009).[189] At the same time, other companies that had previously inverted out of the UK returned. Such companies include The Henderson Global Investors and United Business Media PLC, who have returned to the UK from Ireland during 2012–2013 after making the opposite move from the UK to Ireland a few years earlier.[190]

At least theoretically, inverting out of a territorial system might be particularly suggestive that the inversion will result in a true dislocation of economic attributes. In a territorial jurisdiction a corporation pays taxes only on income sourced from within that jurisdiction.[191] Moving out of the jurisdiction would only result in a tax reduction to the extent the inversion results in less income reported in that jurisdiction.[192] This suggests, in theory, that less income-producing activities would take place in the jurisdiction following the inversion. Reality, however, is more complicated. As noted by other commentators, a complex system of tax rules may allow foreign-owned MNCs more tax-planning opportunities to strip income from a particular jurisdiction than domestic-owned MNCs.[193] Inversion in such context is a "self-help" strategy of domestic-owned MNCs to disguise themselves as foreign-

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substantive tax-policy changes such as reducing the corporate tax rate and implementing a territorial tax system.").

187. *How Other Countries Have Used Tax Reform to Help Their Companies Compete in the Global Market and Create Jobs: Hearing Before the H. Comm. On Ways and Means*, 112th Cong. 24 (2011) (statement of Stephen Edge, Partner, Slaughter & May) (describing the UK reform to territoriality as a response to the threat of inversions).

188. Press Release, INEOS Group LTD., INEOS Move from UK to Switzerland (Apr. 13, 2010), *available at* http://www.ineos.com/news/ineos-group/ineos-move-from-uk-to-switzerland/?business=INEOS+Group.

189. *Brit Insurance Holdings to Reorganise Its Corporate Structure and Moves to the Netherlands*, NEWS INSURANCES (Nov. 12, 2009), http://www.newsinsurances.co.uk/brit-insurance-holdings-to-reorganise-its-corporate-structure-and-moves-to-the-netherlands/01698589.

190. Athanasiou & Stewart, *supra* note 186.

191. *See supra* notes 40–43 and accompanying discussion.

192. This assumes, of course, that the expatriation is associated with real movement of economic attributes. When expatriation is formal, it is possible that anti-abuse rules will safeguard the tax base in that jurisdiction.

193. *See supra* note 46 and accompanying discussion.

owned. This allows such domestic-owned MNCs to decrease taxes on income earned from within their original home jurisdiction.

Indeed, in its inversion plan, Wolseley explicitly stated that "New Wolseley will have the same business and operations after the [inversion] as Old Wolseley has before the [inversion],"[194] and that the inversion will cause no change "in the day-to-day operations of the business of the Wolseley Group or its strategy."[195] Wolseley also noted that following the inversion, it would continue to report its financial results in British pounds.[196]

While Wolseley suggested its intention to establish and maintain permanent staff in Switzerland,[197] such permanent staff apparently included "as few as four people in Switzerland managing . . . treasury operations."[198] Wolseley also expected the move to make little difference in the composition of its board of directors,[199] and to have the senior executives of Old Wolseley become the senior executives of New Wolseley.[200] While some changes to the board composition did take place, they did not alter the board composition in a way that implies a move of board members to Switzerland. In fact, the only change announced prior to the inversion was that one French non-executive director of Old Wolseley would not be appointed to New Wolseley.[201] This non-executive director was scheduled to retire regardless of the inversion.[202] In addition, in the year in which the inversion was completed (fiscal year 2011) three British board members had stepped down. They were replaced by one British national and one Irish/South African national. No Swiss nationals were appointed to Wolseley's board. At the end of 2012 the board comprised seven British nationals,

194. WOLSELEY'S PROSPECTUS, *supra* note 183, at 6.

195. *Id.*

196. Anita Likos & Steve, McGratch, *U.K.'s Wolseley Moves Tax Residence to Switzerland*, WALL ST. J. (Sept. 27, 2010, 3:32 PM), http://online.wsj.com/news/articles/SB10001424052748704654004575517950321881956.

197. WOLSELEY'S PROSPECTUS, *supra* note 183, at 6.

198. Phillip Inman, *Wolseley's Move to Swiss Tax Haven Raises Fears of Second UK Exodus*, THE GUARDIAN, Sep. 27, 2010, at 29.

199. WOLSELEY'S PROSPECTUS, *supra* note 183, at 6 ("New Wolseley will have the same Board of Directors and management as Old Wolseley on the Scheme Effective Date, save that Alain Le Goff will not be a Director of New Wolseley.").

200. *Id.* at 10.

201. *Id.* at 46.

202. Press Release, Reckitt Benckiser Group PLC, Alain Le Goff, EVP Supply Chain, to Retire: Successor Announced (Feb. 17, 2009), *available at* https://www.rb.com/site/rkbr/templates/mediainvestorsgeneral2.aspx?pageid=288&cc=gb.

one American, and one board member with dual Irish/South African nationality.

To summarize, it is clear that at the corporate level, Wolseley's inversion was completely virtual.

At the operational level, Wolseley's segment reporting tells a more complex story. In the years following the inversion, the U.S. remained Wolseley's largest market by far, with forty-one and forty-six percent of revenue in 2011 and 2012 respectively, and thirty-two and forty-two percent of assets.[203] This represents a marked increase compared to U.S. operations prior to the inversion. U.S. workforce also increased from 17,108 employees (thirty-five percent of the global workforce) to 17,822 (forty-one percent of the global workforce) by the end of 2012.[204]

The UK operations, however, showed a marked *decrease*. In 2011, the UK accounted for about fifteen percent of the group's assets (a decrease of about two percent), eighteen percent of gross revenues (a one percent decrease), and twenty percent of the global workforce (about a two percent decrease, or a loss of 1129 employees). These decreases were apparently attributed to the divestment of two UK divisions, explained in the 2011 annual report as a part of a "strategy of focusing on businesses with significant scale and leading market positions."[205] It is thus not clear whether such marked losses of UK operations had anything to do with the tax move. Such divestments continued in 2012, causing further decrease in UK operations. By the end of fiscal year 2012, 2334 additional jobs were lost in the UK, bringing the UK proportion of the global work force to sixteen percent (down from twenty-two percent prior to the inversion). Also at the end of 2012, UK only accounted for fourteen percent of global sales (compared to nineteen percent prior to the inversion) and twelve percent of global assets (compared to seventeen percent prior to the inversion).[206]

While UK operations markedly decreased, and U.S. operations increased, no noteworthy changes occurred in other geographical segments. Interestingly, the central European segment (where Switzerland is located) did not show a gain in jobs (but rather a slight decrease) or a marked change in assets and sales. Today, three years after the inversion, Wolseley has 744 employees in Switzerland (out of 39,286 worldwide) in 46 branches (out of 2917 worldwide).[207] This is

203. Segment information can be found at WOLSELEY PLC, ANNUAL REPORT 105–08 (2012).

204. Employee figures can be found at *id.* at 113.

205. WOLSELEY 2011 ANNUAL REPORT, *supra* note 180, at 26.

206. These figures are based on WOLSELEY PLC, ANNUAL REPORT 114 (2012).

207. WOLSELEY PLC, ANNUAL REPORT (2013).

negligible in comparison to Wolseley's global operations.

To summarize, Wolseley, like Shire, changed little in its UK management activities as a result of the inversion, notwithstanding that Wolseley moved out of a territorial system and that Shire moved out of a worldwide system of taxation.[208] The virtual-management relocation pattern demonstrated by Shire and Wolseley has been followed closely by multiple other UK-based MNCs who have moved from the UK. In many such cases, UK MNCs have maintained the bulk of their management functions in the UK and have added minimal presence (if at all) in the jurisdictions to which they moved.[209]

Wolseley did show a loss of operational attributes in the UK following the inversion. It is impossible to tell with confidence whether the inversion had anything to do with it, though it seems unlikely. Wolseley inverted to Switzerland, but the loss of UK activities was not matched by an increase in Swiss activities. The only segment showing marked increase in the period after the inversion was the U.S. Attributing the UK operational losses to the inversion would also contradict Wolseley's own assertion that no changes were expected "in the day-to-day operations of the business of the Wolseley Group or its strategy."[210] It thus seems that Wolseley's divestment of UK operations was part of its business strategy (as the divestments were explained in its annual reports for 2011 and 2012), and unrelated to tax considerations.

Some of the geographical data of Wolseley's activities before and after the inversion are summarized in Table 3.

208. One commentator summarized what Wolseley UK employees need (or need not) worry about: "building supply depots are inherently local. Tax residence is irrelevant to their future." *See* Andrew Hill, *Wolseley's Tax Move Poses Little Threat*, FIN. TIMES (Sep. 27, 2010, 8:01 PM), http://www.ft.com/intl/cms/s/0/ed074288-ca67-11df-a860-00144feab49a.html.

209. Tax Gap Reporting Team, *supra* note 157.

210. WOLSELEY'S PROSPECTUS, *supra* note 183, at 6.

Table 3 – Summary of Wolseley's activity by geographical segment before and after the inversion

	2010	2011 (Inversion announced and completed)	2012
Board Members' Nationality			
British	9	7	7
French	1	0	0
American	1	1	1
Irish/South African	0	1	1
Total	11	9	9
Employees[211]			
USA	17,108 (35%)	17,175 (37%)	17,822 (41%)
Canada	2,503 (5%)	2,645 (6%)	2,599 (6%)
UK	10,544 (22%)	9,352 (20%)	7,018 (16%)
Nordic Region	6,468 (13%)	6,535 (14%)	6,565 (15%)
France	8,831 (18%)	8,184 (18%)	7,020 (16%)
Central Europe	2,591 (5%)	2,190 (5%)	2,016 (5%)
Other	181 (<1%)	165 (<1%)	130 (<1%)
Total	48,226 (100%)	46,246 (100%)	43,170 (100%)
Local Branches			
USA	1,241	1,261	1,274
Canada	220	221	220
UK	1,486	1,059	919
Nordic Region	285	288	264
France	697	322	313
Central Europe	189	144	142
Total	4,118	3,295	3,132
Gross Assets (£ million)			
USA	2,304 (33%)	2,288 (32%)	2,517 (42%)

211. These numbers represent the annual average number of employees, which Wolseley provides as part of its annual segment reporting (as opposed to the number of ongoing employees at the end of the fiscal year, which Wolseley also reports).

Canada	357 (5%)	382 (5%)	384 (6%)
UK	1166 (17%)	1,082 (15%)	735 (12%)
Nordic Region	1,757 (25%)	1,878 (26%)	1,465 (24%)
France	902 (13%)	1,095 (15%)	592 (10%)
Central Europe	391 (6%)	345 (5%)	297 (5%)
Other	181 (3%)	93 (1%)	42 (1%)
Total	7,058 (100%)	7,163 (100%)	6,032 (100%)
Gross Revenues (£ million)			
USA	5,174 (39%)	5,500 (41%)	6,168 (46%)
Canada	765 (6%)	811 (6%)	850 (6%)
UK	2,466 (19%)	2,404 (18%)	1,898 (14%)
Nordic Region	2,012 (15%)	2,128 (16%)	2,125 (16%)
France	1,937 (15%)	1,943 (14%)	1,666 (12%)
Central Europe	849 (6%)	772 (6%)	714 (5%)
Total	13,203 (100%)	13,558 (100%)	13,421 (100%)

3. Nobel Biocare's 2002 Move from Sweden to Switzerland

Nobel Biocare ("Nobel") was founded in 1981 as Nobelpharma in Gothenburg, Sweden. Nobel has been publicly traded since 1994 (first on the Stockholm Stock Exchange, and since 2002 on the Swiss exchange) and is currently the world's largest manufacturer and distributor of restorative esthetic dental implants.[212]

In April 2002, Nobel announced its plan of restructuring under which Nobel would move its tax-residence from Sweden to Switzerland.[213] Under the plan, a new Swiss subsidiary ("New Nobel") was incorporated in Switzerland. New Nobel's shares were then offered to the shareholders of Nobel in exchange for Nobel shares on a one-to-one basis.[214]

At the time of the announcement, Sweden had a worldwide system of taxation in place and determined the residence of corporations based on the place of incorporation, much like the United States today.[215]

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212. *History*, NOBEL BIOCARE, http://corporate.nobelbiocare.com/en/our-company/history-and-innovations/default.aspx (last visited Jan. 1, 2015).

213. NOBEL BIOCARE, ANNUAL REPORT 28 (2002) [hereinafter NOBEL 2002 ANNUAL REPORT].

214. NOBEL BIOCARE, INTERIM REPORT 1, JANUARY–MARCH 2002, at 4 (Apr. 24, 2002).

215. Sweden adopted a participation exemption system, a variant of a territorial system, in 2003.

Nobel outlined several reasons for the inversion. To begin with, Nobel suggested that "[a] Swiss holding structure will allow Nobel Biocare to optimise its corporate tax position to levels closer to standards with other multinational companies and thereby maximising the capital it can re-invest to grow the company and better exploit the market potential."[216] Nobel expected that the inversion would decrease Nobel's effective tax rate to twenty-five percent in the year following the inversion,[217] from an effective tax rate of about 37.5% prior to the inversion.[218]

Nobel noted several other reasons for the move, in addition to the tax incentive. For example, Nobel explicitly noted the move would facilitate access to a larger "healthcare focused" investor base and better access to capital, as well as increase liquidity.[219]

Indeed, prior to the move, Nobel had a large Swiss investor base. Nobel estimated that, as of the end of 2001 (the last complete fiscal year prior to the inversion), forty-seven percent of its total investor base was Swiss.[220] Nobel's largest shareholder was BB Medtech AG, a Swiss fund, which owned 12.7% of Nobel's share capital.[221] Another significant investor in Nobel was Metalor SA, a Swiss corporation, with a holding of 7.5%.[222]

Nobel's Swiss affiliation was also apparent in the composition of its board. Prior to the inversion, Nobel's board comprised seven members, of whom four were Swedish nationals, and three were Swiss nationals (including the chairman and the deputy chairman). The CEO, appointed in late 2001, was also a Swiss national. Prior to her appointment she headed a Swiss corporation headquartered in Bülach, Switzerland.[223]

See Foreign Income Portfolios: Country Portfolios, BLOOMBERG BNA, http://taxandaccounting.bna.com/btac/T4100/split_display.adp?fedfid=14574094&vname=tmippor&fcn=2&wsn=535732000&fn=14574102&split=0# (last visited Jan. 16, 2015).

216. Press Release, Nobel Biocare, Nobel Biocare Holding AG—New Holding Structure for Nobel Biocare AB 2 (May 27, 2002).

217. *Id.*

218. Nobel Biocare, Tender Offer/Rights Offering Notification Form (Form CB) 19–20 (May 28, 2002) [hereinafter Nobel Biocare Form CB].

219. *Id.* at 19.

220. NOBEL BIOCARE, ANNUAL REPORT 45 (2001) [hereinafter NOBEL 2001 ANNUAL REPORT].

221. *Id.*

222. *Id.*

223. *See* Marcus Balogh, *Heliane Canepa Sinks Her Teeth into Business*, CREDIT SUISSE (Jan. 19, 2004), http://www.bank-credit-suisse-moscow.ru/ru/en/news-and-expertise/news/economy/sectors-and-companies.article.html/article/pwp/news-and-expertise/2004/01/en/heliane-canepa-sinks-her-teeth-into-business.html.

Nobel also had other business interests in Switzerland at the time of the inversion. According to Nobel's 2001 annual report, Switzerland was the most penetrated market of dental implants (followed by Italy and Sweden).[224] One of Nobel's largest competitors, Straumann, was a Swiss company.

It therefore seems that in addition to the tax incentive, Nobel had non-tax reasons to move to Switzerland. The move would allow Nobel to be closer to its investor base, competitors, and customers in one of the most developed markets for its main line of business. Substantive move of management attributes under such circumstances would be consistent with literature in organization studies.[225] Strong local affiliation of both investors and managers with the target jurisdiction would also ameliorate any frictions between managers and shareholders that may have different geographical preferences.

Nonetheless, Nobel went to a great length to assure shareholders that it did not expect the inversion to negatively affect Nobel's Swedish operations. In its description of the inversion plan, Nobel explicitly stated that the restructuring was not expected to affect Nobel employees, that all operational headquarters functions (including R&D) would remain in Sweden, and that production facilities would not be affected.[226] Indeed, a comparison of the Nobel executive team in 2001 thru 2003 shows that no Swiss executives were hired following the inversion, and that Swedish executives who left were replaced by other Swedish executives.

Nobel also suggested that the board of directors of New Nobel would remain largely the same as the board of directors of Old Nobel.[227] However, changes occurred in Nobel's board composition. In the year following the inversion the board comprised five members, of whom three were Swiss nationals (including the chairman) and two were Swedish nationals. This national composition of board members carried through 2003. In other words, after the inversion to Switzerland, the board shifted from a Swedish to a Swiss majority, a marked difference that possibly represents a significant move of management attributes.

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224. NOBEL 2001 ANNUAL REPORT, *supra* note 220, at 11.

225. *See supra* notes 90–98 and accompanying text.

226. NOBEL BIOCARE, INTERIM REPORT 1, JANUARY–MARCH 2002, at 4 (Apr. 24, 2002).

227. Press Release, *supra* note 216, at 2–3. As a rule, however, a board of directors of a Swiss company had to consist of a majority of Swiss nationals resident in Switzerland. Nobel apparently asked for and received an exemption from this rule by the Swiss Federal Office of Justice, provided that at least one director authorized to represent the company would be a national and a resident in Switzerland. *See* Nobel Biocare Form CB, *supra* note 218, at 22.

This is rather surprising, since in Sweden, much like the United States, a corporation is resident for tax purposes if it is incorporated in Sweden.[228] It thus seems that all that Nobel had to do in order to invert was to reincorporate someplace outside Sweden and change little else. Nonetheless, a meaningful relocation of the board of directors did occur.

Based on Nobel's segment reporting it is hard to tell whether any other significant economic changes took place. Sweden was not reported as a separate segment in the relevant years, but rather was included in the "Nordic Countries" segment.[229] Moreover, following the inversion, Nobel stopped reporting the Nordic Countries as a separate segment, and instead aggregated all European jurisdictions into a single segment,[230] further complicating the ability to learn of Nobel's post-inversion Swedish operations.

However, employment figures reported in 2001 through 2003 suggested that no significant changes occurred in the Swedish workforce. Both before and after the inversion, for example, Nobel's R&D team consisted of eighty employees based in Sweden and the U.S.,[231] with the head of R&D based in Sweden. Prior to the inversion, Sweden-based employees accounted for twenty-nine percent of a 1328-strong global workforce. In 2002, Sweden accounted for thirty-two percent of the global work force that remained unchanged in size.[232] In 2003, thirty-one percent of Nobel's 1363 employees were located in Sweden.[233]

It is also interesting to note that prior to the inversion Nobel had five major manufacturing facilities, located in Yorba Linda, California; Fair Lawn, New Jersey; Stockholm, Sweden; and Karlskoga, Sweden.[234] New Nobel maintained the same production facilities.[235]

To summarize, Nobel's move had some economic significance at the very top of the corporate management, with the board transitioning to a

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228. *See Foreign Income Portfolios: Country Portfolios*, BLOOMBERG BNA, http://taxandaccounting.bna.com/btac/T4100/split_display.adp?fedfid=14574093&vname=tmippor&fcn=1&wsn=535730000&fn=14574093&split=0 (last visited Jan. 16, 2015).

229. Nobel's segment reporting for 2001–2002 (pre re-segmentation) can be found at NOBEL 2002 ANNUAL REPORT, *supra* note 213, at 31–32.

230. Nobel's segment reporting for 2002 (post re-segmentation) and 2003 can be found at NOBEL BIOCARE, ANNUAL REPORT 44 (2003) [hereinafter NOBEL 2003 ANNUAL REPORT].

231. *Compare* NOBEL 2002 ANNUAL REPORT, *supra* note 213, at 18 (2002), *with* NOBEL 2003 ANNUAL REPORT, *supra* note 230, at 18.

232. NOBEL 2002 ANNUAL REPORT, *supra* note 213, at 22.

233. NOBEL 2003 ANNUAL REPORT, *supra* note 230, at 25.

234. NOBEL 2002 ANNUAL REPORT, *supra* note 213, at 21.

235. NOBEL 2003 ANNUAL REPORT, *supra* note 230, at 22.

Swiss majority. At the board level, the move has been at least partial (if not full). However, the board had a strong Swiss flavor even prior to the move (in fact, only one new Swiss board member was appointed, while the appointment of two Swedish board members was not renewed). At the operational level, Nobel's move seems to have made little (if any) economic difference in Sweden.

Table 4 summarizes some of the data of Nobel's global activities before and after the inversion.

Table 4 – Summary of Nobel's activity by geographical segment before and after the inversion

	2001	2002a (Inversion announced and completed)	2002b[236]	2003
Board Members' Nationality				
Swedish	4	2		2
Swiss	3	3		3
Total	7	5		5
Senior Executives' Nationality				
Swedish	8	10		10
American	2	2		2
Canadian	1	1		1
Swiss	1	1		1
Employees (% of workforce)[237]				
Europe	27%	24%		25%

236. Until 2002, Nobel Biocare comprised two primary business segments: Dental Implants and a product named Procera. Geographic information was provided for dental implants only. After the integration of Procera in 2002, a decision was made to change segment reporting from 2003 onwards, to include all products in geographical segment reporting. Column 2002a should therefore be compared to column 2001, as both have figures that are exclusive of Procera. Column 2002b represents the restated results for 2002 after the change in segments, and includes Procera. Column 2002b should therefore be compared with column 2003. *See* NOBEL 2003 ANNUAL REPORT, *supra* note 230, at 44.

237. These numbers represent the annual average number of employees, which Nobel provides in its annual reports (as opposed to the number of ongoing employees at the end of the fiscal year, which Nobel regularly reports).

(excluding Sweden)				
North America	34%	34%	33%	
Asia/Pacific	5%	5%	6%	
Other	5%	5%	5%	
Sweden	29%	32%	31%	
Total (Global workforce)	1,328	1,330	1,363	
Capital expenditures (€ thousand)				
Europe	6,321 (62%)	7,365 (60%)	8,435 (62%)	8,354 (60%)
North America	2,615 (25%)	4,437 (36%)	4,653 (34%)	4,677 (34%)
Asia/Pacific	191 (2%)	311 (3%)	311 (2%)	596 (4%)
Other	1,128 (11%)	178 (1%)	178 (1%)	251 (2%)
Total	10,255 (100%)	12,291 (100%)	13,577 (100%)	13,878 (100%)
Gross Assets (€ thousand)				
Europe	109,724 (45%)	143, 572 (55%)	201,693 (62%)	256,498 (68%)
North America	112,394 (46%)	95,482 (37%)	102,162 (32%)	97,650 (26%)
Asia/Pacific	9,669 (4%)	9,248 (4%)	9,248 (3%)	13,927 (4%)
Other	14,537 (6%	11,150 (4%)	11,150 (3%)	10,445 (3%)
Total	246,324 (100%)	259,452 (100%)	324,253 (100%)	378,520 (100%)
Gross Revenues (€ thousand)				
Europe	105,578 (42%)	116,569 (43%)	136,529 (44%)	157,714 (47%)
North America	95,655 (38%)	101,840 (38%)	126,580 (41%)	121,846 (36%)
Asia/Pacific	27,182 (11%)	31,390 (12%)	33,341 (11%)	37,093 (11%)
Other	23,658 (9%)	21,655 (8%)	14,740 (5%)	17,325 (5%)
Total	252,073 (100%)	271,454 (100%)	311,190 (100%)	333,978 (100%)

4. The News Corporation Limited's 2004 Move from Australia to the United States

News Corporation ("News Corp.") is a public multinational media conglomerate. It was founded in 1923 in Adelaide, Australia as a

publisher of a daily newspaper.[238] Since then it became a media empire with interests in film, television, book publishing, and multiple other media-related businesses.[239]

In April of 2004, News Corp. made public its intention to change its legal domicile and reincorporate as a Delaware company, with primary public listing of its securities to move from the Australian Stock Exchange to the New York Stock Exchange.[240] While the precise scheme of the reorganization plan was somewhat complex,[241] shareholders generally exchanged their shares in the Australian News Corp. ("Old News Corp.") for shares in a new Delaware-incorporated company ("New News Corp.") on a one-to-two basis (one new share of New News Corp. for every two shares of Old News Corp.).[242] The reincorporation was completed in November of 2004.[243] News Corp.'s fiscal year ends on June 30. The inversion was therefore announced in the 2004 fiscal year, but was completed in the 2005 fiscal year.

The change of incorporation from Australia to the U.S. resulted in a corresponding change of tax-residence from Australia to the U.S. Significantly, however, News Corp. explicitly stated that the change in tax-residence was not expected to have a significant effect on News Corp.'s effective tax rates in the foreseeable future.[244] If anything, News Corp. had to reassure shareholders that the reincorporation would not result in an *increase* in effective tax rates. As a U.S. company, News Corp. would be subjected to taxation on its worldwide income at a thirty-five percent corporate tax rate.[245] The expert opinion supporting the transaction stated that "[p]rima facie this is disadvantageous as, under the [pre-inversion] structure, News Corporation is subject to tax on its worldwide income at the Australian corporate tax rate of 30."[246]

It therefore seems that corporate-level tax-advantage was not a factor driving the reincorporation, notwithstanding that the transaction resulted in an inversion. The plan was driven by other factors. Rupert Murdoch,

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238. *See* RICHARD A. GERSHON, THE TRANSNATIONAL MEDIA CORPORATION: GLOBAL MESSAGES AND FREE MARKET COMPETITION 195 (1997).

239. The News Corp. Ltd., Report of Foreign Private Issuer (Form 6-K) app. at E-35 (Sep. 15, 2004) [hereinafter News Corp. Form 6-K].

240. *Id.* at 2.

241. For a description of the transaction, see *id.* at 40–57.

242. News Corp. Form 6-K, *supra* note 239, at app. E-1.

243. The News Corp. Ltd., Annual Report (Form 10-K) 1 (Sept. 1, 2005).

244. News Corp. Form 6-K, *supra* note 239, at 30.

245. *OECD Tax Database*, *supra* note 107.

246. News Corp. Form 6-K, *supra* note 239, at E-121.

the long-time Chairman, CEO, and largest shareholder of News Corp., stated at the time that "[w]e undertook this move for one reason: to create greater value for our shareholders."[247] The expected benefit for shareholders was to come from several factors such as:

> [e]nhanced US-based demand for the company's shares, over time, resulting from an expanded active US shareholder base and the expected inclusion in major US indices; Potential narrowing of the trading discount of the non-voting shares relative to the voting shares, further enhancing the relative value of the non-voting shares; Improved access to a larger pool of capital available in the US, which should provide greater financial flexibility and improved pricing for capital raisings and acquisition purposes; Full consolidation and control of [a publishing business] . . . ; Reduced corporate complexity; and [e]xternal reporting in a manner consistent with News Corporation's peer group in the US.[248]

It thus seems that the move was financially-driven and not tax-driven.[249] Indeed, in the two decades preceding the inversion, News Corp. aggressively expanded its U.S. operations.[250] For example, it acquired 20th Century Fox in 1985, Fox TV Network in 1987, launched the Fox News Channel in 1996, and completed the acquisition of DirecTV in 2003.[251] Approximately seventy percent of the group's revenues, eighty percent of the profits, and eighty percent the long-lived assets were located in the United States at the time of the inversion.[252] The corporate operational headquarters was in New York, where it had been located for twenty years by the time of the move.[253]

The largest shareholder of News Corp. was the Murdoch family that—through various holding entities—controlled 29.86% of the voting power (this was expected to decrease to 29.47% after the completion of the transaction).[254] Mr. Murdoch, although born in Australia, has lived in

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247. THE NEWS CORP. LTD., ANNUAL REPORT 4 (2004) [hereinafter NEWS CORP. ANNUAL REPORT].

248. News Corp. Form 6-K, *supra* note 239, at 2 (list formatting omitted).

249. *Id.* at 1 ("Mr. Murdoch said the proposal was designed to make News Corporation a more attractive investment to shareholders and that he believes the proposal has potential benefits for shareholders.").

250. *See id.* at app. E-35.

251. *Id.*

252. *Id.* at E-3.

253. *Id*. at E-5.

254. *Id*. at 9.

the U.S. since 1974 and became a U.S. citizen in 1985.[255] Moreover, U.S. investors controlled the largest share of publicly-traded stock with 20.83% holding in the ordinary class of voting stock, and 34.28% of the non-voting preferred stock.[256] News Corp.'s board was also U.S.-dominated. According to the 2004 annual report, eleven board members were U.S. nationals, four were Australians, one was British, and one was Finnish.

Given the dominant U.S. flavor of News Corp. operations and management at the time of the transaction, the expert opinion supporting the transaction concluded that News Corp. was "already a United States based company."[257] A change in legal domicile simply followed News Corp.'s business reality.[258]

The transaction did not go without conflict. Australian investors—who have held a significant stake in News Corp.—were concerned that corporate governance would be affected to their disadvantage given the difference between Australian and U.S. corporate and securities laws, as well as the physical dislocation of governance mechanisms (such as that the general meeting would no longer be held in Adelaide).[259] This eventually resulted in legal battles and the offloading of shares by Australian institutional investors.[260] Some have speculated that the move was indeed driven by controlling shareholders' desire to take advantage of governance mechanisms available under U.S. law, but not under Australian law.[261]

It is also interesting to note that from an investor-level-tax point of view, the inversion might have been detrimental to Australian shareholders, but beneficial to U.S. shareholders. Most jurisdictions in the world, U.S. and Australia included, impose withholding tax on dividend payments from domestic corporations to foreign

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255. Simon Coppock, *Murdoch, Keith Rupert*, *in* THE ENCYCLOPEDIA OF THE HISTORY OF AMERICAN MANAGEMENT 393, 393 (Morgen Witzel ed., 2005).

256. News Corp. Form 6-K, *supra* note 239, at app. E-86.

257. *Id.* at E-5.

258. *Id.* at E-4 ("[A] change of domicile is probably inevitable at some point if the shareholder base becomes increasingly dominated by United States investors. Deferring this event will not make the index and transition issues go away.").

259. For a detailed discussion of shareholders' disputes the ensued, see Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010).

260. Richard Siklos, *News Corp. Sued over Poison Pill Move*, N.Y. TIMES, Oct. 8, 2005, at C3.

261. News Corp. Form 6-K, *supra* note 239, at 29–40 (discussing comparative differences in respect of the poison pill mechanism adopted by News Corp. following the inversion).

shareholders.[262] This meant that prior to the inversion, U.S. shareholders (including the Murdoch family), but not Australian shareholders, were subject to dividend withholding tax in Australia on any dividend paid by Old News Corp. (under the U.S.-Australia tax treaty, the rate is five percent to shareholders who hold ten percent or more of the voting power, and fifteen percent to all others).[263] After the inversion, U.S. shareholders (including the Murdoch family) were not subject to dividend withholding tax on any dividend paid by New News Corp., while Australian shareholders were.

However, notwithstanding corporate governance and other agency issues, News Corp. went to a great length to explain that its Australian operations would not be affected by the move. New News Corp.'s registration statement (made in connection with New News Corp.'s stock offering) suggested that "the Directors of News Corporation do not intend to make (a) any material change to the continuation of the business of News Corporation; (b) any major changes to the business of News Corporation, including redeploying of fixed assets; or (c) any change to the future employment of the present employees of News Corporation."[264] Mr. Murdoch, in his annual letter to shareholders, added that notwithstanding the inversion plan, "[f]or more than 80 years, the Company has proudly called Australia its home. It is where the Company was founded, nurtured, and from where we get our entrepreneurial spirit. Australia is our spiritual home, and will always remain so."[265] He noted that "[t]he move will have no discernible impact on our operations, in Australia or elsewhere. We will remain a proud and vital part of the Australian media landscape with a listing on the

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262. AULT & ARNOLD, *supra* note 151, at 510 ("All of the systems under consideration here [including United States and Australia] impose gross based withholding tax on certain categories of income."). For United States withholding, see *id*. at 510. For Australian withholding, see *id*. at 513. It should be noted however, that shareholders in worldwide systems would generally be entitled to receive credit for foreign tax paid. Difference in the national identity may still be relevant for the after-tax outcome of shareholders, however, if under national law the entitlement for foreign tax credits is unavailable (for example, as a result of tax exempt status). *See, e.g.*, Omri Marian, *Reconciling Tax Law and Securities Regulations*, 48 MICH. J. L. REFORM 1, 22–28 (2014) (providing numerical examples showing how the interaction of tax-exempt status and foreign tax credits laws may result in different after-tax outcome to similarly situated investors).

263. The Convention Between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austl., art. 10, May 14, 1953, 4 U.S.T. 2274.

264. News Corp. Form 6-K, *supra* note 239, at 94; *see also id.* at E-1 ("There will be no material change to the operations, management or strategy of News Corporation. The directors of News Corporation following the 2004 annual general meeting will all become directors of News Corp US.").

265. NEWS CORP. ANNUAL REPORT, *supra* note 247, at 4.

Australian Stock Exchange—now and for generations to come."[266]

Indeed, based on public disclosures, it seems that News Corp. made good on its promise not to change its Australian operations. In the years following the inversion Australian revenues and assets slightly increased (consistent with expansion of the worldwide activity of News Corp.) and maintained (even slightly increased) their relative share in global operations. Australia accounted for eleven percent of the group's long-lived assets in both 2005 and 2006, and for fifteen percent of the revenues in both years (similar to pre-inversion figures).[267] The national composition of the board also changed little. In both 2005 and 2006 the board comprised ten American members, three Australian (compared with four prior to the inversion), and one British. One Spaniard was appointed in 2006.

To summarize, News Corp.'s inversion resulted in little change to Australian operations, both in terms of strategic management and in terms of local operations. Significant economic attributes had been built up in the U.S. over a period of two decades preceding the inversion. To the extent any meaningful dislocations took place in Australia, they had happened long before the inversion and were driven by non-tax considerations. Tax-residence seems to have followed management and business relocation in this case and not the other way around as empirical literature suggests.[268] Moreover, tax-residence followed business considerations even though the change in tax-residence was not expected to generate any corporate-level tax benefit (and might have even been detrimental).

Table 5 summarizes some of News Corp.'s geographical data before and after the inversion.

266. *Id.* at 4–5.

267. For segment information, see News Corp. Form 6-K, *supra* note 239, at E-40; The News Corp. Ltd., Annual Report (Form 10-K) 138 (Aug. 23, 2006).

268. *See* discussion *supra* Part II.A.

Table 5 – Summary of News Corp.'s activity by geographical segment before and after the inversion

	2003	2004 (Inversion announced)	2005 (Inversion) completed)	2006
Board Members' Nationality				
American	7	8	8	8
Australian	3	4	3	3
British/American	4	3	2	2
British	1	1	1	1
Finish	1	1	0	0
Spanish	0	0	0	1
Total	16	17	14	15
Long-Lived Assets ($ million)				
United States and Canada	Not reported	30,683 (82%)	33,764 (81%)	35,097 (81%)
Europe	Not reported	3,407 (9%)	3,381 (8%)	3,582 (8%)
Australia and other	Not reported	3,254 (9%)	4,768 (11%)	4,847 (11%)
Total	Not reported	37,344 (100%)	41,913 (100%)	43,526 (100%)
Gross Revenues ($ million)				
United States and Canada	11,150 (64%)	12,022 (58%)	12,884 (54%)	14,102 (56%)
Europe	3,846 (22%)	6,015 (29%)	7,511 (31%)	7,552 (30%)
Australia and other	2,384 (14%)	2,765 (13%)	3,464 (15%)	3,673 (15%)
Total	17,380 (100%)	20,802 (100%)	23,859 (100%)	25,327 (100%)

5. Tim Hortons Inc. 2009 Move from the U.S. to Canada

Tim Hortons is a fast-food chain known mostly for its coffee and doughnuts. It was founded in 1964 in Hamilton, Canada.[269] It operated almost exclusively in Canada until 1995, when it was acquired by the U.S.-based Wendy's corporation.[270] In 2006, Tim Hortons went public as a dual listed company, listing its stock on both the NYSE and the Toronto Stock Exchange.[271] At the time, Wendy's sold 17.25% of the stock to the public.[272] The remaining stock was distributed to shareholders later in 2006, and Tim Hortons has been a widely held company ever since.[273]

The initial public offering (IPO) was structured as a spinoff of Tim Hortons out of Wendy's. The spun-off public entity was a Delaware-incorporated entity.[274] Therefore, the publicly traded entity was a U.S. corporation for tax purposes. It remained so until the 2009 inversion discussed below. Notwithstanding its U.S.-based IPO structure, Tim Hortons' management remained in Canada.[275] After the IPO, Tim Hortons also continued to earn substantially all of its operating income from Canada.[276]

On June 29, 2009, Tim Hortons ("Old THI") announced a reorganization plan, under which the publicly traded entity would become a Canadian corporation for tax purposes.[277] Under the plan, Old THI merged with a newly formed Canadian subsidiary ("New THI"),

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269. *The Story of Tim Hortons*, TIM HORTONS, http://www.timhortons.com/us/en/about/the-story-of-tim-hortons.php (last visited Jan. 16, 2015).

270. *Id.*

271. Tim Hortons Inc., Annual Report (Form 10-K) 99 (Feb. 26, 2009) [hereinafter Tim Hortons 2008 10-K] ("On March 29, 2006, the Company completed its initial public offering ('IPO').").

272. *Id.* ("[O]f 33.35 million shares of common stock, representing 17.25% of the common stock outstanding. The remaining 82.75% continued to be held by Wendy's. On September 29, 2006, Wendy's disposed of its remaining 82.75% interest in the Company, by a special pro-rated dividend distribution of the Company's stock to Wendy's shareholders of record on September 15, 2006, and, as a result, since September 30, 2006, the Company's shares have been widely held.").

273. *Id.*

274. For a description of the IPO structure, see Tim Hortons Inc., Registration Statement (Form S-1) 45–46 (Mar. 21, 2006) [hereinafter Tim Hortons S-1].

275. According to the IPO registration statement, the principal executive offices remained in Oakville, Canada. *See id.* at 4.

276. According to its 2007 annual report, 91.9% of the 2007 revenues were produced in Canada. Tim Hortons Inc., 2007 Annual Report (Form 10-K) 121 (Feb. 26. 2008).

277. Press Release, Tim Hortons Inc., Registration Statement Filed for Proposed Reorganization of Tim Hortons as a Canadian Public Company (Jun. 29, 2009) [hereinafter Tim Hortons Press Release].

and the shares of Old THI were converted to shares of New THI.[278] New THI maintained its dual listing in Canada and the United States.

Tax savings was one of the stated reasons for the inversion.[279] As a Canadian company, Tim Hortons expected to reduce its effective tax rates by four percent, six percent, and eight percent for years 2010, 2011, and 2012 respectively.[280] The tax benefit was expected at least in part due to reduction in Canadian corporate tax rates.[281] However, tax did not play an exclusive role in the consideration to invert.

As noted above, following the 2006 IPO, the corporate management as well as most of the operational activity remained in Canada. The registration statement for the 2009 inversion offering recognized such reality, noting that "[c]urrently, our U.S. public company parent . . . is a holding company *that conducts no business and has no material assets* . . . We currently derive approximately 90% of our revenue from our Canadian operations."[282]

The board concluded that "[t]he existence of a non-operating parent holding company incorporated in a country where we conduct only a small portion of our business creates inefficient administrative complexities unrelated to our business operations."[283] Along the same lines, the company suggested that "organizing under a Canadian parent is expected to permit us to expand in Canada and internationally."[284] Also, since Tim Hortons generated most of its cash flow from Canadian operations,[285] it was expected that the post-inversion structure would "reduce exposure to volatility in reported earnings and other items by substantially lowering exposure to foreign exchange rate fluctuations."[286] The board even noted that the pre-inversion U.S. structure, coupled with the dominant Canadian flavor of Old THI, caused confusion among "lenders, suppliers, landlords and local governmental agencies."[287] Matching the legal domicile with the operational reality has therefore been pitched as an expected benefit of

278. *Id.*

279. Tim Hortons Inc., Registration Statement (Form S-4/A) 26 (Aug. 12, 2009) [hereinafter Tim Hortons S-4/A].

280. *Id.* at 19.

281. Tim Hortons Press Release, *supra* note 277.

282. Tim Hortons S-4/A, *supra* note 279, at 26 (emphasis added).

283. *Id.*

284. *Id.*

285. *Id.* at 27.

286. *Id.*

287. *Id.*

the inversion.

This story is well supported by Old THI's corporate filings for 2008 (the year preceding the inversion). At the time, the entire executive team of Old THI was composed of Canadian nationals. Similarly, the board of directors was overwhelmingly controlled by Canadians, with ten Canadian board members and only two Americans. Also at the end of 2008, Old THI had 2917 restaurants in Canada, compared with 520 in the U.S.[288] Old THI occupied 546,410 square feet of manufacturing and distribution facilities in Canada, compared with about 45,500 square feet in the United States.[289] Canada accounted for sixty-six percent of Old THI's long-lived assets and seventy-nine percent of the gross revenues, compared with twenty-seven percent and six percent in the U.S., respectively.[290]

Under such circumstances, Old THI's board was not concerned with any possible penalties imposed by the U.S. anti-inversion rule of Section 7874. Old THI easily met the "substantial business activity" exception, as most of its activities were conducted in Canada, the jurisdiction to which it inverted.[291] Section 7874 did not apply to the transaction.[292]

A review of New THI annual reports in the years following the inversion indicates that no meaningful dislocations can be observed in the United States. For example, there has been little change in the composition of the executive team. In 2009, one Canadian executive left. One Canadian and one American were appointed. The executive team remained the same in 2010. The only change observed in the Board of Directors during the 2008–2010 period was the departure of one American board member.

U.S. operations were also not negatively affected. In fact, New THI opened additional restaurants in the United States. The chain increased its U.S. presence from 520 restaurants before the inversion to 563 and 602 restaurants in 2009 and 2010 respectively.[293] New THI manufacturing and distribution facilities in the United States remained the same throughout the tested period.[294] U.S. revenues remained largely unchanged, with a slight increase observed in 2009 (but a decrease to the

288. TIM HORTONS, ANNUAL REPORT 37 (2008); *id.* at 36.

289. *Id.* at 37

290. TIM HORTONS, ANNUAL REPORT 37 (2009). The percentage figures take into account non-reportable segments.

291. Tim Hortons S-4/A, *supra* note 279, at 34.

292. *Id.* at 34.

293. Tim Hortons Inc., Annual Report (Form 10-K) 62 (Feb. 22, 2011).

294. *Id.* at 40.

pre-inversion level in 2010).[295] While some decline can be observed in the value of the net U.S. long-lived assets (from $402,839,000 in 2008 to $324,600,000 in 2010), this decline has not been matched with a decline in revenues. A corresponding increase in assets can be observed in "corporate assets," which refers to assets that support the corporation as a whole (i.e., assets the benefits of which cannot be associated with an identified geographical segment).[296]

To summarize, Tim Hortons' inversion was a virtual "naked" inversion. In fact, the very suggestion that Tim Hortons' 2009 inversion is an "expatriation" of a corporation away from the United States is a misnomer.[297] The transaction is much better described as *repatriation* to Canada. Tim Hortons was simply "returning to its origins."[298] Given that Tim Hortons has always retained its Canadian identity, one might wonder, why did it move to the U.S. in the first place (in 2006), and why did it wait until 2009 to return to its true home?

The 2006 IPO was probably driven by the interests of THI's U.S. owner, Wendy's, which at the time held the entire capital stock of THI. This can explain the choice to go public as a U.S. entity. Under such circumstances, there was little reason to expect that the 2009 inversion would result in a loss of important economic attributes in the United States. Such attributes were always located in Canada, and were never the United States' to lose.

THI may have chosen 2009 as the year for repatriation for two reasons. First, as stated in the press release, Canada was in the process of gradually reducing its federal corporate income tax rates, from twenty-two percent in 2007 to fifteen percent by 2012. In 2008, the rate was 19.5% and was expected to be reduced to eighteen percent by 2010, the year in which New THI expected to start reaping the tax benefit.[299] It seems odd, however, that a rate reduction of 1.5% made the difference in the decision to invert. Even before Canada's gradual rate reduction, the maximum Canadian rate of twenty-two percent was substantially lower than the U.S. rate of thirty-five percent.

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295. Segment reporting information can be found at *id.* at 165–69.

296. *Id.* at 100.

297. *See, e.g.*, Chris Edwards, *Moving to Canada for Lower Taxes*, CATO INST. BLOG (Jul. 6, 2009, 11:52 AM), http://www.cato.org/blog/moving-canada-lower-taxes (suggesting that "Tim Hortons (essentially Canada's Starbucks) is packing up its U.S. headquarters and moving to Ontario," and that such move "might affect where higher-wage corporate headquarters jobs are located in the long run").

298. MARPLES & GRAVELLE, *supra* note 14, at 7.

299. Tim Hortons Press Release, *supra* note 277.

A second aspect for the decision to invert in 2009 is briefly noted in the registration statement. Old THI, the public company that spun off from Wendy's, entered into certain tax sharing agreements with its parent as part of the IPO.[300] Tax sharing agreements generally prevent a corporation from taking any actions that change the ownership structure within an affiliated group.[301] Also, the U.S. tax code restricts certain dispositions in spun-off companies' stock from taking place too close in time after the spinoff.[302] These issues were explicitly noted in the registration statement as restrictions that prevented earlier changes to the corporate structure.[303] One might wonder what would have happened if it were not for the contractual obligations and the time limits embedded in the U.S. Code.

Table 6 summarizes some of Tim Hortons' geographical data before and after the inversion.

Table 6 – Summary of Tim Hortons activity by geographical segment before and after the inversion

	2008	2009 (Inversion announced and completed)	2010
Executives' Nationality			
Canadian[304]	9	9	9
American	0	1	1
Total	9	10	10
Board Members' Nationality[305]			

300. Tim Hortons S-1, *supra* note 274, at 117–18.

301. Tim Hortons S-4/A, *supra* note 279, at 26 ("As a result of a tax sharing agreement that we entered into with Wendy's at the time of our IPO, and of time constraints under U.S. tax rules relating to our spinoff from Wendy's, our ability to engage in certain acquisitions, reorganizations and other transactions was limited for a period of time. These restrictions have now expired."). For a discussion of reasons for such restrictions, see Stanley Barsky, *Tips on Drafting Tax Sharing Agreements*, 144 TAX NOTES 180 (2014).

302. For a discussion of such restrictions, see Herbert N. Beller & Lori E. Harwell, *After the Spin: Preserving Tax-Free Treatment Under Section 355*, 92 TAX NOTES 1587 (2001).

303. *See* Tim Hortons S-4/A, *supra* note 279, at 26.

304. This includes one executive with a dual Canadian/British citizenship.

305. The nationality of most of Tim Hortons' executives is based on inferences such as the executives' education and other managerial positions. Most are not included in biographical databases that provide citizenship data.

Canadian	10	10	10
American	2	2	1
Total	12	12	11
Restaurants			
Canada	2,917	3,015	3,148
U.S.	520	563	602
Ireland	247	206	194
UK	46	85	81
Afghanistan	1	1	1
Total	3,731	3,870	4,026
Properties (Sq. Ft.)			
Canada	546,410	622,410	757,490
U.S.	≈ 45,500[306]	≈ 45,500	≈ 45,500
Gross Assets ($ thousands)			
Canada	1,290,219 (62%)	1,373,325 (66%)	1,686,209 (68%)
U.S.	567,557 (27%)	478,395 (23%)	424,089 (17%)
Variable Interests[307]	213,407 (10%)	226,470 (11%)	37,868 (2%)
Corporate[308]	26,511 (1%)	16,101 (1%)	333,350 (13%)
Total	2,097,694 (100%)	2,094,291 (100%)	2,481,516 (100%)
Long Lived Assets (net, $ thousands)			
Canada	913,823 (61%)	967,879 (65%)	1,012,322 (74%)
U.S.	402,839 (27%)	356,560 (24%)	324,600 (24%)
Variable Interests	163,376 (11%)	156,712 (10%)	25,252 (2%)
Corporate	13,647 (1%)	12,881 (1%)	11,496 (1%)
Total	1,493,685 (100%)	1,494,032 (100%)	1,373,670 (100%)

306. This includes three assets that are reported as having a size of greater than 2500 square feet. For purposes of the calculation, it is assumed that each asset has a size of 2500 square feet.

307. Variable interests include consolidation of financial results in "variable interest entities" which include entities in which a holder holds controlling interest that is not based on majority of voting rights.

308. Corporate assets include assets that benefit the groups as a whole, rather than an identified geographical segment.

Revenues ($ thousands)			
Canada	1,750,399 (79%)	1,914,210 (78%)	2,114,419 (83%)
U.S.	122,679 (6%)	140,491 (6%)	123,116 (5%)
Variable Interests	356,095 (16%)	384,152 (16%)	298,960 (12%)
Total	2,229,173 (100%)	2,438,853 (100%)	2,536,495 (100%)

IV. DISCUSSION: PATTERNS OF INVERSIONS AND HOME COUNTRY DISLOCATIONS

A. Summary of Findings

Table 7 summarizes each of the case studies discussed. It outlines whether tax-saving was a factor driving the inversion, as well as the business affiliation of each inverting corporation to the target jurisdiction. The two right-most columns summarize what types of meaningful dislocations can be observed in the home jurisdiction following the inversion.

Table 7 – Summary of observed dislocations in the home jurisdictions

Inverting corporation	Was entity-level tax saving a driving factor?	Pre-inversion interests in target jurisdiction	Management relocation	Can other home-jurisdiction dislocations be observed?
Shire Pharmaceuticals	Yes	Insignificant	No; Virtual	No
Wolseley PLC	Yes	Insignificant	No; Virtual	Yes, operational, but not to target jurisdiction; Unclear if attributable to inversion
Nobel Biocare	Yes	Significant: Board members, CEO nationality; Investor base; Major local market	Yes; partial to full	No
News Corporation	No	Significant: Board members' nationality; Functional HQ; Controlling shareholders nationality; Investor base; Largest market of operations	Management already located in target jurisdiction	Yes, corporate governance functions; direct result of the inversion
Tim Hortons	Yes	Significant: Board members and executives nationality; Functional HQ; Largest market of operations	Management already located in target jurisdiction	No; Operational activities already located in target jurisdiction

The first obvious outcome from an analysis of the case studies is that the type and scope of meaningful dislocations varies tremendously. Whether an inversion is associated with the dislocation of meaningful functions in the home jurisdiction is a highly contextualized question. Therefore, a blanket policy statement according to which inversions result in the loss of positive attributes cannot stand. This further supports the need for an observation-based theory that may explain the relationship between inversions and meaningful dislocations. Such theory can suggest propositions for future empirical research, which in turn will provide useful guidance for tax-writers.[309]

A second interesting observation is that in all cases in which meaningful headquarters dislocations occurred, the inverting corporation already had significant business affiliation with the target jurisdiction. It is thus plausible to theorize that meaningful dislocations of management attributes are to be expected where *non-tax* considerations, such as the draw of the target jurisdiction's financial markets, investor base, or personal affiliation of management are present.[310]

This conclusion does not stand to negate the inverse, that is, that no dislocations are expected where *only* tax considerations are present. However, it is plausible to argue that business attributes in the home jurisdiction can serve as friction factors that deter *meaningful* dislocations. If locational tax rules are attached to such factors, inversions that are motivated solely by tax reasons may be prevented.

B. Grounded Constructs of Home Country Effects of Inversions

Various patterns of management relocations can be identified in the case studies that warrant further research. Section 1 discusses the chronology of inversions and meaningful dislocations. As explained, it is not at all clear from the case studies that meaningful dislocations chronologically follow inversions. It is sometimes observed that meaningful dislocations precede inversions. This suggests the possibility that in some cases inversions may be driven by meaningful dislocation, and not the other way around,

Section 2 discusses the spectrum of headquarters dislocations, and demonstrates that the degree of meaningful dislocations, as well as the types of dislocated corporate functions, is different in each case. It therefore seems that the types of meaningful dislocations are context-

309. For a discussion of propositions for future research, see discussion *infra* Part IV.B.

310. Such a conclusion is consistent with the findings of Birkinshaw et al., s*upra* note 8. *See also supra* notes 90–98 and accompanying text.

dependent.

Section 3 discusses dislocations against the background of the tax-residence tests in the home jurisdiction. It shows that a formal tax-residence test, such as POI, is not a panacea against meaningful dislocations, and that a Real Seat test does not necessarily explain meaningful reallocations. This is contrary to the suggested policy implications of empirical inversions literature.

Section 4 demonstrates the importance of reputation as well as conflicts of interests in the context of inversions transactions. This section suggests the possibility that such factors may play a role in an inverted MNC's decision on whether to dislocate significant attributes.

The dislocations patterns are discussed below, and are summarized in Table 8.

Table 8 – Summary of dislocation patterns in inversions

Inverting corporation	Chronology of dislocations	Spectrum and type of dislocations	Pattern of tax-residence dislocation	Stakeholders' interests in respect of meaningful dislocations
Shire Pharmaceuticals	No dislocation observed	Legal relocation; no financial relocation; virtual management relocation; no operational relocation	Virtual CMC relocation	Interests probably aligned for virtual relocation
Wolseley PLC	No management dislocation; concurrent operational dislocation, but not to target jurisdiction	Legal relocation; no financial relocation; virtual management relocation; some operational relocation, but not to target jurisdiction	Virtual CMC relocation	Interests probably aligned for virtual relocation; Interests probably not aligned for operational relocation
Nobel Biocare	Concurrent management dislocation with inversion	Legal, financial and management relocation; no operational relocation	Substantive POI relocation	Interests probably aligned for management relocation and for operational non-relocation
News Corporation	All dislocations prior to inversion	Legal, financial, management and operational relocation	Substantive CMC relocation	Conflicts of interest for legal relocation; interests probably aligned for non-relocation of operational activities
Tim Hortons	No dislocation observed	Legal	Virtual POI relocation	Interests probably aligned for virtual relocation

1. Chronology of Inversions and Dislocations

The case studies suggest that when an inversion is associated with *meaningful* management relocation, it is not necessarily the case that management relocation chronologically *follows* the inversion. Rather, management relocation can be observed in cases where tax relocation happens *after* significant connections of the management to the target jurisdiction had already been established. This suggests that locational tax rules that are attached to management attributes (such as determining residence based on CMC) would not prevent inversions where there are business justifications for the restructuring (nor should it). Two patterns can be observed:

Inversion Follows Meaningful Management Relocation. Under such a pattern, inversion is the last step in a substantive move of management and business operations to another jurisdiction. Over a period of time, an MNC may develop a foreign market that completely outgrows the MNC's historical home market. When the MNC is no longer substantively located in its historic jurisdiction, but rather in the new market, the inversion follows the business reality. For example, by the time News Corp. inverted from Australia to the U.S., it was already, in substance, an American corporation.

Tim Hortons is another interesting example in this context, but one that is somewhat different than News Corp.'s. In that case the inversion followed management (which was located in Canada), but the management was never in the U.S. to begin with. In fact, Tim Hortons' first move to the U.S. in 2006 is an example of an inversion that was not followed by management dislocation, while the 2009 repatriation is an example of a "return to origins" type inversion.

Inversion Complements Meaningful Management Relocation. Under such a pattern, at the time of the inversion, management already has strong business or personal affiliation with the target jurisdiction. For example, Nobel's management move to Switzerland followed the appointment of a Swiss CEO. Three other board members were also Swiss before the inversion. Switzerland was an important market for Nobel, so there were both personal and business reasons to transfer the headquarters from Sweden to Switzerland. Tax savings supported such a move, and may have been the "final straw" necessary to initiate the inversion.[311] It is possible that a more competitive tax environment in Sweden would have prevented the move. However, it does not seem that

311. *See* discussion *supra* Part III.B.3.

tax considerations alone would have facilitated an *actual* move of the management.

Other case studies not discussed herein show similar patterns. For example, when ENSCO inverted from the U.S. to the UK in 2009, it announced that "most of [its] senior executive officers and other key decision makers will move to England."[312] However, at the time, ENSCO already had significant operations in the UK[313]

Theoretically speaking, a third pattern could occur, as suggested by empirical literature on inversions:

Inversion precedes meaningful management relocation. Under such a pattern management move would follow an inversion, even though the corporation had no previous affiliation with the target jurisdiction. This pattern has not been observed in the case studies explored, but it may still be possible.

2. Spectrum and Types of Headquarters Dislocations

The case studies lend support to the decentralized view of MNCs' headquarters. The dislocation of meaningful attributes cannot be described as a binary variable. It is better placed on a spectrum, consistent with studies in organizational science. Different functions may dislocate, and each to a different degree.

For such purposes, Desai's division of MNCs' headquarters to "legal," "financial," and "managerial" is helpful in describing observed patterns of functional dislocations.[314] The crucial question for the purpose of this study is whether it can be observed that a relocation of a firm's tax home (part of the "legal home") is also associated with the relocation of the firm's financial home and managerial talent. This may help to articulate the types of attributes that may be lost as a result of tax-relocation. The loss of different attributes may dictate different policy considerations. For example, whether corporate relocations are associated with the loss of management jobs, or R&D activities, the effect on the local economy might be different. Depending on the type of activities governments wish to encourage within their territories, they may adopt different policies that specifically target management jobs (for example, granting tax incentives to managers to relocate to the

312. *See* ENSCO Int'l Inc., Proxy Statement (Form S-4) 3 (Nov. 20, 2009).

313. According to ENSCO's annual report for 2009, the UK was the largest single-jurisdiction segment in terms of revenues, and accounted for about ten percent for the long-lived assets of worldwide operations. *See* ENSCO INT'L INC., ANNUAL REPORT 101 (2009).

314. *See supra* notes 81–87 and accompanying text.

jurisdiction) or R&D activity (for example, by granting subsidies to the performance of such activities within the jurisdiction).

Management Relocations. Relocation of managerial talent results in the loss of meaningful attributes, but does not seem to be driven (at least not primarily) by tax relocation. The movement of management talent is a matter of degree. It can be complete, partial, or virtual.[315] Inversions driven solely by tax considerations seem to be associated with virtual management relocations (Shire; Wolseley). Full or partial management relocations happen in the context of inversions that are supported, at least in part, by non-tax considerations (Nobel; News Corp.).

Financial Relocations. Financial relocations may bring about a change to governance mechanisms, which can be viewed as a meaningful attribute, the loss of which is detrimental. Indeed, Australian stakeholders in News Corp. who viewed the inversion as detrimental to the company's corporate governance mechanisms fought to prevent the inversion.[316] Changes in governance seem to be associated with tax relocation in cases where non-tax considerations are also involved (Nobel; News Corp.). Where an inversion is driven solely by tax considerations, no changes in governance mechanisms can be observed (Wolseley; Shire).

Tax/Legal Relocation. Tax relocation, in and of itself, results in the loss of the corporate tax base. The case studies suggest that tax relocation may be associated with financial and management relocations (Nobel; News Corp.), but does not necessarily explain financial and management relocations. Also, management home seems more likely to attract the legal home than the legal home is likely to attract management. For example, contractual and tax obligations forced Tim Hortons' management to maintain the legal home separate from the management home. Once this obstruction had been removed, the legal home moved to the place of the managerial home (and not the other way around).

3. Tax Residence and Meaningful Headquarters Dislocations

One of the main arguments against the adoption of a Real Seat test for corporate tax-residence is that it will induce meaningful management relocations. It is therefore preferable to have a POI test in place, as it is not expected to distort locational decisions in an economically meaningful manner. The case studies lend little support to such

315. *See supra* notes 99–101 and accompanying text.

316. *See supra* note 259 and accompanying text.

argument, and contradictory patterns can be observed.

Meaningful Relocation from a POI Jurisdiction. The adoption of a POI test for corporate residence is not an assurance against the dislocation of meaningful management attributes. Business considerations seem to dictate meaningful moves, even if tax considerations suggest otherwise (meaning, when tax relocation can be achieved without a management move). Nobel is an example of such an inversion. In that case, meaningful dislocations can be observed even though the home jurisdiction applied a POI test (Sweden), and the target jurisdiction applied a Real Seat test (Switzerland).[317] Theoretically, all that Nobel had to do in order to lose its tax-residence in Sweden was to incorporate elsewhere. Nonetheless, a meaningful management move took place. Similarly, Tim Hortons' management had always remained in Canada, while the place of incorporation changed in 2006 to the United States, only to return back to Canada in 2009.

Virtual Relocation from a POI Jurisdiction. When the home jurisdiction is a POI jurisdiction, all that an MNC has to do in order to "lose" its tax residence is to achieve foreign incorporation. If only tax considerations are involved, there is no reason to expect further dislocation of economic attributes. This has been the case during the first wave of corporate inversions in the U.S.[318]

In the same vein, Tim Hortons' case study is an interesting example of a corporation that had little presence in the U.S., and therefore little reason to stay in the U.S. Tim Hortons' management was already located in Canada. It seems that the inversion would have happened even if the United States had adopted a Real Seat corporate-residence test.

Virtual Relocation from a CMC Jurisdiction. The case studies also suggest that meaningful attributes must not necessarily be dislocated when an MNC inverts away from a CMC jurisdiction. In both the cases of Wolseley and Shire, management relocations were virtual, notwithstanding the fact that the UK decides the residence of corporations based on a CMC test.

This can be explained, however, by suggesting that the CMC test applied in the UK is not truly a substantive test. The ability to relocate without dislocating real management attributes suggests that the CMC test used in the UK is nothing more than a formal residence test (similar

317. For a similar discussion in the context of ENSCO, see *supra* notes 312–313 and accompanying text.

318. MARPLES & GRAVELLE, *supra* note 14, at 1 ("These corporate inversions apparently involved few, if any, shifts in actual economic activity from the United States abroad, at least in the near term.").

to POI) in disguise. In turn, this implies that corporations virtually inverted from the UK simply because—in the absence of frictions—they could do so at minimal cost (by having board meetings conducted outside the UK).

Meaningful Relocations from a CMC Jurisdiction. One case study suggests that meaningful relocations from a CMC jurisdiction may be associated with an inversion (News Corp.). However, in that case it is clear that the meaningful dislocations happened long before the inversion, and were not caused by the inversion.

Interestingly, one recent study suggests that inversions from European CMC jurisdictions are made from the UK to a much greater extent than from other jurisdictions.[319] No "wave" of cross-border inversions can be observed from CMC jurisdictions such as Germany, France, and other jurisdictions known for high corporate tax rates. France decides the place of corporate residence based on the corporate "effective seat" which is defined as "the place where bodies of management, administration and control are located."[320] French courts have consistently refused to recognize the "foreign" tax status of firms that had no substantive attributes in the foreign jurisdiction, and all of the significant attributes located in France.[321] Similarly, in Germany, the place of management refers to "the place of day-to-day business management of the company rather than to the site of its strategic direction."[322] To make such substantive determination, German courts consider, among others things, the identity of the executives involved, their performed management functions, and the availability (or lack thereof) of permanent management facilities.[323] Simply conducting board meetings elsewhere would not suffice if an MNC sought to give up its German tax-status.

It is therefore plausible that inversions out of the UK are common since UK MNCs can invert out of the UK with no need to incur

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319. *See* Laamanen, Simula & Torstila, *supra* note 3, at 197. Their descriptive statistics report that during the tested period, the net change in UK headquarter firms (i.e., MNCs inverting *from* the UK *minus* MNCs inverting *to* the UK) has been -14. For comparison, the second most negative change had been that of the Netherlands, with -3. Germany had a net loss of only -1, while France had a net gain of 2.

320. Nicolas de Boynes, *France*, *in* RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 441, 450 (Guglielmo Maisto ed., 2009).

321. *Id.* at 450–52.

322. Joachim Englisch, *Germany*, *in* RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 461, 487–88 (Guglielmo Maisto ed., 2009).

323. *See id.* at 489–95 (discussing German courts' adjudication on the place of effective management).

significant costs by dislocating meaningful attributes. On the other hand, when tax-residence is truly determined based on substantive factors, it is plausible to hypothesize that the cost of the dislocations required to achieve a shift of tax residence operates as a deterrent for inversions. An interesting example in this context is Tim Hortons' inversion, the timing of which had apparently been affected by contractual arrangements and time limits embedded in the U.S. tax code. These costs were apparently successful in deterring an earlier inversion.

4. Conflicts of Interests, Reputation and Meaningful Dislocations

Another pattern emerging from the case studies concerns the important role of conflicts of interests arising from an inversion, and corporate handling of such conflicts. Where potentially affected parties—such as managers, investors, customers and employees—face different inversion-related outcomes, agency issues may dictate particular results.

Conflict of interest emerges as a relevant cost factor that may prevent meaningful dislocations. For example, if an inversion can be achieved without dislocations of management attributes, the interests of shareholders and managers are aligned, as both groups wish to see the effective rate of corporate tax decrease. If, however, managers have to actually move in order to achieve an inversion, their interests are no longer aligned with those of shareholders (assuming managers do not want to move). Managers who wish to maintain their place of residence may resist an inversion.

Conversely, it may be the case that shareholders oppose the inversion. For example, if the restructuring itself is a *taxable* stock-for-stock exchange (meaning, a cashless yet taxable transaction), shareholders may be adversely affected. In such a case, shareholders may discount the value of future corporate-level tax savings in the face of current shareholder-level tax liability that is not accompanied by cash distribution to satisfy the tax liability.[324]

In addition, in all cases explored, the inverting corporations addressed reputational issues that may arise from conflicts of interest, usually in the press release announcing the inversion.[325] MNCs take great care to appease the minds of potentially affected parties. It therefore seems that inversion consequences that are viewed negatively by interested parties

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324. For a discussion of such considerations, see Jason Zweig, *How to Owe Capital-Gains Taxes Without Even Trying*, WALL ST. J., Jan. 19, 2013, at B1.

325. *See supra* notes 143–144; 177–179; 210–212; 238–240 and accompanying text.

may also serve as a deterrent for meaningful dislocations. This is consistent with literature suggesting that the structure of legal transactions has a branding effect and that negative branding may cause transactions to fail.[326] In fact, recently, the U.S. retailer Walgreens scrapped a plan to invert to the UK. One of the reasons behind this decision was "the potential consumer backlash and political ramifications, including the risk of losing a book of business."[327]

Inversion with Alignment of Interests Regarding Dislocation. When the tax relocation is achieved with no conflicts of interests between stakeholders, meaningful dislocation will occur if all interested parties share a positive view of dislocation, and are less likely to occur if interested parties share a negative view of dislocation. Within an inverting corporation, different interests may align differently in respect to the relocation of different functions.

For example, when Nobel moved to Switzerland, it seemed that the tax savings and the actual move of management were in the interest of both management members and the large Swiss investor base. Such alignment of interests may explain the meaningful move of the board to Switzerland. On the other hand, the interest of Swedish employees was, obviously, to maintain their jobs in Sweden. Some board members as well as the entire executive team were Swedish. At the same time, it did not seem that any interested party demanded the dislocation of Swedish operations. Such alignment of interests dictated that notwithstanding the tax move, Swedish operations remained untouched.

When Shire and Wolseley inverted, both investors and managers were interested in tax savings. This could have been achieved with no need for the managers to move out of the UK and into the target jurisdictions. This may have contributed to the virtual relocations observed in those circumstances.

Inversion with Conflict of Interest on Dislocation. When interested parties share different interests in the context of the inversion, conflicts may arise. For example, in the context of News Corp.'s relocation, Australian shareholders had different corporate-governance (and possibly tax) interests than those of American shareholders and

326. *See generally*, Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581 (2006) (describing how reputational issues may dictate the presentation of transactions to investors, and how negative consumer reaction may contribute to the prevention of inversions).

327. Maureen Farrell, *Why Walgreen Chose Not to Invert*, MONEYBEAT (Aug. 6, 2014, 1:48 PM), http://blogs.wsj.com/moneybeat/2014/08/06/why-walgreen-chose-not-to-invert/.

controlling shareholders.[328] Such conflict presented an increased cost to the dislocation of meaningful attributes, resulting from shareholders litigation that ensued[329] (though it did not prevent the inversion).

C. Some Policy Implications

The patterns of meaningful dislocations described herein are probably not exhaustive and definitely not exclusive of each other. The case studies should not be viewed as describing an empirical truth. This is an inherent limitation of case studies. They may point to possible existing constructs, but do not suggest that such constructs present the full spectrum of reality. However, the case studies clearly show that the relationship between tax-residence of corporations and the locations of corporate economic attributes is, at best, unclear.

Each case study discussed combines different patterns, and different combinations of such patterns may be suggestive of various types and degrees of meaningful dislocations. It seems that some factors—such as personal affiliation of executives, business interests in foreign jurisdictions, and a large foreign investor base—may support meaningful dislocations. Other factors—such as conflicts of interests, substantive presence in the home jurisdiction, and reputational issues—may deter dislocations. These latter factors can possibly present policymakers with a non-tax toolbox for the prevention of negative effects of corporate inversions.

One possible policy implication is, therefore, that frictions may play an important role in the design of corporate tax residence tests. Tests built on substantive attributes may prevent inversions and by doing so maintain both the corporate tax base and the economic attributes in the home jurisdiction. At the same time, substantive residence determination does not prevent inversions that are executed for sound business reasons (and hence accompanied by real dislocations), nor should it. However, more research is necessary in order to identify the types of frictions best suited for the design of tax-residence tests. The constructs identified herein suggest several paths for such future research. Future research may try to identify the variables that explain the timing of an inversion and the extent of meaningful dislocation that happens following inversions. In particular, it will be interesting to learn about the role of frictions such as tax-residence constructs and conflicts of interests in this

328. *See generally* Hill, *supra* note 259, at 29–40 (explaining the difference in governance mechanism (specifically, board ability to adopt "poison pills") between the U.S. and Australia).

329. Siklos, *supra* note 260.

context.

Another policy implication of the case studies, is that tax-residence of a corporation matters primarily for tax-base calculation, but matters less for anything else. The eclectic reality emerging from the case studies demonstrates the disconnection between a corporation's tax residence and its substantive economic attributes. This reaffirms organizational literature on the decentralized nature of the modern MNC. Corporate tax-residence is not a good proxy for corporate attributes that policymakers may wish to have in their home jurisdictions. If that is the case, it is probably preferable to discount the importance of tax-residence as a target of policy making to the extent such policy is intended to achieve non-tax goals. Instead, policymaking efforts should specifically be aimed at the desired attributes. For example, if policymakers believe R&D creates certain positive effects in the jurisdiction in which it is located, they should target R&D specifically, inducing MNCs to locate their R&D centers in the home jurisdiction[330] rather than targeting residence as a proxy for R&D.

Finally, it should be noted that the case studies are not in conflict with the vast literature on the effects of tax on capital locational decisions. Tax possibly plays a role in driving meaningful dislocations of management attributes (for example, in the case of Nobel), but in cases where such dislocations are also supported by non-tax business rationales. In such cases, business considerations may outweigh the cost of frictions, and tax is a marginal investment consideration. In turn, this implies that developed jurisdictions should be able to determine corporate tax-residence based on substantive factors, without fear of competition from tax havens that cannot offer substantive locational benefits. Tax-residence competition may still be an issue to the extent that developed jurisdictions offer similar comparative benefits. This suggests that as long as corporate tax rates are set at rates similar to other developed jurisdictions, it is possible to determine tax-residence based on substantive factors without worrying about substantive dislocations from one developed jurisdiction to another.

330. Inducing MNCs to have their R&D centers in a jurisdiction may be achieved using multiple tools such as an education system that produces a skilled labor force, building relevant infrastructure, or through tax incentives for R&D activity. This policy issue is beyond the scope of this Article. Most industrialized jurisdictions offer various incentives which directly target R&D. *See Directorate for Science, Technology and Innovation, Measuring R&D Tax Incentives*, OECD, http://www.oecd.org/sti/rd-tax-stats.htm (last visited Jan. 16, 2015).

CONCLUSION

Taxes are an important consideration in the context of investment decisions. But they are many times secondary to real business considerations.[331] Empirical literature that suggests that inversion transactions will cause dislocation of meaningful attributes ignores this simple truth. Due to the decentralized nature of MNCs, meaningful attributes may not leave a home jurisdiction following an inversion, simply because it is not necessarily the case such attributes were in the home jurisdiction to begin with. And if they were located in the home jurisdiction, there is no reason to assume such attributes will be dislocated in conjunction with a change in tax residence, if it makes no business sense to do so.

Taking a case studies approach, the Article developed observation-based constructs that describe the possible meaningful effects of corporate inversions in the home jurisdiction. Such constructs should not be viewed as empirical conclusions, but rather as providing an opportunity for more nuanced empirical research on corporate inversions. Future empirical study of corporate inversions should move beyond the binary variables of tax relocation and study the effects of inversions on multiple corporate functions as a matter of degree.

Two conclusions, however, can be stated based on the observations made in this Article. First, an answer to the question whether inversions are associated with meaningful dislocation in the home jurisdiction is highly contextualized. It cannot be simply stated that an inversion results (or does not result) in meaningful dislocations. Various factors interact in different ways to bring about dislocations. While tax may indeed serve as an incentive to meaningfully dislocate, it seems to be a secondary consideration to other factors.

Second, there seems to be an inherent tension between the desire to locate a headquarters where business opportunities can be exploited on the one hand, and tax savings on the other. It is clear that non-tax considerations play an important role in MNCs' decisions whether to

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331. *The Foundation of International Tax Reform: Worldwide, Territorial, and Something in Between: Hearing Before the S. Comm. on Fin.*, 110th Cong. 32 (2008) (statement of Robert H. Dilworth, McDermott, Will & Emery) ("I have never actually met a businessman (or even a tax executive) who was actually involved in decision-making about the tax issues of where to locate a business (that actually employed people) who would agree that his MNC employer acted to invest somewhere because of an interest-free loan of residual U.S. corporate tax if the company invested in a foreign country rather than the United States. Businesses follow customers, efficient delivery of material and productive work forces to such an extent that tax incentives are often just an afterthought.").

dislocate meaningful attributes, even where tax incentives to invert exist. This implies that it is easier for MNCs to engage in tax-induced inversions if they are able to shift their tax-residence without incurring the high cost of shifting real economic structures. Conversely, the need to change the location of meaningful economic attributes may operate as a deterrent to inversion, which in turn may support both the tax base and the economic factors in the home jurisdiction.