113TH CONGRESS
2d Session

SENATE

TREATY DOC.
113–4

THE PROTOCOL AMENDING THE TAX CONVENTION WITH SPAIN

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF SPAIN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ITS PROTOCOL, SIGNED AT MADRID ON FEBRUARY 22, 1990

MAY 7, 2014.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE

39–112 WASHINGTON : 2014

LETTER OF TRANSMITTAL

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to its ratification, the Protocol Amending the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and its Protocol, signed at Madrid on February 22, 1990, and a related Memorandum of Understanding signed on January 14, 2013, at Madrid, together with correcting notes dated July 23, 2013, and January 31, 2014 (together the "proposed protocol"). I also transmit for the information of the Senate the report of the Department of State, which includes an overview of the proposed protocol.

The proposed protocol was negotiated to bring United States-Spain tax treaty relations into closer conformity with U.S. tax treaty policy. The proposed protocol exempts from source-country withholding cross-border payments of certain direct dividends, interest, royalties, and capital gains, and updates the provisions of the existing convention with respect to preventing abuse by third-country investors and the exchanges of information between revenue authorities. The proposed protocol also updates the mutual agreement procedure by requiring binding arbitration of certain cases that the competent authorities of the United States and Spain have been unable to resolve after a reasonable period of time.

I recommend the Senate give early and favorable consideration to the proposed protocol and give its advice and consent to its ratification.

BARACK OBAMA.

THE WHITE HOUSE, *May 7, 2014.*

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, February 24, 2014.

The PRESIDENT,
The White House.

DEAR MR. PRESIDENT: I have the honor to submit to you, with a view to their transmission to the Senate for advice and consent to ratification, the Protocol Amending the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and its Protocol, signed at Madrid on February 22, 1990, and a related Memorandum of Understanding (together the "proposed protocol") signed January 14, 2013, at Madrid, together with correcting notes dated July 23, 2013, and January 31.

The proposed protocol was negotiated to bring U.S.-Spain tax treaty relations into closer conformity with current U.S. tax treaty policy. The proposed protocol exempts from source-country withholding cross-border payments of certain direct dividends, interest, royalties, and capital gains, and updates the provisions of the existing convention with respect to preventing abuse by third-country investors and the exchanges of information between revenue authorities. Also, the proposed protocol updates the mutual agreement procedure by requiring binding arbitration of certain cases the competent authorities of the United States and Spain have been unable to resolve after a reasonable period of time. An overview of key provisions of the proposed protocol is enclosed with this report.

The proposed protocol is self-executing. The Department of the Treasury and the Department of State cooperated in the negotiation of the proposed protocol, and the Department of the Treasury joins the Department of State in recommending the proposed protocol and correcting notes be transmitted to the Senate as soon as possible for its advice and consent to ratification.

Respectfully submitted,

JOHN F. KERRY.

Enclosures: As stated.

Executive Summary of the Proposed Protocol to Amend the Income Tax Convention Between the United States and Spain

The proposed protocol to amend the income tax convention with Spain (the "proposed protocol") and an accompanying Memorandum of Understanding were negotiated to make a number of key amendments to the existing tax convention with Spain, concluded in 1990 (the "existing convention").

The proposed protocol provides for an exemption from source-country withholding on certain direct dividends (i.e., dividends beneficially owned by a company that has owned, for a period of at least 12 months prior to the date on which the entitlement to the dividends is determined, at least 80 percent of the voting stock of the company paying the dividends). The proposed protocol limits source-country taxation on all other dividends and on branch profits in a manner consistent with the Department of the Treasury's 2006 model income tax convention (the "U.S. model"). The proposed protocol exempts from source-country withholding cross-border payments of interest, royalties, and capital gains in a manner consistent with the U.S. model.

The proposed protocol replaces the provisions in the existing convention designed to protect the convention against abuse by third-country investors with updated rules similar to those found in recent U.S. tax treaties with countries in the European Union.

Consistent with a number of recent U.S. tax treaties, the proposed protocol updates the provisions of the existing convention with respect to the mutual agreement procedure by requiring binding arbitration of certain cases that the competent authorities of the United States and Spain have been unable to resolve after a reasonable period of time.

Consistent with the U.S. model and the international standard for tax information exchange, the proposed protocol provides for the exchange between the revenue authorities of both contracting states of information foreseeably relevant to carrying out the provisions of the existing convention (as modified by the proposed protocol) or the domestic tax laws of either country.

Overview of the Proposed Protocol to Amend the Income Tax Convention Between the United States and Spain

The proposed protocol to amend the income tax convention with Spain (the "proposed protocol") and accompanying Memorandum of Understanding were negotiated to make a number of key amendments to the existing tax convention with Spain, concluded in 1990 (the "existing convention"). Many of the provisions in the proposed protocol are intended to bring the existing convention into closer conformity with current U.S. tax treaty policy as reflected in the Department of the Treasury's 2006 model income tax convention (the "U.S. model"). The provisions in the proposed protocol also reflect particular aspects of Spanish law and tax treaty policy and U.S.-Spain economic relations. Modernizing the existing convention has been a high tax treaty priority for the business communities in both the United States and Spain.

Taxation of Investment Income

The proposed protocol brings the existing convention's rules for taxing payments of cross-border dividends into conformity with a number of recent U.S. tax treaties with major trading partners. The proposed protocol provides for an exemption from source-country withholding on certain direct dividends (i.e., dividends beneficially owned by a company that has owned, for a period of at least twelve months prior to the date on which the entitlement to the dividends is determined, at least 80 percent of the voting stock of the company paying the dividends), as well as dividends beneficially owned by certain pension funds. Consistent with the U.S. model, the proposed protocol limits to five percent the rate of source-country withholding permitted on cross-border dividends beneficially owned by a company that owns at least 10 percent of the voting stock of the company paying the dividends, and limits to 15 percent the rate of source-country withholding permitted on all other dividends. The proposed protocol permits the imposition of source-country withholding on branch profits in a manner consistent with the U.S. model.

The proposed protocol brings the existing convention's taxation of cross-border interest payments largely into conformity with the U.S. model by exempting such interest from source-country taxation. Interest that is contingent interest, however, may be subject to source-country withholding tax at a rate of 10 percent (in contrast to 15 percent under the U.S. model). Consistent with the U.S. model, full source-country tax may be imposed on payments from a U.S. real estate mortgage investment conduit.

The proposed protocol exempts from source-country withholding cross-border payments of royalties and capital gains in a manner consistent with the U.S. model.

Dispute Resolution through Binding Arbitration

The proposed protocol updates the provisions of the existing convention with respect to the mutual agreement procedure by requiring binding arbitration of certain cases the competent authorities of the United States and Spain have been unable to resolve after a reasonable period of time. The arbitration provisions in the proposed protocol are similar to other mandatory arbitration provisions that have recently been introduced into a number of other U.S. bilateral tax treaties.

Protections against Treaty Shopping

The proposed protocol replaces the provisions in the existing convention designed to protect the convention against abuse by third-country investors with updated rules similar to those found in recent U.S. tax treaties with countries in the European Union.

Exchange of Information

Consistent with the U.S. model and the international standard for tax information exchange, the proposed protocol provides for the exchange between the revenue authorities of both contracting states of information foreseeably relevant to carrying out the provisions of the existing convention (as amended by the proposed protocol) or the domestic tax laws of either country. The proposed protocol allows the United States to obtain information (including from financial institutions) from Spain regardless of whether Spain needs the information for its own tax purposes.

Entry into Force

The proposed protocol will enter into force three months after both countries have notified each other they have completed all required internal procedures for entry into force. The proposed protocol will have effect, with respect to taxes withheld at source, for amounts paid or credited on or after the date on which the proposed protocol enters into force, and with respect to other taxes, for taxable years beginning on or after the date on which the proposed protocol enters into force. Special rules apply for the entry into force of the mandatory binding arbitration provisions. The Memorandum of Understanding, which contains a number of understandings regarding the application of the existing convention, as amended by the proposed protocol, will enter into force on the same date as the proposed protocol.

PROTOCOL

Amending the Convention Between
the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and its Protocol signed at Madrid, on February 22, 1990.

The United States of America and the Kingdom of Spain,

Desiring to amend the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and its Protocol, signed at Madrid on February 22, 1990 (hereinafter the "Convention"),

Have agreed as follows:

Article I

The following new paragraphs shall be added to Article 1 (General Scope) of the Convention:

"5. (a) Notwithstanding the provisions of subparagraph (b) of paragraph 2 of this Article:

(i) for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 26 (Mutual Agreement Procedure) of this Convention; and

(ii) the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 25 (Non-Discrimination) of this Convention.

(b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.

6. For purposes of applying this Convention, an item of income, profit or gain derived through an entity that is fiscally transparent under the laws of either Contracting State, and that is formed or organized:

(a) in either Contracting State, or;

(b) in a state that has an agreement in force containing a provision for the exchange of information on tax matters with the Contracting State from which the income, profit, or gain is derived,

shall be considered to be derived by a resident of a Contracting State to the extent that the item is treated for purposes of the taxation law of such Contracting State as the income, profit or gain of a resident."

Article II

1. Paragraph 1 of Article 3 (General Definitions) of the Convention shall be amended by adding the following:

"(j) the term "pension fund" means:

(i) in Spain, any scheme, fund, mutual benefit institution or other entity established *in Spain*:

(A) which is operated principally to manage the right of its beneficiaries to receive income or capital upon retirement, survivorship, widowhood, orphanhood, or disability; and

(B) contributions to which are deductible from the taxable base of personal taxes;

(ii) in the United States, any person established in the United States that is generally exempt from income taxation in the United States, and operated principally either:

(A) to administer or provide pension or retirement benefits; or

(B) to earn income principally for the benefit of one or more persons established in the United States that are generally exempt from income taxation in the United States and are operated principally to administer or provide pension or retirement benefits."

2. Paragraph 2 of Article 3 (General Definitions) of the Convention shall be deleted and replaced by the following:

"2. As regards the application of this Convention at any time by a Contracting State any term not defined therein shall, unless the context otherwise requires, and subject to the provisions of Article 26 (Mutual Agreement Procedure), have the meaning which it has under the laws of that State concerning the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

Article III

Paragraph 3 of Article 5 (Permanent Establishment) of the Convention shall be deleted and replaced by the following:

"3. A building site or construction or installation project or an installation or drilling rig or ship used for the exploration of natural resources, constitutes a permanent establishment only if it lasts or the exploration activity continues for more than twelve months."

Article IV

Article 10 (Dividends) of the Convention shall be deleted and replaced by the following:

"Article 10
Dividends

1. Dividends paid by a company that is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, except as otherwise provided, the tax so charged shall not exceed:

(a) 5 percent of the gross amount of the dividends if the beneficial owner is a company that owns directly at least 10 percent of the voting stock of the company paying the dividends;

(b) 15 percent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. Notwithstanding the provisions of paragraph 2, such dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner is a company that is a resident of the other Contracting State that has owned, directly or indirectly through one or more residents of either Contracting State, shares representing 80 percent or more of the voting stock in the company paying the dividends for a 12-month period ending on the date on which entitlement to the dividends is determined and:

(a) satisfies the conditions of paragraph 2 (c) of Article 17 (Limitation on Benefits);

(b) satisfies the conditions of paragraph 2 (e) of Article 17, provided that the company satisfies the conditions described in paragraph 4 of that Article with respect to the dividends;

(c) is entitled to the benefits of this Convention with respect to the dividends under paragraph 3 of Article 17; or

(d) has received a determination pursuant to paragraph 7 of Article 17 with respect to this paragraph.

4. Notwithstanding paragraph 2, dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if:

(a) the beneficial owner of the dividends is a pension fund that is a resident of the other Contracting State and is generally exempt from tax or subject to a zero rate of tax; and

(b) such dividends are not derived from the carrying on of a trade or business by the pension fund or through an associated enterprise.

5. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income that is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

6. The provisions of paragraphs 1 through 4 of this Article shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on or has carried on a business in the other Contracting State, of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs or has performed in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

7. A Contracting State may not impose any tax on dividends paid by a company resident of the other Contracting State, except insofar as the dividends are paid to a resident of the first-mentioned Contracting State or the dividends are effectively connected with a permanent establishment or a fixed base situated in that Contracting State, nor may it impose tax on a company's undistributed profits, except as provided in paragraph 8 of this Article, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in that Contracting State.

8. A company that is a resident of one of the Contracting States and that has a permanent establishment in the other Contracting State or that is subject to tax in the other Contracting State on a net basis on its income that may be taxed in the other Contracting State under Article 6 (Income from Real Property (Immovable Property)) or under paragraph 1 of Article 13 (Capital Gains) may be subject in that other Contracting State to a tax in addition to the tax allowable under the other provisions of this Convention. Such tax, however, may be imposed only on the portion of the business profits of the company attributable to the permanent establishment and the portion of the income that is subject to tax under Article 6 or under paragraph 1 of Article 13 that, in the case of the United States, represents the dividend equivalent amount of such profits or income and, in the case of Spain, represents the amount of income (*Imposición Complementaria*) determined under the Spanish Non Residents Income Tax regulated by the Amended Text of Non Residents Income Tax Law, passed by Legislative Royal Decree 5/2004 of 5th March, as it may be amended from time to time.

9. The tax referred to in paragraph 8 of this Article shall not be imposed at a rate exceeding the rate specified in subparagraph (a) of paragraph 2 of this Article. In any case, it shall not be imposed on a company that:

(a) satisfies the conditions of paragraph 2 (c) of Article 17;

(b) satisfies the conditions of paragraph 2 (e) of Article 17, provided that the company satisfies the conditions described in paragraph 4 of that Article with respect to an item of income, profit or gain described in paragraph 8 of this Article;

(c) is entitled under paragraph 3 of Article 17 to benefits with respect to an item of income, profit or gain described in paragraph 8 of this Article; or

(d) has received a determination pursuant to paragraph 7 of Article 17 with respect to this paragraph."

Article V

Article 11 (Interest) of the Convention shall be deleted and replaced by the following:

"Article 11
Interest

1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.

2. Notwithstanding the provisions of paragraph 1 of this Article:

(a) interest arising in the United States that is contingent interest of a type that does not qualify as portfolio interest under United States law may be taxed by the United States but, if the beneficial owner of the interest is a resident of Spain, the interest may be taxed at a rate not exceeding 10 percent of the gross amount of the interest; and

(b) interest that is an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit may be taxed by the United States in accordance with its domestic law.

3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the taxation laws of the Contracting State in which the income

arises. Income dealt with in Article 10 (Dividends) and penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

4. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on or has carried on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, or performs or has performed in that other Contracting State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that Contracting State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

Article VI

Article 12 (Royalties) of the Convention shall be deleted and replaced by the following:

"Article 12
Royalties

1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.

2. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic, scientific or other work (including cinematographic films, and films and recordings for radio or television broadcasting), any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on or has carried on business in the other Contracting State through a permanent establishment situated therein, or performs or has performed in that other State independent personal services from a fixed base situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention."

Article VII

1. Article 13 (Capital Gains) of the Convention shall be amended by deleting paragraph 4 and replacing it by the following:

"4. Gains from the alienation of shares or other rights, which directly or indirectly entitle the owner of such shares or rights to the enjoyment of immovable property situated in a Contracting State, may be taxed in that Contracting State."

2. Paragraphs 6 and 7 of Article 13 (Capital Gains) of the Convention shall be deleted and replaced by the following:

"6. Gains from the alienation of any property other than property referred to in paragraphs 1 through 5 shall be taxable only in the Contracting State of which the alienator is a resident."

Article VIII

Article 14 (Branch Tax) of the Convention shall be deleted and replaced by the following:

"Article 14 (Branch Tax) (Deleted)".

Article IX

Article 17 (Limitation on Benefits) of the Convention shall be deleted and replaced by the following:

"Article 17
Limitation on Benefits

1. Except as otherwise provided in this Article, a resident of a Contracting State shall not be entitled to the benefits of this Convention otherwise accorded to residents of a Contracting State unless such resident is a "qualified person" as defined in paragraph 2 of this Article.

2. A resident of a Contracting State shall be a qualified person for a taxable year if the resident is:

(a) an individual;

(b) a Contracting State, or a political subdivision or local authority thereof or wholly-owned instrumentality thereof;

(c) a company, if:

(i) the principal class of its shares (and any disproportionate class of shares) is regularly traded on one or more recognized stock exchanges, and either:

(A) its principal class of shares is primarily traded on one or more recognized stock exchanges located in the Contracting State of which the company is a resident (or, in the case of a company resident in Spain, on a recognized stock exchange located within the European Union or, in the case of a company resident in the United States, on a recognized stock exchange located in another state that is a party to the North American Free Trade Agreement); or

(B) the company's primary place of management and control is in the Contracting State of which it is a resident; or

(ii) at least 50 percent of the aggregate vote and value of the shares (and at least 50 percent of any disproportionate class of shares) in the company is owned directly or indirectly by five or fewer companies entitled to benefits under clause (i) of this subparagraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;

(d) a person other than an individual that is:

(i) established and maintained in that Contracting State exclusively for religious, charitable, scientific, artistic, cultural, or

educational purposes, notwithstanding that all or part of its income or gains may be exempt from tax under the domestic law of that Contracting State; or

(ii) described in subparagraph (j) of paragraph 1 of Article 3 (General Definitions), provided that:

(A) in Spain, in the case of a person described in clause (i) of subparagraph (j) of paragraph 1 of Article 3, and in the United States, in the case of a person described in clause (ii) (A) of subparagraph (j) of paragraph 1 of Article 3, more than 50 percent of the person's beneficiaries, members or participants are individuals resident in either Contracting State; and

(B) in the United States, in the case of a person described in clause (ii) (B) of subparagraph (j) of paragraph 1 of Article 3, all of the persons for which such person earns the income satisfy the requirements of clause (A) of this subparagraph;

(e) a person other than an individual, if:

(i) on at least half the days of the taxable year, persons who are residents of that Contracting State and that are entitled to the benefits of this Convention under subparagraph (a), subparagraph (b), clause (i) of subparagraph (c), or subparagraph (d) of this paragraph own, directly or indirectly, shares or other beneficial interests representing at least 50 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the person, provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State, and

(ii) less than 50 percent of the person's gross income for the taxable year, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph (a), subparagraph (b), clause (i) of subparagraph (c), or subparagraph (d) of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence. For purposes of the foregoing, such deductible payments do not include arm´s length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank that is not related to the payor.

3. A company that is a resident of a Contracting State shall also be entitled to the benefits of this Convention if:

(a) at least 95 percent of the aggregate voting power and value of its shares (and at least 50 percent of any disproportionate class of shares) is owned, directly or indirectly, by seven or fewer persons that are equivalent beneficiaries, provided that in the case of indirect ownership, each intermediate owner is a resident of a member state of the European Union or any party to the North American Free Trade Agreement; and

(b) less than 50 percent of the company's gross income, as determined in the company's State of residence, for the taxable year is paid or accrued, directly or indirectly, to persons who are not equivalent beneficiaries, in the form of payments (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank that is not related to the payor), that are deductible for the purposes of the taxes covered by this Convention in the company's State of residence.

4.

(a) A resident of a Contracting State will be entitled to benefits of the Convention with respect to an item of income derived from the other State, regardless of whether the resident is a qualified person, if the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or registered securities dealer), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business.

(b) If a resident of a Contracting State derives an item of income from a trade or business activity conducted by that resident in the other Contracting State, or derives an item of income arising in the other Contracting State from a related person, the conditions described in subparagraph (a) shall be considered to be satisfied with respect to such item only if the trade or business activity carried on by the resident in the first-mentioned Contracting State is substantial in relation to the trade or business activity carried on by such resident or related person in the other Contracting State. Whether a trade or business activity is substantial for the purposes of this paragraph will be determined based on all the facts and circumstances.

(c) For purposes of applying this paragraph, activities conducted by persons connected to a person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be

connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

5. A person that is a resident of a Contracting State shall also be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State if that person functions as a headquarters company for a multinational corporate group and that resident satisfies any other specified conditions for the obtaining of such benefits other than those of this Article. A person shall be considered a headquarters company for this purpose only if:

(a) it provides a substantial portion of the overall supervision and administration of the group, which may include, but cannot be principally, group financing;

(b) the corporate group consists of corporations resident in, and engaged in an active business in, at least five countries, and the business activities carried on in each of the five countries (or five groupings of countries) generate at least 10 percent of the gross income of the group;

(c) the business activities carried on in any one country other than the Contracting State of residence of the headquarters company generate less than 50 percent of the gross income of the group;

(d) no more than 25 percent of its gross income is derived from the other Contracting State;

(e) it has, and exercises, independent discretionary authority to carry out the functions referred to in subparagraph (a);

(f) it is subject to the same income taxation rules in its State of residence as persons described in paragraph 4; and

(g) the income derived in the other Contracting State either is derived in connection with, or is incidental to, the active business referred to in subparagraph (b).

If the gross income requirements of subparagraphs (b), (c), or (d) of this paragraph are not fulfilled, they will be deemed to be fulfilled if the required ratios are met when averaging the gross income of the preceding four years.

6. Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State derives income from the other Contracting State, and that income is attributable to a permanent establishment which that enterprise has in a third state, the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to that income if the profits of that permanent establishment are subject to a combined aggregate effective rate of tax in the first-mentioned Contracting State and third state that is less than 60 percent of the general rate of company tax applicable in the first-mentioned Contracting State. Any dividends, interest or royalties to which the

provisions of this paragraph apply shall be subject to tax in the other Contracting State at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply shall be subject to tax under the provisions of the domestic law of the other Contracting State, notwithstanding any other provision of the Convention. The provisions of this paragraph shall not apply if:

(a) in the case of royalties, the royalties are received as compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment; or

(b) in the case of any other income, the income derived from the other Contracting State is derived in connection with, or is incidental to, the active conduct of a trade or business carried on by the permanent establishment in the third state (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking or securities activities carried on by a bank or registered securities dealer).

7. If a resident of a Contracting State is not a qualified person pursuant to paragraph 2 of this Article, nor entitled to the benefits of this Convention under paragraphs 3 or 5 of this Article, nor entitled to benefits with respect to an item of income under paragraph 4 of this Article, the competent authority of the other Contracting State may grant the benefits of this Convention, or benefits with respect to a specific item of income, to the resident of the first-mentioned Contracting State, if such grant of benefits is justified based on an evaluation of the extent to which such resident satisfies the requirements of paragraphs 2, 3, 4 or 5 of this Article and after considering the opinion, if any, of the competent authority of the first-mentioned Contracting State as to whether under the circumstances it would be appropriate to grant such benefits.

8. For purposes of this Article:

(a) the term "recognized stock exchange" means:

(i) the NASDAQ System and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;

(ii) any Spanish stock exchange controlled by the "*Comisión Nacional del Mercado de Valores*";

(iii) the principal stock exchanges of Stuttgart, Hamburg, Dusseldorf, Frankfurt, Berlin, Hannover, Munich, London, Amsterdam, Milan, Budapest, Lisbon, Toronto, Mexico City and Buenos Aires; and

(iv) any other stock exchange agreed upon by the competent authorities;

(b) the term "principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company;

(c) the term "disproportionate class of shares" means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately higher participation through dividends, redemption payments or otherwise, in the earnings generated in the other Contracting State by particular assets or activities of the company;

(d) a company's "primary place of management and control" will be in the Contracting State of which it is a resident only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries, if any) in that Contracting State than in any other state and the staff of such persons conduct more of the day-to-day activities necessary for preparing and making those decisions in that Contracting State than in any other state;

(e) the term "shares" includes depository receipts thereof;

(f) the term "gross income" means gross receipts, determined in the person's Contracting State of residence, or where the person is engaged in a business which includes the manufacture, production or sale of goods, such gross receipts reduced by the direct costs of labor and materials attributable to such manufacture or production, or cost of goods purchased for resale;

(g) the term "equivalent beneficiary" means a resident of a member state of the European Union or of a party to the North American Free Trade Agreement, but only if that resident:

(i)

(A) would be entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between any member state of the European Union or any party to the North American Free Trade Agreement and the State from which the benefits of this Convention are claimed under provisions analogous to subparagraph (a), (b), clause (i) of subparagraph (c), or subparagraph (d) of paragraph 2 of this Article, provided that if such convention does not contain a comprehensive limitation on benefits article, the person would be entitled to the benefits of this Convention by reason of subparagraph (a), (b), clause (i) of

subparagraph (c), or subparagraph (d) of paragraph 2 of this Article if such person were a resident of one of the States under Article 4 of this Convention; and

(B) with respect to insurance premiums and to income referred to in Articles 10 (Dividends), 11 (Interest) and 12 (Royalties) of this Convention, would be entitled under such convention to an exemption from excise tax on such premiums or to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or

(ii) is a resident of a Contracting State that is entitled to the benefits of this Convention by reason of subparagraph (a), (b), clause (i) of subparagraph (c) or subparagraph (d) of paragraph 2 of this Article.

For the purposes of applying paragraph 3 of Article 10 (Dividends), in order to determine whether a person owning shares, directly or indirectly, in the company claiming the benefits of this Convention is an equivalent beneficiary, such person shall be deemed to hold the same voting power, for the same period of time, in the company paying the dividend as the company claiming the benefits holds in such company; and

(h) with respect to dividends, interest and royalties arising in Spain and beneficially owned by a company that is a resident of the United States, a company that is a resident of a member state of the European Union will be treated as satisfying the requirements of clause (i) (B) of subparagraph (g) of this paragraph for purposes of determining whether such United States resident is entitled to benefits under this paragraph if a payment of dividends, interest and royalties arising in Spain and paid directly to such resident of a member state of the European Union would have been exempt from tax pursuant to any directive of the European Union, notwithstanding that the convention to avoid double taxation between Spain and that other member state of the European Union would provide for a higher rate of tax with respect to such payment than the rate of tax applicable to such United States company under Article 10, 11, 12 of this Convention."

Article X

Article 20 (Pensions, Annuities, Alimony, and Child Support) of the Convention shall be amended by adding a new paragraph:

"5. Where an individual who is a resident of one of the Contracting States is a member or beneficiary of, or participant in, a pension fund that is a resident of the other Contracting State, income earned by the pension fund may be taxed as income of that individual only when, and, subject to the provisions of

subparagraph (a) of paragraph 1 of Article 20 (Pensions, Annuities, Alimony and Child Support), to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund in that other Contracting State)."

Article XI

Paragraph 3 of Article 25 (Non-Discrimination) of the Convention shall be deleted and replaced by the following:

"3. Nothing in this Article shall be construed as preventing either Contracting State from imposing a tax as described in paragraph 8 of Article 10 (Dividends)."

Article XII

Article 26 (Mutual Agreement Procedure) of the Convention shall be amended by adding the following new paragraphs:

"5. Where, pursuant to this Article, a person has presented a case to the competent authority of the Contracting State of which he is a resident or national on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and the competent authorities have endeavored, but are unable to reach agreement to resolve that case within two years from the commencement date of the case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of this paragraph, paragraph 6 of this Article, and any rules or procedures agreed upon by the competent authorities of the Contracting States pursuant to subparagraph (g) of paragraph 6 of this Article, if:

(a) tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;

(b) the case is not a particular case that both competent authorities of the Contracting States agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for resolution through arbitration;

(c) no decision with respect to such case has already been rendered by a court or administrative tribunal of either Contracting State;

(d) the case does not involve a determination under paragraph 3 of Article 4 (Residence) of the residence of a company; and

(e) all the conditions for the beginning of an arbitration proceeding provided for in subparagraph (c) of paragraph 6 of this Article have been satisfied.

6. For the purposes of paragraph 5 of this Article and this paragraph, the following rules and definitions shall apply:

(a) the term "concerned person" means the presenter of a case to a competent authority for consideration under this Article and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration;

(b) the "commencement date" for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement procedure has been received by both competent authorities;

(c) an arbitration proceeding with respect to a case shall begin on the latest of:

(i) two years after the commencement date of that case, unless both competent authorities have agreed to a different date;

(ii) the date upon which the presenter of the case to a competent authority of a Contracting State has submitted a written request to that competent authority for a resolution of the case through arbitration, which request may not be submitted prior to the date determined in clause (i) of this subparagraph;

(iii) the date upon which all concerned persons and their authorized representatives or agents agree in writing not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration panel, other than the determination of such panel; and

(iv) the date on which all legal actions or suits pending before the courts of either Contracting State concerning any issue involved in the case are suspended or withdrawn as applicable under the laws of the Contracting State in which such legal actions or suits are pending.

(d) The determination of the arbitration panel with respect to a case shall constitute a resolution of such case by mutual agreement under this Article and shall be binding on the Contracting States, unless the presenter of the case does not accept the determination;

(e) for purposes of an arbitration proceeding under paragraph 5 of this Article and this paragraph, the members of the arbitration panel and their staff shall be considered to be "persons or authorities" to whom information may be disclosed under Article 27 (Exchange of Information and Administrative Assistance) of this Convention;

(f) no information relating to an arbitration proceeding (including the arbitration panel's determination) may be disclosed by the competent authorities of the Contracting States, except as permitted by this Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, an arbitration proceeding shall be considered to be information exchanged between the Contracting States. All members of the arbitration panel and their staff must agree in writing in statements sent to each of the competent authorities of the Contracting States not to disclose any information relating to an arbitration proceeding (including the arbitration panel's determination), and to abide by and be subject to the confidentiality and nondisclosure provisions of Article 27 of this Convention and the applicable domestic laws of the Contracting States. In the event those provisions conflict, the most restrictive condition shall apply. Such statement shall also include confirmation of their appointment to the arbitration panel; and

(g) the competent authorities of the Contracting States shall agree in writing, before the date that the first arbitration proceeding commences, on time periods and procedures that are consistent with paragraph 5 and this paragraph for:

(i) notifying the presenter of the case of any agreements pursuant to subparagraph (b) of paragraph 5 of this Article that the case is not suitable for resolution through arbitration, or under clause (i) of subparagraph (c) of paragraph 6 of this Article to change the date on which an arbitration proceeding could begin;

(ii) obtaining the statements of each concerned person, authorized representative or agent, and member of the arbitration panel (including their staff), in which each such person agrees not to disclose to any other person any information received during the course of the arbitration proceeding from the competent authority of either Contracting State or the arbitration panel, other than the determination of such panel;

(iii) the appointment of the members of the arbitration panel;

(iv) the submission of proposed resolutions, position papers, and reply submissions by the competent authorities of the Contracting States to the arbitration panel;

(v) the submission by the presenter of the case of a paper setting forth the presenter's views and analysis of the case for consideration by the arbitration panel;

(vi) the delivery by the arbitration panel of its determination to the competent authorities of the Contracting States;

(vii) the acceptance or rejection by the presenter of the case of the determination of the arbitration panel; and

(viii) the adoption by the arbitration panel of any additional procedures necessary for the conduct of its business.

The competent authorities of the Contracting States may agree in writing on such other rules and procedures as may be necessary for the effective and timely implementation of the provisions of paragraph 5 of this Article and this paragraph."

Article XIII

Article 27 (Exchange of Information and Administrative Assistance) of the Convention shall be deleted and replaced with the following:

"Article 27
Exchange of Information and Administrative Assistance

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed by a Contracting State to the extent that the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by paragraph 1 of Article 1 (General Scope) or Article 2 (Taxes Covered).

2. Any information received under this Article by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1 of this Article, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make available that information to be used for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information.

3. In no case shall the provisions of the preceding paragraphs be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information that is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 of this Article, but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 of this Article be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall, if possible, provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings) to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other Contracting State with respect to its own taxes.

7. Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that any exemption or reduced rate of tax granted by the Convention from taxation imposed by that other State shall not be enjoyed by persons not entitled to such benefits. This paragraph shall not impose upon a Contracting State the obligation to carry out administrative measures:

(a) at variance with the laws and administrative practice of either Contracting State, or

(b) that would be contrary to its sovereignty, security, or public policy.

8. The competent authorities of the Contracting States may develop an agreement upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States, but in no case will the lack of such agreement relieve a Contracting State of its obligations under this Article.

Article XIV

1. Subparagraph (b) of paragraph 5 of the Protocol to the Convention shall be deleted, and subparagraph (c) of paragraph 5 of the Protocol to the Convention shall be renamed subparagraph (b).

2. Paragraph 7 of the Protocol to the Convention shall be deleted and replaced by the following:

"7. With reference to Article 10 (Dividends)

(a) In the case of Spain:

(i) Subparagraph (a) of paragraph 2 of Article 10 shall not apply in the case of dividends paid by any entity regulated under the Law 11/2009 of 26th October on *Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario* (SOCIMI) or successor statutes. Subparagraph (b) of paragraph 2 and paragraph 4 shall apply with respect to such dividends only if the beneficial owner of the dividends holds, directly or indirectly, capital that represents not more than 10 percent of all the capital in the SOCIMI.

(ii) Subparagraph (a) of paragraph 2 of Article 10 shall not apply in the case of dividends paid by a Spanish investment institution regulated under the Law 35/2003 of 4th November on *Instituciones de Inversión Colectiva* or successor statutes. In such case, subparagraph (b) of paragraph 2 and paragraph 4 of Article 10 shall apply with respect to such dividends.

(b) In the case of the United States:

Subparagraph (a) of paragraph 2 of Article 10 shall not apply in the case of dividends paid by a U.S. Regulated Investment Company (RIC) or a U.S. Real Estate Investment Trust (REIT). In the case of dividends paid by a RIC, subparagraph b) of paragraph 2 and paragraph 4 of Article 10 shall apply. In the case of dividends paid by a REIT, subparagraph b) of paragraph 2 and paragraph 4 of Article 10 shall apply only if:

(i) the beneficial owner of the dividends is an individual or pension fund, in either case holding an interest of not more than 10 percent in the REIT;

(ii) the dividends are paid with respect to a class of stock that is publicly traded and the beneficial owner of the dividends is a person holding an interest of not more than 5 percent of any class of the REIT's stock; or

(iii) the beneficial owner of the dividends is a person holding an interest of not more than 10 percent in the REIT and the REIT is diversified.

For purposes of this paragraph, a REIT shall be "diversified" if the value of no single interest in real property exceeds 10 percent of its total interests in real property. For the purposes of this rule, foreclosure property shall not be considered an interest in real property. Where a REIT holds an interest in a partnership, it shall be treated as owning directly a proportion of the partnership's interests in real property corresponding to its interest in the partnership."

3. Paragraph 8 of the Protocol to the Convention shall be deleted and replaced by the following paragraph:

"8. With reference to Article 11 (Interest)

For purposes of subparagraph (b) of paragraph 2, the term real estate mortgage investment conduit means an entity that has in effect an election to be treated as a REMIC under Section 860D of the US Internal Revenue Code."

4. Subparagraph (c) of paragraph 10 of the Protocol to the Convention shall be deleted.

5. Paragraph 11 of the Protocol to the Convention shall be deleted and replaced by the following:

"Paragraph 11 (Deleted)".

6. Paragraph 12 of the Protocol to the Convention shall be deleted and replaced by the following:

"Paragraph 12 (Deleted)".

7. Paragraph 13 of the Protocol to the Convention shall be amended by deleting the words "tax-exempt" and replacing the words "paragraph 1 (d)" with the words "clause (ii) of subparagraph (d) of paragraph 2".

8. Paragraph 18 of the Protocol to the Convention shall be deleted and replaced by the following paragraph:

"18. With reference to paragraphs 1 and 5 of Article 26 (Mutual agreement procedure)

The term "first notification" means, in the case of the United States, the Notice of Proposed Adjustment and, in the case of Spain, the Notification of the Administrative Act of Assessment. In the case of taxes at source, the "first notification" means, in the case of both Contracting States, the date on which the tax is withheld or paid. In addition, for purposes of paragraph 5, it is understood that an action of either Contracting State that has resulted in taxation not in accordance with the provisions of the Convention shall include a Notice of

Proposed Adjustment, a Notification of the Administrative Act of Assessment, or in the case of taxes at source, a payment or withholding of tax."

9. Paragraph 19 of the Protocol to the Convention shall be deleted and replaced by the following:

"Paragraph 19 (Deleted)".

10. The Protocol to the Convention shall be amended by adding the following paragraph:

"21. With reference to paragraphs 5 and 6 of Article 26 (Mutual Agreement Procedure) of the Convention:

(a) The arbitration panel shall consist of three individual members. The members appointed shall not be employees nor have been employees within the twelve-month period prior to the date on which the arbitration proceeding begins, of the tax administration, the Treasury Department or the Ministry of Finance of the Contracting State which identifies them. Each competent authority of the Contracting States shall select one member of the arbitration panel, and the two members selected by the competent authorities of the Contracting States shall select the third member, who shall serve as Chair of the arbitration panel. If the members selected by the competent authorities of the Contracting States fail to agree on the third member, these members shall be dismissed, and each competent authority of the Contracting States shall select a new member of the arbitration panel. The Chair shall not be a national, citizen or lawful permanent resident of either Contracting State.

(b) The arbitration proceeding and the mutual agreement procedure with respect to a case shall terminate if at any time before the arbitration panel delivers a determination to the competent authorities of the Contracting States:

(i) the competent authorities of the Contracting States reach a mutual agreement to resolve the case;

(ii) the presenter of the case withdraws the request for arbitration;

(iii) any concerned person, or any of their representatives or agents, willfully violates the written statement of nondisclosure referred to in clause (iii) of subparagraph (c) of paragraph 6, and the competent authorities of both Contracting States agree that such violation should result in the termination of the arbitration proceeding; or

(iv) any concerned person initiates a legal action or suit before the courts of either Contracting State concerning any issue involved in the case, unless such legal action or suit is suspended according to the applicable laws of the Contracting State.

(c) The competent authority of each of the Contracting States shall be permitted to submit a proposed resolution addressing each adjustment or similar issue raised in the case. Such proposed resolution shall be a resolution of the entire case, and shall reflect, without modification, all matters in the case previously agreed between the competent authorities of both Contracting States. Such proposed resolution shall be limited to a disposition of specific monetary amounts (for example, income, profit, gain or expense) or, where specified, the maximum tax charged pursuant to the Convention for each adjustment or similar issue in the case. The competent authority of each of the Contracting States shall also be permitted to submit a supporting position paper for consideration by the arbitration panel.

(d) Notwithstanding the preceding provisions of this paragraph, it is understood that, in the case of an arbitration proceeding concerning:

(i) the tax liability of an individual with respect to whom the competent authorities have been unable to reach an agreement on the individual's State of residence;

(ii) the taxation of the business profits of an enterprise with respect to which the competent authorities have been unable to reach an agreement on whether a permanent establishment exists; or

(iii) such other issues the determination of which are contingent on resolution of similar threshold questions;

the competent authorities of the Contracting States may submit proposed resolutions separately addressing the relevant threshold questions as described in clause (i), (ii) or (iii) above (for example, the question of whether a permanent establishment exists), and the contingent determinations (for example, the determination of the amount of profit attributable to such permanent establishment).

(e) Where an arbitration proceeding concerns a case comprising multiple adjustments or similar issues each requiring a disposition of specific monetary amounts (for example, of income, profit, gains or expense) or where specified, the maximum tax charged pursuant to the Convention, the proposed resolution may propose a separate disposition for each adjustment or similar issue.

(f) Each of the competent authorities of the Contracting States shall receive the proposed resolution and position paper submitted by the other competent authority, and shall be permitted to submit a reply submission to the arbitration panel. Each of the competent authorities of the Contracting States shall also receive the reply submission of the other competent authority.

(g) The presenter of the case shall be permitted to submit for consideration by the arbitration panel a paper setting forth its analysis and views of the case. Such submission shall not include any information not previously provided to the competent authorities during the mutual agreement procedure and shall be made available to the competent authorities of both Contracting States.

(h) The arbitration panel shall deliver a determination in writing to the competent authorities of the Contracting States. The determination reached by the arbitration panel in the arbitration proceeding shall be limited to one of the proposed resolutions for the case submitted by one of the competent authorities of the Contracting States for each adjustment or similar issue and any threshold questions, and shall not include a rationale or any other explanation of the determination. The determination of the arbitration panel shall have no precedential value with respect to the application of the Convention in any other case.

(i) Unless the competent authorities of both Contracting States agree to a longer time period, the presenter of the case shall have 45 days after receiving the determination of the arbitration panel to notify, in writing, the competent authority of the Contracting State to whom the case was presented, of his acceptance of the determination. If the presenter of the case fails to so advise the relevant competent authority, the determination shall be considered not to be accepted. In addition, in the event the case is pending in litigation or appeal, the determination of the arbitration panel shall be considered not to be accepted by the presenter of the case if any concerned person who is a party to the litigation or appeal does not withdraw from consideration by the relevant court or administrative tribunal, within the same time frame described above, the issues resolved in the arbitration proceeding. Where the determination of the arbitration panel is not accepted, the case will not be eligible for any further consideration by the competent authorities.

(j) The fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceeding by the Contracting States, shall be borne equitably by the competent authorities of Contracting States."

Article XV

1. The Governments of the Contracting States shall notify each other, through diplomatic channels when the internal procedures required by each Contracting State for the entry into force of this Protocol have been complied with.

2. This Protocol shall enter into force after the period of three months following the date of the later of the Notes referred to in paragraph 1 and its provisions shall have effect:

(a) in respect of taxes withheld at source, on amounts paid or credited, on or after the date on which the Protocol enters into force;

(b) in respect to taxes determined with reference to a taxable period, for taxable periods beginning on or after the date on which the Protocol enters into force; and

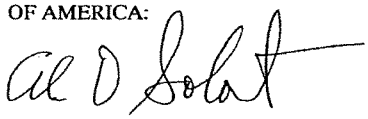
(c) in all other cases, on or after the date on which the Protocol enters into force.

3. Notwithstanding paragraph 2, the provisions of paragraphs 5 and 6 of Article 26 (Mutual Agreement Procedure) of the Convention, as amended by this Protocol, shall not have effect with respect to cases that are under consideration by the competent authorities of the Contracting States on the date on which this Protocol enters into force. With respect to cases that come under consideration by the competent authorities of the Contracting States after the date on which this Protocol enters into force, the provisions of paragraphs 5 and 6 of Article 26 of the Convention, as amended by this Protocol, shall have effect on the date on which the competent authorities agree in writing on a mode of application pursuant to subparagraph (g) of paragraph 6 of Article 26. For cases that come under consideration by the competent authorities of the Contracting States after the entry into force of this Protocol, but before such provisions have effect, the commencement date shall be the date on which the competent authorities have agreed in writing on the mode of application.

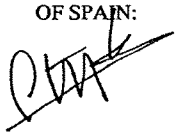
IN WITNESS WHEREOF, the undersigned, duly authorized to that effect, have signed this Protocol.

DONE in duplicate at Madrid, this 14th day of January, 2013, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:



FOR THE KINGDOM OF SPAIN:



MEMORANDUM OF UNDERSTANDING

At the signing today of the Protocol (hereinafter the "2013 Protocol") amending the Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and its Protocol, signed at Madrid, on February 22, 1990 (hereinafter the "Convention"), the United States of America and Spain have agreed as follows:

1. With reference to paragraph 6 of Article 1 (General Scope) of the Convention, as amended by the 2013 Protocol, it is understood that paragraph 6 of Article 1 applies to identify the person that derives an item of income, profit or gain paid to a fiscally transparent entity for purposes of applying the Convention to that first mentioned person. Under paragraph 6 of Article 1, a person shall be treated as deriving an item of income, profit or gain paid to an entity that is fiscally transparent under the laws of either Contracting State, to the extent that the same item of income, profit or gain is treated, for the purposes of the taxation law of the Contracting State in which the person is resident, as the income, profit or gain of a resident. In order to obtain the benefits of the Convention, with respect to the item of income, such person must satisfy all applicable requirements specified in the Convention, including other applicable requirements of Article 1, residence as defined in Article 4 (Residence), beneficial ownership and Article 17 (Limitation on Benefits), and the fiscally transparent entity through which the item of income was paid must be formed or organized in either Contracting State or in a state that has concluded an agreement containing a provision for the exchange of information on tax matters with the Contracting State from which the income, profit or gain arises.

2. With reference to paragraph 3 of the Protocol to the Convention, the Contracting States commit to initiate discussions as soon as possible, but no later than six months after the entry into force of the 2013 Protocol, regarding the conclusion of an appropriate agreement to avoid double taxation on investments between Puerto Rico and Spain.

3. With reference to subparagraph (j) of paragraph 1 of Article 3 (General Definitions) of the Convention, as amended by the 2013 Protocol:

(a) In the case of the United States, the term "pension fund" includes the following: a trust providing pension or retirement benefits under an Internal Revenue Code section 401(a) qualified pension plan (which includes a Code section 401(k) plan), a profit sharing or stock bonus plan, a Code section 403(a) qualified annuity plan, a Code section 403(b) plan, a trust that is an individual retirement account under Code section 408, a Roth individual retirement account under Code section 408A, or a simple retirement account under Code section 408(p), a trust providing pension or retirement benefits under a simplified employee pension plan under Code section 408(k), a trust described in section 457(g) providing pension or retirement benefits under a Code section 457(b) plan, and the Thrift Savings Fund (section 7701(j)). A group trust described in Revenue Ruling 81-100, as amended by Revenue Ruling 2004-67 and Revenue

Ruling 2011-1, qualifies as a pension fund only if each participant is a pension fund that is itself entitled to benefits under the Convention as a resident of the United States.

(b) In the case of Spain, the term "pension fund" includes the following:

(i) any fund regulated under the Amended Text of the Law on pension funds and pension schemes (*Texto Refundido de la Ley sobre Fondos y Planes de Pensiones*), passed by Legislative Royal Decree 1/2002 of 29th November;

(ii) any entity defined under Article 64 of the Amended Text of the Law on the regulation and monitoring of private insurances (*Texto Refundido de la Ley de Ordenación y Supervisión de los Seguros Privados*) passed by Legislative Royal Decree 6/2004 of 29th October, provided that in the case of mutual funds all participants are employees; promoters and sponsoring partners are the companies, institutions or individual entrepreneurs to which the employees are engaged; and benefits are exclusively derived from the social welfare agreement between both parties, as well as any other comparable entity regulated within the scope of the political subdivisions (*Comunidades Autónomas*); and

(iii) insurance companies regulated under the Amended Text of the Law on the regulation and monitoring of private insurances passed by Legislative Royal Decree 6/2004 of 29th October whose activity is the coverage of the contingencies provided for in the Amended Text of the Law on pension funds and pension schemes.

4. With reference to Article 4 (Residence) of the Convention, it is understood that the principles of paragraph 8.6 of the Commentaries to the OECD Model Tax Convention of July 2010 apply for purposes of determining the residence of pension funds and organizations established and maintained in a State exclusively for religious, charitable, scientific, artistic, cultural, or educational purposes.

5. With reference to Article 17 (Limitation on Benefits) of the Convention, as amended by the 2013 Protocol, it is understood that a person shall be deemed to be related to another person if either person participates directly or indirectly in the management, control or capital of the other, or the same persons participate directly or indirectly in the management, control or capital of both.

This Memorandum of Understanding shall enter into force on the date of entry into force of the 2013 Protocol.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto, have signed this Memorandum of Understanding.

DONE at Madrid in duplicate, this 14th day of January, 2013, in the English and Spanish languages, each text being equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE KINGDOM OF SPAIN:

U.S. Department of State
Office of Language Services
Translating Division

LS No.O-2014-
Spanish/English
ME/

TRANSLATION

[Seal]
Embassy of Spain

Washington, January 31,2014

Note Verbale

No. 10

The Embassy of Spain presents its compliments to the Department of State and refers to the Department's Note of July 23, 2013, on rectification of errors in the Protocol and Memorandum of Understanding between the Kingdom of Spain and the United States of America, signed in Madrid on January 14, 2013, and regarding changes to the Agreement between the Kingdom of Spain and the United States of America on prevention of double taxation and income tax evasion, and its Protocol, signed at Madrid on February 22, 1990, which in translation reads as follows:

[The translation of the Department of State note to the Embassy of the Kingdom of Spain, dated July 23, 2013, has been compared to the original English by a qualified comparing officer in the Office of Language Services, and has been found to be identical in all substantive respects.]

The Embassy hereby expresses Spain's agreement to the proposals included in final paragraphs I, II, and III of that Note from the Department of State which, in the terms indicated in those paragraphs, shall constitute, together with this Note in reply, a correction of the text in the United States' Spanish language text of the Protocol signed on January 14, 2013, and of the English and Spanish texts of the Memorandum of Understanding signed on the same date, and shall become part of the original versions thereof. [Initialed]

[Complimentary close.]

[Stamp of the Embassy of Spain, Washington]

Department of State
Spain Desk

The Department of State refers the Embassy of the Kingdom of Spain to the Protocol Amending the Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and its Protocol signed at Madrid, on February 22, 1990 ("the Convention"), done at Madrid on January 14, 2013 ("the 2013 Protocol"), and a related Memorandum of Understanding between the United States of America and the Kingdom of Spain signed the same day. Some errors were discovered in the English and Spanish language texts of the 2013 Protocol and the Memorandum of Understanding, which the Government of the United States of America proposes to rectify as follows:

English language texts of the Memorandum of Understanding

Subparagraph (a) of Paragraph 3 of the texts of the Memorandum of Understanding, which currently read:

(a) In the case of the United States, the term "pension fund" includes the following: a trust providing pension or retirement benefits under an Internal

Revenue Code section 401(a) qualified pension plan (which includes a Code section 401(k) plan), a profit sharing or stock bonus plan, a Code section 403(a) qualified annuity plan, a Code section 403(b) plan, a trust that is an individual retirement account under Code section 408, a Roth individual retirement account under Code section 408A, or a simple retirement account under Code section 408(p), a trust providing pension or retirement benefits under a simplified employee pension plan under Code section 408(k), a trust described in section 457(g) providing pension or retirement benefits under a Code section 457(b) plan, and the Thrift Savings Fund (section 7701(j)). A group trust described in Revenue Ruling 81-100, as amended by Revenue Ruling 2004-67 and Revenue Ruling 2011-1, qualifies as a pension fund only if each participant is a pension fund that is itself entitled to benefits under the Convention as a resident of the United States.

shall now read as follows:

"(a) In the case of the United States, the term "pension fund" includes the following: a trust providing pension or retirement benefits under an Internal Revenue Code section 401(a) qualified pension plan (which includes a Code section 401(k) plan), a profit sharing or stock bonus plan, a Code section 403(a) qualified annuity plan, a Code section 403(b) plan, a trust that is an individual

retirement account under Code section 408, a Roth individual retirement account under Code section 408A, or a simple retirement account under Code section 408(p), a trust providing pension or retirement benefits under a simplified employee pension plan under Code section 408(k), a trust described in section 457(g) providing pension or retirement benefits under a Code section 457(b) plan, and the Thrift Savings Fund (section 7701(j)). A group trust described in Revenue Ruling 81-100, as amended by Revenue Ruling 2004-67 and Revenue Ruling 2011-1, shall qualify as a pension fund only if it earns income principally for the benefit of one or more pension funds entitled to benefits under the Convention as residents of the United States."

The United States' Spanish language text of the 2013 Protocol.

New clause (ii) of subparagraph (a) of paragraph 5 to Article 1 (General Scope) of the Convention, as amended by Article I of the 2013 Protocol, which currently reads:

> "(ii) las disposiciones del artículo XVII del Acuerdo General sobre el Comercio de Servicios no se aplicará a una medida fiscal a

menos que las autoridades competentes estén de acuerdo en que esa medida no recae en el ámbito del artículo 25 (No discriminación) de este Convenio."

shall now read as follows:

"(ii) las disposiciones del artículo XVII del Acuerdo General sobre el Comercio de Servicios no se aplicarán a una medida fiscal a menos que las autoridades competentes estén de acuerdo en que esa medida no recae en el ámbito del artículo 25 (No discriminación) de este Convenio."

Spanish language texts of the Memorandum of Understanding

Subparagraph (a) of Paragraph 3 of the texts of the Memorandum of Understanding, which currently read:

"(a) En el caso de los Estados Unidos, la expresión "fondo de pensiones" comprende los siguientes: los fideicomisos que proporcionen pensiones o prestaciones por jubilación a través de un plan de

pensiones calificado conforme al artículo 401(a) del *Internal Revenue Code* - *IRC* (que incluye los planes comprendidos en el artículo 401(k) del *IRC*), los planes para el reparto de beneficios o planes de compensaciones con acciones a empleados (*stock bonus plan)*, los planes de anualidades calificados conforme al artículo 403(a) del *IRC*, los planes comprendidos en el artículo 403(b) del *IRC*, los fideicomisos que constituyan una cuenta individual de jubilación conforme al artículo 408 del *IRC*, los planes de jubilación individual tipo "Roth" conforme al artículo 408A del *IRC*, o una simple cuenta de jubilación conforme al artículo 408(p) del *IRC*, los fideicomisos que proporcionen pensiones o prestaciones por jubilación mediante un plan de pensiones para trabajadores simplificado conforme al artículo 408(k) del *IRC*, los fideicomisos descritos en el artículo 457(g) que proporcionen pensiones o prestaciones por jubilación a través de un plan previsto en el artículo 457(b) del *IRC* y el fondo de ahorro para empleados federales ("*Thrift Savings Fund*" (artículo 7701(j)). El grupo de fideicomisos al que se refiere la resolución del órgano de administración tributaria estadounidense ("*Internal Revenue Service")* 81-100, modificada por las consultas 2004-67 y 2011-1, puede

calificarse como fondo de pensiones únicamente si todos sus partícipes son fondos de pensiones con derecho propio a acogerse a los beneficios del Convenio como residentes de los Estados Unidos."

shall now read as follows:

(a) En el caso de los Estados Unidos, la expresión "fondo de pensiones" comprende los siguientes: los fideicomisos que proporcionen pensiones o prestaciones por jubilación a través de un plan de pensiones calificado conforme al artículo 401(a) del *Internal Revenue Code - IRC* (que incluye los planes comprendidos en el artículo 401(k) del *IRC*), los planes para el reparto de beneficios o planes de compensaciones con acciones a empleados (*stock bonus plan)*, los planes de anualidades calificados conforme al artículo 403(a) del *IRC*, los planes comprendidos en el artículo 403(b) del *IRC*, los fideicomisos que constituyan una cuenta individual de jubilación conforme al artículo 408 del *IRC*, los planes de jubilación individual tipo "Roth" conforme al artículo 408A del *IRC*, o una simple cuenta de jubilación conforme al artículo 408(p) del *IRC*, los fideicomisos

que proporcionen pensiones o prestaciones por jubilación mediante un plan de pensiones para trabajadores simplificado conforme al artículo 408(k) del *IRC*, los fideicomisos descritos en el artículo 457(g) que proporcionen pensiones o prestaciones por jubilación a través de un plan previsto en el artículo 457(b) del *IRC* y el fondo de ahorro para empleados federales ("*Thrift Savings Fund*" (artículo 7701(j)). El fideicomiso colectivo al que se refiere la resolución del órgano de administración tributaria estadounidense ("*Internal Revenue Service*") 81-100, modificada por las resoluciones 2004-67 y 2011-1, se calificará como fondo de pensiones únicamente si genera rentas principalmente en beneficio de uno o más fondos de pensiones con derecho a acogerse a los beneficios del Convenio como residentes de los Estados Unidos.

The Department of State proposes, on behalf of the Government of the United States of America, that:

I. The United States' Spanish language text of the 2013 Protocol be corrected as set out above;

II. The English and Spanish language texts of the Memorandum of Understanding be corrected as set out above; and

III. The corrected texts of the 2013 Protocol and Memorandum of Understanding replace the defective texts as from the date on which the 2013 Protocol and Memorandum of Understanding were signed;

If the Government of the Kingdom of Spain concurs with the proposals contained in paragraphs I., II., and III. above, the Department of State proposes that this note and the affirmative note in reply thereto of the Embassy of the Kingdom of Spain expressing the concurrence of the Government of the Kindgom of Spain shall constitute a correction of the United States' Spanish language text of the 2013 Protocol and the English and Spanish language texts of the Memorandum of Understanding and shall become part of the original versions thereof.

Department of State,

JUL 23 2013

Washington,

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